



# Torts and Regulation:

**Cases, Principles, and Institutions**

***Third Edition***

A Free Law School Casebook

JOHN FABIAN WITT





# Torts and Regulation: Cases, Principles, and Institutions

John Fabian Witt

Allen H. Duffy Class of 1960 Professor of Law  
Yale Law School

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*For my research assistants and teaching assistants,  
with gratitude for all that they do*



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## Preface: A Note on the Text

*Torts and Regulation: Cases, Principles, and Institutions (TRCPI)* is a new casebook designed to bring together common law principles in the field of torts with related statutory and regulatory materials. The aim is to provide a text that introduces students to key tort principles and the way in which those tort principles have in part shaped the regulatory state and in part been supplanted by the regulatory state.

The occasion for the book is a new course at Yale Law School. For the first time since 1956, the Yale faculty voted in early 2018 to alter its required curriculum beginning in the fall 2019 term. As law professors understand, curricular innovation is fraught with peril. Change disrupts instructors' investments in particular ways of teaching, sometimes rooted in decades of practice and learning. Changes can produce unanticipated ripple effects in other areas of the curriculum.

In making this change, my colleagues and I were especially attentive to the fact that there is no perfect law school curriculum, and certainly no perfect curriculum for all times and places. The required curriculum at Yale Law School, for example, shuffled constantly in the first half of the twentieth century. The course in Common Law Pleading dropped out; the "Auxiliary Course" became "Legal Analysis and Legal Method." Legal Ethics was added as an upper year requirement. But reforms did not stop there. The Law School soon required Procedure I and dropped the Agency requirement. By 1929 a required first-year course in Political and Legal Theory had pushed out Property, at least for the time being. In came Jurisprudence and Constitutional Law. The Depression brought a required course in Commercial Bank Credit alongside a course called Marketing I, which dealt with the law of sales and agency. Constitutional Law became Judicial Process. Courses in Professional Organization and Ethics were required in the mid-1930s, and a course called Trials and Appeals was added in 1935. Agency came back into the required curriculum, and with the New Deal the faculty added Administrative Process as a required course, too. Churn continued after World War Two. Administrative Process fell away. So did Legal Ethics. Criminal Law moved in and out of the required list and oscillated between the first and second terms.

In 1956, the Law School established its modern curriculum by adding the school's signature "small group" for first-term students and establishing four basic first-term courses: Constitutional Law, Contracts, Procedure, and Torts. Since then the only formal alteration to the required courses in the Law School has been the abolition of the upper-level requirement in Property.

The mid-century faculty seems to have learned a lesson: Curricular reform can be a quagmire. Since 1971, when Property was dropped as a required course, leaving only Criminal Law as a required course after the first term, the Law School has altered neither its list of required courses, nor the courses' place in the three-year law school sequence.

In the 2017-2018 academic year, the first year in Dean Heather Gerken's deanship, the faculty undertook to consider whether one or more changes to the required curriculum might be in order. A committee chaired by the author of this book studied the question and concluded that the required curriculum at the Law School lacked substantial attention, at least nominally, to statutory and regulatory material. That this was so was odd in no small part because as a substantive matter the required curriculum was full of statutes and regulations. In Torts, instructors taught substantial statutory and regulatory material. In Procedure inevitably engaged rules promulgated

pursuant to statutes. Contracts teachers taught statutes like the Uniform Commercial Code. And Constitutional Law teachers of course engaged statutes and the constitutional structure of the legislative process.

Nonetheless, the committee recommended, and the faculty approved, a change to make the place of statutes and regulation more explicit in the Law School's curriculum. Under this change, the Torts course became "Torts and Regulation." Torts was the natural place to make the formal change. For six decades, our fearless leader Judge Guido Calabresi – Sterling Professor, Dean, and now senior judge on the U.S. Court of Appeals for the Second Circuit – has taught a torts course that draws powerful and continuous connections between the common law and what Guido memorably describes as The Age of Statutes. His 1993 book, *The Common Law for the Age of Statutes*, is an inspiration for the newly named course.

Torts was also a natural place for change because the instructors who have labored in Judge Calabresi's gardens here in New Haven have largely followed Guido's lead and introduced a variety of statutory and regulatory materials to their courses already.

This casebook is designed specifically for use in the new course, though it would also work for an instructor aiming to teach an innovative torts course. It increases the role of statutes and regulations in the material. In addition, it offers a major innovation by leading the students into the ways in which basic tort doctrine animate fields of statutory law. In particular, the book adopts a series of "modules" that follow the adoption and adaptation of tort principles in the law of employment discrimination.

One final innovation in this book is its copyright structure. The book borrows substantially from a torts casebook co-authored with Karen Tani of the University of California at Berkeley. That book, *Torts: Cases, Principles, and Institutions* (4<sup>th</sup> ed., 2019), or *TCPI*, supplies much of the basic tort material that follows here in *TRCPI*. Both *TCPI* and *TRCPI* are published on Creative Commons licenses that permit the borrowing and lending of the relevant materials. I am very grateful to Professor Tani for her amazing additions beginning with the 4<sup>th</sup> edition of *TCPI*. Readers of *TRCPI* get the benefit of many of them, but Professor Tani bears no blame for errors and infelicities I have introduced here in *TRCPI*.

Many thanks to Dean Heather Gerken for supporting the curricular change that inspired this text. Thanks, too, to the students in my torts classes at Yale and Columbia for honing much of this material over nearly two decades. Alieta-Marie Lynch provided unstinting and omni-competent assistance helping me manage the text. Excellent work by research assistants including Jessie Agatstein, William Baldwin, Michael Beechert, Aurelia Chaudhury, Jessica Garland, Stephanie Garlock, Tanya Kapoor, Hyungwoo Lee, Matthew Quallen, Matthew Shapiro, Jessica Tueller, and Helen White made possible the completion this book and its predecessor. They have my abiding gratitude.

*John Fabian Witt*  
*Lakeville, Connecticut*  
*June 2019*

## **Preface to the Second Edition**

This Second Edition of *TRCPI* tracks the first, with modest changes to the material drawn from old *TCPI* book (many of them authored by Karen Tani, now a University Professor at the University of Pennsylvania).

In addition, the Second Edition adds in substantial new materials in two modules drawing torts principles in the area of antidiscrimination law.

In Chapter 8, a new Section B develops the law of proof in the context of employment discrimination cases alleging that an employment practice is unlawful because of its disparate impact on people in a protected class under Title VII of the Civil Rights Act of 1964. The disparate impact cases have followed a path drawn from the *res ipsa loquitor* cases in negligence cases, and it is a path that departs in complicated ways from the proof of disparate treatment claims under Title VII, which is dealt with in Chapter 8's Section A and which appeared in the First Edition.

A new Chapter 15 extends the vicarious liability and respondeat superior materials from tort in Chapter 14 and helps students watch those same issues play out in the context of harassment claims under Title VII. In the 1990s, the Supreme Court developed a distinctive and controversial approach to respondeat superior liability for employers in harassment cases – an approach that both draws from the common law of tort and departs from it.

Additional research assistance by Tobi Kuehne and Ann Manov helped me prepare these new materials.

*John Fabian Witt*  
*Lakeville, Connecticut*  
*June 2020*

## Preface to the Third Edition

The Third Edition of *TRCPI* continues to develop the themes set in place in the first. The basic outline of the book remains the same. I have expanded sections drawing out tort principles in the anti-discrimination law context. This is particularly true in the area of causation, where the Supreme Court has clumsily lurched through causation questions in *Bostock v. Clayton County*, extending Title VII antidiscrimination protections to people in the LGBT community, as well as other, less well-known cases. My co-author on the companion volume *TCPI*, Karen Tani, has expanded her contributions to the parallel new edition of that book; those additions, in particular with respect to race and gender, make this book better, too, since I have adopted nearly all of them here as well.

A new and not-too-long appendix adds material on the New Zealand alternative.

Superb research assistance by Aaron Sobel and Chris Umanzor made the changes to this edition a pleasure.

*John Fabian Witt*  
*Cheshire, Connecticut*  
*June 2022*

## CHAPTER 1. AN INTRODUCTION TO TORTS AND REGULATION

### A. Two Regimes: The Common Law and the Administrative State

There may be no better illustration of the cross-cutting institutional structures of American law than the struggles over whether statutes enacted by Congress (and regulations promulgated pursuant to those statutes by federal agencies) displace the common law principles of state law. In recent years, the relationship between federal law and state law has been fought out in cases resolving whether federal law displaces private causes of action based in state law common law principles. Consider the United States Supreme Court's 2011 decision in the childhood vaccines case, *Bruesewitz v. Wyeth*.

For now, don't worry about the terminology too much, including whatever you did not understand in the previous paragraph. We will rehearse the basics of tort law beginning in Section B of this chapter. The childhood vaccines case serves as our introduction to the forms and functions of American law.

Vaccination made extraordinary gains against infectious disease in the twentieth century, especially in wealthy countries. The significance of scientific advancements in the development of vaccines which are now given in childhood cannot be understated. In the early 20th century, the infant mortality rate in the United States was 20 percent; the childhood mortality rate before the age of five was an additional 20 percent. Today, according to a 2017 study, the infant mortality rate in the United States is 0.58 percent; a 2015 study found that the childhood mortality rate before the age of five is 0.7 percent. Although every area of medical science has made great strides since 1900, much of the drop in death rates has been due to the lifesaving effects of vaccines.

The first vaccine for smallpox was invented by Edward Jenner in 1796. But the vaccines that are given to children today were developed beginning in the early 20th century with the introduction of immunizations against pertussis (1914), diphtheria (1926), and tetanus (1938). The biggest breakthrough came in 1955, when Dr. Jonas Salk helped develop the polio vaccine. Further vaccines -- against measles, mumps, rubella, and hepatitis B, among others -- were introduced to the public over the subsequent half century. The success of these introductions has been spectacular. There were 12 million cases of rubella in the United States in 1964-65. In 2015, there were six.

Current child vaccination rates in the United States are relatively high considering the number of children who do not attend routine well visits. According to insurance provider Blue Cross Blue Shield, 77 percent of American children were fully vaccinated in 2016, up from 69 percent in 2013. Cause for worry, however, is to be found in statistics about the rate at which parents affirmatively refuse vaccinations for their children. For children born in 2010, the figure was 2.5 percent; for those born in 2013, it was 4.2 percent.

It is well known that vaccines can have rare side effects, most of which are entirely benign, such as injection-site pain, redness, or elevated body temperature. More serious side effects,

such as those stemming from immediate allergic reactions, occur in fewer than one out of every million cases. It is true that, due to mistakes in the development or manufacturing process or for some other reason, public health scares involving vaccine side effects have occurred. (If you're curious, look up the Cutter incident and the 1976 swine flu vaccine fiasco.) But these sorts of events are exceedingly rare. Medical science attributes many of the serious health problems which crop up in the wake of a vaccination to pure coincidence. And of course, not vaccinating poses dangers, too -- dangers that scientists by acclimation agree are ordinarily far greater than vaccinating.

At the same time that the modern culture of vaccination arose, American tort law underwent a period of sustained growth in liability. In the law of tort liability for products, in particular, courts expanded the liability of defendants, establishing new doctrines that allowed certain plaintiffs to recover damages from product manufacturers for injuries, sometimes even where the manufacturer had done nothing wrong. The result was a boom in litigation against the pharmaceutical industry in the late 1970s and early 1980s.

The late Justice Antonin Scalia's opinion in *Bruesewitz* tells the story of Congress's response and concludes that Congress's response preempts (or displaces) the state tort law causes of action for damages. Justice Stephen Breyer writes an opinion concurring in the result. Justice Sonia Sotomayor adds an opinion (joined by Justice Ruth Bader Ginsburg) dissenting from the majority view. In reading through the following opinions, ask yourself which justices have the better of the argument. Most importantly, ask yourself what the criteria ought to be for deciding which is the best argument.

***Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011)**

Justice SCALIA delivered the opinion of the Court.

We consider whether a preemption provision enacted in the National Childhood Vaccine Injury Act of 1986 (NCVIA) bars state-law design-defect claims against vaccine manufacturers.

I.

A.

For the last 66 years, vaccines have been subject to the same federal premarket approval process as prescription drugs, and compensation for vaccine-related injuries has been left largely to the States. Under that regime, the elimination of communicable diseases through vaccination became "one of the greatest achievements" of public health in the 20th century. But in the 1970's and 1980's vaccines became, one might say, victims of their own success. They had been so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases, and much more concerned with the risk of injury from the vaccines themselves.

Much of the concern centered around vaccines against diphtheria, tetanus, and pertussis (DTP), which were blamed for children's disabilities and developmental delays. This led to a massive increase in vaccine-related tort litigation. Whereas between 1978 and 1981 only nine

product-liability suits were filed against DTP manufacturers, by the mid-1980's the suits numbered more than 200 each year. This destabilized the DTP vaccine market, causing two of the three domestic manufacturers to withdraw; and the remaining manufacturer, Lederle Laboratories, estimated that its potential tort liability exceeded its annual sales by a factor of 200. Vaccine shortages arose when Lederle had production problems in 1984.

Despite the large number of suits, there were many complaints that obtaining compensation for legitimate vaccine-inflicted injuries was too costly and difficult. A significant number of parents were already declining vaccination for their children, and concerns about compensation threatened to depress vaccination rates even further. This was a source of concern to public health officials, since vaccines are effective in preventing outbreaks of disease only if a large percentage of the population is vaccinated.

To stabilize the vaccine market and facilitate compensation, Congress enacted the NCVIA in 1986. The Act establishes a no-fault compensation program “designed to work faster and with greater ease than the civil tort system.” *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995). A person injured by a vaccine, or his legal guardian, may file a petition for compensation in the United States Court of Federal Claims, naming the Secretary of Health and Human Services as the respondent. A special master then makes an informal adjudication of the petition within (except for two limited exceptions) 240 days. The Court of Federal Claims must review objections to the special master's decision and enter final judgment under a similarly tight statutory deadline. At that point, a claimant has two options: to accept the court's judgment and forgo a traditional tort suit for damages, or to reject the judgment and seek tort relief from the vaccine manufacturer.

Fast, informal adjudication is made possible by the Act's Vaccine Injury Table, which lists the vaccines covered under the Act; describes each vaccine's compensable, adverse side effects; and indicates how soon after vaccination those side effects should first manifest themselves. Claimants who show that a listed injury first manifested itself at the appropriate time are *prima facie* entitled to compensation. No showing of causation is necessary; the Secretary bears the burden of disproving causation. A claimant may also recover for unlisted side effects, and for listed side effects that occur at times other than those specified in the Table, but for those the claimant must prove causation. Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed.

Successful claimants receive compensation for medical, rehabilitation, counseling, special education, and vocational training expenses; diminished earning capacity; pain and suffering; and \$250,000 for vaccine-related deaths. Attorney's fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous. These awards are paid out of a fund created by an excise tax on each vaccine dose.

The *quid pro quo* for this, designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers. The Act requires claimants to seek relief through the compensation program before filing suit for more than \$1,000. Manufacturers are generally immunized from liability for failure to warn if they have complied with all regulatory requirements (including but not limited to warning requirements) and have given the warning either to the claimant or the claimant's physician. They are immunized from liability for punitive damages absent failure to comply with regulatory requirements, “fraud,”

“intentional and wrongful withholding of information,” or other “criminal or illegal activity.” And most relevant to the present case, the Act expressly eliminates liability for a vaccine's unavoidable, adverse side effects:

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

[42 U.S.C. § 300aa–22(b)(1).]

B.

The vaccine at issue here is a DTP vaccine manufactured by Lederle Laboratories. It first received federal approval in 1948 and received supplemental approvals in 1953 and 1970. Respondent Wyeth purchased Lederle in 1994 and stopped manufacturing the vaccine in 1998.

Hannah Bruesewitz was born on October 20, 1991. Her pediatrician administered doses of the DTP vaccine according to the Center for Disease Control's recommended childhood immunization schedule. Within 24 hours of her April 1992 vaccination, Hannah started to experience seizures. She suffered over 100 seizures during the next month, and her doctors eventually diagnosed her with “residual seizure disorder” and “developmental delay.” Hannah, now a teenager, is still diagnosed with both conditions.

In April 1995, Hannah's parents, Russell and Robalee Bruesewitz, filed a vaccine injury petition in the United States Court of Federal Claims, alleging that Hannah suffered from on-Table residual seizure disorder and encephalopathy injuries. A Special Master denied their claims on various grounds, though they were awarded \$126,800 in attorney's fees and costs. The Bruesewitzes elected to reject the unfavorable judgment, and in October 2005 filed this lawsuit in Pennsylvania state court. Their complaint alleged (as relevant here) that defective design of Lederle's DTP vaccine caused Hannah's disabilities, and that Lederle was subject to strict liability, and liability for negligent design, under Pennsylvania common law.

Wyeth removed the suit to the United States District Court for the Eastern District of Pennsylvania, which granted Wyeth summary judgment on the strict-liability and negligence design-defect claims, holding that the Pennsylvania law providing those causes of action was preempted by 42 U.S.C. § 300aa–22(b)(1). The United States Court of Appeals for the Third Circuit affirmed. We granted certiorari.



## II

### A

We set forth again the statutory text at issue:

“No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.”

The “even though” clause clarifies the word that precedes it. It delineates the preventative measures that a vaccine manufacturer *must* have taken for a side-effect to be considered “unavoidable” under the statute. Provided that there was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore preempted.

If a manufacturer could be held liable for failure to use a different design, the word “unavoidable” would do no work. A side effect of a vaccine could *always* have been avoidable by use of a differently designed vaccine not containing the harmful element. The language of the provision thus suggests that the *design* of the vaccine is a given, not subject to question in the tort action. What the statute establishes as a complete defense must be unavoidability (given safe manufacture and warning) *with respect to the particular design*. Which plainly implies that the design itself is not open to question.

A further textual indication leads to the same conclusion. Products-liability law establishes a classic and well known triumvirate of grounds for liability: defective manufacture, inadequate directions or warnings, and defective design. If all three were intended to be preserved, it would be strange to mention specifically only two, and leave the third to implication. It would have been much easier (and much more natural) to provide that manufacturers would be liable for “defective manufacture, defective directions or warning, and defective design.” It seems that the statute fails to mention design-defect liability “by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). . . .

## III

The structure of the NCVIA and of vaccine regulation in general reinforces what the text of s. 300aa-22(b)(1) suggests. A vaccine’s license spells out the manufacturing method that must be followed and the directions and warnings that must accompany the product. Manufacturers ordinarily must obtain the Food and Drug Administration’s (FDA) approval before modifying either. Deviations from the license thus provide objective evidence of manufacturing defects or inadequate warnings. Further objective evidence comes from the FDA’s regulations—more than 90 of them—that pervasively regulate the manufacturing process, down to the requirements for plumbing and ventilation systems at each manufacturing facility. Material noncompliance with any one of them, or with any other FDA regulation, could cost the manufacturer its regulatory-compliance defense.

Design defects, in contrast, do not merit a single mention in the NCVIA or the FDA's regulations. Indeed, the FDA has never even spelled out in regulations the criteria it uses to decide whether a vaccine is safe and effective for its intended use. And the decision is surely not an easy one. Drug manufacturers often could trade a little less efficacy for a little more safety, but the safest design is not always the best one. Striking the right balance between safety and efficacy is especially difficult with respect to vaccines, which affect public as well as individual health. Yet the Act, which in every other respect micromanages manufacturers, is silent on how to evaluate competing designs.... The lack of guidance for design defects combined with the extensive guidance for the two grounds of liability specifically mentioned in the Act strongly suggests that design defects were not mentioned because they are not a basis for liability.

The mandates contained in the Act lead to the same conclusion. Design-defect torts, broadly speaking, have two beneficial effects: (1) prompting the development of improved designs, and (2) providing compensation for inflicted injuries. The NCVIA provides other means for achieving both effects. . . .

[S]ilence regarding design-defect liability was not inadvertent. It instead reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.

[T]he Act's structural *quid pro quo* leads to the same conclusion: . . . . Taxing vaccine manufacturers' product to fund the compensation program, while leaving their liability for design defect virtually unaltered, would hardly coax manufacturers back into the market. . . .

#### IV

Since our interpretation . . . is the only interpretation supported by the text and structure of the NCVIA, even those of us who believe legislative history is a legitimate tool of statutory interpretation have no need to resort to it. In any case, the dissent's contention that it would contradict our conclusion is mistaken.

The dissent's legislative history relies on the following syllogism: A 1986 House Committee Report states that §300aa-22(b)(1) "sets forth the principle contained in Comment k of Section 402A of the Restatement of Torts (Second);" in 1986 comment *k* was "commonly understood" to require a case-specific showing that "no feasible alternative design" existed; Congress therefore must have intended §300aa-22(b)(1) to require that showing. . . .

Immediately after the language quoted by the dissent, the 1986 Report notes the difficulty a jury would have in faithfully assessing whether a feasible alternative design exists when an innocent "young child, often badly injured or killed," is the plaintiff. Eliminating that concern is why the 1986 Report's authors "strongly believ[e] that Comment k is appropriate and necessary as the policy for civil actions seeking damages in tort." The dissent's interpretation of §300aa-22(b)(1) and its version of "the principle in Comment K" adopted by the 1986 Report leave that concern unaddressed.

The dissent buries another unfavorable piece of legislative history. Because the 1986

Report believes that §300aa-22(b)(1) should incorporate “the principle in Comment K” and because the Act provides a generous no-fault compensation scheme, the 1986 Report counsels injured parties who cannot prove a manufacturing or labeling defect to “pursue recompense in the compensation system, not the tort system.” That counsel echoes our interpretation of §300aa-22(b)(1).

Not to worry, the dissent retorts, a Committee Report by a later Congress “authoritative[ly]” vindicates its interpretation. Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. . . . Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition “could have had no effect on the congressional vote,” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

. . . . Those who voted on the relevant statutory language were not necessarily the same persons who crafted the statements in the later Committee Report; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could possibly have been informed by those later statements. . . .

For the foregoing reasons, we hold that the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects. . . .

Justice BREYER, concurring.

I join the Court’s judgment and opinion. . . . But the textual question considered alone is a close one. Hence, like the dissent, I would look to other sources, including legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion. Unlike the dissent, however, I believe these other sources reinforce the Court’s conclusion.

## I

House Committee Report No. 99–908 contains an “authoritative” account of Congress’ intent in drafting the pre-emption clause of the National Childhood Vaccine Injury Act of 1986 (NCVIA or Act). See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“[T]he authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill”). That Report says that “if” vaccine-injured persons

“cannot demonstrate under applicable law either that a vaccine was improperly prepared or that it was accompanied by improper directions or inadequate warnings [they] should pursue recompense in the compensation system, not the tort system.” H.R. Rep. No. 99–908, pt. 1, p. 26 (1986), U.S. Code Cong. & Admin. News, 1986, pp. 6344, 6365 (hereinafter H.R. Rep. or Report).

The Report lists two specific kinds of tort suits that the clause does not pre-empt (suits based on improper manufacturing and improper labeling), while going on to state that compensation for other tort claims, *e.g.*, design-defect claims, lies in “the [NCVIA’s no-fault] compensation system, not the tort system.” *Ibid.*

The strongest contrary argument rests upon the Report’s earlier description of the statute as “set[ting] forth the principle contained in Comment k” (of the Restatement Second of Torts’ *strict liability* section, 402A) that “a vaccine manufacturer should not be liable for injuries or deaths resulting from *unavoidable* side effects.” *Id.*, at 25 (emphasis added). But . . . nothing in the Report suggests that the statute means the word “unavoidable” to summon up an otherwise unmentioned third exception encompassing suits based on design defects. . . . The Report itself refers, not to comment *k*’s details, but only to its “*principle*,” namely, that vaccine manufacturers should *not* be held liable for unavoidable injuries. It says nothing at all about who—judge, jury, or federal safety agency—should decide whether a safer vaccine could have been designed. . . .

## II

The legislative history describes the statute more generally as trying to protect the lives of children . . . . As the Committee Report makes clear, routine vaccination is “one of the most spectacularly effective public health initiatives this country has ever undertaken.” H.R. Rep., at 4. Before the development of routine whooping cough vaccination, for example, “nearly all children” in the United States caught the disease and more than 4,000 people died annually, most of them infants. . . . But these gains are fragile; “[t]he causative agents for these preventable childhood illnesses are ever present in the environment, waiting for the opportunity to attack the unprotected individual.” Hearing on S. 827 before the Senate Committee on Labor and Human Resources, 99th Cong., 2d Sess., pt. 2, pp. 20–21 (1985) (testimony of the American Academy of Pediatrics). Even a brief period when vaccination programs are disrupted can lead to children’s deaths. Hearings 20–21.

In considering the NCVIA, Congress found that a sharp increase in tort suits brought against whooping cough and other vaccine manufacturers between 1980 and 1985 had “prompted manufacturers to question their continued participation in the vaccine market.” H.R. Rep., at 4. Indeed, two whooping cough vaccine manufacturers withdrew from the market, and other vaccine manufacturers, “fac[ing] great difficulty in obtaining [product liability] insurance,” told Congress that they were considering “a similar course of action.” H.R. Rep., at 4. The Committee Report explains that, since there were only one or two manufacturers of many childhood vaccines, “[t]he loss of any of the existing manufacturers of childhood vaccines . . . could create a genuine public health hazard”; it “would present the very real possibility of vaccine shortages, and, in turn, increasing numbers of unimmunized children, and, perhaps, a resurgence of preventable diseases.” H.R. Rep., at 5. . . .

Given these broad general purposes, to read the pre-emption clause as preserving design-defect suits seems anomalous. The Department of Health and Human Services (HHS) decides when a vaccine is safe enough to be licensed and which licensed vaccines, with which associated injuries, should be placed on the Vaccine Injury Table. A special master in the Act’s compensation program determines whether someone has suffered an injury listed on the Injury Table and, if not, whether the vaccine nonetheless caused the injury. To allow a jury in effect

to second-guess those determinations is to substitute less expert for more expert judgment, thereby threatening manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely to be particularly severe—instances where Congress intended the contrary. That is because potential tort plaintiffs are unlikely to bring suit unless the specialized compensation program has determined that they are not entitled to compensation (say, because it concludes that the vaccine did not cause the injury). Brief for United States as *Amicus Curiae* 28 (“99.8% of successful Compensation Program claimants have accepted their awards, foregoing any tort remedies against vaccine manufacturers”). . . .

The United States, reflecting the views of HHS, urges the Court to read the Act as I and the majority would do. It notes that the compensation program’s listed vaccines have survived rigorous administrative safety review. It says that to read the Act as permitting design-defect lawsuits could lead to a recurrence of “exactly the crisis that precipitated the Act,” namely withdrawals of vaccines or vaccine manufacturers from the market, “disserv[ing] the Act’s central purposes,” and hampering the ability of the agency’s “expert regulators, in conjunction with the medical community, [to] control the availability and withdrawal of a given vaccine.” Brief for United States as *Amicus Curiae* 30, 31.

The United States is supported in this claim by leading public health organizations, including the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Preventive Medicine, the American Public Health Association, the American Medical Association, the March of Dimes Foundation, the Pediatric Infectious Diseases Society, and 15 other similar organizations. . . .

I would give significant weight to the views of HHS. The law charges HHS with responsibility for overseeing vaccine production and safety. It is “likely to have a thorough understanding” of the complicated and technical subject matter of immunization policy, and it is comparatively more “qualified to comprehend the likely impact of state requirements.” *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 883 (2000). HHS’s position is particularly persuasive here because expert public health organizations support its views and the matter concerns a medical and scientific question of great importance: how best to save the lives of children.

In sum, congressional reports and history, the statute’s basic purpose as revealed by that history, and the views of the expert agency along with those of relevant medical and scientific associations, all support the Court’s conclusions. I consequently agree with the Court.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

Vaccine manufacturers have long been subject to a legal duty, rooted in basic principles of products liability law, to improve the designs of their vaccines in light of advances in science and technology. Until today, that duty was enforceable through a traditional state-law tort action for defective design. In holding that § 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act) preempts all design defect claims for injuries stemming from vaccines covered under the Act, the Court imposes its own bare policy preference over the considered judgment of Congress. . . . Its decision leaves a regulatory vacuum in which no one

ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products. . . .

Section 22 of the Vaccine Act provides “standards of responsibility” to govern civil actions against vaccine manufacturers. Section 22(a) sets forth the “general rule” that “State law shall apply to a civil action brought for damages for a vaccine-related injury or death.” This baseline rule that state law applies is subject to three narrow exceptions, one of which, § 22(b)(1), is at issue in this case. Section 22(b)(1) . . . contains two key clauses: “if the injury or death resulted from side effects that were unavoidable” (the “if” clause), and “even though the vaccine was properly prepared and was accompanied by proper directions and warnings” (the “even though” clause).

Blackletter products liability law generally recognizes three different types of product defects: design defects, manufacturing defects, and labeling defects (*e.g.*, failure to warn). The reference in the “even though” clause to a “properly prepared” vaccine “accompanied by proper directions and warnings” is an obvious reference to two such defects—manufacturing and labeling defects. The plain terms of the “even though” clause thus indicate that § 22(b)(1) applies only where neither kind of defect is present. . . .

Given that the “even though” clause requires the absence of manufacturing and labeling defects, the “if” clause’s reference to “side effects that were unavoidable” must refer to side effects caused by something other than manufacturing and labeling defects. The only remaining kind of product defect recognized under traditional products liability law is a design defect. Thus, “side effects that were unavoidable” must refer to side effects caused by a vaccine’s *design* that were “unavoidable.” Because § 22(b)(1) uses the conditional term “if,” moreover, the text plainly implies that some side effects stemming from a vaccine’s design are “unavoidable,” while others are avoidable. Accordingly, because the “if” clause (like the “even though” clause) sets forth a condition to invoke § 22(b)(1)’s defense to tort liability, Congress must also have intended a vaccine manufacturer to demonstrate in each civil action that the particular side effects of a vaccine’s design were “unavoidable.” . . .

Indeed, when Congress intends to preempt design defect claims categorically, it does so using categorical (*e.g.*, “all”) and/or declarative language (*e.g.*, “shall”), rather than a conditional term (“if”). For example, in a related context, Congress has authorized the Secretary of Health and Human Services to designate a vaccine designed to prevent a pandemic or epidemic as a “covered countermeasure.” 42 U.S.C. §§ 247d–6d(b). With respect to such “covered countermeasure[s],” Congress provided that subject to certain exceptions, “a covered person *shall* be immune from suit and liability under Federal and State law with respect to *all* claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure,” § 247d–6d(a)(1) (emphasis added), including specifically claims relating to “the design” of the countermeasure.

The plain text and structure of the Vaccine Act thus compel the conclusion that § 22(b)(1) preempts some—but not all—design defect claims. [W]here a plaintiff has proved that she has suffered an injury resulting from a side effect caused by a vaccine’s design, a vaccine manufacturer may invoke § 22(b)(1)’s liability exemption only if it demonstrates that the side effect stemming from the particular vaccine’s design is “unavoidable,” and that the vaccine is otherwise free from manufacturing and labeling defects. . . .

If Congress intended to exempt vaccine manufacturers categorically from all design defect liability, it more logically would have provided: “No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the vaccine was properly prepared and was accompanied by proper directions and warnings.” There would have been no need for Congress to include the additional 13 words “the injury or death resulted from side effects that were unavoidable even though.”

....

The majority also suggests that Congress necessarily intended to pre-empt design defect claims since the aim of such tort suits is to promote the development of improved designs and provide compensation for injured individuals, and the Vaccine Act “provides other means for achieving both effects”—most notably through the no-fault compensation program and the National Vaccine Program. But the majority’s position elides a significant difference between state tort law and the federal regulatory scheme. Although the Vaccine Act charges the Secretary of Health and Human Services with the obligation to “promote the development of childhood vaccines” and “make or assure improvements in . . . vaccines, and research on vaccines,” neither the Act nor any other provision of federal law places a legal *duty* on vaccine manufacturers to improve the design of their vaccines to account for scientific and technological advances. Indeed, the FDA does not condition approval of a vaccine on it being the most optimally designed among reasonably available alternatives, nor does it (or any other federal entity) ensure that licensed vaccines keep pace with technological and scientific advances. Rather, the function of ensuring that vaccines are optimally designed in light of existing science and technology has traditionally been left to the States through the imposition of damages for design defects. . . .

The normal competitive forces that spur innovation and improvements to existing product lines in other markets . . . operate with less force in the vaccine market, particularly for vaccines that have already been released and marketed to the public. Absent a clear statutory mandate to the contrary, there is no reason to think that Congress intended in the vaccine context to eliminate the traditional incentive and deterrence functions served by state tort liability in favor of a federal regulatory scheme providing only carrots and no sticks.

In enacting the Vaccine Act, Congress established a carefully wrought federal scheme that balances the competing interests of vaccine-injured persons and vaccine manufacturers. . . . Instead of eliminating design defect liability entirely, Congress enacted numerous measures to reduce manufacturers’ liability exposure, including a limited regulatory compliance presumption of adequate warnings, elimination of claims based on failure to provide direct warnings to patients, a heightened standard for punitive damages, and, of course, immunity from damages for “unavoidable” side effects. Considered in light of the Vaccine Act as a whole, § 22(b)(1)’s exemption from liability for unavoidably unsafe vaccines is just one part of a broader statutory scheme that reflects Congress’ careful balance between providing adequate compensation for vaccine-injured children and conferring substantial benefits on vaccine manufacturers to ensure a stable and predictable childhood vaccine supply.

The majority’s decision today disturbs that careful balance based on a bare policy preference that it is better “to leave complex epidemiological judgments about vaccine design

to the FDA and the National Vaccine Program rather than juries.” To be sure, reasonable minds can disagree about the wisdom of having juries weigh the relative costs and benefits of a particular vaccine design. But whatever the merits of the majority’s policy preference, the decision to bar all design defect claims against vaccine manufacturers is one that Congress must make, not this Court. By construing § 22(b)(1) to preempt all design defect claims against vaccine manufacturers for covered vaccines, the majority’s decision leaves a regulatory vacuum in which no one—neither the FDA nor any other federal agency, nor state and federal juries—ensures that vaccine manufacturers adequately take account of scientific and technological advancements. This concern is especially acute with respect to vaccines that have already been released and marketed to the public. Manufacturers, given the lack of robust competition in the vaccine market, will often have little or no incentive to improve the designs of vaccines that are already generating significant profit margins. Nothing in the text, structure, or legislative history remotely suggests that Congress intended that result.

I respectfully dissent.

### *Notes*

1. *The power of the Supremacy Clause.* Underlying the logic of the *Bruesewitz* case is the Supremacy Clause in Article VI of the United States Constitution:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Supremacy Clause gives federal law supremacy over state law, so long as the federal legal norm in question is within the authority of the federal government.

2. *Real people, real consequences.* What happened to the Bruesewitzes? Your author was unable to precisely ascertain the remainder of their story, but it is safe to say that there is no happy ending here. Hannah Bruesewitz will need close supervision and personal care for the remainder of her life as a result of the illness she began to suffer after receiving the DTP vaccine. And since the Special Master denied the Bruesewitz family recovery under the Vaccine Act, their defeat in the Supreme Court leaves them without compensation. Whenever you read a case, keep in mind that a sad story often gives rise to the web of legal questions and principles you are expected to discern.

3. *What’s at stake?* What is at issue in the choice between a federal compensation program and suits under state law? Torts and regulation often force us to contemplate difficult choices. Some are discrete; some are abstract. Think about the following dichotomies with the challenges and lessons of *Bruesewitz* in mind:

a. *Formalism versus functionalism.* One of the roles of law is as a mechanism for resolving social disagreement. *Bruesewitz* illustrates two different ways of going about the enterprise. One goes by the label “formalism.” The other goes by the label “functionalism.” The former is



concerned with answering questions of legal analysis exclusively by reference to the four-corners of a legal text or rule. The latter aims to answer such questions by taking into account the goals of the relevant legal text or rule. Of the three opinions in *Bruesewitz*, which are formalist? Which are functionalist? How can you tell?

b. *Centralization versus decentralization*. In state tort suits, decisions of liability are made by juries comprised of local people; settlement decisions are made by the parties themselves. In a regulatory regime, those decisions are made by bureaucrats working from within a system predicated on centralization. Does one of these two approaches -- centralization or decentralization -- make more sense to you in the context of injuries stemming from vaccines? In general?

c. *Expert versus non-expert*. This dichotomy is related to the previous one. Ideally, a centralized bureaucracy will provide the benefit of expertise. The FDA is staffed by highly trained professionals from relevant fields; these are the people charged with creating and executing the approval process for vaccines. Local juries, on the other hand, are not likely to possess any expertise in medical technology or the science of vaccine development. They may also be more susceptible to anti-vaccination propaganda, which has grown in prominence in recent years. Should expertise be seen as a virtue in the sort of decision-making that had to be performed in *Bruesewitz*? Are there situations in which you would prefer a non-expert perspective?

d. *Dynamic versus static*. Tort can respond quickly and flexibly to changing norms and technologies without cumbersome administrative or legislative processes. Agencies, on the other hand, can become bound up in complex and time-consuming processes. Private litigation can take years and forces tremendous costs on participants. To what degree should prudential concerns such as speed shape our preferences for one forum or another?

e. *Ex-ante versus ex-post*. One view of the regulatory choice sees it as a choice between ex ante and ex post approaches. The former, which characterizes many forms of so-called “command-and-control” regulations, sets regulatory standards in advance and prohibits departures from its mandate. The latter, which characterizes most tort law, allows parties to act as they see fit, so long as they pay damages to injured victims in the event something goes awry. What are the pluses and minuses of the two approaches? In what respects are they actually different from one another? It may be worth thinking a good deal about these questions, since they are pervasive in this course and indeed in the law more generally.

f. *Tort versus regulation, and the goals of the law*. You now have one view of how torts and regulation relate. Which approach is better at advancing our goals? Which is better at providing the right amount of deterrence and risk reduction? Which is better at righting wrongs? Which is better at compensating injuries? We will grapple with these questions throughout the entire term.

***Sydney Spiesel, “The Bundanberg Disaster: Immunization and Its Discontents”***

In 2011, legendary pediatrician Sydney Spiesel delivered the following account of vaccines and the *Bruesewitz* case, putting the case in the context of nearly a century of vaccine history:

Hannah Bruesewitz was given her third DTP shot in 1992, when she was six months old. Shortly following immunization, she developed a serious convulsive disorder, experiencing about 125 seizures in the next 16 days. Her seizure disorder has persisted (in a lessened form), and she also began to show signs of a severe developmental delay and autism. Hearing a story like that might make you confidently assume that Hannah’s neurological problems must have been caused by her immunizations, but you would not necessarily be right. The signs of developmental delay and autism are often very difficult or impossible to detect by six months of age and lots of subsequent statistical research has never shown an association between immunization and the development of autism. Statistics, however, only describe groups and not individual patients and it’s possible that there is something unique about Hannah that led to an extremely rare susceptibility. But the rules of the Vaccine Court require that if a problem doesn’t fit on a table of serious side-effects known to be a risk of immunization, then a family must demonstrate a plausible causative explanation for the side effect before damages can be paid. Similarly, seizures did sometimes follow administration of the old whole-cell DTP vaccine, but these were typically transient (probably related to fever) and the immunization has not been shown to increase the risk for developing a long-standing seizure disorder.

Her case was brought to the Vaccine Court, which ultimately rejected it because neither a residual seizure disorder nor autistic-like developmental disorders are listed in a table of possible injuries clearly attributable to immunization with DTP vaccine and because the special master found no likely connection between her illness and the immunization. Hannah’s family, clearly dissatisfied with the outcome, wanted the case moved from the Vaccine Court to a more conventional court where it could be tried as a civil liability case in which the injuries might be attributed to a defect in the DTP vaccine. Their grounds for asking that the case be taken away from the Vaccine Court is their assertion that the manufacturer could have made a safer vaccine but chose not to (had the manufacturer done so, they argue, Hannah’s injury might have been preventable). If her injury might have been preventable, the argument continued, the vaccine manufacturer should not be exempted from civil liability, so the case should be removed from the jurisdiction (and rules) of the Vaccine Court. They argued that the company chose to stick with an older, inherently bad technology – whole-cell DTP (not mentioned in the brief, but a vaccine preserved with thimerosal) – compared with the newer, purer, “safer” product, DTaP.

There is, it seems to me, a problem with this argument. Vaccines, like most medications intended for use in children, are almost always first tested and used in older children. Only when safety and efficacy have been clearly

demonstrated in those children is testing and permitted use extended to infants. The obvious reason for this policy is that infants are more fragile than older kids and so testing on babies first would be riskier. But there is also another issue that applies specifically to vaccines: some kinds of vaccines simply don't work if given before a child's immunological equipment has reached a critical stage in development, sometimes as late as two years old. In 1992, when Hannah was immunized, the safety and efficacy for infants of DTaP, the purer, "safer" replacement product for the whole cell vaccine she received, still hadn't been clearly established. For that reason, DTaP, though already licensed and available for use in older children, wasn't yet licensed for use in children as young as Hannah was -- that didn't happen until 1996. When Hannah was immunized, there were no other kinds of DTP vaccines licensed for use in children of her age besides the one she was given.

The case is a complex one and its conclusion depended on arcane questions of law (and, as it turns out, grammar). Does it matter that no actual alternative licensed vaccine was available? What, exactly, was the intent of Congress when it inserted in the law that established the Vaccine Court the provision that protected vaccine manufacturers from suits as long as they made the vaccine properly and distributed it with appropriate warnings? Did Congress really want the losers in Vaccine Court decisions -- there are currently 5,000 rejected claimants waiting in the wings -- to be free to sue vaccine manufacturers, anyway? (Yes, I know that technically the argument in this case is a special one -- the idea that a vaccine might be inherently defective if a vaccine maker could possibly have chosen to produce a superior product -- but it's hard to believe that a similar case couldn't be made for many other rejected claimants.) In addition, putting the merits of this particular case aside, does the legislation establishing and giving power to a Federal Vaccine Court improperly and unacceptably preempt state laws which would allow civil liability suits against vaccine manufacturers?

In any case, it is perfectly clear that if losers in Vaccine Court decisions, like Hannah's family, are allowed to sue anyway, or if the function of the Vaccine Court is abolished completely on federalist grounds, childhood immunizations and public health generally will be in big trouble. In a sense, the case that just finally ended at the Supreme Court began in [a famous example of vaccination gone awry] in Bundaberg[, Australia] in 1928.

Bundaberg was threatened with the possibility of a diphtheria epidemic. In response, the Australian federal government distributed a vaccine to prevent an outbreak but some children died or suffered injury because of the vaccine. In the following years, and partly in consequence of what was learned at Bundaberg, immunizations were improved and made safer. And now the question of how to balance public health needs against the small risk inherent in immunization has come back.

One of the hidden costs of the tragedy at Bundaberg is that it added to the fear of immunization. That fear created a suspicion of public health in Bundaberg and elsewhere, leading to a pattern of vaccine refusal. This anxiety was

sufficiently great that, apparently, some Bundaberg parents refused diphtheria vaccination even in the face of epidemics. It took about 25 years (and a threatened polio epidemic) for fears about immunization to abate. A Bundaberg historian reports a significant number of elderly local people with the neck scars resulting from a childhood emergency tracheostomy – surgery to cut into the windpipe and place an artificial breathing opening to save a child from being choked to death by the throat membrane of diphtheria. Ironically, the lessons learned from the Bundaberg disaster are precisely the ones which later made safe vaccines which would have protected these victims from this disease: the substitution of a toxoid vaccine for the old TAT, better methods of bottling vaccines, the need for a preservative in vaccines, and improvement in preservative technology.

But even in Bundaberg the fear of immunization was balanced by fear of a very frightening disease with which almost every family had some direct experience. For most people, seeing a case (or the aftermath) of diphtheria or tetanus or polio or bacterial meningitis will quickly sweep away any misgivings about immunization. Even seeing a child nearly dead of severe chickenpox or measles or permanently deafened by mumps has a pretty powerful effect. Virtually no one – parent, pediatrician, infectious disease specialist, immunologist – will ever encounter a really significant reaction to a vaccine, but anyone who has seen a victim of these vaccine-preventable diseases will remember it forever.

In a way, however, immunization is a victim of its own success. Because of the effectiveness of vaccination these illnesses are no longer around (at least in the developed world) to terrify and remind us, so there is no longer much reinforcement to stimulate any impulse toward prevention.

*Sydney Spiesel, “The Bundaberg Disaster and the Supreme Court: Immunizations and its Discontents,” Yale School of Medicine Pediatric Grand Round Lectures, September 28, 2011.*

At Bundaberg, a badly preserved and contaminated vaccine with a reused needle killed twelve children in a small Australian city within 34 hours of their immunization for diphtheria. Spiesel describes the diphtheria vaccine at issue in the Bundaberg disaster as follows:

Diphtheria, a common – and terrifying – risk for children in 1928, is now an extremely rare disease. It is very unlikely that you or anyone in your family or, for that matter, anyone you have ever met has had diphtheria. It is equally unlikely that any doctor you’ve ever encountered has seen a case of diphtheria. In the US, one case was reported in the decade 1990-2000 and only three have been reported since, which is fortunate, since the disease is so severe. The bacterium which causes diphtheria releases a toxin – a poison – as it grows, most often in the back of the throat. The toxin, which kills human cells, has a local effect – it causes the formation of an adherent leathery membrane across the back of the throat (and sometimes even grows down the air passages toward the lungs) that can choke a patient to death. The toxin produced by the diphtheria germ is also carried by the blood everywhere in the body. The late effects of the toxin are insidious. It causes inflammation and serious damage

and weakening of the heart muscle; in the old days often leading to heart failure. The poison causes severe (but usually reversible) damage to the nerves which control muscles, leading to profound weakness and even paralysis.

That this dangerous disease has disappeared in the US is testimony to the power and value of vaccination. In 1900, prior to the introduction of the vaccine and when the US population was about a quarter of what it is now, there were about 114,000 cases of diphtheria and an estimated 23,000 deaths. Immunization is so effective and so widespread that since 2004 not a single case of respiratory diphtheria has been reported in the US.

Spiesel concludes that “Second only to sewage disposal and slightly above decent nutrition but certainly well more valuable than antibiotics or CT scans, vaccines have made the most significant contribution to the length and quality of your life and the life of everyone you love.”

## B. Principles and Institutions

One point of *Bruesewitz* is to show that American law has a deep toolbox when it comes to regulating risks. To be sure, each of the tools has flaws. But there is a wide array of regulatory and administrative options. In the United States, state and federal agencies regulate occupational hazards, consumer risks, medical care standards, highway safety, and much more. State legislatures and the U.S. Congress have enacted legislation setting standards and guiding conduct.

In the background -- and often surging to the fore -- is the common law of torts. But what exactly is the law of torts?

*Tort law is the common law of civil wrongs not arising out of contract.* Torts books often start with a definition because tort law can seem strange and unfamiliar to the law student. Terms like “contracts,” “procedure,” “property,” and “criminal law,” are relatively familiar to students long before they arrive for the first day of classes. “Constitutional law” will resonate with the law student who has even a passing interest in politics or public policy. Alone among first year subjects, “torts” has not made much headway into lay usage. Indeed, the situation is even worse than this suggests, for to the extent the term has made its way into popular usage, the results have often been terrible misuse and misunderstanding.

So let’s start with a definition: *Tort law is the common law of civil wrongs not arising out of contract.* Let’s now take that definition piece by piece.

We call tort law a *common law* field because it arises out of the body of legal norms and institutions inherited by the United States from England more than two centuries ago, when the United States won independence from the British Empire. In England, the common law was the law of the King’s courts in the centuries after the Norman Conquest in 1066. (The common law was the law *common* to those courts, as opposed to the church courts, borough courts, and the courts of the local nobility, each of which had its own law through the medieval and early modern periods.) Today, to say that a body of law is made up of common law principles is to say that it is mostly judge-made law, though tort doctrine is not necessarily

exclusively so. State legislatures and the U.S. Congress increasingly alter the common law of torts. The Federal Constitution and its state-level counterparts largely (but not entirely) give the Congress and state legislatures power to make such alterations, though as we shall see constitutional constraints touch tort law in several different ways. Nonetheless, it is still fair to call torts a common law field. And as a common law field, torts is made up predominantly of state law, rather than federal law, though federal law has always played a role, especially in the past century, and even more so in the last two decades. To the extent that torts remains a subject of state law, its basic norms will vary from state to state, though usually with a wide area of consensus at its core.

Tort law deals with *civil* wrongs as opposed to violations of the criminal law. This means that tort law's norms and institutions exhibit a cluster of features characteristic of civil proceedings, not criminal proceedings. Private parties, not public prosecutors, typically initiate tort litigation (though the government may be a claimant in tort cases when certain harms befall government property). The array of procedural protections for criminal defendants (many of them constitutionally required) typically does not apply to defendants in torts cases. There is no privilege not to testify on the grounds that you might concede liability, for example. There are no Miranda warnings in torts. And there is no constitutionally protected right to confront witnesses. The Federal Constitution does not require states to offer jury trials in tort cases, though most states do anyway. The standard of proof is a "preponderance of the evidence" rather than the high threshold of "beyond a reasonable doubt." Parties without lawyers are not usually offered free court-appointed counsel. Most importantly, perhaps, the fact that tort law is the law of *civil* wrongs means that, with one exception, tort law does not aim to punish. Punishment is principally a function of the criminal justice system. The remedies in a torts case aim not to punish the defendant, but to compensate the plaintiff, almost always through a monetary award aimed at making up for losses, and sometimes (though much less often) through an order by a court requiring that a defendant cease some ongoing course of conduct. The exception to this rule is the doctrine of punitive damages, which consist of monetary sums awarded by a judge or jury for the purpose of punishing tort defendants, and which are awardable in torts cases involving some especially outrageous or reckless conduct. As we shall see, even though punitive damages are rare, they have attracted considerable attention because of concerns that they punish without the institutional protections offered to criminal defendants. The United States Supreme Court has significantly constrained the size of possible punitive damages awards in recent years.

Tort law is a field not merely of civil law: it is a field of civil law *wrongs*. The term "tort" comes from the Latin meaning bend or twist. (It shares the same root as the word "torture.") For centuries, tort law has thus been connected indelibly to the moral concept of wrongfulness. Most areas of tort doctrine thus ask about the wrongfulness of the parties' conduct. Some domains of tort law purport to do away with the concept of wrongfulness. Since at least the middle of the nineteenth century, important areas of the law (urged on by prominent jurists and commentators) have embraced so-called strict or no-fault liability doctrines that ostensibly allocate accident costs without regard to questions of wrongfulness. In the field of product-related injuries, for example, which we will spend considerable time discussing later in this book, doctrine has moved toward eliminating fault or wrongdoing from the analysis. Such "no fault" approaches remain the exception to the rule.

Last, tort law is a common law field of civil wrongs *not arising out of contract*. This means that, as a conceptual matter, the obligations that tort law recognizes exist independent

of any agreement between the parties. For a person to have a legal obligation to another arising out of tort law, they need not have promised the other person anything. The law of torts itself, not the terms of any agreement, specifies the contours of the obligations it enforces.

Yet this final piece of our definition, like each element of the definition that has preceded it, comes with caveats and exceptions, two of which are worth noting here. First, many and perhaps even most torts cases *do* arise out of the interactions of parties who are in contractual relationships with one another, or at least in relationships akin to contracts. Consumers of products contract with sellers to buy those products, but if they sue for product-related injuries, they often sue in tort law. Patients of doctors enter into contracts to purchase medical services, but if they sue when those services go awry, they usually sue in tort law. And even when there is no formal contract, there are often relationships or social roles that could be construed as setting the terms of the parties' interactions. Social settings such as classrooms or playgrounds, as we shall soon see, typically come with informal conventions and codes of conduct. Such conventions and agreements are crucially important in modern tort law. They require that we decide whether and when tort law should defer to private agreements and when it should override them, especially when they purport to abolish tort obligations altogether.

Second, and just as significant, contracts are vital for the resolution of tort claims because in the real world virtually every successful tort claim is resolved by a special kind of contract called settlement. Contracts of settlement discharge the underlying tort obligation and render it a contractual obligation to pay some or all of the damages the plaintiff sought. In the everyday practice of tort law, such settlement contracts are pervasive. No one really knows what percentage of tort claims settle, but the percentage is thought to be stunningly high, probably well above ninety-five percent of those tort claims that lead to monetary transfers. Settlement is thus at the heart of how American tort law works. And it offers us a segue to a central theme in this book. For settlement is one of the wide array of social practices and institutions that constitute American tort law and that make it more than merely a formal legal definition or a dry and dusty concept in the doctrinal analysis of the law. Tort law in the United States is a vast and highly distinctive socio-regulatory system.

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Tort law in the United States consists of a sprawling set of social institutions and practices. One way to see this is to observe that formal definitions of tort law do not differ much from one legal order to another around the world. But the institutions and sociology of tort law differ radically from legal system to legal system. In this book, we will attend to formal definitions and doctrines. But we will keep an especially close eye on three features of American tort law that breathe life into the field and give it a distinctive twenty-first-century character.

First, tort law's doctrines and principles embody the law's basic norms of interpersonal obligation. The principles underlying those norms are subject to fierce debate, of course. Tort jurists have argued for many decades about these principles, about what they are and what they ought to be. For example, some see tort law as an opportunity for utilitarianism in action. In this view, tort law aims to maximize the aggregate welfare of the relevant society. Others see in tort law a commitment to the moral philosophy of corrective justice or civil recourse; in this view, tort law recognizes the obligation of a wrongdoer to repair wrongful losses, or the right of a wronged victim to pursue recompense. Still others understand tort law's motivating

principle to be constructing and maintaining the basic norms of a community, or shoring up the dignity and social standing of people whose injuries might otherwise degrade them in the eyes of fellow community members. Ideas about the principles underlying tort law are as varied as ideas about how society should be organized. This book will introduce you to, but will not adjudicate for you, the basic controversies over tort law's commitments. These controversies represent live debates in practical moral philosophy. They also help us decide the hardest cutting-edge cases in the field, cases in which there is no obvious existing answer in the doctrine and for which lawyers, judges, and juries will fall back on debates over the law's underlying principles.

Second, tort law in the United States is the starting point for a vast and far-flung set of exceedingly important social practices, ranging from contingency fee representations and highway billboard advertising, to class action litigation and claims adjustment, to contracting and risk assessment. We can barely even begin to evaluate the law of torts and its virtues and defects without taking these social practices into account. We will aim to take account of the tort system by referring to statistics and numbers and through the leading sociological, game-theoretical, and historical accounts. Indeed, to understand the distinctive features of tort law in the United States as opposed to in other legal systems, where tort law operates quite differently, these perspectives will be decisive for illuminating the real stakes in long-running controversies.

Third, American tort law shapes and is shaped by an important array of institutions, among them insurance companies, the administrative state, state-subsidized and state-provided social welfare programs, the jury, social customs, cost-benefit analysis, the plaintiff's bar, and more. These institutions, along with the practices noted above, powerfully influence the law of torts in the United States. We cannot understand the law without them. Indeed, we cannot understand contemporary American law more generally without placing these institutions front and center, and once we see tort law this way, the field serves as an ideal introduction to the central features of our vast and multifarious legal system.

Here, then, is one theory of this book: understanding the characteristic features of American tort law and its regulatory alternatives requires exploring the field's principles, practices, and institutions. The benefit of approaching tort law this way is not only that we understand torts better, though that would be no small thing. The further payoff is that this approach allows us to turn the study of tort law into more than an obligatory first-year purgatory of fusty and old-fashioned common law rules. Instead, we take up the law of civil wrongs as an introduction to some of the most important problems faced by twenty-first-century American lawyers and lawmakers more generally.

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One distinctive feature of tort law is that it is one of the great lenders in the legal marketplace. When state legislatures and the federal Congress enact statutes, and when courts interpret those statutes, they regularly borrow from the basic doctrines of the law of torts. Tort jurists have been dealing with basic problems like reasonableness, proof, and causation for centuries. As a result, tort doctrine has built up a deep well of principles for guiding the resolution of many of the kinds of complex questions that inevitably arise in modern regulatory fields ranging from antitrust law to consumer protection law to labor law and much more.



In this book, we will follow tort principles into one field in particular. The federal law of employment discrimination has become perhaps the most important body of employment law in the United States. At the very least, in the early 21<sup>st</sup> century it is one of the most frequently invoked bodies of employment and labor law. Again and again, the law of employment discrimination has turned to tort doctrine to work out basic questions, ranging from what counts as harassment, to how to prove liability, to what kinds of cause and effect are required to make out a valid claim. Sometimes tort principles have seemed apt for resolving discrimination claims. And sometimes they have seemed poorly matched. Either way, the law of torts has supplied litigants, judges, and commentators with a set of off-the-rack doctrines and a reservoir of theoretical debates.

In what follows, we will move through the law of torts, paying special attention at times to overlap between the law of torts and the regulatory state. We'll think about the significance of statutes and regulations for tort suits, and the significance of tort suits for statutes and regulation. At moments, entire chapters will follow tort principles into the law of employment discrimination. These chapters are called "modules." Readers interested only in the study of the law of torts could safely skip them, though they might be better advised to read the parallel book, Witt & Tani, *Torts: Cases, Principles, and Institutions* (6<sup>th</sup> ed. 2022), which contains much of the same material on torts but without the additional emphasis on regulation and employment discrimination statutes.

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This may seem all quite complicated, to be sure! Thankfully, we can begin to think in these ways by exploring one of the field's simplest and best-known cases, a case that began as a classroom interaction between two boys in nineteenth-century Wisconsin.

## CHAPTER 2. THE TORT OF BATTERY

### A. Simple Cases and Complex Systems

#### 1. *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891)

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. . . . At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for \$2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded.

[The opinion of the court in the initial appeal provides the following additional facts:

“The plaintiff was about 14 years of age, and the defendant about 11 years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revived by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff’s injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant’s foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of \$2,800. The learned circuit judge said to the jury: ‘It is a peculiar

case, an unfortunate case, a case, I think I am at liberty to say that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.' We have much of the same feeling about the case."]

The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for \$2,500. . . . On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for \$2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

LYON, J.

. . .

The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

. . .

Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts [is] that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. [The court explained that in a cause of action “*ex contractu*” and not “*ex delicto*,” a different rule of damages would be applicable in which unforeseeable damages would not be recoverable.]

[Despite upholding the plaintiff’s verdict in these two critical respects, the court nonetheless ruled in a separate part of its opinion that the trial court had erroneously overruled the defendant’s objection to one of plaintiff’s counsel’s questions. Accordingly, the court sent the case back to the trial court for another new trial.]

## 2. *Anatomy of a Torts Case*

*Vosburg v. Putney* was a simple case. By now, it is an old case. But getting to the bottom of it reveals much about the complexities of American tort law right up to the present day.

At an elementary level, the case presents two kinds of questions that will run through the rest of this book and that are omnipresent in legal analysis: *questions of fact* and *questions of law*. There are, for example, questions of fact about causation. What caused the injuries to the leg? Would those injuries have come about anyway if Putney had not made contact with Vosburg on the 20th of February? There are also questions of fact about Putney’s intent: what did he mean to accomplish when he reached out and kicked his classmate?

The questions of law are different. They ask not what happened, but rather what the law is—or what it ought to be. For example, what kind of mental state does the law require for holding Putney liable? Is it sufficient that he intended to make a certain kind of contact with Vosburg? Or does Vosburg need to show that Putney further intended to harm him? Questions of law about Putney’s causal relationship to Vosburg’s leg injury would ask whether it is sufficient for Vosburg to show that Putney’s kick increased the likelihood of leg damage that was already in motion, or that Putney’s kick accelerated that damage.

Once we bring in some of the context for the court’s opinion, this little case from long-ago Wisconsin also serves as a remarkable introduction to the sociology, economics, and functions of tort law. Andrew Vosburg was a slight boy whose father, Seth (a Civil War veteran), worked as a teamster at a local lumber company. According to Professor Zigurds Zile of the University of Wisconsin Law School,

Vosburg was frequently bedridden with a succession of childhood illnesses. He caught scarlet fever at the age of eight and had two or three bouts with the measles. Yet he was raised as an ordinary country boy, obliged to do the customary chores around the homestead, endure discomfort and face the usual hazards associated with rural life. Bumps, bruises and lacerations were part of his workaday experience. Accidents just happened to Andrew; or perhaps they happened to him more often because he lacked the strength and dexterity the

rigors of his environment demanded . . . .

Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 WIS. L. REV. 877, 879. George Putney, by contrast, was the only son of a prominent and prosperous local family. Zile reports that George Putney was described by a contemporary as “a sucker of a boy” with “a bad temper.” *Id.* at 882. In fact, George had a minor altercation with Andrew a couple weeks prior to the incident at the center of the litigation when George inexplicably prevented Andrew from retrieving his textbook before an exam.

The Vosburg family also initiated a criminal case against Putney. Passions, it seems, ran high in 1889 in Waukesha. Andrew’s father went to the town justice of the peace to file a criminal complaint against George on October 19, 1889. The justice of the peace issued a warrant to apprehend George, and a trial ensued. (This was the era before special criminal procedures for juveniles.) After witness testimony and cross-examination, the court found George guilty as charged in the complaint. He was ordered to pay a fine of \$10, plus costs, amounting to a total of \$28.19. The conviction was later overturned on appeal.

The civil and criminal cases arising out of the schoolboy’s kick soon involved substantial time and expenses. During the first jury trial in the civil suit, witnesses included Andrew, George, the boys’ teacher, and Andrew’s doctors. When the case was retried in the December term of 1890, the plaintiff subpoenaed eight witnesses and the defendant subpoenaed eleven. The third trial for Andrew’s case seemed imminent until September 1893, when the circuit court dismissed the case for the plaintiff’s failure to pay overdue court costs. In still another proceeding, Andrew’s father brought a claim against George Putney for the loss of his son’s services. A jury awarded Seth \$1200 in damages against George, which the Wisconsin Supreme Court later affirmed. But even then, it does not seem that the Vosburgs ever collected any damages from the Putneys, perhaps because parents are not liable for the torts of their children. At the end of this long litigation process, there is no evidence that the parties ever exchanged any money.

All told, the dispute between these families lasted for four and a half years and never produced even a dollar in actual damages changing hands. The litigation was expensive, too. Zile estimated that the Vosburgs “would have incurred costs in the amount of \$263 in order to get nothing.” Their lawyers probably spent considerably more in time and money in hopes of recovering a portion, usually a third, of the winnings. The Putneys probably paid at least \$560 in lawyers’ fees and incurred additional costs summing to a further \$677. Zile, *supra*, at 977.

The outsized expenses of the *Vosburg* case are not unusual in American tort law, at least not in the narrow slice of cases that go forward to trial. Observers estimate the administrative costs of the tort system—lawyers’ fees, expert witness fees, court costs, etc.—amount to between fifty and seventy cents for every dollar transferred from defendants to plaintiffs. The *Vosburg* case’s costs were almost exactly in this range: the parties together incurred some \$1500 in costs in a dispute over two claims that juries seemed to value at around \$3700 (a \$2500 claim for Andrew plus the \$1200 claim for Seth). The Vosburgs’ lawyers would have eaten up another one-third of whatever money the Putneys paid, for a total of around \$2700 in costs on \$3700 worth of tort claims. The Vosburgs would only have recovered \$2500 after subtracting their lawyers’ fees. This is equivalent to a costs-to-value ratio of more than 1, a figure that is vastly higher than the administrative cost ratios that attach to, say, disability claims in the Social Security system, where costs are typically closer to ten percent

of the value of the claim. Tort administrative costs are vastly higher than first-party insurance administrative costs, too: victims of injuries can much more cheaply process claims for covered injuries from their own insurance companies than they can prosecute tort claims through the courts.

### 3. *The Pervasiveness of Settlement*

Given how counter-productive the litigation was, one great mystery in *Vosburg* is why the families did not reach a settlement. The initial trial judge seems to have thought the matter ought to have been resolved before trial. The original appeals panel agreed. And there were settlement negotiations. By the early fall of 1889, the Vosburgs had already incurred substantial medical costs and were facing another year and a half of care, eventually costing at least \$475. After the Vosburg family retained a lawyer,

Seth and Janet Vosburg and one of their attorneys called on Henry Putney [George's father] at his store, and the incident "was talked over amongst [them]." The Putneys offered to pay Dr. Bacon's bills [about \$125 accrued to date] and an additional amount of \$125 towards medical and other needs in return for releasing George from any liability arising out of the February 20 incident. The Vosburgs, however, were not willing to settle for less than \$700, which to them was a paltry sum, barely sufficient to meet the financial obligations already accrued, to set aside a reserve against outlays associated with Andrew's convalescence and potential complications, like the amputation of Andrew's diseased leg, and to pay the lawyers for negotiating the settlement. To the Putneys, by contrast, particularly if they looked at George's role as peripheral, the sum of \$250 might have seemed a generous price for the nuisance value of a threatened lawsuit.

Zile, *supra*, at 894.

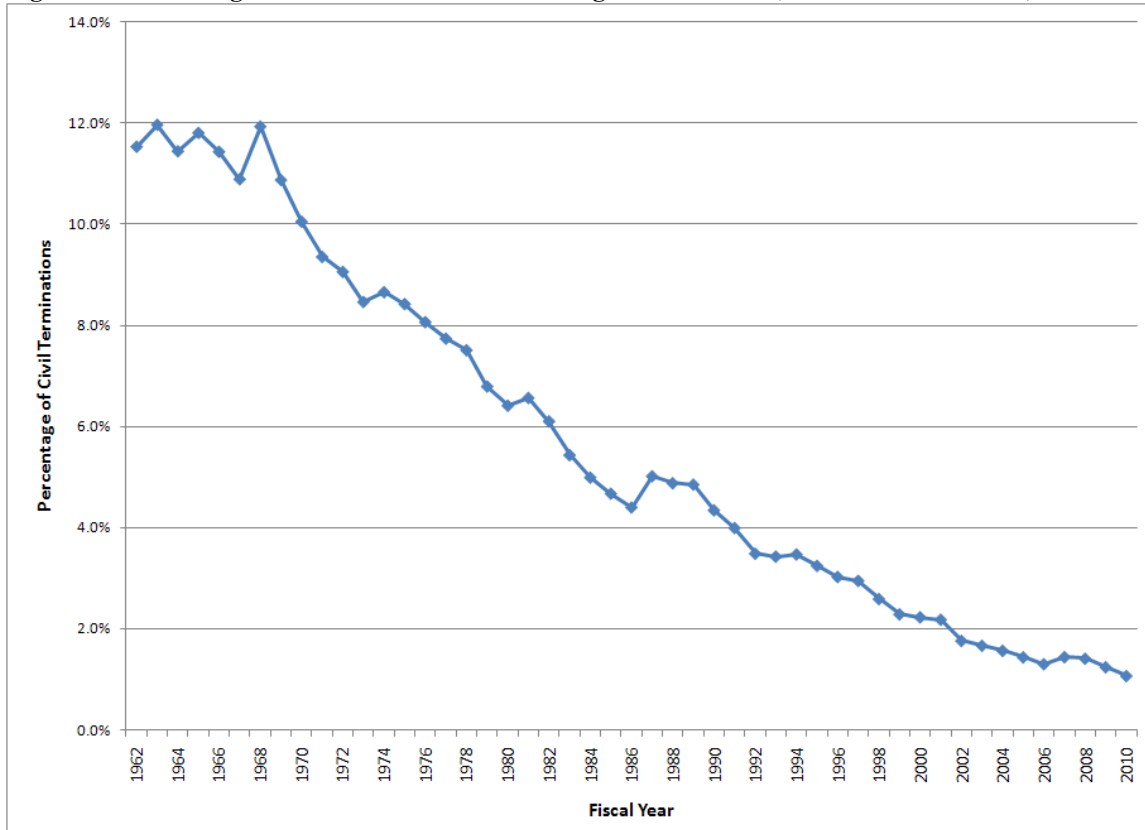
The startling thing is that in hindsight any one of the proposals by either defendant or plaintiff would have been in the interest of the parties. Simply dropping the litigation in return for nothing would have been better than proceeding. Given the array of choices before them, litigating the claims to judgment seems to have been the worst choice available to the parties, and yet each of them chose to litigate rather than to accept settlement offers from the other side that (again, in hindsight) were vastly better than the alternative of trial.

So why didn't the Vosburgs and Putneys settle if it was in their interest to do so? The mystery deepens when we see that virtually all cases end in settlement. One of the most important institutional features of American tort law is that it is almost entirely party-driven. The parties to a lawsuit have virtually complete autonomy in deciding whether to bring claims, how to manage those claims, and whether to withdraw from prosecuting them. The result is that almost all parties settle their disputes before trial.

Settlement has been widespread in American tort law for as long as modern tort law has existed, for more than a century and a half, and there is reason to think settlement is growing even more common in the past fifty years. In 2003, the American Bar Association Litigation Section held a symposium titled *The Vanishing Trial*, which concluded that the "portion of

federal civil cases resolved by federal trial fell from 11.5 percent [of all filings] in 1962 to 1.8 percent in 2002.” Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004). Between 2008 and 2012, a mere “0.56 percent or slightly more than one-half of one percent of all terminations” occurred by civil jury trials. Charles S. Coody, *Vanishing Trial Skills*, A.B.A. (May 22, 2013), <https://perma.cc/QE5C-LPNS>. The following chart, compiled by Marc Galanter, who led the ABA study, and his co-author, shows the stark picture of settlement in civil litigation generally:

**Figure A: Percentage of Civil Terminations During or After Trial, U.S. District Courts, 1962-2010**



Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND CIVIL JUSTICE INST. 1, 3 (2011), <https://perma.cc/9NFE-AP2M>.

Parties settle because, as the Vosburgs and Putneys learned, litigation is expensive and time-consuming. Many parties are risk-averse; they have a preference for the certainty that settlement offers. Moreover, there is reason to think that on the plaintiffs’ side, lawyers paid on a contingency basis, as a percentage of any settlement or award, will have an interest in avoiding long drawn-out proceedings. Settlement minimizes their workload, allows them to take on additional claims, and often allows them to maximize their imputed hourly wage.

Given the incentives for the parties and for the plaintiffs’ lawyers, why is it then that some parties like the Vosburgs and Putneys don’t settle? Looked at this way, the question is not why there are so few trials. The question is why there are any trials at all! Why doesn’t everyone settle?

One especially influential view is that where a case proceeds to judgment, at least one of the two parties, and perhaps both, must have incorrectly estimated the likely value of the claim. In this account, which was first offered by George Priest and Benjamin Klein, trials are errors. See George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Consistent with this view, some observers suggest that the trend toward settlement since the middle of the twentieth century, at least in the federal courts, has been driven by the enactment of the Federal Rules of Civil Procedure (FRCP) in 1938, which authorized pre-trial discovery and deposition procedures that allow each side to learn virtually everything about the facts of the case in advance of the trial itself. Lawyers are thus able to develop quite accurate estimates of the value of the claim—much better estimates than pre-FRCP lawyers were able to form—which in turn allow the parties to settle their cases before trial.

Another view is that parties do not settle because there is something other than dollars and cents at stake in tort disputes. Parties persist, in this view, as a matter of principle. And many argue that we should encourage them to do so. In this latter view, articulated memorably by scholars like Owen Fiss and Judith Resnik, trials are not errors. They are the public forums in which we work out our social commitments and hold our ideals up for testing. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006). Of course, if trials are intrinsically valuable as public fora, then settlement rates are startlingly high. For it appears that something about the tort system—and indeed, civil litigation generally—produces vast numbers of settlements and very few judgments.

#### ***4. The Size of the Tort System***

One way to glimpse the tort system in the aggregate is to look at the total amount of money passing through the American tort system each year. It is here that little cases like *Vosburg* connect up to the heated political controversies over tort law in the past several decades.

Insurers estimate that the money transferred in the tort system amounts to more than \$260 billion per year. This is a huge amount of money, comparable to the amount the United States spends annually on old age pensions in the Social Security system. Moreover, if we look at the amount of money flowing through the tort system, we can see that it has increased sharply over the past sixty years, though that growth has slowed (and by some measures has been reversed) since the middle of the 1990s.

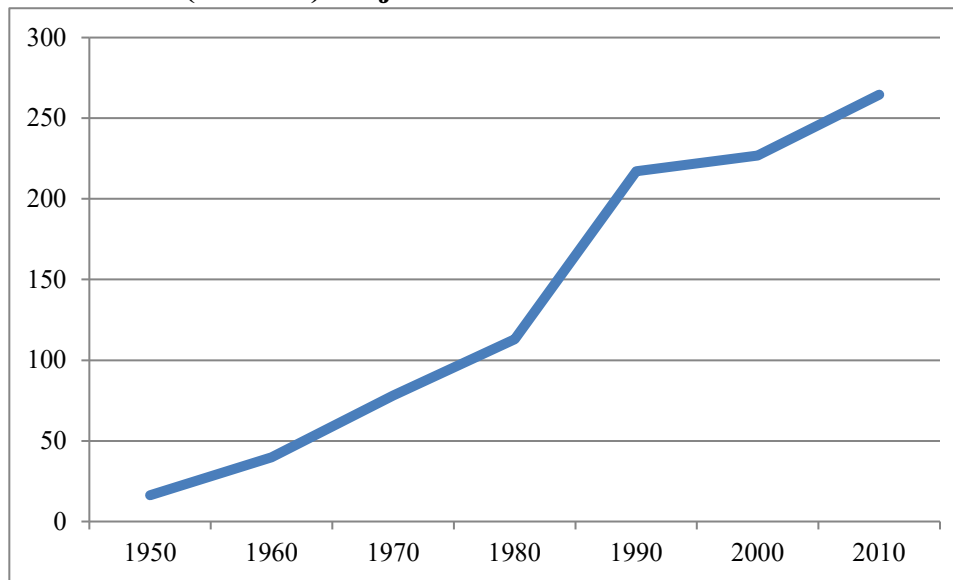


## United States Tort Costs

| Year | U.S.<br>Population<br>(millions) | Adjusted<br>Tort<br>Costs<br>(billions)<br>(2010) | Tort Costs<br>as<br>Percentage<br>of GDP |
|------|----------------------------------|---|--|
| 1950 | 152                              | 16  | 0.62%                                    |
| 1960 | 181                              | 40  | 1.03%                                    |
| 1970 | 205                              | 78  | 1.34%                                    |
| 1980 | 228                              | 113   | 1.53%                                    |
| 1990 | 249                              | 217   | 2.24%                                    |
| 2000 | 281                              | 227   | 1.80%                                    |
| 2010 | 309                              | 265   | 1.82%                                    |

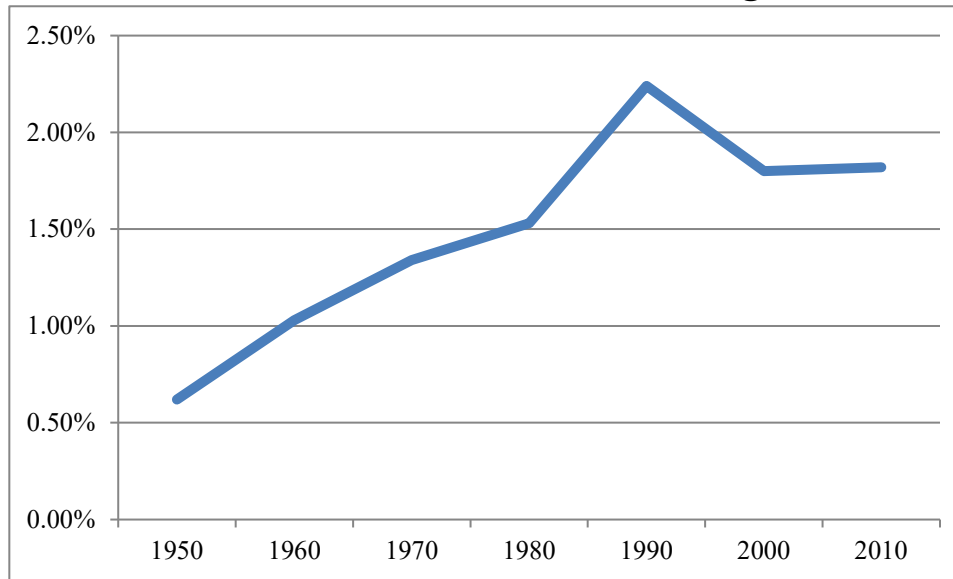
Source: Towers-Watson, *2011 Update on U.S. Tort Cost Trends*, <https://perma.cc/4EGK-VXBY>.

## Tort Costs (billions) Adjusted for Inflation



Source: Towers-Watson data, adjusted by the Consumer Price Index

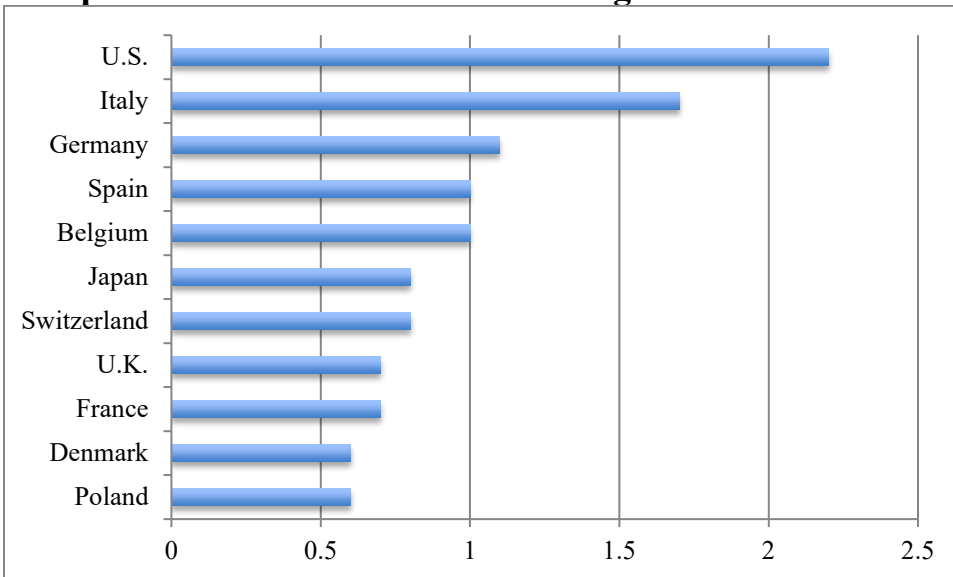
## Tort Costs as Percentage of GDP



Source: Towers-Watson data

Even with the slower growth of recent years, the figures for transfers and administrative costs in tort law are far higher in the United States than in any comparable legal system or economy.

## Comparative Tort Costs as a Percentage of GDP in 2000



Source: Tillinghast-Towers Perrin, *U.S. Tort Costs and Cross-Border Perspectives: 2005 Update*.

There is at least one country where tort costs as a percentage of GDP are near zero: New Zealand simply abolished tort law for virtually all injuries fifty years ago, replacing it with a system of social insurance. (For more on New Zealand, see the appendix to this book.)

One of the things we will want to be able to make sense of by the end of this book is why the tort system is so much bigger in the United States than it is in other countries. The answer, it turns out, is not about the substantive doctrines of American tort law, which more or less resemble the substantive tort doctrines of other developed legal systems. The real difference in American tort law lies in its institutions and procedures: jury trials, discovery, a plaintiffs' bar whose fees are contingent percentages of the plaintiff's ultimate recovery, and relatively restrictive programs of social provision. One study of 24 countries, for example, finds a strong negative relationship between the generosity of government social programs, on the one hand, and tort liability, on the other, after controlling for income, accident rates, and other factors. See Dana A. Kerr, Yu-Luen Ma, & Joan T. Schmit, *A Cross-National Study of Government Social Insurance as an Alternative to Tort Liability Compensation*, 76 J. RISK & INSURANCE 367 (2009).

It is worth noting that the data cited above, regarding torts costs in the U.S., is hotly controversial: it comes from a consultant to the insurance industry now named Towers-Watson, formerly Tillinghast or Towers-Perrin. Critics contend that the Towers-Watson data is misleading and tendentious and that the insurance industry aims to use it to promote legislation that would reduce tort costs and thus serve the interests of insurers and the tort defendants they insure. See, e.g., Lawrence Chimerine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change*, ECON. POL'Y INST. (May 16, 2005), <https://perma.cc/6BRJ-UYP5>. The critics complain both that certain elements of the cost calculation, such as insurance executive compensation, ought to be excluded, and that Towers-Watson and its predecessors misstate the concept of costs in the tort system. Both critiques have some force. The latter critique in particular has obvious merit. Why, after all, call the monetary transfers in the tort system the "costs" of tort law? The costs might much better be described as the underlying injuries plus avoidance costs plus the costs of administering claims when injuries happen. Is it a "cost" when tort law transfers money from wrongdoer to victim? Or is it a "cost" when a wrongdoer injured the victim in the first place? For a general theory of the sum of accident costs, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

Despite the criticisms, however, there is also a good reason to use the insurers' data as a basic measure of the tort system. For the startling thing about tort law in the United States is that insurers' private information is *the only way* we can even possibly begin to grasp the full size and scope of the tort system. This is worth emphasizing again: the biggest insurers and only the biggest insurers are in a position to see the macro trends in the field. The reason is that the pervasiveness of private settlement ensures that there is no public repository of information about the fate of most tort claims, sometimes virtually all tort claims. Nothing in the law of torts or in the law of settlement contracts even requires that a claim be filed with a court before it is contractually extinguished in a settlement agreement. To the contrary, the parties can save money on the cost of drafting and filing a complaint and share those savings between them if they settle before filing the claim in a courthouse. There is thus often not even a single trace in the public record of a tort claim, even one that produces a substantial settlement. Indeed, many plaintiffs receive higher settlement awards precisely in return for their promise to keep the terms of the settlement and even the fact of their claim confidential—promises that are enforceable under current law, despite the protests of many well-positioned observers.

In short, the only institutions that could possibly know the overall size of the American tort system are the insurers. And that tells us a lot about the system we are studying. It is

party-driven, highly opaque, radically decentralized, and vast. Taken together, these features present the tort lawyer with an important challenge: What goals or moral projects could possibly be so important as to make U.S. tort law worth its stunningly high costs?

### ***5. Accident Rates and the Deterrence Goal***

One goal tort jurists often advance is the deterrence of unreasonably dangerous conduct. The logic here is simple and intuitively attractive. Tort law raises the price of injurious behavior. As a result, the logic goes, the prospect of tort liability should decrease the amount of injurious behavior in the world. Deterrence theory has further implications and wrinkles. We will return to these at a number of junctures later in the book. But the important point for now is that the risk of tort damages ought to lead rational parties to take into account the costs of their behavior in a way they might not, absent tort liability.

Of course, tort law is one of many regulatory mechanisms that aim to accomplish the goal of improving safety standards. Consider, for example, state inspection regimes for everything from housing code compliance to factory employment standards. The federal Food and Drug Administration seeks to guarantee the safety of pharmaceuticals and food products. The Federal Highway Administration's Office of Safety issues regulations and guidelines with an eye toward automobile accidents. The Consumer Product Safety Commission does the same for consumer goods. Even aside from regulators, the market itself creates many incentives for safety on the part of market actors seeking to attract buyers, passengers, or clients.

Does tort law add to the deterrence function played by these other regulatory institutions? Formal evidence is considerably more difficult to come by, in no small part because of the difficulties described above in obtaining good information about the size and significance of tort costs. Nonetheless, anecdotal evidence suggests that in the United States tort law does shape behavior around risk and safety. We routinely read news stories about firms that claim to have made some decision—often an unpopular one—on the basis of the risk of litigation.

Consider the big picture trends in accidental and violent injuries over time. For the past three-quarters of a century and more—precisely the time during which tort costs have soared—rates of accidental death have declined substantially. This is not to say that tort law has caused that decline. It might be the case that causation runs in the other direction: improvements in safety may have generated higher expectations of safety and thus led to heightened standards in tort law. Either way, the trend is striking. Since 1960, accidental deaths in the United States have fallen by nearly half.

**Table 123. Age-Adjusted Death Rates by Major Causes: 1960 to 2011**

[Age-adjusted rates per 100,000 population. Rates for 2001-2009 have been revised using population estimates based on the 2010 Census. Age-adjusted death rates were prepared using the direct method, in which age specific death rates for a population of interest are applied to a standard population distributed by age. Age adjustment eliminates the differences in observed rates between points in time or among compared population groups that result from age differences in population composition. Beginning 1999, deaths classified according to tenth revision of International Classification of Diseases; for earlier years, causes of death were classified according to the revisions then in use. Changes in classification of causes of death due to these revisions may result in discontinuities in cause-of-death trends. See Appendix III.]

| Year                    | Dis-eases of the heart | Malignant neo-plasms (cancer) | Cerebro-vascular diseases | Chronic lower res-piratory diseases | Acci-dents <sup>1</sup> | Alz-heimer's disease | Dia-betes mellitus | Influenza and pneu-monia | Chronic liver disease and cirrhosis | Inten-tional self-harm (suicide) |
|-------------------------|------------------------|-------------------------------|---------------------------|-------------------------------------|-------------------------|----------------------|--------------------|--------------------------|-------------------------------------|----------------------------------|
| 1960.....               | 559.0                  | 193.9                         | 177.9                     | 12.5                                | 63.1                    | (NA)                 | 22.5               | 53.7                     | 13.3                                | 12.5                             |
| 1961.....               | 545.3                  | 193.4                         | 173.1                     | 12.6                                | 60.6                    | (NA)                 | 22.1               | 43.4                     | 13.3                                | 12.2                             |
| 1962.....               | 556.9                  | 193.3                         | 174.0                     | 14.2                                | 62.9                    | (NA)                 | 22.6               | 47.1                     | 13.8                                | 12.8                             |
| 1963.....               | 563.4                  | 194.7                         | 173.9                     | 16.5                                | 64.0                    | (NA)                 | 23.1               | 55.6                     | 14.0                                | 13.0                             |
| 1964.....               | 543.3                  | 193.6                         | 167.0                     | 16.3                                | 64.1                    | (NA)                 | 22.5               | 45.4                     | 14.2                                | 12.7                             |
| 1965.....               | 542.5                  | 195.6                         | 166.4                     | 18.3                                | 65.8                    | (NA)                 | 22.9               | 46.8                     | 14.9                                | 13.0                             |
| 1966.....               | 541.2                  | 196.5                         | 165.8                     | 19.2                                | 67.6                    | (NA)                 | 23.6               | 47.9                     | 15.9                                | 12.7                             |
| 1967.....               | 524.7                  | 197.3                         | 159.3                     | 19.2                                | 66.2                    | (NA)                 | 23.4               | 42.2                     | 16.3                                | 12.5                             |
| 1968.....               | 531.0                  | 198.8                         | 162.5                     | 20.7                                | 65.5                    | (NA)                 | 25.3               | 52.8                     | 16.9                                | 12.4                             |
| 1969.....               | 516.8                  | 198.5                         | 155.4                     | 20.9                                | 64.9                    | (NA)                 | 25.1               | 47.9                     | 17.1                                | 12.7                             |
| 1970.....               | 492.7                  | 198.6                         | 147.7                     | 21.3                                | 62.2                    | (NA)                 | 24.3               | 41.7                     | 17.8                                | 13.1                             |
| 1971.....               | 492.9                  | 199.3                         | 147.6                     | 21.8                                | 60.3                    | (NA)                 | 23.9               | 38.4                     | 17.8                                | 13.1                             |
| 1972.....               | 490.2                  | 200.3                         | 147.3                     | 22.8                                | 60.2                    | (NA)                 | 23.7               | 41.3                     | 18.0                                | 13.3                             |
| 1973.....               | 482.0                  | 200.0                         | 145.2                     | 23.6                                | 59.3                    | (NA)                 | 23.0               | 41.2                     | 18.1                                | 13.1                             |
| 1974.....               | 458.8                  | 201.5                         | 136.8                     | 23.2                                | 52.7                    | (NA)                 | 22.1               | 35.5                     | 17.9                                | 13.2                             |
| 1975.....               | 431.2                  | 200.1                         | 123.5                     | 23.7                                | 50.8                    | (NA)                 | 20.3               | 34.9                     | 16.7                                | 13.6                             |
| 1976.....               | 426.9                  | 202.5                         | 117.4                     | 24.9                                | 48.7                    | (NA)                 | 19.5               | 38.8                     | 16.4                                | 13.2                             |
| 1977.....               | 413.7                  | 203.5                         | 110.4                     | 24.7                                | 48.8                    | (NA)                 | 18.2               | 31.0                     | 15.8                                | 13.7                             |
| 1978.....               | 409.9                  | 204.9                         | 103.7                     | 26.3                                | 48.9                    | (NA)                 | 18.3               | 34.5                     | 15.2                                | 12.9                             |
| 1979.....               | 401.6                  | 204.0                         | 97.1                      | 25.5                                | 46.5                    | (NA)                 | 17.5               | 26.1                     | 14.8                                | 12.6                             |
| 1980.....               | 412.1                  | 207.9                         | 96.4                      | 28.3                                | 46.4                    | (NA)                 | 18.1               | 31.4                     | 15.1                                | 12.2                             |
| 1981.....               | 397.0                  | 206.4                         | 89.5                      | 29.0                                | 43.4                    | 0.9                  | 17.6               | 30.0                     | 14.2                                | 12.3                             |
| 1982.....               | 389.0                  | 208.3                         | 84.2                      | 29.1                                | 40.1                    | 1.3                  | 17.2               | 26.5                     | 13.2                                | 12.5                             |
| 1983.....               | 388.9                  | 209.1                         | 81.2                      | 31.6                                | 39.1                    | 2.2                  | 17.6               | 29.8                     | 12.8                                | 12.4                             |
| 1984.....               | 378.8                  | 210.8                         | 78.7                      | 32.4                                | 38.8                    | 3.1                  | 17.2               | 30.6                     | 12.7                                | 12.6                             |
| 1985.....               | 375.0                  | 211.3                         | 76.6                      | 34.5                                | 38.5                    | 4.1                  | 17.4               | 34.5                     | 12.3                                | 12.5                             |
| 1986.....               | 365.1                  | 211.5                         | 73.1                      | 34.8                                | 38.6                    | 4.6                  | 17.2               | 34.8                     | 11.8                                | 13.0                             |
| 1987.....               | 355.9                  | 211.7                         | 71.6                      | 35.0                                | 38.2                    | 5.5                  | 17.4               | 33.8                     | 11.7                                | 12.8                             |
| 1988.....               | 352.5                  | 212.5                         | 70.6                      | 36.5                                | 38.9                    | 5.8                  | 18.0               | 37.3                     | 11.6                                | 12.5                             |
| 1989.....               | 332.0                  | 214.2                         | 66.9                      | 36.6                                | 37.7                    | 6.1                  | 20.5               | 35.9                     | 11.6                                | 12.3                             |
| 1990.....               | 321.8                  | 216.0                         | 65.3                      | 37.2                                | 36.3                    | 6.3                  | 20.7               | 36.8                     | 11.1                                | 12.5                             |
| 1991.....               | 312.5                  | 215.2                         | 62.9                      | 37.9                                | 34.7                    | 6.3                  | 20.7               | 34.7                     | 10.7                                | 12.3                             |
| 1992.....               | 304.0                  | 213.5                         | 61.5                      | 37.7                                | 33.2                    | 6.3                  | 20.7               | 32.8                     | 10.4                                | 12.0                             |
| 1993.....               | 308.1                  | 213.5                         | 62.7                      | 40.7                                | 34.2                    | 7.1                  | 21.9               | 35.0                     | 10.2                                | 12.1                             |
| 1994.....               | 297.5                  | 211.7                         | 62.6                      | 40.3                                | 34.2                    | 7.7                  | 22.6               | 33.6                     | 10.1                                | 11.9                             |
| 1995.....               | 293.4                  | 209.9                         | 63.1                      | 40.1                                | 34.4                    | 8.4                  | 23.2               | 33.4                     | 9.9                                 | 11.8                             |
| 1996.....               | 285.7                  | 206.7                         | 62.5                      | 40.6                                | 34.5                    | 8.5                  | 23.8               | 32.9                     | 9.7                                 | 11.5                             |
| 1997.....               | 277.7                  | 203.4                         | 61.1                      | 41.1                                | 34.2                    | 8.7                  | 23.7               | 33.3                     | 9.5                                 | 11.2                             |
| 1998.....               | 267.4                  | 202.1                         | 62.8                      | 43.8                                | 35.6                    | 8.6                  | 24.2               | 24.2                     | 9.6                                 | 11.1                             |
| 1999.....               | 266.5                  | 200.8                         | 61.6                      | 45.4                                | 35.3                    | 16.5                 | 25.0               | 23.5                     | 9.6                                 | 10.5                             |
| 2000.....               | 257.6                  | 199.6                         | 60.9                      | 44.2                                | 34.9                    | 18.1                 | 25.0               | 23.7                     | 9.5                                 | 10.4                             |
| 2001.....               | 249.5                  | 196.5                         | 58.4                      | 43.9                                | 35.7                    | 19.3                 | 25.4               | 22.2                     | 9.5                                 | 10.7                             |
| 2002.....               | 244.6                  | 194.3                         | 57.2                      | 43.9                                | 37.1                    | 20.8                 | 25.6               | 23.2                     | 9.4                                 | 10.9                             |
| 2003.....               | 236.3                  | 190.9                         | 54.6                      | 43.7                                | 37.6                    | 22.1                 | 25.5               | 22.6                     | 9.3                                 | 10.8                             |
| 2004.....               | 221.6                  | 186.8                         | 51.2                      | 41.6                                | 38.1                    | 22.6                 | 24.7               | 20.4                     | 9.0                                 | 11.0                             |
| 2005.....               | 216.8                  | 185.1                         | 48.0                      | 43.9                                | 39.5                    | 24.0                 | 24.9               | 21.0                     | 8.9                                 | 10.9                             |
| 2006.....               | 205.5                  | 181.8                         | 44.8                      | 41.0                                | 40.2                    | 23.7                 | 23.6               | 18.4                     | 8.8                                 | 11.0                             |
| 2007.....               | 196.1                  | 179.3                         | 43.5                      | 41.4                                | 40.4                    | 23.8                 | 22.8               | 16.8                     | 9.1                                 | 11.3                             |
| 2008.....               | 192.1                  | 176.4                         | 42.1                      | 44.7                                | 39.2                    | 25.8                 | 22.0               | 17.6                     | 9.2                                 | 11.6                             |
| 2009.....               | 182.8                  | 173.5                         | 39.6                      | 42.7                                | 37.5                    | 24.2                 | 21.0               | 16.5                     | 9.1                                 | 11.8                             |
| 2010.....               | 179.1                  | 172.8                         | 39.1                      | 42.2                                | 38.0                    | 25.1                 | 20.8               | 15.1                     | 9.4                                 | 12.1                             |
| 2011 <sup>2</sup> ..... | 173.7                  | 168.6                         | 37.9                      | 42.7                                | 38.0                    | 24.6                 | 21.5               | 15.7                     | 9.7                                 | 12.0                             |

NA Not available. <sup>1</sup> Unintentional injuries. <sup>2</sup> Preliminary data.

Source: U.S. National Center for Health Statistics, National Vital Statistics Reports, Deaths: Preliminary Data for 2011, Vol. 61, No. 6, October 2012; and Health, United States, 2012, May 2013. See also <<http://www.cdc.gov/nchs/products/nvsr.htm>>.

Source: *Statistical Abstracts of the U.S.* (2014)

Much of this change continues a trend that began long before 1960. Excluding motor vehicle accidents, accidental deaths fell from around a hundred per 100,000 people in the population annually to less than thirty by 1975.

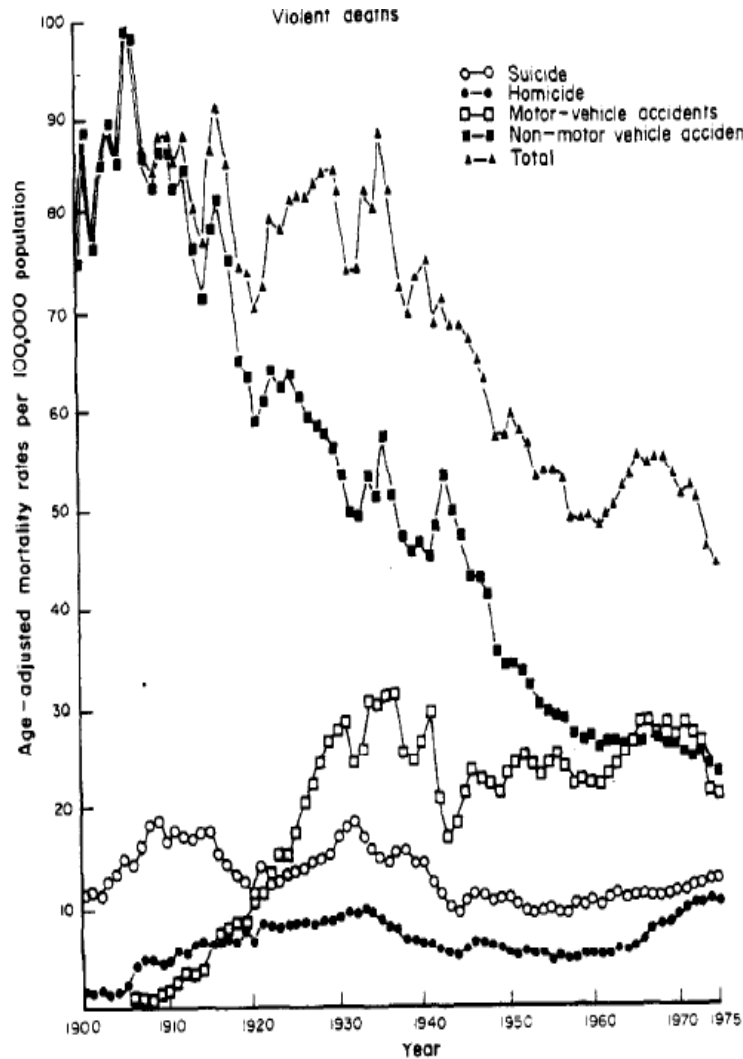
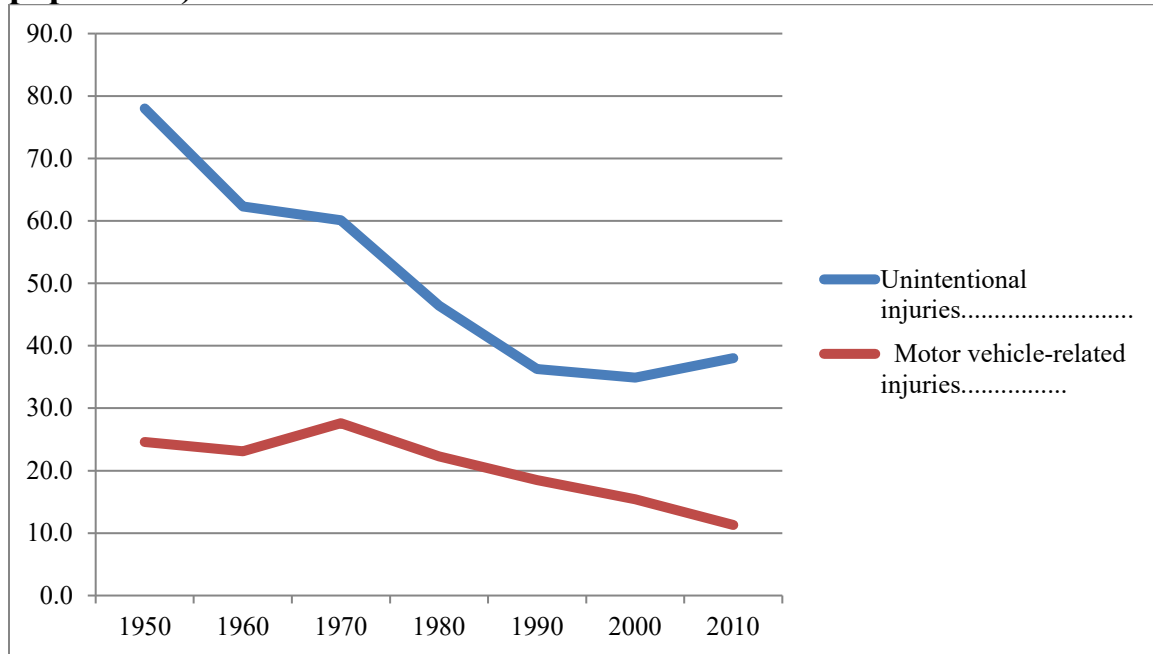


Fig. 1. Age-adjusted violent death rates by type of mortality, United States, 1900–1975. Sources of data: *Vital Statistics—Special Reports 43*, (for 1900–1953); Grove R. D. and Hetzel A. M. *Vital Statistics Rates in the United States: 1940–1960*, U.S. Government Printing Office, 1968 (for 1954–1960); *Vital Statistics in the United States, Mortality*, 1961–1975 (for age-adjusted motor-vehicle accident and non-motor-vehicle accident mortality rates, 1961–1975); *Vital and Health Statistics*, Series 20, Number 16, U.S. Government Printing Office, 1974 [for age-adjusted accident (total), suicide, and homicide mortality rates, 1970–1975].

Even motor vehicle accidental death rates have dropped during the past seventy years.

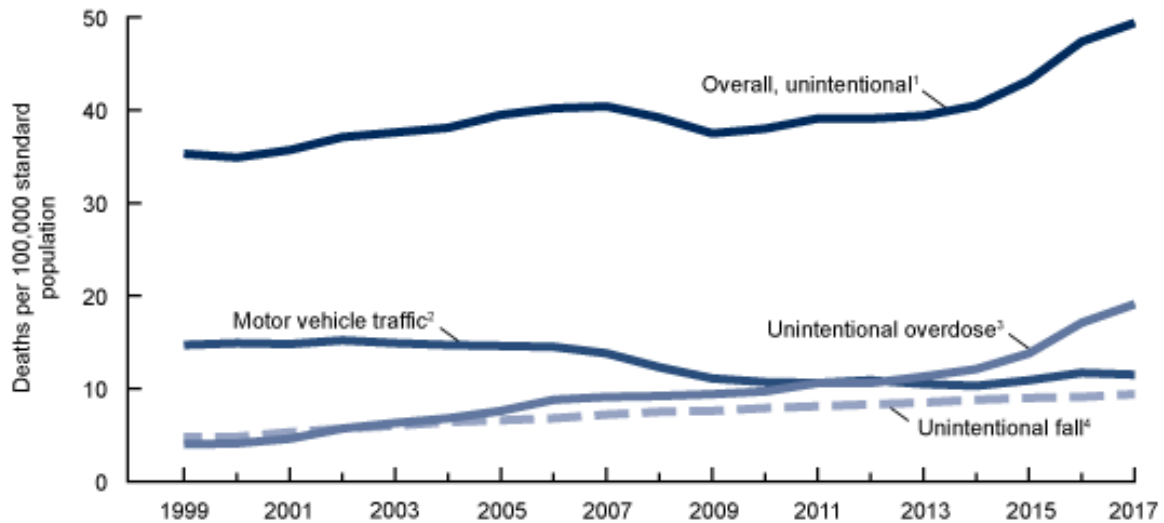
**Age-adjusted Death Rates for Unintentional Injuries and Motor-vehicle-related Injuries: United States, selected years 1950-2010 (per 100,000 population)**



Source: Center for Disease Control and Prevention, <https://perma.cc/V87X-9W64>

And if we adjust for miles traveled, the drop in motor vehicle traffic fatalities was pronounced and constant for nearly a century from 1917 onward. See National Highway Traffic Safety Administration, *An Analysis of the Significant Decline in Motor Vehicle Traffic Fatalities in 2008*, U.S. DEP'T TRANSP. 12, (June 2010), <https://perma.cc/F5SV-FKAV>.

Worryingly, the long-term trends in accidental death rates have reversed slightly in the past two decades. As the Center for Disease Control chart below shows, rates of unintentional injury death are rising in the twentieth century, driven almost entirely by increases in unintentional drug overdose deaths. Motor vehicle accident rates (measured by population) have also ticked up since 2014, perhaps because of increased cell phone usage.

**Age-adjusted rates for unintentional injury deaths, overall and by three leading causes:**

Source: National Center for Health Statistics, *Unintentional Injury Death Rates in Rural and Urban Areas: United States, 1999–2017*, NCHS Data Brief No. 343, July 2019, available at <https://perma.cc/4DE5-75DP>.

Yet even if accidental death rates have, for the most part, fallen in the modern era of American tort law, the connections between deterring accidental injury, on the one hand, and tort law, on the other, are not at all clear. Consider a case like *Vosburg*. Is it reasonable to think that the prospect of tort damages payments—or even the prospect of interminable tort litigation—will alter the behavior of children in a classroom? In this domain, at least, using tort law to induce appropriately safe behavior by children seems a fool’s errand, at least so long as we are trying to alter the behavior of children with monetary sanctions aimed at the children themselves. (Monetary awards against the school or the teachers might be far more effective, even if controversial for other reasons.)

Many scholars believe that the notion of tort damages shaping behavior is unlikely even in other domains where it might seem more plausible than in the middle-school classroom. We will return to this problem repeatedly in this book. For now, it is sufficient to observe that the critics point to myriad factors that they say get in the way of translating prospective tort damages into safer behavior. Some parties are not susceptible to being incentivized in the relevant respect by cash. Others act irrationally. Still others act rationally and are responsive to monetary incentives, but are protected from tort damages by third parties who will pay the damages, such as liability insurers or employers. Some may be sheltered from the threat of paying tort damages because they have time horizons shorter than the 4-plus years that it took *Vosburg* to conclude.

This is not to say that deterrence is an impossible goal, or that deterrence ought not be thought of as an important function of tort law. We will see considerable support for the idea that tort damages do shape behavior in many contexts. Nonetheless, the effort to shape behavior and induce safety offers at best a partial justification for tort law.



## 6. Expressing Moral Judgments and Correcting Injustice

Another way we could defend tort law in light of its high costs would be to describe it as expressing our moral judgments about wrongful behavior and calling wrongdoers to account. Judgments of liability signify that a defendant has wronged a plaintiff—and, further, that the community sees and acknowledges that wrong. They also call upon the defendant to repair the damage done.

If we understand tort law this way, we might care much less about the behavioral effects of particular legal rules or judgments, because deterrence would not be the most important goal. Stating that a particular course of conduct crossed the line has a value that is separable from discouraging the conduct in the first instance. We also might think differently about cost: it might be worth a lot to pursue the questions of right and wrong that torts cases commonly raise, both for the actors involved and for society. And it might not be surprising that inquiries into such questions are considerably more complex (and costly) than the kinds of inquiries Social Security claims administrators or insurance claims adjusters need to make.

As with the deterrence goal, we will continue to discuss expressive values and corrective justice throughout this book. For now it is important to observe that these ideas may play an especially powerful role in accounting for the distinctive features of intentional torts. These are often distinctively wrongful acts, arising out of conduct that has little or no social value. Our law of intentional torts helps mark out such acts as wrongful, reinforcing our moral commitments while providing wronged parties recognition and repair.

Later in the book, we will often find ourselves wondering what, if anything, makes an actor's conduct wrongful. Where that line is unclear, ideas about expressing moral judgment and correcting injustice are less helpful, for they come with no internal metric for distinguishing wrongful conduct from conduct that is justified. In this discussion of battery, however, we face no such conundrum. Here, wrongfulness arises out of the relationship between the defendant's intentionality and the plaintiff's injury. A plaintiff in an intentional tort suit is essentially saying, "The defendant meant to do something wrong!" That meaning—that intent—makes the conduct wrongful.

The next case and the following notes take up intent with more specificity. What does it mean to act intentionally in the world of tort law?

### B. Intent and Corrective Justice in the Battery Cause of Action

#### *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955)

HILL, J.

Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian

deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

III. . . . [T]hat while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any willful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.* (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be \$11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

...

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 *Restatement, Torts*, 29, § 13 [1934], as:

An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

- (a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and
- (b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
- (c) the contact is not otherwise privileged.

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

*Character of actor's intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced . . . .

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. *Vosburg v. Putney, supra*.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the 'Character of actor's intention,' relating to clause (a) of the rule from the Restatement heretofore set forth:

It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section.

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. . . . Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's

knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. *Vosburg v. Putney*, *supra*. If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

...

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

### Notes

1. *Intentionality: the Restatement view.* What counts as an intention with respect to some consequence? One answer comes from the authors of the influential Restatement of Torts, an authoritative account of the common law published by leading lawyers in a century-old private organization known as the American Law Institute (ALI) based in Philadelphia. The ALI published the first Torts Restatement in 1934. Thirty years later, the organization published an update known as the Second Restatement. A third Restatement has been coming out in pieces for the past decade. The ALI Restatements have been highly influential in torts, and each Restatement has adopted its own distinctive approach. Today, lawyers and judges commonly cite both the Second and Third Restatements.

Section 1 of the *Restatement (Third) of Torts: Liability for Physical & Emotional Harm*, published in 2010, offers an updated definition of the intent required for battery—one that is largely similar to the definition adopted in the First Restatement in 1934 and quoted in *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955). According to the Third Restatement, “A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 (2010).

2. *Knowledge with substantial certainty as intent.* The Restatement’s position on knowledge of the substantial certainty that a consequence will result raises important questions about the boundaries of intentional torts. When does knowledge of the likelihood of a consequence amount to substantial certainty? Consider, for example, an employer who employs many employees in work with known hazards. Is the employer substantially certain that injury to one or more employees will result? It follows from the law of large numbers that a certain number of injuries will occur in such situations. Some courts have held that being aware of the risk of harm is not the same as knowing that harm will occur with substantial certainty. See *Tomeo v. Thomas Whitesell Constr. Co.*, 823 A.2d 769, 772 (N.J. 2003) (holding that plaintiff-employee, who was injured by a snow blower in the scope of employment, could not use defendant-employer’s awareness of the inherent risks in operating a snow blower to establish substantial certainty). The *Tomeo* Court held that “mere knowledge and appreciation of risk—something short of substantial certainty—is not intent.” *Id.* (internal quotation marks

omitted). Courts in other jurisdictions have echoed *Tomeo*'s holding. See, e.g., *Adams v. Time Saver Stores*, 615 So. 2d 460, 462 (La. Ct. App. 1993) (holding that the mere foreseeability of an injury does not establish substantial certainty).

Other cases, however, have approached the issue differently. For example, in *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884 (N.J. 2002), the plaintiff-employee successfully established that the defendant-employer acted with substantial certainty of the consequences of injury to the plaintiff where the defendant disabled a safety device and enabled it only when OSHA inspectors were present.

The more common position, consistent with cases like *Tomeo*, was adopted in *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539 (D. Md. 1997), in which plaintiff truck-driver, who shared a cab with a heavy smoker, sued his partner's cigarette manufacturer for battery by smoke. The *Shaw* case also raised a different aspect of intent: its supposed "transferability." It is well accepted that the law of battery will allow for transferred intent: when A intentionally strikes at B and hits B's companion C instead, the error does not undercut A's battery liability to C. If the common law recognizes a theory of transferred intent, why not also a doctrine of transferred intent on a larger scale where the defendant knew to a certainty that its smoke would come into contact with many third parties? District Judge Walter E. Black, Sr., rejected the extension of the transferred intent doctrine to the more general smoking context:

Brown & Williamson did not know with a substantial degree of certainty that second-hand smoke would touch any particular non-smoker. While it may have had knowledge that second-hand smoke would reach some non-smokers, the Court finds that such generalized knowledge is insufficient to satisfy the intent requirement for battery. Indeed, as defendant points out, a finding that Brown & Williamson has committed a battery by manufacturing cigarettes would be tantamount to holding manufacturers of handguns liable in battery for exposing third parties to gunfire. Such a finding would expose the courts to a flood of farfetched and nebulous litigation concerning the tort of battery.

973 F. Supp. at 548. The Restatement authors agree with Judge Black. The substantial certainty doctrine, the Restatement asserts, should be limited to cases in which "the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim or to someone within a small class of potential victims within a localized area." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 cmt. e (2010) (emphasis added). Why limit the tort of battery in this way?

3. *Is intentionality intuitive?* The famed Supreme Court justice Oliver Wendell Holmes, Jr., once claimed that "even a dog knows the difference between being kicked and being stumbled over." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881). Yet research from developmental psychology paints a more complicated picture.

It is true that the ability to distinguish intentional from unintentional action is a foundational skill that emerges early in development. Chimpanzees, orangutans, and eight-month-old human infants can reliably discriminate between purposeful and accidental action. Josep Call & Michael Tomasello, *Distinguishing Intentional from Accidental Actions in Orangutans (Pongo Pygmaeus) and Chimpanzees (Pan Troglodytes) and Human Children*,

122 J. COMP. PSYCHOL. 192 (1998). This faculty plays an essential role in helping children acquire language and develop interpersonal skills. In fact, preschoolers whose ability to infer others' intentions is disrupted, often due to maltreatment or physical abuse, are at heightened risk for later social maladjustment and behavioral problems. See Kenneth A. Dodge, John E. Bates & Gregory S. Petit, *Mechanisms in the Cycle of Violence*, 250 SCIENCE 1678 (1990). Indeed, some have argued that our ability to identify unintentional harms as accidents and to respond with forgiveness is what allows for the evolution of cooperative societies in which individuals coordinate their behavior to maximize collective welfare. E.g., Drew Fudenberg, David G. Rand & Anna Dreber, *Slow to Anger and Fast to Forgive: Cooperation in an Uncertain World*, 102 AM. ECON. REV. 720 (2012).

Yet while the distinction between intentional and accidental behavior is intuitive for apes and babies alike, we do not always use this distinction when forming moral judgments. For instance, the celebrated developmental psychologist Jean Piaget observed in 1932 that young children consider it morally worse (“naughtier”) for a child to make a large ink stain accidentally than to make a small stain intentionally. Older children, he noticed, felt just the opposite. Since Piaget’s discovery, this developmental trajectory has been extensively documented. Preschoolers tend to judge the moral valence of an act by focusing on its outcome and largely ignoring the agent’s beliefs and intentions. By around age 6, children begin to condemn actions on the basis of the agent’s mental states such as intent to harm. In other words, children shift from outcome-based moral judgment to intent-based moral judgment as they age. Fiery Cushman, Rachel Sheketoff, Sophie Wharton & Susan Carey, *The Development of Intent-Based Moral Judgment*, 127 COGNITION 6 (2013).

Under some circumstances, adults will also exhibit a tendency to focus on outcomes rather than intentions when judging actions that result in harm. Research from cognitive psychology demonstrates that adults who are placed under time pressure and asked to make hurried moral judgments show a systematic bias toward judging actions as intentional. In their haste, these decision-makers will say that harms were intentional. Given more time to make their decisions, they revert to saying that harms were unintentional. Evelyn Rosset, *It’s No Accident: Our Bias for Intentional Explanations*, 108 COGNITION 771 (2008). This work suggests that we tend to adopt a default assumption that actions are undertaken intentionally and that it takes mental effort to persuade ourselves to abandon our initial stance. This finding is consistent with the developmental pattern showing that sensitivity to harm is relatively automatic, manifests early in childhood, and is continuous throughout development, while sensitivity to intentions emerges later and requires more cognitive resources.

4. *Intent to be harmful or offend?* In cases where a defendant has the requisite mental state with respect to the consequences of a volitional act—the movement of his foot, culminating in contact with another’s leg—there is still a question of whether the defendant’s mental state must extend not only to the fact of the contact but also to its harmfulness or offensiveness. Need the plaintiff show that the defendant intended a harmful or offensive contact, with specific intent to do harm or cause offense? Or is it sufficient to establish that the defendant intended a contact, where the contact is properly deemed harmful or offensive by the community? By whose standards must a contact have been harmful or offensive? The defendant’s or the court’s? *Vosburg* sheds a little light on this question, but not much. Judge Lyon held that the plaintiff need not establish that a defendant intended to harm him, but merely that the defendant intended to make an “unlawful” contact. But Judge Lyon’s formulation is

decidedly unhelpful, since, after all, what we want to know is what kinds of contact the law rules out. Telling us that the law will sanction unlawful contacts gets us nowhere!

The Utah Supreme Court took on precisely this question in *Wagner v. State*, 122 P. 3d 599 (Utah 2005), involving a mentally disabled person who, while out at a K-Mart store with caretakers, allegedly grabbed another shopper by the head and hair and threw her to the ground. If it was true, as one party to the litigation argued, that the person who inflicted the harm did not have the capacity to appreciate the harmful or offensive nature of his actions, could the intent requirement for battery be established? The Court offered the following discussion:

The Restatement defines a battery as having occurred where “[an actor] acts intending to cause a harmful or offensive contact.” Restatement (Second) of Torts § 13. The comments to the definition of battery refer the reader to the definition of intent in section 8A. *Id.* § 13 cmt. c. Section 8A reads:

The word “intent” is used throughout the Restatement of this Subject to denote that the actor desires to cause *the consequences of his act*, or that he believes that the consequences are substantially certain to result from it.

*Id.* § 8A (emphasis added).

Although this language might not immediately seem to further inform our analysis, the comments to this section do illustrate the difference between an intentional act and an unintentional one: the existence of intent as to the contact that results from the act. Because much of the confusion surrounding the intent element required in an intentional tort arises from erroneously conflating the act with the consequence intended, we must clarify these basic terms as they are used in our law before we analyze the legal significance of intent as to an act versus intent as to the consequences of that act.

Section 2 of the Restatement (Second) of Torts defines the term “act” as “an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended.” *Id.* § 2. To illustrate this point, the comments clarify that when an actor points a pistol at another person and pulls the trigger, the act is the pulling of the trigger. *Id.* at cmt. c. The consequence of that act is the “impingement of the bullet upon the other’s person.” *Id.* It would be improper to describe the act as “the shooting,” since the shooting is actually the conflation of the act with the consequence. For another example, the act that has taken place when one intentionally strikes another with his fist “is only the movement of the actor’s hand and not the contact with the others body immediately established.” *Id.* Thus, presuming that the movement was voluntary rather than spastic, whether an actor has committed an intentional or negligent contact with another, and thus a tort sounding in battery or negligence, depends not upon whether he intended to move his hand, but upon whether he intended to make contact thereby.

The example the Restatement sets forth to illustrate this point is that of an actor firing a gun into the Mojave Desert. Restatement (Second of Torts) § 8A cmt. a. In both accidental and intentional shootings, the actor intended to pull the

trigger. *Id.* Battery liability, rather than liability sounding in negligence, will attach only when the actor pulled the trigger in order to shoot another person, or knowing that it was substantially likely that pulling the trigger would lead to that result. *Id.* § 8A cmts. a & b. An actor who intentionally fires a bullet, but who does not realize that the bullet would make contact with another person, as when “the bullet hits a person who is present in the desert without the actor’s knowledge,” is not liable for an intentional tort. *Id.*

A hunter, for example, may intentionally fire his gun in an attempt to shoot a bird, but may accidentally shoot a person whom he had no reason to know was in the vicinity. He intended his act, pulling the trigger, but not the contact between his bullet and the body of another that resulted from that act. Thus, he intended the act but not the consequence. It is the consequential contact with the other person that the actor must either intend or be substantially certain would result, not the act—pulling the trigger—itself. He is therefore not liable for an intentional tort because his intentional act resulted in an unintended contact. On the other hand, the actor is liable for an intentional tort if he pulled the trigger intending that the bullet released thereby would strike someone, or knowing that it was substantially likely to strike someone as a result of his act. *Id.* at cmts. a & b.

Can an actor who acknowledges that he intentionally pulled the trigger, and did so with the intent that the bullet make contact with the person of another, defeat a battery charge if he can show that he did so only as a joke, or did not intend that the contact between the bullet and the body of the person would cause harm or offense to that person?

No, the court answered, he may not. “The linchpin to liability for battery is not a guilty mind, but rather an intent to make a contact the law forbids. The actor need not appreciate that his contact is forbidden; he need only intend the contact, and the contact must, in fact, be forbidden.” *Id.* at 604-05.

As for what kind of contact is “in fact, forbidden,” the *Wagner* court offered the following guidance:

A harmful or offensive contact is simply one to which the recipient of the contact has not consented either directly or by implication. *Prosser [and Keeton on the Law of Torts], supra*, § 9, at 41–42. Under this definition, harmful or offensive contact is not limited to that which is medically injurious or perpetrated with the intent to cause some form of psychological or physical injury. Instead, it includes all physical contacts that the individual either expressly communicates are unwanted, or those contacts to which no reasonable person would consent.

What is not included in this definition are the uncommunicated idiosyncratic preferences of individuals not to be touched in ways considered normal and customary in our culture. Instead, the law assumes consent to contacts “according to the usages of decent society,” and unless an individual expressly states that he does not want to shake hands, for example, someone who shakes



his hand against his silent wishes has not committed a harmful or offensive contact. *Id.* § 9, at 42.

As Prosser notes in his analysis on the subject, “in a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life.” *Id.* Among the contacts Prosser noted as part of this common intercourse were: “a tap on the shoulder,” “a friendly grasp of the arm,” and “a casual jostling to make a passage.” *Id.* Thus, the tort of battery seeks to strike a balance between preserving the bodily integrity of others and recognizing and accommodating the realities of our physical world.

Because the law defines “harmful and offensive” with reference to the mores of polite society, and protects against invasions of bodily integrity perpetrated outside those bounds, whether consent is assumed also depends upon who is making the contact. For example, it seems clear that “the usages of a decent society” and “polite manners” are in nowise offended when a baby reaches out to perform the non-medically injurious act of stroking the hair of a nearby stranger. Such encounters with babies are “customary ... in the course of life.” *Id.* § 9, at 42.

Thus, we can include this type of contact from babies in the category of contacts for which we are assumed to have consented. A grown man, on the other hand, perpetrating the same act for equally complimentary reasons, would not enjoy the same privilege, for his behavior would not be considered by reasonable people to be a customary contact in decent society to which members consent.

*Id.* at 609. How does this discussion of harmfulness and offensiveness square with the court’s opinion in *Vosburg*? Does it capture Judge Lyon’s sense of what is “unlawful”?

Note that not all jurisdictions agree with the *Wagner* court’s holding on the nature of the intent requirement for battery. Some tolerate a body of case law that, when examined closely, is ambiguous and inconsistent. And some go the other way, affirmatively embracing the “dual intent” formulation that the *Wagner* court rejected. *See, e.g., White v. University of Idaho*, 595 P.2d 108 (Idaho 1990). For these dual intent jurisdictions, the plaintiff must prove that the defendant (1) intended to make contact with another person, *and* (2) understood that the contact would be harmful or offensive.

In many cases, this difference in interpretation will not produce different outcomes. But sometimes it will. The following note raises implications for persons with mental, intellectual, or cognitive impairments. In what other kinds of scenarios might this interpretive difference (single intent versus dual intent) prove determinative?

5. *Capacity, ability, and the intent requirement.* Should it have mattered in *Wagner* that the person who allegedly struck the plaintiff had “the mental age of a small infant,” according to one party? 122 P.3d at 604. Should such a divergence from typical adult mental functioning preclude a finding of intent? The *Wagner* court rejected this argument. It was true, the court

noted, that such a person's mental capacity might "insulate him from criminal liability," given the criminal law's stricter *mens rea* requirements. *Id.* at 610. But civil liability is different. Here, the ultimate question is who should bear the cost of the plaintiff's injuries, and according to the *Wagner* court, it should be the person who inflicted the harm, or that person's caretaker(s). The court also noted that "lawmakers ha[d] specifically declined to exempt mentally handicapped or insane individuals from the list of possible perpetrators of this tort for the express reason that they would prefer that the caretakers of such individuals feel heightened responsibility to ensure that their charges do not attack or otherwise injure members of the public." *Id.*

An oft-cited decision with a similar underlying fact pattern is *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937), in which the plaintiff, a private nurse, sued her patient, described by the court as "an insane person," for injuries that the defendant inflicted on the plaintiff during a violent outburst. On appeal from a judgment in the plaintiff's favor, the defendant's lawyer argued that the defendant's insanity should have precluded a finding of intent. According to the court, however, the great weight of authority cut the other way—not so much because the "underlying principles of civil liability" dictated this result but because of "public policy" concerns and "a popular view of the requirements of essential justice":

Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

*Id.* at 327. Applying the dominant rule to this case, the court found that the jury could reasonably have concluded "that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent." *Id.* at 329. Whether some "delusion or other consequence of h[er] affliction" caused her to do so was not relevant and would not prevent the court from holding her financially responsible. *Id.* at 328. What does the reasoning in *Wagner* and *McGuire* suggest about the underlying goals or functions of tort law? Do these decisions vindicate utilitarian aims? Do you see in them corrective justice? What message do these decisions send about the community's values and commitments?

For a contrasting, more recent opinion, see *White v. Muniz*, 999 P.2d 814 (Colo. 2000), in which a plaintiff caretaker alleged battery by an elderly patient with senile dementia. Asked to review the trial court's instructions to the jury on the intent requirement, the Colorado Supreme Court emphasized Colorado's embrace of the dual intent approach and described insanity as "a characteristic, like infancy, that may make it more difficult to prove" that a defendant "intended offensive or harmful consequences." *Id.* at 818. The court then reinstated the jury's verdict in the defendant's favor. Given tort law's concern with wrongfulness, should courts be even more forgiving of people who cannot appreciate the wrongfulness of their

conduct? Should the law of intentional torts treat mental illness or mental incapacity as a complete defense?

6. *The boundaries of intentionality.* As we puzzle through the boundary between the intentional torts cause of action and other potential causes of action, one important question is *what is at stake* in guarding this boundary. As we will see in later chapters in this book, plaintiffs in cases such as *Tomeo* and *Laidlow*, described in Note 2, *supra*, would ordinarily have claims for unintentional torts available to them. Why then did their lawyers seek to advance an intentional tort theory instead? Most likely, the plaintiffs' attorneys in *Tomeo* and *Laidlow* were trying to circumvent the workers' compensation statutes that provide modest compensation for workplace injuries but also prohibit employees from suing their employers in tort for most unintentional injuries arising in the course of their work. See, e.g., N.J. STAT. ANN. § 34:15-8 (West 2013). The lawyers for Ruth Garratt were probably also trying to get around a legal obstacle when they characterized Brian Dailey's act as an intentional tort rather than as the kind of unintentional but negligent act for which, as we shall see in later chapters, plaintiffs may also obtain damages. For Ms. Garratt, the problem was very likely that in an unintentional torts case, Dailey would have been held to a lenient standard of conduct measured by reference to children of like age and experience.

In other domains, by contrast, plaintiffs have powerful incentives *not* to characterize their injuries as intentional torts. One force that creates such an incentive is liability insurance: it usually does not cover intentional torts; as a result, a plaintiff who alleges an intentional tort rather than a tortious accident may ultimately never be able to collect on the resulting judgment. See Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005). In suits against employers for the torts of their employees, plaintiffs face similar incentives to avoid intentional torts claims, since the intentionally caused injuries are often less likely to be ruled within the scope of an employer's responsibility than unintentional but negligently caused harms. Finally, state law often applies a shorter statute of limitations period to intentional torts, making it less likely that plaintiffs will bring intentional tort claims in a timely manner and more likely that plaintiffs will have to find a different way of framing their claims. Compare N.Y. C.P.L.R. § 215 (McKinney 2006) (providing a one-year statute of limitations for assault, battery, false imprisonment, libel, and slander), with N.Y. C.P.L.R. § 214 (McKinney 1986) (providing a three-year statute of limitations for unintentional personal injury and property damage cases).

The boundary between intentional and unintentional torts is important for the law to police for another, more theoretical, reason as well. For unintentionally inflicted injuries, the law sometimes allows defendants to draw on utilitarian arguments to escape responsibility for the damage they have caused—to say, in essence, “Yes, I created a risk of harm, and, in fact, I harmed you, but I should not have to pay for your injuries because my conduct improved the welfare of society.” In the law of intentional torts, by contrast, utilitarian defenses to unconsented-to intentional acts are very narrowly cabined. If the law aims to preserve the distinctiveness of these two domains at the case-by-case level—utilitarian balancing for unintentional torts, on one hand, and its absence for intentional torts, on the other—then the law has to maintain the boundary between intentional and unintentional torts.

7. *Battery for the Era of #MeToo: possibilities and pitfalls.* The #MeToo movement has made clear that unwelcome sexual contact is common; that people of all gender identities and

sexual orientations experience it; and that for many people, the criminal justice system appears to be, or has proven to be, an unreliable ally. Might tort law, and specifically, the tort of battery, offer an alternative or complementary path toward justice? Why are tort actions not as salient a part of the public debate over sex assault, and especially campus sex assault, as one might expect?

There are a number of possible reasons. First, the time it takes to litigate is a powerful disincentive. Even if the aggrieved party files right away, at a time when all the evidence is fresh, a tort action can take years to complete, extending and perhaps exacerbating the trauma that many survivors experience in the wake of assault. Second, the broad discovery available in civil actions means that private and personal information about the plaintiff's life, including possibly information about past sexual conduct, can become public. (Cross examination during a trial is often crafted to discredit the plaintiff.) Third, common misconceptions about sexual violence have led many people to believe that sexual assault cases somehow belong, uniquely, to the criminal law; where a plaintiff pursues a tort action against an alleged perpetrator before the state prosecutes, the plaintiff may fear—rightfully—that the fact of the civil suit will hurt the chances of success in the criminal case, by imputing to the plaintiff a financial motive. Fourth, a tort suit may not make financial sense. A person who has experienced sexual assault and is grappling with its aftermath might not want to spend valuable resources on a lawyer, and lawyers may be unwilling to take a case where the defendant would not be able to pay damages sufficient to provide a worthwhile contingent fee. Note that expensive criminal cases can exhaust a putative assailant's financial resources before a plaintiff has the chance to collect, and in campus sexual assault cases, putative defendants will typically be young and therefore less likely to have substantial assets. In theory, a damages judgment could be used to collect against future assets. In practice, judgment debtors will often be able to discharge personal injury debt in bankruptcy. *See generally* Ellen Bublick, *Torts Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55 (2006); Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (2009), available at <https://perma.cc/468P-3X9J>; *see also* Sarah Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963 (2016) (documenting and explaining the absence of tort law from public conversations about campus sexual assault). Last but not least, and as discussed in greater depth in the following pages, almost any plaintiff who files an intentional tort suit for sexual assault will run into arguments about consent, and with them a body of case law that includes controversial assumptions about the circumstances under which consent to sexual contact may be presumed or inferred.

Nevertheless, pursuing justice via tort law has advantages, especially as compared to a criminal case. In a civil tort case, as we shall see later in this book, the plaintiff's burden of proof is a "preponderance of the evidence"; proof in a criminal trial requires that the jury be convinced under the higher standard of "beyond a reasonable doubt," a standard that is often impossible to meet in sexual assault cases. Moreover, in a civil case the plaintiff controls the course of the litigation and pursues private satisfaction (perhaps in the form of money damages, but also perhaps in the form of an apology or an agreement to stay away from previously shared spaces). This is distinct from a criminal case, in which a public prosecutor controls the litigation in pursuit of a public punishment. *See generally* Ellen Bublick, *Torts Suits Filed by Rape and Sexual Assault Victims in Civil Courts*, 59 S.M.U. L. REV. 55 (2006).

Research suggests that tort suits against alleged assailants have been rising over the past several decades. One headline-grabbing example was pop star Taylor Swift's battery suit against a radio talk show host. Swift claimed he lifted her dress and groped her during a pre-concert meet-and-greet. A jury believed Swift and awarded her the symbolic \$1 she sought. Emily Yahr, *Jury Says Taylor Swift Was Groped by Radio DJ, Awards Her a Symbolic \$1 Verdict*, WASH. POST, Aug. 14, 2007. Recovery of more substantial damages in such suits appears infrequent, though settlement practices obscure much from view. Tort actions for sexual assault and battery against third parties are more visibly successful, at least when such third parties bear some responsibility for the assailant's actions. Survivors of sexual abuse by Michigan State University sports physician Lawrence Nassar sued the university on the theory that it was vicariously liable as employer for its employee Nassar's battery. Later in the book we will take up the subject of employers' liability for the torts of their employees. For now, the important point is that the plaintiffs' complaint raised a classic battery cause of action, alleging that Nassar "intended to cause harmful or offensive contact with Plaintiff's person, or intended to put Plaintiff in imminent apprehension of such contact." Complaint at 20, *Jane JD Doe v. Doe 1* (Cal. Super. Ct. Sacramento 2016) (No. 34-2016-00200075), *available at* <https://perma.cc/97RS-SS69>. In the spring of 2018, Michigan State agreed to a \$500 million dollar settlement with 332 plaintiffs. Later the same spring, a civil jury in Georgia awarded a rape victim an astounding \$1 billion in damages against the security firm that employed a guard who assaulted the plaintiff in her friend's apartment complex. For more on tort suits against third parties for sexual violence and misconduct, see Ellen Bublick, *Torts Suits Filed by Rape and Sexual Assault Victims*, *supra*; Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39 (2018).

Despite, or perhaps because of such large awards, it is worth asking whether money damages are the right way to address the harms of sexual assault. (Are such awards collectible? Who pays? We will return to such questions in a subsequent chapter of this book.) Are people who experience the harm of sexual assault well-served by having to characterize their claims as "batteries"—a generic term for all types of harmful and offensive contact—rather than as something more specific, something that better expresses the nature of the injury? Should there be a tort called rape? See Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT LAW 1, 61-62 (2017). If you were able to craft such a tort from scratch, what would be its elements?

8. *The Knobe Effect*. The philosopher Joshua Knobe has studied people's intuitions about the distinction between intentional and unintentional effects. He makes an important finding, known in the literature as the Knobe Effect: people label certain foreseen outcomes intentional and others unintentional on the basis of value judgments about the outcome. In particular, people are much more likely to attribute intentional responsibility to actors who foresaw (but did not care about) bad outcomes than to those who foresaw (but did not care about) good ones. So, for example, people attribute intentionality to the harms caused by a chief executive officer (CEO) who approves a moneymaking plan that he knows will *harm* the environment, but do not attribute intentionality to the benefits caused by a CEO who approves a moneymaking plan that he knows will *help* the environment. See Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190-93 (2003).

The Knobe Effect is interesting in its own right. But it also suggests that our ostensibly factual descriptions of the world are often, if not always, shot through with value-laden intuitions and influences. We speak of intent as if doing so will help us reach a reasoned

outcome in analyzing a case before us. But it turns out that the very tool with which we reason (“intent”) is already saturated by the value judgments we hope such tools will help us make! We have already seen how awkwardly circular it was in *Vosburg* to try to use the idea of “unlawful contact” as a doctrinal tool. The Knobe Effect suggests that the circularity problem may be much deeper: the descriptions of the world on which our prescriptive analyses purport to be based may already be shaped by normative intuitions.

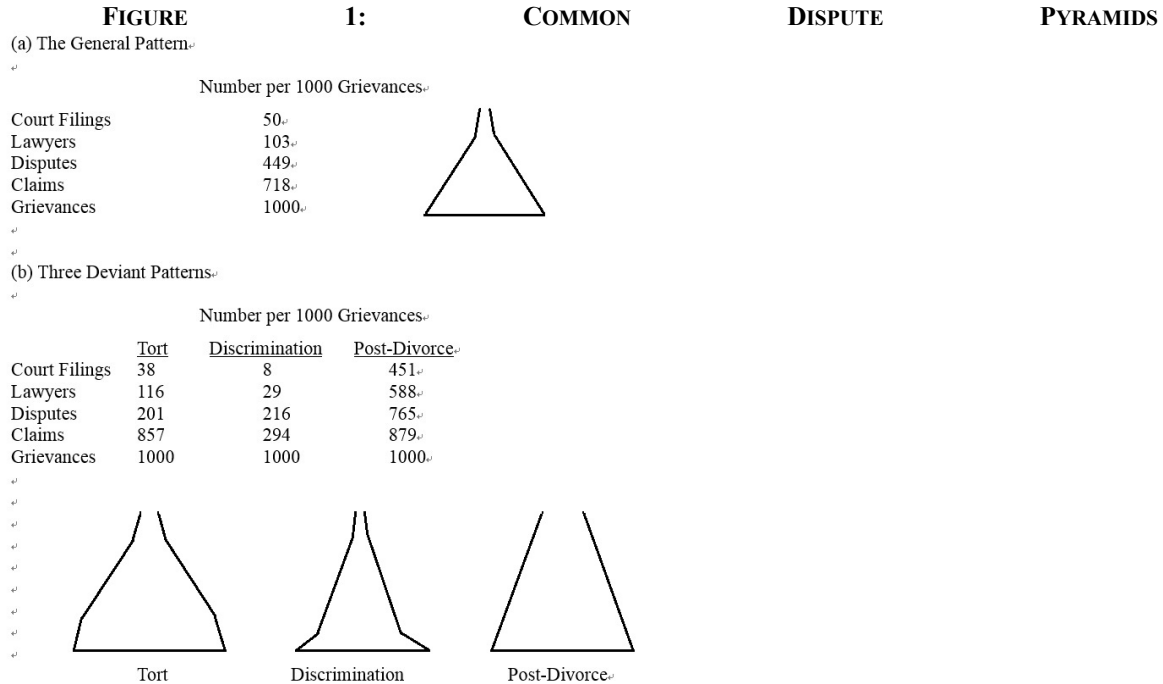
### ***The Dispute Pyramid***

Before we move on, it is worth noting an important feature of the cases we have read so far, and, indeed, of every case we will read in this book. Not every schoolroom injury becomes a dispute. Not every dispute produces a claim. Not every claim is filed. And, as Note 3 above observes, virtually every claim that is filed settles before trial. Galanter posits the *dispute pyramid* as an effective way to conceptualize our system:

We can imagine a bottom layer consisting of all the *events* in which . . . [i]n a small fraction . . . someone gets hurt. Let us call this layer *injuries*. Some of these injuries go unperceived; in other instances someone thinks he is injured, even though he is not. Thus we have a layer of *perceived injuries* . . . . In many cases, those who perceive injuries blame themselves or ascribe the injury to fate or chance. But some blame some human agency, a person, a corporation, or the government. To dispute analysts, these are *grievances*. Among those with grievances, many do nothing further. . . . But some go on to complain, typically to the person or agency thought to be responsible. This is the level of *claims*. Some of these claims are granted in whole or in part . . . . When claims are denied, they are denominated *disputes*. Some of these are abandoned without further action, but some disputes are pursued further. . . . [T]ypically this would be accomplished by taking the dispute to a lawyer. In analyzing such disputes, therefore, we call the next layer *lawyers*. Of the disputes that get to lawyers, some are abandoned, some are resolved, and some end up as filings in court. Let us call this the *filings* layer. Most cases that are filed eventually result in settlement. Typically only a small fraction reach the next layer of *trials*, and a small portion of these go on to become *appeals*.

Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099-1101 (1996).

The dispute pyramid conveys the fact that very few events and perceived injuries are resolved inside a courtroom. Galanter presents some real-world dispute pyramids:



Source: Galanter, *Real World Torts*, *supra*, at 1101.

What this means is that the cases in this casebook—cases that have reached an appellate court at the very top of the torts dispute pyramid—are virtually all atypical, and even bizarre. Indeed, as in *Vosburg*, these are cases in which the disputants are jointly almost always economically worse off than they would have been had they found some other way to resolve their dispute. Professor Samuel Issacharoff elaborates:

[A]s soon as disputants enter the litigation process, they are clear losers. Whatever the stakes in a dispute between two parties, there is only one way in which they can preserve their joint welfare. Any division of the stake between them, whether it be one side taking all, or half-and-half or anything in between, leaves the parties jointly in the same position as when they begin their dispute: however they slice it, they will still have the entire pie to share. It is only by bringing lawyers into the mix and by subjecting themselves to the inevitable costs of litigation that the parties consign themselves to being worse off. Once lawyers and courts and filing fees and witnesses and depositions and all the rest are brought into the picture, the pie starts getting smaller and smaller. Because this is perfectly obvious, and perfectly obvious to all rational disputants right from the get go, the penchant of our casebook warriors to litigate requires some explanation.

Samuel Issacharoff, *The Content of Our Casebooks: Why do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1265-66 (2001).

Are parties who choose litigation over settlement irrational actors, as the passage by Professor Issacharoff suggests? Are these disputants short-sighted fools? Or are they principled zealots? What about their lawyers? How about the *Vosburgs* and *Putneys* or Ms. Garratt and young Brian Dailey?

### ***Empathy and the case method***

What is the effect of learning tort law through the case method? How does approaching torts through the lens of individual stories alter our thinking about overarching principles?

Many students—and presumably many jurors—cannot help but feel moved when they read cases about heinous injuries and destroyed livelihoods. Yet the psychologist Paul Bloom argues that empathy is a poor guide for making law or setting policy. Empathy can lead us to neglect the systemic perspective in favor of attending to a particular suffering person. PAUL BLOOM, *AGAINST EMPATHY* 9 (2016). Approaching tort law through individual cases may marginalize the interests of diffuse, non-present stakeholders who are unrepresented—the unnamed masses who will be affected by the liability rule going forward.

Psychologists have identified several features of empathy that make it vulnerable to manipulation. First, our affective reactions are roused by vivid, concrete examples, not by abstract, hypothetical, or distant concepts. As the Nobel laureate Thomas Schelling observed in 1968: “Let a six-year-old girl . . . need thousands of dollars for an operation that will prolong her life until Christmas, and the post office will be swamped with nickels and dimes to save her. But let it be reported that without a sales tax the hospital facilities of Massachusetts will deteriorate and cause a barely perceptible increase in preventable deaths—not many will drop a tear or reach for their checkbook.” Thomas C. Schelling, *The Life You Save May Be Your Own*, in *PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS: STUDIES OF GOVERNMENT FINANCE* (Samuel B. Chase ed., 1968). The same dynamic may arise when there is a six-year-old child who has been injured and to whom the tort system can give resources, on the one hand, and a systemic social policy question about the optimal liability rule, on the other hand.

A second feature of empathy is that it does not scale. We feel impelled to come to the aid of a single needy person, but we experience diminished motivation in response to large numbers of victims, a phenomenon known as “psychic numbing.” Paul Slovic, “*If I Look at the Mass I Will Never Act*”: *Psychic Numbing and Genocide*, 2 *JUDGMENT & DECISION-MAKING* 79 (2007).

Sometimes tort law doesn’t scale either. This is often because (as we shall see) courts cut off liability when damages seem uncontrolled. Even if judges do not cut off liability, the resources of defendants to pay is limited.

Rationalists like Bloom would like to see laws and policy set based on system-level logic rather than case-level logic. Does the case method disable Bloom’s system-level view?



## CHAPTER 3. INTENTIONALLY INFLICTED PHYSICAL HARMS

The previous chapter offered an introduction to tort law through the law of battery, the paradigmatic intentional tort with respect to people's bodies. Now we pursue the law of intentional torts against property, including real property (which is to say, land and any fixtures thereupon) and personal property (which is to say, everything else). The chapter then takes up four causes of action that respond to less tangible but no less significant personal injuries: to one's dignity (offensive battery), to one's sense of physical safety and bodily integrity (assault), to one's freedom of movement (false imprisonment), and to one's psychological and emotional well-being (intentional infliction of emotional distress). Finally, we end the chapter with a discussion of defenses to liability for intentional torts.

### A. Trespass

#### 1. *Trespass to Land*

##### ***Dougherty v. Stepp*, 18 N.C. 371 (1835)**

The only proof introduced by the plaintiff to establish an act of trespass, was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury under his instructions, found a verdict for the defendant, and the plaintiff appealed. . . .

RUFFIN, C.J.

In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorised, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our Courts have for a long time past held that if there be no adverse possession, the title makes the land the owner's close. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a wilful entry into the land of another, upon an unfounded claim of right, innocent, which one, who sat up no title to the land, could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

Judgment Reversed.

## Notes

1. *Special rules for real property?* Why is there “no statute, nor rule of reason” that will excuse trespass to real property under the common law? Recall that if Putney had kicked Vosburg on a playground as opposed to in the classroom, he might not have been held liable for the damages to the smaller boy’s leg. The circumstances mattered. Judge Ruffin, by contrast, seems to say that in trespass to real property, circumstances are irrelevant. Why would that be? Moreover, why does the law of trespass to real property dispense with the requirement that the defendant’s act cause damages? To make out a cause of action in battery, as we saw in Chapter 1, the plaintiff must show that the defendant’s act was harmful or offensive. Not so in trespass to real property.

One view is that an important function of the law of trespass to property, at least in some cases, is determining who owns what. In early modern England, trespass actions (often trumped up by the parties collusively) became a principal vehicle for settling underlying disputes over who owned a particular piece of land. In such cases, damages really were irrelevant and would merely have gotten in the way of the determination that both parties desired. See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 67-68 (5th ed. 1984). Another view holds that trespass actions developed primarily to protect the owners of real property in a medieval feudal regime in which rights in land were the foundation of the social structure; on this view, the absence of a damages requirement reflected the special and privileged place of property in medieval and early modern England. See STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 23:1, at 840 (2011). Which of these justifications, if either, is compelling in the law today? Are there other possible rationales? What is the justification for treating owners of land differently from plaintiffs in battery cases making claims for injuries to their body?

2. *Thomas Ruffin.* Judge Thomas Ruffin (author of the opinion in *Dougherty*) served as the Chief Justice of the North Carolina Supreme Court from 1833 to 1852, and on that court generally from 1829 to 1852, and again from 1858 to 1859. A century later, in 1936, the legendary Dean Roscoe Pound of Harvard Law School named Ruffin one of the ten greatest jurists of American history. Ruffin was also an especially brutal owner of enslaved people and the silent partner in a slave-trading business specializing in selling people away from their birthplaces in the Upper South to new owners in the newly-opened cotton lands of the Deep South and the old Southwest. See Eric Muller & Sally Greene, *His Pro-Slavery Rhetoric Was Extreme*, THE NEWS & OBSERVER [Raleigh-Durham], Oct. 25, 2018.

Ruffin is best remembered for the terrible case of *State v. Mann*, in which he held that it was not a crime for a master to kill one of his slaves. His opinion asserted no rule of reason in the master-slave relationship:

The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They

cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

*State v. Mann*, 13 N.C. 263, 266-67 (1829). Ruffin's opinion in *State v. Mann* was notorious enough to mobilize a generation of Northern abolitionists before the Civil War. Nonetheless, in North Carolina, Ruffin's portrait hung above the bench of the state Supreme Court until 2020. A statue of the man stood in an alcove outside the State Court of Appeals building until the same year. State officials have now removed both. See Bryan Anderson, *NC Supreme Court Removing Portrait of Slave Owner Ex-Justice*, A.P. NEWS, Dec. 22, 2020.

Suffice it to say, American law did not allow tort actions by a person whom the law defined as a slave against a person whom the law defined as the slave's master. Injuries to enslaved persons did form the basis for a substantial body of tort law in the American South, but these cases involved enslaved persons who had been hired out by their owners; the plaintiffs in such cases were the owners, seeking compensation for something they understood as property damage, not the enslaved persons who had experienced bodily harm. See THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996).

3. *Intangible trespass.* Traditionally, trespass actions were limited to physical intrusions. In Michigan, for example, dust, noise, and vibrations crossing from the defendant's mining activities onto a plaintiff's property do not constitute a trespass. See *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. App. 1999). In other jurisdictions, courts have allowed that such intangible crossings over a property line may produce liability for trespass. But even in these jurisdictions, there is a significant difference between intangible trespass and tangible trespass. The former only creates liability in tort if accompanied by actual damages. To put it in Judge Ruffin's terms, there is a rule of reason for intangible trespasses, and that rule of reason provides that trespasses without injury are not actionable as trespasses. (Many such cases raise questions in the doctrine of nuisance, which we will turn to in Chapter 9.)

Why place this additional requirement on actions for intangible trespass to real property? In Colorado, in a trespass action brought for sound waves, radiation, and electromagnetic fields from a public utility, the state Supreme Court held that intangible trespass actions may succeed "only if an aggrieved party is able to prove physical damage to the property." The Court explained:

The requirement that the intangible intrusion be intentional, and that a plaintiff prove physical damage caused by the intrusion, safeguards against the concern that allowing trespass claims against intangible intrusions would produce too much liability. . . . Moreover, a property owner forced to prove damage will be further limited to seeking redress in cases of serious or substantial invasions. The difficulty in proving a connection between a minor damage and an intangible intrusion is too great to support mass litigiousness on the part of pestered property owners.

*Public Service Co. of Colorado v. Van Wyck*, 27 P.3d 377, 390 (Colo. 2001). What about flashes of light communicated through buried fiber-optic cables? Should these be treated as

trespassing on the property in which the cables are buried? See *In re WorldCom, Inc.*, 546 F.3d 211, 217-18 (2d Cir. 2008) (Sotomayor, J.).

4. *Aerial trespass.* English common law traditionally held that property rights extended upward to the heavens. In William Blackstone's words, "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards." 2 WILLIAM BLACKSTONE, COMMENTARIES \*18. The development of the airplane, however, began a decades long struggle to determine the relationship between airspace rights and trespass to land, a struggle that culminated in the 1946 Supreme Court decision *United States v. Causby*. Justice William O. Douglas's opinion for the Court held that the *ad coelum* doctrine "has no place in the modern world." *United States v. Causby*, 328 U.S. 256, 260-61 (1946). The court held a landowner "owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* at 264. See generally STUART BANNER, WHO OWNS THE SKY?: THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008).

Judicial approaches to airspace property determinations ran alongside legislative and regulatory attempts to establish boundaries between private and public airspace. The 1938 Civil Aeronautics Act provided "a public right of freedom of transit in air commerce through the navigable air space of the United States." Civil Aeronautics Act of 1938, Pub. L. No. 75-706 § 3, 52 Stat. 973, 980. The Federal Aviation Agency (FAA), in turn, defines navigable airspace by reference to the minimum safe operating altitudes of various aircraft. See 14 C.F.R. § 91.119 (2002).

What about unmanned aircraft systems, commonly called drones? In 2012 Congress instructed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a)(1), 126 Stat. 11, 73. The law included a requirement to "define the acceptable standards for operation." *Id.* at § 332(a)(2)(A)(i). What about unmanned aircraft systems, commonly called drones? In 2012 Congress instructed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a)(1), 126 Stat. 11, 73. The law included a requirement to "define the acceptable standards for operation." *Id.* at § 332(a)(2)(A)(i). Congress intervened again six years later with the FAA Reauthorization Act of 2018, 115 Pub. L. 254, §§ 341-84, 132 Stat. 3186, 3284-3323 (setting forth additional requirements and guidance regarding unmanned aircraft systems and directing the Secretary of Transportation to update the FAA's "comprehensive plan" accordingly). The current regulations appear in Part 107 of the Code of Federal Regulations. 14 C.F.R. § 107 (2021). Particularly noteworthy, for tort law purposes, is the regulation stating that "[t]he altitude of the small unmanned aircraft cannot be higher than 400 feet above ground level" (except for in a few limited circumstances). 14 C.F.R. § 107.51 (2021). With drones flying at this low altitude, future disputes over "drone trespass" seem inevitable. See Lane Page, *Drone Trespass and the Line Separating the National Airspace and Private Property*, 86 GEO. WASH. L. REV. 1152 (2018).

## 2. Trespass to Chattels

Traditionally, reported cases of trespass to chattels have been few and far between and of relatively little legal significance, at least in the grand scheme of things. Typical cases of trespass to chattels in the traditional sense include *Jones v. Boswell*, 250 S.W.3d 140 (Tex. App. 2008), in which the court found that an action of trespass to chattels would lie where the defendant who repaired the plaintiffs' bulldozer refused to return the bulldozer before he received payment for his services, or *Kirschbaum v. McLaurin Parking Co.*, 188 N.C. App. 782, 656 S.E.2d 683 (2008), in which a court held that the defendant was not liable for trespass to chattels when it placed a "boot" (an immobilization device that attaches to, and restricts the movement of, the wheel of a vehicle) on the defendant's car while the defendant was illegally parked in a private lot.

Common law jurisdictions typically hold that a person is liable for trespass to chattels only if her interference with the chattel either causes dispossession or causes injury to the possessor. See, e.g., RESTATEMENT (SECOND) OF TORTS § 218 (1965). In other words, the common law imposes the same kind of injury or damage requirement that appeared in the law of intangible trespasses and in the law of battery, but which is not typically present in the law of trespass to real property. Whether the property interest in question is real or personal can thus have determinative significance for the outcome of a case.

Yet, the difference between the two formal categories of property—and thus the difference between the two trespass causes of action—can be difficult to discern. Consider *Blondell v. Consolidated Gas Co.*, where the plaintiff natural gas supplier sued defendants for attaching a device known as a "governor" to the plaintiff's meters, pipes, and connections inside the buildings of the plaintiffs' customers for the purpose of reducing gas consumption by the customers. Defendants replied by denying that their governors caused any damage to the plaintiff's meters, pipes, and connections. The meters, pipes, and connections belonged to the plaintiff; they were not fixtures on the real property (the buildings) of the customers. Nonetheless, the court applied the trespass standard as if the property in question was real rather than personal:

The meter is a device for measuring the consumption of gas, which the law requires to be used by the plaintiff as a part of its system, while the governor which the defendants claim the right to affix thereto is a device designed for the purpose of regulating the pressure of the gas after it passes through the meter. Now, it seems to us that the large mass of testimony contained in the record, showing on the one hand that the affixing of the governor was, and on the other hand that it was not, injurious to the meter and its connections, is entirely beside the question; for, whether the alleged acts were or were not productive of injury, they were, in the eye of the law, trespasses, if, as we have said, the meters are the plaintiff's property.

43 A. 817, 819 (Md. 1908). Is the property at issue in *Blondell* real or personal? In each scenario, which party would be most likely to prevail?

Lately, this once sleepy area of the law has generated more excitement. Without anyone quite anticipating what would take place, the law of trespass to chattels has become

central to a crucial question in the brave new world of digital interactions. What about trespass in cyberspace?

***Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003)**

WERDEGAR, J.

...

Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet, through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. [Intel itself sent Hamidi several cease and desist letters, demanding that he stop sending emails to addresses on its servers, but Hamidi asserted a right to communicate with willing Intel employees and resumed his electronic mailings.] Hamidi's communications to individual Intel employees caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.

On these facts, Intel brought suit, claiming that by communicating with its employees over the company's e-mail system Hamidi committed the tort of trespass to chattels. The trial court granted Intel's motion for summary judgment and enjoined Hamidi from any further mailings. [A preliminary injunction had been entered in November 1998; the permanent injunction followed in June 1999.] A divided Court of Appeal affirmed.

[W]e conclude that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. . . .

**I. Current California Tort Law**

Dubbed by Prosser the "little brother of conversion," the tort of trespass to chattels allows recovery for interferences with possession of personal property "not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered." (Prosser & Keeton, Torts (5th ed.1984) § 14, pp. 85–86.)

Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury*." (*Thrifty-Tel, Inc. v. Bezenek* (1996) . . . ).

...

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable, but other forms of interference require some additional harm to the personal property or the possessor's interests in it. . . . [A]s Prosser explains, modern day trespass to chattels differs . . . from the action for trespass to land:

. . . Where the defendant merely interferes without doing any harm—as where, for example, he merely lays hands upon the plaintiff's horse, or sits in his car—there has been a division of opinion among the writers, and a surprising dearth of authority. *By analogy to trespass to land there might be a technical tort in such a case. . . . Such scanty authority as there is, however, has considered that the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie.*"

PROSSER & KEETON, TORTS [s. 14, p. 87]. . . .

Intel suggests that the requirement of actual harm does not apply here because it sought only injunctive relief, as protection from future injuries. But as Justice Kolkey, dissenting below, observed, "[t]he fact the relief sought is injunctive does not excuse a showing of injury, whether actual or threatened." Indeed, in order to obtain injunctive relief the plaintiff must ordinarily show that the defendant's wrongful acts threaten to cause *irreparable* injuries, ones that cannot be adequately compensated in damages. . . . [T]o issue an injunction without a showing of likely irreparable injury in an action for trespass to chattels, in which injury to the personal property or the possessor's interest in it *is* an element of the action, would make little legal sense.

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. . . . Intel contends that, while its computers were not damaged by receiving Hamidi's messages, its interest in the "physical condition, quality or value" (Rest.2d Torts, s. 218 . . . ) of the computers was harmed. We disagree. . . .

In *Thrifty-Tel, Inc. v. Bezenek*, *supra* . . . , the California Court of Appeal held that evidence of automated searching of a telephone carrier's system for authorization codes supported a cause of action for trespass to chattels. The defendant's automated dialing program "overburdened the [plaintiff's] system, denying some subscribers access to phone lines," showing the requisite injury.

Following *Thrifty-Tel*, a series of federal district court decisions held that sending [unsolicited commercial bulk email ("UCE")] through an [internet service provider's ("ISP's")] equipment may constitute trespass to the ISP's computer system. . . .

In each of these spamming cases, the plaintiff showed, or was prepared to show, some interference with the efficient functioning of its computer system. . . . In [*CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio, 1997)], the plaintiff ISP's mail equipment monitor stated that mass UCE mailings, especially from nonexistent addresses such as those used by the defendant, placed "a tremendous burden" on the ISP's equipment, using "disk space and drain[ing] the processing power," making those resources unavailable to serve subscribers.

Building on the spamming cases, in particular *CompuServe*, . . . recent district court decisions addressed whether unauthorized robotic data collection from a company's publicly accessible Web site is a trespass on the company's computer system. . . . In the leading case, [*eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000)], the defendant Bidder's Edge operating an auction aggregation site, accessed the eBay Web site about 100,000 times per day, accounting for between 1 and 2 percent of the information requests received by eBay and a slightly smaller percentage of the data transferred by eBay. The district court rejected eBay's claim that it was entitled to injunctive relief because of the defendant's unauthorized presence alone, or because of the incremental cost the defendant had imposed on operation of the eBay site, but found sufficient proof of *threatened* harm in the potential for others to imitate the defendant's activity . . . .

That Intel does not claim the type of functional impact that spammers and robots have been alleged to cause is not surprising in light of the differences between Hamidi's activities and those of a commercial enterprise that uses sheer quantity of messages as its communications strategy. Though Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. . . .

In addition to impairment of system functionality, *CompuServe* and its progeny also refer to the ISP's loss of business reputation and customer goodwill, resulting from the inconvenience and cost that spam causes to its members, as harm to the ISP's legally protected interests in its personal property. Intel argues that its own interest in employee productivity, assertedly disrupted by Hamidi's messages, is a comparable protected interest in its computer system. We disagree. . . .

Intel's workers . . . were allegedly distracted from their work not because of the frequency or quantity of Hamidi's messages, but because of assertions and opinions the messages conveyed. Intel's complaint is thus about *the contents of the messages* rather than the functioning of the company's e-mail system. . . . Intel's position represents a further extension of the trespass to chattels tort, fictionally recharacterizing the allegedly injurious effect of a communication's *contents* on recipients as an impairment to the device which transmitted the message.

This theory of "impairment by content" (Burk, *The Trouble with Trespass* . . . , 4 J. Small & Emerging Bus.L. at p. 37) threatens to stretch trespass law to cover injuries far afield from the harms to possession the tort evolved to protect. . . .

Nor may Intel appropriately assert a *property* interest in its employees' time. "The Restatement test clearly speaks in the first instance to the impairment of the chattel. . . . But employees are not chattels (at least not in the legal sense of the term)." (Burk, *The*



*Trespass, supra*, 4 J. Small & Emerging Bus.L. at p. 36.)

## II. Proposed Extension of California Tort Law

...

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago urges us to excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, “extending the rules of trespass to real property to all interactive Web sites and servers.” The court is thus urged to recognize, for owners of a particular species of personal property, computer servers, the same interest in inviolability as is generally accorded a possessor of land. In effect, Professor Epstein suggests that a company’s server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.

Epstein’s argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it: “cyberspace,” “the information superhighway,” e-mail “addresses,” and the like. Of course, the Internet is also frequently called simply the “Net,” a term, Hamidi points out, “evoking a fisherman’s chattel.” A major component of the Internet is the World Wide “Web,” a descriptive term suggesting neither personal nor real property, and “cyberspace” itself has come to be known by the oxymoronic phrase “virtual reality,” which would suggest that any real property “located” in “cyberspace” must be “virtually real” property. Metaphor is a two-edged sword.

Indeed, the metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass. That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936–937, 55 Cal.Rptr.2d 724, 920 P.2d 669.) Since Intel does not claim Hamidi’s electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. Some further extension of the conceit would be required, under which the electronic signals Hamidi sent would be recast as tangible intruders, perhaps as tiny messengers rushing through the “hallways” of Intel’s computers and bursting out of employees’ computers to read them Hamidi’s missives. But such fictions promise more confusion than clarity in the law. . . .

The plain fact is that computers, even those making up the Internet, are—like such older communications equipment as telephones and fax machines—personal property, not realty. Professor Epstein observes that “[a]lthough servers may be moved in real space, they cannot be moved in cyberspace,” because an Internet server must, to be useful, be accessible at a known address. But the same is true of the telephone: to be useful for incoming communication, the telephone must remain constantly linked to the same number (or, when the number is changed, the system must include some forwarding or notification capability, a qualification that also applies to computer addresses). Does this suggest that an unwelcome message delivered through a telephone or fax machine should be viewed as a trespass to a type of real property? We think not: As already discussed, the contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions

(e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an interest in property, much less real property, and the appropriate tort is not trespass.

More substantively, Professor Epstein argues that a rule of computer server inviolability will, through the formation or extension of a market in computer-to-computer access, create “the right social result.” In most circumstances, he predicts, companies with computers on the Internet will continue to authorize transmission of information through e-mail, Web site searching, and page linking because they benefit by that open access. When a Web site owner does deny access to a particular sending, searching, or linking computer, a system of “simple one-on-one negotiations” will arise to provide the necessary individual licenses.

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley . . . writing on behalf of an *amici curiae* group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, “each of the hundreds of millions of [Internet] users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel.” The consequence for e-mail could be a substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. . . .

A leading scholar of internet law and policy, Professor Lawrence Lessig . . . , has criticized Professor Epstein’s theory of the computer server as quasi-real property . . . on the ground that it ignores the costs to society in the loss of network benefits: “eBay benefits greatly from a network that is open and where access is free. It is this general feature of the Net that makes the Net so valuable to users and a source of great innovation. And to the extent that individual sites begin to impose their own rules of exclusion, the value of the network as a network declines. If machines must negotiate before entering any individual site, then the costs of using the network climb.” LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 171 (2001) . . . .

We discuss this debate among the *amici curiae* and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one’s e-mail and Web servers might help force spammers to internalize the costs they impose on ISP’s and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law. . . .

### III. Constitutional Considerations

[The Court’s opinion declined to reach possible First Amendment claims on both sides, but it did observe that injunctions barring communications “must comply with First Amendment limits.” The majority strongly suggested that Hamidi’s emails were the modern-day equivalent of protected speech, asserting that Hamidi “no more invaded Intel’s property

than does a protester holding a sign or shouting through a bullhorn outside corporate headquarters, posting a letter through the mail, or telephoning to complain of a corporate practice.” And the majority dismissed Intel’s own constitutional claims of a “right not to listen” on the grounds that the actual recipients of the emails was not Intel but its individual employees.]

Dissenting Opinion of BROWN, J.

. . . Intel has invested millions of dollars to develop and maintain a computer system. It did this not to act as a public forum but to enhance the productivity of its employees. . . . The time required to review and delete Hamidi’s messages diverted employees from productive tasks and undermined the utility of the computer system. . . .

Hamidi concedes Intel’s legal entitlement to block the unwanted messages. The problem is that although Intel has resorted to the cyberspace version of reasonable force, it has so far been unsuccessful in determining how to resist the unwanted use of its system. Thus, while Intel has the legal right to exclude Hamidi from its system, it does not have the physical ability. It *may* forbid Hamidi’s use, but it *cannot* prevent it.

To the majority, Hamidi’s ability to outwit Intel’s cyber defenses justifies denial of Intel’s claim to exclusive use of its property. Under this reasoning, it is not right but might that determines the extent of a party’s possessory interest. Although the world often works this way, the legal system should not. . . .

Dissenting Opinion by MOSK, J.

. . . The majority fail to distinguish open communication in the public “commons” of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited “junk” mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks. Because Intel’s security measures have been circumvented by Hamidi, the majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless he causes a malfunction or systems “crash.” . . .

Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve his bulk mailing objectives—incidentally, without even having to pay postage.

**Notes**

1. *Thrifty-Tel, Inc. v. Bezenek (1996)*. *Thrifty-Tel* was one of the first cases to apply trespass to chattels principles to electronic communication. *Thrifty-Tel*, a long-distance telephone company sued the parents of minors who used computers to crack the company’s authorization codes, and to make long-distance calls without paying. In holding that trespass to chattels “lies where an intentional interference with the possession of personal property has

proximately caused injury,” the *Thrifty-Tel* court found that the defendants’ hacking substantially interfered with Thrifty-Tel’s operations, sufficiently to give rise to a common law trespass to chattels cause of action. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473.

Around the same time, CompuServe Inc., an early internet service provider, brought an action against Cyber Promotions Inc. for sending CompuServe users unsolicited advertisements through CompuServe’s servers. The court in *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) found that defendants were guilty of trespass to chattels because “multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff’s computer equipment,” and because the defendants’ actions caused customers to complain, resulting in a loss of good will toward CompuServe.

In *Ticketmaster Corp. v. Tickets.com Inc.*, 2000 WL 525390 (C.D. Cal. Mar. 27, 2000), Ticketmaster filed suit against Tickets.com for their practice of providing hyperlinks to Ticketmaster.com, and for copying event information from Ticketmaster’s webpage and placing it on the Tickets.com web page. The court found that providing a hyperlink to, and copying purely factual information from, a publicly available website did not (absent more) establish a claim of trespass.

A few months after the *Ticketmaster* decision, a federal judge in the Northern District of California held that the gathering of publicly accessible auction information from eBay.com by an auction services firm called Bidder’s Edge constituted a trespass to chattels. Bidder’s Edge used electronic “spiders” to crawl through bidding information on eBay and other auction sites and used the information it collected to allow its customers to compare goods and prices across bidding websites. Does it matter that eBay’s database was publicly accessible, or that it posted a notice purporting to forbid the use of information collecting spiders? Part of the threat to eBay was that Bidder’s Edge allowed users to access the eBay site without encountering eBay’s advertising. Note that eBay said that it was willing to sell Bidder’s Edge a license to collect the information for a charge. See *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

2. *The property analogy?* Did the *Hamidi* court err in grounding its ruling in trespass to chattels principles? For an argument that property analogies (either chattel or real) wrongly govern virtual space, see Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cyber Trespass*, 12 MICH. TELECOMM. TECH. L. REV. 265 (2006). Richard Epstein, in contrast, has argued that the *Hamidi* ruling’s refusal to adopt the real property analogy deprives internet users of much needed civil protection when self-help remedies for excluding cyber trespassers fail. See Richard A. Epstein, *Intel Corp. v. Hamidi: The Role of Self-help in Cyberspace?*, 1 J.L. ECON. & POL’Y 147 (2005) for an extended critique of *Intel Corp. v. Hamidi*. For an argument that courts should chart a middle path requiring that plaintiffs show sufficient recourse to self-help measures as a condition for awarding civil relief, see Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TULSA L. REV. 677 (2008). Why not simply adopt a narrowly-tailored opt-out regime that would allow harmless cyber interaction unless and until a party has been asked specifically to cease and desist?

How far can trespass principles be applied? Consider the case of *United States v. Jones*, 565 U.S. 400 (2012), where police placed a GPS tracking device on the defendant’s vehicle

without a warrant. The Government introduced aggregated GPS data at trial that connected Jones (the defendant) with a cocaine stash house. Delivering the opinion of the Court, Justice Antonin Scalia reasoned that the question of whether placing the device on the plaintiff's vehicle amounted to a constitutionally regulated search and seizure turned on whether the government's action would have constituted a trespass at common law. Justice Sonia Sotomayor concurred, but worried that "[i]n cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance." 565 U.S. at 415. Did placing the GPS device on the defendant's personal property constitute a common law trespass if it caused no damage to the property?

3. *Anti-spamming legislation.* Although the California Supreme Court declined to censure Mr. Hamidi's emailing in *Intel Corp. v. Hamidi*, Congress and many state legislatures have passed anti-spamming laws. In 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing (or CAN-SPAM) Act. Broadly, the act protects against fraud, and misleading commercial emails. CAN-SPAM also requires that commercial senders allow email recipients to opt out of receiving future messages and establishes a national "Do-Not-Email" registry on which they can do so. See 15 U.S.C.A §§ 7701-13. Many states, including California, have passed state anti-spam statutes as well, though CAN-SPAM has preempted much of the content of the state statutes. Interestingly, in recent years, private email distributors have begun adding additional safeguards for consumer privacy beyond those required by CAN-SPAM and its state analogues. The widely-used digital distribution and marketing firm MailChimp, for example, includes in its terms of use a commitment that their users "won't send Spam!" MailChimp reserves the right to enforce this provision by dropping clients who violate it. Terms of Use, MAILCHIMP.COM, <https://perma.cc/K3D2-9X3Y> (last visited Apr. 8, 2014). Does MailChimp's policy suggest that some combination of market reputation on the part of distributors and self-help by potential recipients would evolve toward protections against spamming regardless of what the law does?

## **B. Beyond Battery: Causes of Action for Other Personal Injuries**

### **1. Offensive Battery**

Note that the following case includes outdated racial terms, which, when used today, often have derogatory connotations.

***Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967)**

GREENHILL, J.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn [who managed the Brass Ring, on Carrousel's behalf, and who died before the trial].

Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. . . . After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

[The jury found for Fisher and awarded damages.]

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

‘The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient;  
\* \* \* The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it.’

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. ‘To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done in an offensive manner, is sufficient.’

Such holding is not unique to the jurisprudence of this State. In *S. H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed ‘an assault or trespass upon the person’ by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant ‘dispossessed plaintiff of the book’ and caused her to suffer ‘humiliation and indignity.’

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d s 18 (Comment p. 31) as follows:

'Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.'

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

...

Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

...

... The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for \$900 with interest from the date of the trial court's judgment, and for costs of this suit.

### Notes

1. *Intent required.* Though not emphasized in the *Fisher* case, offensive battery requires that the defendant have acted with intent—in the Restatement formulation, “inten[t] to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact.” RESTATEMENT (SECOND) OF TORTS § 18 (1965). This language is identical to the language found in the Restatement provision on conventional (harmful) battery, discussed in the previous section. The key distinction between harmful battery and offensive battery is the nature of the contact that results. On the meaning of “intent,” recall that according to the Third Restatement, “[a] person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 1 (2010).

2. *Why recognize offensive battery?* It will become very clear as this book goes on that tort law does not supply a remedy for all types of wrongful conduct, even conduct that is widely reviled. Some types of wrongful conduct have gone untouched because judges have worried about interfering in particular relationships (*e.g.*, husband and wife, parent and child), or about creating incentives for fraud, or simply about opening the door to an unmanageable number of cases. Judges have deemed other types of wrongful conduct too trivial, too petty.

Why, then, has the law long recognized a cause of action for physical contacts that offend but do not harm? What about the maxim “no harm, no foul”? The 1872 case *Alcorn v. Mitchell*, 63 Ill. 533, involving a defendant who deliberately spit in the face of the plaintiff, offers a classic explanation for the law’s recognition of offensive battery. The spitting, according to the concise statement of facts, occurred in a court room, at the close of a legal proceeding between the two men (adjudicating a charge of trespass), and “in the presence of a large number of persons.” *Id.* at 553. In consequence, a trial court awarded the defendant to pay \$1,000, a hefty sum at the time. In upholding the award, the Illinois Supreme Court characterized the spitting as an act “of the greatest indignity, highly provocative of retaliation by force.” *Id.* at 554. To “sav[e] the necessity of resort to personal violence as the only means of redress” and thereby preserve “public tranquility,” the court explained, the law “should afford substantial protection against such outrages, in the way of liberal damages.” *Id.*

How does this justification hold up in an age of modern policing, when we disapprove, at least formally, of individual citizens taking the law into their own hands? Does it appear anachronistic now that the concepts of honor and reputation no longer play such important roles in everyday life? Professor Scott Hershovitz defends damage awards in cases like this on the ground that, even if they do not prevent violence, they recognize and rebut a moral injury; judgment by judgment, they create and recreate the world we want to live in. “We are the agents of morality,” Hershovitz argues. “There is no one else to do the job. If we think that, as a matter of morality, Mitchell’s dignity confers on him a right to be free from insults like Alcorn’s spit, then we must live as if he has that right. . . . Tort is a way for us to do that.” Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 15 (2018); see also Leslie Bender, *Tort Law’s Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249 (1998) (“Giving people who are injured compensation from their harm-causers is one way our social order can help promote their dignity and their ability to be social equals.”). Do you buy it? In the big scheme of things, are cases of offensive battery a good use of judicial resources?

## 2. Assault

### *I. de S. & Wife v. W. de S.*, 1348 or 1349<sup>1</sup>

THORPE, C.J.

I de S and M, his wife, complain of W de S concerning this that the said W, in the year etc., with force and arms [*vi et armis*] did make an assault upon the said M at S and beat her. And W. pleaded not guilty. And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he pounded on the door with a hatchet, which he had in his hand, and the female plaintiff put her head out at a window and told him to stop; and he saw her and aimed at her with the hatchet, but did not hit her. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done. THORP, C. J. There is harm

<sup>1</sup> Y.B. Lib.Ass. folio 99, placitum 60 (Assizes 1348), translated from the Law French in, JAMES BARR AMES, SELECT CASES ON TORTS 1 (1874).



done, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no other harm. Wherefore tax his damages, &c. And they taxed the damages at half a mark. THORP, C.J., awarded that they should recover their damages, &c., and that the other should be taken. Et sic nota, that for an assault one shall recover damages, &c.

### Notes

1. *The action for assault.* The case of *I. de S.* is an early recognition of legally protectable interests in an emotional state—the emotional state of being free of certain kinds of fright. Prosser described the assault action as recourse for unlawful “touching of the mind”:

The interest in freedom from apprehension of a harmful or offensive contact with the person, as distinguished from the contact itself, is protected by an action for the tort known as assault. No actual contact is necessary to it, and the plaintiff is protected against a purely mental disturbance of this distinctive kind. This action, which developed very early as a form of trespass, is the first recognition of a mental, as distinct from a physical, injury. There is a “touching of the mind, if not of the body.”

W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984).

2. *Everyday frictions?* Even if the action of assault has been recognized at common law for centuries, it has always been hedged in by limits. Not every obnoxious or hurtful touching of the mind gives rise to an assault action. Courts normally do not allow assault remedies for the ordinary insults and frictions that accompany everyday life. In *Bollaert v. Witter*, 792 P.2d 465 (Or. App. 1990), for example, an Oregon State appellate court ruled against a party’s claims of assault in a home boundary dispute where an angry neighbor yelled: “Let’s duke it out . . . I’m a Vietnam vet” and “I wouldn’t be surprised if my wife—if, while you’re working on the fence, my wife took a gun and shot you.” Similarly, in *Groff v. Sw. Beverage Co., Inc.*, 997 So. 2d 782 (La. 2008), a Louisiana court dismissed the assault claims of an employee who sued his employer for yelling, “using numerous profanities,” and “hitting the desk with his hand.” These are the sorts of unpleasant encounters that the common law of torts requires people to bear on their own.

3. *Threats of future harm?* Nor is it generally sufficient to allege threats of future harm. Consider the opinion in *Kijonka v. Seitzinger*, written by Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. Appellant Kijonka was a former small-town mayor who during his term had fired the town dog-catcher, one Berle “Peanut” Shoulders, Jr., after reports of corruption and narcotics dealing. Shoulders then stalked Kijonka for some time in a threatening manner. Some time later the two men spotted one another while driving. “[A]ccording to Shoulders, Kijonka rolled down his car window, gave Shoulders a ‘dirty look,’ and said: ‘You have a nice day and your ass is mine you son of a bitch and I will get you.’” Judge Posner held that the exchange did not constitute an assault:

Ever since the fourteenth century, assault whether civil or criminal has involved (1) a threatening *gesture*, or an otherwise innocent gesture made threatening by the accompanying words, that (2) creates a reasonable apprehension of an *imminent* battery. . . . A merely verbal threat of indefinite action in the indefinite future is not an assault. . . . It is missing two elements: gesture and imminence. . . . Kijonka's rolling down his car window was not a threatening gesture . . . . There was no threatening gesture, nor even a present threat. It's not as if Kijonka had said, "I have a gun in my glove compartment and I'm going to reach in and get it and shoot you, you son of a bitch." Even that would have been a threat rather than an assault until he actually reached toward the glove compartment. . . .

Shoulders, given his history of stalking Kijonka, may have feared that the day of retribution had arrived (though this is doubtful, given the presence at the scene of a policeman). But a victim's fear . . . cannot transform a remote threat into an assault.

364 F.3d 645 (7th Cir. 2004). Why should the common law not make such behavior actionable? Is there anything socially valuable in the kind of behavior at issue here?

4. *Threats of distant harm.* Distance in space will vitiate an assault action just as surely as distance in time. The canonical case is *Smith v. Newsam*, 84 E. R. 722 (K.B. 1673), where the court per Chief Justice Hale rejected a claim of assault in which plaintiff complained that the defendant had shaken "a sword against the plaintiff in a cutlers shop, being on the other side the street." Mere words or gestures will not constitute an assault absent the imminent apprehension of contact.

Contrast *Smith* with *Vetter v. Morgan*, 913 P.2d 1200 (Kan. Ct. App. 1995), in which plaintiff van driver Morgan Vetter claimed that she was assaulted at an intersection by defendant Chad Morgan, a passenger in an adjacent vehicle. At around 1:30 a.m., Vetter alleged, a car pulled up alongside hers at a red light, whereupon Morgan "began screaming vile and threatening obscenities at [her], shaking his fist, and making obscene gestures in a violent manner"; as this was happening, the driver Morgan's vehicle revved the engine and "moved the car back and forth." *Id.* at 1203. Vetter also claimed that Morgan threatened to remove her from her vehicle and spat on her van door. A Kansas appeals court reversed the dismissal of Vetter's assault claim, noting that although Vetter's van was locked and the windows were rolled up, the record supported the inference that Morgan had the apparent ability to inflict imminent harm: there was evidence that the two vehicles were only six feet apart, that "Morgan was accompanied by two other males," and that, given the time of day, "witnesses and potential rescuers were unlikely." *Id.* at 1204.

5. *Conditional threats.* The same principle generally renders conditional threats inactionable. In the classic English case *Tuberville v. Savage*, the "evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, 'If it were not assize-time, I would not take such language from you.'" (In response to this "provocation," the defendant had apparently wounded the plaintiff in some fashion—thus this suit for damages.) Assize-time was when the king's judges arrived to deliver justice in the English countryside.

With the array of royal officials present, it would have been a singularly bad time for one person to attack another. And so the court concluded that the evidence was insufficient to make out an assault (and by implication, the defendant's injurious actions were not justified):

[T]he declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault. Therefore, if one strike another upon the hand or arm or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.

*Tuberville v. Savage*, 86 Eng. Rep. 684 (K.B. 1669).

For an example of when a conditional threat and surrounding circumstances might support a finding of assault, consider *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991). Plaintiff Dan Cullison alleged that defendant Ernest Medley and other members of the Medley family assaulted him when they showed up at his mobile home late at night and chastised him for his apparent interest in sixteen-year-old Sandy Medley, Ernest's daughter. Ernest Medley had a revolver in a holster attached to his thigh, according to Cullison, and although Medley never withdrew the gun from the holster, he "'grabbed for the gun a few times and shook the gun' at [Cullison] while threatening to 'jump astraddle' of Cullison if he did not leave Sandy alone." *Id.* at 28-29. The Indiana Court of Appeals treated this threat as a conditional one and on that basis, among others, affirmed the trial court's grant of summary judgment to the defendants. The Indiana Supreme Court reversed. If a jury credited the facts that Cullison alleged, it could reasonably find that all the elements of assault were established, including imminent apprehension of harmful or offensive contact. *Id.* at 30-31.

6. *The Restatement approach.* The Restatement view is that an actor may be liable for assault to another if (1) the actor either intended to cause a "harmful or offensive contact" to the other person or to a third party, or to cause "imminent apprehension of such contact," and (2) the other person is "thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21 (1965). Merely imposing an unreasonable risk of harmful or offensive contacts, without the intent to cause such contacts or imminent apprehension thereof, may give rise to liability for negligence, but does not constitute the tort of assault.

***Speicher v. Rajtora*, 766 N.W.2d 649 (Iowa App. 2009)**

EISENHAUER, J.

Daniel Rajtora and Kendra Speicher are the parents of an eight-year-old daughter. Although they never married, the parties have resided with one another on various occasions. Daniel appeals a civil domestic abuse protective order issued in favor of Kendra. He argues the district court's finding he committed domestic abuse assault is not supported by a preponderance of the evidence. He specifically maintains there was insufficient evidence he acted in a manner "intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." See Iowa Code §§ 239.2(2), 708.1(2) (2007). . . .

On March 30, 2008, Daniel returned their daughter to Kendra's residence after a visitation. Daniel did not see Kendra at any time on March 30, and did not speak to her at the drop-off. Kendra testified she called Daniel about five minutes later using a new cell phone Daniel had just purchased for their daughter. Kendra asked Daniel to prevent their daughter from taking her new cell phone to church or school. Kendra testified Daniel threatened her by replying: "Shut the f\* \* \* up. Don't worry about it and shut the f\* \* \* up before I come over there and beat both your asses."

Kendra stated she placed the call to Daniel's cell phone and he did not say where he was located. However, she believed he had returned to a friend's house one to two miles away. At the hearing, Daniel admitted swearing, but denied making a threat. Daniel was at his friend's house during the call.

Even assuming Daniel made the alleged threat, we are compelled to find insufficient evidence of assault . . . . Assault requires "fear of immediate physical contact" coupled with "the apparent ability to execute" the assault. The record does not establish Daniel's apparent ability to execute the threat at the time the threat was made. The testimony only established Kendra's belief Daniel had a future ability to return from a distance and execute the threat.

We find insufficient evidence to support the assault element of domestic abuse assault. We reverse and remand for dismissal of the protective order.

### *Note*

1. *Torts and domestic abuse.* It is one thing to deny a remedy for ordinary everyday frictions, for distant threats, or for medieval bluster. But what about the all-too-ordinary verbal attacks that are characteristic of abusive domestic relations? According to a recent government report, one in four women and one in ten men in the U.S. "experienced contact sexual violence, physical violence, and/or stalking by an intimate partner during their lifetime and reported some form of [Intimate Partner Violence]-related impact." SHARON G. SMITH, ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 8-9 (2018), *available at* <https://perma.cc/8DGD-NRS3>. Data is more limited on transgender and non-binary people, but a 2015 survey by the National Center for Transgender Equality found that more than half of the 27,715 respondents had experienced some form of intimate partner violence and that for one quarter of respondents that violence was "severe." S. E. JAMES, ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), *available at* <https://perma.cc/76R9-3HFM>. Do the limits of the assault cause of action prevent the law from dealing with domestic violence? Would a more robust assault action empower otherwise disempowered people to resist threats or acts of violence in the context of intimate and familial relationships? What other consequences might you expect to follow were courts to more readily recognize as assault situations like the one in *Speicher*?

Note that when it comes to using tort law to address domestic violence, the problem may go much deeper than the elements of any particular tort. Professor Martha Chamallas notes that, as compared to fifty years ago, tort claims are much more available to people who experience domestic violence. And yet "practical and cultural reasons" have prevented tort law from becoming an effective response to domestic violence: "Plaintiffs are deterred by short

statutes of limitations, joinder rules in some jurisdictions which require filing claims in conjunction with a divorce action, restrictions on legal services organizations prohibiting the filing of such suits and, most importantly, the lack of liability insurance that could operate as a fund for victims to tap into to secure compensation. . . .” Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 46-51 (2018); see also Jennifer Wiggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001); Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 U. KAN. L. REV. 695 (2014); Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957 (2020). What would it take to change this pattern? Why has it proven so sticky?

### 3. False Imprisonment

#### ***Whittaker v. Sandford*, 110 Me. 77 (1912)**

SAVAGE, J.

Action for false imprisonment. The plaintiff recovered a verdict for \$1,100. The case comes up on defendant’s exceptions and motion for a new trial.

The case shows that for several years prior to 1910, at a locality called “Shiloh,” in Durham, in this state, there had been gathered together a religious sect, of which the defendant was at least the religious leader. They dwelt in a so-called colony. There was a similar colony under the same religious leadership at Jaffa, in Syria. The plaintiff was a member of this sect, and her husband was one of its ministers. For the promotion of the work of the “movement,” as it is called, a Yacht Club was incorporated, of which the defendant was president. The Yacht Club owned two sailing yachts, the “Kingdom” and the “Coronet.” So far as this case is concerned, these yachts were employed in transporting members of the movement, back and forth, between the coast of Maine and Jaffa.

The plaintiff, with her four children, sailed on the Coronet to Jaffa in 1905. Her husband was in Jerusalem, but came to Jaffa, and there remained until he sailed, a year later, apparently to America. The plaintiff lived in Jerusalem and Jaffa, as a member of the colony, until March, 1909. At that time she decided to abandon the movement, and from that time on ceased to take part in its exercise or to be recognized as a member. She made her preparations to return to America by steamer, but did not obtain the necessary funds therefor until December 24, 1909. At that time the Kingdom was in the harbor at Jaffa, and the defendant was on board. On Christmas day he sent a messenger to ask the plaintiff to come on board. She went, first being assured by the messenger that she should be returned to shore. The defendant expressed a strong desire that she should come back to America on the Kingdom, rather than in a steamer, saying, as she says, that he could not bear the sting of having her come home by steamer; he having taken her out. The plaintiff fearing, as she says, that if she came on board the defendant’s yacht she would not be let off until she was “won to the movement” again, discussed that subject with the defendant, and he assured her repeatedly that under no circumstances would she be detained on board the vessel after they got into port, and that she should be free to do what she wanted to the moment they reached shore. Relying upon this promise, she boarded the Kingdom on December 28th and sailed for America. She was treated

as a guest, and with all respect. She had her four children with her. The defendant was also on board.

The Kingdom arrived in Portland Harbor on the afternoon of Sunday, May 8, 1910. The plaintiff's husband, who was at Shiloh, . . . went at once to Portland Harbor, reaching the yacht about midnight of the same day. The Coronet was also in Portland Harbor at that time. Later both yachts sailed to South Freeport, reaching there Tuesday morning, May 10th. From this time until June 6th following the plaintiff claims that she was prevented from leaving the Kingdom, by the defendant, in such manner as to constitute false imprisonment.

#### The Exceptions

. . . .

. . . The defendant requested the court to instruct the jury that "to maintain her action the plaintiff must show some actual physical force exercised by the defendant or by some one acting as his agent and by his authority to restrain her of her liberty."

. . . . The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence; that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff; that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would be a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. . . . Now is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier.

. . . .

It is shown that on several occasions the defendant told the plaintiff she could have a boat when she wished; but it is also shown by testimony which the jury might believe that, each time she made a request for a boat to be used at the time, she was refused. The plaintiff did not ask the captain or other officers of the yacht for a boat. . . . We do not think the defendant can justly claim that she should have asked the officers under him, if he had himself denied her a boat. And in the one specific case shown in the evidence, when she did ask the captain for a boat to go on shore, he referred the discussion of the matter to the defendant. . . . She apparently believed that an appeal to the officers would be useless. It was not an unreasonable belief.

. . . [I]t is claimed for [the defendant] that after Tuesday, May 10th, he assumed no responsibility whatever for the plaintiff, and left her in the care of her husband, specifically saying that he would leave it to her husband to say whether she could leave the yacht. From that date, he stayed on the Coronet, only coming aboard the Kingdom once, though on that occasion she says he refused her the use of a boat. From that date she was in the company of

her husband, though they were not living in marital relations. She went ashore with him. She visited neighboring islands with him. She was trying to persuade him to leave the movement and make a home for her and their children. He was trying to persuade her to become again a member of the movement. When on shore with him she made no effort to escape. She says she believed it would be useless, and thus went back to the yacht with him. She says that when she did ask her husband to put her ashore to leave, he replied, “We will see Mr. Sandford about it and see what he says.” She further says that the defendant had told her that “he” (her husband) “couldn’t do it” (put her on shore).

Besides the evidence of express personal refusal on the part of the defendant, we think that a jury might well find upon the evidence that . . . in view of the relation which the defendant bore to the movement and to the husband, in view of the mystical character attributed to him, in view of the manifest power possessed by him over the minds of the members . . . and which the husband shared in, the husband, if not acting by express mutual understanding with the defendant, was the minister of his known will, with the result that the plaintiff was prevented from leaving the yacht, that the defendant was the superior, the controlling factor, by an influence intentionally used, in keeping her there, that he possessed the key that would unlock the situation, and that in violation of his duty he refused to use it, and thus restrained her of her liberty. If all this was true, the defendant is liable to the plaintiff. The verdict should not be set aside on that ground.

...

### Notes

1. *What is the price of liberty?* After sustaining the jury’s finding of false imprisonment, Justice Savage ruled that the damage award was “manifestly excessive” and ordered the plaintiff to remit all but \$500 (about \$13,000 in 2019 dollars). In his estimation, Mrs. Whittaker “was by no means in close confinement” and in fact enjoyed a number of “liberties,” including being “taken on shore by her husband to do shopping and transact business at a bank” and “visit[ing] neighboring islands with her husband and children, on one of which they enjoyed a family picnic.” *Whittaker v. Sandford*, 110 Me. 77 (1912). “The case lacks the elements of humiliation and disgrace that frequently attend false imprisonment,” Judge Savage explained. *Id.* What is an appropriate damage award for a situation like this? How much should the conditions of the confinement matter?

2. *What constitutes confinement?* The tort of false imprisonment remains alive and well a century after the *Whittaker* case. The crux of this tort is confinement. As the Restatement explains, this action captures situations where a defendant “acts intending to confine the other or a third person within boundaries fixed by the actor”; where the defendant’s “act directly or indirectly results in such a confinement of the other”; and where the person who has been confined “is conscious of the confinement or is harmed by it.” RESTATEMENT (SECOND) § 35 (1965). As for the more precise meaning of confinement, the Restatement offers several clarifications:

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

RESTATEMENT (SECOND) § 36 (1965). What concrete scenarios do you imagine gave rise to this language? Can you imagine a situation in which a person who was confined would not have been conscious of the confinement but would have been harmed by it? To the extent that this language denies recovery for some intentional, wrongful restrictions on another person's movement, how do we make sense of such exclusions?

For an example of a situation that this tort was found not to cover, consider the facts of *Zavala v. Wal Mart Stores*, 691 F.3d 527 (3d. Cir. 2012): The plaintiff employees alleged that during their night-time and weekend shifts (when the defendant retail store was closed to customers), the defendant locked them inside; if necessary, they could ask a manager to open the doors, but “[m]anagers were often unavailable and were sometimes not even in the store.” *Id.* at 532. In affirming the district court’s grant of summary judgment to the defendant on the false imprisonment claim, the court characterized the store’s emergency exits as a reasonable means of escape, even though, according to the plaintiffs’ attorneys, “no one ever showed [the plaintiffs] the location of emergency exits and their minimal proficiency in English would make it difficult or impossible to find them on their own.” *Id.* at 544-45.

Contrast *Zavala* with *Barrett v. Watkins*, 919 N.Y.S.2d 569 (N.Y. App. Div. 2011), where the plaintiffs alleged that they were prevented from exiting a “remote, wooded public recreation area” by an unoccupied truck blocking the access road. The defendants had the power to move the truck but refused until ordered to do so by the police. The court rejected the defendants’ assertion that, because there existed another way out of the recreation area, the plaintiffs could not establish a complete confinement. “[T]here is no evidence that [the defendant] informed plaintiffs of this, that plaintiffs were otherwise aware of any alternate means of egress, or that any such other means was reasonable,” the court explained. *Id.* at 571.

3. *Does motive matter?* False imprisonment requires intent, but it is only intent to confine, not intent to harm. Indeed, false imprisonment cases often arise from scenarios in which the actors who caused the confinement thought they were playing a joke, protecting private property, or even looking out for the best interests of the person they confined (for example, by removing the actor from the influence of a cult). Such motives may assist the defendant in establishing an affirmative defense (as discussed in later pages), but they generally will not prevent the plaintiff from establishing a prima facie case of false imprisonment.

Note that although a plaintiff suing for false imprisonment is not required to show intent to harm, even intent to confine is not always easy to establish, including in situations where the defendant’s actions have indisputably produced a long and injurious confinement. Consider *Vumbaca v. Terminal One Group Ass’n L.P.*, 859 F.Supp.2d 343 (E.D.N.Y. 2012),



in which a passenger sought damages from an operator of an airport terminal after being stuck in an aircraft on the tarmac without food, water, or adequate sanitary facilities for seven hours. District Judge Jack Weinstein granted the defendant's motion for summary judgment on the plaintiff's false imprisonment claim. Although the passenger's confinement could be traced to the defendant's failure to "provide a safe means of egress from the airplane," and although any consent on the passenger's part had arguably expired, the record did not support a finding of intent: "While it was likely that passengers would be confined in the aircraft for some period of time after landing, this possibility fell far short of the high probability that is required for defendant's knowledge to rise to the level of intent." *Id.* at 830.

#### **4. Intentional Infliction of Emotional Distress**

Of all the intentional torts discussed so far, intentional infliction of emotional distress (IIED) is of the most recent vintage. Although it has roots in late nineteenth-century English common law, *see* *Wilkinson v. Downton*, [1897] 2 Q.B. 57, only in the 1930s did legal commentators take note of its arrival on the American scene. One way of thinking about IIED is with reference to injuries that other, more established causes of action had left unrecognized and uncompensated; when that lack of recognition became noticeable, and then intolerable, the tort of IIED emerged to fill the void.

#### ***GTE Southwest v. Bruce*, 998 S.W.2d 605 (Tex. 1999)**

ABBOTT, J.

In this case we determine whether three GTE Southwest, Incorporated employees may recover damages for intentional infliction of emotional distress based on the workplace conduct of their supervisor. The trial court rendered judgment for the employees on the jury verdict, and the court of appeals affirmed. We affirm the judgment of the court of appeals.

##### **I. Facts**

Three GTE employees, Rhonda Bruce, Linda Davis, and Joyce Poelstra, sued GTE for intentional infliction of emotional distress premised on the constant humiliating and abusive behavior of their supervisor, Morris Shields. . . . Between 1981 and May 1991, Shields worked as a supervisor in GTE's supply department in Jacksonville, Arkansas. During his tenure there, four of Shields's subordinate employees (none of the employees involved in this case) filed formal grievances against Shields with GTE, alleging that Shields constantly harassed them. . . . GTE investigated Shields's conduct in 1988 and 1989, but took no formal disciplinary action against him.

In May 1991, GTE transferred Shields from Jacksonville to Nash, Texas, where he became the supply operations supervisor. . . . Bruce, Davis, and Poelstra ("the employees") worked under Shields at the Nash facility. Like the GTE employees in Jacksonville, Bruce, Davis, and Poelstra complained to GTE of Shields's conduct, alleging that Shields constantly harassed and intimidated them. The employees complained about Shields's daily use of profanity, short temper, and his abusive and vulgar dictatorial manner. The employees complained that, among other offensive acts, Shields repeatedly yelled, screamed, cursed, and

even “charged” at them. In addition, he intentionally humiliated and embarrassed the employees.

GTE investigated these complaints in April 1992, after which GTE issued Shields a “letter of reprimand.” After the reprimand, Shields discontinued some of his egregious conduct, but did not end it completely.

Eventually, Bruce, Davis, and Poelstra sought medical treatment for emotional distress caused by Shields’s conduct. In March 1994, the employees filed suit, alleging that GTE intentionally inflicted emotional distress on them through Shields. . . . The jury awarded \$100,000.00 plus prejudgment interest to Bruce, \$100,000.00 plus interest to Davis, and \$75,000.00 plus interest to Poelstra.

...

### III. Intentional Infliction of Emotional Distress

... To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. In addition, “[a] claim for intentional infliction of emotional distress cannot be maintained when the risk that emotional distress will result is merely incidental to the commission of some other tort.” Accordingly, a claim for intentional infliction of emotional distress will not lie if emotional distress is not the intended or primary consequence of the defendant’s conduct.

...

#### A. Extreme and Outrageous Conduct

... To be extreme and outrageous, conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Generally, insensitive or even rude behavior does not constitute extreme and outrageous conduct. Similarly, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct.

In determining whether certain conduct is extreme and outrageous, courts consider the context and the relationship between the parties. “The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.” Restatement (Second) of Torts § 46 cmt. e (1965).

In the employment context, some courts have held that a plaintiff’s status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger. . . .

In contrast, several courts, including Texas courts, have adopted a strict approach to intentional infliction of emotional distress claims arising in the workplace. These courts rely

on the fact that, to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. Although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results. We agree with the approach taken by these courts.

. . . . Thus, to establish a cause of action for intentional infliction of emotional distress in the workplace, an employee must prove the existence of some conduct that brings the dispute outside the scope of an ordinary employment dispute and into the realm of extreme and outrageous conduct.

GTE contends that the evidence establishes nothing more than an ordinary employment dispute. To the contrary, the employees produced evidence that, over a period of more than two years, Shields engaged in a pattern of grossly abusive, threatening, and degrading conduct. Shields began regularly using the harshest vulgarity shortly after his arrival at the Nash facility. In response, Bruce and Davis informed Shields that they were uncomfortable with obscene jokes, vulgar cursing, and sexual innuendo in the office. Despite these objections, Shields continued to use exceedingly vulgar language on a daily basis. Several witnesses testified that Shields used the word “f—” as part of his normal pattern of conversation, and that he regularly heaped abusive profanity on the employees. Linda Davis testified that Shields used this language to get a reaction. Gene Martin, another GTE employee, testified that Shields used the words “f—” and “motherf—er” frequently when speaking with the employees. On one occasion when Bruce asked Shields to curb his language because it was offensive, Shields positioned himself in front of her face, and screamed, “I will do and say any damn thing I want. And I don’t give a s— who likes it.” Another typical example is when Gene Martin asked Shields to stop his yelling and vulgarity because it upset the female employees, and Shields replied “I’m tired of walking on f—ing eggshells, trying to make people happy around here.” There was further evidence that Shields’s harsh and vulgar language was not merely accidental, but seemed intended to abuse the employees.

More importantly, the employees testified that Shields repeatedly physically and verbally threatened and terrorized them. There was evidence that Shields was continuously in a rage, and that Shields would frequently assault each of the employees by physically charging at them. When doing so, Shields would bend his head down, put his arms straight down by his sides, ball his hands into fists, and walk quickly toward or “lunge” at the employees, stopping uncomfortably close to their faces while screaming and yelling. The employees were exceedingly frightened by this behavior, afraid that Shields might hit them. Linda Davis testified that Shields charged the employees with the intent to frighten them. At least once, another employee came between Shields and Poelstra to protect her from Shields’s charge. A number of witnesses testified that Shields frequently yelled and screamed at the top of his voice, and pounded his fists when requesting the employees to do things. Bruce testified that Shields would “come up fast” and “get up over her”—causing her to lean back—and yell and scream in her face for her to get things for him. Shields included vulgar language in his yelling and screaming. Bruce stated that such conduct was not a part of any disciplinary action against her. Further, the incidents usually occurred in the open rather than in private. Bruce testified that, on one occasion, Shields began beating a banana on his desk, and when he jumped up and slammed the banana into the trash, Bruce thought he would hit her. Afterwards, Shields was shaking and said “I’m sick.”

Bruce also told of an occasion when Shields entered Bruce's office and went into a rage because Davis had left her purse on a chair and Bruce had placed her umbrella on a filing cabinet in the office. Shields yelled and screamed for Bruce to clean up her office. Shields yelled, "If you don't get things picked up in this office, you will not be working for me." He later said that Bruce and Davis would be sent to the unemployment line and "could be replaced by two Kelly girls" that were twenty years old. On another occasion, Shields came up behind Bruce and said, "You're going to be in the unemployment line." Once he told Bruce that he had been sent to Nash to fire her. Another time, he typed "quit" on his computer and said, "That's what you can do." Davis testified that Shields threatened to "get them" for complaining about his behavior. And both Bruce and Martin testified that Shields had stated that "he was in a position to get even for what [the employees] had done."

Bruce also testified that Shields called her into his office every day and would have her stand in front of him, sometimes for as long as thirty minutes, while Shields simply stared at her. Bruce was not allowed to leave Shields's office until she was dismissed, even though Shields would periodically talk on the phone or read papers. This often occurred several times a day. Bruce testified that it made her nauseated and intimidated her. On one occasion, Shields backed Bruce into a corner, leaned over her, and said, "Rumor has it that you know how to get anything you want out here." During an annual review, Shields said to Bruce, "You're mean and you're deadly, very deadly." Davis also testified that Shields would stand over her desk and stare at her.

Shields required Bruce and Davis, both general clerks at GTE, to purchase vacuum cleaners with company funds and to vacuum their offices daily, despite the fact that the company had a cleaning service that performed janitorial services such as vacuuming. The purpose of this seemed not to clean, but to humiliate. Bruce testified that she was ridiculed by other employees. Shields also yelled and screamed when he discovered a spot on the carpet; he made Bruce get on her hands and knees and clean the spots while he stood over her yelling. Poelstra testified that Shields required her to clean tobacco stains from a wall in the warehouse. Poelstra testified that, after she forgot her paperwork for a driving test, Shields ordered her to wear a post-it note on her shirt that said, "Don't forget your paperwork." Other witnesses corroborated the employees' testimony about Shields's conduct.

In considering whether the evidence establishes more than an ordinary employment dispute, we will also address GTE's argument that because none of Shields's acts standing alone rises to the level of outrageous conduct, the court of appeals erred in holding that, considered cumulatively, the conduct was extreme and outrageous.

[T]he employees demonstrated at trial that Shields engaged in a course of harassing conduct directed at each of them, the totality of which caused severe emotional distress. It is well recognized outside of the employment context that a course of harassing conduct may support liability for intentional infliction of emotional distress. In such cases, courts consider the totality of the conduct in determining whether it is extreme and outrageous.

Similarly, in the employment context, courts and commentators have almost unanimously recognized that liability may arise when one in a position of authority engages in repeated or ongoing harassment of an employee, if the cumulative quality and quantity of the harassment is extreme and outrageous.

....

We agree with the overwhelming weight of authority in this state and around the country that when repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous. Accordingly, we hold that the court of appeals did not err in doing so.

We now consider whether Shields's conduct, taken as a whole, amounts to extreme and outrageous conduct. "It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery . . . ." When reasonable minds may differ, however, it is for the jury, subject to the court's control, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. Restatement (Second) of Torts § 46 cmt. h. To support liability for intentional infliction of emotional distress, it is not enough that the defendant has acted with an intent that is tortious, malicious, or even criminal, or that he has intended to inflict emotional distress. *Id.* § 46 cmt. d. Although the defendant's intent is relevant, the conduct itself must be extreme and outrageous to support liability.

...

We recognize that, even when an employer or supervisor abuses a position of power over an employee, the employer will not be liable for mere insults, indignities, or annoyances that are not extreme and outrageous. But Shields's ongoing acts of harassment, intimidation, and humiliation and his daily obscene and vulgar behavior, which GTE defends as his "management style," went beyond the bounds of tolerable workplace conduct. The picture painted by the evidence at trial was unmistakable: Shields greatly exceeded the necessary leeway to supervise, criticize, demote, transfer, and discipline, and created a workplace that was a den of terror for the employees. And the evidence showed that all of Shields's abusive conduct was common, not rare. Being purposefully humiliated and intimidated, and being repeatedly put in fear of one's physical well-being at the hands of a supervisor is more than a mere triviality or annoyance.

Occasional malicious and abusive incidents should not be condoned, but must often be tolerated in our society. But once conduct such as that shown here becomes a regular pattern of behavior and continues despite the victim's objection and attempts to remedy the situation, it can no longer be tolerated. . . . Conduct such as being regularly assaulted, intimidated, and threatened is not typically encountered nor expected in the course of one's employment, nor should it be accepted in a civilized society. . . . Accordingly, the trial court properly submitted the issue to the jury, and there was some evidence to support the jury's conclusion that Shields's conduct was extreme and outrageous.

#### B. Intent

[Under the doctrine of vicarious liability, it is not necessary that GTE acted with the requisite intent. "If the intentional tort is committed in the accomplishment of a duty entrusted to the employee, rather than because of personal animosity, the employer may be liable. Shields's acts, although inappropriate, involved conduct within the scope of his position as the employees' supervisor."]

...

### C. Severe Emotional Distress

GTE next contends that any distress the employees suffered was not severe. GTE argues that the employees' complaints of embarrassment, fear, stomach aches, loss of sleep, and headaches "are problems that are normally dealt with by each of us in every day life."

Emotional distress includes all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry. Severe emotional distress is distress that is so severe that no reasonable person could be expected to endure it. The employees testified that, as a result of being exposed to Shields's outrageous conduct, they experienced a variety of emotional problems, including crying spells, emotional outbursts, nausea, stomach disorders, headaches, difficulty in sleeping and eating, stress, anxiety, and depression. The employees testified that they experienced anxiety and fear because of Shields's continuing harassment, especially his charges and rages. Each employee sought medical treatment for these problems, and all three plaintiffs were prescribed medication to alleviate the problems. An expert witness testified that each of them suffered from post-traumatic stress disorder. This evidence is legally sufficient to support the jury's finding that the employees suffered severe emotional distress.

....

.... We conclude that there is legally sufficient evidence to support the jury's verdict against GTE on each of the employees' claims for intentional infliction of emotional distress. ... [W]e affirm the court of appeals' judgment.

### Notes

1. *What constitutes "extreme and outrageous conduct."* Although the plaintiffs in the GTE case succeeded in convincing a jury that the conduct in question was "extreme and outrageous," it was not a sure thing. Indeed, one member of the Texas Supreme Court (Justice Priscilla Owen) declined to join the majority's opinion because of concerns about the way the majority characterized the conduct at issue. Actions such as screaming at employees while telling them to do things or threatening employees with firing may have been experienced as "humiliating and degrading" but it was simply "not a basis for sustaining a cause of action for intentional infliction of emotional distress," Justice Owen insisted. 998 S.W.2d 605, 620-21 (Owen, J., concurring).

Many other plaintiffs have, in fact, struggled to establish the element of "extreme and outrageous" conduct. A famous example is *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), in which Paula Jones sued then-president Bill Clinton for claims arising from his alleged conduct toward her in 1991, when he was Governor of Arkansas and she was a state employee. According to Jones, Clinton invited her to his hotel room, where, after referencing his close friendship with Jones's immediate supervisor, he made several unwelcome sexual advances. These allegedly included putting his hand on her leg and "sliding it toward her pelvic area" and, after Jones clearly signaled her disinterest, exposing and "fondling" his erect penis while

talking to her. *Id.* at 663-64. Jones alleged that in the weeks after the incident, in the course of her job, she had several distressing encounters with Clinton and with the bodyguard who had originally escorted her to Clinton's hotel room, including a request for her phone number; she also claimed that her work environment became hostile. *Id.* at 665. In dismissing Jones's IIED claim, the court characterized the alleged conduct as "a mere sexual proposition or encounter, albeit an odious one, that was relatively brief in duration, did not involve any coercion or threats of reprisal, and was abandoned as soon as plaintiff made clear that the advance was not welcome." *Id.* at 677. The court's language is reminiscent of Professor (later Judge) Calvert Magruder's statement of the law in 1936: that when it came to men soliciting sex from women, courts apparently saw "no harm in asking." Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936). Given the current prevalence of conversations about unwelcome sexual conduct and imbalances of power, do you think the *Jones* case would come out differently today? Or would the #MeToo movement's many revelations about abuses of power by prominent men cause these facts to appear even less "extreme and outrageous"? Can a set of facts that is common nonetheless be "extreme and outrageous"?

On the other side of the ledger are cases such as *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000), where the court recounted the following alleged facts, involving a woman driving alone down a highway:

. . . . As [plaintiff Morgan] continued toward her home . . . the problems with her automobile worsened. She was no longer able to drive more than five miles per hour, so she began traveling on the shoulder.

As she was making her way, Mack Anthony, whom she had never before seen, pulled in front of her in his pickup. At that point, Morgan's vehicle died. Anthony got out of his truck, approached Morgan's car on the passenger side, and opened the door. He asked if she was having trouble, to which she responded yes, but she told Anthony that her husband, who was a mechanic, or her father was on the way to help her. She thanked Anthony and tried to shut her car door, but he held it open. Anthony then made a statement to the effect that Morgan's husband might not be "taking care of [her] in the car department" and implied that her husband might not be "taking care of her" in other areas of her life. Anthony then said that maybe he could "help [her] in another area." She replied no, that she was a happily married woman and asked Anthony to please let her shut the car door. Anthony responded that he did not live very far away and suggested that Morgan follow him so that he could fix her car "and anything extra that [she] needed."

Morgan continued her efforts to pull her car door closed, but Anthony continued to hold it open. She repeatedly asked him to let her shut her door, but he refused. During most of this exchange, Anthony was leaning into the car with one hand on the dashboard, and he stared between Morgan's legs and at her breasts. When he stepped back, with only one hand on the car door, Morgan was able to shut and lock it. Morgan made numerous attempts to restart her car as Anthony stood outside the passenger window saying things such as "come on baby, open the door." Morgan's car eventually did restart

and she drove off, but she again could not get her car to go faster than five miles per hour.

According to Morgan, Anthony continued to follow her down the highway, variously pulling in front of her, blocking her access to the shoulder of the road, and, when her vehicle was stopped or debilitated, approaching her vehicle to make comments, even after she explicitly conveyed to him her fear. *Id.* at 929. This pattern broke only when Morgan at last saw a diner parking lot to turn into and got help from a family member. *Id.* at 930. Here, the court had “no difficulty” finding evidence of conduct that was sufficiently outrageous to survive a motion for summary judgment. *Id.* at 931; *see also State ex. rel Halsey v. Phillips*, 576 S.W.3d 177 (Mo. 2019) (holding that the plaintiff police department analyst stated a valid claim for IIED against her supervisor, the Deputy Chief of Police, when she alleged that he asked her to send him naked pictures of herself, sent her pictures of a naked woman, “placed his hands on [her] buttocks and pulled her into his erect penis,” and “placed his erect penis near her face while at work”).

There is also a broad swath of territory somewhere in the middle, where courts have reached seemingly conflicting conclusions and only context can explain the outcomes. For example, in *Hoard v. Shawnee Medical Center*, 662 P.2d 1214 (Kan. 1983), and *Peddycoat v. Birmingham*, 392 So.2d 536 (Ala. 1980), erroneous statements to plaintiffs that their children had died, in horrifying ways, did not amount to conduct that was sufficiently extreme and outrageous to sustain a claim for IIED. In *Dunbar v. Strimas*, 632 S.W.2d 558 (Tenn. Ct. App. 1982), by contrast, the court held that the plaintiff parents did state a claim of IIED where they alleged that a medical examiner, on the basis of no valid evidence, informed them that their deceased nineteen-month-old daughter (found dead in her crib at a relative’s house while her mother was hospitalized giving birth to a second child) showed signs of being sexually abused. In *Berian v. Berberian*, 483 P.3d 937, 951 (Idaho 2020), the court reversed a grant of summary judgment in favor of the defendant where the plaintiffs’ IIED claim was based on allegations that the defendant “ma[de] numerous, unsubstantiated allegations of [plaintiffs’] criminal wrongdoing” to law enforcement authorities. By contrast, in *Zsigray v. Langman*, 842 S.E.2d 716, 727 (W.Va. 2020), the court found that a fast-food worker’s decision to report a customer to the police after he “for a second time used inappropriate and aggressive language towards her” when ordering food, resulting in the plaintiff customer’s arrest and (unsuccessful) prosecution, did not rise to the level of “extreme and outrageous” conduct. In Alabama, where IIED is referred to as the tort of “outrage,” a plaintiff survived a motion to dismiss where she alleged that the doctors treating her mother for colon cancer “made numerous and repeated tactless comments to [her and her mother] about [her mother’s] condition and her impending death,” including suggesting that her mother was wasting hospital resources. *Wilson v. Univ. of Ala. Health Services Found., P.C.*, 266 So.3d 674, 675 (Ala. 2017). By contrast, the Texas Supreme Court “conclude[d] as a matter of law” that the defendant contractor’s course of conduct toward the wife of a business associate was not extreme and outrageous when, during her husband’s terminal illness and immediately after his death, the defendant behaved in a manner that was “regularly insensitive, unreasonable, or otherwise wrongful” and sometimes “callous and uncaring,” including threatening to terminate contracts if she insisted on shutting down a worksite on the day of her husband’s funeral. *Tiller v. McClure*, 121 S.W.3d 709 (Tex. 2003).



One factor that helps make sense of seemingly conflicting outcomes is the perceived fragility of the plaintiff and whether the facts suggest that the defendant knew about the plaintiff's vulnerable state. As the Restatement authors explain, "the extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." Conduct that might not otherwise be considered "heartless, flagrant, and outrageous" may become so "when the actor proceeds in the face of such knowledge." RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

2. *Racist speech as "extreme and outrageous" conduct.* Courts have often deemed racial epithets insufficiently extreme and outrageous to support a claim of IIED. *See, e.g., Golden v. World Sec. Agency, Inc.*, 884 F. Supp. 2d 675 (N.D. Ill. 2012) (holding that a supervisor referring to an African-American employee as a monkey, sending a KKK-themed text with a depiction of a noose to another employee, and using racial slurs on a nearly daily basis was not sufficiently extreme and outrageous); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (holding that a supervisor's reference to an employee as a "Mexican" and a "wetback" did not support an IIED claim); *Leibowitz v. Bank Leumi Trust Co. of New York*, 548 N.Y.S.2d 513, 521 (N.Y. App. Div. 1989) (holding that an employer who repeatedly used derogatory terms against a Jewish employee was not liable for IIED because, although the use of terms such as "hebe" and "kike" was condemnable, it was merely "meanspirited" and "annoying"); *Dawson v. Zayre Dept. Stores*, 499 A.2d 648, 649 (Pa. Super. Ct. 1985) (holding that when an employee of the defendant store referred to the plaintiff customer using a racial epithet, this "conduct merely constitute[d] insulting namecalling from which no recovery may be had"); *Bradshaw v. Swagerty*, 563 P.2d 511 (Kan. 1977) (describing as "mere insults" defendant's alleged use of the terms "bastard," "knot-headed boy," and a racial epithet to refer to the plaintiff and therefore holding that summary judgment for the defendant was appropriate). When courts have treated racial insults as a colorable foundation for an IIED claim, the alleged facts have tended to include other discriminatory actions. *See, e.g., Lathrope-Olson v. Oregon Department of Transportation*, 876 P.2d 345 (Or. Ct. App. 1994) (holding that summary judgment in favor of a defendant employer was inappropriate where the plaintiff employee alleged sexual harassment, threats of physical violence, and the use of a derogatory term for a Native American woman); *Ledsinger v. Burmeister*, 318 N.W.2d 558 (Mich. Ct. App. 1982) (holding that the plaintiffs had a viable IIED claim where they alleged that the defendant merchant used racially derogatory terms while ejecting them from a commercial establishment).

Professor Tasnim Motala argues that this is one area of law where reliance on precedent is especially problematic, because doing so further entrenches the ideas that racist language is inevitable and that its targets must simply endure it. Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes toward Racist Speech*, 56 HARV. CIV. RTS.-CIV. LIB. L. REV. 115, 118 (2021). In fact, she contends, the use of "[r]acist language . . . is the sort of conduct that IIED was created to address": "by its definition, [it] weaponizes a history of oppression, dehumanization, and pernicious stereotypes against racial minorities." *Id.* Professor Motala argues that in analyzing whether the use of such language is extreme and outrageous, courts should anchor their assessments in society's current understanding of outrage: "[w]hile racist language might have been tolerable forty or fifty years ago, today, society widely deems this same language intolerable." *Id.* at 139.

3. *What constitutes severe emotional distress?* Plaintiffs in IIED cases must not only clear the high bar of outrageousness but must also prove that the distress they experienced was sufficiently severe. Proving severe emotional distress can be especially challenging when the plaintiff has not responded to the defendant's conduct in the way a judge or jury finds intuitive. For example, in the *Jones v. Clinton* case referenced above, the court declined to credit the expert report Jones submitted regarding the psychological and emotional impact of Clinton's alleged behavior while treating as significant evidence that Jones "never missed a day of work following the alleged incident"; continued to work at her job for another nineteen months, even though it required her to "go on a daily basis to the Governor's Office to deliver items"; and never formally reported the incident to a supervisor. 990 F. Supp. at 678.

The Supreme Court of Alabama was similarly skeptical of the plaintiff's claim of severe distress in *Grantham v. Vanderzyl*, 802 So.2d 1077 (Ala. 2001), where the plaintiff nurse alleged that, during a surgical procedure, the defendant surgeon intentionally threw at her a "surgical drape[] containing the patient's blood and surgical refuse," after "ma[king] a remark to the effect that [she] lacked the appropriate training"; the incident left "blood and fluids on [the plaintiff's] face," the defendant conceded, and led to six separate rounds of blood tests (all negative) for "HIV, hepatitis, and other communicable diseases." The Alabama Supreme Court agreed with the trial court that even if all the allegations were true, the plaintiff had no viable claim for "outrage" (as IIED is called in Alabama). Although a hospital supervisor allegedly told the plaintiff to "consider herself HIV-positive and to adapt her lifestyle accordingly," the plaintiff was never actually "in danger of contracting a communicable disease," the court noted, and so had no "basis in fact" for the fearful response she claimed. *Id.* at 1079, 1081.

For an example of circumstances that were found to satisfy the "severity" bar, consider *Roth v. Weise*, 716 N.W.2d 419 (Neb. 2006). Plaintiff Leslie Roth sought damages from her paternal uncle Gary Weise for the emotional distress he allegedly inflicted on her after she disclosed that he sexually abused her decades prior, when she was a child. Weise appealed a jury verdict in Roth's favor, claiming that the emotional distress she alleged was insufficiently severe. The Nebraska Supreme Court refused to overturn the verdict on this ground, citing evidence in the record that after Weise initially contacted Roth about her disclosure of the abuse, she "had trouble sleeping, had nightmares, became fearful of her children going out, bought a gun, and relocated to a new home." The court also cited expert testimony establishing diagnoses of posttraumatic stress disorder and chronic depression, as well as "evidence that [Roth] began using alcohol on a daily basis, that she began sleeping after work and failing to interact with her family, and that her income suffered due to an inability to concentrate." *Id.* at 433.

Complicating these inquiries is the language found in the Restatement, which many jurisdictions look to as their guide on severity: "[S]ome degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (emphasis added). What are the implications of such language in a society with a well-recognized gender gap in the experience and expression of particular emotions and with a cultural tendency to cast women as overly emotional? Changing "reasonable man" to "reasonable person," as many jurisdictions have done, facially eliminates gender from the standard, but does it address the gender (and other) biases that factfinders might bring with them when they evaluate a particular plaintiff's alleged

distress? For a survey of sociological research on gender differences in the experience and expression of emotions, see Robin W. Simon, *Sociological Scholarship on Gender Differences in Emotion and Emotional Well-Being in the United States: A Snapshot of the Field*, 6 AM. J. Soc. 196 (2014).

The Restatement language presents still another puzzle: What work does the word “reasonable” do here? Does it signal the uncompensability of sincerely felt but objectively unreasonable distress? Or might it instead create space for uniquely sensitive plaintiffs to recover, so long as they offer enough evidence of their subjective experience of distress to make that experience cognizable to the factfinder, who can then test it out on the fictitious “reasonable man”?

4. *Intentionality.* A successful claim of IIED also requires a showing that the defendant acted with a particular mental state. In the words of the Restatement, the extreme and outrageous conduct must have been done “intentionally or recklessly.” RESTATEMENT (SECOND) OF TORTS § 46 (1965). We have previously covered the word “intentionally,” in our discussion of battery. A person acts “recklessly,” according to the Restatement, if “(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (2010). An example of conduct that could fairly be deemed reckless, if not intentional, can be found in *Golston v. Lincoln Cemetery, Inc.*, 573 S.W.2d 700 (Mo. Ct. App. 1978), where the defendant funeral director's carelessness resulted in a woman's remains being buried in a shallow grave, rather than in the contracted-for vault, and where heavy equipment then uncovered her body, parts of which the plaintiff relatives of the decedent could see when they visited her grave site.

## C. Defenses to Intentional Torts

When a plaintiff alleges that a defendant has committed an intentional tort, a defendant may respond in at least two ways. One is by attacking the plaintiff's *prima facie* case, such as by denying that the plaintiff can establish a required element. Where the defendant successfully undercuts the plaintiff's showing of intent, for example, any of the intentional torts claims we discuss will fail. A second response is to raise an “affirmative defense”—an argument that the defendant's apparently tortious conduct was legally justified or privileged.

### 1. Self-Defense

***Courvoisier v. Raymond*, 47 P. 284 (Colo. 1896)**

HAYT, C.J.

It is admitted, or proven beyond controversy, that appellee received a gunshot wound at the hands of the appellant . . . , and that, as the result of such wound, the appellee was seriously injured. It is further shown that the shooting occurred under the following

circumstances: That Mr. Courvoisier, on the night in question, was asleep in his bed, in the second story of a brick building, situate[d] at the corner of South Broadway and Dakota streets, in South Denver; that he occupied a portion of the lower floor of this building as a jewelry store. He was aroused from his bed, shortly after midnight, by parties shaking or trying to open the door of the jewelry store. These parties, when asked by him as to what they wanted, insisted upon being admitted, and, upon his refusal to comply with this request, they used profane and abusive epithets towards him. Being unable to gain admission, they broke some signs upon the front of the building, and then entered the building by another entrance, and, passing upstairs, commenced knocking upon the door of a room where defendant's sister was sleeping. Courvoisier partly dressed himself, and, taking his revolver, went upstairs, and expelled the intruders from the building. In doing this he passed downstairs, and out on the sidewalk, as far as the entrance to his store, which was at the corner of the building. The parties expelled from the building, upon reaching the rear of the store, were joined by two or three others. In order to frighten these parties away, the defendant fired a shot in the air; but, instead of retreating, they passed around to the street in front, throwing stones and brickbats at the defendant, whereupon he fired a second, and perhaps a third, shot. The first shot fired attracted the attention of plaintiff, Raymond, and two deputy sheriffs, who were at the tramway depot across the street. These officers started towards Mr. Courvoisier, who still continued to shoot; but two of them stopped, when they reached the men in the street, for the purpose of arresting them, Mr. Raymond alone proceeding towards the defendant, calling out to him that he was an officer, and to stop shooting. Although the night was dark, the street was well lighted by electricity, and, when the officer approached him, defendant shaded his eyes, and, taking deliberate aim, fired, causing the injury complained of. The plaintiff's theory of the case is that he was a duly-authorized police officer, and in the discharge of his duties at the time; that the defendant was committing a breach of the peace; and that the defendant, knowing him to be a police officer, recklessly fired the shot in question. The defendant claims that the plaintiff was approaching him at the time in a threatening attitude, and that the surrounding circumstances were such as to cause a reasonable man to believe that his life was in danger, and that it was necessary to shoot in self defense, and that defendant did so believe at the time of firing the shot.

...

The next error assigned [the court had considered and rejected four other alleged errors] relates to the instructions given by the court to the jury, and to those requested by the defendant and refused by the court. The second instruction given by the court was clearly erroneous. The instruction is as follows: 'The court instructs you that if you believe, from the evidence, that, at the time the defendant shot the plaintiff, the plaintiff was not assaulting the defendant, then your verdict should be for the plaintiff.' The vice of this instruction is that it excluded from the jury a full consideration of the justification claimed by the defendant. The evidence for the plaintiff tends to show that the shooting, if not malicious, was wanton and reckless; but the evidence for the defendant tends to show that the circumstances surrounding him at the time of the shooting were such as to lead a reasonable man to believe that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of the plaintiff, and the defendant testified that he did so believe. He swears that his house was invaded, shortly after midnight, by two men, whom he supposed to be burglars; that, when ejected, they were joined on the outside by three or four others; that the crowd so formed assaulted him with stones and other missiles, when, to frighten them away, he shot into the air; that, instead of going away, some one approached him from the direction of the crowd; that he supposed this person to be one of the rioters, and did not ascertain that it was the plaintiff until after the shooting. He says

that he had had no previous acquaintance with plaintiff; that he did not know that he was a police officer, or that there were any police officers in the town of South Denver; that he heard nothing said at the time, by the plaintiff or any one else, that caused him to think the plaintiff was an officer; that his eyesight was greatly impaired, so that he was obliged to use glasses; and that he was without glasses at the time of the shooting, and for this reason could not see distinctly. He then adds: "I saw a man come away from the bunch of men, and come up towards me, and as I looked around I saw this man put his hand to his hip pocket. I didn't think I had time to jump aside, and therefore turned around and fired at him. I had no doubts but it was somebody that had come to rob me, because, some weeks before, Mr. Wilson's store was robbed. It is next door to mine."

By this evidence two phases of the transaction are presented for consideration: *First*. Was the plaintiff assaulting the defendant at the time plaintiff was shot? *Second*. If not, was there sufficient evidence of justification for the consideration of the jury? The first question was properly submitted, but the second was excluded by the instruction under review. The defendant's justification did not rest entirely upon the proof of assault by the plaintiff. A riot was in progress, and the defendant swears that he was attacked with missiles, hit with stones, brickbats, etc.; that he shot plaintiff, supposing him to be one of the rioters. We must assume these facts as established in reviewing the instruction, as we cannot say that the jury might have found had this evidence been submitted to them under a proper charge. By the second instruction, the conduct of those who started the fracas was eliminated from the consideration of the jury. If the jury believed, from the evidence, that the defendant would have been justified in shooting one of the rioters, had such person advanced towards him, as did the plaintiff, then it became important to determine whether the defendant mistook plaintiff for one of the rioters; and, if such a mistake was in fact made, was it excusable, in the light of all the circumstances leading up to and surrounding the commission of the act? If these issues had been resolved by the jury in favor of the defendant, he would have been entitled to a judgment. *Morris v. Platt*, 32 Conn. 75; *Patten v. People*, 18 Mich. 318; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; *Higgins v. Minaghan*, 76 Wis. 298, 45 N. W. 127. The opinion the first of the cases above cited contains an exhaustive review of the authorities, and is very instructive. The action was for damages resulting from a pistol-shot wound. The defendant justified under the plea of self-defense. The proof for the plaintiff tended to show that he was a mere bystander at a riot, when he received a shot aimed at another; and the court held that, if the defendant was justified in firing the shot at his antagonist, he was not liable to the plaintiff, for the reason that the act of shooting was lawful under the circumstances. Where a defendant, in a civil action like the one before us, attempts to justify on a plea of necessary self-defense, he must satisfy the jury, not only that he acted honestly in using force, but that his fears were reasonable under the circumstances, and also as to the reasonableness of the means made use of. In this case, perhaps, the verdict would not have been different, had the jury been properly instructed; but it might have been, and therefore the judgment must be reversed.

### Notes

1. *Reasonable errors in self-defense*. Why should innocent third parties bear the costs of another person's mistaken self-defense? Since at least *Morris v. Platt*, discussed in the *Courvoisier* opinion, American courts have adopted the view that a defendant may not be held

liable for injuries caused by mistaken self-defense, so long as the mistake was reasonable. Other legal systems, however, have allowed injured persons to hold defendants liable under these circumstances, allocating mistake costs to the mistaken self-defender himself. The Roman law rule, for example, provided that:

Those who do damage because they cannot otherwise defend themselves are blameless; for all laws and all legal systems allow one to use force to defend oneself against violence. But if in order to defend myself I throw a stone at my attacker and I hit not him but a passerby I shall be liable under the *lex Aquilia*; for it is permitted only to use force against an attacker.

1 THEODOR MOMMSEN & ALAN WATSON EDS., *THE DIGEST OF JUSTINIAN* 9.2.45.4, at p. 292 (1985). Today's German law adopts a similar approach. See RAYMOND YOUNGS, ENGLISH, FRENCH & GERMAN COMPARATIVE LAW 472-73 (2d ed. 2007). The French adopt the *Courvoisier* approach. Jean Limpens, Robert M. Kruithof & Anne Meinertzhagen-Limpens, *Liability for One's Own Act*, in 11 INT'L ENCYCLOPEDIA OF COMPARATIVE L., 2-1, 2-171 (André Tunc ed., 1983).

In the United Kingdom, the House of Lords recently indicated its inclination to adopt the Roman law rule of strict liability for mistaken self-defense, regardless of whether the defendant's beliefs and actions were reasonable under the circumstances. A majority of the Lords of Appeal in the case affirmed their agreement with the opinion of Lord Scott, who asserted that the correct principle would be that "in order to establish the relevant necessity the defendant must establish that there was in fact an imminent and real risk of attack." *Ashley v. Chief Constable of Sussex Police*, [2008] UKHL 25, 1 A.C. 962, para. 16-19. Because the issue was not squarely posed, the Lords of Appeal did not decide the issue definitively.

On the other hand, the criminal law—and at least one U.S. jurisdiction's tort law—adopts a standard for self-defense that substantially vindicates a defendant whether the defendant's belief in the necessity of self-defense is reasonable or not. Under this approach, so long as the defendant has a subjectively authentic belief in the threat of an attack, the defendant is privileged to respond with appropriate force without risking prosecution for any crime in which intent is a requirement. (A defendant in such circumstances may nonetheless be liable for those crimes for which proof of recklessness is sufficient.). Delaware (possibly alone among the states) limits tort liability in self-defense cases to instances in which the defendant is found to have had intent sufficient to sustain a criminal conviction for intentional crimes. See *Moor v. Ricciardello*, 463 A.2d 268, 270-71 (Del. 1983).

Which is the better approach? The American one? The Roman law rule, which now seems likely to become the British rule as well? Or the criminal law standard? Why does the criminal law approach differ from the usual common law rule for civil liability?

2. *Reasonable escalation.* Defense of oneself permits a person to use reasonable force to defend against an unprivileged act by another, or the threat of an imminent unprivileged act by another, which the person reasonably believes will cause them harm. A key limit here is that the force used in self-defense must be "reasonable."

In *Martin v. Yeoham*, 419 S.W.2d 937 (Mo. App. 1967), for example, the court held that a defendant's apprehension of bodily harm alone would not have justified the use of deadly force; only apprehension of "imminent danger of death or great bodily harm" would have warranted the use of a firearm in defense against the perceived threat. The basic test is whether the defendant's use of force was necessary given all the attendant facts and circumstances. As the Connecticut Supreme Court put it, "The permissible degree of force used in self-defense depends on that which is necessary, under all the circumstances, to prevent an impending injury." *Hanauer v. Coscia*, 244 A.2d 611, 614 (Conn. 1968).

In English law, and according to the Restatement authors, the necessity standard, properly understood, includes an obligation to retreat before using deadly force if retreat is possible. See RESTATEMENT (SECOND) OF TORTS § 63 (1965). This is the doctrine known as the "retreat to the wall" rule. A number of American states, however, follow the so-called "true man" or "stand your ground" rule, which allows the use of deadly force in response to imminent danger of death or great bodily harm, even when the alternative of retreat exists. See, e.g., *Boykin v. People*, 45 P. 419 (Colo. 1896). Some states have even extended the stand-your-ground approach to allow deadly force in self-defense without an obligation to make an available retreat by a person who is himself a trespasser at the time. See, e.g., *People v. Toler*, 9 P.3d 341 (Colo. 2000). The Restatement authors, by contrast, insist that such a duty to retreat will sometimes require that a person surrender certain privileges to an attacker, or comply with certain demands by an attacker, if doing so offers an alternative to the use of deadly force. See RESTATEMENT (SECOND) OF TORTS § 65 (1965). On the other hand, virtually all authorities agree that at one's own dwelling, a person is not obliged to retreat before using deadly force. See *Beard v. United States*, 158 U.S. 550, 563-64 (1895) (when defendant was at his dwelling he was "not obliged to retreat . . . but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way . . . as . . . he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to . . . protect himself from great bodily injury").

What are the considerations in favor of the Restatement's "retreat to the wall" approach as opposed to the majority "true man" approach? (Note that the doctrinal labels themselves seem slanted heavily toward the latter, in a clumsily gendered way.) Why does the Restatement view carve out the home as a special no-retreat-required zone? Is defending one's home somehow more worthy of respect than, say, defending one's family or one's business or one's neighbors?

3. *Race and self-defense.* "Stand your ground" laws faced renewed public scrutiny after the death of a seventeen-year-old African-American named Trayvon Martin in Florida in 2012. Martin was walking back to the house where he was staying (after going out to a local 7-Eleven to buy Skittles and an iced tea) when a neighborhood watch member named George Zimmerman deemed him "suspicious." During a subsequent confrontation, Zimmerman shot the unarmed black teen to death. Zimmerman's "suspicions," according to Martin's family and in the eyes of many critics, had everything to do with Martin's race. In Zimmerman's criminal trial, the trial judge instructed the jury that Florida's 2005 "stand your ground" law provided that Zimmerman had no duty to retreat before using deadly force in self-defense as long as he was attacked in a place where he had a lawful right to be. The jury found Zimmerman not guilty.

Critics argue that one problem with the “stand your ground” principle is the apparent racial disparity of its impact. Psychological research on implicit bias finds that in simulation shooting studies, “participants are faster and more accurate when shooting an armed black man than an armed white man, and faster and more accurate when responding ‘don’t shoot’ to an unarmed white man than an unarmed black man.” Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1007 (2007). The Urban Institute released a study in 2013 that found “with respect to race, controlling for all other case attributes, the odds a white-on-black homicide is found justified is 281 percent greater than the odds a white-on-white homicide is found justified. By contrast, a black-on-white homicide has barely half the odds of being ruled justifiable relative to white-on-white homicides.” JOHN K. ROMAN, URBAN INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA (2013). One view is that the law of self-defense affords justifications to actors seeking to defend white spaces against non-white actors. See generally Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113 (2017).

How should the “reasonableness” standard be applied in view of such racial disparities?

4. *Defense of third parties.* A person is privileged to defend others, too—even strangers. Until the second half of the twentieth century, most courts held that the privilege of a person to defend another was no greater than the other’s right to defend himself. A person using force to defend another thus took the risk that the other was for some reason not privileged to use force in his own defense. If the other person, for example, was subject to lawful arrest and confinement, or if the attack on the other person was itself privileged as self-defense by some third party, it would follow that any use of force in his defense would not be privileged.

Since the 1960s, the rule has shifted. Today, “one who intervenes in a struggle between strangers under the mistaken but reasonable belief that he is protecting another who he assumes is being unlawfully beaten is thereby exonerated from criminal liability” —and from tort liability, too. *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).

Which of the two approaches is better? Why do you think we have seen a shift from one approach to the other?

## 2. *Defense of Real Property*

### *Bird v. Holbrook*, 130 Eng. Rep. 911 (C.P. 1825)

[Plaintiff was a nineteen-year-old boy who, seeing a young woman giving chase to a stray pea-hen, climbed the wall of a neighboring garden for the innocent purpose of retrieving the fowl, which belonged to the young woman’s employer and had flown over the wall and into the garden. The defendant, who leased the garden, used it to grow “valuable flower-roots,” including tulips “of the choicest and most expensive description.” He lived one mile from the garden but sometimes slept with his wife in a summer house on the garden grounds so as to better protect his tulips. Shortly before the incident at issue in the case, defendant had been robbed of flowers and roots in the value of about £20. To prevent further theft, the defendant



placed in the garden a spring gun loaded with gunpowder and buckshot and operated by wires stretching across the garden's paths in three or four locations. Defendant posted no notice of the spring gun, and though the wires were visible from the wall, the defendant conceded that the plaintiff did not see them. When the defendant told one or two people about the spring gun, he asked them not to tell others of its presence in the garden "lest the villain should not be detected." One witness testified that he (the witness) had urged the defendant to post a notice of the gun, but the defendant had answered that "he did not conceive that there was any law to oblige him to so." "The Defendant stated to the same person that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days." Plaintiff climbed the garden wall, which was nowhere higher than seven feet, between the hours of six and seven in the afternoon. "Having called out two or three times to ascertain whether any person was in the garden and waiting a short space of time without receiving any answer," the plaintiff jumped down into the garden and pursued the pea-hen into a corner near the summer house, where his foot came into contact with one of the wires close to the spot where the gun was set. The wire triggered the gun, which discharged a load of swan shot into the plaintiffs' knee, maiming him. After the case was tried at the Bristol assizes, plaintiff and defendant consented to enter a verdict for the plaintiff of £50, to be reserved pending the judgment of the Court of Common Pleas.]

Merewether Serjt. for the defendant. . . . Plaintiff cannot recover for an injury occasioned to him by his own wrongful act. . . . If a man place broken glass on a wall, or spikes behind a carriage, one who willfully encounters them, and is wounded, even though it were by night, when he could have no notice, has no claim for compensation. *Volenti non fit injuria* [no legally cognizable injury occurs with the consent of the victim]. The Defendant lawfully places a gun on his own property; he leaves the wires visible; he builds a high wall, expressly to keep off intruders; and if, under those circumstances, they are permitted to recover for an injury resulting from their scaling the wall, no man can protect his property at a distance.

Wilde in reply. . . . No illustration can be drawn from the use of spikes and broken glass on walls, &c. These are mere preventives, obvious to the sight,—unless the trespasser chooses a time of darkness, when no notice could be available,—mere preventives, injurious only to the persevering and determined trespasser, who can calculate at the moment of incurring the danger the amount of suffering he is about to endure, and who will, consequently, desist from his enterprise whenever the anticipated advantage is outweighed by the pain which he must endure to obtain it.

BEST, C.J. . . . It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as It has always been held to be, part of the law of England. I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that the contents should be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground. . . . As to the case of *Brock v. Copeland*, Lord Kenyon proceeded on the ground that the Defendant had a right to keep a dog for the preservation of

his house, and the Plaintiff, who was his foreman, knew where the dog was stationed. The case of the furious bull is altogether different; for if a man places such an animal where there is a public footpath, he interferes with the rights of the public. What would be the determination of the court if the bull were placed in a field where there is no footpath, we need not now decide; but it may be observed, that he must be placed somewhere, and is kept, not for mischief, but to renew his species; while the gun in the present case was placed purely for mischief. . . .

But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to withhold notice, lest, by affording it, he should fail to entrap his victim.

. . .

BURROUGH, J. The common understanding of mankind shews, that notice ought to be given when these means of protection are resorted to; and it was formerly the practice upon such occasions to give public notice in market towns. But the present case is of a worse complexion than those which have preceded it; for if the Defendant had proposed merely to protect his property from thieves, he would have set the spring guns only by night. The Plaintiff was only a trespasser: if the Defendant had been present he would not have been authorized even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly. . . . [N]o notice whatever was given, but the Defendant artfully abstained from giving it, and he must take the consequences.

### Notes

1. *Pea-fowls versus tulips*. Judge Richard Posner analyzes *Bird* as presenting a conflict between two economic activities:

The issue in the case, as an economist would frame it, was the proper accommodation of two legitimate activities, growing tulips and raising peacocks. The defendant had a substantial investment in the tulip garden; he lived at a distance; and the wall had proved ineffective against thieves. In an era of negligible police protection, a spring gun may have been the most cost-effective means of protection for the tulips. But since spring guns do not discriminate between the thief and the innocent trespasser, they deter owners of domestic animals from pursuing their animals onto other people's property and so increase the costs (enclosure costs or straying losses) of keeping animals. The court in *Bird* implied an ingenious accommodation: One who set a spring gun must post notices that he has done so. Then owners of animals will not be reluctant to pursue their animals onto property not so posted. A notice will be of no avail at night, but animals are more likely to be secured then and in any event few owners would chase their straying animals after dark.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 260-61 (8th ed. 2011). If this is the right way to think about *Bird v. Holbrook* (is it?), what explains the court's decision to place the obligation to avoid the conflict between the two activities on the tulip growers rather than on the pea-fowl farmers? The tulip grower has at least built a wall. Should the plaintiff be able to sue the pea-fowl farmer for the effects of his failure to keep the pea-fowl contained?

Note Judge Posner's reference to the negligible police protection of 1820s Great Britain. We no longer live in such an era—at least not in developed countries. Does this matter for the analysis? What about technological changes? Should spring guns or other dangerous traps be allowed even with notice in defense of private property now that inexpensive digital cameras promise the possibility of constant surveillance?

2. *Malicious traps.* The use of spring guns and other traps by property owners looking for an inexpensive way to defend their property—or to wreak private vengeance on thieves—has not disappeared in the modern era of policing. Such traps raise questions of both criminal law, which asks whether criminal punishment is appropriate, and tort law, which asks whether property-owners should be required to compensate for the injuries their traps cause, or should instead be treated as having engaged in justified self-defense.

Probably the most celebrated (and reviled) instance of the use of spring gun traps is *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971), near the beginning of the late-twentieth-century increase in crime rates. The issue before the court in *Katko* was whether an owner “may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.” After a series of break-ins to their vacant farmhouse over a ten year period—break-ins that had resulted in considerable property damage and the theft of household items—Mr. and Mrs. Briney decided to put a stop to the crimes once and for all. In June 1967, they supplemented the “no trespass” signs on the property with boards on the windows and doors and with a spring-loaded shotgun wired to fire when the door to a bedroom was opened.

In July 1967, a man named Katko entered the home to steal antique glass bottles and fruit jars he had found on an earlier visit. After loosening a board on the porch window, Katko entered the house with a companion and began to search it. On opening the north bedroom door, Katko triggered the shotgun trap that the defendants had set. The 20-gauge spring shotgun fired, striking Katko in the right leg above the ankle; much of his leg, including part of the tibia, was destroyed. Katko later entered a guilty plea to larceny, stating that he knew “he had no right to break and enter the house with the intent to steal.” The value of the jars and bottles was set at less than \$20 in value; Katko was later fined \$50 and paroled during good behavior from his 60-day jail sentence. The legal consequences for the Brineys were stiffer. When Katko brought suit for damages, the trial judge instructed the jury:

You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the human party is a trespasser and is in violation of the law himself.

The jury found for Katko and awarded him \$20,000 in compensatory damages and an additional \$10,000 in punitive damages. The Iowa Supreme Court upheld the verdict and approved the instruction, 183 N.W.2d 657, notwithstanding widespread protest, an angry dissent, and a nationwide fundraiser that netted some \$10,000 for the Brineys. Newspapers later reported that the Brineys sold 80 acres of their 120-acre farm in order to pay the judgment to Katko. When asked several years later whether he had any regrets, Mr. Briney replied: “There’s one thing I’d do different, though. . . . I’d have aimed that gun a few feet higher.” *Booby Trap Case in Iowa Takes New Turn*, CHI. TRIBUNE, Apr. 25, 1975, at 1.

Why was the spring shotgun an unjustifiable protection for the Brineys’ farmhouse? Does it matter that the defendants’ home was several miles from the scene? That neither Mr. Briney nor Mrs. Briney were present on the property at the time of the break-in? Under what conditions, if any, could the Brineys’ shotgun trap be considered a reasonable protection of property?

### 3. Defense of Chattels

#### ***Gortarez v. Smitty’s Super Valu*, 680 P.2d 807 (Ariz. 1984)**

FELDMAN, J.

Ernest Gortarez, age 16, and his cousin, Albert Hernandez, age 18, went to Smitty’s store on January 2, 1979, around 8:00 p.m. [In the automotive department, Hernandez selected and bought something known as a “power booster” for \$22.00, while Gortarez picked up a 59-cent vaporizer used to freshen the air in cars. Before leaving the store, Gortarez changed his mind, left the vaporizer near the check-out stand and left the store through an unattended check-out aisle. A clerk, not having seen Gortarez put down the vaporizer,] told the assistant manager and the security guard, Daniel Gibson, that “[t]hose two guys just ripped us off.” . . .

Gibson and Scott Miller, the assistant manager, along with two other store employees, then ran out of the store to catch the two young men as they were about to get inside their car in the parking lot. Miller went to the passenger side to intercept Gortarez, while Gibson went for Hernandez, who was about to open the car door on the driver’s side. Gibson said that he identified himself “as an officer” by showing his badge as he ran up to Hernandez. (Gibson was an off-duty police officer working as a security guard for Smitty’s.) Gibson told Hernandez: “I believe you have something you did not pay for.” He then seized Hernandez, put his arms on the car and began searching him. Hernandez offered no resistance even though Gibson did not ask for the vaporizer, nor say what he was looking for. In cross-examination, Gibson admitted that Hernandez did nothing to resist him, and, as Gibson searched him, Hernandez kept repeating that he did not have anything that he had not paid for.

Meanwhile, on the other side of the car, flanked by Miller, Gortarez saw Gibson grab Hernandez, push him up against the car, and search him. Gortarez was outraged at this behavior and used strong language to protest the detention and the search—yelling at Gibson to leave his cousin alone. According to Gortarez, he thought the men were looking for the vaporizer because he heard Gibson tell the others to watch out for the bottle, and to look under the car for the bottle. Gortarez testified that he told the men that Hernandez did not have the vaporizer—it was in the store. No one had stopped to check at the counter through which the

two exited, where the vaporizer was eventually found in one of the catch-all baskets at the unattended check-out stand.

Seeing Gibson “rousting” Hernandez, Gortarez came to the defense of his cousin, ran around the front of the car and pushed Gibson away. Gibson then grabbed Gortarez and put a choke hold around Gortarez’ neck until he stopped struggling. Both Hernandez and Gortarez testified that the first time that Gibson identified himself to them was after he had restrained Gortarez in a choke hold. There was testimony that Gortarez was held in the choke hold for a period of time even after Gortarez had advised the store employees that he had left the vaporizer in the store. When a carry-out boy told the store employees that he had found the vaporizer in a basket at the check-out stand, the two cousins were released.

Gortarez later required medical treatment for injuries suffered from the choke hold. Plaintiffs sued Smitty’s and Gibson for false arrest [and] false imprisonment . . . . The case was tried before a jury. At the close of all the evidence, the court directed a verdict for the defendants on the false imprisonment and false arrest count[s]. . . . The court of appeals affirmed, and plaintiffs petition this court for review. . . .

There is a limited privilege for an owner whose property has been wrongfully taken, while in fresh pursuit, to use reasonable force to recapture a chattel. An important caveat to this privilege is that the actor must be correct as to the facts which he believes grant him the privilege, and faces liability for damages resulting from any mistake, however reasonable. The force privileged must be reasonable under the circumstances, and not calculated to inflict serious bodily harm. Ordinarily, the use of any force at all will not be justified until there has been a demand made for the return of the property.

Thus, privileges for misdemeanor arrest traditionally available at common law recognize no privilege to arrest for ordinary “shoplifting.” Under this rule a shopkeeper who believed that a customer was shoplifting was placed in an untenable position. Either the shopkeeper allowed the suspect to leave the premises, risking the loss of merchandise, or took the risk of attempting to recapture the chattel by detaining the customer, facing liability for the wrongful detention if the person had not stolen merchandise.

As Prosser noted, shoplifting is a major problem, causing losses that range into millions of dollars each year. There have been a number of decisions which permit a business person for reasonable cause, to detain a customer for investigation. This privilege, however, is narrow: it is confined to what is reasonably necessary for its limited purpose, of enabling the defendant to do what is possible on the spot to discover the facts. . . .

Arizona has adopted the shopkeeper’s privilege by statute, which provides in pertinent part:

C. A merchant, or his agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting . . . for questioning or summoning a law enforcement officer.

D. Reasonable cause is a defense to a civil or criminal action against a peace officer, merchant or an agent or employee of such merchant for false arrest,

false or unlawful imprisonment or wrongful detention. A.R.S. § 13–1805 (emphasis supplied).

. . . Once reasonable cause is established, there are two further questions regarding the application of the privilege. We must ask whether the purpose of the shopkeeper’s action was proper (i.e., detention for questioning or summoning a law enforcement officer). The last question is whether the detention was carried out in a reasonable manner and for a reasonable length of time. If the answer to any of the three questions is negative, then the privilege granted by statute is inapplicable and the actions of the shopkeeper are taken at his peril. . . .

[The court concluded that while it could not say that the shopkeepers lacked reasonable cause or acted with an improper purpose, neither could it conclude that the detention was necessarily reasonable under the circumstances:]

There was no request that the two young men remain. No inquiry was made with regard to whether Hernandez had the vaporizer. Gibson testified that Hernandez gave no indication of resistance and made no attempt to escape. The possible theft of a 59-cent item hardly warrants apprehension that the two were armed or dangerous. There was, arguably, time to make a request to remain before Gibson seized Hernandez and began searching him. Also, there is no indication that such a request would *obviously* have been futile. The evidence adduced probably would have supported a finding that the manner of detention was unreasonable as a matter of law. At best, there was a question of fact; there was no support for the court’s presumptive finding that as a matter of law the detention was performed reasonably.

[T]he court erred in its findings with respect to both the purpose and manner of detention. This requires reversal and retrial. . . .

### Notes

1. *The recapture privilege.* In *Hodegeden v. Hubbard*, 18 Vt. 504 (1846), the plaintiff purchased a stove from defendants in exchange for a promissory note, making assurances of his creditworthiness. When the defendant-sellers “on the same day, and soon after the sale” learned of credible reports that the buyer-plaintiff’s assurances were false, and that he was irresponsible and a poor credit risk, they gave chase and caught up to him on the road to his home. Plaintiff drew a knife to defend himself, but was overcome by the defendants, who held him down and recaptured the stove. The court rejected plaintiff’s suit on the grounds that the defendants were privileged to recapture the stove:

To obtain possession of the property in question no violence to the person of the plaintiff was necessary, or required, unless from his resistance. It was not like property carried about the person, as a watch, or money, nor did it require a number of people to effect the object. The plaintiff had no lawful possession, nor any right to resist the attempt of the defendants to regain the property, of which he had unlawfully and fraudulently obtained the possession.

18 Vt. at 507-08. Critical to the shopkeeper's privilege is the requirement that the privilege be exercised (as the *Gortarez* court opinion indicated) "on the spot" or while in "fresh pursuit" of the purported shoplifters. What is the function of the "fresh pursuit" rule?

2. *Claims of right.* In *Kirby v. Foster*, 22 A. 1111 (R.I. 1891), Foster gave his bookkeeper, Kirby, a sum of money to be used as wages for other employees. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, and an additional \$50 that Kirby believed to have been wrongly deducted from his pay by Foster on a previous occasion. Kirby put this sum into his pocket, and returned the balance to Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants—Foster and his son—then seized the plaintiff, and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, which led to his suit. In his opinion, Judge Stiness rejected the defense that Foster was engaged in a privileged recapture of his money:

Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: *First*, possession by the owner; and, *second*, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence.

22 A. at 1112. Why does Kirby's claim of right in the money transform the legal situation from that of ordinary recapture of chattels?

#### 4. *Consent*

Consent is a "defense" in the sense that where the plaintiff has consented to the defendant's conduct, such conduct generally (but not always) loses its wrongful character and the plaintiff's intentional torts claim should fail.

***Mohr v. Williams*, 104 N.W. 12, 13-16 (Minn. 1905)**

BROWN, J.

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anaesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.

The trial in the court below resulted in a verdict for plaintiff for \$14,322.50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover . . . . The trial court denied the motion for judgment . . . . Defendant appealed . . . .

The . . . contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would



seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. [E]very person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery.

In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. . . .

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Order affirmed.

### Notes

1. *Consent or utility?* The operation was "in every way successful and skillfully performed." No one seems to have doubted that the surgeon adopted the prudent course of action once the operation had begun. Moreover, the surgeon even consulted with his patient's family doctor during the surgery. To have obtained permission from the patient herself would have required that she be brought out of anesthesia and then put back under, no easy feat at the time, and a procedure with considerable risks to the patient herself. Why would the court conclude that the undoubtedly correct surgical decision was nonetheless a battery on the plaintiff? Is this a wasteful decision, requiring future doctors and patients to expend unnecessary and foolish resources in time, money, and health?

2. *Identifying consent.* It is not always easy to identify when consent has taken place. Consider *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266 (Mass. 1891), in which a steerage passenger on the defendant's steamship brought an action for intentional tort alleging that defendant administered a contaminated vaccine without her consent. The plaintiff never said to anyone that she desired to be vaccinated. To the contrary, she told the ship's surgeon that she had already been vaccinated, though it had left no mark. On the other hand, the plaintiff waited in a line with 200 other women who were all vaccinated; the plaintiff presented her arm to the surgeon as the women before her had done; and the plaintiff used the vaccination card she received to gain admission to the United States at the port of Boston.

Writing for the court, Judge Knowlton held that the question of consent turned on a broad reading of the surrounding facts and circumstances:

In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings.

The court concluded about the women passengers that "[t]hey all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit." 28 N.E. at 273-74. How does the court's recognition of consent-by-conduct square with the kinds of concerns that motivate the consent requirement in the first place?

Note that the influential Restatement (Second) of Torts is consistent with the court's approach to consent in *O'Brien* (although a jury today might apply the law differently to the facts). The Restatement defines consent as "willingness in fact for conduct to occur"; such willingness "may be manifested by action or inaction and need not be communicated to the actor." RESTATEMENT (SECOND) OF TORTS § 892 (1979). Commentators today refer to this as "actual consent." The same section gives the identical effect to "apparent consent": "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." *Id.*

3. *Consent to allegedly tortious sexual conduct.* As discussed in Note 2, the influential Restatement (Second) of Torts employs a general definition of consent. Tort claims involving unwelcome sexual contact receive no special treatment. Consider the following illustration, which the Restatement authors include in the commentary following Section 892: "A, a young man, is alone with B, a girl, in the moonlight. A proposes to kiss B. Although inwardly objecting, B says nothing and neither resists nor protests by any word or gesture. A kisses B. A is not liable to B." RESTATEMENT (SECOND) OF TORTS § 892, cmt. c, illustration 3 (1979). B's conduct, in this hypothetical scenario, exemplifies "apparent consent."

The doctrine of apparent consent has proven controversial, to say the least. Professor Martha Chamallas, for example, contends that the "outdated and inhospitable doctrine of consent" is "a main obstacle to successful prosecution of a sexual battery or assault tort claim against [an] offender." Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 52 (2018).

It is also worth asking whether some groups of potential plaintiffs are particularly poorly served by the doctrine of apparent consent. Professor Elizabeth Adjin-Tettey contends that "the objective ascertainment of reasonable belief in consent" sounds neutral, but in application is likely to privilege the perspective that, historically, has enjoyed social and cultural dominance: that of white, heterosexual men. Elizabeth Adjin-Tettey, *Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Battery*, 39 U.B.C. L. REV. 3 (2006). For related reasons, this doctrine poses a risk for the very populations that are most vulnerable to sexual abuse. For example, what might an objective reasonableness inquiry mean for non-white women, who face well-documented racialized stereotypes about their sexual availability and sexual deviance? *Id.* What might it mean for plaintiffs whose key identity markers—such as disability, poverty, or gender non-conformity—leave them underrepresented among the legal decisionmakers who will apply this "reasonable belief" standard to their cases?

Where is the law headed? One might expect tort law to incorporate, eventually, the evolving norms on college campuses, where both school officials and some students have embraced the notion of “affirmative consent.” Under affirmative consent policies, sexual contact is presumed non-consensual unless and until the parties expressly agree to it. Such policies often go hand-in-hand with a skepticism towards expressions of consent given while an actor’s judgment is demonstrably impaired by drugs or alcohol. The authors of the Third Restatement (Intentional Torts to Persons) have attempted to address this difficult issue in a draft chapter on consent, which includes a specific section on consent to sexual conduct. RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 18 TD No 4 (2019). In the draft comments, the authors acknowledge the “social importance” of the issue and the apparent shift in norms toward an affirmative consent standard. *Id.* § 18 cmts. a & f. Ultimately, however, the authors decline to take a position on whether affirmative consent should be the standard for consent to sexual conduct in tort law and instead adopt a less controversial “no means no” approach to consent. *Id.* § 18 cmts. e & f. Under “no means no” policies, sexual contact is presumed consensual unless and until a party expresses an unwillingness to permit sexual contact. If the Third Restatement’s proposed approach to consent is widely adopted, how might this affect litigation over allegedly tortious sexual conduct? What are the advantages and disadvantages of this approach as compared to a standard of affirmative consent?

4. *Boilerplate consent.* Modern consent mechanisms in the medical care context are radically different from the informal inferences of *O’Brien*. Establishing consent in a medical context is now a matter of detailed medical paperwork. Consider the following excerpt from a standardized consent form at Yale-New Haven Hospital:

#### SECTION A

1. After discussing other options, including no treatment, with my doctor, I ask Dr. \_\_\_\_\_ and/or his/her partners to perform the following procedure(s):  
 \_\_\_\_\_  
*Name or description of operation(s), procedure(s) and/or treatment(s). Indicate applicable level, side, or site.* I understand that this procedure is for purposes of \_\_\_\_\_
2. I give permission to my doctor to do whatever may be necessary if there is a complication or unforeseen condition during my procedure.
3. My doctor has explained to me that some possible complications of the procedure(s) can include:
  - a. Bleeding; infection; accidental injury of other body parts; my condition returning or not being improved; or, possibly, death.
  - b. My doctor has discussed with me the additional risks listed below and their chances of happening. I do understand that other things can happen as well.

4. I agree to have anesthesia as necessary to perform the procedure(s). I understand that if an anesthesiologist is to be involved he/she will speak to me about the risks of anesthesia in more detail.
5. I understand that I may need to have a blood transfusion during or after the procedure(s). I understand that some risks of blood transfusions include: fever, allergic reaction, or getting an infectious disease. I agree to receive blood or blood products if my doctor decides it is necessary.
6. I give permission to the hospital to keep tissue, blood, body parts, or fluids removed from my body during the procedure and use them to make a diagnosis, after which they may be used for scientific research or teaching by appropriate persons within or outside the hospital. These materials will only be used for scientific research after review by an ethics board. I understand that I will no longer own or have any rights to these things regardless of how they may be used.
7. I understand that Yale-New Haven is a teaching hospital. Doctors who are in training may help my doctor with the procedure. My doctor will supervise these trainees and will be present at all important times during the procedure. I also understand that my doctor's associate(s), surgical assistants and/or other non-physicians or trainees may assist or perform parts of the procedure under my doctor's supervision, as permitted by law and hospital policy. If others who are not hospital staff will be present in the operating room, my doctor has spoken with me about this.
8. I understand the purpose and potential benefits of the procedure. My doctor has explained to me what results to expect, and the chances of getting those results. I understand that no promises or guarantees have been made or can be made about the results of the procedure(s).
9. I give permission to the hospital and the above-named doctor to photograph and/or videotape the procedure(s) for medical, scientific, or educational purposes.

Consent signed on \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ AM / PM

\_\_\_\_\_  
Signature of Patient or Guardian (Circle one)

\_\_\_\_\_  
Signature of Doctor Performing Procedure

\_\_\_\_\_  
Signature of Person Obtaining Consent

\_\_\_\_\_  
Printed Name

Do boilerplate consent forms of modern medical practice undo the decision in *Mohr*? Or do they vindicate it? What if the consent form said only the following: "I give permission to my

doctor to do whatever the doctor deems advisable for my health and wellbeing during my procedure.” Would this undo the decision in *Mohr*?

For a troubling example of the type of conduct that such a form might make consensual, legally speaking, consider the once common practice (now increasingly under scrutiny) at teaching hospitals of medical trainees performing pelvic exams on unconscious, anesthetized women patients, often solely for the purpose of educating the trainees. Such hospitals have also sometimes allowed medical trainees to practice rectal exams on patients undergoing prostate surgery. Defenders of these practices have advanced utilitarian arguments: such exams allow future doctors to gain and hone crucial skills, to the benefit of society. Phoebe Friesen, *Educational Pelvic Exams on Anesthetized Women: Why Consent Matters*, 32 *BIOETHICS* 298 (2018). Consider also the increasingly acknowledged phenomenon of “obstetric violence,” including unwanted surgical incisions, unnecessary resort to forceps and vacuum extractors, and physical restraint during the processes of labor and delivery. Elizabeth Kukura, *Obstetric Violence*, 106 *GEO. L.J.* 721 (2018). How should tort law address situations of this nature?

5. *Limitations on consent.* Not all manifestations of consent will prevent defendants from being held liable for the injurious consequences of their action. One set of situations where the effect of consent is limited is when the person who purportedly consented could not legally give that consent. The Restatement explains it this way: “To be effective, consent must be (a) by one who has the capacity to consent or by a person empowered to consent for him, and (b) to the particular conduct, or to substantially the same conduct.” *RESTATEMENT (SECOND) OF TORTS* § 892A (1979).

The Restatement also notes the existence of “conditional” or “restricted” consent, which “is effective only within the limits of the condition or restriction. And “[u]pon termination of consent its effectiveness is terminated,” too, “except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act.” *RESTATEMENT (SECOND) OF TORTS* § 892A (1979).

A final set of situations where the law will not honor what the defendant claims to be consent is where the facts suggest a lack of voluntariness. Thus, consent given under duress will not defeat a plaintiff’s claim to recovery for injury from an ostensibly consented-to action. *See* *RESTATEMENT (SECOND) OF TORTS* § 892B (1979). Courts take a similar approach to consent secured by false pretenses. The Restatement puts it this way: “If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other’s misrepresentation, the consent is not effective for the unexpected invasion or harm.” *RESTATEMENT (SECOND) OF TORTS* § 892B (1979).

6. *The psychology of consent.* Do we know involuntariness when we see it? Research by Roseanna Sommers and Vanessa Bohns has been invoked by some scholars to suggest that social pressures may turn requests for voluntary consent into occasions of coerced compliance. Sommers and Bohns report that when researchers conducting a laboratory study asked one

group of participants to unlock their password-protected smartphone and give the phone to an experimenter to search through while the participants waited in another room (*i.e.*, a highly intrusive request), the vast majority of participants complied; when researchers asked another group of participants whether a reasonable person would agree to such a request if hypothetically approached by the same researcher, the vast majority predicted that people would refuse and reported that they themselves would refuse the request. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962 (2019). What explains the gap between predicted performance and actual performance? If it is true that decisionmakers are not good at estimating the freedom, or lack of freedom, that another person feels when asked to permit an intrusion on their own interests, is this a reason to change the way the doctrine of consent currently operates? What might such a change look like?

### 5. Necessity

For cases of alleged trespass, tort law allows defendants to argue that their actions were necessary and therefore privileged. The following two cases present famous nuances arising from claims of necessity. Pay careful attention in each case to which party has asserted such a claim.

#### ***Ploof v. Putnam*, 71 A. 188 (Vt. 1908)**

MUNSON, J.

It is alleged as the ground on recovery that on the 13th day of November 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. . . .

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine. . . . In trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there damage feasant, and chased them towards the pound, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. . . . If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. . . . A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. . . . An entry upon land to save goods which are in danger of being lost or destroyed by water or

fire is not a trespass. . . . In *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. . . .

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. . . . One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity . . . . But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

. . .

Judgment affirmed and cause remanded.

***Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910)**

O'BRIEN, J.

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds

signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of \$500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift a way from it. . . . [T]hose in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was



incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In *Ploof v. Putnam*, 71 Atl. 188, 20 L. R. A. (N. S.) 152, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

LEWIS, J., dissenting.

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own. In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would

be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J., concurs herein.

### Notes

1. *The incomplete privilege of private necessity.* Under the privilege of necessity, a defendant is permitted to commit what would otherwise be an intentional tort to another's rights in property or realty to protect a more valuable interest in property or an interest in bodily security or life. See RESTATEMENT (SECOND) OF TORTS §§ 196, 197, 262, 263 (1965). Where the more valuable interest belongs to a large number of persons, as for example, where a city must be saved from a fire, the privilege may be deemed one of *public* necessity, and the defendant will owe no compensation for any damage that occurs in reasonable exercise of the privilege. See *id.* §§ 196, 262. However, where the more valuable interest belongs only to the defendant or a small number of persons, the privilege is classified as a case of private necessity, and in suits by a party injured by the invasion, courts will require that the taker pay compensation for the harm caused by the invasion. See *id.* § 197(2); § 263(2) & cmt. e. The privilege of private necessity is thus an incomplete privilege (while the privilege of public necessity, by contrast, is complete). Note, however, that even where the privilege is incomplete in this sense, the privilege to invade another's property means that a property owner engaging in self-help to prevent the privileged invasion must pay for any damages resulting from her self-help. See *id.* § 263 cmt. b.

2. *A philosopher's view of Vincent.* Philosophers of tort law typically argue that the normative structure of tort law is organized around wrongs and obligations of repair. But if that is so, what was the wrong in *Vincent*? Philosopher of tort law Jules Coleman offered an argument on this score:

There are three different ways in which “wrongs” and “compensation” can be connected. (1) You wrong me and owe me compensation because of the wrong you have done me. (2) You pay me compensation and thereby make right (or make permissible) what would otherwise be a wrong to me. (3) You wrong me and owe me compensation, but your conduct is permissible even if you cannot and ultimately do not compensate me.

Jules L. Coleman, *Some Reflections on Richard Brooks's "Efficient Performance Hypothesis,"* 116 YALE L.J. POCKET PART 416 (2007). Does the Coleman explanation offer an adequate explanation of why a law of civil wrongs would require compensation from the shipowner to the dockowner?

3. *The paradigm of reciprocity.* Perhaps the wrong that corrective justice theorists believe is present in *Vincent* can be cashed out in terms of fairness. This is George Fletcher's view—namely, that an unexcused nonreciprocity of risk is what makes sense of *Vincent*.

The critical feature of [*Vincent*] is that the defendant created a risk of harm to the plaintiff that was of an order different from the risks that the plaintiff imposed on the defendant. [S]uppose that two sailors secured their ships in rough weather to a single buoy. [E]ach party would subject the other to a risk of . . . abrasion. [This] manifestation . . . of the paradigm of reciprocity . . . express[es] the same principle of fairness: all individuals in society have the right to roughly the same degree of security from risk. By analogy to John Rawls' first principle of justice, the principle might read: we all have the right to the maximum amount of security compatible with a like security for everyone else. This means that we are subject to harm, without compensation, from background risks, but that no one may suffer harm from additional risks without recourse for damages against the risk-creator. Compensation is a surrogate for the individual's right to the same security as enjoyed by others. But the violation of the right to equal security does not mean that one should be able to enjoin the risk-creating activity or impose criminal penalties against the risk-creator. The interests of society may often require a disproportionate distribution of risk. Yet, according to the paradigm of reciprocity, the interests of the individual require us to grant compensation whenever this disproportionate distribution of risk injures someone subject to more than his fair share of risk.

George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Does Fletcher's view of *Vincent* do a better job than Coleman's view of explaining the outcome of the case? The question for any view based on reciprocity is how to identify the appropriate baseline from which reciprocity may be measured. Fletcher's conception of reciprocal risks in the case of two sailors and a single buoy presupposes that the law vests each sailor with a protectable entitlement in their respective vessels. But whether any such entitlements exist is what we are trying to decide. To take the *Vincent* example, can we identify the risks as nonreciprocal without assuming that the plaintiff has a protectable entitlement in the dock? But isn't that what we are trying to decide?

4. *A civil recourse approach?* More recently, Professors John Goldberg and Benjamin Zipursky have attempted to establish a civil recourse theory of tort as an alternative to both the economic-utilitarian and corrective justice approaches. The basic idea that animates civil recourse theory is that a tort is a wrong that empowers the victim to seek satisfaction from the wrongdoer through special means of redress provided by the government. Tort (in this view) is therefore not about loss-spreading, risk allocation, or even compensation, but rather about

vindicating the right of the victim of wrong to recourse from the tortfeasor. Goldberg and Zipursky believe that their view of tort generates an explanation of *Vincent*:

Our own view of *Vincent* is that . . . it deserves attention because it vividly demonstrates the distinctiveness of the wrong of trespass to land. *Vincent*, we believe, is a plain-vanilla trespass case. The ship owner intentionally occupied the defendant's property (the dock) even after it was no longer permitted to do so. It therefore committed a trespass for which compensation was owed. Of course its decision to trespass was entirely reasonable. However—as we have emphasized all along—the wrong of trespass, at least in the first instance, has nothing to do with whether the defendant behaved reasonably. . . .

Even though the reasonableness of the trespass in *Vincent* does not prevent it from being a trespass, it does have *some* significance on the outcome of the case. . . . [T]he same circumstances that explain why the captain's decision to stay put was entirely reasonable also explain why the dock owner in *Vincent*, like the dock owner in *Ploof*, would have faced liability if it had forcibly ejected the Reynolds from the dock, thereby causing it or its crew to suffer harm. A property owner has a limited privilege to take measures to ward off trespassers [but] as we saw in *Katko v. Briney*, a property possessor cannot do just anything in response to trespasses. *Ploof* tells us that if a property owner expels trespassers under circumstances where the expulsion exposes them to a grave risk of death or bodily harm, the property owner will have abused his privilege to defend his property and therefore will be subject to liability for battery.

JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS (2010). What, in Goldberg's and Zipursky's view, explains why the dockowner may not forcibly unmoor the shipowner? Do Goldberg and Zipursky have an account of this feature of the legal structure, or does their theory beg the question of whence the privilege comes?

5. *The economic view of Vincent*. A very different set of accounts of tort law and of cases like *Vincent* emphasizes the economic logic of the case. In this view, the aim of the law should be to allocate liability to the party best positioned and incentivized to minimize the costs of accidents. Costs should be allocated, in other words, to the best cost avoider. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

Note, however, that cases like *Vincent* pose two wrinkles. The first is that it can be very hard for an adjudicator to accurately gauge which party is better positioned to minimize accident costs. The second is that it is not always clear that adjudicators will in fact always be able to decide that question, at least as a prospective matter. Will shipowners in Minnesota bear the risk of *Vincent*-like damages in future *Vincent*-like situations? One might think so having just read the case. But if we allow shipowners and dockowners to trade the risks before those risks come to fruition, we should expect to see the risk freely traded, even if the common law tort rule allocates it to ship owners as an initial matter.

This insight has made the *Vincent* decision a classic case for the discussion of what economists and lawyers call the Coase Theorem. In a famous article, Nobel Prize-winning economist Ronald Coase contended that absent transaction costs, rational parties will transact

to allocate the entitlements to their highest value user regardless of the initial allocation of legal entitlements. Parties will do so in order to maximize the joint value of the entitlement in question. Coase gave the analogy of a then-recent British case brought by a physician against a neighboring baker whose noisy machinery interfered with his medical practice. The court had allocated the entitlement to the doctor, who thereafter had the power to stop the confectioner from using the loud machines. But Coase observed that a rational doctor would have been willing to

waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration.

Ronald N. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 9 (1960). In turn, the baker “would have been willing to do this,” if and only if “the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionery business to some other location.” *Id.*

The only real question, in Coase’s account, was whether “continued use of the machinery adds more to the confectioner’s income than it subtracts from the doctor’s.” If it did, then the baker would buy from the doctor the right to continue with the machinery. Indeed, Coase’s insight was that the same outcome would obtain no matter whether the court found for the doctor or the baker.

But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery.

Just as in the first scenario in which the doctor won, the parties will trade the entitlement so that the party valuing it most ends up with it. As Coase concludes: “With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.” Coase’s point is that where trading is possible, entitlements will tend to go to their highest value users. *Id.* at 9-10.

At around the same time Coase wrote *The Problem of Social Cost*, Guido Calabresi made a similar observation in a classic article, *The Decision for Accidents*:

[A]lthough there are situations in which the choice of an original loss bearer is relatively easy because it . . . makes no difference . . . there are other situations in which the choice of an original loss bearer or, if you wish, the question of what loss belongs to what activity, is not only important, but hard!

Guido Calabresi, *The Decision for Accidents*, 78 HARV. L. REV. 713, 732 (1965). Calabresi emphasized the pervasiveness of transaction costs, where Coase emphasized the power of

markets. But together their insights have produced elaborate literatures in law and economics in the years since.

Some of the claims in the law and economics literature are quite contentious because they make strong assertions or assumptions about the efficiency of markets. But the basic point—that common law adjudications are often not the final word on the allocation of an entitlement—is a straightforward, important, and widely accepted one.

How does this matter for torts? Typically the Coase theorem is stated in the form of entitlements and assets. But as the case of the baker and the confectioner suggests, the point holds for liabilities and risks, too. Rational parties in settings of low transaction costs will trade liabilities and risks just as they trade entitlements and assets. Only now they will tend to allocate those liabilities and risks not to a highest value user, but to a lowest cost bearer.

Now we can begin to see the implications of Coase's ideas about entitlements and transaction costs for risks like those present in *Vincent v. Lake Erie Transportation*. Under what conditions will dock owners bear those risks, even if *Vincent* remains the background common law rule? The Coase Theorem seems to indicate that we should expect mooring contracts to allocate the costs of storm damage to the lowest-cost bearer (an inverse to the highest value user above). This only stands to reason, since the real price of any such contract is the price net of the cost of the risks. If the cost of the risks can be reduced, the parties to the contract can split the gains between them: shipowners can pay reduced net prices while dockowners receive higher net prices. It's a win-win! Mooring contracts should allocate risks to shipowners when shipowners are in a better position to bear those risks at minimum costs, and to dockowners when the situation is reversed. Shipowners and dockowners would be foolish to do otherwise. They would simply be leaving money on the table, or in the water, as the case may be.

6. *The economic view of Vincent (II): what difference do legal rules make?* The Coase Theorem does not assert that legal rules make no difference. The Theorem purports to identify what kinds of difference, under conditions of low or zero transaction costs, legal rules will and will not make. Even if the initial allocation of an entitlement or a risk makes no difference for its ultimate allocation, the initial allocation does have a distributional or wealth effect. Entitlement allocations have a positive wealth effect on the initial holder because such allocations endow the holder of the entitlement with either the entitlement or the value received for selling it to some other higher value holder. Risk allocations have a negative wealth effect in the same way. By hypothesis, the initial allocatee will be willing to pay a cheaper cost bearer to bear the risk. Either way, however, the initial allocatee is worse off.

To see this in a real life setting, consider the *Ploof* case as an example. By allocating the entitlement, or privilege, to boat owners, the court made the Ploof family that much better off and the defendants that much worse off. The law mattered!

In contractual settings, however, there is a wrinkle. The privilege in *Ploof* settings exists for all boaters moving forward, whether or not dock owners agree. That is the pro-boater wealth effect of the initial entitlement. The *Vincent* case is different. Viewed after the fact, the decision of the Minnesota Supreme Court benefitted a particular dockowner at the expense of a particular shipowner. But prospectively, the rule allocating the privilege as between

shipowners and dockowners looking to enter into consensual docking agreements—as they will in *Vincent v. Lake Erie*-like settings—is a different kind of animal. The key difference is that there is no entitlement for the law to allocate here unless the parties agree to a docking arrangement. Rather than allocating an initial entitlement as in *Ploof*, the *Vincent* rule is better thought of as setting a default rule or a contract presumption in the event the parties agree to have a relationship. Moving forward, the allocation of this risk is subject to rearrangement by the parties if they see fit to alter the presumptive or default term of the mooring contract, since either one of them can refuse to consent to the deal in question. In future *Vincent v. Lake Erie* situations, the privilege to lash and re-lash can only come about if both parties agree to bring it into existence by virtue of entering into a mooring contract that either tacitly or expressly adopts the contract presumption or default rule. The result is that the law has not allocated an entitlement to the initial allocatee at all—at least not in any obvious way. As Stewart Schwab puts it, “because both sides to a contract simultaneously agree to create and distribute wealth, the distributive effect of contract rules is muted.” Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 239 (1988).

7. *The economic view of Vincent (III): transaction costs.* Real-world bargaining is not seamless, of course. The real world involves transaction costs, and when these costs are included in the analysis, it turns out that parties may not be able to enter into jointly advantageous arrangements. In some situations, there simply isn’t an opportunity to bargain. The parties creating risks for one another, for example, may be strangers hurtling down a highway toward one another. Or perhaps they are in a *Ploof*-like situation, where a sudden oncoming storm makes negotiation impossible. The usual mooring scenario typically does not involve very high transaction costs at all, at least not in this sense. Shipowners and dockowners are already entering into deals with one another, so the transaction costs of adding a term to govern the risks of storm damage are low. But, in many other settings, transaction costs may be prohibitive.

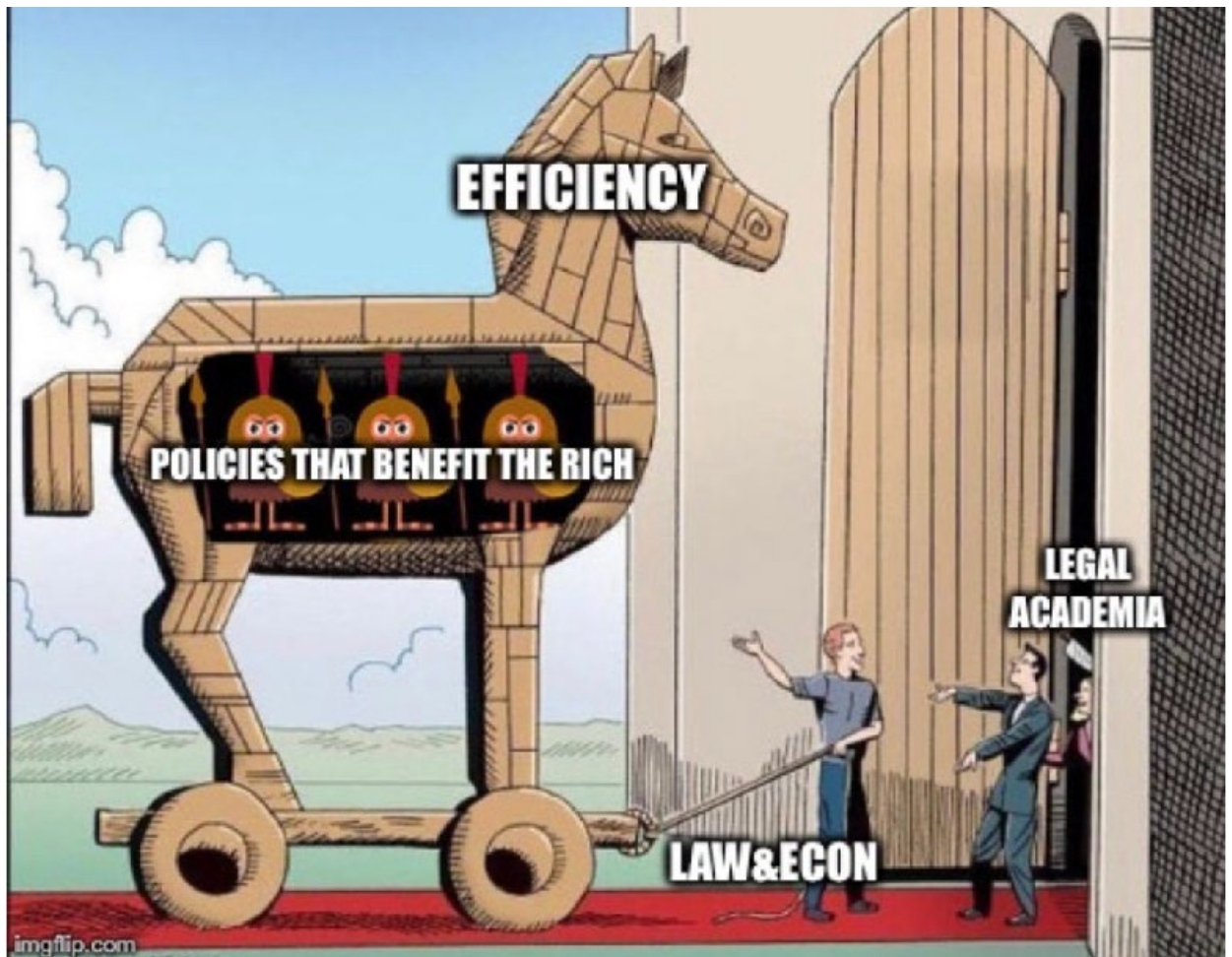
Ian Ayres and Jack Balkin argue that in high-transaction-costs settings the privilege regime of *Ploof* and *Vincent* creates ersatz auctions in which a sequence of unilateral actions by the parties may reproduce the effect of a market without transaction costs.

Viewing entitlements as auctions implies that after one party exercises its option to take nonconsensually, the other has an option to “take back,” and so on, for some number of rounds. . . . [R]eciprocal takings regimes, like ordinary auctions, can increase efficiency by inducing participants to reveal information about how much they value an asset. This tends to place the asset in the hands of the person who is willing to pay the most for it.

The Ayres and Balkin argument is that the process by which the parties choose to exercise their option to take (either by mooring or unmooring) essentially reproduces the dynamic of an internal auction in which the parties bid on the entitlement in question. The shipowner moors if he thinks the savings thereby achieved to be greater than the damages to be incurred. That’s his opening bid, and it flushes new information into the open: namely, that the shipowner’s willingness to pay to save his vessel (his reserve price, in the parlance of auctions) is greater than what he takes the value of the dock to be. With this new information, the dockowner, in turn, has the opportunity to unmoor. That’s a second bid. It too reveals new information about the relative valuations of the assets in question. And the

auction need not be over. The shipowner may re-lash the vessel to the dock, and the dockowner may sever the lines again. With each passing round the chance that we will make the right choice as between saving the dock or the ship in the storm rises, even though no market transaction ever takes place. As Ayres and Balkin explain, “[t]he more rounds we add to an internal auction, the more it appears to mimic bargaining between the participants.” Ian Ayres & J. M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1997).

8. *The economic view of Vincent (IV): critique.*



Credit: Twitter Meme by Isabel Echarte, @IsabelEcharte, July 15, 2019.

We will have occasion to pursue the subject of law and economics in tort law in future chapters. For now, consider what about the analyses offered by Calabresi, Coase, and others might lead an academic meme designer such as the sly and brilliant Echarte to level this critique?



## CHAPTER 4. STRICT LIABILITY AND NEGLIGENCE: HISTORY AND INTRODUCTION

In chapters two and three of this book, we have studied torts arising out of intentionally inflicted harms. But the great majority of torts cases in the court system – and the great majority of the hard cases – arise not out of intentional conduct but out of unintentional conduct. These are unintentionally inflicted harms. From one point of view, they are accidents. But if a defendant does not intend an injury, ought the defendant be obligated to compensate the injured person in some way? Some jurists have answered no, or rarely. Others have answered in the affirmative, or at least sometimes. If compensation is sometimes appropriate, then what kinds of unintentional injuries produce such obligations to compensate? These are the central questions for the law of unintentional torts, and we turn to them now through the development of the common law of torts.

### A. Negligence

Despite a smattering of older cases, the modern law of unintentional torts is relatively new. Scholars trace it back to the middle of the nineteenth century, when a confluence of developments gave rise to something recognizable as modern tort law. Industrialization produced a sharp increase in the sheer number of accidental injuries and deaths. The demise of the writ system and the abolition of the old common law forms of action gave rise to substantive conceptual categories for the law, such that for the first time law book publishers issued treatises on tort law. Equally important, the rise of a market economy characterized by male wage earners supporting families of dependent women and children gave rise to new pressure for wage replacement when wage earners were injured or killed. *See generally* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

Just as modern tort law was beginning to emerge, an influential judge in Massachusetts weighed in on the question that had animated the smattering of English cases since *The Case of the Thorns*: when is a defendant obligated to compensate a plaintiff for unintentionally inflicted harm? Strangely enough, the question would arise in a case that had nothing to do with the industrial revolution or the kinds of wage work that seemed to have occasioned the new law of torts. To the contrary, the case arose out of a very simple story about two dogs, two men, and one stick.

#### ***Brown v. Kendall*, 60 Mass. 292 (1850)**

It appeared in evidence, on the trial . . . that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick

over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

SHAW, C.J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery . . . . [The trial court entered judgment for the plaintiff, instructing “the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense.”]

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term “unintentional” rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party’s remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*, 3 East, 593. . . .

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. . . .

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85-92. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. . . . In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time,

both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The [trial] court instruct[ion] . . . is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant,) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable

the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

### Notes

1. *What is a holding?* What is the holding of *Brown v. Kendall*? For that matter, what is a holding? Judges do not make law simply by speaking and writing. A judge's opinion, or at least part of that opinion, becomes law for subsequent cases by virtue of the court's resolution of the dispute that is before the court. That is why a case that settles before it is decided by a court does not produce any law at all. In the formulation of Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit, a holding is a "proposition of law" that "explain[s] why the court's judgment goes in favor of the winner." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006). Professors Michael Abramowicz and Maxwell Stearns observe further that it cannot be that holdings are merely those parts of an opinion necessary (or, as in one influential formulation, "pivotal") in reaching the decision, since there is often more than one possible route to a particular resolution. Abramowicz and Stearns argue therefore that a holding consists of "those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment." Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2004).

Using the Leval or Abramowicz/Stearns theories of a holding, we might take the question about the holding of *Brown v. Kendall* a step further. The first question is what Justice Shaw held in *Brown v. Kendall* as to the relevant liability standard. But the second and underlying question is whether there was a holding at all!

2. *Tort law as industrial subsidy?* Setting aside the problem of characterizing the holding of *Brown v. Kendall*, it seems clear that Shaw meant to articulate a principle for distinguishing between the plaintiff and the defendant in accident cases. The principle Shaw identified was the negligence principle. He moved the liability standard as administered by judges toward something like a negligence test, holding defendants liable only when they fail to exercise ordinary or reasonable care—that is, when they act negligently. This negligence standard generally offers a more favorable approach for defendants than a test that holds them liable even if they exercise reasonable care, but fail to take the extraordinary care on which earlier cases sometimes seemed to insist. Why would Shaw have wanted to do this?

Given the historical influence of Shaw's opinion, a substantial literature has tried to explain Shaw's motivations. Harvard professor Morton Horwitz controversially claimed that Shaw adopted the negligence standard to subsidize industrialization and economic growth at the expense of poor constituencies. In contrast to the stricter liability standard that preceded it, Horwitz argues, negligence immunized emerging industries from legal liability absent fault, placing more of the burden of economic growth on the weakest groups in American society: groups like farmers and workers. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 97, 99-101 (1977).

Subsequent scholars have criticized Horwitz's thesis. Some dispute Horwitz's characterization of mid- and late-nineteenth-century tort law as having been especially friendly to defendants. For example, Peter Karsten has argued that nineteenth-century negligence plaintiffs faced no "new 'roadblocks and hurdles'" in collecting damages. See PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 80 (1997). Gary Schwartz similarly rejected Horwitz's claim that nineteenth-century courts favored major industries. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 U.C.L.A. L. REV. 641, 717 (1988); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981).

The more perceptive critique of the Horwitz view begins with the observation that before the era of *Brown v. Kendall*, there were remarkably few tort actions for personal injuries of any kind. For them, *Brown v. Kendall* is thus not a decision narrowing an earlier era of relatively liberal liability, but precisely the opposite. It is the beginning of the modern liability regime, representing the end of an era of pervasive status-based immunities from suit, and also the halting beginning of a new era of tort-based responsibility for harms. For this account, see especially Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 961 (1981), and also Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 75 (1982), and John Fabian Witt, *From Loss of Services to Loss of Support*, 25 L. & SOCIAL INQUIRY 717 (2000).

Scholars have also objected to one of Horwitz's underlying premises: that private law doctrine can redistribute wealth among social groups. For example, Richard Epstein has claimed that courts and common law doctrines typically lack the institutional capacity to redistribute wealth, since (after all) all parties—including industrialists—are simultaneously prospective defendants and prospective plaintiffs. In theory, they may stand to lose as much as they gain from new common law rules favoring one side or the other. See Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718 (1982). Today's lawyer-economists thus usually argue that common law rules are highly inferior to the tax system as mechanisms for redistributing wealth. See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. L. STUD. 667 (1994).

Is there any reason to think that in the real world firms or industries with deep pockets are more likely to be defendants than plaintiffs in tort litigation? It is a sociological fact that some actors are essentially not worth suing in tort: they are "judgment proof," as the saying goes, because they lack the assets against which any tort judgment against them could be collected. Firms or industries with assets, by contrast, are judgment-worthy. They are worth suing. Note that assisting industries through the targeted manipulation of tort rules is

something that policy-makers continue to do to this day. To take one recent example, several state legislatures have recently passed legislation to immunize the private space flight industry from liability. See, e.g., COLO. REV. STAT. §§ 41-6-101(1) to (2)(a) (2014). These state immunity statutes protect and subsidize the “small but growing” private space flight industry. See Justin Silver, Note, *Houston, We Have a (Liability) Problem*, 112 MICH. L. REV. 833, 838 (2014). At the federal level, to take two further examples, Congress has immunized firearm manufacturers from suits by the victims of criminal shootings, see Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (2012), and vaccine manufacturers from tort actions for bad reactions to childhood vaccines, see National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-11 (2012). These targeted, scalpel-like immunizations are considerably more precise than the blunderbuss of the general negligence standard. But they suggest that tort rules *can* accomplish some kinds of distributive goals, worthy or otherwise—or, at least, that lobbyists and legislatures think so. For a recent argument that the choice between private law rules or the tax system as the best vehicle for redistribution is a contextual and empirical question, see Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018) and Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Include Equity as Well as Efficiency*, 123 YALE L.J. 2134 (2014).

3. *Negligence and wrongfulness.* Are there other grounds that might have made the negligence principle appealing to Shaw? One view argues that the ordinary care standard advances the social interest, not merely the private interests of particular industries. This argument, to which we will return in Chapter 4, contends that the standard of ordinary care demands of actors only that they not engage in conduct that is, on balance, socially harmful and therefore wrongful. Another view comes from jurists who defend tort law as an institution primarily for correcting injustice or for expressing moral judgments about wrongfulness. For corrective justice theorists, tort law embodies the obligation to repair wrongful losses. For theorists who emphasize tort law’s expressive function, tort law is a crucial mechanism for signaling whose interests the community deems worthy of respect and when those interests have been wrongfully impinged upon. The negligence standard might be said to be consistent with this emphasis on wrongfulness because to act negligently is to behave wrongfully, even if not intentionally so. See JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

The leading turn-of-the-twentieth-century jurist, and later Supreme Court justice, Oliver Wendell Holmes, Jr., organized much of the book with which he made his name around identifying a moral ground for the test that Shaw articulated in *Brown v. Kendall*:

**OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77, 81-96 (1881)**

The object of the next two Lectures is to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is. . . .

[T]here are two theories of the common-law liability for unintentional harm. Both of them seem to receive the implied assent of popular textbooks, and neither of them is wanting in plausibility and the semblance of authority.

The first is that of Austin, which is essentially the theory of a criminalist. According to him, the characteristic feature of law, properly so called, is a sanction or detriment threatened

and imposed by the sovereign for disobedience to the sovereign's commands. As the greater part of the law only makes a man civilly answerable for breaking it, Austin is compelled to regard the liability to an action as a sanction, or, in other words, as a penalty for disobedience. It follows from this, according to the prevailing views of penal law, that such liability ought only to be based upon personal fault; and Austin accepts that conclusion, with its corollaries, one of which is that negligence means a state of the party's mind. These doctrines will be referred to later, so far as necessary.

The other theory is directly opposed to the foregoing. It seems to be adopted by some of the greatest common law authorities, and requires serious discussion before it can be set aside in favor of any third opinion which may be maintained. According to this view, broadly stated, under the common law a man acts at his peril. It may be held as a sort of set-off, that he is never liable for omissions except in consequence of some duty voluntarily undertaken. But the whole and sufficient ground for such liabilities as he does incur outside the last class is supposed to be that he has voluntarily acted, and that damage has ensued. If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor.

In order to do justice to this way of looking at the subject, we must remember that the abolition of the common-law forms of pleading has not changed the rules of substantive law. Hence, although pleaders now generally allege intent or negligence, anything which would formerly have been sufficient to charge a defendant in trespass is still sufficient, notwithstanding the fact that the ancient form of action and declaration has disappeared.

In the first place, it is said, consider generally the protection given by the law to property, both within and outside the limits of the last-named action. If a man crosses his neighbor's boundary by however innocent a mistake, or if his cattle escape into his neighbor's field, he is said to be liable in trespass *quare clausum fregit*. If an auctioneer in the most perfect good faith, and in the regular course of his business, sells goods sent to his rooms for the purpose of being sold, he may be compelled to pay their full value if a third person turns out to be the owner, although he has paid over the proceeds, and has no means of obtaining indemnity.

Now suppose that, instead of a dealing with the plaintiff's property, the case is that force has proceeded directly from the defendant's body to the plaintiff's body, it is urged that, as the law cannot be less careful of the persons than of the property of its subjects, the only defences possible are similar to those which would have been open to an alleged trespass on land. You may show that there was no trespass by showing that the defendant did no act; as where he was thrown from his horse upon the plaintiff, or where a third person took his hand and struck the plaintiff with it. In such cases the defendant's body is the passive instrument of an external force, and the bodily motion relied on by the plaintiff is not his act at all. So you may show a justification or excuse in the conduct of the plaintiff himself. But if no such excuse is shown, and the defendant has voluntarily acted, he must answer for the consequences, however little intended and however unforeseen. If, for instance, being assaulted by a third person, the defendant lifted his stick and accidentally hit the plaintiff, who was standing behind him, according to this view he is liable, irrespective of any negligence toward the party injured.

The arguments for the doctrine under consideration are, for the most part, drawn from precedent, but it is sometimes supposed to be defensible as theoretically sound. Every man, it

is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors. In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it. . . .

In spite, however, of all the arguments which may be urged for the rule that a man acts at his peril, it has been rejected by very eminent courts, even under the old forms of action. In view of this fact, and of the further circumstance that, since the old forms have been abolished, the allegation of negligence has spread from the action on the case to all ordinary declarations in tort which do not allege intent, probably many lawyers would be surprised that any one should think it worthwhile to go into the present discussion. Such is the natural impression to be derived from daily practice. But even if the doctrine under consideration had no longer any followers, which is not the case, it would be well to have something more than daily practice to sustain our views upon so fundamental a question; as it seems to me at least, the true principle is far from being articulately grasped by all who are interested in it, and can only be arrived at after a careful analysis of what has been thought hitherto. It might be thought enough to cite the decisions opposed to the rule of absolute responsibility, and to show that such a rule is inconsistent with admitted doctrines and sound policy. But we may go further with profit, and inquire whether there are not strong grounds for thinking that the common law has never known such a rule, unless in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction. Conciliating the attention of those who, contrary to most modern practitioners, still adhere to the strict doctrine, by reminding them once more that there are weighty decisions to be cited adverse to it, and that, if they have involved an innovation, the fact that it has been made by such magistrates as Chief Justice Shaw goes far to prove that the change was politic, I think I may assert that a little reflection will show that it was required not only by policy, but by consistency. I will begin with the latter.

The same reasoning which would make a man answerable in trespass for all damage to another by force directly resulting from his own act, irrespective of negligence or intent, would make him answerable in case for the like damage similarly resulting from the act of his servant, in the course of the latter's employment. The discussions of the company's negligence in many railway cases would therefore be wholly out of place, for although, to be sure, there is a contract which would make the company liable for negligence, that contract cannot be taken to diminish any liability which would otherwise exist for a trespass on the part of its employees.

More than this, the same reasoning would make a defendant responsible for all damage, however remote, of which his act could be called the cause. So long, at least, as only physical or irresponsible agencies, however unforeseen, co-operated with the act complained of to produce the result, the argument which would resolve the case of accidentally striking the plaintiff, when lifting a stick in necessary self-defence, adversely to the defendant, would require a decision against him in every case where his act was a factor in the result complained of. The distinction between a direct application of force, and causing damage indirectly, or as a more remote consequence of one's act, although it may determine whether the form of action should be trespass or case, does not touch the theory of responsibility, if that theory be that a man acts at his peril.

As was said at the outset, if the strict liability is to be maintained at all, it must be maintained throughout. A principle cannot be stated which would retain the strict liability in



trespass while abandoning it in case. It cannot be said that trespass is for acts alone, and case for consequences of those acts. All actions of trespass are for consequences of acts, not for the acts themselves. And some actions of trespass are for consequences more remote from the defendant's act than in other instances where the remedy would be case.

An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes. An example or two will make this extremely clear.

When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done. Suppose that, instead of firing a pistol, he takes up a hose which is discharging water on the sidewalk, and directs it at the plaintiff, he does not even set in motion the physical causes which must co-operate with his act to make a battery. Not only natural causes, but a living being, may intervene between the act and its effect. . . . In *Scott v. Shepherd* . . . trespass was maintained against one who had thrown a squib into a crowd, where it was tossed from hand to hand in self-defence until it burst and injured the plaintiff. Here even human agencies were a part of the chain between the defendant's act and the result, although they were treated as more or less nearly automatic, in order to arrive at the decision.

Now I repeat, that, if principle requires us to charge a man in trespass when his act has brought force to bear on another through a comparatively short train of intervening causes, in spite of his having used all possible care, it requires the same liability, however numerous and unexpected the events between the act and the result. If running a man down is a trespass when the accident can be referred to the rider's act of spurring, why is it not a tort in every case . . . seeing that it can always be referred more remotely to his act of mounting and taking the horse out?

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. It seems to be admitted by the English judges that, even on the question whether the acts of leaving dry trimmings in hot weather by the side of a railroad, and then sending an engine over the track, are negligent,—that is, are a ground of liability,—the consequences which might reasonably be anticipated are material. Yet these are acts which, under the circumstances, can hardly be called innocent in their natural and obvious effects. The same doctrine has been applied to acts in violation of statute which could not reasonably have been expected to lead to the result complained of.

But there is no difference in principle between the case where a natural cause or physical factor intervenes after the act in some way not to be foreseen, and turns what seemed innocent to harm, and the case where such a cause or factor intervenes, unknown, at the time . . .

To return to the example of the accidental blow with a stick lifted in self-defence, there is no difference between hitting a person standing in one's rear and hitting one who was pushed

by a horse within range of the stick just as it was lifted, provided that it was not possible, under the circumstances, in the one case to have known, in the other to have anticipated, the proximity. In either case there is wanting the only element which distinguishes voluntary acts from spasmodic muscular contractions as a ground of liability. In neither of them, that is to say, has there been an opportunity of choice with reference to the consequence complained of,—a chance to guard against the result which has come to pass. A choice which entails a concealed consequence is as to that consequence no choice.

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: “No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.” If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. . . .

A man need not, it is true, do this or that act, the term act implies a choice,—but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor. The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens’ mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant’s act would not only be open to these objections, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

*Note*

Holmes's gloss on *Brown v. Kendall* has provided a theoretical defense for the reasonable care regime for more than a century now. Yet even as Shaw and then Holmes articulated the basic principles of the negligence regime, an alternative approach that turned neither on negligence nor on any failure of reasonable care sprang up. No-fault liability arose almost simultaneously with the negligence regime and remains alongside it in tort law today, a century and a half later.

## B. Non-Fault Based Liability

### **Fletcher v. Rylands, 159 Eng. Rep. 737 (Court of Exchequer 1865)**

[This was an action by a tenant coal-mine operator against the builder of a new reservoir for damages that occurred when the filling of the reservoir flooded the coal mining operation. In the 1850s, a tenant to the Earl of Wilton leased beds of coal from Lord Wilton for the purpose of extracting the coal. In the process of working the coal seam, the tenant came into contact with old abandoned coal workings from prior mining efforts. Soon thereafter, defendants—who did not know about the old coal workings, or about the plaintiff's having found any such coal workings in the course of plaintiff's mining—began to build a dam on an adjoining part of Lord Wilton's land for purposes of building a reservoir that would power their mill. The defendant, everyone agreed, exercised due care in selecting competent engineers to build the reservoir. In the course of their work, the engineers discovered that the bed was in part built on top of “five old shafts, running vertically downwards” and “constructed of timber” but “filled up with marl or soil of the same kind as the marl or soil which immediately surrounded them.” The condition of the ancient shafts was such that the engineers did not know or suspect they were old coal mining shafts. When the reservoir was filled with water in December 1860, one of the shafts under the reservoir bed gave way, flooding the old workings underneath. The water flowed through into the plaintiff's coal workings and forced the plaintiff to suspend its operations.]

The question for the opinion of the Court was, whether the plaintiff was entitled to recover damages from the defendants by reason of the matter stated in the case.

BRAMWELL, B. . . . [W]hat is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing he subjected himself to all consequences resulting from natural causes, among others, to the influx of all water naturally flowing in. But he had a right to be free from what has been called “foreign” water, that is, water artificially brought or sent to him directly, or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly it is admitted an action would lie; and that it would if they did it again. . . . The plaintiff's right then has been infringed; the defendants in causing water to flow to the plaintiff have done that which they had no right to do. [C]onsequently th[e] the action is maintainable. The plaintiff's case is, you have violated my

right, you have done what you had no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water by the act of those who know what they are doing. I think this is not so. I know no case of a right so limited. As a rule the knowledge or ignorance of the damage done is immaterial. The burthen of proof of this proposition is not on the plaintiff. . . .

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which but for their, the defendants', act would not have gone, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law.

MARTIN, B. . . . I think there was no trespass. In the judgment of my brother Bramwell . . . the act of the defendants was a trespass, but I cannot concur, and I own it seems to me that the cases cited by him, *Leame v. Bray* (3 East, 593) . . . prove the contrary. . . . [T]o constitute trespass the act doing the damage must be immediate, and that if the damage be mediate or consequential (which I think the present was), it is not a trespass. . . . The digging a reservoir in a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land, and the water escaped from the bottom of the reservoir, and in ordinary course would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable would therefore make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue.

[T]here is no better established rule of law than that when damage is done to personal property, and even to the person, by collision either upon the road or at sea, there must be negligence in the party doing the damage to render him legally responsible, and if there be no negligence the party sustaining the damage must bear with it. The existence of this rule is proved by the exceptions to it, the cases of the innkeeper and common carrier of goods for hire, who are quasi insurers. These cases are said to be by the custom of the realm, treating them as exceptions from the ordinary rule of law. In the absence of authority to the contrary, I can see no reason why damage to real property should be governed by a different rule or principle than damage to personal property. There is an instance also of damage to real property, when the party causing it was at common law liable upon the custom of the realm as a quasi insurer, viz, the master of a house if a fire had kindled there and consumed the house of another. In such case, the master of the house was liable at common law without proof negligence on his part. This seems to be an exception from the ordinary rule of law, and in my opinion, affords an argument that in other cases such as the present, there must be negligence to create a liability. . . .

POLLOCK, C. B. . . . I agree with my brother Martin that no action will lie. It appears to me that my brother Bramwell assumes too strongly that the complainant "had a right to be free from what is called 'foreign water.'" That may be so with reference to surface-rights; but I am not prepared to hold that this applies to every possible way in which water may happen to come. There being, therefore, no authority for bringing such an action, I think the safer course is to decide in favour of the defendants. . . .

**Fletcher v. Rylands, L.R. 1 Ex. 265 (Exchequer Chamber 1866)**

BLACKBURN, J. We have come to the conclusion that the opinion of Bramwell, B., was right, and that . . . the plaintiff was entitled to recover damages from the defendants . . .

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect. . . .

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. . . .

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. . . .

[T]here does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty

imposed on him who brings on his land, water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor. . . .

. . . [I]t was . . . said by Martin, B. that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible, and this is no doubt true . . . . But we think these cases distinguishable from the present. Traffic on the highways . . . cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; . . . those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . . . But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property. . . .

We are of [the] opinion that the plaintiff is entitled to recover.

***Rylands v. Fletcher, L.R. 3 H.L. 330 (House of Lords 1868)***

THE LORD CHANCELLOR (LORD CAIRNS) My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. . . .

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment, in the Court of Exchequer Chamber . . . .

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. . . .

. . . I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. . . . If water naturally rising in the Defendants' land . . . had by percolation found its way down to the Plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. . . . But that is not the real state of the case. The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the Defendant in Error.

### Notes

1. *Is strict liability possible?* In *Rylands*, the Court of Exchequer and the House of Lords purported to identify a basis for liability other than negligence. Many have characterized the *Rylands* case as a form of "strict liability." But what does that mean? Strict liability, as Professor Stephen Perry points out, may not be conceptually available, at least not if it simply means cause-based liability. After all, both the plaintiff and the defendant in *Rylands* were causes of the injury at issue; no injury would have taken place had the plaintiff not been mining coal, just as no injury would have taken place had the defendant not built a reservoir. See Stephen R. Perry, *The Impossibility of Strict Liability*, 1 CAN J. L. & JURISPRUDENCE 147, 169-70 (1988). To put it a different way: causation alone does not distinguish between the two parties to the case. So what then is the ground for liability offered by the judges in *Rylands* who differ with Judge Martin's negligence standard?

2. *The reciprocity view.* In discussing the defense of necessity in *Vincent v. Lake Erie Transportation Co.*, above, we noted the argument advanced by torts jurists like George Fletcher that the real basis for the liability in torts is the imposition of a non-reciprocal risk. Fletcher contends that *Rylands* is precisely such a case: "The critical feature of [*Rylands*] is

that the defendant created a risk of harm to the plaintiff that was of an order different from the risks that the plaintiff imposed on the defendant.” George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546 (1971). Does the reciprocity argument offer a sound basis for allocating the cost of the harm to the reservoir-building defendant in *Rylands*? Critics insist that the reciprocity argument is just as circular here in *Rylands* as it was in *Vincent*. It is circular because the relative risks of the activities turn on tort law’s underlying allocation of those risks. If the plaintiff coal miner has the right to compensation for the costs imposed by the defendant reservoir builder’s conduct, then the defendant has created a risk of harm for itself, not for the plaintiff. The risk to the coal mining plaintiff is only asymmetrical if we imagine a baseline of what belongs to whom in the situation. But that of course is precisely what the torts judge is supposed to do to resolve the dispute in the first place!

3. *First in time?* What about a first-in-time principle? The coal mine operator was removing coal from the land before the construction of the defendant’s large new reservoir and mill. Should this timing factor be enough to decide the case, or should temporal priority be disregarded? Does it matter that the defendant already operated a much smaller reservoir and mill nearby? Note, too, that the plaintiff and the defendant were linked in a web of contracts with a common landlord. If the parties had contemplated risks like the one that came to fruition, what kind of a term would they have adopted in their respective leases to deal with it?

4. *Unusual behavior.* Another possible justification for the *Rylands* outcome focuses on the kinds of conduct that are ordinary in the neighborhood. When actors engage in new or otherwise unusual activities, others may not be in a position to anticipate the risks that such conduct poses. Does this distinction offer a ground for explaining the *Rylands* case?

5. *Rylands* was met with strong opposition in some American courts, as the next two cases make clear:

***Brown v. Collins*, 53 N.H. 442 (1873)**

DOE, J.

It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff’s land. . . .

[I]f there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems



to be man's duty carefully to do. . . . Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. . . .

In *Fletcher v. Rylands* . . . Mr. Justice Blackburn, commenting upon the remark of Mr. Baron Martin, "that Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveller off the street. . . .

The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment.

Case discharged.

### *Note*

*Does civilization really rest on the rejection of the Rylands rule?* Was nineteenth-century New Hampshire really a more "civilized" place (whatever that would mean) than nineteenth-century Great Britain? The overheated rhetoric of *Brown v. Collins* tells us as much about the cultural attitudes of late nineteenth-century jurists as it does about the law of torts. And Judge Doe was not alone in thinking that important values were at stake. In New York, Judge Earl added an additional dimension to the critique of *Rylands*:

### ***Losee v. Buchanan*, 51 N.Y. 476 (1872)**

EARL, J.

. . . The claim on the part of the plaintiff is, that the casting of the [steam] boiler upon his premises by [an] explosion [of the steam boiler in question] was a direct trespass upon his

right to the undisturbed possession and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises.

I do not believe this claim to be well founded . . . .

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. . . . Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case, [*Fletcher v. Rylands*,] decided in the Exchequer Chamber, which seems to uphold the claim made. . . .

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his own premises into a reservoir, in case the dam or the banks of the reservoir give away and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. . . .

All concur.

### Notes

1. *Torts and the social contract*. Judge Earl's account seems to suggest that people in civilized societies enter into a social contract under which they trade away their natural rights to compensation for injuries caused without fault. Why would they do so in Judge Earl's account? Is a negligence rule necessarily one of the terms of the social contract? Taking up the social contractarianism of the political philosopher John Rawls, Professor Gregory Keating argues that distributive fairness in tort law would require the adoption not of a negligence standard but of a no-fault approach that allocates injury costs to the enterprises that benefit from the activity creating the risk—an approach that Keating calls “strict enterprise liability.” See Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857 (2004). How does Keating know that it is the enterprise and not the injured party—or both—who created the risk in the relevant sense? The plaintiff in *Losee v.*

*Buchanan* engaged in and benefited from an activity creating a risk: he built a structure that was at risk of collapse. This is not to say that the plaintiff ought to be thought of as responsible for the structure's collapse when the steam boiler flew from the defendant's property and smashed into it. That would be an unlikely way to characterize the situation. But it does suggest that the reason for holding the defendant liable—or, as in the actual case, holding the defendant not liable—cannot be that one party was engaged in a beneficial activity and the other was not. They both were!

Note that in cases between parties with ongoing consensual relationships, an analysis of which party was benefitting from the action will be even more difficult. In such situations, both parties are (by hypothesis) beneficiaries of the activity in question. For example, when an enterprise sells a product to a consumer, they both benefit from the activity of producing and selling the product.

2. *The floodgates of strict liability.* Although *Brown* and *Losee* rejected *Rylands*, recent research in the caselaw concludes that other American jurisdictions were far more open to the *Rylands* doctrine than either *Brown* or *Losee* suggest. In his student note, Professor Jed Shugerman found:

[A] significant majority of the states actually accepted *Rylands* in the late nineteenth and early twentieth centuries, at the height of the “era of fault.” . . . A few states split on the validity of *Rylands* in the 1870s, but a wave of states from the mid-1880s to the early 1910s adopted *Rylands*, with fifteen states and the District of Columbia solidly accepting *Rylands*, nine more leaning toward *Rylands* or its rule, five states wavering, and only three states consistently rejecting it. Just after the turn of the century, the California Supreme Court declared, more correctly than not, that “[t]he American authorities, with hardly an exception, follow the doctrine laid down in the courts of England [in *Rylands*].” In the following years, some states shifted against *Rylands*, but an equivalent number of new states also adopted *Rylands*. Accordingly, a strong majority of states has consistently recognized this precedent for strict liability from about 1890 to the present.

Jed Shugerman, Note, “*The Floodgates of Strict Liability*”: *Bursting Reservoirs and the Adoption of Fletcher v. Rylands in The Gilded Age*, 110 YALE L.J. 333 (2000). Shugerman contends that the embrace of the *Rylands* doctrine was prompted by a series of high-profile dam-breaks in late nineteenth-century America. Most famously, the Johnstown Flood in Pennsylvania in 1889 killed 2000 people when a poorly built dam collapsed, flooding an entire valley and destroying the town of Johnstown. The dam was on the property of a hunting and recreation club owned by some of America's wealthiest Gilded Age men. Shugerman notes that “three of the states most widely recognized for their rejection of *Rylands*—New York, New Jersey, and Pennsylvania—reversed their stance on *Rylands* in the 1890s, soon after the Johnstown Flood.”

Flood cases notwithstanding, the high-point of American judges' resistance to no-fault liability arguably came still later, in another New York case, this time a constitutional challenge to the country's first workers' compensation law:

***Ives v. South Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911)**

WERNER, J. . . .

[Earl Ives, a railway brakeman, was injured while working and brought an action under New York's new workmen's compensation statute. Defendant railway answered that the statute was unconstitutional because, among other things, it imposed liability on them in the absence of negligence. Ives demurred, and the trial court awarded judgment to Ives.]

The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is that every employer who is engaged in any of the classified industries shall be liable for any injury to a workman arising out of and in the course of the employment by 'a necessary risk or danger of the employment or one inherent in the nature thereof; . . . provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.' This rule of liability, stated in another form, is that the employer is responsible to the employe for every accident in the course of the employment, whether the employer is at fault or not, and whether the employe is at fault or not, except when the fault of the employe is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employe only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise . . . .

[The Commission that drafted the statute advocated for it on the ground that the negligence rule was "economically unwise and unfair"; "that in operation it is wasteful, uncertain, and productive of antagonism between workmen and employers"; and "that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want."]

Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written Constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. . . .

With these considerations in mind we turn to the purely legal phases of the controversy for the purpose of disposing of some things which are incidental to the main question. . . .

This legislation is challenged as void under the fourteenth amendment to the federal Constitution and under section 6, art. 1 of our state Constitution, which guarantee all persons against deprivation of life, liberty, or property without due process of law. . . . One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employes for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent

in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and willful misconduct of the injured workman.

It is conceded that this is a liability unknown to the common law, and we think it plainly constitutes a deprivation of liberty and property under the federal and state Constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head. In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances, or tools; that, under our present system, the loss falls immediately upon the employe who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employe which it is to the interests of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment; but we think it is an appeal which must be made to the people, and not to the courts. The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by Legislatures. In a government like ours, theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided.

...

The argument that the risk to an employe should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employe, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A. and giving it to B., and that cannot be done under our Constitutions. Practical and simple illustrations of the extent to which this theory of liability might be carried could be multiplied ad infinitum, and many will readily occur to the thoughtful reader. . . .

[W]e therefore take up the discussion of the police power under which this law is sought to be justified. The police power is, of course, one of the necessary attributes of civilized government. . . . But it is a power which is always subject to the Constitution . . . . In order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety, and welfare. . . . [T]he new addition to the labor law . . . does nothing to conserve the health,

safety, or morals of the employes, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employe, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health, and morals of his employes, is liable in damages to any employe who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employe himself.

...

CULLEN, C. . [concurring]

I concur in the opinion of Judge WERNER for reversal of the judgment appealed from. . . . It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault. It might as well be argued in support of a law requiring a man to pay his neighbor's debts that the common law requires each man to pay his own debts, and the statute in question was a mere modification of the common law so as to require each to pay his neighbor's debts. . . .

### Notes

1. *Explaining Ives*. Was Judge Werner correct in saying that when the federal and state constitutions were adopted, "it was the law of the land that no man who was without fault or negligence could be held liable in damages"? If he was not correct in saying this, then what is the basis for his decision?

2. *Workers' compensation statutes*. The New York statute underlying the *Ives* case was the first workers' compensation law in the country, but it was hardly the only such law. Starting in 1910, every state in the U.S. adopted comprehensive no-fault workers' compensation schemes. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004). Under workers' compensation, injured employees whose injuries arise out of and in the course of the work are typically entitled to medical care and services and a fraction of their wage loss replacement—typically two-thirds of the injured employee's weekly wages, or two-thirds of the jurisdiction's median weekly wage, whichever is lower. Claimants may also receive payments for disabling injuries and for "disfigurement." N.Y. WORK COMP. LAW. § 13, 15. If the employee is killed, his or her dependents may be eligible for death benefits. *Id.* § 16. In exchange for these obligations, modern workers' compensation statutes immunize employers from overlapping tort liability. *Id.* § 11. Note that the original New York statute from 1910 did not provide employers with the quid pro quo of immunization from tort liability. It left injured employees with the choice to sue in tort for negligence or to file a compensation claim—a choice to be exercised after suffering the injury.

3. *The triumph of workers' compensation—and the tragedy of William Werner.* Coming as it did in the face of such a widespread movement to enact workers' compensation, the *Ives* decision was hotly controversial. Moreover, just days after Judge Werner announced the decision, the infamous Triangle Shirt-Waist Fire on the eastern edge of Washington Square Park in New York City killed more than a hundred young women workers, many of whom leapt to their deaths from the factory windows when they found the exits locked and impassable. An amendment to the state constitution quickly passed, providing that workers' compensation statutes were constitutional as a matter of state law. Judge Werner, a self-made man from western New York who had been an ambitious and promising candidate for nomination to the U.S. Supreme Court, lost his campaign to become the chief judge of the state. His former political sponsor, Theodore Roosevelt, condemned him as the worst kind of reactionary judge. Werner died soon thereafter a broken and defeated man. In 1917, the U.S. Supreme Court put the last nail in his coffin by ruling decisively that the Federal Constitution permitted workers' compensation liability. For Werner's story, see WITT, *THE ACCIDENTAL REPUBLIC*, Chapter 6.

4. *State constitutions and tort reform.* Even though *Ives* seems like a cautionary tale for state courts striking down legislation dealing with tort law, state courts regularly invalidate tort reform statutes today. See John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1163 (2005). In the past two decades, courts have struck down tort reform statutes limiting awards for noneconomic damages, see, e.g., *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) and *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010); tort reform statutes that cap punitive damages, see, e.g., *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011); tort reform statutes that cap total damages, see, e.g., *State ex rel. Ohio Acad. of Trial Lawyers v. Sherwood*, 715 N.E.2d 1062 (Ohio 1999); tort reform statutes creating additional procedural hurdles for plaintiffs, see, e.g., *Wall v. Marouk*, 302 P.3d 775 (Okla. 2013); tort reform statutes barring plaintiffs from suing individual tortfeasors, see, e.g., *Clarke v. Or. Health Sci. Univ.*, 175 P.3d 418 (Or. 2007); tort reform statutes abolishing joint and several liability, see, e.g., *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); and discovery statutes mandating unlimited disclosure of plaintiffs' medical records, see, e.g., *id.* Should state courts override legislative action in the torts area?

5. *Tort persists—third-party claims.* Workers' compensation was designed in significant part to remove lawyers and expensive litigation from workplace injury disputes. The statutes remove many of the contested issues from a claimant's case and replace common law courts and juries with an administrative claims process. Moreover, workers' compensation statutes typically place low caps on lawyers' fees, in part to prevent compensation claims from being heavily litigated.

Even so, workers' compensation has become the foundation for many plaintiffs' lawyers' practices. Plaintiffs' lawyers often organize their offices by arranging for a steady intake of workers' compensation claims, which pay very little, but pay more quickly than tort claims and bring in a steady stream of revenue. One function of the compensation cases for the plaintiffs' lawyer is to find so-called "third-party cases": cases where the involvement of a product in the events leading to the injury allow for a tort suit against the product's manufacturer. The product manufacturer is a third party and thus not immunized from suit by the workers' compensation legislation. See Stephen Daniels & Joanne Martin, *Texas Plaintiffs'*

*Practice in the Age of Tort Reform: Survival of the Fittest—It's Even More True Now*, 51 N.Y.L. SCH. L. REV. 286 (2006).

Workers' compensation statutes were designed to remove tort litigation from the workplace. But the third-party cases reintroduce tort precisely where workers' compensation aimed to displace it. In some jurisdictions, third-party defendants in such suits are able to bring claims for contribution or indemnity against employers if they can show that the employers' negligence was a cause of the injury in question. The result is that employees and employers are involved in tort litigation over work injuries, the aim of the compensation programs to the contrary notwithstanding. In other jurisdictions, product manufacturer defendants are barred from bringing contribution claims against employers. But even here, employers still pay for tort liability over and above the workers' compensation benefits to the extent that third parties, such as product manufacturers or other vendors or service providers, price their products and services to reflect the risk of third-party suits.

6. *Settlement as a compensation system.* The idea of workers' compensation was to replace the uncertainty and the expense of common law jury trials with a certain (though limited) compensation regime. The two systems are typically described as polar opposites. But how different they are in practice is unclear, since few common law tort cases ever get to a courtroom and a jury. Indeed, some observers argue that a vast private settlement system has emerged in the shadow of tort law that has come to resemble the administrative apparatus of workers' compensation systems. As early as the 1930s, plaintiffs' lawyers were converting many types of injuries into settlement values. Since then, settlement practices in many areas of tort law and workers' compensation have converged on administrative schemes that adopt liability matrixes and damages grids to manage settlements. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1615, 1625-26 (2004); JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS 274-75 (2007). The common law tort litigant thus does not often find herself in a system providing each individual with a "day in court" before a jury of her peers. To the contrary, tort litigants (like workers' compensation claimants) often find themselves in vast bureaucracies with easily-administered, one-size-fits-all rules for claims resolution. The difference—and it is a significant one—is that the tort litigant encounters a private bureaucracy, where the compensation claimant is in a public one. See Issacharoff & Witt, *supra*, at 1625-26; see also John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 268-69 (2007).

The general phenomenon is especially striking in the area of automobile accident claims. A half-century ago, public no-fault systems modeled on workers' compensation were under discussion in state legislatures across the nation. Some states enacted such no-fault statutes. But their momentum soon ebbed. Professor Nora Engstrom argues that the progress of no-fault statutes in auto cases slowed in part because fault and no-fault liability schemes had begun to converge. Tort practice in auto cases became less adversarial and more administrative, with plaintiffs' lawyers and insurance company claims adjusters negotiating private settlement arrangements using grids that resembled in practice the kind of administrative systems that no-fault insurance schemes aimed to adopt. At the same time, those no-fault insurance schemes have often become more adversarial than their rationalizing administrative founders had anticipated, involving more lawsuits and more lawyers. See Nora



Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 374 (2012).

If torts practice and workers' compensation converge, what is at stake in the choice between them?

## CHAPTER 5. THE REASONABLE PERSON

So far our treatment of the law of unintentional torts has focused on the development of fault-based and non-fault-based (or strict liability) approaches. Beginning here in Chapter 5, we will spend the next five chapters pursuing the principal fault-based approach to tort law: the negligence standard and the duty of reasonable care that Judge Shaw announced in *Brown v. Kendall*.

But what is reasonable care? What does it mean to demand that a person act reasonably? We will pursue the characteristics of the reasonable person. We will take up the influential (but always controversial) idea that to behave reasonably is to make those choices that cost-benefit analysis requires. We will ask who decides what reasonableness requires in any given situation. Should a generalist judge or an untrained jury decide? Or perhaps the decision about reasonableness should be made by particular industries, or by experts, or by democratically-accountable legislatures? We will end this chapter with two brief excursions. The first pursues the question of what litigants need to do to establish that they or their adversaries acted reasonably or unreasonably, as the case may be. The second steps back and asks a set of deep questions about the theoretical basis of tort law and about its internal logic and structure.

First, though, we begin with what is in some sense the most basic of all questions: who is the reasonable person?

### A. Introduction

#### **Vaughan v. Menlove, 3 Bingham's New Cases 468 (Court of Common Pleas, 1837)**

The declaration alleged, in substance, that plaintiff was the owner of two cottages; that defendant owned land near to the said cottages; that defendant had a rick or stack of hay near the boundary of his land which was liable and likely to ignite, and thereby was dangerous to the plaintiff's cottages; that the defendant, well knowing the premises, wrongfully and negligently kept and continued the rick in the aforesaid dangerous condition; that the rick did ignite, and that plaintiff's cottages were burned by fire communicated from the rick . . . .

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

PATTESON, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained,\* on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of a gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted bona fide to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances was of the first impression.

Talfourd, Serjt., and Whately, showed cause [for the plaintiff]. . . . [T]here were no means of estimating the defendant's negligence, except by taking as a standard the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. RICHARDS, in support of the rule [for the defendant]. First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the defendant had a right to place his stack as near to the extremity of his own land as he pleased . . . . [U]nder that right, and subject to no contract, he can only be called on to act bona fide to the best of his judgment; if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence.

TINDAL, C. J. I agree that this is a case *prime impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect: and though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the risk; for it is well known that hay will ferment and take fire if it be not carefully stacked. . . .

It is contended, however, that . . . the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and bona fide to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an

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\* [Recall from Chapter 3 that a “rule nisi” was essentially a device for obtaining appellate review; it was an order requiring a new trial unless the other side could show cause why the original decision should be upheld—Ed.]

intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment . . . . The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule, which requires in all cases a regard to caution such as a man of ordinary prudence would observe. . . .

Rule discharged.

***Oliver Wendell Holmes, Jr., The Common Law 107-09 (1881)***

Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming . . . . Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was. . . .

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant. Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

### Notes

1. *The “reasonable man” is born.* Together, *Vaughan v. Menlove* and the Holmes excerpt above sketch the contours of the “reasonable man,” the standard at the heart of modern negligence law. They do so by taking up the question of which features, if any, particular to the party ought to be relevant to the evaluation of that person’s conduct. *Vaughan* concludes that lack of ordinary intelligence is not an excuse for failing to live up to the standard of ordinary care. It adopts what we call an objective approach to the reasonableness inquiry: rather than asking whether the defendant acted reasonably in light of the defendant’s personal characteristics and capabilities (which would privilege the defendant’s subjectivity), the chosen approach abstracts away from the particular features of the defendant and asks whether the defendant’s conduct was reasonable on the basis of an external social standard. The Restatement puts it this way: “Unless the actor is a child” (more on this in the pages that follow), “the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.” RESTATEMENT (SECOND) OF TORTS § 283 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 & cmt. a (2010) (defining negligence as failure to “exercise reasonable care under all the circumstances,” where “the ‘reasonable care standard . . . is basically the same as a standard expressed in terms of the ‘reasonably careful person’”). If a person does their best within the limits of their own intellectual or cognitive capacities to act reasonably carefully—acting “bona fide to the best of their judgment,” as the defendant’s lawyer put it in *Vaughan*—have they acted wrongfully when they nonetheless fall short of society’s expectations? If not, why does tort law embrace a standard that allows liability in this situation?

2. *Is the reasonable person a rational actor?* One view of the facts in *Vaughan* is that the defendant acted in accordance with what a rational person in his circumstances might do. “[H]is stock,” after all, “was insured.” Why not “chance it”? Does tort law’s “reasonable person” behave in the same way as a “rational person”? If not, when might their actions diverge?

3. Holmes's account of the reasonableness inquiry is more or less congruent with *Vaughan v. Menlove*, at least insofar as lack of ordinary intelligence goes. But Holmes begins to introduce subjective considerations for certain characteristics such as blindness, "tender years," and certain forms (though not all forms) of insanity. What explains Holmes's arguments in favor of taking certain characteristics into account but not others? In what follows, we will review the major controversies in this area of the law, beginning with the basic physical trait of blindness that Holmes introduced.

## B. Physical Traits

### *Smith v. Sneller*, 26 A.2d 452 (Pa. 1942)

DREW, J. Plaintiff recovered a verdict and judgment. On appeal, the Superior Court reversed the judgment on the ground that plaintiff was guilty of contributory negligence, and entered judgment n.o.v. for defendant Sneller, he alone having appealed. This appeal was then specially allowed. . . .

Plaintiff, while engaged in a house to house canvass as a salesman of small articles, was injured in falling into an open trench in the west sidewalk of North Fifth Street in the City of Philadelphia. . . . The trench then extended from the curb across the sidewalk, three or four feet wide, and had been dug to a depth of seven or eight feet. The earth from the excavation had been thrown upon the sidewalk along both sides of the trench. . . . On the far side of the trench as [plaintiff] approached it, there was a barricade but along the side nearest him there was only the pile of excavated material between him and the trench, about two feet high according to the only testimony on the subject. Plaintiff, because of defective eyesight, did not see the pile of earth and had no notice that it was there until he felt it under his feet as he walked upon it. The loose material slipped from under him causing him to lose his footing and he fell into the trench. . . .

He did not carry a cane and, because he was unable to see, did not have notice of the break in the pavement, the pile of earth on the sidewalk, nor the open trench in front of him.

The Superior Court said further: "Under somewhat similar circumstances, recovery was denied a blind plaintiff, who fell into an open cellarway extending into the sidewalk, in *Fraser v. Freeman*, 87 Pa. Superior Ct. 454, in which Judge Porter said: 'The law requires a degree of care upon the part of one whose eye-sight is impaired proportioned to the degree of his impairment of vision. . . . In the exercise of common prudence one of defective eye-sight must usually, as a matter of general knowledge, take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions; in order to reach the standard established by law for all persons alike, whether they be sound or deficient. The statement that a blind or deaf man is bound to a higher degree of caution than a normal person does not mean that there is imposed upon him a higher standard of duty, but rather that in order to measure up to the ordinary standard he must the more vigilantly exercise caution through other senses and other means, in order to compensate for the loss or impairment of those senses in which he is defective. . . .'"

We cannot escape the conclusion of the Superior Court that the instant case is ruled by the *Fraser* case. . . . The fact that plaintiff did not anticipate the existence of the ditch across the sidewalk, in itself, does not charge him with negligence. But, it is common knowledge, chargeable to plaintiff, that obstructions and defects are not uncommon in the sidewalks of a city, any one of which may be a source of injury to the blind. . . . In such circumstances he was bound to take precautions which one not so afflicted need not take. In the exercise of due care for his own safety it was his duty to use one of the common, well-known compensatory devices for the blind, such as a cane, a “seeing-eye” dog, or a companion. These are a poor substitute for sight, but any one of them would probably have been sufficient to prevent this accident. . . . We are in accord with that learned court, that plaintiff was guilty of contributory negligence as a matter of law, and we must, therefore, affirm the judgment.

***Davis v. Feinstein*, 88 A.2d 695 (Pa. 1952)**

STEARNE, J. This is an appeal from judgment entered on a jury’s verdict for plaintiff in an action of trespass. Defendants . . . rest their motion for judgment non obstante veredicto on the sole ground that plaintiff was guilty of contributory negligence as matter of law. . . .

Plaintiff is a blind man. While walking south on 60th Street between Market and Arch Streets in Philadelphia, he fell into an open cellarway in front of the furniture store maintained by defendants. The opening was equipped with a cellar door, flush with the pavement when closed, and consisting of two sections each about two and one-half feet wide. When the door was open, an iron bar about five feet in length usually connected the two sections at the front, holding them erect and thus presenting a barrier which would ordinarily prevent a pedestrian from stepping into the opening. At the time of the accident, the north section was closed and even with the sidewalk; the connecting bar was not in place; and the south section of the door was standing erect. It was into the aperture thus left uncovered that the plaintiff fell and suffered the injuries which were the basis of this suit. . . .

Both sides agree with the statement of the learned court below that the controlling authority is *Smith v. Sneller*, 345 Pa. 68, 26 A. 2d 452. In that case the blind plaintiff employed no cane or other compensatory aid. . . .

In the instant case plaintiff testified that he was employing his cane as a guide, moving it laterally in order to touch the walls of abutting buildings and keep on a straight course, and also tapping the ground before him to search out obstacles in his path. Defense counsel argues: “Even as a man with sight cannot say he did not observe that which was open and obvious, neither can a blind man say that he made proper use of the cane and was unable to learn of the existence of the defect. It necessarily follows that he did not have a proper instrument, that is to say, the cane was not adequate or he did not use it properly.”

We did not so decide in *Smith v. Sneller*, supra. A blind person is not bound to discover everything which a person of normal vision would. He is bound to use due care under the circumstances. Due care for a blind man includes a reasonable effort to compensate for his unfortunate affliction by the use of artificial aids for discerning obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a reasonable one. The general rule applies that “Contributory negligence may be declared as a

matter of law only when it is so clearly revealed that fair and reasonable persons cannot disagree as to its existence . . . .” *Guca v. Pittsburgh Railways Company*, 80 A. 2d 779.

It was not unreasonable for the jury to have concluded that plaintiff exercised due care for his safety when he used his cane in the manner which he described. . . .

Judgment affirmed.

## Notes

1. *Why take physical traits into account?* *Vaughan v. Menlove* stands for an objective approach and the irrelevance of what Holmes called the “infinite varieties” of human characteristics. Why do we see courts adopting a different approach here—subjectivizing, in a way, a standard that is supposed to be objective? What makes vision impairment different from intellectual impairment?

2. *The Restatement view.* The Restatement aligns with the holdings in *Smith v. Sneller*, 26 A.2d 452 (Pa. 1942), and *Davis v. Feinstein*, 88 A.2d 695 (Pa. 1952): “If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.” RESTATEMENT (SECOND) OF TORTS § 283C (1965). Note that sometimes this standard might require a person with a physical impairment to take greater precautions than the person not so impaired. Simultaneously, it might excuse the person from taking precautions that reasonable care would demand of others. *Id.* at cmt. c. Such adjustments, according to prominent torts theorist William Lloyd Prosser, are the common law’s way of declaring that “[t]he man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world.” WILLIAM LLOYD PROSSER, THE LAW OF TORTS § 32, at 155 (3d ed. 1964).

3. *The negligence standard and “the right to live in the world.”* Perhaps the most famous critique of tort law’s approach to physical traits is Professor Jacobus tenBroek’s *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966). Like Prosser, tenBroek argues that tort law plays a crucial role in whether people with physical limitations feel free “to move about and be in public places”—“to go about in the streets, sidewalks, roads and highways, to ride upon trains, buses, airplanes, and taxi cabs, and to enter and to receive goods and services in hotels, restaurants, and other places of public accommodation.” *Id.* at 842. But tenBroek—drawing in part on his own experiences as a blind man—offers a much darker assessment than Prosser of tort law’s accomplishments:

Dean Prosser's grand pronouncement . . . while purporting to be drawn from the case law, and while seeming to express for the law of torts the legislatively established policy of the integration of the disabled, is in no sense an accurate summary of the law of torts as that law stands today. The judges either qualify or ignore Dean Prosser's pronouncement and the integrationist policy. In some areas, the pronouncement and the policy are completely rejected; in others, they are given only halting and partial credence; and in none are they fully and



positively implemented by the courts. Dean Prosser himself immediately emasculates his proposition. He applies it only to a narrow realm of street accidents. And even there, while freeing the disabled of negligence per se for being where they are, he hobbles them with the views of the able-bodied as to what their reasonable conduct should be. In these areas, the sum total of the law's beneficence to the disabled seeking a full-fledged right to live in the world can be easily and briefly summarized: The courts, prodding the tardy genius of the common law, have extended a variant of the reasonable man concept to those who injure the disabled on the streets, in traffic, and on common carriers. This constitutes a meager and inadequate accomplishment in the light of the integrationist purpose and the legislative declaration of policy. . . .

*Id.* at 852. Summarizing how courts have applied the negligence standard in cases involving disabled people, tenBroek continues:

The majority of courts say that it is not negligence per se for a blind man to walk the streets without a companion or attendant; others that he may do so only in certain circumstances. Some say that it is contributory negligence as a matter of law to travel without dog, cane, or companion; others, that the failure to use one or more of these travel aids presents a question for the jury as to whether due care was employed. No courts say that a blind man may not, when taking the proper precautions, enter unfamiliar territory; most courts, however, emphasize the plaintiff's knowledge of the surroundings and the frequency of his presence. Some say that the plaintiff's knowledge that the streets are or may be defective or dangerous creates a kind of assumption of risk; others, that in the circumstances, the disabled person may proceed but must do so with due care in the light of his knowledge. The latter rule is also applied by some courts to blind persons in railway depots, at railway street crossings, and like places of similar danger, while others say that it is gross negligence for blind persons to be in such places alone. Some courts say that the disabled may proceed upon the assumption that the streets and highways are kept in a reasonably safe condition, and that cities and abutting property owners must expect the disabled to be abroad in the land and accordingly must take precautions necessary to warn or otherwise protect them. Others say that those who create, maintain, or tamper with the streets and public passageways are only under a duty to safeguard the able-bodied pedestrian.

No courts have held or even darkly hinted that a blind man may rise in the morning, help get the children off to school, bid his wife goodbye, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step and sure air, knowing that he is part of the public for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live. He would then be doing what any reasonable, or prudent, or reasonably prudent blind man would do, and also what social policy must positively foster and judges in their developing common law must be alert to sustain.

*Id.* at 866-68. If tort law were really concerned with vindicating a “right to live in the world,” tenBroek argues, it would ask “not whether the defendant created an unreasonable risk of harm [to a disabled plaintiff], but whether he interfered with the effectuation of the policy of the social integration of the disabled; not whether the [disabled] plaintiff conducted himself as a reasonable man of ordinary prudence acting in the light of all the circumstances, but whether he acted pursuant to his right to be a part of his community.” *Id.* at 914.

How radical is tenBroek’s proposal? How sound? The answer may depend on how you understand disability. One conventional understanding of disability is that it is an individual characteristic—a biologically or medically based trait, akin to sex or age. By contrast, the “social model” of disability, which emerged in the 1960s, emphasizes the role of society, culture, and other external forces in limiting what people with particular bodies and minds can do, thereby *creating* disability where none necessarily had to exist. Today, many scholars of disability and many people who identify as disabled have embraced the core insight of this social model (while pulling back from any implication that individuals’ bodily experiences are entirely socially constructed). See generally Sagit Mor, *The Meaning of Injury: A Disability Perspective*, in INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 27, 29 (Anne Bloom, David M. Engel, & Michael McCann, eds., 2018). How might tort law’s approach to physical difference “mediate” the experience of disablement? Could tort law alleviate the conditions that cause particular individuals to feel disabled as they navigate the world? Should it? Note that since tenBroek’s time, a bevy of state and federal statutes have emerged to protect the access rights of people with disabilities, including Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2012)), and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328 (codified as amended at 42 U.S.C. § 12101 (2012)). But much of what tenBroek critiqued in 1966 still appears to hold for tort law. See Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 49 CATH. U. L. REV. 323 (1999).

If we do want to take seriously a “right to live in the world” as a concern of tort law, what is the content of that right? Here it is worth saying more about tenBroek: in addition to being blind, he was white, tall, and handsome by the standards of his time; he was highly educated, with advanced degrees in political science and law; at the time he wrote this article, he was a professor at one of the world’s greatest universities (the University of California, Berkeley) and had served in a prominent position in California state government; his wife, Hazel tenBroek, was extremely devoted to his care and his work. Does tenBroek’s theoretical “right to live in the world” extend to disabled people whose circumstances might require the actors around them to make much more significant adjustments than would be required to vindicate tenBroek’s own “right to live in the world”? And what does it mean to “live in the world” in a full and dignified way? Does tenBroek idealize too much the way that able-bodied, adult, white, educated, male breadwinners navigate public space? Or should everyone, with the aid perhaps of tort law, be entitled to experience the world in that way?

4. *What about physical impairments that arise suddenly?* See, for example, *Lehman v. Haynam*, 133 N.E.2d 97 (Ohio 1956), where the court ruled that a defendant’s sudden and unforeseeable unconsciousness would be relevant to the determination of whether he drove negligently when his car veered across the center line of a highway and struck the plaintiff.

(That is, the court did not employ the metric of a reasonable person who was not so afflicted.) The Ohio Supreme Court recently reaffirmed the *Lehman* rule and noted that it is supported by “the great weight of authority” in common law jurisdictions. *Roman v. Estate of Gobbo*, 791 N.E.2d 422, 427 (Ohio 2003). What logic supports this rule?

5. *Disaggregating disability*. Recall Holmes’s justification for not requiring “ordinary care” from certain individuals: “When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them.” HOLMES, *supra*. How should the law apply to actors whose physical impairments are less apparent to the world than those of the paradigmatic blind man with a cane? This is not a hypothetical. The majority of people who meet the conventional definition of disability have an invisible disability. Common examples include chronic fatigue syndrome, chronic pain, epilepsy, irritable bowel syndrome, food allergies, and chemical sensitivity. Does reasonableness require that actors with invisible disabilities take extra precautions? What about actors who have multiple disabilities? What about actors whose multiple disabilities include both an intellectual or cognitive disability and a physical disability?

## C. Children

### ***Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961)**

LOEVINGER, J.

This case arises out of a personal injury to Jeanette E. Dellwo, one of the plaintiffs. She and her husband, the other plaintiff, were fishing on one of Minnesota’s numerous and beautiful lakes by trolling at a low speed with about 40 to 50 feet of line trailing behind the boat. Defendant, a 12-year-old boy, operating a boat with an outboard motor, crossed behind plaintiffs’ boat. Just at this time Mrs. Dellwo felt a jerk on her line which suddenly was pulled out very rapidly. The line was knotted to the spool of the reel so that when it had run out the fishing rod was pulled downward, the reel hit the side of the boat, the reel came apart, and part of it flew through the lens of Mrs. Dellwo’s glasses and injured her eye. Both parties then proceeded to a dock where inspection of defendant’s motor disclosed 2 to 3 feet of fishing line wound about the propeller.

The case was fully tried to the court and jury and submitted to the jury upon instructions which, in so far as relevant here, instructed the jury that: (1) In considering the matter of negligence the duty to which defendant is held is modified because he is a child, a child not being held to the same standard of conduct as an adult and being required to exercise only that degree of care which ordinarily is exercised by children of like age, mental capacity, and experience under the same or similar circumstances . . . .

The jury returned a general verdict for defendant, and plaintiffs appeal. . . .

There is no doubt that the instruction given substantially reflects the language of numerous decisions in this and other courts. . . . However, the great majority of these cases involve the issue of contributory negligence and the standard of care that may properly be required of a child in protecting himself against some hazard.<sup>11</sup> The standard of care stated is proper and appropriate for such situations.

However, this court has previously recognized that there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to hazards. . . . Certainly in the circumstances of modern life, where vehicles moved by powerful motors are readily available and frequently operated by immature individuals, we should be skeptical of a rule that would allow motor vehicles to be operated to the hazard of the public with less than the normal minimum degree of care and competence.<sup>13</sup>

To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. While minors are entitled to be judged by standards commensurate with age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play with toys, throwing balls, operating tricycles or velocipedes, or engaged in other childhood activities may anticipate conduct that does not reach an adult standard of care or prudence. . . . However, one cannot know whether the operator of an approaching automobile, airplane, or powerboat is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned. Accordingly, we hold that in the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.

Undoubtedly there are problems attendant upon such a view. However, there are problems in any rule that may be adopted applicable to this matter. They will have to be solved as they may present themselves in the setting of future cases. The latest tentative revision of the Restatement of Torts proposes an even broader rule that would hold a child to adult standards whenever he engages "in an activity which is normally undertaken only by adults, and for which adult qualifications are required."<sup>15</sup> However, it is unnecessary to this case to adopt a rule in such broad form, and, therefore, we expressly leave open the question whether or not that rule should be adopted in this state. For the present it is sufficient to say that no reasonable grounds for differentiating between automobiles, airplanes, and powerboats appears, and that a rule requiring a single standard of care in the operation of such vehicles,

<sup>11</sup> As relevant to the issue of the instant case, it should be noted that this court has also said that a lower standard of care for their own safety may be required of very old, as well as very young, people. *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260, 69 N.W. 900, 36 L.R.A. 586. It would follow that if minors are permitted to operate motor vehicles with less than ordinary care, then so should the elderly and infirm.

<sup>13</sup> Apparently sanctioning such a rule is: *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457, 73 A.L.R. 1266. It should be noted this case was decided in 1931. . . .

<sup>15</sup> RESTATEMENT, TORTS, TENTATIVE DRAFT NO. 4, § 238A, Comment c. This is quoted with apparent approval in *Wittmeier v. Post*, S.D., 105 N.W.2d 65.

regardless of the age of the operator, appears to us to be required by the circumstances of contemporary life.

Reversed and remanded for a new trial.

### Notes

1. *Headnotes: a cautionary tale.* If you read this case in a West reporter, or on Westlaw, you will see the following information preceding the text of the opinion:

West Headnotes

...

[6] Infants k61  
211k61

In operation of automobile, airplane or powerboat, minor is to be held to same standard of care as adult.

Syllabus by the Court

...

2. In the operation of an automobile, airplane, or powerboat, a minor is to be held to the same standard of care as an adult.

What are “West Headnotes”? For that matter, what is the “Syllabus of the Court”? Are these statements of law? Recall our discussion of holdings in the notes after *Brown v. Kendall* in Chapter 3. What is the holding of *Dellwo*? Does the headnote excerpted above accurately capture it?

2. *What is a dangerous adult activity?* The *Dellwo* court declined to adopt the Second Restatement approach of creating a general category of dangerous adult activities. But the Second Restatement has been widely influential and has been repeated in the Restatement (Third) of Torts, which advises that children engaging in dangerous adult activities may be held to the same standard of care required of an adult and that, in such instances, “no account is taken of their childhood.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 10 cmt. f (2010).

The question remains, however: what counts as a dangerous adult activity? Courts have held that dangerous adult activities include operating a motor vehicle, *Harrelson v. Whitehead*, 365 S.W.2d 868 (Ark. 1963); operating farm equipment, *Jackson v. McCuiston*, 448 S.W.2d 33 (Ark. 1969); operating a snowmobile, *Robinson v. Lindsay*, 598 P.2d 392 (Wash. 1979); and operating a minibike, *Frayser by Edenhofer v. Lovell*, 529 N.W.2d 236 (Wis. Ct. App. 1995).

Firing a high-powered hunting rifle, however, is not a dangerous adult activity, at least not in Arkansas. *Purtle v. Shelton*, 474 S.W.2d 123 (Ark. 1971). Nor is skiing in New Jersey, *Goss v. Allen*, 360 A.2d 388 (N.J. 1976), or Utah, *Donovan v. Sutton*, 498 P.3d 382 (Utah 2021); starting a campfire in Michigan, *Farm Bureau Ins. Group v. Phillips*, 323 N.W.2d 477 (Mich. App. 1982); operating a golf cart in Oregon, *Hudson-Connor v. Putney*, 86 P.3d 106 (Or. App. 2004); or riding a bicycle in Illinois, *Conway v. Tamborini*, 215 N.E.2d 303 (Ill. App. 3d Dist. 1966); though Arizona courts disagree, see *Barnes v. Tucson*, 760 P.2d 566 (Ariz. App. 1988). Firing an air rifle, *Swix v. Daisy Mfg. Co.*, 373 F.3d 678 (6th Cir. 2004), is not a dangerous adult activity. Nor is driving on private roads or property, *Ricketts v. Norfolk S. Ry.*, 686 So. 2d 1100 (Ala. 1996); firing a BB gun, *Huebner by Lane v. Koelfgren*, 519 N.W.2d 488 (Minn. App. 1994); failing to yield the right of way, *Ruby v. Easton*, 207 N.W.2d 10 (Iowa 1973); firing a revolver, *LaBarge v. Stewart*, 501 P.2d 666 (N.M. App. 1972); or playing softball, *Jones v. Cobb*, 834 So. 2d 13 (La. App. 2d Cir. 2002). Golfing is not a dangerous adult activity in North Dakota, *Kirchoffner v. Quam*, 264 N.W.2d 203 (N.D. 1978), but it is in New York, *Neumann v. Shlansky*, 312 N.Y.S.2d 951 (Sup. Ct. 1970).

3. *Beginners.* The traditional common law rule for children, in which tender years are taken into account, seems to have reflected at least in part an intuition that it might be valuable to encourage youth to develop new skills. This intuition could be generalized: what about encouraging beginners more generally, regardless of age? Interestingly, courts have overwhelmingly rejected any such approach that would take into account a party's lack of expertise in determining whether the party exercised reasonable care. See, for example, *Stevens v. Veenstra*, 573 N.W.2d 341 (Mich. App. 1997), in which the Michigan Court of Appeals held that an unlicensed driver in a drivers' education course had to conform to the same standard of care required of licensed drivers.

A beginner's inexperience may be relevant to the standard of care owed to people with whom the beginner is in a preexisting relationship that gives notice of the relevant inexperience. The classic example is the case of the driving instructor injured while a student is at the wheel. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 12 cmt. b (2010) (concluding that a defendant driving student's inexperience should be taken into account in considering the defendant's negligence in a case brought by the instructor). The same approach applies in the instance of flight instruction. See *Vee Bar Airport v. De Vries*, 43 N.W.2d 369 (S.D. 1950).

4. *Experts.* What about parties with unusually developed expertise or skills? Here, too, the question of encouraging or discouraging investment in expertise is raised. The Restatement (Third) of Torts poses the following hypothetical: "Consider two cars that collide on the highway, or two skiers who collide on a ski trail; if it turns out that one of the motorists is a professional driver or one of the skiers a professional ski instructor, this is a fortuity as far as the other motorist or the other skier is concerned." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 12 cmt. a (2010). Because increased liability for experts will reduce incentives to invest in expertise, the Restatement reports that the best approach excludes expertise from consideration. See, e.g., *Southard v. Belanger*, 966 F. Supp. 2d 727, 740-41 (W.D. Ky. 2013) (holding that a plaintiff could not hold the defendant, a professional tractor-trailer driver who was turning left while using his cell phone, to a higher standard of care).

Some courts, however, have been uncomfortable allowing defendants to disclaim their expertise. Experts who hold themselves out as expert professionals, for example, are held to the standard of similarly situated professionals. *See, e.g., Louisville & Nashville R.R. v. Perry's Adm'r*, 190 S.W. 1064, 1066 (Ky. Ct. App 1917) (“When a Kentucky court says that an engineer must use ordinary care . . . , this implies such care as a competent engineer would exercise and the doing of such things as a capable engineer would do.”); *Donathan v. McConnell*, 193 P.2d 819, 825 (Mont. 1948) (holding that dentists are required to exercise “reasonable care and skill as is usually exercised by a dentist in good standing”); *Vigneault v. Dr. Hewson Dental Co.*, 15 N.E.2d 185 (Mass. 1938) (holding the same as *Donathan v. McConnell*). *Cf. Alfonso v. Robinson*, 514 S.E.2d 615 (Va. 1999) (holding that defendant truck driver’s professional expertise was relevant in determining whether his conduct amounted to willful and wanton negligence).

The Restatement (Third) of Torts supports taking expertise into account in determining whether a defendant exercised reasonable care when (1) the defendant engages in an activity that poses “distinctive and significant dangers” or (2) a plaintiff with a preexisting relationship with the defendant has reasonably relied on the defendant’s expertise. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 12 cmt. a (2010). Certain courts have applied the Restatement’s view. *See Levi v. Sw. La. Elec. Membership Coop.*, 542 So. 2d 1081, 1084 (La. 1989) (holding the employees of defendant power company to the standard of “a reasonable person” with the “superior attributes” of experts in view of the “distinctive and significant dangers” of high power lines); *Everett v. Bucky Warren, Inc.*, 380 N.E.2d 653, 659 (Mass. 1978) (holding that the defendant, a high school hockey coach who had substantial experience in the game of hockey, could be held to a higher standard of care than an average person in the selection of the helmets he supplied his players when one of those helmets failed to protect the plaintiff from injuries).

Why are these cases not treated like those of the expert skiers and drivers who collide with strangers?

5. *Asymmetry in the application of the reasonableness standard.* The *Dellwo* opinion flags an interesting phenomenon: “a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to hazards.” As it turns out, this phenomenon is not limited to children. Professor Avihay Dorfmann offers the following hypothetical:

(1) Roger, aged 85, drove his automobile across the city. Although not exceeding the relevant speed limit, Roger failed to stop his automobile on time, striking down a person innocently walking on a designated crosswalk. Roger’s failure is attributed to his poor reflexes, probably the upshot of his old age. (2) Now consider the opposite case where the same Roger is struck at the same place by an automobile. The driver is negligent for driving unreasonably fast (whatever unreasonably fast means). On his part, Roger’s slow reflexes have amplified the gravity of his injury—had he responded quicker to the approaching automobile, the harm he suffered could have been either reduced or even avoided altogether. For the sake of clarity, suppose that the only risk produced by Roger [as] the pedestrian is risk to himself . . . . In both cases, the conduct of Roger is assessed against the baseline of reasonableness. Whereas

in the first case the question is whether Roger the tort-feasor breached the duty of reasonable care he owed the injured pedestrian, the second one gives rise to the question of whether, and to what extent, his response to the injurer's negligence was itself unreasonable, which is to say contributory or comparatively negligent.

Avihay Dorfmann, *Negligence and Accommodation*, 22 LEGAL THEORY 77, 82-83 (2016). How should courts treat Roger's age? Should his age work in his favor, potentially excusing his behavior in Scenario #1 and posing no obstacle to his recovery of full damages in Scenario #2, despite the fact that his age likely resulted in more costly injuries? Or, should his age work against him, obliging him to expend additional effort or resources in order to meet a standard of reasonable care? Dorfmann suggests that in the caselaw, the answer turns on whether Roger is the plaintiff or the defendant, although courts offer no justification for this asymmetry. *Id.* at 109. What underlying rationales might explain this pattern? We will revisit this question in our subsequent discussion of contributory negligence.

## D. Mental Illness

### ***Breunig v. American Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970)**

[Plaintiff Phillip A. Breunig's truck was struck by an automobile driven by Erma Veith and insured by the defendant American Family Insurance Company. Breunig suffered serious personal injuries. At the time of the accident, Veith's car was proceeding west in an eastbound lane. The jury returned a verdict for the plaintiff, and defendant insurance company appealed.]

HALLOWS, C.J. The evidence established that Mrs. Veith, while returning home after taking her husband to work, saw a white light on the back of a car ahead of her. She followed this light for three or four blocks. Mrs. Veith did not remember anything else except landing in a field, lying on the side of the road and people talking. She recalled awaking in the hospital.

The psychiatrist testified Mrs. Veith told him she was driving on a road when she believed that God was taking ahold of the steering wheel and was directing her car. She saw the truck coming and stepped on the gas in order to become airborne because she knew she could fly because Batman does it. To her surprise she was not airborne before striking the truck but after the impact she was flying. Actually, Mrs. Veith's car continued west on Highway 19 for about a mile. . . . When a traffic officer came to the car to investigate the accident, he found Mrs. Veith sitting behind the wheel looking off into space. . . .

The psychiatrist testified Erma Veith was suffering from "schizophrenic reaction, paranoid type, acute." He stated that from the time Mrs. Veith commenced following the car with the white light and ending with the stopping of her vehicle in the cornfield, she was not able to operate the vehicle with her conscious mind and that she had no knowledge or forewarning that such illness or disability would likely occur.



The insurance company argues Erma Veith was not negligent as a matter of law because there is no evidence upon which the jury could find that she had knowledge or warning or should have reasonably foreseen that she might be subject to a mental delusion which would suddenly cause her to lose control of the car. Plaintiff argues there was such evidence of forewarning and also suggests Erma Veith should be liable because insanity should not be a defense in negligence cases.

The case was tried on the theory that some forms of insanity are a defense to and preclude liability for negligence under the doctrine of *Theisen v. Milwaukee Automobile Mut. Ins. Co.* (1962), 18 Wis. 2d 91 . . . .

In *Theisen* we recognized one was not negligent if he was unable to conform his conduct through no fault of his own but held a sleeping driver negligent as a matter of law because one is always given conscious warnings of drowsiness and if a person does not heed such warnings and continues to drive his car, he is negligent for continuing to drive under such conditions. But we distinguished those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force, or fainting, or heart attack, or epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen. . . .

The policy basis of holding a permanently insane person liable for his tort is: (1) Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it; (2) to induce those interested in the estate of the insane person (if he has one) to restrain and control him; and (3) the fear an insanity defense would lead to false claims of insanity to avoid liability. . . .

The cases holding an insane person liable for his torts have generally dealt with pre-existing insanity of a permanent nature. . . .

[But] we think the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances. These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of the whole doctrine of liability for negligence, i.e., that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident.

We need not reach the question of contributory negligence of an insane person or the question of comparative negligence as those problems are not now presented. All we hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity. . . .

The insurance company argues that since the psychiatrist was the only expert witness who testified concerning the mental disability of Mrs. Veith and the lack of forewarning that as a matter of law there was no forewarning and she could not be held negligent; and [that] the trial court should have so held. While there was testimony of friends

indicating she was normal for some months prior to the accident, the psychiatrist testified the origin of her mental illness appeared in August, 1965, prior to the accident. . . .

The question is whether she had warning or knowledge which would reasonably lead her to believe that hallucinations would occur and be such as to affect her driving an automobile. Even though the doctor's testimony is uncontradicted, it need not be accepted by the jury. It is an expert's opinion but it is not conclusive. It is for the jury to decide whether the facts underpinning an expert opinion are true. . . . The jury could find that a woman, who believed she had a special relationship to God and was the chosen one to survive the end of the world, could believe that God would take over the direction of her life to the extent of driving her car. Since these mental aberrations were not constant, the jury could infer she had knowledge of her condition and the likelihood of a hallucination just as one who has knowledge of a heart condition knows the possibility of an attack. While the evidence may not be strong upon which to base an inference, especially in view of the fact that two jurors dissented on this verdict and expressly stated they could find no evidence of forewarning, nevertheless, the evidence to sustain the verdict of the jury need not constitute the great weight and clear preponderance.

Judgment affirmed.

### Notes

1. *Mental illness as an immunity or an adjustment to the reasonable person standard?* Is the *Breunig* court suggesting that, absent foreknowledge, a suddenly ill defendant is immune from tort liability? Or is mental illness something to be taken into account in determining what counts as reasonable, just as the standard accounts for physical impairment? Would this amount to the standard of a reasonable mentally ill person? What would that mean? Why not apply the rule of *Vaughan v. Menlove* and exclude the mental impairment as irrelevant to the reasonableness of the party's conduct? Is taking mental illness into account more defensible—or less—when the condition is temporary rather than permanent?

2. *Jurisdictional variation.* Not all courts have held that sudden mental illness may shield an actor from liability for negligence. See *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635 (Cal. App. 1996) (holding that sudden and unanticipated mental illness does not preclude liability for negligence); *Turner v. Caldwell*, 421 A.2d 876 (Conn. Super. Ct. 1980) (refusing to accept a temporary insanity defense in automobile accidents); *Kuhn v. Zabotsky*, 224 N.E.2d 137 (Ohio 1967) (holding that a defendant who struck a plaintiff's car could not use sudden mental illness as a defense). But do these divergent approaches in fact lead to different results? Note that in *Breunig*-type scenarios, in jurisdictions that accept the *Breunig* approach, cases are in fact often resolved in the plaintiff's favor because of the defendant's foreknowledge of the possibility of sudden disability or illness. See *Ramey v. Knorr*, 124 P.3d 314, 316 (Wash. App. 2005) (tortfeasor who wishes to plead sudden mental incapacity must establish "no prior notice or forewarning of [his or her] potential for becoming disabled"). Note that the foreknowledge solution is not limited exclusively to mental illness or delusion cases. Certain cases relating to the standard of care for beginners might also be characterized as foreknowledge cases. See *Navailles v. Dielman*, 50 So. 449, 450 (La. 1909) (holding that the defendant, an inexperienced

driver, could be held liable for his negligence because he “ventured upon the streets in an automobile without knowing how to make an emergency stop”).

3. *The narrow scope of the Breunig rule.* The Wisconsin Supreme Court has applied *Breunig* narrowly in subsequent decisions. See *Burch v. American Family Mut. Ins. Co.*, 543 N.W.2d 277, 281 (Wis. 1996) (holding that a developmentally disabled defendant driver’s mental capacity was not relevant to determining her liability for negligence). The Wisconsin Supreme Court has also stressed that the rule of special treatment for sudden mental illness in *Breunig* is limited and that the objective standard of care generally applies in mental illness cases. See *Jankee v. Clark County*, 612 N.W.2d 297, 314 (Wis. 2000). Explaining why this approach continues to make sense in the 21<sup>st</sup> century, the Court has supplemented the rationales in *Breunig* with two others: (1) “in an era in which society is less inclined to institutionalize the mentally disabled, the reasonable person standard of care obligates the mentally disabled to conform their behavior to the expectations of the communities in which they live”; and (2) “the reasonable person standard of care allows courts and juries to bypass the imprecise task of distinguishing among variations in character, emotional equilibrium, and intellect.” *Id.* at 312. How persuasive do you find these rationales? Are there other explanations for the state of the doctrine? After reviewing courts’ approach to mental illness, professor of psychiatry Paul S. Applebaum concluded that the caselaw is “difficult to understand other than as a reflection of deep-seated prejudices against persons with mental illness and profound misunderstandings of the nature of mental disorders.” Paul S. Appelbaum, *Responsibility for Torts: Should the Courts Continue to Ignore Mental Illness?* 63 PSYCHIATRIC SERVICES 308, 310 (2012). What do you think?

4. Is there a basis for distinguishing cases like *Breunig* from cases like *Lehman v. Haynam*, 133 N.E.2d 97 (Ohio 1956), discussed in the notes above, in which defendants suffer from sudden physical ailments illnesses like epilepsy, heart attacks, or unconsciousness? Or do they stand for the same principle? What are the relevant considerations for sorting out an actor’s responsibility for injuries arising out of sudden and unanticipated conditions?

What if the party alleging negligence had notice of the allegedly negligent party’s condition? Would that change the general treatment of mental illness? Consider the next case:

***Gould v. American Family Mut. Ins. Co.*, 543 N.W.2d 282 (Wis. 2000)**

BRADLEY, J. . . . The judgment imposed liability against American Family for personal injuries caused by its insured, Roland Monicken, who was institutionalized suffering from Alzheimer’s disease. . . .

Monicken was diagnosed with Alzheimer’s disease after displaying bizarre and irrational behavior. As a result of his deteriorating condition, his family was later forced to admit him to the St. Croix Health Care Center. Sheri Gould [the plaintiff] was the head nurse of the center’s dementia unit and took care of him on several occasions.

Monicken’s records from St. Croix indicate that he was often disoriented, resistant to care, and occasionally combative. When not physically restrained, he often went into other

patients' rooms and sometimes resisted being removed by staff. On one such occasion, Gould attempted to redirect Monicken to his own room by touching him on the elbow. She sustained personal injuries when Monicken responded by knocking her to the floor. . . .

It is a widely accepted rule in most American jurisdictions that mentally disabled adults are held responsible for the torts they commit regardless of their capacity to comprehend their actions; they are held to an objective reasonable person standard. . . .

In *Breunig*, [supra] . . . [t]his court created a limited exception to the common law rule, holding that insanity could be a defense in the rare case "where the [person] is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances." . . .

[T]he actual holding was very limited:

All we hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity.

*Breunig*, 45 Wis. 2d at 544. . . .

The record reveals that Gould was not an innocent member of the public unable to anticipate or safeguard against the harm when encountered. Rather, she was employed as a caretaker specifically for dementia patients and knowingly encountered the dangers associated with such employment. It is undisputed that Gould, as head nurse of the dementia unit, knew Monicken was diagnosed with Alzheimer's disease and was aware of his disorientation and his potential for violent outbursts. Her own notes indicate that Monicken was angry and resisted being removed from another patient's room on the day of her injury.

. . .

[O]rdinarily a mentally disabled person is responsible for his or her torts. However, we conclude that this rule does not apply in this case . . . . When a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not "innocent" of the risk involved. . . . Therefore, we hold that a person institutionalized, as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation.

### Notes

1. *Mental illness and caretakers.* Why immunize mentally disabled defendants from liability under such circumstances? Would it be an alternative to make the defendant's condition a relevant consideration in the inquiry into whether the defendant's conduct was negligent? Or, if it is nonsensical or unworkable to describe such defendants as behaving reasonably or unreasonably, what about an approach that hinges the allocation of losses from caretaker injuries on whether the plaintiff caretaker had notice of the specific kind of conduct that caused the plaintiff's injury?

2. *The “notice principle.”* The result in the *Gould* case fits with a larger historical pattern, one that may help us make sense of the way courts appear to toggle between objective and more subjective standards depending on the actors in front of them. Professor Sarah Seo and this author argue that common law judges have typically tried to allocate the obligation to take care to the party with the best information about the risks in question. Call this the “notice principle”: in choosing how to evaluate an allegedly careless actor’s conduct (leading ultimately to the question of who should bear the cost of the injury), the nineteenth-century judges that Seo and Witt examine tended to ask which party had good information about the relevant disability and its likely risks in the relevant setting; this, in turn, dictated whether the judges applied a purely objective standard (“reasonable person”) or something more subjective:

For instance, if a train conductor noticed that a pedestrian suffered from a mental illness that prevented exercise of requisite care when crossing the tracks, then it became the conductor’s duty to take more care than the objective standard required to avoid a collision; and in the case of an accident, the pedestrian [accused of contributory negligence] would be held to a subjective standard. Otherwise, if the conductor was not aware of the mental condition, then the prevailing objective standard still applied to both parties, regardless of whether it was impossible for the mentally ill pedestrian to meet that standard.

Attaching liability to information furthered a number of practical goals. To begin with, such an approach encouraged parties to account for observable disabilities in others and thus promoted a kind of informal private ordering, guiding parties toward an efficient allocation of the costs of taking extra precaution to avoid accidents. The notice principle, moreover, had a mitigating effect on the strict-liability-like effects of the objective standard for mentally unsound people. At the same time, by triggering a heightened duty only with notice, railroads, cities, and other [prospective] defendants were not required to adopt safety measures for their general operations at an inefficiently high level solely to accommodate those who could not meet the reasonable person standard. . . .

Sarah A. Seo & John Fabian Witt, *The Metaphysics of the Mind and the Practical Science of the Law*, 26 L. & HIST. REV. 161, 165-66 (2006). Recall that Holmes stated a version of the notice principle in a passage above: “When a man has *a distinct defect of such a nature that all can recognize it* as making certain precautions impossible, he will not be held answerable for not taking them.” The notice principle might also make sense of the Restatement and *Dellwo* approach to cases involving youth. (Recall that the *Dellwo* court specifically observed that the age of children engaged in driving, boating, or flying would not be observable by third parties.)

3. *The reasonable person in the era of big data.* One concern that courses beneath decisions involving mentally ill and mentally disabled actors is the impossibility of knowing these actors’ individual capacities. Individually tailored standards of care might be the most fair, in the sense of truly tethering liability to wrongfulness, but to this point, such standards have not seemed pragmatic. Professors Omri Ben-Shahar and Ariel Porat argue that with the advent of “Big Data,” we in fact have the ability to develop standards of care tailored to each person in society and their particular ability to reduce risk, which he calls the “reasonable you

standard.” Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627 (2016). For example, if a 65-year-old man hit a small child with his car while driving 35 miles per hour, rather than asking whether that was a reasonable speed for any driver, the “reasonable you” standard looks to Big Data to determine what speed is slow enough to enable a 65-year-old man to react in time to stop before hitting the child. *Id.* at 630-32. But not all 65-year-olds have the same reflexes, so the standard could also incorporate the stop time for various vehicles—the driver of a nimble sports car that can stop on a dime would therefore be treated differently than the driver of a clunky old truck—and so on. If one important rationale for a universal “reasonable person” standard was the unknowability of the capacities of each individual, is it now out of date in the era of Big Data? Or does some other justification, such as setting society-wide norms, underlie the “reasonable person” standard?

## E. Unreasonable Faiths?

Are a person’s religious convictions relevant in determinations of reasonableness? Consider the case of sixteen-year-old Ruth Friedman, who, along with a male co-worker, found herself stranded on a ski lift, suspended in the air, after ski lift operators shut down the lift without noticing that Friedman and her colleague were still aboard. *Friedman v. New York*, 282 N.Y.S.2d 858 (N.Y. Ct. Cl. 1967). After screaming in vain for help, and with darkness descending, Friedman jumped off the ski lift, fell twenty to twenty-five feet, and sustained injuries. Friedman sued the state of New York, which operated the ski lift, claiming damages. The state argued that Friedman had been contributorily negligent for jumping. Friedman, who identified as a member of the Jewish faith and had been raised according to “ultraorthodox tenets,” countered that she was compelled to act as she did by her belief in “the Jichud, which absolutely forbids a woman to stay with a man in a place which is not available to a third person.” *Id.* at 860-62. The court took into account her religious beliefs and found that she was not contributorily negligent. More recent cases have not been as accommodating of plaintiffs’ religious beliefs. See *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (holding as a matter of Mississippi law that plaintiff’s Jehovah’s Witness faith was irrelevant in determining the reasonableness of her decision to refuse blood transfusions); *Braverman v. Granger*, 844 N.W.2d 485, 496 (Mich. App. 2014) (holding that “the proper inquiry is not [into] a person’s subjective reasons [but rather] whether the blood transfusion was an objectively reasonable means to avoid or minimize damages”). Would taking a party’s religious beliefs into account require courts to engage in constitutionally problematic evaluations of the reasonableness of particular religious views? See, for example, *Williams v. Bright*, 658 N.Y.S.2d 910 (N.Y. App. Div. 1997), where the court ruled that instructing the jury to consider the reasonableness of the plaintiff’s conduct by reference to the tenets of her own religion would constitute a “government endorsement” of her religious beliefs.

In all of the cases above, injured plaintiffs asked that the reasonableness inquiry take into account the fact of their religious convictions. Should the inquiry be any different when defendants contend that faith led them to adopt what objectively would be a less than reasonable level of care? Some have argued that while subjective religious beliefs may sometimes be relevant to the inquiry into the reasonableness of a plaintiff-victim’s conduct, such subjective beliefs ought not be taken into account in evaluating the reasonableness of a defendant-injurer’s conduct. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE

LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 66 (1985); *see also Lange v. Hoyt*, 159 A. 575 (Conn. 1932) (assuming for purposes of argument that a Christian Scientist mother might be found negligent for failing to seek medical attention for her injured daughter). Does this distinction make sense? If accommodating plaintiff-victim A's subjective religious beliefs effectively shifts the costs of injuries caused by those beliefs to defendant-injurer B, isn't that essentially identical to allowing the subjective religious tenets of defendant-injurer A to impose harms on plaintiff-victim B? Would the case be different if both parties held the same religious beliefs?

The Religious Freedom Restoration Act, or RFRA, might be understood to require that tort law accommodate plaintiffs' and defendants' religious exercise equally. RFRA, enacted in 1993, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government's actions are "in furtherance of a compelling governmental interest and [are] the least restrictive means of furthering that . . . interest." Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012). A 1993 Supreme Court case diluted the power of this law somewhat, by finding it unconstitutional as applied to state governments (on the grounds that such application was beyond Congress's power to enforce the rights guaranteed by the 14th Amendment). *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). As of 2015, however, thirty-one states had applied RFRA-like restrictions to themselves, either through legislation or court rulings.

Can common law standards of reasonableness "substantially burden" a party's exercise of religious freedom under the mini RFRA's? Some courts have said no. *See Osborne v. Power*, 890 S.W.2d 574 (Ark. 1994) (holding that common law nuisance prohibitions against obnoxious Christmas lights displays do not substantially burden a homeowner's free exercise rights). Other courts seem to have held that state religious freedom legislation may prohibit a reasonableness inquiry into the exercise of a party's religious freedom. In Connecticut, a plaintiff who fell and hit her head during a prayer healing session sued for negligence. The court held that a reasonableness inquiry would have substantially burdened the defendant's rights of free exercise and that there was no "compelling State interest in permitting the court to evaluate the plaintiff's claims in this case." *Kubala v. Hartford Roman Catholic Diocese*, 41 A.3d 351, 365 (Conn. Super. Ct. 2011). In contrast, a different Connecticut court found the state's RFRA did not "preclude a plaintiff from holding a religious institution responsible for its torts in the context of sexual abuse of a child by a clergyman." *Noll v. Hartford Roman Catholic Diocesan Corp.*, 46 Conn. L. Rptr. 527, 532 (Conn. Super. Ct. 2008).

For more on religiosity and reasonableness, see W. Jackson Vallar, *Can the Reasonable Person Be Religious? Accommodation and the Common Law*, 107 VA. L. REV. 189 (2021).

## F. Unreasonable Gender Identities?

The notion of a reasonable person is a concept, not a representation of an actual person. There are no actually existing "reasonable people," as the law understands that term. Instead, human beings come embodied in what often seems like an infinite variety of particularities. We are constituted by actual characteristics, not average features. One of those characteristics is biological sex. Should sex be taken into account, similarly to a child's age or

a physical impairment, in making reasonableness determinations? What about gender—that is, the roles, behaviors, and characteristics that societies ascribe to particular sexes?

A century ago, courts often took gender into account, albeit unsystematically, in cases where women sought damages for personal injury:

[A] range of doctrinal options existed for a court confronting an accident involving a female driver and a claim that gender difference was relevant: women might be bound to take more care to compensate for their lack of skill; women might be held to commit contributory negligence simply by driving; women might be held to a standard of care that referenced only other women drivers (in practice, then, their perceived lesser skill could excuse what otherwise might be contributory negligence), or to a male standard of care, or to a bi-gender standard of care; defendants might be required to take more care to accommodate women's needs as drivers. There are cases weighing each of these options, but no one approach appears to have prevailed.

Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L.J. 79 (1998). Professor Schlanger finds that “[t]he largest constellation of early personal injury cases in which gender appears, in text and subtext, arose when women passengers of trains and streetcars were injured, usually boarding or disembarking.” The “[f]irst and foremost” problem for courts was how to deal with the fact that “women’s physical agility was impaired by long skirts, corsets, and, often, high heels.” *Id.*; see also Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 LAW & SOC. INQ. 369 (1994).

Tort law today generally does not make reasonableness determinations turn on the sex or gender of the actor, at least not explicitly. Should it?



## **CHAPTER 6. ANTIDISCRIMINATION LAW MODULE #1 -- REASONABLENESS IN HARASSMENT CASES & POLICE USE OF FORCE**

### **A. Harassment Cases**

Tort law today generally does not typically make reasonableness determinations turn on the sex or gender of the actor, at least not explicitly. One body of caselaw where this debate has resurfaced is in judicial interpretations of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. In the early 1990s, some courts, notably the United States Court of Appeals for the Ninth Circuit, adopted a “reasonable woman” standard for determining whether a female plaintiff had been subjected to a sexually harassing hostile work environment in violation of Title VII:

#### ***Ellison v. Brady*, 924 F.2d 872 (9<sup>th</sup> Cir. 1991)**

BEEZER, Circuit Judge:

Kerry Ellison appeals the district court’s order granting summary judgment to the Secretary of the Treasury on her sexual harassment action brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1982). This appeal presents two important issues: (1) what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment, and (2) what remedial actions can shield employers from liability for sexual harassment by co-workers. The district court held that Ellison did not state a prima facie case of hostile environment sexual harassment. We reverse and remand. . . .

Kerry Ellison worked as a revenue agent for the Internal Revenue Service in San Mateo, California. During her initial training in 1984 she met Sterling Gray, another trainee, who was also assigned to the San Mateo office. The two co-workers never became friends, and they did not work closely together.

Gray’s desk was twenty feet from Ellison’s desk, two rows behind and one row over. Revenue agents in the San Mateo office often went to lunch in groups. In June of 1986 when no one else was in the office, Gray asked Ellison to lunch. She accepted. Gray had to pick up his son’s forgotten lunch, so they stopped by Gray’s house. He gave Ellison a tour of his house.

Ellison alleges that after the June lunch Gray started to pester her with unnecessary questions and hang around her desk. On October 9, 1986, Gray asked Ellison out for a drink after work. She declined, but she suggested that they have lunch the following week. She did not want to have lunch alone with him, and she tried to stay away from the office during lunch time. One day during the following week, Gray uncharacteristically dressed in a three-piece suit and asked Ellison out for lunch. Again, she did not accept.

On October 22, 1986 Gray handed Ellison a note he wrote on a telephone message slip which read:

I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.

When Ellison realized that Gray wrote the note, she became shocked and frightened and left the room. Gray followed her into the hallway and demanded that she talk to him, but she left the building.

Ellison later showed the note to Bonnie Miller, who supervised both Ellison and Gray. Miller said "this is sexual harassment." Ellison asked Miller not to do anything about it. She wanted to try to handle it herself. Ellison asked a male co-worker to talk to Gray, to tell him that she was not interested in him and to leave her alone. The next day, Thursday, Gray called in sick.

Ellison did not work on Friday, and on the following Monday, she started four weeks of training in St. Louis, Missouri. Gray mailed her a card and a typed, single-spaced, three-page letter. She describes this letter as "twenty times, a hundred times weirder" than the prior note. Gray wrote, in part:

I know that you are worth knowing with or without sex.... Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future.

Explaining her reaction, Ellison stated: "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened."

[While Ellison was still in Missouri, Miller arranged for Gray to be transferred to the IRS's San Francisco office. Gray protested the transfer through the union grievance procedure, and several months later, he transferred back to the San Mateo office on the condition that he not bother Ellison. But Ellison was, in her words, "frantic," all the more so when Gray sought out joint counseling for the two of them in the San Mateo office and wrote Ellison further letters maintaining the idea that they had some kind of relationship. Ellison filed a formal complaint alleging sexual harassment on January 30, 1987 with the IRS. The Treasury Department rejected Ellison's complaint because on the grounds that "the complaint did not describe a pattern or practice of sexual harassment covered by the EEOC regulations. On appeal, the EEOC affirmed the Treasury Department's decision on the theory that the agency had taken adequate action to prevent the repetition of Gray's conduct.]

Ellison filed a complaint in September of 1987 in federal district court. The court granted the government's motion for summary judgment on the ground that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment. Ellison appeals.

....

[W]e believe that Gray's conduct was sufficiently severe and pervasive to alter the conditions of Ellison's employment and create an abusive working environment. . . .

[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir.1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive") . . . . *See also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (finding men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object") . . . .

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share.<sup>9</sup> For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman<sup>11</sup> would consider sufficiently severe or pervasive to alter the conditions of employment

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<sup>9</sup> One writer explains: "While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989).

<sup>11</sup> Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man.

and create an abusive working environment.

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. *Cf. Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-1227 (9th Cir. 1971) (invalidating under Title VII paternalistic state labor laws restricting employment opportunities for women). Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.”

### *Note*

In 1993, the U.S. Supreme Court decided *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), which adopted a “reasonable person” standard rather than the “reasonable woman” standard of *Ellison*:

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, “mere utterance of an . . . epithet which engenders offensive feelings in a employee,” . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

510 U.S. at 21 (emphasis added).

Many interpreted *Harris* as rejecting the Ninth Circuit’s “reasonable woman” standard, but the matter is not quite so clear. After the *Harris* decision, the Ninth Circuit held that “[w]hether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics,” citing to its pre-*Harris* decision in *Ellison*. See *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Is gender one of the *Fuller* decision’s “fundamental characteristics”? If so, did the Ninth Circuit smuggle gender back in, despite the apparent rejection of gender by the Supreme Court in *Harris*? More recently, the Ninth Circuit has been explicit about its view that the sex harassment question requires an inquiry into the view of the “reasonable woman.” *Brooks v. City of San Mateo*, 229 F.3d 917, 922 (9th Cir. 2000); see also *Hamilton v. RDI/Caesars Riverboat Casino, LLC*, 179 F. Supp. 2d 929 (S.D. Ind. 2002). An opinion by Judge Richard Paez brings the issue into the open:

***McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004)**

PAEZ, Circuit Judge:

George McGinest, an African-American employee of GTE Service Corporation (“GTE”), sued GTE under Title VII for creation of a racially hostile work environment, failure to promote due to racial discrimination, and failure to promote due to retaliation. McGinest claims that GTE created a racially hostile work environment based both upon its perpetration of and its failure to adequately respond to a large number of incidents that occurred over a fifteen year period. In support of his hostile work environment claim, McGinest alleges that he was placed in dangerous working conditions because of his race, prevented from collecting bonus pay available to non-African American coworkers, forced to endure racial taunts and insults by supervisors and coworkers, and subjected to racist graffiti in GTE’s bathrooms and on switch boxes. Additionally, McGinest claims that he was denied a promotion in late 1998 due to his race and in retaliation for filing an EEOC complaint; GTE responds that it was unable to promote him due to a hiring freeze.

The district court granted summary judgment to GTE. The court found that the incidents comprising the hostile work environment claim were sporadic, and for the most part adequately remedied. Moreover, it found that McGinest was unable to produce sufficient evidence that GTE’s stated reason for failing to promote him was a pretext.

We reverse the district court’s dismissal of the hostile environment . . . claim[]. The district court resolved numerous factual questions in favor of GTE, failed to distinguish between supervisors and coworkers in evaluating GTE’s liability, and did not consider fully the cumulative impact of the events that occurred. Because McGinest has established genuine material issues of fact regarding his hostile work environment claim, . . . [this] claim[] must be remanded.

....

Under Title VII of the Civil Rights Act of 1964, it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race.” 42 U.S.C. § 2000e–2(a)(1) (2003). This prohibition encompasses the creation of a hostile work environment, which violates Title VII’s guarantee of “the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” [\*Meritor Sav. Bank, FSB v. Vinson\*](#), 477 U.S. 57, 65 (1986). “Courts have long recognized that a workplace in which racial hostility is pervasive constitutes a form of discrimination.” [\*Woods v. Graphic Communications\*](#), 925 F.2d 1195, 1200 (9th Cir. 1991).

In order to survive summary judgment, McGinest must show the existence of a genuine factual dispute as to 1) whether a reasonable African-American man would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment; and 2) whether GTE failed to take adequate remedial and disciplinary action.

....

A plaintiff must show that the work environment was both subjectively and objectively hostile. *Nichols*, 256 F.3d at 871–72. Subjective hostility is clearly established in the instant case through McGinest’s un rebutted testimony and his complaints to supervisors and to the EEOC. *Id.* at 873.

In evaluating the objective hostility of a work environment, the factors to be considered include the “frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Nichols*, 256 F.3d at 872 (quoting *Harris v. Forklift Sys.*, 510 U.S. at 23, 114 S.Ct. 367). “The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.” *Id.* (internal quotation marks omitted). Considering the facts in the light most favorable to McGinest, it is clear that the incidents described are sufficient to survive a motion for summary judgment. According to McGinest, he was involved in a serious automobile accident because, due to his race, both his supervisor and garage personnel were unwilling to ensure that his vehicle received necessary maintenance. He was forced to work in dangerous situations and barraged with insults and abuse by, among others, Supervisor Noson. Over a two-year period, he was prevented from collecting overtime pay that he worked. McGinest’s ability to perform his job was directly affected by the refusal of his coworkers to work under his direction on occasion.

Additionally, McGinest was subjected to extreme racial insults, as well as more subtle taunts, by supervisors and coworkers. Racist graffiti such as “n\*\*\*\*r” and “white is right” regularly appeared in the bathroom and on equipment, and on one occasion a management-level employee called McGinest “stupid n\*\*\*\*r” to his face. Although it is clear that “[n]ot every insult or harassing comment will constitute a hostile work environment,” “[r]epeated derogatory or humiliating statements ... can constitute a hostile work environment.” *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000).

In evaluating the significance of the statements in question, we consider the objective hostility of the workplace from the perspective of the plaintiff. *Nichols*, 256 F.3d at 872; *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991). In *Ellison*, in the context of sexual harassment, we evaluated objective hostility from the perspective of a reasonable woman. As the Supreme Court has noted, “Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 116 n. 10. We now state explicitly what was clear from our holding in *Ellison*, that allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.<sup>8</sup>

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<sup>8</sup> Following the Supreme Court’s decision in *Harris v. Forklift Systems*, which referred to “an environment that a reasonable person would find hostile or abusive,” 510 U.S. at 21, a number of courts refused to apply a reasonable person standard based on the perspective of a person sharing the characteristics of the plaintiff. See, e.g., *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996); *Watkins v. Bowden*, 105 F.3d 1344, 1355–56 (11th Cir. 1997). However, in *Oncale v. Sundowner Offshore Services*, the Supreme Court recharacterized the *Harris* statement, making it clear that it is proper to use an individualized standard based upon the characteristics of the plaintiff. 523 U.S. 75, 78 (1998) (“We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”).

In *Ellison* we noted that “[a] complete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women.” 924 F.2d at 878. . . . Our analysis of the importance of interpreting gender discrimination from the perspective of a reasonable woman reverberates powerfully in the context of racial harassment.

Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. “The omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive.” *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991) (noting that “instances of racial violence or threatened violence which might appear to white observers as mere ‘pranks’ are, to black observers, evidence of threatening, pervasive attitudes”) . . . . By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff’s race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.

....

For purposes of [defeating defendant’s motion for] summary judgment, McGinest persuasively demonstrates that he was subjected to a hostile work environment.

### Note

The Second Circuit, by contrast with the Ninth, has rejected the inclusion of gender in the analysis of reasonableness. In the 1999 decision *Richardson v. New York State Department of Correctional Services*, the court adopted a “reasonable person” standard for Title VII sex harassment cases and explained:

[W]e reject the view of those courts that look to the perspective of the particular ethnic or gender group, *e.g.*, a “reasonable African-American” or a “reasonable Jew.” While we recognize that there is dicta in this circuit supporting such an approach, we believe that examining hostile environment claims from the perspective of a “reasonable person who is the target of racially or ethnically oriented remarks” is the proper approach. First, Title VII seeks to protect those that are the targets of such conduct, and it is their perspective, not that of bystanders or the speaker, that is pertinent. Second, this standard makes clear that triers of fact are not to determine whether some ethnic or gender groups are more thin-skinned than others. Such an inquiry would at best concern largely indeterminate and fluid matters varying according to location, time, and current events. It might also lead to evidence, argument, and deliberations regarding supposed group characteristics and to undesirable, even ugly, jury and courtroom scenes.

180 F.3d 426, 436 n.3 (2d Cir. 1999), *abrogated on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

Which federal circuit do you think has the better of the argument, the Second or the Ninth? Does either circuit court's argument capture the correct perspective? As critical legal theorist Kimberlé Crenshaw famously observed in her landmark 1991 article introducing the concept of "intersectionality," individuals are not just reasonable people with a gender identity; they also have racial identities and class identities. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991). People also have temperaments and personalities, likes and dislikes, and more. Is there any hope of subcategorizing the reasonable person in light of the kaleidoscope of identity-making characteristics with which people are endowed? Perhaps the law should pay attention to some such characteristics but not others? Consider Susan Cain's best-selling book *Quiet*, which argues that society wrongly prefers extroverts to introverts. Is there a reason to be more concerned with gendered injustice than introversion injustice?

As you consider the merits of a "reasonable woman" standard for tort law, note that allegedly harassing conduct in the workplace is not the only context in which group characteristics may correspond with significant differences in perception. A well-known phenomenon among scholars of risk cognition is the so-called white male effect: researchers have found that when asked about the riskiness of a variety of hazards, ranging from firearms, to ozone depletion, to commercial air travel, white men consistently perceived less risk than white women, nonwhite men, and nonwhite women. Melissa L. Finucane, et al., *Gender, Race, and Perceived Risk: The 'White Male' Effect*, 2 HEALTH, RISK & SOC. 159 (2000). Law and psychology scholar Dan Kahan and his collaborators have added nuance to this finding by considering race and gender alongside "worldviews." Building from anthropologist Mary Douglas's typology of worldviews—under which some views of the world are more hierarchical and others more egalitarian, some more individualist and others more communitarian—they find that "gender affects risk perception only in conjunction with particular worldviews." Kahan and his co-authors theorize that particular hazards (for example, gun possession) confer cultural status on hierarchical and individualist men; for such men to characterize these hazards as risky would be to invite regulation and place their own status under threat. Dan M. Kahan, *Culture and Identity-Protective Cognition: Explaining the White Male Effect on Risk Perception*, 4 J. EMPIRICAL LEGAL STUDIES 465 (2007).

With all this in mind, do you think the explicit incorporation of sex or gender into the reasonable person standard is a reform worth pursuing? Would it reify inaccurate assumptions and status-based stereotypes? Or would it be a valuable recognition of the real differences in the way that actually existing men and women tend to experience the world? What about people who identify as transgender or genderqueer? Is it even useful to think about this issue in terms of actually existing people of one or another sex or gender identity, or is it preferable to start with ideal types? Is it possible to operationalize an ideal type that is un-gendered? Un-raced?



## B. Police Use of Force

***David D. Kirkpatrick, Split-Second Decisions: How a Supreme Court Case Shaped Modern Policing, New York Times, April 25, 2021***

In case after case, it took only a split second for an officer to pull the trigger.

Adam Toledo, a 13-year-old in Chicago, had tossed away a handgun and begun raising his hands. Ma'Khia Bryant, a 16-year-old in Columbus, Ohio, lunged with a knife at another teenager. Tyrell Wilson, a 33-year-old mentally ill homeless man in Danville, Calif., had a knife in hand when he shouted “Kill me” at an approaching deputy sheriff.

All three were among more than 100 people shot and killed by the police over the previous six weeks.

The officers’ justification for the use of lethal force in each instance differs with the circumstances. But as in almost every other recent case involving questions of police use of force, law enforcement officials defending the officers are relying on a doctrine set forth by the Supreme Court three decades ago and now deeply ingrained in police culture: that judges and juries should not second-guess officers’ split-second decisions, no matter how unnecessary a killing may appear in hindsight.

Now, the national movement launched by the death of George Floyd, emboldened by an officer’s conviction last week for his murder, is pushing to change that standard.

While most agree that officers must sometimes use deadly force to protect themselves or others, many criminologists say the wide latitude under the rule is an obstacle to reducing the number of police killings, and lawmakers in Congress and many states have begun seeking tighter restrictions.

The number of people killed by the police in the United States — consistently about 1,000 a year — is far higher than in other developed countries. A disproportionate number of the shootings are by white police officers [against people of color](#), as in the cases of Adam Toledo, Ma'Khia Bryant and Tyrell Wilson. And many experts say the split-second standard is partly to blame for that death toll.

“I am convinced that is the No. 1 cause,” said Lawrence W. Sherman, an American criminologist with experience in the police departments of New York and Minneapolis who is now an emeritus professor at the University of Cambridge.

“It puts the United States into an extreme exceptionalism in allowing killings that would be prosecuted as murder elsewhere, like the U.K.,” he added.

Lawyers for police unions argue that the rate of police killings in the United States reflects a higher level of civilian violence because of greater gun ownership and a flimsier social safety net than in other wealthy countries. They say the split-second decision standard is essential to keeping officers and the public safe.

“If the officer doesn’t act, there’s a strong probability that an individual will be killed,” said Larry James, general counsel for the Fraternal Order of Police, pointing to the recent shooting of the 16-year-old in Columbus.

“The officer is duty-bound to take that action to protect the life of another citizen or him or herself — that is the standard that police should be judged by, not Monday morning quarterbacking,” he added.

Until the mid-1980s, policies on the use of force varied widely across the states. Some allowed deadly action against any fleeing suspect of a felony, even if the suspect posed no imminent threat.

That changed in 1985. The Supreme Court ruled in *Tennessee v. Garner* that police could shoot only if they had probable cause to believe that a fleeing suspect posed a significant threat of injury or death to an officer or others. The number of police killings steadily declined over the next four years, studies show.

But in 1989, a more conservative court took a different approach in the ruling of *Graham v. Connor*, establishing the precedent that dominates today.

The case was brought by Dethorne Graham, a Black man the police had stopped in Charlotte, N.C., on suspicion of shoplifting because he had hurried in and out of a convenience store.

Mr. Graham, a diabetic desperate for orange juice to avoid a seizure from low blood sugar, told the police that he had rushed out of the store because of a long checkout line. But as he staggered and briefly passed out, officers assumed he was drunk and forced him into tight handcuffs, leaving him with a broken foot, cuts on his wrists, bruises on his forehead and an injury to his shoulder.

The Supreme Court sent the case back to a lower court, finding that the police needed only to meet the standard of what a reasonable officer might do. The criteria for “reasonable,” the high court said, should include special accommodations for the pressures of police work.

“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation,” Chief Justice William H. Rehnquist wrote in the majority opinion.

“‘Not every push or shove’” was improper “even if it may later seem unnecessary in the peace of a judge’s chambers,” the chief justice wrote, quoting an earlier ruling. The lower court ultimately ruled in favor of the police.

The Supreme Court opinion did not explicitly address lethal force and defined only the rights of a suspect, not the restrictions a state could impose on law enforcement.

But state legislatures and judges, often sympathetic to the police, largely adopted the question of what would be reasonable to an officer making a split-second judgment as the test for assessing any police use of force, whether deadly or not.

Graham v. Connor became “the lodestar” and “created this impression that almost nothing is out of bounds,” said Barry Friedman, a law professor at New York University and the director of its Policing Project, which has drafted a [model statute](#) to regulate the police use of force.

The same standard also became embedded in the training and practices of American police — “part of law enforcement DNA, often unnoticed as it works in the background to determine our actions,” a [magazine for police officers](#) declared in a 2014 article about the ruling.

“A generation of officers has been trained in the case’s practical meaning and has spent decades applying it to every use-of-force decision,” the article said.

It was published in response to a wave of protests over allegations of excessive force in the fatal shooting of Michael Brown, a Black man in Ferguson, Mo. In part because he claimed he had made a split-second decision about his self-defense, the officer who killed Mr. Brown never faced charges.

Many critics say the standard’s narrow focus on the moment an officer pulls the trigger obscures questions about the many choices that led up to the confrontation, noted Rachel Harmon, an authority on police law at the University of Virginia. For example, she said, did the officer rush recklessly into danger or take steps to defuse the situation?

The same standard may also make it more difficult to combat racial bias in the use of lethal force, even though Black suspects are more than twice as likely as people of other races to be killed by the police, said [Jeffrey Fagan](#), a law professor at Columbia.

“All an officer has to say is, ‘I feared for my life’ — those are the magic words,” he said. But the statistics strongly suggest that the “police are more likely to form that sense of imminent danger when confronting a Black person than a white person.”

Mr. Chauvin was convicted in part because he could not claim that Mr. Floyd’s suffocation was a split-second decision. But critics of the split-second standard cite a litany of police shootings of innocent Black people. In 2014, Cleveland police officers screeched their cruiser to a halt just a few feet from [Tamir Rice](#), a Black 12-year-old playing in a park with a toy replica gun, and within two seconds had shot him because they deemed him a threat. He died the next day.

The next year, a police officer in a suburb of Minnesota pulled over Philando Castile, a 32-year-old Black man driving with his girlfriend and daughter. The officer shot him five times at close range, killing him in the seat of his parked car, out of a mistaken fear that he might have been reaching for a gun.

In 2018, the police raced to a street corner in the Crown Heights section of Brooklyn to investigate reports of a possible gunman, and moments later shot and killed [Saheed Vassell](#), a 34-year-old mentally ill Black man who was well known around the neighborhood. He had been pointing a piece of pipe they mistook for a weapon.

The officer who shot Mr. Castile was [acquitted of manslaughter](#). The officers in the other cases were not charged. The cities where Tamir Rice and Mr. Castile were killed paid millions of dollars to settle civil claims.

The split-second standard “has become a way to insulate officers from any critical review,” said Seth Stoughton, a professor at the University of South Carolina School of Law. A former policeman in Tallahassee, Fla., he testified as an expert witness in the trial of Derek Chauvin, the officer who killed Mr. Floyd.

Now, after the uproar over the Floyd killing, [many state and federal lawmakers](#) are trying to impose new restrictions on the use of force. A Maryland law passed this month over the objections of the governor requires that any such actions must be “necessary and proportional” to prevent “an imminent threat of physical injury” or to achieve “a legitimate law enforcement objective.” It specifies a prison sentence of up to 10 years for any officer who causes injury or death by violating those rules.

California, Illinois and other state legislatures have debated similar measures, and the House of Representatives last year passed its own [bill](#) raising standards for the use of force and requiring attempts at de-escalation.

Some police advocates argue that the new rules could violate officers’ right to defend themselves.

“With the benefit and luxury of hindsight and time and tranquillity, you could get any kind of use-of-force or police-practices expert or even an attorney to say that there was something else that an officer could have done,” said David Mastagni, a California lawyer for police unions who has helped lobby in Sacramento against such restrictions. “Then the officer is stripped retroactively of the right to self-defense.”

But Mr. James, general counsel of the Fraternal Order of Police, brushed off all the efforts at legislation and said he was not worried. Even if states or Congress pass stricter standards “that trump *Graham v. Connor*,” he said much would depend on whether judges continue to instruct juries, as they often have since the ruling, about the inherent risks of second-guessing an officer’s split-second decision.

### ***Graham v. Connor*, 490 U.S. 386 (1989)**

Chief Justice REHNQUIST delivered the opinion of the Court. . . .

On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check outline. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend’s house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something

was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U.S.C. § 1983 against the individual officers involved in the incident, all of whom are respondents here, alleging that they had used excessive force . . . . The case was tried before a jury. At the close of petitioner's evidence, respondents moved for a directed verdict. . . . Finding that the amount of force used by the officers was "appropriate under the circumstances" . . . and that the force used "was not applied maliciously or sadistically for the very purpose of causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation," the District Court granted respondents' motion for a directed verdict.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. . . .

Today we . . . hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard . . . .

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake. [citing *Tennessee v. Garner*, 471 U.S. 1 (1985).] Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an

immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S. at 8-9 (the question is “whether the totality of the circumstances justifie[s] a particular sort of ... seizure”).

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional. . . .

Because the Court of Appeals reviewed the District Court’s ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

### ***NYU POLICING PROJECT MODEL USE OF FORCE STATUTE*** **Working Draft -- 2021**

[Compare the approach to reasonableness in *Graham v. Connor* with the approach adopted in the following Model Use of Force Statute drafted by the NYU Policing Project in 2021:]

#### **SECTION I: DEFINITIONS**

The following definitions apply to the entire statute:

- (1) “Physical force” is any intentional touching by a body part or by the intentional application of a tool, technique, or weapon to a person’s body.
- (2) “Reportable use of force” means any application of physical force, other than physical contact used solely for facilitating custody of a compliant person, such as the application of handcuffs on a cooperative arrestee. Reportable use of force includes a threat of force by pointing a firearm at or in the direction of a person, other than in the context of training or

qualification. Reportable use of force also includes the deployment of a canine to assist in effecting a detention or arrest.

(3) “Deadly force” is physical force that, under the circumstances as they reasonably appear, is substantially likely to result in serious bodily injury or death to the person against whom it is used.

(4) “Serious bodily injury” means bodily injury that results in a permanent disfigurement, extreme physical pain, loss or impairment of a bodily function, limb or organ, or a significant risk of death. Examples of serious bodily injury include: broken bones, closed head injuries, loss of consciousness, as well as any other injuries that could result in death or disfigurement.

(5) Information required under this statute is “publicly available” if: (a) it is posted conspicuously on the reporting agency’s website, or (b) if the agency does not maintain a website, and employs fewer than [10] full-time sworn officers, if the document is made available upon request, within 5 days of when a request is made, and at no cost to the requesting party.

(6) “Political subdivision” means any county, municipality, department, commission, district, board, or other public body, whether corporate or otherwise, created by or under state law, that has a police department or a sheriff’s department.

## SECTION II: AUTHORIZED USE OF PHYSICAL FORCE BY LAW ENFORCEMENT OFFICERS

*Many states, to the extent that they address officer use of force at all, do so only as a defense to criminal liability. Yet there are a variety of circumstances in which an officer’s use of force may be excessive, thereby justifying civil liability or discipline, but in which criminal liability may nevertheless be inappropriate. For example, because of the criminal law’s emphasis on culpability, justification statutes necessarily must take into account an officer’s subjective beliefs—even if they turn out to be mistaken (and sometimes even unreasonable).*

*As a result, states that have defined permissible force solely in reference to that which is not criminal have tended to end up with statutes that are both overly permissive and insufficiently detailed. In addition, by defining authorized force solely as that which is not criminal, existing law has at times led to confusion about the precise scope of agency liability for excessive—but perhaps not criminally excessive—force.*

*For this reason, our statute begins by making clear when force is lawful for the purposes of civil liability, discipline, and decertification—and addresses defenses to criminal liability separately.*

*This portion of the statute also emphasizes the fact that officers are authorized to exercise force only on behalf of agencies that employ them—and that agencies have an obligation to provide appropriate guidance to officers on when force is appropriate.*

(1) For the purposes of this Section:

(a) The following are “lawful objectives” that may justify the use or attempted use of force:

- (i) protect against imminent harm to themselves or others;
- (ii) to effect an arrest or detention that the officer reasonably believes is lawful;
- (iii) to prevent an escape of a person from custody;
- (iv) to carry out a search that the officer reasonably believes is lawful;
- (v) to prevent the person's entry into a secured area; and
- (vi) to prevent the destruction of evidence or property.

(b) Physical force is "necessary" when there are no reasonable alternative means to effect the lawful objective and avoid the use of force, including non-force tactics or techniques that are intended to stabilize the situation and reduce the immediacy of the threat, such as distance, cover, containment, tactical repositioning, requesting additional officers, and surveillance; verbal communication or de-escalation; and the deployment of specialized equipment or resources, such as officers trained in crisis intervention, or mental health professionals. An alternative to the use of physical force may be a reasonable alternative even if it extends the overall duration of the interaction.

(c) A threat is "imminent" when the person who poses the threat reasonably appears to have the present ability, opportunity, and intent to immediately inflict injury.

(d) "Passive resistance" means behavior that is unresponsive to verbal or other direction from an officer. Passive resistance may include verbal statements indicating a refusal to comply.

(e) "Active resistance" means behavior intended to avoid physical control or arrest by creating distance between the person and the officer or officer's reach. Active resistance includes but is not limited to evasive movement of the arm, flailing arms, and attempts to leave the scene or flee from custody.

(2) A law enforcement officer is authorized to use or attempt to use force only when:

- (a) it is necessary to accomplish a lawful objective;

- (b) the degree of force used or attempted is no greater than necessary to accomplish the lawful objective; and

- (c) both the decision to use force and the degree of force used are objectively reasonable under a totality of the circumstances.

(3) The reasonableness of an officer's use or attempted use of force shall be determined based



on the totality of the encounter between the officer and the person against whom force was used, including:

- (a) the extent of any resistance, including whether the resistance is passive or active;
- (b) the severity of the threat, if any, posed to the officer or others;
- (c) whether the officer engaged in de-escalation measures or non-force tactics to reduce the immediacy of the threat, if such measures were feasible;
- (d) whether the officer engaged in any actions that substantially increased the likelihood that the use of force would be necessary; and
- (e) when force is used to effect an arrest, carry out a search or seizure, or prevent the destruction of property, the severity of the suspected offense or property damage at issue, and the degree to which the law enforcement objective could be achieved at a later date or time without substantially impairing the government's interest in the search, arrest, or detention.

(4) A law enforcement officer shall reduce the degree of force used as the threat diminishes and cease the use of force as soon as:

- (a) The person on whom force is used is under the officer's control or no longer poses an imminent threat of serious physical injury or death to the officer or another person; or
- (b) The officer determines that the injury that is likely to result from the continued application of force is no longer reasonable in relation to the legitimate law enforcement objective.

(5) Unless doing so would place the officer or others at a significant risk of injury, an officer must, prior to using force:

- (a) identify him or herself as a law enforcement officer, and
- (b) provide a clear verbal warning of the officer's intent to use physical force, along with clear instructions about what is required to comply, with sufficient time for the instructions to be observed.

(6) An officer may not threaten to use physical force in any circumstance in which the officer would not in fact be authorized to use physical force under the statute.

(7) After [X date], and except as otherwise authorized by state law, a law enforcement officer is not authorized to use or attempt to use physical force under this statute unless the officer is employed by an agency that has adopted a written, publicly available use of force policy that:

- (a) incorporates the standards articulated in Sections I through III, and
- (b) requires officers to utilize de-escalation techniques, crisis intervention tactics, and other reasonable alternatives to force when it is feasible to do so.

The political subdivision that employs the law enforcement officer shall be liable for any damages caused by an officer's unauthorized use of force in violation of this subsection. Violation of this subsection shall not be a basis for either criminal or civil liability against the officer.

*[Note: Subsection 7 makes clear that officers are only authorized to use force as members of law enforcement agencies, and that agencies have an obligation to oversee officers' use of force by, at a minimum, adopting policies that are consistent with the requirements outlined here. An agency that fails to adopt the requisite policies would be liable for any damages caused by an officers' use of force—even if force would otherwise have been lawful had the agency had the requisite policies in place.]*

(8) No later than [x date], the [State Peace Officer Standards and Training Board, "POST Board"] shall develop a model use of force policy that is consistent with the requirements of this statute, and shall obtain public comment on the policy in the manner prescribed under the [rulemaking provisions of the State Administrative Procedures Act].

### SECTION III: AUTHORIZED USE OF DEADLY FORCE BY LAW ENFORCEMENT OFFICERS

(1) For the purposes of this section:

(a) Deadly force is "necessary" when there are no reasonable alternative means to effect the lawful objective and avoid the use of deadly force, including the use of less-lethal force alternatives, non-force tactics or techniques that are intended to stabilize the situation and reduce the immediacy of the threat, such as distance, cover, containment, tactical repositioning, requesting additional officers, and surveillance; verbal communication or de-escalation; and the deployment of specialized equipment or resources, such as officers trained in crisis intervention, or mental health professionals. An alternative to the use of deadly force may be a reasonable alternative even if it extends the overall duration of the interaction.

(b) A threat is "imminent" when the person who poses the threat reasonably appears to have the present ability, opportunity, and intent to immediately inflict serious bodily injury.

(2) A law enforcement officer may use or attempt to use deadly force only when it is:

(a) necessary to protect the officer or another from an imminent threat of death or serious bodily injury;

(b) necessary to effect an arrest when:

(i) there is probable cause to believe that the person has committed an offense involving death or serious bodily injury, and the officer has reason to believe the person would cause death or serious bodily injury to another if not immediately apprehended; and

(ii) the officer's use of deadly force does not create a significant risk of serious bodily injury to any persons other than the person against whom the deadly force is directed.

*Note: The felony flight rule proposed above imposes four limitations: force must be necessary to apprehend the person, there must be probable cause to believe that the person committed an offense involving death or serious bodily injury, and there must be reason to believe (i.e. some articulable factual basis) that the person would cause death or serious bodily injury to someone else if not immediately apprehended, and the use of deadly force must not create a significant risk of injury to any other person.*

(3) The reasonableness of an officer's use or attempted use of deadly force shall be determined based on the totality of the encounter between the officer and the person against whom deadly force was used, including:

(a) whether the officer engaged in de-escalation measures, non-force tactics, or less-lethal alternatives to reduce the immediacy of the threat, if such measures were feasible; and

(b) whether the officer engaged in any actions that substantially increased the likelihood that the use of deadly force would be necessary.

(4) Deadly force may not be used:

(a) solely to protect property;

(b) against a person who poses a risk of harm only to themselves.

(5) Unless doing so would place the officer or others at a significant risk of serious bodily injury, an officer must, prior to using deadly force:

(a) identify themselves as a law enforcement officer, and

(b) provide a clear verbal warning of the officer's intent to use deadly force, along with clear instructions about what is required to comply, with sufficient time for the warning to be observed.

(6) An officer may not threaten to use deadly force in any circumstance in which the officer would not in fact be authorized to use deadly force under this statute.

#### SECTION IV: LIMITATIONS ON THE USE OF SPECIFIC WEAPONS AND TECHNIQUES BY LAW ENFORCEMENT OFFICERS

(1) For the purposes of this Section:

(a) "Less-lethal weapon" means any apprehension or restraint tool, other than handcuffs, which, when used as intended, is less likely to cause death or serious bodily injury than a conventional lethal weapon such as a firearm. Less-lethal weapons include but are not limited to: electronic control weapons, tear gas, chemical spray, kinetic impact projectiles, batons, and other striking devices.

(b) "Chokehold" means any maneuver that applies pressure to the neck, throat, wind pipe, or carotid artery that may prevent or hinder breathing, reduce intake of air, or impede the flow of blood or oxygen to the brain.

(c) "Canine deployment" means any situation in which a canine is used in an attempt to locate or apprehend a person suspected of a criminal offense, whether or not the person actually is located or apprehended. This includes all instances in which a canine is removed from the police car, or when a person sought gives up immediately after an announcement is made that if they do not surrender, the canine will be released. A canine deployment does not include the on-leash use of a canine to search for a missing person or for physical evidence, or to identify the presence a weapon or contraband.

(2) A law enforcement agency may not issue a less-lethal weapon to any officer employed by the agency unless:

(a) the agency has adopted a written, publicly available policy that incorporates the standards articulated in this section, and provides clear and specific guidance to officers on the circumstances and manner in which the weapon may be discharged or used;

(b) the officer has been trained on the use of the weapon, has demonstrated knowledge of the legal and policy limitations on the use of the weapon, and has demonstrated proficiency in its use.

(3) The [State POST] shall develop minimum standards for training officers in the use of less-lethal weapons that are commonly issued to officers in the State, and for assessing an officer's

proficiency in their use. The [State POST] shall assess on an annual basis whether additional standards are necessary to address newly developed less-lethal weapons.

(4) A law enforcement officer may not use a weapon to overcome passive or active resistance in order to effect an arrest of a person who is suspected only of a [misdemeanor / level of misdemeanor], and:

(a) does not pose any imminent risk of harm to the officer or others; and

(b) would not, in light of the facts and circumstances known to the officer at the time pose a risk of harm to others if not immediately apprehended.

5) A law enforcement officer may not:

(a) deploy a canine to assist in effecting an arrest or detention of a person who is suspected only of a misdemeanor or other non-violent crime or infraction, including drug crimes;

(b) permit a canine to bite a person unless the person poses an imminent risk of harm to the officer or to another person, and a lower degree of force would not be reasonably expected to eliminate the imminent risk;

(c) conduct an off-leash deployment of a canine to apprehend a person who does not pose an imminent threat of death or serious bodily to the officer or to another person, other than the person subject to apprehension;

(d) deploy or display an apprehension canine in any manner at a protest, demonstration, march, or similar event.

(6) A law enforcement officer may not point a firearm at or in the direction of a person unless the officer reasonably believes that the situation may escalate to justify the use of deadly force. Each law enforcement agency shall, as part of its written, publicly available use of force policy, provide additional guidance to officers on the circumstances in which they are permitted to either unholster a firearm or point it in the direction of a person.

(7) A law enforcement officer may not: (a) fire at or into a moving vehicle unless there is an imminent risk of death or serious bodily injury to an officer or another, and that risk cannot be avoided through other means, including by avoiding the path of the vehicle.

(b) use a chokehold unless deadly force is authorized;

(c) transport a person in a prone (i.e. face down) position;

(d) restrain a person in a prone position any longer than necessary to properly secure the person. Any law enforcement officer who has placed a person in a prone position must move the person into a recovery position on their side, sitting, or standing as soon as the person has been properly secured to facilitate breathing.

***Note***

What are the principal differences between the common law approach to reasonableness and the Title VII reasonable person, on the one hand, and the reasonableness approach of the NYU Model Statute, on the other? What explains the differences you see?

## CHAPTER 7. THE NEGLIGENCE STANDARD

### A. Cost / Benefit Calculations and the Learned Hand Formula

How does the reasonable person behave? What kinds of precautions does the reasonable person take? What level of safety does the reasonable person aim to achieve? These sorts of questions have proven to be just as vexing as questions about how to deal with the idiosyncratic features of particular litigants, perhaps even more so.

In this section, we will study several different efforts at articulating the obligations of reasonableness. One especially influential (but equally controversial) account of reasonableness asserts that to behave reasonably is to behave in such a way as to maximize net benefits. This is the so-called cost-benefit approach to identifying negligent conduct. It asks whether the costs and benefits of a given precaution make it the kind of precaution that should have been taken.

As we shall see, however, the cost-benefit approach is not the only approach to evaluating reasonableness. In the actual practice of torts judges, it is rarely invoked, though many believe that it plays a large (even if tacit) role. Our first pair of cases does not seem to involve cost-benefit reasoning at all.

#### 1. Negligence Basics

##### *Stone v. Bolton*, [1950] 1 K.B. 201 (C.A.)

On August 9, 1947, the plaintiff, Miss Bessie Stone, of 10, Beckenham Road, Cheetham, near Manchester, had just stepped from her garden gateway on to the pavement of the highway when she was struck on the head by a cricket ball and suffered injury. The ball had been driven by a player of a visiting team over the fence or hoarding surrounding the Cheetham Cricket Club ground, which at its northern boundary abuts on to the Beckenham Road. The said ground had been in use as a cricket club for some 80 to 90 years [considerably longer than Beckenham Road had existed]. The fence or hoarding surrounding it was 12 feet high and at the northern boundary, owing to a rise in the ground, was 17 feet above the level of the wicket. . . . The distance from the southern wicket to the northern boundary fence was estimated to be 78 yards. The “hit” in question was described by a member of the club with long experience as “quite the biggest seen on that ground,” but evidence was adduced at the trial that on some six to ten occasions cricket balls had been hit over the fence into the road in the past 30 years.

The plaintiff sued the defendants, as representing all the members of the club, for damages for personal injuries, alleging that the defendants were negligent. . . . The case came on for hearing before Oliver J. at Manchester Assizes on December 20, 1948, and the learned judge dismissed the claim. [The plaintiff appealed.]

JENKINS L.J. . . . [L]egitimate as the playing of cricket may be, a cricket ball hit out of the ground into a public highway is obviously capable of doing serious harm to anyone using the highway who may happen to be in its course, and I see no justification for holding the defendants entitled to subject people in Beckenham Road to any reasonably foreseeable risk of injury in this way. Accordingly, I am of opinion that the defendants were under a duty to prevent balls being hit into Beckenham Road so far as there was any reasonably foreseeable risk of this happening. The case as regards to negligence, therefore, seems to me to resolve itself into the question whether, with the wickets sited as they were, and the fence at the Beckenham Road end as it was, on August 9, 1947, the hitting into Beckenham Road of the ball which struck and injured the plaintiff was the realization of a reasonably foreseeable risk, or was in the nature of an unprecedented occurrence which the defendants could not reasonably have foreseen.

On the evidence this question seems to me to admit of only one answer. Balls had been hit into Beckenham Road before. It is true this had happened only at rare intervals, perhaps no more than six times in thirty seasons. But it was known from practical experience to be an actual possibility in the conditions in which matches were customarily played on the ground from about 1910 onwards, that is to say, with the wickets sited substantially as they were, and the fence at the Beckenham Road end, I gather, exactly as it was as regards height and position on August 9, 1947. What had happened several times before could, as it seems to me, reasonably be expected to happen again sooner or later. It was not likely to happen often, but it was certainly likely to happen again in time. When or how often it would happen again no one could tell, as this would depend on the strength of the batsmen playing on the ground (including visitors about whose capacity the defendants might know nothing) and the efficiency or otherwise of the bowlers. In my opinion, therefore, the hitting out of the ground of the ball which struck and injured the plaintiff was a realization of a reasonably foreseeable risk, which because it could reasonably be foreseen, the defendants were under a duty to prevent.

The defendants had, in fact, done nothing since the rearrangement of the ground on the making of Beckenham Road in or about 1910, whether by heightening the fence (e.g., by means of a screen of wire netting on poles) or by altering the position of the pitch, to guard against the known possibility of balls being hit into Beckenham Road. It follows that, if I have rightly defined the extent of the defendants' duty in this matter, the hitting out of the ground of the ball which injured the plaintiff did involve a breach of that duty for the consequences of which the defendants must be held liable to the plaintiff in damages. . . .

The hitting of a ball into the road *was* a reasonably foreseeable event, and no steps at all had been taken to prevent it beyond the erection and subsequent maintenance in its original form of the fence put up in or about 1910, which had been shown by experience to be inadequate. We were, in effect, invited to hold that in as much as the hitting of a ball into Beckenham Road was a rarity, and the odds were against anyone in Beckenham Road being struck on one of the rare occasions when this did happen, the risk of anyone being injured in this way was so remote that the defendants were under no obligation to take any further precautions at all, but were entitled to subject people in Beckenham Road (whether cricket enthusiasts or not) to this remote risk, so to speak in the interests of the national pastime. I see no justification for placing cricketers in this privileged position. . . .



It was also, I think, suggested that no possible precaution would have arrested the flight of this particular ball, so high did it pass over the fence. This seems to me an irrelevant consideration. If cricket cannot be played on a given ground without foreseeable risk of injury to persons outside it, then it is always possible in the last resort to stop using that ground for cricket. The plaintiff in this case might, I apprehend, quite possibly have been killed. I ask myself whether in that event the defendants would have claimed the right to go on as before, because such a thing was unlikely to happen again for several years, though it might happen again on any day on which one of the teams in the match included a strong hitter. No doubt as a practical matter the defendants might decide that the double chance of a ball being hit into the road and finding a human target there was so remote that rather than go to expense in the way of a wire screen or the like, or worse still abandon the ground, they would run the risk of such an occurrence and meet any ensuing claim for damages if and when it arose. But I fail to see on what principle they can be entitled to require people in Beckenham Road to accept the risk, and, if hit by a ball, put up with the possibly very serious harm done to them as *damnum sine injuria*, unless able to identify, trace, and successfully sue the particular batsman who made the hit.

For these reasons I am of opinion that the plaintiff is entitled to succeed on her claim in negligence.

***Bolton v. Stone*, [1951] A.C. 850**

[The defendant cricket club members appealed to the House of Lords.]

LORD REID. My Lords, it was readily foreseeable that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches. Balls had been driven into the public road from time to time and it was obvious that, if a person happened to be where a ball fell, that person would receive injuries which might or might not be serious. On the other hand it was plain that the chance of that happening was small. The exact number of times a ball has been driven into the road is not known, but it is not proved that this has happened more than about six times in about thirty years. If I assume that it has happened on the average once in three seasons I shall be doing no injustice to the respondent's case. Then there has to be considered the chance of a person being hit by a ball falling in the road. The road appears to be an ordinary side road giving access to a number of private houses, and there is no evidence to suggest that the traffic on this road is other than what one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It follows that the chance of a person ever being struck even in a long period of years was very small.

This case, therefore raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material? . .

. .

Counsel for the respondent in this case had to put his case so high as to say that, at least as soon as one ball had been driven into the road in the ordinary course of a match, the appellants could and should have realized that that might happen again and that, if it did, someone might be injured; and that that was enough to put on the appellants a duty to take steps to prevent such an occurrence. . . .

It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. Of course there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognized by the law. But I do not think that this case comes within any such special category. It was argued that this case comes within the principle in *Rylands v. Fletcher*, but I agree with your Lordships that there is no substance in this argument. In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.

In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. . . . [H]aving given the whole matter repeated and anxious consideration I find myself unable to decide this question in favour of the respondent. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small. . . .

LORD RADCLIFFE. My Lords, I agree that this appeal must be allowed. I agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organized on their cricket ground at Cheetham Hill. But the law of negligence is concerned less with what is fair than with what is culpable, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case. . . .

[A] breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as “reasonable care” or “ordinary care” or “proper care”—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty. And here, I think, the respondent’s case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing. . . .

[The House of Lords ruled unanimously in favor of the appellant cricket club members.]

**Notes**

1. Judge Jenkins views the relevant consideration as the foreseeability of an injury. Lords Reid and Radcliffe add an additional element, namely the gravity of the foreseeable injury. Are these two factors sufficient in evaluating the reasonableness of a party's behavior?

2. Does it matter that the homes on Beckenham Road were built after the cricket pitch was in place?

3. Why does the case proceed on the assumption that the relevant precaution is one that the cricket club might have taken, rather than one that Bessie Stone might have taken? Are there, for example, helmets that could have protected her head from long hits?

4. In the next case below, Judge Learned Hand adds a further consideration to the analysis of negligence, one that did not appear in any of the *Stone v. Bolton* opinions. Hand asks not merely whether an injury was foreseeable, nor what the severity of any such injury would have been, but also what the costs of avoiding that injury would have been.

***United States v. Carroll Towing Co.***, 159 F.2d 169 (2d Cir. 1947)

HAND, J.

These appeals concern the sinking of the barge, 'Anna C,' on January 4, 1944, off Pier 51, North River. [The barge accident occurred when the tug Carroll (owned by the Carroll Towing Company) attempted to move a barge tied up just to the north of the Anna C, which was owned by the Conners Company. The maneuver dislodged the Anna C from its pier, and through a series of unfortunate events, a six-barge pile-up including the Anna C slowly careered down the Hudson. When the Anna C collided with a tanker, the tanker's underwater propeller pierced the hull of the Anna C, which began to take water. The Anna C dumped its cargo—flour owned by the United States government—and sank. The United States, as owner of the flour, sued the Carroll Towing Company, which raised a defense of contributory negligence. The Conners Company employee who was supposed to mind the Anna C (the so-called "bargee") had not been on board the barge and indeed had been nowhere to be found when the barge broke loose of its moorings. Carroll Towing argued that had the bargee been on board, he would have noticed the leak and been able to call for help in time to save the barge and its cargo. The case thus turned on whether the Conners Company (the Anna C's owner) had been contributorily negligent because of the absence of its bargee.]

It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called  $P$ ; the injury,  $L$ ; and the burden,  $B$ ; liability depends upon whether  $B$  is less than  $L$  multiplied by  $P$ : i.e., whether  $B$  less than  $PL$ . Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "The Kathryn B. Guinan," and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

### Notes

1. *Learned Hand's formula.* The so-called Hand Formula for determining negligence rounds out the considerations cited in the opinions from *Stone v. Bolton*, and it adds an additional factor: the burden of adequate precautions. But the algebra doesn't by itself supply all the elements needed to make the negligence inquiry. For example, to estimate the probability of the injury's occurrence, we need to know something about the temporality of the Hand Formula. Is it the probability *ex ante* or *ex post*—before or after the fact? The typical Learned Hand test adopts an *ex ante* perspective, comparing the cost of a precaution with the risk of loss at the time the decision about whether to take the precaution in question ought to have been made. *Ex post*, the probability of injury is typically 100%, since we only have a torts question if there has been some injury. (Though note that we will see an *ex post* version of the Hand Formula when we get to products liability in Chapter 9.)

Another element needed to operationalize the Hand Formula is to identify the kind of person making this ex ante analysis. An expert with perfect information will often come to a different conclusion than a layperson about the reasonableness of a particular course of conduct. Typically, however, the Hand Formula imposes no such obligation of perfect information. Instead, it asks what a reasonable person in the position of the party whose conduct is under evaluation would have thought about the likely costs and benefits in question; in other words, it asks what values the reasonable person would have inserted into the equation.

Two additional points round out our first pass at the Learned Hand approach. The first is to observe that in the common law's adversary system it is the party charging negligence—often but not always the plaintiff—who sets the agenda by identifying the precaution that the defendant allegedly ought to have taken. Judge and jury need not comb the world for precautions that might have been taken in any given situation. They need only consider precautions that the party charging negligence contends ought to have been taken. The second is that the cost-benefit calculations required by the Hand formula are *social* cost benefit calculations, not private ones. The question is whether the social costs of the precaution at issue seemed at the time to a reasonable person in the position of the relevant party greater or less than its social benefits. We are interested in the costs and benefits to society of taking any given precaution, not merely the costs and benefits borne or captured by the decision-maker.

So there we have it! Taking a deep breath we can say that the Learned Hand test is an ex ante, reasonable person formula for evaluating by reference to precautions identified by the parties the social advisability of risky conduct. Whew!

The test has been influential in part because, as Judge Richard Posner observed in one of his early articles, it can be read to embody an economic approach to tort law:

Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. It may be the cost of installing safety equipment or otherwise making the activity safer. . . . If the cost of safety measures . . . exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability. Furthermore, overall economic value or welfare would be diminished rather than increased by incurring a higher accident-prevention cost in order to avoid a lower accident cost. If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments. . . .

Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.

Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-34 (1972).

Negligence, in the Hand-Posner formulation, is a cost-benefit scheme designed to encourage behavior that is rational from a cost-benefit perspective. It should induce rational decision-makers to take into account the costs their behavior poses to others and to take all precautions that are socially worthwhile in the sense that their social benefits exceed their social costs.

2. *A cost-benefit analysis of cricket.* What result if Learned Hand's "BPL formula" ( $\text{Burden} < \text{Probability} * \text{Loss}$ ) had been used in *Stone v. Bolton* and *Bolton v. Stone*? Would the outcome of the case have changed if the Lords had explicitly adopted the Hand approach?

Imagine, for example, two scenarios in which the probability of a ball causing damage on Beckenham Road in any given season is 1 in 10. The expected harm from such damage is £100. (Pounds rather than dollars, given that this is cricket after all.) Imagine further that the precaution identified by plaintiff Bessie Stone is the building of a higher wall to prevent balls from flying into the road. In scenario 1, the cost of such a wall is £15. In scenario 2, the cost of the wall is £5. Under the Learned Hand test, the defendant cricket club would not be negligent for having failed to build the wall in scenario 1, because the cost of building the wall ( $B = £15$ ) is greater than the expected cost of not building the wall ( $10\% * £100 = £10$ ). By contrast, the defendant cricket club would be negligent not to have built a wall in scenario 2, because the cost of building the wall ( $B = £5$ ) is less than the expected cost of not building the wall ( $10\% * £100 = £10$ ).

Table 1 below presents the analysis:

**Table 1: The Negligence Analysis**

|  | Burden of the precaution (B) | Probability of harm absent the precaution (P) | Expected damages in the event harm occurs (L) |               |
|--|------------------------------|---|---|---------------|
| Scenario 1:<br>Expensive<br>Precaution   | 15                           | 10%   | 100   | Not negligent |
| Scenario 2:<br>Inexpensive<br>Precaution | 5                            | 10%   | 100   | Negligent     |

3. *The ex ante view.* So far we've given consideration to what we might think of as the ex post application of the Hand test. We have asked how someone in the position of a judge or jury would operationalize it with respect to precautions not taken. But the deeper significance of the Learned Hand test may be its ex ante implications. Parties knowing that in

the event of an injury they will be held liable for having failed to take certain precautions that were cost justified should begin to take those precautions. Consider the cricket club: under a negligence regime, will they build a higher wall at the beginning of the year? In scenario 2, assuming that they have a lawyer who is worth her socks, they sure will. In scenario 1, on the other hand, they will not. Note that it is very likely that in the actual world the cricket team will get decent advice on such a question. They almost certainly will have a liability insurance policy. And if they do, the liability insurer will have every incentive to inspect the field and require the team (on pain of a higher liability insurance premium) to raise the fence.

We can see this in Table 2, which is a variation on the two scenario set-up in Table 1. Here we include a fourth column that adds the *ex ante* decision that the negligence regime incentivizes. You can see that where the precaution costs more than it is worth, the rational actor will not build. But where the precaution is less costly than the expected cost of the injuries that will take place absent the precaution, the rational actor will build.

**Table 2. To Build or Not to Build (under a Negligence Regime)**

|            | (B) | (P) | (L) | Court Determination in event of injury | Ex ante view: Build the Higher Fence? |
|------------|-----|-----|-----|--|---------------------------------------|
| Scenario 1 | 15  | 10% | 100 | Not negligent—D doesn't pay            | Not build                             |
| Scenario 2 | 5   | 10% | 100 | Negligent—D pays                       | Yes build                             |

4. *Strict liability in the ex ante view.* At this point in the analysis something striking emerges. Let's take the same scenarios as above but compare the incentives to take precautions under a Learned Hand-style negligence regime with the incentives to take precautions under a strict liability approach that allocates the cost of cricket injuries on Beckenham Road to the cricket club regardless of whether it was at fault in not taking the precaution. Table 3 illustrates the basic set-up of the analysis. Where building the higher fence costs more than the expected damages to others, the cricket club will choose not to build. Where building the higher fence costs less than the expected damages to others, the cricket club will choose to build. At least as between negligence and strict cricket club liability, *the liability regime has no effect on the behavior of the rational actor.*

**Table 3: To Build or Not to Build (under Negligence *and* Strict Liability)**

|                  |            | (B) | (P) | (L) | Court Determination in event of injury | Ex ante view: Build the Higher Fence? |
|------------------|------------|-----|-----|-----|--|---------------------------------------|
| NEGLIGENCE       | Scenario 1 | 15  | 10% | 100 | Not negligent—D doesn't pay            | Not build                             |
|                  | Scenario 2 | 5   | 10% | 100 | Negligent—D pays                       | Yes build                             |
| STRICT LIABILITY | Scenario 1 | 15  | 10% | 100 | D pays                                 | Not build                             |
|                  | Scenario 2 | 5   | 10% | 100 | D pays                                 | Yes build                             |

The startling revelation here is that the two liability regimes we have been analyzing for unintentional injuries—negligence and non-fault liability—seem to induce precisely the same behavior in rational actors.

## 2. Critiques of Cost-Benefit Reasoning

### *Critiques from First Principles*

Posner's influential articulation of the negligence test helped give rise to the economic analysis of the law, which is now pervasive in the academy and influential in some areas outside of it. The law and economics approach has also been the subject of controversy, however. Critics object that Learned Hand's formula imbues the tort system with a utilitarian philosophy that fails to square either with the law as it is or with our moral intuitions about what it should be. We can get a flavor of this from the so-called "trolley problem," which is often invoked to establish that utilitarian considerations of costs and benefits do not capture the nuances of our moral reasoning.

Consider Judith Jarvis Thomson's widely discussed formulation:

Suppose you are the driver of a trolley. The trolley rounds a bend, and there come into view ahead five track workmen, who have been repairing the track. The track goes through a bit of a valley at that point, and the sides are steep, so you must stop the trolley if you are to avoid running the five men down. You step on the brakes, but alas they don't work. Now you suddenly see a spur of track leading off to the right. You can turn the trolley onto it, and thus save the five men on the straight track ahead. Unfortunately, . . . there is one track workman on that spur of track. He can no more get off the track in time than the five can, so you will kill him if you turn the trolley onto him. Is it morally permissible for you to turn the trolley?



Everybody to whom I have put this hypothetical case says, Yes, it is. Some people say something stronger than that it is morally permissible for you to turn the trolley: They say that morally speaking, you must turn it—that morality requires you to do so. . . .

[Now c]onsider a case . . . in which you are standing on a footbridge over the trolley track. You can see a trolley hurtling down the track, out of control. You turn around to see where the trolley is headed, and there are five workmen on the track where it exits from under the footbridge. What to do? Being an expert on trolleys, you know of one certain way to stop an out-of-control trolley: Drop a really heavy weight in its path. But where to find one? It just so happens that standing next to you on the footbridge is a fat man, a really fat man. He is leaning over the railing, watching the trolley; all you have to do is to give him a little shove, and over the railing he will go, onto the track in the path of the trolley. Would it be permissible for you to do this? Everybody to whom I have put this case says it would not be. But why?

Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1409 (1985).

We might put the question slightly differently. We might ask whether the estates and families of the workman or the man in the footbridge example have causes of action against the driver or passerby. Or we might ask whether the estates and families of the five killed by a failure either to switch the track or to push the man off the footbridge might have a cause of action against the actor who failed to take the step that would have saved the five. Either way, however, the puzzle of the trolley problem, which was first introduced by the twentieth-century British philosopher Philippa Foot, is that measured in terms of costs and benefits; the spur scenario and the footbridge scenario seem identical. One death for five lives. And yet, as Thomson says, the two scenarios seem to most people to require quite different moral analyses. It seems to follow, at least on one account, that non-utilitarian considerations are necessary to make sense of our evaluations of right and wrong.

Even if the trolley problem illustrates the limits of utilitarian considerations, however, does Thompson's example rule out cost-benefit analysis altogether? Probably not. Observe that the decision to switch the tracks in the spur scenario would be senseless absent the apparently greater cost of the five deaths as compared to the one. Costs and benefits seem necessary for rational moral decision-making even if they are not entirely sufficient.

The claim of critics of cost-benefit reasoning is thus not that this form of reasoning has no place in law and morality. The claim, as the late legal philosopher Ronald Dworkin put it, is that in some circumstances, rights "trump" utilities. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, ix (1977). The trick, then, is to identify the circumstances in which rights take precedence over utility, and the circumstances in which utilitarian goals might indeed be sufficient.

### *Critiques from Distributive Justice*

Is there a distributional impact to using cost-benefit analysis as the measure of reasonableness? Professor Zachary Liscow describes how cost-benefit analysis interacts with the common law of torts by focusing on the cost of injury (or the “L,” in the Learned Hand formula):

[W]orkers are typically eligible for compensation for lost wages resulting from tortious behavior. Higher-income workers have higher wages and, thus, de facto have a larger legal entitlement. For example, consider a dangerous driver driving in a rich neighborhood versus a poor neighborhood. Drivers responding to incentives would expect to pay more if they cause an injury in the rich neighborhood than in the poor neighborhood. They may thus drive more dangerously in the poor neighborhood, increasing the likelihood of an accident there, thereby reducing the legal entitlement of poor groups to safe traffic conditions.

Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1692 (2018). Does cost-benefit analysis legitimize this choice, deeming “reasonable” conduct that would burden poor people with greater risks and ultimately more injuries?

This insight becomes all the more troubling when we bring the demographics of wealth into view. Consider the long-standing wealth gap between black Americans and white Americans. Do cost-benefit analyses lead American companies to target poor and minority communities when making ex ante judgments about where to site risky behavior? Professors Kimberly Yuracko and Ronen Avraham argue that the idea is hardly far-fetched:

A 2004 study, for example, found that the risk of accidents for chemical facilities in heavily African-American counties is twice as high as the risk in other counties, and a Harvard study conducted for the City of New York in 1990 documented higher numbers of adverse actions caused by negligence in hospitals serving minority communities. There is also a history of legislative bodies disproportionately siting hazardous waste dumps in minority communities.

Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325, 334-35 (2018).

The distributional critique can be bypassed if you believe, as some scholars do, that distributional questions really are not the concern of private law fields like tort, because such fields are ill-equipped to address them. According to this view, tort ought to maximize welfare through cost-benefit reasoning and the like, and leave distributive questions to tax policy and social provision policy. How has that strategy fared in practice? Liscow contends that the distributive effects of private law allocations are “sticky”: tax policy doesn’t adjust to do the distributive work we might desire, even if in theory the world would be better off if it did. Liscow, *Is Efficiency Biased*, *supra*, at 1662-66. Are there political institutions that would more effectively translate distributional effects into redistributive tax or social policy?

### *Critiques from Administrability*

Even setting aside objections to the moral structure of utilitarianism, methodological difficulties abound for cost-benefit analysis. Professors Frank Ackerman and Lisa Heinzerling argue that the valuations commonly used by analysts are typically “inaccurate and implausible,” and that analysts “trivialize . . . future harms and the irreversibility of some environmental problems” by valuing present economic gains over future economic losses (through a process economists call discounting). They also suggest that adding up all of society’s gains and losses muddles opportunities for a full conversation about distributional and moral consequences, making a supposedly transparent and objective process anything but. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1563 (2002).

Other critics observe that the informational demands of Posner’s approach to cost-benefit analysis are superhuman. In decentralized markets, well-informed market participants compound vast quantities of information. The market’s capacity to crowd-source cost-benefit calculations is, as Nobel laureate Amartya Sen puts it, “[t]he spectacular merit of the informational economy of the market system for private goods.” But judicial cost-benefit analysis can claim no such market advantage. “When all the requirements of ubiquitous market-centered evaluation have been incorporated into the procedures of cost-benefit analysis,” Sen has remarked, “it is not so much a discipline as a daydream.” Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 951 (2000). See also David M. Driesen, *Is Cost-Benefit Analysis Neutral?* 77 U. COLO. L. REV. 335 (2006); Ulrich Hampicke & Konrad Ott (eds.), *Reflections on Discounting*, 6 INT. J. OF SUSTAINABLE DEVELOPMENT 7 (2003).

### *A Precautionary Alternative?*

Critics further argue that there are better alternatives to cost-benefit analysis. Some advocate a “precautionary principle” for making policy decisions about risk. For example, the Declaration of the 1992 United Nations Conference on Environment and Development (also known as the “Rio Declaration”) states that “where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” How might a precautionary principle approach be adopted in tort law? Should we all have a duty to take special precautions to avoid irreversible damage to life and limb, even when not cost-justified? Or are injuries to life and limb themselves costs to be brought into the balance?

Can the precautionary principle handle decisions about risk that feature risks to human health and life on both sides of the equation? It is an important question, since most decisions about risk can be said to include risks to life on both sides of the equation. Consider safety regulations that increase the cost of some consumer good. Safer cars will save lives. But more expensive cars will cost lives, too, since they may reduce the number of cars sold, reduce wealth, and cost some people their jobs. Such “life-life” or “risk-risk” situations, contend the defenders of cost-benefit reasoning, preclude resort to any “precautionary” approach, since

there are risks on all sides. Even setting aside the risk-risk problem, opponents of the precautionary principle contend that its advocates are simply trying to put an illicit thumb on the scale for difficult policy balancing decisions. See Cass Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003).

### ***Kysar's Constructivist Critique***

Professor Douglas Kysar has advanced a different defense of the precautionary principle. According to Kysar, the regulatory approaches we use are not just tools we manipulate to advance our social values. Our approaches to risk policy constitute our values, even as they implement them.

The precautionary principle encourages . . . conscientiousness by reminding the political community, poised on the verge of a policy choice with potentially serious or irreversible environmental consequences, that its actions matter, that they belong uniquely to the community and will form a part of its narrative history and identity, helping to underwrite its standing in the community of communities, which includes other states, other generations, and other forms of life. Like the Hippocratic adage for physicians, the precautionary principle reminds the cautioned agent that life is precious, that actions are irreversible, and that responsibility is unavoidable. Such considerations, in contrast, hold no clear or secure place within the logic of welfare maximization, tending, as it does, to deny the political community a view from within itself and to ask the community, in essence, to regulate from nowhere.

DOUGLAS A. KYSAR, REGULATING FROM NOWHERE, ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 16 (2010). Kysar's point is that we construct ourselves in the policies we adopt. His precautionary principle is typically raised in debates over environmental law and regulation, which usually operate on a forward-looking basis to deal with ongoing pollution problems. Does the precautionary principle have a place in the tort system, which ostensibly is confronting *past* wrongs?

### ***3. In Defense of Cost-Benefit Reasoning***

Defenders of cost-benefit reasoning have responded to these critiques with their own counter-arguments, beginning with a response to the so-called "incommensurability problem":

**Robert H. Frank, *Why is Cost-Benefit Analysis so Controversial?*, 29 J. LEGAL STUD. 913, 914 (2000)**

The cost-benefit principle says we should install a guardrail on a dangerous stretch of mountain road if the dollar cost of doing so is less than the implicit dollar value of the injuries, deaths, and property damage thus prevented. Many critics respond that placing a dollar value on human life and suffering is morally illegitimate.

The apparent implication is that we should install the guardrail no matter how much it costs or no matter how little it affects the risk of death and injury.

Given that we live in a world of scarcity, however, this position is difficult to defend. After all, money spent on a guardrail could be used to purchase other things we value, including things that enhance health and safety in other domains. Since we have only so much to spend, why should we install a guardrail if the same money spent on, say, better weather forecasting would prevent even more deaths and injuries?

More generally, critics object to the cost-benefit framework's use of a monetary metric to place the pros and cons of an action on a common footing. They complain, for example, that when a power plant pollutes the air, our gains from the cheap power thus obtained simply cannot be compared with the pristine view of the Grand Canyon we sacrifice. . . .

This view has troubling implications. . . . Scarcity is a simple fact of the human condition. To have more of one good thing, we must settle for less of another. Claiming that different values are incommensurable simply hinders clear thinking about difficult trade-offs.

Notwithstanding their public pronouncements about incommensurability, even the fiercest critics of cost-benefit analysis cannot escape such trade-offs. For example, they do not vacuum their houses several times a day, nor do they get their brakes checked every morning. The reason, presumably, is not that clean air and auto safety do not matter, but that they have more pressing uses of their time. Like the rest of us, they are forced to make the best accommodations they can between competing values.

Cass Sunstein articulates a different defense of cost-benefit reasoning, one that focuses on the architecture of the decision-making process:

***Cass Sunstein, Cognition and Cost-Benefit Analysis, 29 J. LEGAL STUD. 1059, 1060 (2000)***

[C]ost-benefit analysis is best defended as a means of overcoming predictable problems in individual and social cognition. Most of these problems might be collected under the general heading of selective attention. Cost-benefit analysis should be understood as a method for putting "on screen" important social facts that might otherwise escape private and public attention. Thus understood, cost-benefit analysis is a way of ensuring better priority setting and of overcoming predictable obstacles to desirable regulation, whatever may be our criteria for deciding the hardest questions about that topic. . . . [T]his method, conceived in a particular way, might attract support from people with varying conceptions of the good and the right, including, for example, neoclassical economists and those who are quite skeptical about some normative claims in

neoclassical economics, involving those who do and who do not take private preferences, and willingness to pay, as the proper foundation for regulatory policy.

Sunstein's support of cost-benefit reasoning sees the method as the best—perhaps the only—tool to make transparent, rational decisions in regulatory agencies and courtrooms. He claims that cost-benefit analysis actually helps us organize a broad range of value judgments, whether or not they fit neatly into existing markets.

Sunstein has also used behavioral science research to suggest that our moral intuitions against utilitarianism, and potentially for alternatives like the precautionary principle, are fundamentally mistaken. Taking up Judith Jarvis Thomson's trolley problem, which we encountered above, Sunstein argues that in unusual cases our ordinary moral intuitions mislead us and that the two trolley scenarios are morally identical:

***Cass Sunstein, Moral Heuristics, 28 BEHAV. & BRAIN SCI. 531, 540-41 (2005)***

As a matter of principle, there is no difference between the two cases. People's different reactions are based on moral heuristics that condemn the throwing of the stranger but support the throwing of the switch. As a matter of principle, it is worse to throw a human being in the path of a trolley than to throw a switch that (indirectly?) leads to a death. The relevant heuristics generally point in the right direction. To say the least, it is desirable for people to act on the basis of a moral heuristic that makes it extremely abhorrent to throw innocent people to their death. But the underlying heuristics misfire in drawing a distinction between the two cleverly devised cases. Hence, people struggle heroically to rescue their intuitions and to establish that the two cases are genuinely different in principle. But they aren't. In this sense, a moral heuristic . . . leads to errors. And this objection does not bear only on ingeniously devised hypothetical cases. It suggests that a moral mistake pervades both commonsense morality and law, including constitutional law, by treating harmful omissions as morally unproblematic or categorically different from harmful actions.

Is there anything to be said to those who believe that their moral judgments, distinguishing the trolley and footbridge problems, are entirely reflective, and embody no heuristic at all? Consider a suggestive experiment designed to see how the human brain responds to the two problems (Greene et al. 2001). The authors do not attempt to answer the moral questions in principle, but they find "that there are systematic variations in the engagement of emotions in moral judgment," and that brain areas associated with emotion are far more active in contemplating the footbridge problem than in contemplating the trolley problem. An implication of Greene et al.'s finding is that human brains are hard-wired to distinguish between bringing about a death "up close and personal" and doing so at a distance. Of course, this experiment is far from decisive; emotions and cognition are not easily separable (Nussbaum 2002), and there may be good moral reasons why certain brain areas are activated by one problem and not by the other. Perhaps the brain is closely attuned to

morally irrelevant differences. But consider the case of fear, where an identifiable region of the brain makes helpfully immediate but not entirely reliable judgments (Ledoux 1996), in a way that suggests a possible physical location for some of the operations of [our moral heuristics]. The same may well be true in the context of morality, politics, and law (Greene & Haidt, 2002).

#### ***4. The Logic of Cost-Benefit***

##### ***Cooley v. Public Service Co., 10 A.2d 673 (N.H. 1940)***

PAGE, J. On November 29, 1935, the Telephone Company maintained a cable on Taylor Street, Manchester, running north and south. This cable consisted of a lead sheath, inside which were carried a large number of wires connected with the service stations of its subscribers. The cable was supported by rings from a messenger wire strung on the Telephone Company poles. The construction conformed to standard practices, and the messenger wire was grounded every thousand feet. The sheath of the cable also was grounded. The Telephone Company further maintained at the station which the plaintiff was using when she received her injuries, two protective devices for grounding foreign currents in order to prevent their entrance to the house and to the subscriber's instrument. There is no evidence that these devices did not operate perfectly.

At a point about a mile distant from the plaintiff's house, the Public Service Company's lines, east and west along Valley Street, crossed the telephone cable at right angles and some eight or ten feet above it. These lines were not insulated.

Shortly after midnight, during a heavy storm, several of the Public Service wires over the intersection of Valley and Taylor Streets broke and fell to the ground. One of them came into contact with the telephone messenger. This particular wire of the defendant carried a voltage of about 2300. Consequently an arc was created, which burned through the messenger and nearly half through the cable before the current was shut off. . . .

When the contact of the wires occurred, the plaintiff was standing at the telephone, engaged in a long-distance conversation. The contact created a violent agitation in the diaphragm of the receiver and a loud explosive noise. The plaintiff fell to the floor. She has since suffered from what her physicians describe as traumatic neurosis, accompanied by loss of sensation on the left side.

Apparently there is no claim that the negligence of the defendant caused the wires to fall. The plaintiff's sole claim is that the defendant could have anticipated (1) that its wire might fall for a variety of reasons, which is true; (2) that a telephone subscriber in such case might hear a great noise, which also is true; (3) that as a result of fright thereby induced the user of the telephone would suffer physical injuries, which, as we have seen, is a rare contingency, though it may be anticipated. It is urged that the defendant's consequent duty was to maintain such devices at cross-overs as would prevent one of its falling wires from coming into contact with a telephone wire.

The devices suggested are two. The first is a wire-mesh basket suspended from the poles of the defendant at the point of cross-over, above the cable and below the defendant's wires. Two forms were suggested. One would be about six by eight feet. The other would be of an unassigned width and would stretch the full distance between defendant's poles. In either case the basket would be insulated. The theory is that falling wires, though alive, would remain harmless in the basket. . . .

There was evidence that baskets and similar devices were used by the Telephone Company, some years ago, for the protection of their wires at cross-overs. But the verdict establishes its lack of duty thus to protect its customers in this particular instance. There was no evidence that electric light companies ever erected baskets or insulated wires in such situations, and there was positive evidence that standard construction practices do not require either. The plaintiff cannot claim that the defendant maintained a system less carefully devised than one conforming to accepted practice. It is conceded, however, that due care might require some device better than the usual one. If the plaintiff and persons in her situation could be isolated, and duties to others ignored, due care might require the use of such devices as are here urged.

But the same reasoning that would establish a duty to do so raises another duty to the people in the street, not to lessen the protective effect of their circuit-breaking device. . . .

In the case before us, there was danger of electrocution in the street. As long as the Telephone Company's safety devices are properly installed and maintained, there is no danger of electrocution in the house. The only foreseeable danger to the telephone subscriber is from noise-fright and neurosis. Balancing the two, the danger to those such as the plaintiff is remote, that to those on the ground near the broken wires is obvious and immediate. The balance would not be improved by taking a chance to avoid traumatic neurosis of the plaintiff at the expense of greater risk to the lives of others. To the extent that the duty to use care depends upon relationship, the defendant's duty of care towards the plaintiff is obviously weaker than that towards the man in the street.

The defendant's duty cannot, in the circumstances, be to both. If that were so, performance of one duty would mean nonperformance of the other. If it be negligent to save the life of the highway traveler at the expense of bodily injury resulting from the fright and neurosis of a telephone subscriber, it must be equally negligent to avoid the fright at the risk of another's life. The law could tolerate no such theory of "be liable if you do and liable if you don't". The law does not contemplate a shifting duty that requires care towards A and then discovers a duty to avoid injury incidentally suffered by B because there was due care with respect to A. Such a shifting is entirely inconsistent with the fundamental conception that the duty of due care requires precisely the measure of care that is reasonable under all the circumstances. 2 Restatement Torts, §§ 291-295. . . .

If the duty to the man in the street be forgotten for the moment, the duty to the plaintiff would depend upon anticipation of bodily injuries because of fright at a noise. Of a defendant in such case it is to be remarked that "the likelihood that his conduct will cause bodily harm involves two uncertain factors, the chance that his act will cause the [emotional] disturbance and the chance that the disturbance if it occurs will result in bodily harm." 2 Restatement, Torts, § 306, comment c. The chance of physical contact with a live wire in the street, with consequent electrocution, is much less remote and complicated than that. It is clearly more foreseeable and



is the controlling one of all the circumstances for present purposes. In this particular case, it could not be found that it would be reasonable to neglect the protection of those more obviously at risk than the plaintiff.

It is not doubted that due care might require the defendant to adopt some device that would afford protection against emotional disturbances in telephone-users without depriving the traveling public of reasonable protection from live wires immediately dangerous to life. Such a device, if it exists, is not disclosed by the record. The burden was upon the plaintiff to show its practicability. Since the burden was not sustained, a verdict should have been directed for the defendant.

Other exceptions therefore require no consideration.

Judgment for the defendant. All concurred.

**Note**

A social endeavor. The plaintiff in *Cooley* tried to prove negligence by focusing on the costs and benefits of the defendant's actions in relation to her. Page, J., rejected this argument, demonstrating the courts' use of cost-benefit analysis as a social—rather than private—calculation; he analyzes the reasonableness of the defendant's safety technology as applied to all foreseeable plaintiffs. Does this make sense? How well do you think a social cost-benefit analysis fit into the plaintiff-driven, two-party nature of the tort system?

***Activities and activity levels—and the strict liability alternative***

The plaintiff in *Cooley* offers an alternative technology to make operating phone lines safer. But what if the act of operating phone lines with due care is not enough? What if engaging in the activity itself is negligent? Can the tort system deter activities that are unsafe because of the *levels* of the activity that people engage in? Steven Shavell criticizes the negligence regime for failing to adequately address the problem of over-participation in unsafe activities:

By definition, under the negligence rule all that an injurer needs to do to avoid the possibility of liability is to make sure to exercise due care if he engages in his activity. Consequently *he will not be motivated to consider the effect on accident losses of his choice of whether to engage in his activity or, more generally, of the level at which to engage in his activity*; he will choose his level of activity in accordance only with the personal benefits so derived. But surely any increase in his level of activity will typically raise expected accident losses (holding constant the level of care). Thus he will be led to choose too high a level of activity; the negligence rule is not “efficient.” . . .

However, under a rule of strict liability, the situation is different. Because an injurer must pay for losses whenever he is involved in an accident, he will be induced to consider the effect on accident losses of both his level of care *and* his level of activity. His decisions will therefore be efficient. Because drivers

will be liable for losses sustained by pedestrians, they will decide not only to exercise due care in driving but also to drive only when the utility gained from it outweighs expected liability payments to pedestrians.

*Steven Shavell, Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1, 2-3 (1980).

***Calabresi: Incentives, Distributions, and Institutions in the Decision for Accidents***

Is there a way to incorporate unsafe levels of activity into a cost-benefit analysis of due care? Calabresi offers another alternative to the negligence regime to address this problem in his classic “The Decision for Accidents”:

There are acts or activities that we would bar in our society regardless of the willingness of the doer to pay for the harm they cause. It is these that we call “useless” and feel that there is no societal loss in deterring them specifically. But certainly even if some such activities can be isolated, there are a great many other activities whose undesirability consists only in the fact that they result in accidents and then only to the extent that people would, if they knew the costs of these accidents, prefer to abstain from the activity rather than pay those costs. . . .

The question then is, Can we not deter these acts or activities more effectively than through a system of fault liability which, together with insurance, merely raises somewhat the cost to those who as an actuarial class tend to do these acts or activities? I suggest, and it is not a particularly original suggestion, that a system of noninsurable tort fines assessed on the individual doer of the “useless” act, together with general nonfault liability, would do a far better job of deterring valueless activities of this type.

This leaves those acts or activities that, as a society, we are unprepared to call valueless—those activities that, subject to some subsequent political reconsideration and modification, we want to permit to the extent that they can pay for their accident costs. I would suggest, though it is not crucial to my analysis, that these comprise the bulk of the decisions as to accidents. Despite Learned Hand’s formulation that negligence is a balancing of the “danger of an activity” against what must usefully be given up to avoid that danger, it is altogether too clear that a system of fault liability is designed to deal only with “useless” conduct and not with the more subtle interests involved in measuring the value and danger of an activity. If using a threshold of terrazzo is not deemed careless, then a system based on fault—as an all-or-nothing proposition—will have no effect whatever on this activity. The best way we can establish the extent to which we want to allow such activities is by a market decision based on the relative price of each of these activities and of their substitutes when each bears the costs of the accidents it causes. This can be done by a system of nonfault enterprise liability, a system that assesses the costs of accidents to activities according to their involvement in accidents. By contrast, our fault system, with insurance, assesses the cost of an activity not

according to the number of accidents it causes but according to the number of accidents it causes in which certain predetermined indicia of fault can be attributed to it. This results in a deterrence of only faultily caused accidents in an area where by hypothesis we are interested in deterring activities not because of some moral implications but because of the accidents they cause.

*Guido Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 718-20 (1965).

Elsewhere, Calabresi makes the point that the nonfault or strict liability standard for accidents would accomplish the same economic goals as Learned Hand's negligence test:

If we make the assumptions under which the Learned Hand test would work adequately, the fascinating thing is that as good a result in terms of reducing primary accident costs could be achieved by a liability rule which is the exact reverse of the Learned Hand test. Under such a "reverse Learned Hand test," the costs of an accident would be borne by the injurer unless accident avoidance on the part of the victim would have cost less than the accident. If a reverse contributory negligence test were added, the victim would bear the accident costs only if the injurer could not also have avoided the accident at less cost than the accident entailed. . . .

*Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1058-59 (1972).

The two approaches—a cost-benefit fault theory and a nonfault theory of strict liability—are not completely identical. "Under the Learned Hand test," write Calabresi and Hirschoff, "the costs of all accidents not worth avoiding are borne by victims, whereas under the reverse Learned Hand test they would be borne by injurers." *Id.* at 1059. Moreover, the choice between fault and nonfault liability standards alters the institutional location of the necessary cost-benefit analysis:

When a case comes to judgment under either of the two Learned Hand type tests, a cost-benefit analysis is made by an outside governmental institution (a judge or a jury) as to the relative costs of the accident and of accident avoidance. . . . The strict liability test we suggest does not require that a governmental institution make such a cost-benefit analysis. It requires of such an institution only a decision as to which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.

*Id.* at 1060. Nonfault approaches may not eliminate cost-benefit analysis. In fact, by requiring that private actors bear the social costs of their decisions, they create institutional incentives for those actors to engage in preemptive cost-benefit analysis. Of course, it may matter a great deal that the actors charged with engaging in the cost-benefit calculus are private actors rather than public actors. For one thing, the allocation of the decision-making responsibility to the private sphere means fewer decisions by the state. Is nonfault liability thus less

interventionist—and more favorable toward the private sector—than a liability standard that requires a state determination of fault?

***Cost-benefit in practice (I): Does tort law really deter?***

For much of the middle of the twentieth century, leading scholars doubted that the prospect of tort liability dramatically affected accident rates. Mid-twentieth-century Yale torts jurist Professor Fleming James, for example, believed (as he argued in one especially distinctive article) that people are simply accident prone or not, as the case may be. Incentives, he insisted, were neither here nor there. See Fleming James, Jr. & John Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950). A generation of scholars followed James's basic idea.

Today, the literature is considerably less skeptical, though some of the most heroic ideas of tort damages as a perfect deterrence device remain far-fetched. Some of the best evidence we have is in the much-studied field of medical malpractice. One recent study examined changes in state common law making the liability standard hinge on compliance with a national physician's custom rather than a state-level physician's custom; the author concluded that such state law changes changed physician practice, making them more uniform across regions and bringing them into line with the national standard. Michael Frakes, *The Impact of Medical Liability Standards on Regional Variations in Physician Behavior: Evidence from the Adoption of National-Standard Rules*, 103 AM. ECON. REV. 257 (2013). The same author finds that reform laws reducing tort damages decrease the number of episiotomies during vaginal deliveries without altering outcomes as shown by newborns' Apgar test scores. Michael Frakes, *Defensive Medicine and Obstetric Practices*, 9 J. EMPIRICAL LEGAL. STUD. 457 (2012). The literature indicates that tort law affects C-section rates, though not in the way conventional wisdom imagines. C-section rates are not higher today because of tort liability; to the contrary, reform laws decreasing likely tort damages awards actually increase the rate of caesarian sections, apparently because the prospect of tort damages has the effect of holding c-section rates down. Janet Currie & W. Bentley MacLeod, *First Do No Harm? Tort Reform and Birth Outcomes*, 123 Q. J. ECON. 795 (2008).

Evidence from other areas has been modest and mixed, but still indicates some deterrent effect. For example, a leading study by Alma Cohen and Rajeev Dehejia found that transitions to no-fault auto liability (and away from tort) led to a 6% increase in traffic-related deaths in the United States. Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J. L. & ECON. 357 (2004). Other studies in the same area have been more equivocal, but the methodological obstacles are considerable.

***Cost-benefit in practice (II): The problem of insurance***

Assuming that tort law does deter, at least sometimes, what happens when potential plaintiffs and defendants are insured? How does liability insurance affect the viability of using negligence to deter unwanted and uneconomic acts? Economists and legal scholars call the problem that insurance raises for the behavior of insured actors "moral hazard." If people are insured, the theory goes, they have less incentive to take reasonable precautions to avoid

accidents, and our negligence deterrence system will fail. Recall, for example, the defendant in *Vaughn v. Menlove* from Chapter 4, who chose to risk a fire because he had purchased property insurance.

Fleming James, who was skeptical of the significance of rational incentives, concluded that there was no evidence available to prove that increasing rates of insurance led to increased carelessness. Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). But today many scholars, especially those of an economic orientation, are more likely to credit the significance of moral hazard, at least in some forms. And the empirical evidence suggests that there is some reason to think that the moral hazard effect is at work in modern liability insurance markets. Cohen and Dehejia, for example, found that compulsory auto insurance regimes produced an increase in fatalities; for each percentage point decrease in uninsured motorists in a state (i.e., for an increase in drivers covered by insurance), they found a one percent increase in traffic fatalities. Cohen & Dehejia, *The Effect of Automobile Insurance*, *supra*.

But the connection between insurance and accident rates is not a simple one. Insurance companies know all about moral hazard, of course. They would go bankrupt very quickly if they did not take it into account in pricing and shaping their policies. Much of the structure of the typical liability insurance business is designed to counteract the incentives that the fact of insurance will create for their customers. Insurers try to screen out bad risks at the front-end of the process. And once they enter into insurance contracts, they design those contracts to encourage safe behavior; as Professor Tom Baker puts it, insurers seek to create insurance contracts that do “not encourage the wicked to apply or tempt good people to do wrong.” Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 241 (1996).

One way insurers encourage safety is by developing and disseminating new safety strategies and mechanisms. Insurance companies have powerful incentives—and an ideal institutional position—to aggregate information about risks, to analyze it, and to share it with their policy holders. In one of the most famous examples, firms offering insurance against the catastrophic effects of early steam boilers were almost single-handedly responsible for dramatically reducing the risks of boiler design and maintenance. See John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003).

Liability insurers also typically adopt “experience rating” for their insurance premiums. Insured policy holders whose conduct generates covered accidents often find that their premiums go up. In insurance areas like automobile insurance, insurers also use information such as traffic infractions to gauge an insured driver’s likelihood of being in an accident. Experience rating can thus generate incentives of its own for insured actors to take account of the risk of harm to others—incentives that are one degree removed from tort law, but which some observers think may be even more powerful deterrents than the prospect of paying tort damages. The close and certain connections between accidents and traffic infractions, on the one hand, and increased automobile insurance rates, on the other, may make the insurance policy incentives for safety much more salient than the highly attenuated and uncertain connection between unsafe driving and the prospect of tort liability. See, e.g., John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 825 (1967).

### ***Cost-benefit in practice (III): Juries and jury instructions***

Finally, we are left with the realist's question: does cost-benefit analysis actually influence juries' decisions? Law professors Patrick Kelley and Laurel Wendt reviewed the recommended jury instructions in forty-eight states to see how courts instruct juries on the negligence standard. They laid out five possible interpretations of negligence: (1) whether the defendant's conduct was morally wrong according to prevailing community norms; (2) whether individuals in the jury, upon placing themselves in the defendant's shoes along with prudence and carefulness, would have acted as the defendant actually did; (3) whether the defendant breached a safety convention commonly understood in the community to protect the kinds of people like the plaintiff; (4) whether an ordinary, reasonable person would have foreseen danger to others under known circumstances, as described by Holmes; and, finally, (5) whether the defendant's actions accorded with an *ex ante* cost-benefit analysis, as described by Hand in *Carroll Towing*.

They found that the first three interpretations had varying support by states' jury instructions. However, they found judges rarely instructed juries using the fourth or fifth interpretations of the negligence standard.

[T]here seems to be no support in the pattern negligence instructions for Holmes's theory of the negligence standard. Foreseeability is not mentioned in most of the negligence instructions, and [in the five states] where it is, the foreseeability of danger from the defendant's conduct *simpliciter* is not presented as the negligence standard . . . .

Second, the cost-benefit test of negligence does not seem to be the probable meaning of even those five pattern negligence instructions couched in terms of unreasonable foreseeable risk. . . . None of the foreseeability instructions except that of Louisiana's provision set out the detailed cost-benefit explanation of unreasonable foreseeable risk. . . . Each instruction identifies foreseeability as the foresight of an ordinary prudent person, and all but Wisconsin's instructions ask the jury to determine, in addition to foreseeable harm from the defendant's act, whether that conduct could reasonably be avoided, or whether the act is one that a reasonably prudent person, in the exercise of ordinary care, would not do. . . . It seems to us that a jury would interpret that standard not as an invitation to engage in cost-benefit analysis, but as an invitation to determine how reasonably careful people in their community would in fact act in light of all the circumstances, including the foreseeable risk of harm to others from the proposed conduct.

Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 619-20 (2002).

Kelley and Wendt believe their findings indicate that cost-benefit analysis plays only a small role, if any, in both jury instructions or actual jury deliberations about negligence; instead, they contend, the law asks jurors to determine whether a defendant's actions falls outside the bounds of a reasonably careful or prudent person. Are they right in thinking that the state jury instructions they found rule out the cost-benefit approach? Wouldn't a reasonably

prudent person engage in a cost-benefit analysis before acting? Do reasonably prudent people do *some kind* of cost-benefit analysis, even if by the seat of their pants? Should they? Is there any alternative?

One possible alternative to the cost-benefit approach to reasonable care arises in those settings where, in some jurisdictions, certain actors are said to be held to a standard of care higher than reasonable care. Consider the next case, *Andrews v. United Airlines*.

***Andrews v. United Airlines*, 24 F.3d 39 (9th Cir. 1994)**

KOZINSKI, J. We are called upon to determine whether United Airlines took adequate measures to deal with that elementary notion of physics—what goes up, must come down. For, while the skies are friendly enough, the ground can be a mighty dangerous place when heavy objects tumble from overhead compartments.

I

During the mad scramble that usually follows hard upon an airplane's arrival at the gate, a briefcase fell from an overhead compartment and seriously injured plaintiff Billie Jean Andrews. No one knows who opened the compartment or what caused the briefcase to fall, and Andrews doesn't claim that airline personnel were involved in stowing the object or opening the bin. Her claim, rather, is that the injury was foreseeable and the airline didn't prevent it.

The district court dismissed the suit on summary judgment, and we review de novo. . .

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II

The parties agree that United Airlines is a common carrier and as such "owe[s] both a duty of utmost care and the vigilance of a very cautious person towards [its] passengers." *Acosta v. Southern Cal. Rapid Transit Dist.*, 2 Cal.3d 19, (1970). Though United is "responsible for any, even the slightest, negligence and [is] required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances," it is not an insurer of its passengers' safety. "[T]he degree of care and diligence which [it] must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of [its] business. . . ."

To show that United did not satisfy its duty of care toward its passengers, Ms. Andrews presented the testimony of two witnesses. The first was Janice Northcott, United's Manager of Inflight Safety, who disclosed that in 1987 the airline had received 135 reports of items falling from overhead bins. As a result of these incidents, Ms. Northcott testified, United decided to add a warning to its arrival announcements, to wit, that items stored overhead might have shifted during flight and passengers should use caution in opening the bins. This announcement later became the industry standard.

Ms. Andrews's second witness was safety and human factors expert Dr. David Thompson, who testified that United's announcement was ineffective because passengers opening overhead bins couldn't see objects poised to fall until the bins were opened, by which time it was too late. Dr. Thompson also testified that United could have taken additional steps to prevent the hazard, such as retrofitting its overhead bins with baggage nets, as some airlines

had already done, or by requiring passengers to store only lightweight items overhead.

United argues that Andrews presented too little proof to satisfy her burden. . . . One hundred thirty-five reported incidents, United points out, are trivial when spread over the millions of passengers travelling on its 175,000 flights every year. Even that number overstates the problem, according to United, because it includes events where passengers merely observed items falling from overhead bins but no one was struck or injured. Indeed, United sees the low incidence of injuries as incontrovertible proof that the safety measures suggested by plaintiff's expert would not merit the additional cost and inconvenience to airline passengers.

### III

It is a close question, but we conclude that plaintiff has made a sufficient case to overcome summary judgment. United is hard-pressed to dispute that its passengers are subject to a hazard from objects falling out of overhead bins, considering the warning its flight crews give hundreds of times each day. The case then turns on whether the hazard is serious enough to warrant more than a warning. Given the heightened duty of a common carrier, even a small risk of serious injury to passengers may form the basis of liability if that risk could be eliminated "consistent with the character and mode of [airline travel] and the practical operation of [that] business. . . ." United has demonstrated neither that retrofitting overhead bins with netting (or other means) would be prohibitively expensive, nor that such steps would grossly interfere with the convenience of its passengers. Thus, a jury could find United has failed to do "all that human care, vigilance, and foresight reasonably can do under all the circumstances."

The reality, with which airline passengers are only too familiar, is that airline travel has changed significantly in recent years. As harried travelers try to avoid the agonizing ritual of checked baggage, they hand-carry more and larger items-computers, musical instruments, an occasional deceased relative. The airlines have coped with this trend, but perhaps not well enough. Given its awareness of the hazard, United may not have done everything technology permits and prudence dictates to eliminate it.

Jurors, many of whom will have been airline passengers, will be well equipped to decide whether United had a duty to do more than warn passengers about the possibility of falling baggage. A reasonable jury might conclude United should have done more; it might also find that United did enough. Either decision would be rational on the record presented to the district court, which, of course, means summary judgment was not appropriate.

### *Note*

*Common carriers.* How is the negligence standard applied to United Airlines different from that applied to an ordinary negligence defendant? Common carriers, traditionally including the operators of ferries, barges, railroads, and other publicly available modes of transport, have been historically held to a higher standard of care. *See Bregel v. Busch Ent. Corp.*, 444 S.E.2d 718, 719 (Va. 1994) (defining "common carrier" as "one who, by virtue of his calling and as a regular business, undertakes for hire to transport persons or commodities from place to place, offering his services to all such as may choose to employ him and pay his



charges” and indicating that common carriers are “required to exercise the highest degree of care and diligence in the maintenance and operation of the elevator to prevent injury to passengers”). Judge Kozinski’s opinion seems to follow this tradition. Is a standard that holds a common carrier liable for even the slightest negligence actually different from a reasonable care standard? Would it be rational to do “all that human care” can do in order to prevent injuries from accidents? Will tort law damages induce a common carrier to take such steps? Does cost-benefit analysis still have a role to play for common carriers?

## 5. *Claims Resolution in the Real World*

So far in our consideration of the negligence standard and cost-benefit calculations we have proceeded as if parties in the real world engage pervasively in the kind of case-by-case cost-benefit thinking that the Learned Hand test and its variations contemplate. But of course, in the real world, the decision to adopt such a strategy is itself subject to a cost-benefit analysis. In many of the most common tort situations, case-by-case evaluations have fallen away in favor of what are essentially mass settlement systems.

### *Rules of Thumb in Auto Collision Cases*

How do we define negligence in car accident cases? In a sociological study of how car insurance companies’ claims adjusters determine settlement amounts, H. Laurence Ross (1980) found that insurance adjusters used easy rules of thumb—like whether a traffic rule was violated—to determine liability in an accident, “regardless of intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge.” In rear-end collisions, adjusters routinely did little investigation, giving a strong presumption of liability to the rear driver. When a claimant had the formal right of way in the case of a stop sign or green light, there was usually little follow-up investigation before paying the claimant. He found similar rules of thumb for most other forms of auto accidents, including head-on collisions, sideswipes, left-turns, and one-car cases. Instead of engaging in the complexities of the reasonably prudent person standard, or any other aspect of the negligence standard, car insurance adjusters rely on these rules of thumb to determine the vast majority of auto accident settlement amounts. H. LAURENCE ROSS, *SETTLED OUT OF COURT* 98-104 (1980).

What does this mean for our understanding of the tort system as a provider of individualized justice? Does every plaintiff get her day in court? John Witt and Samuel Issacharoff examined how privatized information aggregation takes place in “mature torts”—torts with common fact patterns like the car accidents Ross studied in *Settled Out of Court*. They argue that the existence of repeat-play lawyers and claims agents on both the plaintiffs’ and the defendants’ side “permits private settlement systems to emerge based on the information the agents possess about the value of claims in the retail litigation market of adjudication.” Over time, they claim, these private settlement systems depart substantially from the explicit negligence calculus of the Learned Hand test. In the aggregate, the standardized negotiations of the repeat-play claims agents and defense lawyers can look less like tort law in the courts than like the public bureaucratic systems that administer accident claims in programs like workers’ compensation. Such private claims settlement systems emerged by the 1950s and 1960s:

The development and increased coordination of repeat-play claimants' agents, of course, promoted considerable anguish among certain sectors of the defense bar. Yet as some defense-side agents noted, the presence of bargaining agents who knew the short-cuts, the heuristics, and the rules-of-thumb often made the settlement process considerably more efficient. In Chicago, for example, insurers found that for precisely these reasons, the repeat-play plaintiffs'-lawyer specialist was "an easier man to deal with than a general practitioner." Insurers dealing with such lawyers reported that they were regularly able to strike "package-deals" in which they disposed of "a great many cases at one time." Indeed, together the plaintiffs' bargaining agent and the liability insurer's claims adjuster were, as the vice-president of one early casualty insurance organization put it, the "lubricant" that made the law of torts "run with as little friction as possible. . . ." [B]y the mid-1960s, automobile accident tort claims were being settled with much greater speed than other personal injury tort claims.

John Fabian Witt & Samuel Issacharoff, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1614 (2004).

One example of such repeat-play plaintiffs'-side claims agents are the so-called "settlement mills": high-volume personal injury practices that, as Professor Nora Engstrom describes them, "aggressively advertise and mass produce the resolution of claims, typically with little client interaction and without initiating lawsuits, much less taking claims to trial." The eight firms from around the country that Engstrom studied resolved three times the number of claims heard by jury trials in all federal district courts in the same period. Intriguingly, in the absence of individualized accident information or proven ability and willingness to take a claim to trial, bargains between insurance companies and mill lawyers were informed by *past settlements*, rather than past jury verdicts. Engstrom found that, by using these settlement mills, plaintiffs with very small meritorious claims and plaintiffs with any size of unmeritorious claims fared fairly well, with far lower costs than further litigation would have imposed. However, plaintiffs with especially meritorious claims or serious injuries fared relatively poorly when they hired a settlement mill lawyer. Thus insurance companies may be cooperating with settlement mills because they "share two sets of overlapping interests: speed and certainty. Insurers, it appears, cooperate with settlement mills, even in marginal cases, because *cooperation is profitable*." Nora Engstrom, *Run-of-the-Mill Justice*, 22 G. J. LEGAL ETHICS 1485, 1486, 1491 (2009).

Theoretically, the past settlements that such lawyers rely upon to produce *new* settlements were once informed by a jury verdict in a related negligence case. Is that a satisfactory relationship to the negligence standard and the formal tort system? If not, what would you do to influence or change the settlement mill system? Does the merit or seriousness of a plaintiff's claim change your judgment? Is the existence of the settlement mill a good or a bad thing for the plaintiff who wants her day in court?

Interestingly, Engstrom's paper was published in a journal of legal ethics. Why do you think that is? What kinds of ethical problems arise from the settlement mill system?

### ***The Failure of No-Fault Auto***

In the mid-1960s, a group of professors responded to the expense of litigation in courts over tort cases with a novel proposal: “no-fault.” Under their plan, only the gravely injured would have access to the tort system; instead, *all* car accident victims, regardless of fault, would receive partial but speedy compensation from their own insurers. Reformers modeled their plans on the workers’ compensation systems that had displaced tort law in workplaces half a century before. The plans spread widely—and quickly. By 1976, about half of the states in the U.S. adopted some version of no-fault auto, or at least substantially restricted car accident victims’ ability to sue.

But then the wave of reform halted. Resistance from the plaintiffs’ bar and some unexpected problems could reasonably explain the rapid end of no-fault programs. Yet Engstrom argues that the halt of no-fault auto expansion came when no-fault systems and the tort settlement system began to converge. Repeat-play claims agents had begun to produce in the shadow of tort law a system of settlement that resembled the no-fault systems of the reformers. Auto torts claims became less adversarial, with more victims recovering modest settlement awards. Meanwhile, modern no-fault systems became *more* adversarial, with more claims, money, lawyers, and lawsuits. With less at stake, the momentum for no-fault systems faded. Nora Engstrom, *An Alternative Explanation for No-Fault’s ‘Demise’*, 61 DEPAUL L. REV. 303 (2011).

What is at stake in choosing between tort and public compensation mechanisms like workers’ compensation and automobile no-fault systems?

### **B. Judges and Juries**

Of course, there are still some cases that go to a civil jury. And even those cases that do settle (i.e., the vast majority) settle in the shadow of the jury system such that their settlement values reflect the fact of the jury.

The civil jury purports to be a shining hallmark of the American tort system—and *only* the American tort system. While the English legal tradition invented the common law jury and then revered it for nearly eight centuries as one of the great “ancient rights” of the unwritten English constitution, the U.K. largely abandoned the civil jury trial in the early twentieth century. Every common law country that received the civil jury from the British, including Australia and Canada, followed suit by the middle of the twentieth century. *See* NEIL VIDMAR, *WORLD JURY SYSTEMS* (2000). The United States, in short, is an international outlier, which raises two questions: Why has the U.S. held onto an institution that everyone else around the globe has thrown aside? And should we join the crowd?

In American tort law, the civil jury has played a distinctively large role—so much so that Dean Leon Green, a twentieth century giant in the field, once wrote that “probably there is no class of cases which demands so much jury participation as those we label ‘negligence.’” On the other hand, Green observed further, “there is no other group for which the courts have

developed so many subtle doctrines for effectually controlling jury judgment and reaching results that the appellate courts themselves approve.” LEON GREEN, JUDGE AND JURY 386 (1930). Reviewing the situation, another leading torts jurist contended that the “allocation of work” as between “judge and jury in torts cases” is “the end to which all doctrines, rules and formulae in current use in such cases are directed.” Fowler V. Harper, *Judge and Jury*, 6 IND. L.J. 285, 285 (1931).

***Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66 (1927)***

HOLMES, J. This is a suit brought by the widow and administratrix of Nathan Goodman against the petitioner for causing his death by running him down at a grade crossing. The defence is that Goodman’s own negligence caused the death. At the trial the defendant asked the Court to direct a verdict for it, but the request and others looking to the same direction were refused, and the plaintiff got a verdict and a judgment which was affirmed by the Circuit Court of Appeals.

Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than 60 miles an hour. The line was straight but it is said by the respondent that Goodman ‘had no practical view’ beyond a section house 243 feet north of the crossing until he was about 20 feet from the first rail, or, as the respondent argues, 12 feet from danger, and that then the engine was still obscured by the section house. He had been driving at the rate of 10 or 12 miles an hour but had cut down his rate to 5 or 6 miles at about 40 feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

We do not go into further details as to Goodman’s precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true. . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. . . .

Judgment reversed.

***Oliver Wendell Holmes, Jr., The Common Law 111, 123-4 (1881)***

If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that

the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither courts nor legislatures have ever stopped at that point. . . .

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.

But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any other such question should not be settled, as well as that of liability for stairs with smooth strips of brass upon their edges. The exceptions would mainly be found where the standard was rapidly changing, as, for instance, in some questions of medical treatment.

If this be the proper conclusion in plain cases, further consequences ensue. Facts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do. A judge who has long sat at *nisi prius* [i.e., in a trial court] ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.

### Notes

1. *Rules and Standards.* Holmes saw great appeal in creating hard and fast rules to govern cases with similar fact patterns. In doing so, Holmes helped to illuminate an important distinction between two different kinds of legal norms. One is rules. The other is standards. Rules provide crisp, on-off metrics for decision-making. For example, an administrative agency might require that automobiles be designed with air bags, and a court might instruct a jury that any car designed without air bags is negligently designed. Standards, in contrast, offer

open-ended and flexible criteria for deciding cases. The law of negligence, for example, might require that automobiles be designed in a reasonably safe manner, which under some circumstances would require airbags, but which under other circumstances would not.

In Holmes's view, a rule such as "all drivers crossing the railroad must stop, look, and listen," or "all stairs must have brass 'nosing' strips on their edges," made for a cleaner decision-making tool than the "featureless generality" of the negligence standard. What are the general considerations when choosing between standards and rules? Note that the choice between these two decision strategies is pervasive in social life. Insurance companies rely heavily on rules. So do bureaucracies of any number of kinds. Teachers often use rules in managing large classes. The most famous social movement activists and military leaders, by contrast, have typically opted for standards in developing strategy around their most important efforts. Professor Beverly Gage, director of Yale's Brady-Johnson Program in Grand Strategy, observes that Prussian military theorist Carl von Clausewitz rejected "hard-and-fast rules" as "always too rigid for the battlefield," preferring instead "the application of *principle*," which Clausewitz believed "allows for a greater latitude of judgment." Movement leader Saul Alinsky likewise asserted that "[t]here can be no prescriptions for particular situations because the same situation rarely recurs, any more than history repeats itself." Alinsky insisted that it was "the *principles* that the organizer must carry with him in battle." The application of imagination, in Alinsky's view, allows activists to relate principles "tactically to specific situations" in a way that no uniform rule could capture. See Beverly Gage, *The Blob and the Mob*, in *RETHINKING GRAND STRATEGY* (Christopher Nichols & Andrew Preston eds., forthcoming Oxford University Press).

What are the considerations that prompt effective decisionmakers to choose one rules over standards or vice versa? For the law, note that the choice between these two legal technologies may entail important consequences for the relative power of judges and juries.

2. Does a jury serve any role other than the updating function Holmes alludes to in his discussion of medical malpractice cases, even in repeated fact pattern cases? Seven years after *Goodman*, Holmes's replacement on the Supreme Court, Benjamin Cardozo, revisited Holmes's hard and fast judge-made rule for railroad crossing cases.

***Pokora v. Wabash Railroad Co.*, 292 U.S. 98 (1934)**

CARDOZO, J.

John Pokora, driving his truck across a railway grade crossing in the city of Springfield, Ill., was struck by a train and injured. Upon the trial of his suit for damages, the District Court held that he had been guilty of contributory negligence, and directed a verdict for the defendant. The Circuit Court of Appeals (one judge dissenting) affirmed . . . resting its judgment on the opinion of this court in *B. & O.R. Co. v. Goodman*, 275 U.S. 66. A writ of certiorari brings the case here.

Pokora was an ice dealer, and had come to the crossing to load his truck with ice. The tracks of the Wabash Railway are laid along Tenth street, which runs north and south. There is a crossing at Edwards street running east and west. Two ice depots are on opposite corners of

Tenth and Edward streets; one at the northeast corner, the other at the southwest. Pokora, driving west along Edwards street, stopped at the first of these corners to get his load of ice, but found so many trucks ahead of him that he decided to try the depot on the other side of the way. In this crossing of the railway, the accident occurred.

The defendant has four tracks on Tenth street; a switch track on the east, then the main track, and then two switches. Pokora, as he left the northeast corner where his truck had been stopped, looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of the switch ahead of him. A string of box cars standing on the switch, about five to ten feet from the north line of Edwards street, cut off his view of the tracks beyond him to the north. At the same time he listened. There was neither bell nor whistle. Still listening, he crossed the switch, and reaching the main track was struck by a passenger train coming from the north at a speed of twenty-five to thirty miles an hour.

... The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop. A space of eight feet lay between the west rail of the switch and the east rail of the main track, but there was an overhang of the locomotive (perhaps two and a half or three feet), as well as an overhang of the box cars, which brought the zone of danger even nearer. When the front of the truck had come within this zone, Pokora was on his seat, and so was farther back (perhaps five feet or even more), just how far we do not know, for the defendant has omitted to make proof of the dimensions. ... For all that appears he had no view of the main track northward, or none for a substantial distance, till the train was so near that escape had been cut off.

In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. Pokora made his crossing in the daytime, but like the traveler by night he used the faculties available to one in his position. A jury, but not the court, might say that with faculties thus limited he should have found some other means of assuring himself of safety before venturing to cross. The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle. Indeed, the statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men.

The argument is made, however, that our decision in *B. & O.R. Co. v. Goodman*, *supra*, is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible. With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such

circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.” . . .

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. The opinion in *Goodman*'s case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.

The judgment should be reversed, and the cause remanded for further proceedings in accordance with this opinion.

### Notes

1. *Cardozo versus Holmes*. Does *Pokora* overrule *Goodman*? Or are the two grappling with different fact patterns? In *Pokora*, Cardozo suggests that the lower federal courts had not supported the hard and fast rule outlined in *Goodman*. Why might trial courts opt for a more



jury-friendly, standard-like *Pokora* doctrine instead of a more judge-friendly, rule-like *Goodman* doctrine?

2. *Grade-crossing accidents in the 21st century.* Grade-crossing accidents continue to vex the twenty-first century tort system. In the mid-2000s, the *New York Times* found that, “[o]n average, one person a day dies at a crossing in the United States.” In a series of stories, the paper documented the challenges plaintiffs face in wrongful death suits against railroad companies. Among other things, the *Times* series suggested that railroads systematically destroyed relevant evidence in grade-crossing cases to avoid liability. See, e.g., Walt Bogdanish, *In Deaths at Rail Crossings, Missing Evidence and Silence*, N.Y. TIMES, Jul. 11, 2004.

Despite Cardozo’s apparent win in the judges versus juries debate in railroad crossings in the 1930s with *Pokora*, some state courts have continued to demand a *Goodman* rule-like structure in grade-crossing accidents, especially in single-track and open country situations. In *Ridgeway v. CSX Transportation, Inc.*, 723 So. 2d 600, 605 (Ala. 1998), the court found the *Goodman* rule “deeply rooted in Alabama law” and elaborated that the rule in Alabama meant that “a person who fails to stop, look, and listen before crossing a railroad track is, in the absence of special circumstances, contributorily negligent as a matter of law.” The Supreme Court of Virginia also adopted a version of *Goodman*, calling a driver who had failed to adequately stop, look, and listen “the architect of his own misfortune.” *Wright v. Norfolk & W. Ry. Co.*, 427 S.E.2d 724, 730 (Va. 1993). The driver had flouted Virginia law, which required “the operator of a vehicle approaching a grade crossing . . . to look and listen at a time and place when both looking and listening will be effective, intelligently using both eyes and ears.” *Id.*, (internal citations omitted).

Other state courts side with *Pokora* and resolve the grade-crossing debate on the side of juries rather than judges. Judge Posner analogized an old Illinois railroad crossing rule to the *Goodman* rule and found that “[b]oth rules buck the twentieth-century trend—as strong in Illinois as anywhere—toward leaving questions of care to the jury to be decided under the broad, unelaborated standard of negligence.” *Trevino v. Union Pac. R. Co.*, 916 F.2d 1230, 1235 (7th Cir. 1990). And the more complicated the rail crossing, the more likely the plaintiff will get past the judge to the jury. For example, in *McKinney v. Yelavich*, 90 N.W.2d 883 (Mich. 1958), the Supreme Court of Michigan refused the lower court’s efforts towards “rule canonization” of contributory negligence in crossing cases, given that the pedestrian plaintiff had been hit in a complicated, poorly marked six-way intersection. The court gave a history of the *Goodman* and *Pokora* before explaining its view of the problem with allowing judges to craft hard and fast rules in negligence cases:

We have elaborated upon the history of the stop, look and listen “rule” because it is characteristic of a host of others. Each has its origin in a justifiable holding in a particular fact situation. By lazy repetition the holding becomes a “rule,” entirely divorced from its creative facts. It grows as an excrescence of injustice until its very strength concentrates a court’s attention upon it, with, normally, the result seen in the *Pokora* case.

*Id.* *Pokora* reigns not only in most state courts, but also in the Third Restatement, which warns that apparently “constant or recurring issue[s] of conduct” often turn out “on closer inspection”

to involve too many “variables” for one-size-fits-all treatment. Tort law, insist the editors of the Restatement, adopts “an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (2010). On the other hand, even the Restatement editors concede that “[o]ccasionally . . . the need for providing a clear and stable answer to the question of negligence is so overwhelming as to justify a court in withdrawing the negligence evaluation from the jury.” They cite, for example, highway cases involving seatbelts, where the considerations are “of such force as to make it acceptable for a state’s highest court to reach a final, general decision as to whether not wearing seat belts is or is not contributory negligence.” *Id.*

3. *The judge-jury debate.* The judge versus jury debate is by no means confined to rail crossing accidents. Similar debates have cropped up around other repeat fact pattern cases. For example, New York courts sought to manage slip-and-fall cases in public spaces with the doctrine that businesses have no duty to warn customers of “open and notorious” hazards over which they could trip and fall. *See, e.g., Michalski v. Home Depot, Inc.*, 225 F.3d 113 (2d Cir. 2000); *Pinero v. Rite Aid of New York, Inc.*, 294 A.D. 2d 251 (N.Y. App. Div. 2002). Where a hazard is “open and notorious” as a matter of law, a defendant has no duty to warn.

4. *Studying the jury.* The canonical study of juries was done at the University of Chicago by Professors Harry Kalven and Hans Zeisel, who studied 8,000 civil and criminal juries in the early 1960s. They concluded that juries and judges agreed on a case’s outcome in 78% of criminal cases and 79% of civil cases. As they put it, “the jury agrees with the judge often enough to be reassuring, yet disagrees often enough to keep it interesting.” Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964).

In the 20% of criminal cases in which the jury and judge disagreed, the jury was far more likely than a judge to acquit rather than convict. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY*, 55-81 (1966). But the asymmetry of judge-jury disagreement in criminal cases did not extend to the civil cases in the Kalven and Zeisel sample. In civil cases involving disagreement, judges and juries exhibited no systematic divergence from one another as between plaintiffs and defendants. “Whereas the greater leniency of the jury toward the criminal defendant is congruent with popular expectations, the equality of pro-plaintiff response between judge and jury in civil cases is in sharp contrast to popular expectations.” Kalven, *The Dignity of the Civil Jury*, *supra* at 1065.

Indeed, common popular perceptions of the jury tend to ascribe to the institution the failures of costliness, inefficiency, and inexperience—and sometimes even sheer incompetence. *See, e.g.,* FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* (1994). Yet more recent surveys of empirical work on the jury system tend to confirm Kalven and Zeisel’s initial work, suggesting that judges and juries are not as different decision-makers as one might imagine. *See, e.g.,* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

So if Kalven and Zeisel’s findings continue to hold true today—if judges and juries agree the vast majority of the time and are as pro-plaintiff as one another—is there anything to be said on behalf of juries than cannot also be said on behalf of judges? For example, neither

judges nor juries bring subject-matter expertise to the resolution of complicated questions of health and safety.

One area where juries seem to behave differently on a systematic basis from judges is in the awarding of punitive damages. We will turn to punitive damages at the end of this casebook. For now, the important point is that juries seem to handle punitive damages awards quite differently from judges. One study of over 500 mock jury sessions found that the jury group deliberation process produced radical changes in damages awards. They found that, “[a]s compared with the median of individual predeliberation judgments, dollar awards *increased* after group deliberation, often dramatically so: Among juries that voted to award punitive damages, 27% reached dollar verdicts that were as high or higher than the highest predeliberation judgment among their own jurors.” David Schkade, Cass Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, in PUNITIVE DAMAGES (2002) (emphasis omitted). In fact, while moral judgments of fault did not change after deliberation, dollar amounts *did*.

Elsewhere, Sunstein has attributed this dollar-increasing phenomenon to the psychological dynamics of intra-group polarization by which groups “go to extremes.” See Cass Sunstein, *The Law of Group Polarization* 1, 18-19 (John M. Olin Law & Economics Working Paper No. 91, 2000).

Others have faulted juries for rejecting—and even punishing—explicit cost-benefit reasoning through punitive damage awards. In the late 1990s, Professor Kip Viscusi surveyed about 500 juror-eligible adults to determine how they determine damages in hypothetical cases. He found that individuals awarded 50% larger punitive damages for companies that had performed a cost-benefit analysis, as compared to a similarly at-fault company that did not perform a cost-benefit analysis. In addition, individuals awarded larger punitive damages against companies that placed a *greater* value on the loss of a human life, in comparison to a company that *devalued* human life. Thus “companies are in the bizarre position of risking greater liability if they place more weight on consumer safety.” W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 555-60 (2000).

5. *Why are juries still around?* If juries make the same decisions as judges, except when juries admonish wrongdoers with extreme (and, according to many observers, unwarranted) punitive damages, why are civil juries still around? What explains the persistence of the American civil jury system? The Seventh Amendment, which guarantees a civil jury in federal courts, has clear explanatory power for the federal civil jury system. But American tort law is mostly state law, and the Seventh Amendment is not incorporated against the states and so does not apply at all in state courts, which are the more important institutions for most tort cases. To be sure, state constitutions have jury-trial guarantees, too. But these provisions cannot explain the persistence of the civil jury, because state constitutions almost never entrench their provisions against subsequent political reform. State constitutions are typically almost as easy to amend as statutes. See Helen Herschkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1181-84 (1992).

The problem of explaining the durability of the jury grows when we look at its history. When the Seventh Amendment was ratified, the civil jury may have been seen as “a bulwark

against tyranny.” But very quickly objections and critiques emerged. By the time of the adoption of the Federal Rules of Civil Procedure in 1938, many scholars and judges “regarded civil juries less as a bulwark . . . than as a nuisance.” Renee Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 G.W.U. L. REV. 448, 451-52 (2013). So how did the jury survive, given such criticism? Lerner argues that the rise of jury-limiting procedures in the nineteenth and twentieth centuries, along with substantive tort doctrines like contributory negligence, and later the rise of a powerful summary judgment rule, narrowed the jury’s authority so substantially as to make abolishing the institution less imperative. Green expressed much the same idea when he wrote that

the extravagant pains we take to preserve the integrity of jury trial in final analysis are completely counteracted in the more extravagant provisions which we make for [judicial] review, together with the remarkable technique . . . courts have developed for subjecting every phase of trial to their own scrutiny and judgment.

LEON GREEN, JUDGE AND JURY 390-91 (1930). The Green and Lerner explanation of the persistence of the civil jury system is that jury trials survive in the United States, and only in the United States, in significant part because they exist in theory but barely exist in practice. The pattern grows stronger when we see that jury trials are expressly disallowed in the Federal Tort Claims Act, the Longshoreman and Harbor Workers Compensation Act, and the Miller and Tucker Acts (governing contract claims against the federal government). There are no juries in Tax Court, Customs Court, or the Court of Claims. Workers’ compensation did away with juries for work accidents. And entire fields such as admiralty and maritime law, naturalization and immigration law, and bankruptcy law are largely conducted in the absence of juries. See Edward Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570 (1974).

Another distinctive factor in the U.S. is the politically influential plaintiffs’ bar, which has embraced the beleaguered institution. Even as judges attempted to pry tort cases away from the jury and scholars and politicians attempted to pry personal injury cases away from civil trials entirely, in the 1950s and early 1960s, the plaintiffs’ bar became a powerful interest group defending the common law trial and the jury. Rallying against administrative alternatives as “bureaucratic socialism” and “modern totalitarianism,” against which only the jury could stand tall, the plaintiffs’ bar lobbied loudly and in many cases successfully against the displacement of the medieval Anglo-American institution. See JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS 209-10 (2007).

Setting aside the continuing controversy over the merits of the jury, virtually everyone agrees that in day-to-day practice juries are deciding less and less. In a review of data on state and federal court trials through the mid-2000s, Professor Marc Galanter discovered a century-long decline in the proportion of civil trials terminating in or after trial: while about 20% of cases ended in trial in 1938, just 2% did in 2003. In fact, even as the absolute number of cases in federal and state systems has increased, there has still been a decline in the absolute number of civil trials. In 1992, federal courts held 1,728 tort trials with juries, and state courts in the seventy-five most populous counties held 9,431. Yet in 2001, federal courts 1,471 tort trials with juries, and the county courts held 7,218. That’s a respective 33% and 24% decline in jury trials for tort cases over the course of a decade. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256-59 (2005).

6. *Replacing the jury.* What, if anything, has replaced the jury? In addition to more judge-intensive inquiries into the plausibility of pleadings, summary judgment, and class certification processes, civil trials have been dominated by a heightened judicial role in scrutinizing expert witnesses (in what are known as *Daubert* hearings). Professor Richard Nagareda contends that “[t]he full-scale, front-to-back, common law trial before a jury has nearly vanished. Its replacement effectively consists of a regime of sequenced trial-like proceedings on what are formally pretrial motions, all ruled upon by a judge alone.” Richard Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 667-68 (2010).

More broadly, Professor John Langbein argues that the Federal Rules of Civil Procedure displaced both judge *and* jury by arming both plaintiff and defendant with the information they need to settle early on in a case:

[A] civil procedure system serves two connected functions: investigating the facts and adjudicating the dispute. The better the system investigates and clarifies the facts, the more it promotes settlement and reduces the need to adjudicate. The Anglo-American common law for most of its history paid scant attention to the investigative function. . . . Pleading was the only significant component of pretrial procedure, and the dominant function of pleading was to control the jury by narrowing to a single issue the question that the jury would be asked to decide. This primitive pretrial process left trial as the only occasion at which it was sometimes possible to investigate issues of fact. Over time, the jury-free equity courts developed techniques to enable litigants to obtain testimonial and documentary evidence in advance of the adjudication. The fusion of law and equity in the Federal Rules of Civil Procedure of 1938 brought those techniques into the merged procedure, and expanded them notably. The signature reform of the Federal Rules was to shift pretrial procedure from pleading to discovery. A new system of civil procedure emerged, centered on the discovery of documents and the sworn depositions of parties and witnesses. Related innovations, the pretrial conference and summary judgment, reinforced the substitution of discovery for trial. This new procedure system has overcome the investigation deficit that so afflicted common law procedure, enabling almost all cases to be settled or dismissed without trial. Pretrial procedure has become nontribal procedure by making trial obsolete.

John Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

Ironically, the decline in jury trials may not be a sign of the decline of jury power at all. In a world where discovery and pre-trial procedures such as *Daubert* hearings allow the parties to have increasingly good information about the value of their claims, plaintiffs and defendants alike will look to settle more often. But settlement happens in the shadow of the jury. Settlements, in other words, reflect the expected costs and benefits of going to trial with a jury. Indeed, the pervasiveness of settlement may undermine one of the main complaints with juries. Many object that the random draw of lay juries injects an element of chance into the dispute resolution process. It is not fair, critics say, that important cases are resolved by the luck of the draw in juror selection. But in a world of pervasive private settlements, one bad

jury hardly matters. The quirks of any one jury's outlier decision are washed away in the averaging that parties do when they estimate settlement values.

## C. Custom

### *1. The Basic Rule—and Its Functions*

#### *The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932)*

[This case arose out of the foundering of two coal barges off the mid-Atlantic coast in March, 1928. Two tugs, the T. J. Hooper and Montrose, left Hampton Roads, bound for New York and New England ports on March 7. Each tug towed three barges. There were no storm warnings at any station along the coast until 9:30 a.m. on March 9th, when the tugs were in the vicinity of Atlantic City, or about 50 miles north of Delaware breakwater. Later that day, the tugs ran into strong winds and heavy seas. Early the next morning, one barge in the tow of each tug sank with their cargoes, though the crew of barges escaped unharmed. There was no allegation that the tugs acted negligently in leaving Hampton bays on the 7th. Several other tugs traveling along the coast that day pulled into the Delaware breakwater on the 8th, but the district court found that they did so only because they were equipped with radios and received early warnings of the impending storm. And once the storm broke, all the parties conceded that the wiser course was to try to push through. The case thus came down to a single question: whether the cargo and barge owners were right in their claim that “the two tugs were unseaworthy in not having effective radio sets, capable of receiving the forecasts of unfavorable weather broadcast along the coast on March 8th.”]

HAND, J. A March gale is not unusual north of Hatteras; barges along the coast must be ready to meet one, and there is in the case at bar no adequate explanation for the result except that these were not well-found. . . .

The weather bureau at Arlington broadcasts two predictions daily, at ten in the morning and ten in the evening. Apparently there are other reports floating about, which come at uncertain hours but which can also be picked up. The Arlington report of the morning read as follows: “Moderate north, shifting to east and southeast winds, increasing Friday, fair weather to-night.” The substance of this, apparently from another source, reached a tow bound north to New York about noon, and, coupled with a falling glass, decided the master to put in to the Delaware Breakwater in the afternoon. The glass had not indeed fallen much and perhaps the tug was over cautious; nevertheless, although the appearances were all fair, he thought discretion the better part of valor. Three other tows followed him . . . .

Moreover, the “Montrose” and the “Hooper” would have had the benefit of the evening report from Arlington had they had proper receiving sets. This predicted worse weather; it read: “Increasing east and southeast winds, becoming fresh to strong, Friday night and increasing cloudiness followed by rain Friday.” The bare “increase” of the morning had become “fresh to strong.” To be sure this scarcely foretold a gale of from forty to fifty miles for five hours or more, rising at one time to fifty-six; but if the four tows thought the first report enough, the

second ought to have laid any doubts. The master of the “Montrose” himself, when asked what he would have done had he received a substantially similar report, said that he would certainly have put in. The master of the “Hooper” was also asked for his opinion, and said that he would have turned back also, but this admission is somewhat vitiated by the incorporation in the question of the statement that it was a “storm warning,” which the witness seized upon in his answer. All this seems to us to support the conclusion of the judge that prudent masters, who had received the second warning, would have found the risk more than the exigency warranted . . . .

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so as to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master’s binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to maneuver, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. . . . But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute (section 484, title 46, U.S. Code [46 USCA § 484]) does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

### *Notes*

1. *What is the custom?* In the District Court, Judge Alfred Coxe adopted a different view of the custom in question, but came to the same outcome. As Judge Coxe saw it, there was a custom on tugs to have radios on board. Coxe then applied the custom to conclude that The

T.J. Hooper and The *Monrose* were unseaworthy for failure to have complied with the custom. How did Judge Hand reach the same end point even though he came to the opposite view of the relevant practice?

2. *The Restatement.* According to the Restatement (Third) of Torts, “complying with custom confirms that the actor has behaved in an ordinary way.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 13 cmt. a (2010). The Restatement further provides that compliance with custom is “evidence that the actor’s conduct is not negligent but does not preclude a finding of negligence.” *Id.* § 13.

3. *When is a practice a custom?* Customs may provide evidence of reasonableness. But what constitutes a custom?

A custom, according to one prominent torts treatise, is “a fairly well-defined and regular usage or way of doing a specific thing, among a group of people such as a trade, calling, or profession.” 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 17.3 (3d ed. 2006). The U.S. Supreme Court, in an 1838 action for ejectment of land, defined custom as “the law or rule which is not written and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it,” being introduced by the people, deriving its authority from the express or tacit consent of the king, and having the force of law. *See Strother v. Lucas*, 37 U.S. 410, 445-46 (1838).

To count as a custom, a practice must be general, *see Wise & Co. v. Wecoline Products*, 36 N.E.2d 623 (N.Y. 1941); *Alberts v. Mutual Serv. Cas. Ins. Co.*, 123 N.W.2d 96 (S.D. 1963), definite, fixed, reasonable, and old enough to have been known to parties, *see Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 449 (Mo. 1994). A custom does not have to be universal. *See U.S. v. Stanolind Crude Oil Purchasing Co.*, 113 F.2d 194 (C.C.A. 10th Cir. 1940). However, it has to be known and practiced by more than a few people and cannot be limited to isolated instances. *See El Encanto, Inc. v. Boca Raton Club, Inc.*, 68 So.2d 819 (Fla. 1953).

4. *Majoritarian default rules.* Why defer to custom, as Judge Coxe suggests? One reason might be that the groups that create customs and are responsible for the practices in a given field have lots of very good information about the relevant field and are well positioned—much better positioned than judges and juries—to make informed decisions about which risks are reasonable and which risks are not. An industry practice or custom is something that arises out of those informed decisions. The case for following custom is strongest when, as in *The T.J. Hooper*, the parties are in contractual relationships with one another in which the customs of the relevant industry are known to all involved.

We might think of industry customs or practices in such cases as default rules of contractual interpretation, or contract presumptions. The question, one might say, is this: how would the parties have allocated the losses arising out of the absence of radios on the tugs? In many circumstances, the answer to this question might be said to lie in the custom of the trade. If the custom is to have radios, then we might imagine that the preferred arrangement among barge owners and tug boat companies is to have radios—and thus that the presumptive or



default term of the contract for cases of losses because of the absence of such a radio would be to allocate the costs to the tugs. In most cases, the theory goes, the allocation that follows what the parties would usually do—the so-called majoritarian default—will best reflect the expectations of the parties. For this argument in contract law more generally, see Robert Scott, *Theory of Default Rules*, 19 J. LEGAL STUD. 597, 607-08 (1990).

5. *Neighbors and strangers.* Would Judge Coxe's deference to the custom of the industry be as warranted if the claimants had been strangers rather than the barge and cargo owners? For example, what if the claimants were not the barges and cargo owners, but rather a third-party vessel damaged by the tug in the storm? Or what about a coastal property owner suffering damage if the tug or its barges were cast upon land in the storm? The parties to tug and barge contracts may have very good information about the risks of storms and the costs and benefits of radios. But do they have good reason—absent tort liability—for considering the interests of such third parties?

6. The odd thing about Hand's opinion is that he refuses to defer to the industry practice, as he construes it, even though there were contracts among all the relevant parties. Why not defer to custom in such an instance? How can Judge Hand be so certain that he is better positioned than tugs and barges and cargo owners to know what is good for them? Of course, even where there are contractual relations between the relevant parties, deference to the customary practice as a governing term in that relation may not be warranted. For example, what if the parties have asymmetric information about the risks in question? Customs and practices in a particular field may not reflect the implicit contract terms that are best for everyone involved. Consider, for example, the next case, *Trimarco v. Klein*:

***Trimarco v. Klein*, 436 N.E.2d 502 (N.Y. 1982)**

FUCHSBERG, J.

After trial by jury in a negligence suit for personal injuries, the plaintiff, Vincent N. Trimarco, recovered a judgment of \$240,000. A sharply divided Appellate Division . . . reversed on the law and dismissed the complaint . . .

The controversy has its genesis in the shattering of a bathtub's glass enclosure door in a multiple dwelling in July, 1976. Taking the testimony most favorably to the plaintiff, as we must in passing on the presence of a prima facie case, we note that, according to the trial testimony, at the time of the incident plaintiff . . . was in the process of sliding the door open so that he could exit the tub. It is undisputed that the occurrence was sudden and unexpected and the injuries he received from the lacerating glass most severe.

The door, which turned out to have been made of ordinary glass variously estimated as one sixteenth to one quarter of an inch in thickness, concededly would have presented no different appearance to the plaintiff . . . than did tempered safety glass, which [the plaintiff] assumed it to be. Nor was there any suggestion that defendants ever brought its true nature to [the plaintiff's] attention. . . .

. . . [S]ince at least the early 1950's, practice of using shatterproof glazing materials for bathroom enclosures had come into common use, so that by 1976 the glass door here no longer conformed to accepted safety standards. This proof was reinforced by a showing that over this period bulletins of nationally recognized safety and consumer organizations along with official Federal publications had joined in warning of the dangers that lurked when plain glass was utilized in "hazardous locations", including "bathtub enclosures." . . . [D]efendants' managing agent, who long had enjoyed extensive familiarity with the management of multiple dwelling units in the New York City area, [testified] that, since at least 1965, it was customary for landlords who had occasion to install glass for shower enclosures, whether to replace broken glass or to comply with the request of a tenant or otherwise, to do so with "some material such as plastic or safety glass."

In face of this record, . . . the rationale of the majority at the Appellate Division was that, "assuming that there existed a custom and usage at the time to substitute shatterproof glass" and that this was a "better way or a safer method of enclosing showers," unless prior notice of the danger came to the defendants either from the plaintiff or by reason of a similar accident in the building, no duty devolved on the defendants to replace the glass . . . [Two justices from the Appellate Division disagreed, finding "ample" evidence of custom and usage to support the verdict in favor of the plaintiff.]

. . . Which brings us to the well-recognized and pragmatic proposition that when "certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that [the one charged with the dereliction] has fallen below the required standard." . . . Such proof, of course, is not admitted in the abstract. It must bear on what is reasonable conduct under all the circumstances, the quintessential test of negligence.

It follows that, when proof of an accepted practice is accompanied by evidence that the defendant conformed to it, this may establish due care . . . , and, contrariwise, when proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability . . . Put more conceptually, proof of a common practice aids in "formulat[ing] the general expectation of society as to how individuals will act in the course of their undertakings, and thus to guide the common sense or expert intuition of a jury or commission when called on to judge of particular conduct under particular circumstances" (Pound, *Administrative Application of Legal Standards*, 44 ABA REP, 445, 456-57).

The source of the probative power of proof of custom and usage is described differently by various authorities, but all agree on its potency. Chief among the rationales offered is, of course, the fact that it reflects the judgment and experience and conduct of many (2 Wigmore, *Evidence* [3d ed], § 461; Prosser, *Torts* [4th ed], § 33). Support for its relevancy and reliability comes too from the direct bearing it has on feasibility, for its focusing is on the practicality of a precaution in actual operation and the readiness with which it can be employed (Morris, *Custom and Negligence*, 42 COL[UM]. L. REV. 1147, 1148 [(1942)]). Following in the train of both of these boons is the custom's exemplification of the opportunities it provides to others to learn of the safe way, if that the customary one be. . .

From all this it is not to be assumed customary practice and usage need be universal. It suffices that it be fairly well defined and in the same calling or business so that "the actor may

be charged with knowledge of it or negligent ignorance” (Prosser, Torts [4th ed], § 33, p. 168 . . .).

However, once its existence is credited, a common practice or usage is still not necessarily a conclusive or even a compelling test of negligence . . . . Before it can be, the jury must be satisfied with its reasonableness, just as the jury must be satisfied with the reasonableness of the behavior which adhered to the custom or the unreasonableness of that which did not . . . . After all, customs and usages run the gamut of merit like everything else. That is why the question in each instance is whether it meets the test of reasonableness. As Holmes’ now classic statement on this subject expresses it, “[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not” (*Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 [(1903)]).

So measured, the case the plaintiff presented . . . was enough to send it to the jury and to sustain the verdict reached. The expert testimony, [and] the admissions of the defendant’s manager . . . easily filled that bill. Moreover, it was also for the jury to decide whether, at the point in time when the accident occurred, the modest cost and ready availability of safety glass and the dynamics of the growing custom to use it for shower enclosures had transformed what once may have been considered a reasonably safe part of the apartment into one which, in the light of later developments, no longer could be so regarded.

Furthermore, the charge on this subject was correct. The Trial Judge placed the evidence of custom and usage “by others engaged in the same business” in proper perspective, when, among other things, he told the jury that the issue on which it was received was “the reasonableness of the defendant’s conduct under all the circumstances.” He also emphasized that the testimony on this score was not conclusive, not only by saying so but by explaining that “the mere fact that another person or landlord may have used a better or safer practice does not establish a standard” and that it was for the jurors “to determine whether or not the evidence in this case does establish a general custom or practice.”

[Notwithstanding its decision to reverse the Appellate Division, the Court of Appeals remanded for a new trial on the ground that the trial judge had erroneously omitted evidence of a non-retroactive statute requiring that newly-installed showers use tempered safety glass.]

Order reversed, with costs, and case remitted to Supreme Court, Bronx County, for a new trial in accordance with the opinion herein.

### *Notes*

1. *Custom in practice.* What was the custom in the industry with respect to shower glass? Who instituted the custom? And who would have been in a position to know about it and guide their conduct accordingly?

2. *Penalty default rules.* Professors Ian Ayres and Robert Gertner take issue with deference to custom, at least under conditions of asymmetric information. Their observation

is that deference to the majoritarian or customary practice will sometimes allow parties with better information about the risks in question to take advantage of parties who, for lack of information, have underestimated those risks. Ayres and Gertner therefore contend that the better approach to filling in missing contract terms is not by inserting the customary rule, but rather by inserting a rule that disfavors the party with more information. Moving forward, such a rule—which they call a “penalty default” because it would penalize the party with better information—creates powerful incentives for the informed party to lay its information on the table so that the less informed counterparty has the chance to take it into account.

Does the Ayres and Gertner theory of penalty defaults help explain the outcome in *Trimarco*? Here is the thought experiment: If the lease between the landlord and the tenant had stated that the shower glass in the apartment was NOT safety glass, but that the landlord would replace the glass with new safety glass upon request, would the tenant-plaintiff have won? If you don’t think that anyone reads leases (note: you should read your leases!), then what if such a notice were posted on the shower glass itself? A penalty default in the Ayres-Gertner sense would induce landlords to find some way to convey information about the risks in question. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 127 (1989).

## 2. Custom and Medical Malpractice Cases

The custom rule takes on a different cast in medical care cases. The following materials show that in a wide swath of medical negligence cases, the custom of the profession will set the standard. In a smaller subset—involving negligence in disclosing treatment risks—it may not. As you read, ask yourself why—if at all—the custom of the profession ought to be treated differently in medical care than in other social domains.

### ***Brune v. Belinkoff*, 235 N.E.2d 793 (Mass. 1968)**

SPALDING, J. In this action of tort for malpractice Theresa Brune (plaintiff) seeks to recover from the defendant because of alleged negligence in administering a spinal anesthetic. There is a count by the plaintiff’s husband for consequential damages. The jury returned verdicts for the defendant on each count. The case comes here on the plaintiffs’ exceptions to the judge’s refusal to grant certain requests for instructions, to portions of the charge, and to the denial of the plaintiffs’ motion for a new trial.

The plaintiff was delivered of a baby on October 4, 1958, at St. Luke’s Hospital in New Bedford. During the delivery, the defendant, a specialist in anesthesiology practising in New Bedford, administered a spinal anesthetic to the plaintiff containing eight milligrams of pontocaine in one cubic centimeter of ten per cent solution of glucose. When the plaintiff attempted to get out of bed eleven hours later, she slipped and fell on the floor. The plaintiff subsequently complained of numbness and weakness in her left leg, an affliction which appears to have persisted to the time of trial.

Testimony was given by eight physicians. Much of it related to the plaintiff’s condition. There was ample evidence that her condition resulted from an excessive dosage of pontocaine.

There was medical evidence that the dosage of eight milligrams of pontocaine was excessive and that good medical practice required a dosage of five milligrams or less. There was also medical evidence, including testimony of the defendant, to the effect that a dosage of eight milligrams in one cubic centimeter of ten per cent dextrose was proper. There was evidence that this dosage was customary in New Bedford in a case, as here, of a vaginal delivery. . . .

The plaintiffs' exception to the refusal to give their first request for instruction and their exception to a portion of the charge present substantially the same question and will be considered together. The request reads: "As a specialist, the defendant owed the plaintiff the duty to have and use the care and skill commonly possessed and used by similar specialist[s] in like circumstances." The relevant portion of the charge excepted to was as follows: "[The defendant] must measure up to the standard of professional care and skill ordinarily possessed by others in his profession in the community, which is New Bedford, and its environs, of course, where he practices, having regard to the current state of advance of the profession. If, in a given case, it were determined by a jury that the ability and skill of the physician in New Bedford were fifty percent inferior to that which existed in Boston, a defendant in New Bedford would be required to measure up to the standard of skill and competence and ability that is ordinarily found by physicians in New Bedford."

The basic issue raised by the exceptions to the charge and to the refused request is whether the defendant was to be judged by the standard of doctors practising in New Bedford.

The instruction given to the jury was based on the rule, often called the "community" or "locality" rule first enunciated in *Small v. Howard*, 128 Mass. 131, a case decided in 1880. There the defendant, a general practitioner in a country town with a population of 2,500, was consulted by the plaintiff to treat a severe wound which required a considerable degree of surgical skill. In an action against the defendant for malpractice this court defined his duty as follows: "It is a matter of common knowledge that a physician in a small country village does not usually make a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations. He would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford. The defendant was applied to, being the practitioner in a small village, and we think it was correct to rule that 'he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery. . . .'"

The rationale of the rule of *Small v. Howard* is that a physician in a small or rural community will lack opportunities to keep abreast with the advances in the profession and that he will not have the most modern facilities for treating his patients. Thus, it is unfair to hold the country doctor to the standard of doctors practising in large cities. The plaintiffs earnestly contend that distinctions based on geography are no longer valid in view of modern developments in transportation, communication and medical education, all of which tend to promote a certain degree of standardization within the profession. Hence, the plaintiffs urge that the rule laid down in *Small v. Howard* almost ninety years ago now be reexamined in the light of contemporary conditions. . . .

Because of the importance of the subject, and the fact that we have been asked to abandon the “locality” rule we have reviewed the relevant decisions at some length. We are of opinion that the “locality” rule of *Small v. Howard* which measures a physician’s conduct by the standards of other doctors in similar communities is unsuited to present day conditions. The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases. Accordingly, *Small v. Howard* is hereby overruled. The present case affords a good illustration of the inappropriateness of the “locality” rule to existing conditions. The defendant was a specialist practising in New Bedford, a city of 100,000, which is slightly more than fifty miles from Boston, one of the medical centers of the nation, if not the world. This is a far cry from the country doctor in *Small v. Howard*, who ninety years ago was called upon to perform difficult surgery. Yet the trial judge told the jury that if the skill and ability of New Bedford physicians were “fifty percent inferior” to those obtaining in Boston the defendant should be judged by New Bedford standards, “having regard to the current state of advance of the profession.” This may well be carrying the rule of *Small v. Howard* to its logical conclusion, but it is, we submit, a *reductio ad absurdum* of the rule.

The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community in which the physician carries on his practice. See Prosser, Torts (3d ed.) § 32 (pp. 166-167).

One holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practising the specialty, taking into account the advances in the profession. And, as in the case of the general practitioner, it is permissible to consider the medical resources available to him.

Because the instructions permitted the jury to judge the defendant’s conduct against a standard that has now been determined to be incorrect, the plaintiffs’ exceptions to the charge and to the refusal of his request must be sustained. . . .

## Notes

1. *Compare* *Brune to Trimarco or T.J. Hooper*. Why is the rule for custom in medical malpractice different from the rule for custom in negligence cases more generally?

2. *Custom in medical malpractice cases*. Although most courts have deferred to custom in medical malpractice cases, the Washington Supreme Court did the opposite in *Helling v. Carey*. In *Helling*, the plaintiff, a 32-year-old patient, consulted the defendants, two ophthalmologists, for what seemed to be myopia. The physicians did not administer a pressure or field of vision test until nine years after the plaintiff’s first consultation. Upon administering the test, however, the physicians discovered that the patient was actually suffering from glaucoma, a disease that is undetectable in the absence of a pressure test “until the damage has

become irreversible.” *Helling v. Carey*, 519 P.2d 981, 981 (Wash. 1974). At the time of test, the plaintiff had “essentially lost her peripheral vision.” *Id.* at 982. The plaintiff sued the ophthalmologists, alleging that she “sustained severe and permanent damage to her eyes as a proximate result of the defendants’ negligence in failing to administer a timely glaucoma test.” *Id.* Even though medical experts testified that the “standards for the profession . . . do not require routine pressure test[s] for glaucoma” for patients under forty, the court disagreed. *Id.* Overriding physicians’ customary practices, the Washington Supreme Court held that the “reasonable standard that should have been followed [by the physicians] . . . was the timely giving of [a] simple, harmless pressure test to th[e] plaintiff.” *Id.* at 984.

In later cases, Washington courts have curtailed *Helling*’s holding. For example, just two years after *Helling* was decided, the Washington Court of Appeals noted, “[*Helling*’s] holding . . . was intended to be restricted solely to its own ‘unique’ facts, i.e., cases in which an ophthalmologist is alleged to have failed to test for glaucoma under the same or similar circumstances.” *Meeks v. Marx*, 550 P.2d 1158, 1162 (Wash. Ct. App. 1976).

3. *The glaucoma case.* Glaucoma testing is now standard, though probably not as a result of the Washington Supreme Court’s decision in *Helling*. Because “glaucoma is a process,” physicians often use glaucoma tests to establish a baseline to determine whether the optic nerve has changed. George L. Spaeth, *Glaucoma Testing: Too Much of a Good Thing*, 20 REV. OPHTHALMOLOGY 100, 103 (2013). Frequent and unnecessary glaucoma testing, however, has “develop[ed] a standard of care that says [glaucoma testing] should be done.” Some combination of third-party-payment for medical services, tort liability risk, and professional standardization has had the effect of “driv[ing] up the cost of care significantly and unnecessarily.” *Id.* at 102.

Many commentators think that medical malpractice is one of the least well functioning areas of American tort law. Consider the views of some of the leading authorities on medical malpractice, David Studdert, Michelle Mello, and Troyen Brennan:

**David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 283-86 (2004)**

Prompted by the malpractice crisis of the mid-1980s, a research team at Harvard University embarked on a review of medical records from over 30,000 hospital discharges and 3500 malpractice claims in New York. The reviewers found rates of adverse events and negligent adverse events (3.7 percent and 1.0 percent, respectively) that were remarkably close to those in California. Extrapolations from these rates produced alarming estimates of the burden of medical injury, including projections that negligent care caused approximately 20,000 disabling injuries and 7000 deaths in New York hospitals in 1984. Overall, there were 7.6 times as many negligent injuries as there were claims.

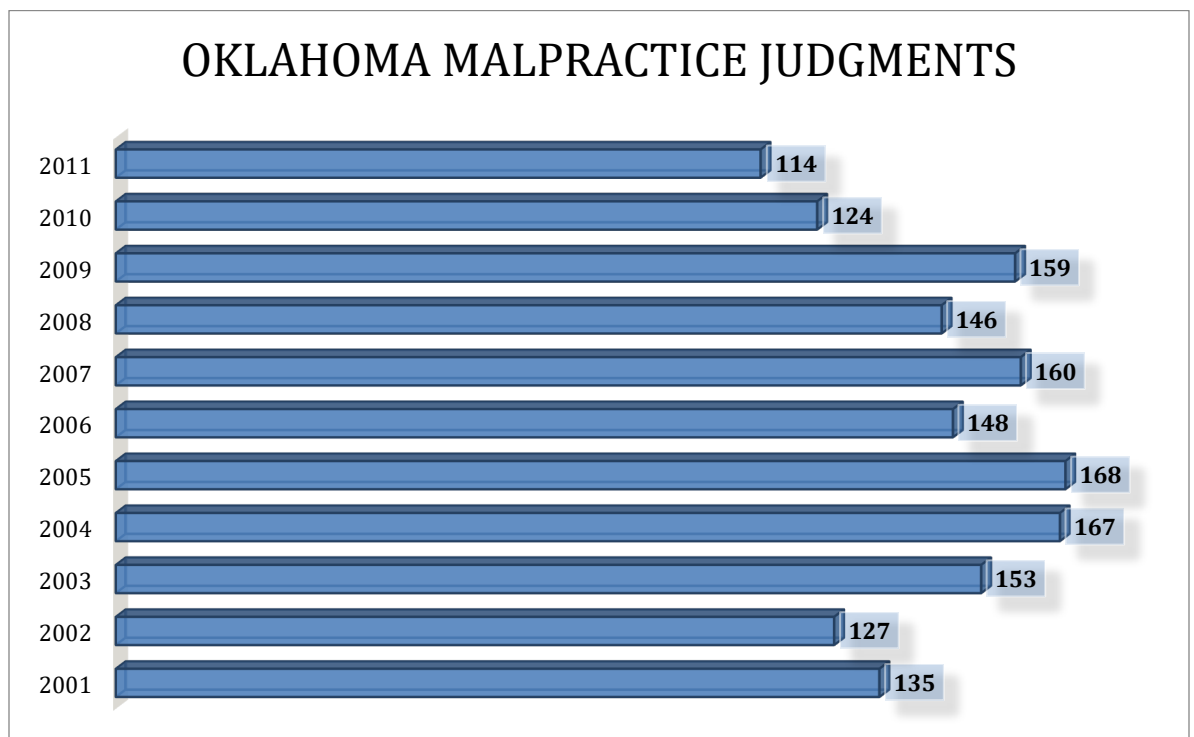
But it was the matching of specific claims to specific injuries in New York that threw the troubling relationship between malpractice claims and injuries into sharp relief. Only 2 percent of negligent injuries resulted in claims, and only 17 percent of claims appeared to involve a negligent injury. . . . In a third study, conducted in Utah and Colorado in the late

1990s, the injury rates detected were similar to those in New York, and the disconnections observed between injury and litigation were virtually identical, suggesting that the core problems were neither regionally nor temporally idiosyncratic. . . .

The overall picture that emerges from these studies is disheartening. When all patients with negligent injuries are considered, not just those who manage to seek compensation as plaintiffs, the findings from the studies in California, in New York, and in Utah and Colorado are a searing indictment of the performance of the malpractice system. The data reveal a profoundly inaccurate mechanism for distributing compensation. It is also tremendously inefficient. Approximately 60 cents of every dollar expended on the system is absorbed by administrative costs (predominantly legal fees), an amount that is twice the overhead rate for an average workers' compensation scheme. . . .

### Notes

1. *State malpractice judgments.* In recent years, state medical malpractice judgments have been declining. In Washington, the number of malpractice payments has “declined 6.1% from 1991 to 2004.” The total number of payments has declined 35.6% over the same period. *Fewer Lawsuits and More Doctors: The Myths of Washington State’s Medical Malpractice “Crisis,”* PUB.CITIZEN (Sept. 2005), <https://www.citizen.org/documents/WashMedMal.pdf>. And the declines seem to be continuing. In Oklahoma, for example, the number of malpractice judgments is “at the lowest level of the decade.” See below.



Source: Wayne Green, *State Malpractice Judgments Down 28 Percent Since 2009*, TULSA WORLD, July 31, 2012, available at <https://perma.cc/46N4-4TCV>



These state-level trends are not aberrations. A 2017 study of nationwide medical malpractice claims showed that between 1994 and 2014, the rate of medical malpractice claims paid on behalf of physicians decreased by 55.7 percent. Adam C. Schaffer, M.D., et al., *Rates and Characteristics of Paid Malpractice Claims Among US Physicians by Specialty, 1992-2014*, JAMA INTERN. MED. (Mar. 27, 2017), <https://perma.cc/L5PZ-JKNE>.

2. *Medical malpractice and insurance premiums.* Doctors complain mightily (and often with good reason!) about the costs of their malpractice insurance. Physicians' insurance premiums rose in the 1970s, 1980s, and 2000s. But the increase does not seem to have been driven by a medical malpractice crisis. Through studying Texas Department of Insurance data, Bernard Black and his co-authors argue that the number of large paid malpractice claims (over \$25,000 per claim in constant 1998 dollars) was constant from 1991 to 2002. The number of small paid claims (less than \$10,000 per claim in constant 1998 dollars) actually declined over the same period. See Bernard Black, Charles Silver, David A. Hyman & William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas: 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 207 (2005).

3. *Changing the supply of physicians?* Rising premiums, however, "seem not to have an effect on the total number of physicians in each state." Katherine Baicker & Amitabh Chandra, *Defensive Medicine and Disappearing Doctors*, 28 REG. 24, 29 (2005). Older practitioners in rural areas may leave their practices when premiums increase because they have "fewer patients over whom to spread their increased costs of malpractice premiums." *Id.* But it is not clear that these departures wouldn't have happened anyway even absent any change in medical malpractice rates. Nor is it clear, though it can be hard to say so, that these departures are always a bad thing. Perhaps because of the pervasiveness of third-party-payer fee-for-service health care, or perhaps because of the small size of medical malpractice costs as a fraction of health care costs generally, rising premiums seem not to have had an effect on the supply of physicians, despite widespread anecdotal evidence to the contrary.

4. *Medical malpractice and health care costs.* According to a 2010 publication, the costs of the medical liability system amount to \$55.6 billion per year, or 2.4% of the United States' total health care expenditures. Michelle M. Mello, Amitabh Chandra, Atul A. Gawande & David M. Studdert, *National Costs of the Medical Liability System*, 29 HEALTH AFFAIRS 1569 (2010). The authors of the study included in that figure \$45 billion in so-called defensive medicine, which they defined as "tests, procedures, or visits, or [decisions to] avoid certain high-risk patients or procedures, primarily (but not solely) because of concern about malpractice liability." Defensive medicine includes "supplemental care, such as additional testing or treatment; replaced care, such as referral to other physicians; and reduced care, including refusal to treat particular patients." Lee Black, *Health Law: Effect of Malpractice Law on the Practice of Medicine*, 9 AM. MED. ASS'N J. ETHICS 437, 437 (2007). But as the authors of the *Health Affairs* study emphasize, there are at least two problems with their defensive medicine estimate. First, it is exceedingly difficult to distinguish defensive care from care that has been caused by incentives to provide more care that are inherent in the third-party payer system; any estimates of the costs of defensive medicine must therefore be treated with great caution. Second, the estimate tells us nothing about either the benefits (or perhaps

additional harms) for patients of the additional care produced by the threat of malpractice suits. After all, one of the aims of tort law is to incentivize sensible expenditures on safety.

5. *How important really is medical malpractice reform to doctors?* Even though the American Medical Association (AMA) has taken strong public positions in favor of malpractice reform to reduce malpractice costs, the AMA apparently did not make malpractice reform a priority in closed-door Affordable Care Act negotiations with the White House. Instead, the AMA focused on increasing physicians' Medicare payments, purportedly to the exclusion of virtually all else. See Ezekiel Emanuel, *Inside the Making of Obamacare*, WALL ST. J., Mar. 8, 2014, at C3 (noting that the final version of the Affordable Care Act merely "funded states to test their own malpractice reforms"). Does this tell us anything about the real politics of medical malpractice?

6. *Is there an effect of medical malpractice liability on health outcomes?* One goal of medical malpractice liability is to improve health outcomes by creating good incentives for medical professionals. Yet many observers doubt that liability has any consistent relationship to health outcomes. One empirical study used Medicare claims data to examine the impact of states' malpractice regimes on patients' health outcomes post-surgery. The researchers found no consistent relationship between a state's malpractice laws and patients' risk of death or complications arising from surgery. Christina A. Minami et al., *Association Between State Medical Malpractice Environment and Postoperative Outcomes in the United States*, 224 J. AM. COLLEGE SURGEONS 310 (2017); see also Michael Frakes & Anupam B. Jena, *Does Medical Malpractice Law Improve Health Care Quality?*, 143 J. PUBLIC ECON. 142 (2016) (suggesting that damage caps play "at most a modest role" in improving patient outcomes). Nor do state damage caps affect rates of births by cesarean section. Sabrina Safrin, *The C-Section Epidemic: What's Tort Reform Got to Do with It?*, 2018 U. ILL. L. REV. 747 (2018). On the other hand, studies of medical malpractice have found that in at least some areas of medical care, there are good reasons to think that tort liability has played a substantial and constructive role in improving outcomes. Anesthesiology, which proved susceptible to monitoring and automation, and which was far more dangerous than it is now, is the lead example. See TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 108-10 (2008); see also Robert A. Caplan, Karen L. Posner, Richard J. Ward & Frederick W. Cheney, *Adverse Respiratory Events in Anesthesia: A Closed Claims Analysis*, 72 ANESTHESIOLOGY 828 (1990) (using malpractice claims to identify the leading cause of injury in anesthetic practice—adverse respiratory events—and observing that 72% of these injuries could be prevented with better monitoring and equipment).

## D. Statutes and Regulations

A pervasive question in the modern state is how to deal with legislation and regulatory directives. Writing more than thirty years ago, Guido Calabresi put it this way:

The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law,

divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law. The consequences of this “orgy of statute making,” in Grant Gilmore’s felicitous phrase, are just beginning to be recognized. The change itself and its effect on our whole legal system have not been systematically treated.

GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982). The statutory revolution has had vast implications for tort law. What do legislative rules governing conduct mean for questions about the reasonableness of that conduct? Does it matter whether the rule in question is a permission or a prohibition? What are the distinctive virtues and vices of legislatures and courts in making judgments about tort liability standards?

In what follows in this section, we take up three specific problems arising out of legislative and regulatory directives in the torts field. (1) What is the significance of *deviation from* a legislative or regulatory safety standard for determinations of common law reasonableness and negligence? (2) What is the significance of *compliance with* a legislative or regulatory safety standard for determinations of common law reasonableness and negligence? (3) When does a statutory safety standard imply a private cause of action in tort that would not have existed at common law?

### ***1. Violations of Statutory Standards***

#### ***Martin v. Herzog*, 19 N.E.2d 987 (N.Y. 1920)**

CARDOZO, J.

The action is one to recover damages for injuries resulting in death. Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant’s automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve, when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway. Highway Law, § 286, subd. 3, and section 332 (Consol. Laws, c. 25). Negligence is charged against the plaintiff’s intestate, the driver of the wagon, in that he was traveling without lights. Highway Law, § 329a, as amended by Laws 1915, c. 367. There is no evidence that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. The beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and, looking in the direction of the plaintiff’s approach, he was peering into the shadow. The case against him must stand, therefore, if at all, upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

We agree with the Appellate Division that the charge to the jury was erroneous and misleading. . . . In the body of the charge the trial judge said that the jury could consider the absence of light “in determining whether the plaintiff’s intestate was guilty of contributory negligence in failing to have a light upon the buggy as provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your

consideration.” The defendant requested a ruling that the absence of a light on the plaintiff’s vehicle was “prima facie evidence of contributory negligence.” This request was refused, and the jury were again instructed that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. The plaintiff then requested a charge that “the fact that the plaintiff’s intestate was driving without a light is not negligence in itself,” and to this the court acceded. The defendant saved his rights by appropriate exceptions.

We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway. Highway Law, § 329a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state. . . . Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when, if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought. . . .

In the conditions here present they come together and coalesce. A rule less rigid has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed. . . . Some relaxation there has also been where the safeguard is prescribed by local ordinance, and not by statute. . . . Courts have been reluctant to hold that the police regulations of boards and councils and other subordinate officials create rights of action beyond the specific penalties imposed. This has led them to say that the violation of a statute is negligence, and the violation of a like ordinance is only evidence of negligence. An ordinance, however, like a statute, is law within its sphere of operation, and so the distinction has not escaped criticism. . . . Whether it has become too deeply rooted to be abandoned, even if it be thought illogical, is a question not now before us. . . .

In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. . . . They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman. . . . Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and, being wholly unexcused, was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

. . .

We are persuaded that the tendency of the charge, and of all the rulings, following it, was to minimize unduly, in the minds of the triers of the facts, the gravity of the decedent’s fault. Errors may not be ignored as unsubstantial, when they tend to such an outcome. A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to

conform. The order of the Appellate Division should be affirmed, and judgment absolute directed on the stipulation in favor of the defendant, with costs in all courts.

**Note**

Why should the common law rely so heavily on statutes? Does Cardozo offer reasons for the deference to statutes on which he insists? Relevant considerations include the vindication of democratic processes and the relative virtues of legislatures and courts as institutions for risk-regulation.

Does the case for deference to statutes seem the same after reading the next case?

***Tedla v. Ellman*, 19 N.E.2d 287 (N.Y. 1939)**

LEHMAN, J.

While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant Hellman. She was injured and Bachek was killed. Bachek was a deaf-mute. His occupation was collecting and selling junk. His sister, Mrs. Tedla, was engaged in the same occupation. They often picked up junk at the incinerator of the village of Islip. At the time of the accident they were walking along "Sunrise Highway" [a major route connecting New York City and Long Island] and wheeling baby carriages containing junk and wood which they had picked up at the incinerator. It was about six o'clock, or a little earlier, on a Sunday evening . . . Darkness had already set in. Bachek was carrying a lighted lantern, or, at least, there is testimony to that effect. The jury found that the accident was due solely to the negligence of the operator of the automobile. The defendants do not, upon this appeal, challenge the finding of negligence on the part of the operator. They maintain, however, that Mrs. Tedla and her brother were guilty of contributory negligence as matter of law.

Sunrise Highway, at the place of the accident, consists of two roadways, separated by a grass plot. There are no footpaths along the highway and the center grass plot was soft. It is not unlawful for a pedestrian, wheeling a baby carriage, to use the roadway under such circumstances, but a pedestrian using the roadway is bound to exercise such care for his safety as a reasonably prudent person would use. The Vehicle and Traffic Law (Consol. Laws, c. 71) provides that "Pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof, so as to permit all vehicles passing them in either direction to pass on their right. Such pedestrians shall not be subject to the rules governing vehicles as to giving signals." . . . Mrs. Tedla and her brother did not observe the statutory rule, and at the time of the accident were proceeding in easterly direction on the east bound or right-hand roadway. . . . The trial judge left to the jury the question whether failure to observe the statutory rule was a proximate cause of the accident . . . . Upon this appeal, the only question presented is whether, as matter of law, disregard of the statutory rule that

pedestrians shall keep to the left of the center line of a highway constitutes contributory negligence which bars any recovery by the plaintiff.

. . . Custom and common sense have always dictated that vehicles should have the right of way over pedestrians and that pedestrians should walk along the edge of a highway so that they might step aside for passing vehicles with least danger to themselves and least obstruction to vehicular traffic. Otherwise, perhaps, no customary rule of the road was observed by pedestrians with the same uniformity as by vehicles; though, in general, they probably followed, until recently, the same rules as vehicles.

. . . Until . . . 1933, [when the Legislature enacted the Vehicle and Traffic Law], there was no special statutory rule for pedestrians walking along a highway. Then for the first time it reversed, for pedestrians, the rule established for vehicles by immemorial custom, and provided that pedestrians shall keep to the left of the center line of a highway.

The plaintiffs showed by the testimony of a State policeman that “there were very few cars going east” at the time of the accident, but that going west there was “very heavy Sunday night traffic.” Until the recent adoption of the new statutory rule for pedestrians, ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the “very heavy Sunday night traffic” was proceeding when they could walk in comparative safety along a roadway used by very few cars. It is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road. . . . If that be true, then the Legislature has decreed that pedestrians must observe the general rule of conduct which it has prescribed for their safety even under circumstances where observance would subject them to unusual risk; that pedestrians are to be charged with negligence as matter of law for acting as prudence dictates. . . .

The appellants lean heavily upon [*Martin v. Herzog*] and kindred cases and the principle established by them. The analogy is, however, incomplete. The “established rule” should not be weakened either by subtle distinctions or by extension beyond its letter or spirit into a field where “by the very terms of the hypothesis” it can have no proper application. At times the indefinite and flexible standard of care of the traditional reasonably prudent man may be, in the opinion of the Legislature, an insufficient measure of the care which should be exercised to guard against a recognized danger; at times, the duty, imposed by custom, that no man shall use what is his to the harm of others provides insufficient safeguard for the preservation of the life or limb or property of others. Then the Legislature may by statute prescribe additional safeguards and may define duty and standard of care in rigid terms; and when the Legislature has spoken, the standard of the care required is no longer what the reasonably prudent man would do under the circumstances but what the Legislature has commanded. That is the rule established by the courts and “by the very terms of the hypothesis” the rule applies where the Legislature has prescribed safeguards “for the benefit of another that he may be preserved in life or limb.” In that field debate as to whether the safeguards so prescribed are reasonably necessary is ended by the legislative fiat. Obedience to that fiat cannot add to the danger, even assuming that the prescribed safeguards are not reasonably necessary and where the legislative anticipation of dangers is realized and harm results through heedless or willful omission of the prescribed safeguard, injury flows from wrong and the wrongdoer is properly held responsible for the consequent damages.

The statute upon which the defendants rely is of different character. It does not prescribe additional safeguards which pedestrians must provide for the preservation of the life or limb or property of others, or even of themselves, nor does it impose upon pedestrians a higher standard of care. What the statute does provide is rules of the road to be observed by pedestrians and by vehicles, so that all those who use the road may know how they and others should proceed, at least under usual circumstances. A general rule of conduct—and, specifically, a rule of the road—may accomplish its intended purpose under usual conditions, but, when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic results.

Negligence is failure to exercise the care required by law. Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then, as we have said, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard imposed by statute is negligence, as a matter of law. On the other hand, where a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property but merely codifies or supplements a common-law rule, which has always been subject to limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under conditions when observance might cause accidents. We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger.

...

Even under that construction of the statute, a pedestrian is, of course, at fault if he fails without good reason to observe the statutory rule of conduct. The general duty is established by the statute, and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting from his wrong. . . .

In each action, the judgment should be affirmed, with costs.

O'BRIEN and FINCH, JJ., dissent on the authority of *Martin v. Herzog* . . . .

### Notes

1. *Distinguishing Martin v. Herzog*. How does Judge Lehman distinguish Cardozo's approach in *Martin v. Herzog*? Does the distinction between safety statutes and "rules of the road" explain the difference between *Martin* and *Tedla*?

2. *Irving Lehman*. In 1939, Irving Lehman's brother, Herbert Lehman, was governor of New York. Both Lehmans were highly-respected mid-century liberals. The *New York Times* obituary for Irving, who died in 1945, described him as a jurist "whose interpretation of the law made it a living force subject to change and development with the appearance of new problems and new outlooks." *Irving Lehman, 69, Noted Jurist, Dies*, N.Y. TIMES, Sept. 23, 1945. Does a flexible theory of the law as a living and evolving institution help explain Lehman's decision in *Tedla*? Does Judge Lehman's "living law" theory have implications for the relationship between statutes and the common law more generally? Note that the book with which we began this section, Guido Calabresi's *A Common Law for the Age of Statutes*, was principally concerned with the problem of statutes that had become, by passage of time and changes in values, out of date or otherwise out of step with the spirit of the times.

3. *Meta institutional choice*. Does Lehman's opinion require a general theory of the relative virtues of courts as opposed to legislatures as decision-makers about risk? Or does Lehman need merely to establish a meta rule about which institution is properly authorized to decide which institution is the better decision-maker under the circumstances?

4. *Statutory standards*. Even when a court does defer to the statute as supplying the relevant standard of conduct, it does not necessarily follow that any loss caused by a departure from the statutory standard is a loss for which the departing party may be held liable. As Cardozo wrote in *Martin*, courts are "less rigid" when the party charging negligence on the basis of a statutory safeguard "is not a member of the class for whose protection the safeguard is designed." Moreover, courts have generally held that statutory standards are only to be treated as negligence per se when the losses that occur are the kinds of losses the legislature sought to guard against in passing the statute. Consider the terrible case of the very wet sheep:

***Gorris v. Scott*, [1874] L.R. 9 Ex. 125**

KELLY, C.B.

This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animals) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. Under the authority of that Act, certain orders were made; amongst others, an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot holds. The object of this order is to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.



The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued . . . .

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. . . . [T]he damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

PIGOTT, B.

The object . . . of the regulations which have been broken was, not to prevent cattle from being washed overboard, but to protect them against contagious disease. . . . If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as the case stands on this declaration, the answer to the action is this: Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose. . . .

Judgment for the defendant.

### ***The Restatement Approach***

The Restatement (Second) of Torts's provisions for statutes and tort liability restate the approach found in *Martin*, *Tedla*, and *Gorris*. A statutory or regulatory standard of conduct may be adopted as the standard of reasonableness where that statute's or regulation's purpose is, at least in part, "to protect a class of persons" that includes the plaintiff, and where the statute's or regulation's purpose is to protect the "particular interest invaded" against the particular sort of harm complained of. RESTATEMENT (SECOND) OF TORTS § 286 (1965). Section 288 further provides that an actor's violations of statutory or regulatory standards are excused, and thus are not negligence, when the actor's incapacity makes the violation reasonable; where the actor "neither knows nor should know of the occasion for compliance"; where the actor is "unable after reasonable diligence or care to comply"; where the actor is "confronted by an emergency not due to his own misconduct"; or where "compliance would involve a greater risk of harm to the actor or to others." RESTATEMENT (SECOND) OF TORTS § 288A (1965).

Do Section 288's exceptions comport with the basic rule of negligence per se set out in Section 286 and in *Martin v. Herzog*? Does the Restatement offer a coherent reformulation of the caselaw? Or does it merely reproduce the caselaw's tensions, in particular the tension between *Martin* and *Tedla*? The Restatement (Third) of Torts offers a more linguistically economical formulation, but not one that does any better than its predecessor. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 14-15 (2010).

## 2. A Regulatory Compliance Defense?

So far the cases we have considered arise out of the violations of statutory standards. But what about when a party complies with such a standard? If violations are negligence per se, does compliance constitute reasonableness as a matter of law?

Controversially, the traditional answer is no. In *Lugo v. L.J.N. Toys*, for example, a New York court rejected the defendant's contention that its compliance with safety regulations absolved it from liability, citing the long-standing rule that "while compliance with a statute may constitute some evidence of due care, it does not preclude a finding of negligence." 539 N.Y.S.2d 922, 924 (1989), *aff'd*, 552 N.E.2d 162 (1990). The standard rationale is that legislation sets a floor on conduct, not a ceiling, and that courts and juries are entitled to insist that actors surpass statutory safety standards when, under the circumstances, reasonableness so requires. Moreover, defenders of the common law rule insist that there are good reasons underlying it. Administrative agencies and legislatures, they contend, are subject to the phenomenon known as "regulatory capture," under which regulations serve not the interest of the public, but the interests of the regulated entity. The basic problem, as influentially identified by political scientist Theodore Lowi in the late 1960s, is that regulators unavoidably interact with the industries they regulate. Those industries have ample opportunity and motive to advance their interests with regulators. The public, by contrast, is diffuse and disorganized and may not press its interests nearly as forcefully in the regulatory process. The problem grows worse in systems like the United States, with the so-called "revolving door" between the regulator and the regulated entities. If regulators are former employees of the firms they regulate—and hope to be employees of such firms once again in the future—then critics contend that the regulations will almost certainly favor the regulated entities interests over those of the public in situations where the two diverge.

Critics, however, contend that the absence of a regulatory compliance defense means that regulated actors face two separate regulatory systems, one statutory and the other common law. The absence of a such a defense means that they bear the burdens of both but not the benefits.

In the early 1990s, the American Law Institute (publisher of the Restatements) issued a Reporter's Study that made recommendations for a revised regulatory compliance defense. The ALI reporter, Richard B. Steward, proposed that compliance with a safety standard be made a complete defense to the charge of negligence when: (a) the standard was promulgated by a specialized administrative agency charged with the power to monitor and assess and regulate the risk in question; and (b) when the regulated entity seeking to invoke the defense made disclosures to the agency about the risks in question. In particular, Stewart's proposal would have required that:

the defendant must have publicly disclosed to the relevant regulatory agency any material information in its possession (or of which it has reason to be aware) concerning the risks posed by the defendant's activities and/or the means of controlling them. This requirement would extend to information indicating that agency standards or tests may be inadequate or inappropriate . . .

*Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO.

L.J. 2167 (2000). Is Stewart's proposal superior to the traditional common law approach to regulatory compliance? Defenders of the traditional approach often cite the risk of regulatory capture. Stewart's public disclosure requirement was designed to ameliorate the capture problem while preserving the virtues of the risk regulators as against the decisions of lay juries in common law courts.

In the end, controversy over Stewart's proposal prevented it from being added to the Restatement, though the Third Restatement did add a more modest alteration, contending that the common law reasonableness standard should not require a course of conduct that is forbidden by some a statutory or administrative standard. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 16(b):

### ***3. Torts in the Modern State: Implied Private Causes of Action***

A further question for statutes and tort suits arises when a statute imposes an obligation that did not exist at common law. Does failure to comply with that statutory obligation, when such failure causes harm, give rise to a separate cause of action for damages (*i.e.*, something other than common law negligence) to enforce the public standard? When the legislation explicitly authorizes private causes of action, the answer is a relatively straightforward yes. Subject to the limitations of the Constitution's standing requirements, Congress and the state legislatures are generally free to authorize private parties to act as the enforcers of publicly enacted norms.

But what about legislation that does not specify whether private parties may enforce its provisions? Here the problem is more difficult.

#### ***Uhr v. East Greenbush Central School District, 94 N.Y.2d 32 (1999)***

ROSENBLATT, J.

Education Law § 905 (1) requires school authorities in the State of New York to examine students between 8 and 16 years of age for scoliosis at least once in each school year. The principal issue on this appeal is whether the statute authorizes a private right of action.

During the 1992–1993 school year, the infant plaintiff was a seventh grade student at the Goff Middle School, operated by defendant East Greenbush Central School District. In October 1992, as part of a school program, a nurse screened her for scoliosis. The results were negative. She was examined during the following school year (1993–1994) by a school nurse who checked her height, weight and vision but allegedly did not screen her for scoliosis.

In March 1995, when the infant plaintiff was a ninth grader during the 1994–1995 school year at Columbia High School . . . a school nurse screened her for scoliosis and the examination proved positive. . . . [A]n orthopedic doctor . . . concluded that her scoliosis had progressed to the point that surgery was required instead of the braces that often can be utilized when the condition is diagnosed earlier. The infant plaintiff underwent surgery in July 1995.

Plaintiffs have alleged two causes of action . . . . One is based on a claimed violation of Education Law § 905 (1), one on common-law negligence. Plaintiffs assert, in essence, that the District was negligent in failing to examine the infant plaintiff for scoliosis during the 1993-1994 school year, as a result of which her ailment was allowed to progress undetected, to her detriment. Supreme Court granted the District's motion for summary judgment, holding that Education Law § 905 (1) does not create a private right of action, and that plaintiffs had otherwise failed to state a claim for common-law negligence. The Appellate Division affirmed. We granted leave to appeal to this Court and now affirm.

...

*The Test For the Availability of a Private Right of Action*

. . . A statutory command . . . does not necessarily carry with it a right of private enforcement by means of tort litigation . . . .

When a statute is silent, as it is here, courts have had to determine whether a private right of action may be fairly implied. . . . In making the determination, we ask:

- “(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted;
- “(2) whether recognition of a private right of action would promote the legislative purpose; and
- “(3) whether creation of such a right would be consistent with the legislative scheme” (*Sheehy v. Big Flats Community Day*, 73 N.Y.2d, at 633, *supra*).

There is no doubt that the infant plaintiff is a member of the class for whose particular benefit Education Law § 905 (1) was enacted. The first prong is satisfied.

The second prong is itself a two-part inquiry. We must first discern what the Legislature was seeking to accomplish when it enacted the statute, and then determine whether a private right of action would promote that objective (*see, e.g., Burns Jackson Miller Summit & Spitzer v Lindner*, 59 N.Y.2d, at 330, *supra*).

Here, the purpose of the statute is obvious. Scoliosis is a curvature of the spine which, if left undetected in children, can be crippling . . . . Upon early detection, scoliosis can be treated successfully, often without the need for surgery. . . .

Early detection of the condition serves the dual legislative purpose of promoting public health and avoiding costly hospitalization.

In arguing that a private right of action would promote these objectives, plaintiffs assert that the risk of liability for failure to screen will encourage compliance with Education Law § 905 (1), and thereby further the statute's purpose of providing broad-based screenings that benefit the public. In response, the District argues that the risk of liability will prompt school districts to seek waivers of the requirement to screen and thus defeat the statute's purpose.

. . . Although the District's "waiver" argument is not entirely implausible it is an insufficient basis on which to conclude that private enforcement would not promote the

statute’s purpose. . . . [W]e conclude that a private right of action would promote the legislative purpose and, therefore, the second prong is satisfied.

We turn next to the third *Sheehy* prong—whether a private right of action is consistent with the legislative scheme. . . . [P]rivate avenues of enforcement do not always harmonize [with public enforcement] . . . . Both may . . . promote statutory compliance . . . but . . . are born of different motivations and may produce a different allocation of benefits owing to differences in approach . . . .

Plaintiffs argue that a private right of action is not only consistent with Education Law § 905 (1) but also necessary for its operation. They assert that the statute offers no other practical means of enforcement and that a private right of action is imperative, in order to give it life. We disagree and conclude that a private right of action would not be consistent with the statutory scheme. . . . [T]he statute carries its own potent official enforcement mechanism. The Legislature has expressly charged the Commissioner of Education with the duty to implement Education Law § 905 (1) and has equipped the Commissioner with authority to adopt rules and regulations for such purpose (*see*, Education Law § 905[1]; § 911). Moreover, the Legislature has vested the Commissioner with power to withhold public funding from noncompliant school districts. Thus, the Legislature clearly contemplated administrative enforcement of this statute. The question then becomes whether, in addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme.

It would not. The evolution of Education Law § 905 (2) is compelling evidence of the Legislature’s intent to immunize the school districts from any liability that might arise out of the scoliosis screening program. . . . [T]he Legislature deemed that the school district “shall not suffer any liability to any person as a result of *making* such test or examination” (emphasis added). . . . [P]laintiffs would interpret the statute as conferring immunity for misfeasance but not nonfeasance. . . .

Plaintiffs’ reading of the statute might have some appeal if we did not have persuasive evidence as to the Legislature’s intent to immunize the school districts for both nonfeasance and misfeasance. The Legislature revealed its stance, in support of the District’s interpretation, when in 1994 it amended Education Law § 905 (2) in reaction to an Appellate Division ruling in *Bello v. Board of Educ.* (139 A.D.2d 945). The *Bello* Court ruled that Education Law § 905 (2) did not impose liability for the school district’s failure to notify a child’s parents of the positive results of the screening (*Bello v. Board of Educ.*, 139 A.D.2d, at 945, *supra*). . . . The Legislature specifically responded to *Bello* by amending Education Law § 905 (2) to require parental notification of positive test results within 90 days after the test (L.1994, ch. 197). Revealingly, the Legislature evidently saw no need to amend Education Law § 905 in any other way . . . . Its failure to otherwise amend the statute is strong evidence of the Legislature’s conclusion that the Appellate Divisions had correctly interpreted the statute’s immunity provision.

There is also the matter of cost to the school districts, as evidenced by the Legislature’s expressed sensitivity in that regard. . . .

Given the Legislature’s concern over the possible costs to the school districts—as evidenced by the statutory immunity provision and the other legislative statements reflecting those concerns—we conclude that the Legislature did not intend that the districts bear the

potential liability for a program that benefits a far wider population. If we are to imply such a right, we must have clear evidence of the Legislature's willingness to expose the governmental entity to liability that it might not otherwise incur. The case before us reveals no such legislative intent.

In sum, we conclude that a private right of action to enforce Education Law § 905 (1) is inconsistent with the statute's legislative scheme and therefore cannot be fairly implied.

*Common-Law Negligence*

. . . [P]laintiffs argue that the District assumed a duty to the infant plaintiff and her parents by creating a special relationship with them in connection with the Education Law § 905(1) program and that it breached its duty by failing to perform the examination during the 1993-1994 school year. We agree with the courts below that plaintiffs have failed as a matter of law to state a claim for common-law negligence.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

***Bennett v. Hardy*, 113 Wash.2d 912 (1990)**

BRACHTENBACH, J.

Plaintiffs allege age discrimination by their employer but cannot bring a cause of action against him under RCW Ch. 49.60, the state Law Against Discrimination, because he employs fewer than eight employees and thus is not within that statute's definition of employer. The issue presented is whether we should imply a cause of action under a separate statute, RCW 49.44.090, which makes age discrimination an unfair employment practice but does not create a remedy.

. . . . The trial court granted defendant's motion for summary judgment and dismissed plaintiffs' claims. . . . We reverse the trial court's dismissal of plaintiffs' action and remand for trial.

The plaintiffs, Laura Bennett and Wanda Bowden, are twin sisters who were employed as dental hygienists for defendant's predecessor and kept on by defendant when he purchased that dental practice in the late 1970's. Following several years of employment for defendant, plaintiffs allege that statements and conduct of defendant began to single them out, treating them differently from other employees, and in general creating an age-hostile work environment.

Included in plaintiffs' response to defendant's summary judgment motion are allegations that Dr. Hardy suggested to one of the plaintiffs on at least one occasion that she might be suffering from Alzheimer's disease, that Dr. Hardy suggested that perhaps the plaintiffs were too old to be trained in new techniques, and that Dr. Hardy called the cleaning compound used by plaintiffs "witches brew." Plaintiffs also allege that Dr. Hardy interfered with their work productivity by delaying seeing their patients and diverting their patients to other employees, and by refusing to replace their outdated equipment while doing so for other employees. Plaintiffs further allege that Dr. Hardy created a stressful work environment by making offensive comments, including telling plaintiffs that they should "go dance naked in

the window.” In July 1985 defendant terminated plaintiff Bowden who was then 60 years old. Following her sister’s discharge plaintiff Bennett contends that Dr. Hardy continued to sustain the hostile work environment. Plaintiffs hired an attorney who informed Dr. Hardy that his discharge of Ms. Bowden constituted age discrimination and wrongful discharge, and that any further action taken against Ms. Bennett would be considered retaliatory. In March 1986 defendant terminated plaintiff Bennett who was then 61 years old.

Plaintiffs allege that their terminations from defendant’s employ were based upon their age as well as in retaliation for plaintiff Bennett’s resistance to defendants’ discriminatory practices. On defendant’s motion for summary judgment, the trial court concluded that no statutory cause of action for age discrimination existed because RCW Ch. 49.60, Washington’s Law Against Discrimination, applied only to firms employing eight or more persons. Because there existed no factual dispute that during the period of defendant’s allegedly discriminatory practices he had never employed eight or more individuals, the trial court granted defendant’s motion for summary judgment, dismissing plaintiffs’ statutory age discrimination claims . . . .

#### I. Implied Cause of Action Under RCW 49.44.090

RCW 49.44.090 makes it an unfair employment practice

[f]or an employer . . . , because an individual is between the ages of forty and seventy, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment. . . .

RCW Ch. 49.44 is silent regarding remedies against an employer engaged in this “unfair practice”; the chapter also does not define “employer.”

“It has long been recognized that a legislative enactment may be the foundation of a right of action.” *McNeal v. Allen*, 95 Wash.2d 265, 274 (1980) (Brachtenbach, J., dissenting). Further,

we can assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless.

*McNeal*, at 277 (Brachtenbach, J., dissenting).

And as a majority of this court has stated, when a “statute . . . [has] provided a right of recovery, it is incumbent upon the court to devise a remedy. *See* 2A C. Sands, *Sutherland’s Statutes and Statutory Construction* § 55.03 (4th ed. 1973).” *State v. Manuel*, 94 Wash.2d 695, 699 (1980).

The Restatement of Torts recognizes the implied right of action:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if

it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Restatement (Second) of Torts § 874A (1979).

....

Plaintiffs, employees who were aged 60 and 61 at the time of their discharges, are clearly part of the class of persons entitled to the protection of RCW 49.44.090. The statute creates a right on the part of employees within the protected class to be free from age discrimination by their employers but does not indicate explicitly an intent to create a remedy. However, as noted above, we may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Moreover, the purpose of this legislation is obviously to confront the problem of age discrimination by employers, and according a private right of action to persons within the protected class is consistent with this underlying legislative purpose.

Therefore, we hold that because RCW 49.44.090 makes it an unfair employment practice to discriminate against an employee who is between the ages of 40 and 70 based upon her age, but provides no express method of redress against an employer who has engaged in such an unfair practice, there is an implied right of action for plaintiffs alleging violations of that statute.

....

Based on the foregoing analysis, we reverse the trial court's grant of defendants' motion for summary judgment and remand this case for trial.

### **Notes**

1. *Minimum number of employees.* The Supreme Court of Washington went on to rule that RCW 49.44.090 did not implicitly adopt RCW 49.60's exemption of employers with fewer than eight employees. Was this the right ruling? Consider that this interpretation strips 49.60's minimum requirement of any effect; private individuals can sue employers with fewer than eight employees for age discrimination. Is it possible that Washington's legislators included the requirement of eight in RCW 49.60 and not in RCW 49.44.090 for a reason?

2. *Rights and private causes of action.* Not all rights are accompanied by private causes of action. Legislatures can codify rights in statutes—to be free from discrimination or protected from pollution, for example—while neglecting to specify whether private parties can sue on the basis of those statutes. Courts are then left to determine whether individuals can or cannot maintain a private cause of action. In a classic article, Richard B. Stewart and Cass R. Sunstein outline three rationales for judicial creation of private causes of action, citing the advancement of public values, the correction of market failures, and the security of entitlement. In their view, whether or not a statute authorizes (or should be found to authorize) a private cause of action



turns on considerations about the match or mismatch between the particular project of a given statute and the effects of a private cause of action. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). Which of the three rationales, if any, warrants an implied private right of action against the employer in *Bennett*? Does the Stewart and Sunstein framework resolve the question of private causes of action, or merely provide a framework for resolving it? If the latter, then what does resolve the question?

3. *Torts in the modern state.* State courts (and federal courts applying state tort law) have addressed implied cause of action claims in a variety of contexts. In *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629 (1989), the New York Court of Appeals held that a state law prohibiting the furnishing of alcoholic beverages to anyone under the legal age did not create a private cause of action for a minor plaintiff who was injured while intoxicated because the law was intended to authorize suits by those injured by intoxicated minors. In *Lu v. Hawaiian Gardens Casino*, 50 Cal. 4th 592 (2010), the Supreme Court of California held that employees could not sue to enforce a provision of the state's labor code, which prohibited employees from taking gratuities left for employees.

Note that private right of action analyses ask whether the statute in question imposes a duty on the defendant owed to and enforceable by the plaintiff in a private suit for damages, rather than whether the statutory standard sets the measure of negligence for purposes of a common law negligence claim. Remember that in *Martin v. Herzog*, a lack of statutorily mandated lights constituted negligence *per se*. The statute was not the basis of the lawsuit, as was the case in *Uhr* and *Bennett*; rather, the statute was invoked by the defendant to establish that the decedent driver's conduct had been unreasonable.

But sometimes, as in *Uhr*, plaintiffs advance both types of claims—they are, after all, functionally very similar—and the analysis can become muddy. For an example of a case that elucidates better than *Uhr* the distinction between a statute-based private cause of action and a common law negligence claim that relies on a statutorily created standard, consider *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995), involving three plaintiffs who alleged that, as middle and high school students, school district employees subjected them to sexual and other abuse; claims of negligence against some of the defendants turned on their failure to report suspected child abuse, as required by New Hampshire state law. Taking up the relationship of a statutory violation to civil liability, the court explained:

... whether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability. The doctrine of negligence *per se*, on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard. The doctrine of negligence *per se*, however, plays no role in the creation of common law causes of action. Thus, in many cases, the common law may fail to recognize liability for failure to perform affirmative duties that are imposed by statute.

*Id.* at 713-14. In other words, the court recognized a scenario in which a common law negligence claim might fail, because the common law does not recognize the kind of duty that

the statute imposes, but a statutory violation might nonetheless translate into civil liability, producing functionally the same result (monetary damages); *see also* *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004) (discussing whether violation of an Illinois child abuse reporting statute constitutes negligence per se and, in doing so, distinguishing between a common law cause of action and a statutory one).

The distinction between these two kinds of analyses – negligence per se and implied private causes of action -- is also drawn out in *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998), a child abuse case which considered whether a mandatory reporting statute can be interpreted both as creating a private cause of action and as establishing a standard of negligence. Although mandatory reporting statutes have created privately enforceable duties in other jurisdictions, *see, e.g., Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), the Texas Supreme Court interpreted the Texas statute as neither creating a private cause of action, nor setting a standard for negligence per se. The defendants were therefore released from tort liability. They were, however, imprisoned for 21 years for crimes related to sexual and satanic child abuse before being declared innocent of all charges in 2017. *See* Aimée Lutkin, *Couple Wrongfully Imprisoned for 21 Years for Alleged Satanic Abuse Awarded \$3.4 Million*, JEZEBEL (August 23, 2017), <https://jezebel.com/couple-wrongfully-imprisoned-for-21-years-for-alleged-s-1798355498>. Is there any good reason to insulate defendants from tort liability when they are subject to stiff criminal penalties?

4. *Private enforcement and public enforcement.* When should legislatures authorize private enforcement of legislation? Lawyer economist Steven Shavell argues that the effectiveness of private damages actions as an enforcement mechanism turns on several factors, chief among which are (a) whether private parties have access to the information necessary to be effective regulators of risky activities, and (b) whether the actor(s) whose conduct is to be regulated can pay for the full magnitude of the harm. If private parties do not have enough information to bring enforcement actions, then their effectiveness will be severely limited. Consider, for example, using private enforcement to police safety regulations in a nuclear power plant. Similarly, if the regulated actor(s) presents a risk of harm to others that exceeds their ability to pay, then the threat of tort damages after the fact will prove to be an insufficient deterrent. The paradigmatic example here is the judgment-proof individual, but, although it is somewhat terrifying, we might just as well consider nuclear power plants again, since the chances that a power plant operator could be made to internalize the costs of a Chernobyl-like meltdown are slim to none. For the basic analysis, *see* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357–64 (1984).

Objections to private causes of action often focus on the risk of over deterrence, which can arise when regulated actors face both public and private sanctions, each of which might be effective on its own, but which together require too much care. *See* W. KIP VISCUSI, *REGULATION THROUGH LITIGATION* 1–6 (2002). One especially problematic version of this occurs when plaintiffs' lawyers piggyback on regulatory action that would have been sufficient in and of itself. (Chapter 9 of this book takes this problem up in more detail.) Still others criticize private litigation on democracy grounds. Negotiated tort settlements, they say, force regulated entities to accept regulatory policies outside of the democratically-accountable rulemaking process. Of course, since the private causes of action for damages only exist if courts conclude that the statutes they enforce imply the availability of such causes of action,

then these suits are themselves the creatures of democratic legislation. Legislatures are entirely free to abolish such private causes of action.

Defenders of certain private causes of action sometimes assert that courts and juries may be less vulnerable than legislatures and regulators to capture by tyrannical majorities. This idea famously appears in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n. 4 (1938), a New Deal case that expanded Congress's power under the Commerce Clause while suggesting a "more searching judicial inquiry" when "prejudice against discrete and insular minorities . . . curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities."

A further consideration is that judges and juries are often more flexible in their ability to compensate than the bureaucracy; they continuously update their damages evaluations while the bureaucratic system may become ossified and rigid. *See generally* John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 272 (2007).

5. *The Restatement approach.* Section 874 of the Second Restatement, cited in *Bennett v. Hardy*, recommends that implied private causes of action be recognized when such a cause of action "is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision." RESTATEMENT (SECOND) OF TORTS, § 874A.

The Third Restatement contains no analog to Section 874. However, the Third Restatement does note that in "a suit brought by the victim of [a statutory violation], the court, relying on ordinary principles of legislative interpretation, may in appropriate cases infer from the statute a cause of action for damages against a violator." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM §14, cmt. b. Additionally, the Third Restatement permits a court to rely on a statute to find that the plaintiff owes an affirmative duty to the defendant, which, when breached, creates a common law cause of action. *See id.* § 38 ("Affirmative Duty Based on Statutory Provisions Imposing Obligations to Protect Another").

For a discussion of the relationship between Section 38 and Section 874A of the Second Restatement, *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM §38, cmt. A; *see also id.* at §38, cmt. d.

#### **4. Implied Private Causes of Action in Federal Statutes**

A line of cases at the federal level has dealt with this same issue: when does a statute contain an implied private cause of action?

##### **J. I. Case Co. v. Borak, 377 U.S. 426 (1964)**

Mr. Justice CLARK delivered the opinion of the Court.

This is a civil action brought by respondent, a stockholder of petitioner J. I. Case Company, charging deprivation of the pre-emptive rights of respondent and other shareholders

by reason by a merger between Case and the American Tractor Corporation. It is alleged that the merger was effected through the circulation of a false and misleading proxy statement by those proposing the merger. The complaint was in two counts, the first based on diversity and claiming a breach of the directors' fiduciary duty to the stockholders. The second count alleged a violation of § 14(a) of the Securities Exchange Act of 1934 with reference to the proxy solicitation material. . . . We consider only the question of whether § 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14(a) of the Act. . . .

I.

. . . . The District Court ruled that the Wisconsin security for expenses statute did not apply to Count 2 since it arose under federal law. However, the court found that its jurisdiction was limited to declaratory relief in a private, as opposed to a government, suit alleging violation of § 14(a) of the Act. Since the additional equitable relief and damages prayed for by the respondent would, therefore, be available only under state law, it ruled those claims subject to the security for expenses statute. After setting the amount of security at \$75,000 and upon the representation of counsel that the security would not be posted, the court dismissed the complaint, save that portion of Count 2 seeking a declaration that the proxy solicitation material was false and misleading and that the proxies and, hence, the merger were void.

II.

It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. Indeed, this section specifically grants the appropriate District Courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act. The petitioners make no concessions, however, emphasizing that Congress made no specific reference to a private right of action in § 14(a). . . .

III.

. . . .

The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R.Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." *Id.*, at 14. "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S.Rep.No.792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors.*" (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is "the

protection of investors,” which certainly implies the availability of judicial relief where necessary to achieve that result.

....

We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942):

“When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.”

It is for the federal courts “to adjust their remedies so as to grant the necessary relief” where federally secured rights are invaded. “And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S. 678, 684 (1946). Section 27 grants the District Courts jurisdiction “of all suits in equity and actions at law brought to enforce any liability or duty created by this title . . . .” In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). This significant language was used:

“The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.” At 288 of 311 U.S.

Nor do we find merit in the contention that such remedies are limited to prospective relief. This was the position taken in *Dann v. Studebaker-Packard Corp.*, 6 Cir. [(1961)], where it was held that the “preponderance of questions of state law which would have to be interpreted and applied in order to grant the relief sought. . . . is so great that the federal question involved . . . is really negligible in comparison.” At 214. But we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it “is not uncommon for federal courts to fashion federal law where federal rights are concerned.” *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 457 (1957). In addition, the fact that questions of state law must be decided does not change the character of the right; it remains federal. As Chief Justice Marshall said in *Osborn v. Bank of United States*, 9 Wheat. 738 (1824):

“If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn . . . .” At 819–820 of 9 Wheat.

Moreover, if federal jurisdiction were limited to the granting of declaratory relief, victims of deceptive proxy statements would be obliged to go into state courts for remedial relief. And if the law of the State happened to attach no responsibility to the use of misleading proxy

statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victim might face . . . might well prove insuperable to effective relief.

#### IV.

Our finding that federal courts have the power to grant all necessary remedial relief is not to be construed as any indication of what we believe to be the necessary and appropriate relief in this case. We are concerned here only with a determination that federal jurisdiction for this purpose does exist. Whatever remedy is necessary must await the trial on the merits.

#### Notes

1. *Establishing federal question jurisdiction.* In *Borak*, the Supreme Court found an implied cause of action not in order to provide an immediate resolution to the dispute but in order to establish federal jurisdiction over the case. Implied private causes of action, a matter of minor importance in prior centuries, had gained procedural significance due to the unusual trappings of American federalism. Since the establishment of federal question jurisdiction in 1875, parties have been able to access federal courts when the case arises out of federal law. See 28 U.S.C. § 1331.

2. *Federal implied causes of action.* Federal implied causes of action have a relatively short history. The Supreme Court first recognized an implied cause of action in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916) (a personal injury case authorizing private parties to sue under the Safety Appliance Act of 1910). The modern wave of implied federal cause of action cases began after the onslaught of New Deal legislation, when the Court liberally authorized private causes of action under the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940. See John A. Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783, 789–804 (1980). *Borak* exemplifies that trend.

A turning point in implied cause of action cases began with *Cort v. Ash*, 422 U.S. 66 (1975). *Cort* established a four-factor test for determining whether a federal statute implied a private cause of action: (1) is the plaintiff a member of the class that the statute was meant to benefit, (2) are there indications of legislative intent, (3) would an implied cause of action be consistent with the underlying purpose of the statute, and (4) is this an area traditionally of state or of federal concern. The first three factors were adopted and continue to be used by many state courts.

In subsequent years, the Supreme Court recharacterized *Cort*'s four factors in such a way as to make them less hospitable to implied private causes of action. In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court gave a privileged place to the second *Cort* factor, basing these decisions on whether or not Congress intended to create a private cause of action.

The Court continued on this path in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

***Alexander v. Sandoval*, 532 U.S. 275 (2001)**

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

I

The Alabama Department of Public Safety (Department), of which petitioner James Alexander is the director, accepted grants of financial assistance from the United States Department of Justice (DOJ) and Department of Transportation (DOT) and so subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.* Section 601 of that Title provides that no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability,” 42 U.S.C. § 2000d–1, and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .” 28 CFR § 42.104(b)(2) (2000).

The State of Alabama amended its Constitution in 1990 to declare English “the official language of the state of Alabama.” Amdt. 509. Pursuant to this provision and, petitioners have argued, to advance public safety, the Department decided to administer state driver’s license examinations only in English. Respondent Sandoval, as representative of a class, brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The District Court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers. Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed. Both courts rejected petitioners’ argument that Title VI did not provide respondents a cause of action to enforce the regulation.

....

II

.... Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (remedies available are those “that Congress enacted into law”). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Statutory intent on this latter point is determinative. See, e.g., *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 812, n. 9 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, e.g., *Massachusetts Mut. Life Ins. Co. v.*

*Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica Mortgage Advisors, Inc. v. Lewis*, *supra*, at 23; *Touche Ross & Co. v. Redington*, *supra*, at 575–576. “Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.” *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court’s statement in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose” expressed by a statute. We abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975)—which itself interpreted a statute enacted under the *ancien regime*—and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*’s method for discerning and defining causes of action. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, [511 U.S. 164, 188 (1994)]; *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 291–293 (1993); *Virginia Bankshares, Inc. v. Sandberg*, *supra*, at 1102–1103; *Touche Ross & Co. v. Redington*, *supra*, at 576–578. Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.

Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort v. Ash* have given “dispositive weight” to the “expectations” that the enacting Congress had formed “in light of the ‘contemporary legal context.’” . . . We have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, see *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991), legal context matters only to the extent it clarifies text.

We therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI. Section 602 authorizes federal agencies “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d–1. . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to “effectuat[ing]” rights already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection. Statutes that focus on the person regulated rather than the individuals protected create “no implication of an intent to confer rights on a particular class of persons.” *California v. Sierra Club*, 451 U.S. 287, 294 (1981). Section 602 is yet a step further removed: It focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754 (1981), § 602 is “phrased as a directive to federal agencies engaged in the distribution of public funds,” *id.*, at 772. When this is true, “[t]here [is] far less reason to infer a private remedy in favor of individual persons,” *Cannon v. University of Chicago*, [441 U.S. 667, 690–691 (1979)]. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action.

Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. Section 602 empowers agencies to enforce their regulations either by terminating funding to the “particular program, or part thereof,” that has violated the regulation or “by any other means



authorized by law,” 42 U.S.C. § 2000d–1. No enforcement action may be taken, however, “until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.” *Ibid.* And every agency enforcement action is subject to judicial review. § 2000d–2. If an agency attempts to terminate program funding, still more restrictions apply. The agency head must “file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action.” § 2000d–1. And the termination of funding does not “become effective until thirty days have elapsed after the filing of such report.” *Ibid.* Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created *outside* of § 602, they tend to contradict a congressional intent to create privately enforceable rights through § 602 itself. The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. See, e.g., *Karahalios v. Federal Employees*, 489 U.S. 527, 533 (1989); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93–94 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S., at 19–20. Sometimes the suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff “a member of the class for whose benefit the statute was enacted”) suggest the contrary. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S., at 145; see *id.*, at 146–147. And as our Rev. Stat. § 1979, 42 U.S.C. § 1983, cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights. See, e.g., *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19–20 (1981). In the present case, the claim of exclusivity for the express remedial scheme does not even have to overcome such obstacles. The question whether § 602’s remedial scheme can overbear other evidence of congressional intent is simply not presented, since we have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.

....

Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists. . . .

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

.... According to [the majority’s] analysis, the recognition of an implied right of action when the text and structure of the statute do not absolutely compel such a conclusion is an act of judicial self-indulgence. As much as we would like to help those disadvantaged by discrimination, we must resist the temptation to pour ourselves “one last drink.” To do otherwise would be to “ventur[e] beyond Congress’s intent.”

Overwrought imagery aside, it is the majority’s approach that blinds itself to congressional intent. While it remains true that, if Congress intends a private right of action to

support statutory rights, “the far better course is for it to specify as much when it creates those rights,” *Cannon*, 441 U.S. at 717, its failure to do so does not absolve us of the responsibility to endeavor to discern its intent. In a series of cases since *Cort v. Ash*, we have laid out rules and developed strategies for this task.

The very existence of these rules and strategies assumes that we will sometimes find manifestations of an implicit intent to create such a right. Our decision in *Cannon* [holding that Title IX of the Education Amendments of 1972 authorized private causes of action for damages] represents one such occasion. As the *Cannon* opinion iterated and reiterated, the question whether the plaintiff had a right of action that could be asserted in federal court was a “question of statutory construction,” 441 U.S. at 688, not a question of policy for the Court to decide. Applying the *Cort v. Ash* factors, we examined the nature of the rights at issue, the text and structure of the statute, and the relevant legislative history. Our conclusion was that Congress unmistakably intended a private right of action to enforce both Title IX and Title VI. Our reasoning—and, as I have demonstrated, our holding—was equally applicable to intentional discrimination and disparate-impact claims.

Underlying today’s opinion is the conviction that *Cannon* must be cabined because it exemplifies an “expansive rights-creating approach.” *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 77 (1992) (SCALIA, J., concurring in judgment). But, as I have taken pains to explain, it was Congress, not the Court, that created the cause of action, and it was the Congress that later ratified the *Cannon* holding in 1986 and again in 1988.

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. . . .

Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum. As the respondents and the Government suggest, and as we have held several times, the objective manifestations of congressional intent to create a private right of action must be measured in light of the enacting Congress’ expectations as to how the judiciary might evaluate the question. See *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–379 (1982); *Cannon*, 441 U.S., at 698–699.

At the time Congress was considering Title VI, it was normal practice for the courts to infer that Congress intended a private right of action whenever it passed a statute designed to protect a particular class that did not contain enforcement mechanisms which would be thwarted by a private remedy. See *Merrill Lynch*, 456 U.S., at 374–375 (discussing this history). Indeed, the very year Congress adopted Title VI, this Court specifically stated that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.” *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress’ intent—evidence the majority declines to consider.

. . . .  
I respectfully dissent.

## Notes

1. *After Sandoval*. The immediate impact of *Sandoval*'s limiting of Title VI has been felt in areas as far-flung as environmental advocacy. See Lisa S. Core, *Alexander v. Sandoval: Why A Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENVTL. AFF. L. REV. 191 (2002). The *Sandoval* Court's emphasis on textual support for congressional intent has also restricted federal courts' ability to find implied private causes of action in other statutes. See Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, ARIZ. ST. L.J. 816, 856–66 (2002).

2. *Separation of powers*. The *Sandoval* opinion elaborates on an idea Justice Scalia had previously expressed in *Thompson v. Thompson* of “the necessity of an actual congressional intent to create a private right of action.” 484 U.S. 174, 188 (1988) (Scalia, J., concurring). In both opinions, Scalia's concern lies not with the policy objectives of the statutes but with the role of the federal judiciary in U.S. democracy more generally. He regards federal judicial creation of private causes of action as unconstitutional because in so doing the courts assume a legislative function, which goes against the separation of powers. Viewed in this light, any federal court's finding of implied causes of action without evidence of legislative intent is unconstitutional—“no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Sandoval*, 532 U.S. at 287.

3. *Common-law exception*. Justice Scalia did not reject all judicial findings of implied causes of action. He allowed that this “may be a proper function for common-law courts, but not for federal tribunals.” *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment)). By “common-law courts,” Scalia presumably meant state courts of general jurisdiction. His point here is that the federal Constitution constrains the ability of federal courts, but not state courts, to make substantive law. Does this contention create divergent approaches for the interpretation of federal and state statutes for purposes of identifying a private cause of action?

4. *Legislating for Litigation*. A recent study of federal regulatory legislation reveals that Congress writes statutory provisions for private causes of action with greater specificity than it does for bureaucratic or hybrid implementation regimes. See Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CAL. L. REV. 1529, 1574–75 (2018). To illustrate his point, Farhang considers the varied implementation schemes contained in the Civil Rights Act of 1964, including lawsuits by the Attorney General (Title I), rulemaking and sanctions by agencies (Title VI), and lawsuits by both the Attorney General and private individuals (Title VII). He compares the specificity of Title VII's litigation provision, which allows for private causes of action, with the specificity of the Civil Rights Act's other provisions to demonstrate Congress' heightened attentiveness when elaborating private causes of action. Farhang argues that Congress legislates in this manner due to its awareness of the judiciary's relative lack of resources for policymaking and of its relative unaccountability to political processes.

5. *The False Claims Act.* One interesting model for public and private enforcement is the False Claims Act's (FCA) *qui tam* provisions, which permit private persons (styled as "relators") to bring civil actions against private parties who defraud the federal government. In return, relators receive 15% to 25% of the proceeds of the action or settlement or 25% to 30% if the government chooses not to pursue the litigation. 31 U.S.C. § 3730(b)–(d). Critics of these *qui tam* provisions claim that inefficient, specialized relator-side firms increasingly dominate *qui tam* litigation. Others argue that these firms have positive effects on the system because they enjoy higher success rates and expose larger frauds than less experienced firms. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1248–50 (2012).

### **5. Implied Private Causes of Action in the Federal Constitution**

In addition to state and federal statutes, some constitutional provisions have been held to imply private causes of action for damages. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court ruled that federal officials may be sued in their personal capacity for damages caused by constitutional violations.

#### ***Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)**

Mr. Justice BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that:

‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .’

. . . . This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause. Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought \$15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action. The Court of Appeals, one judge concurring specially, affirmed on that basis. We granted certiorari. We reverse.

## I

. . . . [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And ‘where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.’ *Bell v. Hood*, 327 U.S. [678, 684 (1946)].

. . . . That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900); J. Landynski, *Search and Seizure and the Supreme Court* 28 et seq. (1966); N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution* 43 et seq. (1937); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 8—33 (1968); cf. *West v. Cabell*, 153 U.S. 78 (1894); *Lammon v. Feusier*, 111 U.S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But ‘it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.’ *Bell v. Hood*, 327 U.S., at 684. The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of ‘federal fiscal policy,’ as in *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that ‘the United States (was) the party plaintiff to the suit. And the United States has power at any time to create the liability.’ *Id.*, at 316; see *United States v. Gilman*, 347 U.S. 507 (1954). Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963). Finally, we cannot accept respondents’ formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *Jacobs v. United States*, 290 U.S. 13, 16 (1933). ‘The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.’ *Marbury v. Madison*, 1 Cranch 137, 163 (1803). Having concluded that petitioner’s complaint states a cause of action under the Fourth Amendment, we hold that

petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

....

Judgment reversed and case remanded.

***Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)**

Justice KENNEDY delivered the opinion of the Court.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some of the aliens who had been detained filed suit, leading to the cases now before the Court.

.... Seeking to invoke the Court's decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

....

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is “who should decide” whether to provide for a damages remedy, Congress or the courts? *Bush* [*v. Lucas*], 462 U.S. [367, 380 (1983)].

The answer most often will be Congress. When an issue “involves a host of considerations that must be weighed and appraised,” it should be committed to “those who write the laws” rather than “those who interpret them.” *Ibid.* (quoting *United States v. Gilman*, 347 U.S. 507, 512–513 (1954)). In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if “the public interest would be served” by imposing a “new substantive legal liability.” *Schweiker* [*v. Chilicky*], 487 U.S. 412, 426–427 (1988)] (quoting *Bush, supra*, at 390). As a result, the Court has urged “caution” before “extending *Bivens* remedies into any new context.” [*Correctional Services Corp. v. Malesko*, [534 U.S. 61, 74 (2001)]]. The Court's precedents now make clear that a *Bivens*

remedy will not be available if there are “special factors counselling hesitation in the absence of affirmative action by Congress.” *Carlson* [v. *Green*], 446 U.S. [14, 18 (1980)] (quoting *Bivens* [v. *Six Unknown Fed. Narcotics Agents*], 403 U.S. [388, 396 (1971)]).

This Court has not defined the phrase “special factors counselling hesitation.” The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a “special factor counselling hesitation,” a factor must cause a court to hesitate before answering that question in the affirmative.

....

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not “a proper vehicle for altering an entity’s policy.” *Malesko*, *supra*, at 74. Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. “The purpose of *Bivens* is to deter the officer.” [*FDIC v.*] *Meyer*, 510 U.S. [471, 485 (1994)]. *Bivens* is not designed to hold officers responsible for acts of their subordinates. See [*Ashcroft v.*] *Iqbal*, 556 U.S. [662, 676 (2009)] (“Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*”).

Even if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties. See *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 382 (2004) (noting “the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties”).

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. See *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979) (noting that disclosure of Executive Branch documents “could inhibit the free flow of advice, including analysis, reports, and expression of opinion within an agency”). Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. See *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (recognizing that “[e]ven when a branch does not arrogate power to itself ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties” (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))). These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. See *Cheney*, *supra*, at 385 (noting that “special considerations control” when a case implicates “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications”).

In addition to this special factor . . . respondents' detention policy claims challenge more than standard "law enforcement operations." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. . . .

The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than "inadvertent." *Schweiker*, 487 U.S., at 423. This possibility counsels hesitation "in the absence of affirmative action by Congress." *Bivens*, 403 U.S., at 396.

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," *Schweiker*, *supra*, at 425, and some of that interest has been directed to the conditions of confinement at issue here. . . . Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U.S., at 426.

. . . .

It is of central importance, too, that this is not a case like *Bivens* . . . in which "it is damages or nothing." *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment). . . . Respondents . . . challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. . . .

The judgment of the Court of Appeals is reversed.

## Notes

1. *After Bivens*. The Court expanded *Bivens* liability to violations of the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228 (1979), and the Eighth Amendment, see *Carlson v. Green*, 446 U.S. 14 (1980). But *Bivens*-style implied constitutional causes of action reached their high-water mark with *Carlson*. As in the implied statutory causes of action cases, the Court has been much more reluctant in recent decades to find implied private actions in the Constitution; the justices have not extended liability to new defendants or new constitutional claims since 1980.

For a discussion of *Bivens* and its consequences for official liability, see Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010). Plaintiffs may sue state and local officials for similar constitutional violations under a federal statute that explicitly authorizes private causes of action. See 42 U.S.C. § 1983.

2. *National security*. The "special factors" test for *Bivens* claims is not an enumerated list of exceptions. Instead, this test substitutes generally for the idea that courts should weigh various concerns against the possible benefits of a private cause of action for damages arising



under the Constitution. The special factor of national security considered in *Ziglar* originated in the circuit courts in the aftermath of 9/11, when the courts worried that *Bivens* claims might hinder the executive's counter-terrorism capabilities. See *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009); *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009). Stephen I. Vladeck criticizes these decisions for incorporating national security considerations not only through case-by-case analysis of whether judicial deference might be wise but also at the threshold question of whether there is a private cause of action at all. *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1313 (2012). This arguably undue emphasis on national security has effectively barred *Bivens* claims, especially now that the Supreme Court has spoken on the issue. See Amanda McGlaun, *Meshal v. Higgenbotham: Has National Security Killed Bivens?*, 25 TUL. J. INT'L & COMP. L. 481 (2017); Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153 (2018).

3. *Separation of powers*. In the *Bivens* line of cases, dissenting opinions by Justices Burger and Rehnquist raised the same concerns as Justice Scalia did in the majority opinion of *Sandoval*, arguing that separation of powers requires Congress to enact statutes in order for the federal judiciary to award damages. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411–12 (1971) (BURGER, J., dissenting). (arguing the Court should “preserve the important values of the doctrine of separation powers . . . by recommending a solution to the Congress” instead of finding a private cause of action). Susan Bandes interrogates this application of the separation of powers doctrine, contending that “the separation of powers principles upon which the *Bivens* critics seek to rely instead support the need for the *Bivens* remedy.” *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 294 (1995). How might the ability of courts to adjudicate private causes of actions for damages arising under the Constitution uphold democratic principles such as the separation of powers?

## E. Proof of Negligence

It is one thing to understand the basic elements of the negligence cause of action. But in practice, a plaintiff needs to prove her case, too. The question of what precisely it means to meet a plaintiff's burden of proof turns out to be a tricky one. Consider Judge Posner's opinion in *Howard v. Wal-Mart*:

### 1. The Basic Problem

***Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358 (7th Cir. 1998)**

POSNER, C.J. We have before us a charming miniature of a case. In 1993 Dolores Howard, age 65, slipped and fell in a puddle of liquid soap that someone—no one knows who—had spilled on the floor of the aisle in a Wal-Mart store in Cahokia, Illinois. . . . The jury awarded her \$18,750. Wal-Mart has appealed out of fear (its lawyer explained to us at argument) of the precedential effect in future slip-and-fall cases of the judge's refusal to grant judgment for Wal-Mart as a matter of law. We don't tell people whether to exercise their rights

of appeal, but we feel impelled to remind Wal-Mart and its lawyer that a district court's decision does not have precedential authority . . . let alone a jury verdict or an unreported order by a magistrate judge . . . refusing on unstated grounds to throw out a jury's verdict.

The issue on appeal is whether there was enough evidence of liability to allow the case to go to a jury, and, specifically, whether there was enough evidence that an employee rather than a customer spilled the soap. . . . Even if a customer spilled it, Wal-Mart could be liable if it failed to notice the spill and clean it up within a reasonable time. . . . It has a legal duty to make its premises reasonably safe for its customers. But there is no evidence with regard to how much time elapsed between the spill and the fall; it may have been minutes. Wal-Mart is not required to patrol the aisles continuously, but only at reasonable intervals. . . . So Howard could prevail only if there was enough evidence that an employee spilled the soap to satisfy the requirement of proving causation by a preponderance of the evidence.

The accident occurred in the morning, and morning is also when the employees stock the shelves. The defendant presented evidence that the puddle of liquid soap on which Howard slipped was about the diameter of a softball and was in the middle of the aisle. Howard testified that it was a large puddle on the right side of the aisle and "when I got up, I had it all over me, my coat, my pants, my shoes, my socks." An employee could have dropped one of the plastic containers of liquid soap on the floor while trying to shelve it and the container could have broken and leaked. Or the cap on one of the containers might have come loose. Or the containers might have been packed improperly in the box from which they were loaded onto the shelves and one of them might have sprung a leak. Alternatively, as Wal-Mart points out, a customer, or a customer's child, might have knocked a container off the shelf. A curious feature of the case, however, is that the container that leaked and caused the spill was never found. Howard argues, not implausibly, that a customer who had come across a damaged container or had damaged it would be unlikely to purchase it, having lost part of its contents—a large part, if Howard's testimony was believed; and the jury was entitled to believe it—or indeed to put it in her shopping cart and risk smearing her other purchases with liquid soap. In light of this consideration, we cannot say that the jury was irrational in finding that the balance of probabilities tipped in favor of the plaintiff, though surely only by a hair's breadth.

Is a hair's breadth enough, though? Judges, and commentators on the law of evidence, have been troubled by cases in which the plaintiff has established a probability that only minutely exceeds 50 percent that his version of what happened is correct. The concern is illuminated by the much-discussed bus hypothetical. Suppose that the plaintiff is hit by a bus, and it is known that 51 percent of the buses on the road where the plaintiff was hit are owned by Bus Company A and 49 percent by Company B. The plaintiff sues A and asks for judgment on the basis of this statistic alone (we can ignore the other elements of liability besides causation by assuming they have all been satisfied, as in this case); he tenders no other evidence. If the defendant also puts in no evidence, should a jury be allowed to award judgment to the plaintiff? The law's answer is "no." See Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1050-51 (1988), and cases cited there. Our hypothetical case is a variant of *Smith v. Rapid Transit*, 317 Mass. 469, 58 N.E.2d 754 (1945), where the court held that it "was not enough" "that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident." *Id.* at 755. . . .

*Smith* . . . involve[s] explicitly probabilistic evidence. But as all evidence is probabilistic in the sense of lacking absolute certainty, all evidence can be expressed in probabilistic terms, and so the problem or dilemma presented by those cases is general. The eyewitness might say that he was “99 percent sure” that he had seen the defendant, and jurors appraising his testimony might reckon some different probability that he was correct. What powers the intuition that the plaintiff should lose the bus case is not the explicitly probabilistic nature of the evidence, but the evidentiary significance of missing evidence. If the 51/49 statistic is the plaintiff’s only evidence, and he does not show that it was infeasible for him to obtain any additional evidence, the inference to be drawn is not that there is a 51 percent probability that it was a bus owned by A that hit the plaintiff. It is that the plaintiff either investigated and discovered that the bus was actually owned by B (and B might not have been negligent and so not liable even if a cause of the accident, or might be judgment-proof and so not worth suing), or that he simply has not bothered to conduct an investigation. If the first alternative is true, he should of course lose; and since it may be true, the probability that the plaintiff was hit by a bus owned by A is less than 51 percent and the plaintiff has failed to carry his burden of proof. If the second alternative is true—the plaintiff just hasn’t conducted an investigation—he still should lose. A court shouldn’t be required to expend its scarce resources of time and effort on a case until the plaintiff has conducted a sufficient investigation to make reasonably clear that an expenditure of public resources is likely to yield a significant social benefit. This principle is implicit in the law’s decision to place the burden of producing evidence on the plaintiff rather than on the defendant. Suppose it would cost the court system \$10,000 to try even a barebones case. This expenditure would be worthless from the standpoint of deterring accidents should it turn out that the bus was owned by B. It makes sense for the court to require some advance investigation by the plaintiff in order to increase the probability that a commitment of judicial resources would be worthwhile.

These objections to basing a decision on thin evidence do not apply to the present case. Not only is there no reason to suspect that the plaintiff is holding back unfavorable evidence; it would have been unreasonable, given the stakes, to expect her to conduct a more thorough investigation. This is a tiny case; not so tiny that it can be expelled from the federal court system without a decision, but so tiny that it would make no sense to try to coerce the parties to produce more evidence, when, as we have said, no inference can be drawn from the paucity of evidence that the plaintiff was afraid to look harder for fear that she would discover that a customer and not an employee of Wal-Mart had spilled the soap.

We conclude, therefore, that the jury verdict must stand. And, Wal-Mart, this decision, a reported appellate decision, unlike the decision of the district court, will have precedential authority!

Affirmed.

### *Notes*

1. *Statistical evidence in the common law.* Why is it not enough for plaintiffs to prove their case using statistical evidence that establishes a “more likely than not” probability that the defendant was negligent?

According to Professor Daniel Shaviro, courts refuse to rule for plaintiffs in such cases for three reasons. First, relying on such evidence “makes the unjust punishment of innocent persons certain, rather than probable,” effectively allowing such defendants “to be sacrificed for general social benefit.” Daniel Shaviro, Commentary, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 535 (1989) (emphasis omitted). Second, such evidence “violates the principle that defendants should be treated as unique individuals.” *Id.* at 537 (emphasis omitted). Third, “defendants should not be held . . . liable absent ‘actual belief’ by the jury, and such belief cannot be derived from statistical-probability evidence.” *Id.* at 539. Professor Laurence Tribe similarly argues that courts’ reliance on statistical evidence “dehumaniz[es] . . . justice,” directing jurors to focus on defendants’ liability, rather than innocence, and “distort[ing] . . . important values . . . that society means to express or to pursue through . . . legal trials.” Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1375, 1330 (1971). For more on statistical evidence in trials, see *infra* Chapter 6, Causation.

Recall, however, the case of *Martin v. Herzog*, in which Mrs. Martin could not recover damages after her husband was killed by a car that crossed the median simply because their buggy was not equipped with a light. The rule of per se negligence may forbid courts from taking into account some of the values that Professor Tribe and others might think important. A rule characterizing certain conduct as per se negligent is a kind of categorical judgment about the class of cases covered by the rule. In this respect, rules do not treat parties as “unique individuals” (in Shaviro’s terms). Indeed, rule-based adjudication that leaves out the universe of extenuating circumstances makes the unjust treatment of innocent persons a statistical certainty. Standards (as opposed to rules) allow for highly individualized adjudication of the sort Tribe and Shaviro seem to have in mind: adjudication that accounts for the myriad individuating circumstances of any one case. Why isn’t the use of rules, as opposed to standards, perceived to be as objectionable as statistical proof?

Note, too, that of course insurers use statistics all the time to generalize about the riskiness of certain groups. Even if a teenage boy is, himself, incredibly cautious, and even if detailed inquiry into his behavior would produce a low risk assessment, he will nevertheless almost certainly face a higher insurance premium than a middle-aged woman. Professor Frederick Schauer argues that the stereotype of teenage boys being riskier drivers is a “nonspurious” generalization—i.e. there is sound empirical evidence that a higher percentage of teenage boys drive recklessly than other groups—and therefore should be fair to rely on as insurance companies evaluate premiums and risk. FREDERICK SCHAUER, *PROFILES, PROBABILITIES & STEREOTYPES*, 15 (2003). Schauer goes on to argue that empirically sound generalizations are often superior ways to organize decision-making than the particularized evaluations defended by Professor Tribe. Not only might a generalized decision-making regime make fewer errors in the long run, it may also “serve other important goals and embody other important values,” such as efficiency and objectivity. *Id.* at 24.

While the teenage driver example of the use of the “reasonable person” may seem acceptable, what about charging homebuyers a higher interest rate on their mortgage because their buyers in their low-income neighborhood are statistically more likely to default?

2. *Burdens of production, burdens of persuasion.* The burden of proof consists of the burden of production and the burden of persuasion. The burden of production requires a party,

initially the plaintiff, to produce “sufficient evidence to support a finding in favor of that [party].” *Bruner v. Office of Pers. Mgmt.*, 996 F.2d 290, 293 (Fed. Cir. 1993). Once the plaintiff has met her burden of production, the defendant may be required to offer evidence showing otherwise or calling into question a material fact lest the defendant be defeated by a motion for summary judgment. *Id.* Not all prima facie cases by the plaintiff—cases presenting sufficient evidence to support a finding in the plaintiff’s favor—will support a plaintiff’s summary judgment motion absent evidence offered by the defendant. But some will. And in this sense, although the burden of production starts with the plaintiff, we can think of it as shifting back and forth during a proceeding whenever either party develops evidence that would require a reasonable trier of fact to find for that party absent an additional showing of contrary evidence. The burden of persuasion, by contrast, generally “rests with one party throughout the case.” *Rivera v. Philip Morris, Inc.*, 209 P.3d 271, 275 (Nev. 2009). To meet the burden of persuasion, a party must “produce sufficient evidence to convince a judge that a fact has been established.” *Id.* In civil cases, the threshold is a preponderance of the evidence. The party bearing the burden of persuasion, typically the plaintiff, at least as to the prima facie case, bears the risk that the evidence is in perfect equipoise. But the plaintiff can win if the jury decides that their version of the events in question is just that much more likely than their adversary’s version.

3. *Status Quo Bias?* One view is that the basis for this basic feature of virtually all civil litigation is a bias for the status quo. According to a leading treatise on the law of evidence, for example, pleading and proof burdens are usually assigned to the plaintiff because the plaintiff is the one seeking “to change the present state of affairs” and therefore “naturally should be expected to bear the risk of failure of proof or persuasion.” JOHN W. STRONG, MCCORMICK ON EVIDENCE § 337, at 412 (5th ed., 1999). Is this a good argument for the initial allocation? What other arguments might be made?

## 2. *Res Ipsa Loquitur*

The problem of cases in which proof is difficult to establish is a longstanding one, of course. Courts have used the doctrine of *res ipsa loquitur* (“the thing speaks for itself”) to assign liability in such cases. Consider the two cases and notes below:

### ***Byrne v. Boadle*, 159 Eng. Rep. 299 (Court of Exchequer and Exchequer Chamber, 1863)**

At the trial . . . , the evidence adduced on the part of the plaintiff was as follows:—A witness named Critchley said: “On the 18th July, I was in Scotland Road, on the right side going north, defendant’s shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant’s house and shop, and knocked the plaintiff down. . . . I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident.” The plaintiff said: “On approaching Scotland Place and defendant’s shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight.” (He then described his sufferings.) “I saw the path clear. I did not see any cart opposite defendant’s shop.” Another witness said: “I saw a

barrel falling. I don't know how, but from defendant's [shop]." . . . It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him. . . .

Littler, in the present term, obtained a rule nisi to enter the verdict for the plaintiff, on the ground of misdirection of the learned Assessor in ruling that there was no evidence of negligence on the part of the defendant; against which Charles Russell now shewed cause. First, there was no evidence to connect the defendant or his servants with the occurrence. It is not suggested that the defendant himself was present, and it will be argued that upon these pleadings it is not open to the defendant to contend that his servants were not engaged in lowering the barrel of flour. But the declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour, that by and through the negligence of the defendant, by his said servants, it fell upon the plaintiff. That is tantamount to an allegation that the injury was caused by the defendant's negligence, and it is competent to him, under the plea of not guilty, to contend that his servants were not concerned in the act alleged. The plaintiff could not properly plead to this declaration that his servants were not guilty of negligence, or that the servants were not his servants. If it had been stated by way of inducement that at the time of the grievance the defendant's servants were engaged in lowering the barrel of flour, that would have been a traversable allegation, not in issue under the plea of not guilty. Then, assuming the point is open upon these pleadings, there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his servant, or it may be that a stranger was engaged to do it without the knowledge or authority of the defendant. [Pollock, C. B. The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not it was competent to the defendant to prove it.] Surmise ought not to be substituted for strict proof when it is sought to fix a defendant with serious liability. The plaintiff should establish his case by affirmative evidence.

Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evidence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. [Pollock, C. B. There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.] . . . [Bramwell, B. No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence.] The law will not presume that a man is guilty of a wrong. It is consistent with the facts proved that the defendant's servants were using the utmost care and the best appliances to lower the barrel with safety. Then why should the fact that accidents of this nature are sometimes caused by negligence raise any presumption against the defendant? There are many accidents from which no presumption of negligence can arise. [Bramwell, B. Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit

to tell the jury.] Unless a plaintiff gives some evidence which ought to be submitted to the jury, the defendant is not bound to offer any defence. The plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation. [Pollock, C. B. I have frequently observed that a defendant has a right to remain silent unless a prima facie case is established against him. But here the question is whether the plaintiff has not shewn such a case.] In a case of this nature, in which the sympathies of a jury are with the plaintiff, it would be dangerous to allow presumption to be substituted for affirmative proof of negligence.

POLLOCK, C.B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B. I am of the same opinion.

CHANNELL, B. I am of the same opinion. The first part of the rules assumes the existence of negligence, but takes this shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and therefore prima facie he is responsible. Then the question is whether there was any evidence of negligence, not a mere scintilla, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that the rule ought to be absolute to enter the verdict for the plaintiff.

PIGOTT, B. I am of the same opinion.

Rule absolute.

***Grajales-Romero v. American Airlines, Inc.*, 194 F.3d 288 (1st Cir. 1999)**

LIPEZ, J.

. . . American Airlines, Inc. appeals from a judgment of \$150,000 in favor of Ananias Grajales-Romero, who was injured by a collapsing check-in counter sign at an airport in St. Kitts. . . . American . . . claims that there was insufficient evidence of negligence to sustain the jury verdict in this case. . . .

I. Factual background

We present the facts as a jury might have found them, consistent with the record but in the light most favorable to the verdict. On July 29, 1994, Plaintiff Ananias Grajales-Romero (“Grajales”) was waiting in line at an American Eagle 1 check-in counter in the St. Kitts airport for a return flight to San Juan, Puerto Rico. His acquaintance Terry Connor had accompanied him to the check-in counter. Connor attempted to load Grajales’s luggage onto the weigh-in scale adjacent to the check-in counter. In doing so, he grabbed onto an ashtray built into the countertop to gain some leverage in lifting the luggage. The countertop was attached by a hinge to the vertical front facing of the counter. When Connor pulled on the ashtray, the countertop came loose, and pivoted forward on its hinge. A metal signpost and sign were attached to the countertop, and this signpost and sign also pivoted forward with the countertop. As this was happening, plaintiff Grajales was looking down at his ticket. The signpost and/or sign struck Grajales on the top of his head, opening up a two-inch long wound. Although he did not lose consciousness or fall to the floor, he was taken to the St. Kitts hospital, where he received four stitches. After the accident, Grajales experienced neck pains, headaches, and forgetfulness. He was diagnosed by a neurologist as suffering from post-concussion syndrome and a cervical sprain secondary to the accident.

Grajales filed a complaint against American, AMR Corp., and AMR Eagle, Inc. in the federal district court for the District of Puerto Rico on July 28, 1995. . . . The court refused to give an instruction on the doctrine of *res ipsa loquitur* requested by Grajales, and refused several instructions offered by American. The jury found American liable in the amount of \$150,000. The court issued its judgment accordingly. . . . Both parties appealed. . . .

[Part II is omitted]

III. Sufficiency of the Evidence of Negligence

(a) *Res Ipsa Loquitur*

American states that plaintiff produced no evidence—either through customary airline practices, past practices, or expert testimony—to establish a standard of care by which American should have operated. Further, plaintiff presented no evidence regarding the



inspection, maintenance, and operation of the ticket counter, and made no attempt to explain in what manner any such conduct might have constituted negligence.

From these assertions, and the fact that the court refused to give the jurors Grajales's proposed *res ipsa loquitur* instruction, American argues that "no jury could reasonably conclude that American exercised less than reasonable care from the unexplained fact that an accident occurred."

We agree with American that Grajales did not produce either direct or circumstantial evidence explaining how American violated its duty of care. Grajales offered no evidence, for example, suggesting that the ticket counter had been improperly designed, installed, maintained, or operated. Instead, Grajales relied on the fact of an unexpected occurrence, arguing that the counter top would not have fallen over and struck him unless American had violated its duty of care. The Supreme Court of Puerto Rico has ruled that the fact of an unexplained occurrence cannot establish an inference of negligence unless the conditions of *res ipsa loquitur* are satisfied: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of defendant; [and] (3) it must not be due to any voluntary action on the part of plaintiff." Given the lack of direct or other circumstantial evidence on American's violation of its duty of care, we must consider whether the conditions of *res ipsa loquitur* were satisfied here.

We conclude that they were. Indeed, the first two elements of *res ipsa loquitur* were easily established. A reasonable jury could have concluded that the accident was of a kind which "ordinarily does not occur in the absence of someone's negligence," and that the accident was "caused by an . . . instrumentality within the exclusive control of [the] defendant."

The *res ipsa loquitur* requirement that the accident not be caused by any "voluntary action" on the part of the plaintiff posed a more difficult challenge for Grajales. American argues that a *res ipsa loquitur* inference was unreasonable because the evidence indicates that plaintiff's acquaintance Connor took the "voluntary action" of pulling on the counter-top. Even if Connor's actions could be attributed to Grajales, American's argument misses its mark. The test is not whether the plaintiff took any voluntary action, but whether that voluntary action can be blamed for the accident. . . . The evidence here was sufficient to support a finding that Grajales and his colorable agent Connor were blameless, having done nothing more than "attempt to [use the instrumentality] in the ordinary manner[.]" So long as the jurors could have concluded from the evidence that Connor's use of the counter for leverage constituted a normal usage of the counter by a customer, the jury could have inferred American's negligence.

While there was sufficient evidence on each of the conditions of *res ipsa loquitur*, the district court did not provide the jury with a *res ipsa loquitur* instruction, as Grajales had requested. We must therefore consider an argument implicit in American's challenge to the sufficiency of the evidence of negligence—that a jury verdict cannot be justified on the basis of *res ipsa loquitur* when the jurors were never instructed on the doctrine.

Puerto Rico's statement of the three elements of *res ipsa loquitur* is derived from the first edition of a well-known treatise on evidence. See W. Page Keeton et al., *Prosser and Keeton on Torts* 244 (Lawyer's 5th ed. 1984). That origin confirms that a *res ipsa loquitur*

instruction explains to the jury a specific form of permissible inference from circumstantial evidence of negligence. Given this purpose, jurors who can draw the inference of negligence even without a *res ipsa loquitur* instruction should be permitted to do so.

In this case, the jurors were adequately instructed on inference and circumstantial evidence, and Grajales made the specific inference contemplated by a *res ipsa loquitur* instruction the linchpin of his theory of the case. Given that there was sufficient evidence on each of the *res ipsa loquitur* requirements, the jurors were entitled to make the *res ipsa loquitur* inference even in the absence of a specific instruction. . . .

Affirmed.

### Notes

1. *The elements of res ipsa.* Under what conditions can plaintiffs establish *res ipsa loquitur*? According to many courts, the doctrine of *res ipsa loquitur* requires proof of “casualty of a kind (1) that does not ordinarily occur absent negligence; (2) that was caused by an instrumentality exclusively in the defendant’s control; and (3) that was not caused by an act or omission of the plaintiff.” See, e.g., *Holzhauer v. Saks & Co.*, 697 A.2d 89, 92-93 (Md. 1997). Courts have used the second element to preclude *res ipsa loquitur* claims when parties other than the defendant can control the instrumentality causing injury to the plaintiff. For example, in *Holzhauer*, the Maryland Court of Appeals precluded a *res ipsa loquitur* claim from a plaintiff who was injured when a mall escalator stopped abruptly. Because “hundreds of [the defendant’s] customers ha[d] unlimited access to the [escalator’s] emergency stop buttons,” the court held that it was “impossible to establish that the escalator was in [Defendant’s] exclusive control.” *Id.* at 94.

Courts in other jurisdictions have diverged from the Maryland Court of Appeals’s holding in *Holzhauer*. For example, in *Rose v. Port of New York Authority*, the New Jersey Supreme Court held that the plaintiff, who was struck by an automatic glass door at an airport, could recover under the doctrine of *res ipsa loquitur*. Because “members of the public pass . . . through automatic doors . . . without sustaining injury,” the court held that the plaintiff’s injury was “unusual and not commonplace, . . . strongly suggest[ing] a malfunction, which in turn suggests neglect.” *Rose v. Port of N.Y. Auth.*, 293 A.2d 371, 375 (N.J. 1972). But see *Kmart Corp. v. Bassett*, 769 So. 2d 282, 283 (Ala. 2000) (rejecting *res ipsa* doctrine in automatic doors case).

2. *Res ipsa discriminator?* A falling barrel or check-in kiosk are not the only scenarios in which the burden of production is shifted to the defendant. In the same way a person walking down the street may not be able to prove what led to a barrel falling on their head, employees often lack the evidence to prove that they were the objects of a discriminatory adverse employment action. As we shall see in Chapter 8, the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) created a burden shifting scheme to fix this problem. When an employee can make out a *prima facie* case of discrimination under Title VII of the Civil Rights Act, the burden of production shifts to the employer to provide a non-discriminatory reason for the decision. *Id.* at 802. Once the defendant provides a reason, the burden shifts back to the plaintiff to show that this reason is mere pretext. *Id.* at 798. Even if the plaintiff can prove the

employer's proffered decision is pretextual, the plaintiff is not automatically entitled to summary judgment. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Rather, a jury must decide whether the pretextual rationale is a front for invidious discrimination or some other justification the employer would rather keep quiet, like a particularly petty personal dispute. *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997). In *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000), the Supreme Court clarified that when a plaintiff proves a prima facie case of discrimination and also proves that the employer's proffered reason is pretextual, the plaintiff does not automatically gain summary judgment, but such a plaintiff may sometimes be entitled to summary judgment, depending on the facts in the record.

Why not make adjudication in employment discrimination cases turn on the fate of the employer's proffered reason? In this approach, the plaintiff would win if the jury were persuaded by a preponderance of the evidence that the defendant's proffered reason was a pretext, regardless whether or not the plaintiff has also proven by a preponderance that the real reason was unlawful discrimination. Such a plaintiff would be automatically entitled to summary judgment if after discovery no reasonable jury could find from the evidence in the record that the employer's proffered reason was the actual reason for the employment decision at issue.

3. *What does res ipsa do?* What is the effect of successfully invoking the res ipsa doctrine? According to a leading treatise by Dan Dobbs, Paul Hayden, and Ellen Bublick, the effect of res ipsa is to permit (but not require) a factfinder to infer negligence. "A few courts," such as California, have held "that when res ipsa applies, the defendant must introduce at least some evidence to rebut the inference, and that the jury must find negligence if the defendant fails to do so," but in the authors' view, any language about a "presumption of negligence" is, at core, expressing a "permissible inference rule." DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN BUBLICK, *THE LAW OF TORTS* § 170 (2d. ed. 2021). In this sense, the res ipsa doctrine is best thought of as a doctrine of circumstantial evidence. Consider, however the following case:

***Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944)**

GIBSON, C.J.

. . . This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Doctors Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered

the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. . . . He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. . . .

Plaintiff . . . consulted Dr. Wilfred Sterling Clark, who . . . [concluded that] plaintiff's condition was due to trauma or injury by pressure or strain, applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes . . . .

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of *res ipsa loquitur*, and that the inference of negligence arising therefrom makes the granting of a nonsuit improper. Defendants take the position that . . . there is no showing that the act of any particular defendant . . . was the cause thereof. They attack plaintiff's action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others . . . . We are satisfied, however, that these objections are not well taken in the circumstances of this case.

The doctrine of *res ipsa loquitur* has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (Prosser, Torts, p. 295.) . . .

There is, however, some uncertainty as to the extent to which *res ipsa loquitur* may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." . . .

The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the

doctrine a patient who received permanent injuries of a serious character, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us. . . .

[I]t should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of *respondeat superior*. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from responsibility for their negligence.

It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of *res ipsa loquitur*. The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. . . .

The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of *res ipsa loquitur* is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

### *Note*

*Res ipsa in multiple actor cases.* Is the logic of *Ybarra* applicable to other multi-defendant cases? Consider the facts of *Samson v. Riesing*, 215 N.W.2d 698 (Wis. 1974), in which plaintiff Pearl Samson experienced severe and lasting illness after eating turkey salad contaminated with salmonella bacteria. The turkey salad consisted of meat from nine different turkeys, prepared by nine different members of the Wauwatosa High School Band Mothers. According to undisputed expert testimony, "salmonella contamination would exist only if the turkeys were improperly cooked or the flesh contaminated by contact with salmonella bacteria

after cooking.” *Id.* at 706. Samson alleged that each of turkey preparers had been negligent, as had two additional defendant band mothers who assisted in preparing the salad. Appealing a directed verdict in favor the defendants, Samson argued that the doctrine of *res ipsa* permitted an inference in her favor. The Wisconsin Supreme Court disagreed. None of the defendants could be said to have had “exclusive control” of the harm-causing instrumentality, and there was no proof “actually or circumstantially, of any circumstances that would show that one or more of the women were, on any theory, vicariously liable for the negligence of any one of them.” *Id.* at 708-10.

### **3. Federal Constitutional Constraints on the Burden of Proof**

Legislatures have sometimes sought to alter burdens of proof and persuasion. In response, some courts have suggested constitutional limits on legislative alterations of the proof process. For example, in *Mobile, Jackson & Kansas City R.R. v. Turnipseed*, 219 U.S. 35 (1910), the petitioner, a railroad company, challenged a Mississippi statute that provided:

In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies.

MISSISSIPPI CODE OF 1906, § 1985 (1906). The petitioner claimed that the statute violated the Equal Protection Clause, depriving railroad companies “of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.” *Id.* at 42. The Court, however, ruled against the petitioner, holding:

Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . .

The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

*Id.* at 42-43. Two decades after *Turnipseed*, however, the Court invalidated a similar state statute passed by the Georgia Legislature. *See W. & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929). The statute in question in *Henderson* provided, in relevant part:

A railroad company shall be liable for any damages done to persons . . . by the running of the locomotives, or cars, or other machinery of such company unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

*Id.* at 640 (quoting § 2780 of the Georgia Civil Code). The Court held that the foregoing statute violated the Due Process Clause:

Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. . . .

Appellee relies principally upon *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U.S. 35. . . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. . . .

The presumption raised by § 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment. . . .

Nearly fifty years after these two decisions, the Court held that Congress could reduce plaintiffs' burden of proof without violating any constitutional provisions. For example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court upheld the constitutionality of the Black Lung Benefits Act, which provided benefits to coal miners suffering from black lung disease (pneumoconiosis). In particular, the Act reduced certain miners' burden of proof to show that they contracted pneumoconiosis from a particular operator's mine. The respondent mine operators challenged two particular provisions of the Act:

[T]he Operators challenge . . . the presumptions contained in §§ 411 (c)(1)

and (2). Section 411 (c)(1) provides that a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment. Section 411 (c)(2) provides that if a coal miner with 10 years' employment in the mines dies from a respiratory disease, his death will be presumed to have been due to pneumoconiosis. Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator.

*Id.* at 27. In response, the Court held:

The Operators insist . . . that the 10-year presumptions are arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others. We reject this contention. In providing for a shifting of the burden of going forward to the operators, Congress was no more constrained to require a preliminary showing of the degree of dust concentration to which a miner was exposed, a historical fact difficult for the miner to prove, than it was to require a preliminary showing with respect to all other factors that might bear on the danger of infection. It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411(c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respirable disease under § 411(c)(2) to presumptively establish that death was due to pneumoconiosis. . . . We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner. . . . *Mobile, J & KC R. v. Turnipseed, supra*, at 43.

*Id.* at 29-30.

#### **4. A Note on Settlement Mills**

One of the most striking features of contemporary tort practice is the rise of whole areas of practice in which proof almost never happens. These are the so-called "settlement mills": personal injury law firms that achieve speedy recoveries for their clients in the *absence of proof*, without ever going to trial. According to Professor Nora Engstrom, some plaintiffs'-side practices have become a volume business. Settlement mill attorneys handle two hundred to three hundred open files per day. By getting standardized sums for their clients with virtually no lawyer-client interaction, the settlement mills radically lower transaction costs. They also substantially reduce uncertainty for their clients.

The big question for the settlement mills is why the defendants cooperate: Why do defendants enter into settlements with lawyers who never bring a case to trial? The short answer is that it is very hard to tell, since all these settlements happen in private without disclosure obligations. Lawyer-client confidentiality rules mean that there is virtually no way to pry open the secrecy of the settlement world to see what is going on inside. (Lawyer-client confidentiality poses a number of problems for the regulation of the market in legal services in



tort cases.) Nonetheless, we can speculate and try to game out what is going on in these settlements. A leading possibility is that settlement mill settlements systematically undercompensate those who have been most seriously injured, thus providing a benefit to defendants and inducing them to participate in the settlement system. Is this a good way to run a tort system? *See generally* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 805 (2011).

### 5. Aggregation and Sampling by Bellwether Trials

***Samuel Issacharoff, “Shocked”: Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1927-29, 1935-36 (2001)**

The world of mature mass torts is simply the world of evolved aggregation of claims and defenses. Exposed firms enter into joint-defense agreements, coordinate negotiations with plaintiffs, and create centralized operations to combat the onslaught of litigation. The plaintiffs’ market operates through an elaborate referral system that concentrates cases in the hands of a small number of repeat-player firms. These firms are able to realize tremendous economies of scale in processing cases, developing ongoing relations with experts and trial teams across the country, and amortizing the significant costs of actually going to trial across a large portfolio of cases that will likely settle based on established trial outcomes. As Professor Hensler aptly sums up . . . , “[I]ndividual treatment of asbestos cases—with individual plaintiffs controlling the course of their litigation and the decision to settle—was largely a myth.” The private market is every bit as aggregated as the class actions presented for Supreme Court review, with two critical differences: there is no public scrutiny of the aggregation mechanisms established through private ordering, and the private mechanisms do not offer the same prospect of closure as did the proposed class action settlements.

One of the consequences of a concentrated and developed market in asbestos claims is that there is little dispute about the value of particular claims. While any individual case that is pursued to trial might produce a range of outcomes, the sheer number of cases that have gone to trial yields a highly evolved valuation of claims. Certainly there will be fluctuations in individual results . . . but mass torts conform to the law of large numbers. In speaking to lawyers on both sides of the aisle . . . , one repeatedly hears that experienced participants in asbestos litigation can agree across a very high percentage of cases about the expected value of any particular claim. . . .

If neither valuation nor liability is at issue in the vast majority of asbestos claims, the question is then what role the court system plays in this process. . . . In asbestos litigation, there is relatively little informational value added by the fact of any particular case going to trial. Instead, the courts serve as a filtering mechanism over the pace at which claims are resolved . . . and in determining which claims are processed at what rate. . . .

The asbestos crisis is best approached by comparing it to what might be the ideal mechanism for the compensation of the injured. If we could posit a world in which there are no transaction costs and no informational barriers to determining who is actually injured and what resources are available for payment, the process would be relatively straightforward. The ideal resolution would be to aggregate all the funds available for asbestos injury, calculate the value of all the potential claims based upon historic averages of awards, discount for the time

benefit and lack of risk in administrative resolution (as opposed to the litigation process), and distribute the available funds to the injured on that basis. Assuming accurate forecasting of future claims (in itself no small matter), full information would yield the total demand, the total compensation available, and what pro rata discount would have to be applied should demand for compensation exceed available funds. In effect, this is what happens on a smaller scale in the aggregate settlements that characterize the mature mass tort arena. The question is whether the settlement structures that have evolved to deal with the large inventory of cases can be replicated more broadly in some coordinated fashion.

Looking back from this perspective, it is worth noting the consistency with which the failed attempts at aggregate resolution of asbestos claims have conformed to the same basic structure for their attempted solutions. Each relied primarily on a payout matrix defined by injury and exposure. Indeed, for all the controversy surrounding each asbestos resolution approach put forward over the past decade or so, there is almost complete silence on the question of how the payout matrices were (or will be) structured or how the estimated litigation value of the claims is to be calculated. Each of the central approaches returns to the same basic structure.

The starting point for the formal aggregate treatment of asbestos cases in litigation is *Cimino v. Raymark Industries*. *Cimino* formalized the intuition that asbestos had long ceased to be meaningfully addressed through case-by-case adjudication; the evidence in each case was largely duplicative and the valuations of the individualized aspects of the harm incurred could be predicted with a fair degree of statistical certainty. *Cimino* attempted to create a trial mechanism to replicate the settlement grids that had emerged with the concentration of the plaintiffs' bar in the 1980s. The key was to reduce each claim to a series of variables . . . that were typically used in settling cases, but then use those same variables to select representative cases for trial among the cohort of all asbestos cases then pending in the Eastern District of Texas. Although this approach was unceremoniously rejected by the Fifth Circuit, the *Cimino* grids were soon to be integrated into every subsequent aggregate settlement approach. . . .

***Alexandra D. Lahav, Bellwether Trials, 76 GEO. WASH. L. REV. 576, 580-89 (2008)***

Asbestos is the paradigmatic story of modern mass tort litigation. Although there are some unique features to the asbestos litigation, it raised for the first time many of the recurring issues in mass tort litigation. This story has been told at length elsewhere, but it is worth briefly reviewing to understand why a judge might think binding bellwether trials are the best solution to the seemingly intractable problems posed by mass torts. . . .

In 1990, Judge Robert Parker, then a federal district court judge for the Eastern District of Texas, had approximately 3000 wrongful death suits arising out of asbestos exposure before him. The court could not have tried all these suits in a reasonable time frame, so he adopted an innovative procedure: binding bellwether trials. He approved a trial plan that was to proceed in three phases. The first phase provided class-wide determinations of failure to warn and punitive damages. The second phase determined causation. The court intended to have a jury establish asbestos exposure on a craft and worksite basis during the relevant time periods, rather than on the basis of individual proof. Instead, this phase was resolved by stipulation, with defendants reserving their right to appeal. The third phase, which is the one that concerns us here, was the damages phase.

Judge Parker selected 160 cases to be tried before two jury panels. Each jury was told that the causation requirement had been met and was charged only with determining damages in each individual case before it. The trials took 133 days, involving hundreds of witnesses and thousands of exhibits. The effort expended in the proceeding was enormous, and Judge Parker noted, “If all that is accomplished by this is the closing of 169 cases then it was not worth the effort and will not be repeated.”

. . . . The court allocated the cases into five disease categories and averaged the awards, including the zero awards, within those categories. The average verdict in each disease category was “mesothelioma, \$1,224,333; lung cancer, \$545,200; other cancer, \$917,785; asbestosis, \$543,783; pleural disease, \$558,900.” After hearing expert testimony, the judge determined that these cases were typical or representative of the remaining plaintiffs. The judge held a hearing in which he assigned the remaining cases to one of the five disease categories. He made an award in each case according to the average award for that disease category. Thus, for example, each plaintiff with mesothelioma was awarded \$1,224,333—even those whose cases had not actually been tried.

The plaintiffs agreed to this procedure, likely because the alternative was an untenably long wait for a trial. The defendants, by contrast, objected and appealed. They argued that under Texas law and the Seventh Amendment they were entitled to an individual trial on causation and damages for each plaintiff. The Fifth Circuit, perhaps hoping for legislative intervention, waited eight years before reversing the district court’s trial plan. The circuit court rejected the bellwether trial procedure, reasoning that the Seventh Amendment and Texas law entitled the defendants to individual trials against each plaintiff on both causation and damages. . . .

### Notes

*a. The persistence of bellwether trials.* Although the Fifth Circuit rejected bellwether trials in *Cimino*, courts in other jurisdictions continue to hold such trials in recent mass tort cases:

The terrorist attacks on September 11, 2001, left in their wake thousands of bereaved families and injured individuals. Congress created the September 11th Victims Compensation Fund, an administrative body, to rationalize compensation for these victims. By participating in this expedited, administrative process, the families and victims of the attacks gave up their right to sue. The fund distributed \$7.049 billion to victims of the terrorist attacks who filed claims. Ninety-seven percent of the victims and their families participated in the administrative procedure instead of pursuing court cases. Forty-one plaintiffs, representing forty-two victims and their families, filed lawsuits in federal court. These forty-one cases were consolidated before a single judge, the Honorable Judge Alvin K. Hellerstein, in the Southern District of New York.

Six years after the attacks, these lawsuits were still pending. As Judge Hellerstein observed, the slow pace of the litigation frustrated the plaintiffs.

Some of the victims were adamantly against settlement because they wanted the publicity of a trial. But others, the judge believed, wanted to settle, and the only obstacle to settling those cases was that the parties could not agree on their monetary value. So he proposed holding bellwether trials for selected plaintiffs who would volunteer to participate. The trials were to be for damages only; the jury would not consider questions of liability or causation. The results were intended to be available to other plaintiffs and to defendants to assist them in valuing cases for settlement. As a result of the decision to conduct bellwether trials using reverse bifurcation, fourteen of the cases have settled so far.

This is how the bellwether trial is used today. Cases are chosen, not quite randomly, for trial on a particular issue. The results of the trials are not binding on the other litigants in the group. The outcomes can be used by the parties to assist in settlement, but the parties can also ignore these results and insist on an individual trial. . . .

Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 580-89 (2008)

*b. Binding bellwethers?* Note that the bellwether trials following the terrorist attacks of September 11, 2001 were nonbinding on other litigants. How can such trials be binding on all plaintiffs, given that the bellwether plaintiffs are typical of the rest of the plaintiff group? Professor Lahav describes one possible approach:

In a binding bellwether trial procedure, the court will choose a random sample of cases to try to a jury. The judge may then bifurcate the cases into liability and damages phases, or perhaps even trifurcate them into liability, causation, and damages phases. The parties will try each bellwether case before a jury that will render a verdict in that case. Finally, the results of the bellwether trials will be extrapolated to the remaining plaintiffs. The underlying principle of such an extrapolation is that the bellwether plaintiffs are *typical* of the rest of the plaintiff group such that the results of the bellwether trials represent the *likely outcome* of their cases as well. What these extrapolation plaintiffs get in a bellwether trial procedure is not individuated justice but rather group typical justice.

The following example explains how the extrapolation process might work. Imagine that a court tries 100 sample cases and 50% of them result in plaintiff victories. Of these 50, half are awarded \$200 and the other half are awarded \$300. Taking all of these results into account, and counting the defense verdicts as \$0, the average award would be \$125. Under a simple averaging regime, every plaintiff would receive \$125. If this result seems too rough, the court could calculate separate averages based on relevant variables.

Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 580-89 (2008)

*c. Mass torts?* If the bellwether strategy violates the parties' due process rights, what is to be done in mass torts cases? As U.S. District Judge Jack Weinstein observed in *Schwab v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006):

In mass fraud cases with hundreds of thousands or millions of injured the cost of one-on-one procedures is insuperable and unsuitable for either a jury or a bench trial. The consequence of requiring individual proof from each smoker would be to allow a defendant which has injured millions of people and caused billions of dollars in damages to escape almost all liability.

Excluding bellwether trials may mean that the resolution of such cases will inevitably happen in settlements outside of the courtroom. Is that better?

## 6. Negligence Puzzles

We end our initial treatment of the negligence standard with three puzzles in the law of negligence:

### *Should Wealth Matter?*

Should the defendant's wealth matter in setting the reasonable care standard in a negligence case? Won't wealthy actors often be able to go ahead with risky behavior, confident that the damages suffered by others will have little effect on their own relative wealth? Professors Ken Abraham and John Jeffrey argue the contrary. Wealth, they insist, should not matter if we want to achieve optimal deterrence:

[T]he defendant's wealth is irrelevant to deterrence. . . . Deterrence theory is based on the (usually and to one or another extent plausible) assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct, and evidence on the subject is inadmissible in the typical tort action claiming compensatory damages.

Kenneth Abraham & John Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989).

In response, Professor Jennifer Arlen argues that wealth *must* matter if we care about achieving optimal deterrence. Using an economic analysis assuming that individuals are risk-

averse instead of risk-neutral, she finds that a defendant's wealth should be taken into account in a negligence case, effectively calling for wealthy people to adhere to a higher standard of care than poor people:

Consider a very wealthy potential defendant contemplating an additional \$100 expenditure on care. The \$100 expenditure on care will not affect the wealthy individual's ability to purchase necessities and may little affect his ability to purchase other goods. The expenditure will accordingly not adversely affect his total utility. A very poor defendant, however, will probably have to pay for a \$100 expenditure on care with money set aside for necessities such as food and shelter. Thus, the \$100 expenditure on care will have a substantial adverse effect on the poor individual's utility. The cost to society of this \$100 expenditure on care is minimized by allocating most of it to the wealthier individual since the wealthier individual bears this expenditure at a lower cost to himself. . . . [T]he optimal due-care standard must vary with the wealth of the defendant: wealthy defendants should be required to take more care than less wealthy defendants. . . . Accordingly, if individuals are risk averse, current law, by which wealth differences are excluded from the assessment of due care, will not induce optimal deterrence.

Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 422-23 (1992). Does it matter that poor actors are almost never worth suing in tort because they are effectively judgment proof? Does it matter that liability insurance is widely available to working- and middle-class people, and required for the most common dangerous activity people engage in (namely driving)?

Would a negligence standard that takes wealth into account function mainly to redistribute wealth? Or are there non-redistributive reasons to take wealth into account?

Does Arlen's argument resonate with a corrective justice understanding of the tort system or only a deterrence framework? What about a framework that focuses on expressing community norms and values? How would her theory work in a case with a poor plaintiff and a poor defendant—or a rich plaintiff and a rich defendant? Whose argument—Arlen's or Abraham and Jeffries's—do you find more persuasive?

### *Seavey's Paradox*

Almost a century ago, torts jurist Warren Seavey observed a paradox in the way tort law handles intentional torts in comparison to negligent torts:

[I]f, to save his life, *A* intentionally destroys ten cents worth of *B*'s property, *A* must pay; if, however, he takes a ten per cent chance of killing *B* in an effort to save his own life, his conduct might not be found to be wrongful, although obviously *B* would much prefer, antecedently, to lose ten cents worth of property than to submit to a ten per cent chance of being killed.

Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 8, n.7 (1927). Is Seavey's paradox evidence of some logical defect in the law of torts? Note that it is a cop-

out to try to resolve the paradox by reference to the idea that in the probabilistic scenario B has not been killed. Seavey's point is that even if B is killed, B's estate may have no tort action against A, whereas B would have had a tort action for the intentional destruction of the ten cents.

Can the paradox be resolved by reference to a policy of promoting consensual transactions when they can be made? Is there a reason to think that intentional tort plaintiffs are identifiable in advance in a way that negligence plaintiffs are not?

### ***The Utility Monster***

What if B in Seavey's paradox values her or his life more highly than A? What if B *really* preferred to not be killed—so much so that the expected utility loss of B's being subject to a ten percent chance of death would be greater than the utility loss of A's actually dying? Should these differentials matter? It is an important question, because we might need to incorporate different values for different lives in our Hand Formula calculations.

Libertarian philosopher Robert Nozick famously puzzled over the conundrum in utilitarianism of "utility monsters": people "who get enormously greater gains in utility from any sacrifice of others than these others lose." Nozick objects that the theory of utilitarianism, taken seriously, "seems to require that we all be sacrificed in the monster's maw, in order to increase total utility." ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 41 (1974). Does the tort system leave out utility monsters by using an objective negligence standard instead of a subjective one? Or is the subjective utility of Novick's monster simply an item to be factored into the Learned Hand negligence formula? Should it be?

Is the answer different if the value of B's life is high relative to that of A not because of B's subjective utility curve, but because of the high social value of B relative to A? What if A is an unemployed homeless man with no family, while B is a skilled mayor, a brilliant Steve Jobs-like executive in a Fortune 500 corporation, a virtuoso pianist, or a national hero World Cup soccer star?

## CHAPTER 8. ANTIDISCRIMINATION LAW MODULE #2 – PROVING DISCRIMINATION

Recall our discussion of employment discrimination from the first antidiscrimination module in chapter 6. There we saw some of the ways Title VII of the Civil Rights Act of 1964 borrows tort law principles of reasonableness for purposes of animating the law of workplace harassment. The law of employment discrimination does much the same with the difficult problem of proving negligence.

### A. Proving Disparate Treatment

The first set of proof problems under Title VII involve allegations of illegal disparate treatment. How does one smoke out the real discriminatory reason for a disputed employment action? The stakes are often large in American employment law, because the background rule that employees are at-will employees. Liable to being fired, demoted, or denied a promotion on any but for a narrow set of grounds laid out in federal and state anti-discrimination law. Here the law borrows from and adapts tort law's old *res ipsa loquitor* doctrine. The key early case is *McDonnell Douglas Corp. v. Green*.

#### *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

Mr. Justice POWELL delivered the opinion for a unanimous Court.

The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964.

Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964<sup>1</sup> when he was laid off in the course of a general reduction in petitioner's work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner's plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent's participation in, the 'stall-in' as follows:

(F)ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn

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<sup>1</sup> His employment during these years was continuous except for 21 months of service in the military.



off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Acting under the “stall in” plan, plaintiff (respondent in the present action) drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.

On July 2, 1965, a “lock-in” took place wherein a chain and padlock were placed on the front door of a building to prevent the occupants, certain of petitioner's employees, from leaving. Though respondent apparently knew beforehand of the “lock-in,” the full extent of his involvement remains uncertain.

Some three weeks following the “lock-in,” on July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the “stall-in” and “lock-in.” Shortly thereafter, respondent filed a formal complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703(a)(1) and 704(a) of the Civil Rights Act of 1964.<sup>4</sup> The former section generally prohibits racial discrimination in any employment decision while the latter forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

The Commission made no finding on respondent's allegation of racial bias under § 703(a)(1), but it did find reasonable cause to believe petitioner had violated § 704(a) by refusing to rehire respondent because of his civil rights activity. After the Commission unsuccessfully attempted to conciliate the dispute, it advised respondent in March 1968, of his right to institute a civil action in federal court within 30 days.

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<sup>4</sup> Section 703(a)(1) of the Civil Rights Act of 1964 in pertinent part provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 704(a) of the Civil Rights Act of 1964 in pertinent part provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

On April 15, 1968, respondent brought the present action, claiming initially a violation of § 704(a) and, in an amended complaint, a violation of § 703(a)(1) as well.<sup>5</sup> The District Court dismissed the . . . claim of racial discrimination in petitioner's hiring procedures . . . [and] concluded that nothing in Title VII or § 704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations."

On appeal, the Eighth Circuit . . . reversed the dismissal of respondent's § 703(a)(1) claim relating to racially discriminatory hiring practices . . . .

. . . . In order to clarify the standards governing the disposition of an action challenging employment discrimination, we granted certiorari. . . .

## II

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. As noted in *Griggs [v. Duke Power Co.]*, 401 U.S. 424 (1971):

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

In this case respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. . . .

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that

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<sup>5</sup> Respondent also contested the legality of his 1964 discharge by petitioner, but both courts held this claim barred by the statute of limitations. Respondent does not challenge those rulings here.

he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>13</sup> In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications and acknowledges that his past work performance in petitioner's employ was "satisfactory."

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination." . . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. . . .

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.<sup>19</sup> In short, on the retrial respondent must be given a full and fair opportunity to

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<sup>13</sup> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

<sup>19</sup> The District Court may, for example, determine, after reasonable discovery that "the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen,

demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

....

The cause is hereby remanded to the District Court for reconsideration in accordance with this opinion.

**Note**

*Res ipsa for discrimination?* *McDonnell Douglas* offers a version of the res ipsa doctrine for employment discrimination in the sense that it allows the plaintiff to present a stylized story that creates an obligation (or at least an opportunity) for the defendant to come forward with information about the events in question.

If *McDonnell Douglas* is a variation of res ipsa, however, what should be the significance of successfully making out a prima facie case? Should it function simply as a guide for the value of certain kinds of contextual evidence? Or should it do more? In the 1990s, the federal courts of appeals and the U.S. Supreme Court waded into controversy over the significance of making out a prima facie case of discrimination.

***St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)**

Justice SCALIA delivered the opinion of the Court.

We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964 the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.

I

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and

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[*Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59] at 92 [(1972)]. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official log book on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1). After a full bench trial, the District Court found for petitioners. The United States Court of Appeals for the Eighth Circuit reversed and remanded and we granted certiorari.

## II

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

It shall be an unlawful employment practice for an employer—

(1) ... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . .

With the goal of “progressively ... sharpen[ing] the inquiry into the elusive factual question of intentional discrimination,” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981), our opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a “prima facie” case of racial discrimination. Petitioners do not challenge the District Court’s finding that respondent satisfied the minimal requirements of such a prima facie case . . . by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.

Under the *McDonnell Douglas* scheme, “[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.” *Burdine, supra*, at 254. To establish a “presumption” is to say that a finding of the predicate fact (here, the prima facie case) produces “a required conclusion in the absence of explanation” (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, *Federal Evidence* § 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of “producing evidence” that the adverse employment actions were taken “for a legitimate, nondiscriminatory reason.” *Burdine*, 450 U.S., at 254. “[T]he defendant must clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254-255, and n. 8. It is important to note, however, that although

the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” 450 U.S., at 253. . . .

Respondent does not challenge the District Court’s finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. Our cases make clear that at that point the shifted burden of production became irrelevant: “If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted,” *Burdine*, 450 U.S., at 255, and “drops from the case,” *id.*, at 255, n. 10. The plaintiff then has “the full and fair opportunity to demonstrate,” through presentation of his own case and through cross-examination of the defendant’s witnesses, “that the proffered reason was not the true reason for the employment decision,” *id.*, at 256, and that race was. He retains that “ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.” *Ibid.*

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's co-workers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. It nonetheless held that respondent had failed to carry his ultimate burden of proving that *his race* was the determining factor in petitioners’ decision first to demote and then to dismiss him.<sup>2</sup> In short, the District Court concluded that “although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.”

The Court of Appeals set this determination aside on the ground that “[o]nce [respondent] proved all of [petitioners’] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law.” The Court of Appeals reasoned:

Because all of defendants’ proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.” *Ibid.*

That is not so. By producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a “better position than if they had remained silent.”

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<sup>2</sup> Various considerations led it to this conclusion, including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that “the number of black employees at St. Mary’s remained constant.”

In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage. At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a *prima facie* case, and (2) the defendant has failed to meet its burden of production—*i.e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law . . . . If the defendant has failed to sustain its burden but reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a *prima facie* case, then a question of fact *does* remain, which the trier of fact will be called upon to answer.

If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was “produced” to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.” 450 U.S. at 254. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. *Id.* at 255. The defendant’s “production” (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven “that the defendant intentionally discriminated against [him]” because of his race, *id.*, at 253. The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, “[n]o additional proof of discrimination is *required*.” But the Court of Appeals’ holding that rejection of the defendant’s proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle . . . that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the “ultimate burden of persuasion.”

. . . .

#### IV

. . . . What appears to trouble the dissent more than anything is that, in its view, our rule is adopted “for the benefit of employers who have been found to have given false evidence in a court of law,” whom we “favo[r]” by “exempting them from responsibility for lies.” [O]ur rule in no way gives special favor to those employers whose evidence is disbelieved. But initially we must point out that there is no justification for assuming (as the dissent repeatedly does) that those employers whose evidence is disbelieved are perjurers and liars. Even if these were typically cases in which an individual defendant’s sworn assertion regarding a physical occurrence was pitted against an individual plaintiff’s sworn assertion regarding the same physical occurrence, surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar. And in these Title VII cases, the defendant is ordinarily *not* an individual but a company, which must rely upon the

statement of an employee—often a relatively low-level employee—as to the central fact; and that central fact is *not* a physical occurrence, but rather that employee's state of mind. To say that the company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.

Undoubtedly some employers (or at least their employees) will be lying. But even if we could readily identify these perjurers, what an extraordinary notion, that we “exempt them from responsibility for their lies” unless we enter Title VII judgments for the plaintiffs! Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that.

....

We reaffirm today what we said in [*United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983)]:

[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be ‘eyewitness’ testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern ‘the basic allocation of burdens and order of presentation of proof,’ *Burdine*, 450 U.S., at 252, in deciding this ultimate question.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice SOUTER, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, dissenting.

.... The *McDonnell Douglas* framework that the Court inexplicably casts aside today was summarized neatly in *Burdine*:

“First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” 450 U.S., at 252–253 (citations and internal quotation marks omitted).

We adopted this three-step process to implement, in an orderly fashion, “[t]he language of Title VII,” which “makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.” 411 U.S., at 800. Because “Title VII tolerates no racial discrimination, subtle or otherwise,” *id.*, at 801, we devised a framework that would allow both plaintiffs and the courts to deal effectively with



employment discrimination revealed only through circumstantial evidence. See *Aikens, supra*, at 716 (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes”). This framework has gained wide acceptance . . . . Given our assumption that “people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting,” we have explained that a prima facie case implies discrimination “because we presume [the employer’s] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” *Furnco*, 438 U.S., at 577.

Under *McDonnell Douglas* and *Burdine*, however, proof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff. Although the employer bears no trial burden at all until the plaintiff proves his prima facie case, once the plaintiff does so the employer must either respond or lose. As we made clear in *Burdine*, “[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff.” *Id.*, at 254. Thus, if the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, the plaintiff is entitled to judgment under *Burdine*.

Obviously, it would be unfair to bar an employer from coming forward at this stage with a nondiscriminatory explanation for its actions, since the lack of an open position and the plaintiff’s lack of qualifications do not exhaust the set of nondiscriminatory reasons that might explain an adverse personnel decision. If the trier of fact could not consider other explanations, employers’ autonomy would be curtailed far beyond what is needed to rectify the discrimination identified by Congress. Cf. *Furnco, supra*, at 577–578 (Title VII “does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees”). On the other hand, it would be equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision. The Court in *McDonnell Douglas* reconciled these competing interests in a very sensible way by requiring the employer to “articulate,” through the introduction of admissible evidence, one or more “legitimate, nondiscriminatory reason[s]” for its actions. Proof of a prima facie case thus serves as a catalyst obligating the employer to step forward with an explanation for its actions. St. Mary’s, in this case, used this opportunity to provide two reasons for its treatment of Hicks: the severity and accumulation of rule infractions he had allegedly committed.

The Court emphasizes that the employer’s obligation at this stage is only a burden of production . . . . This much is certainly true, but the obligation also serves an important function neglected by the majority, in requiring the employer “to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” 450 U.S., at 255-256. The employer, in other words, has a “burden of production” that gives it the right to choose the scope of the factual issues to be resolved by the factfinder. But investing the employer with this choice has no point unless the scope it chooses binds the employer as well as the plaintiff. Nor does it make sense to tell the employer, as this Court has done, that its explanation of legitimate reasons “must be clear and reasonably specific,” if the factfinder can rely on a reason not clearly articulated, or on one not articulated at all, to rule in favor of the employer.

. . . .

The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent. The Court repeats the truism that the plaintiff has the "ultimate burden" of proving discrimination, without ever facing the practical question of how the plaintiff without such direct evidence can meet this burden. *Burdine* provides the answer, telling us that such a plaintiff may succeed in meeting his ultimate burden of proving discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S., at 256. The possibility of some practical procedure for addressing what *Burdine* calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive. And yet, under the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record. . . .

. . . .

There is simply no justification for favoring these employers by exempting them from responsibility for lies. It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding in it a justification to dispense with an orderly procedure for getting at "the elusive factual question of intentional discrimination." *Burdine*, 450 U.S., at 255, n. 8, 101 S.Ct., at 1094, n. 8.

With no justification in the employer's favor, the consequences to actual and potential Title VII litigants stand out sharply. To the extent that workers like Melvin Hicks decide not to sue, given the uncertainties they would face under the majority's scheme, the legislative purpose in adopting Title VII will be frustrated. To the extent such workers nevertheless decide to press forward, the result will likely be wasted time, effort, and money for all concerned. . . .

The enhancement of a Title VII plaintiff's burden wrought by the Court's opinion is exemplified in this case. Melvin Hicks was denied any opportunity, much less a full and fair one, to demonstrate that the supposedly nondiscriminatory explanation for his demotion and termination, the personal animosity of his immediate supervisor, was unworthy of credence. In fact, the District Court did not find that personal animosity (which it failed to recognize might be racially motivated) was the true reason for the actions St. Mary's took; it adduced this reason simply as a possibility in explaining that Hicks had failed to prove "that the crusade [to terminate him] was racially rather than personally motivated." It is hardly surprising that Hicks failed to prove anything about this supposed personal crusade, since St. Mary's never articulated such an explanation for Hicks's discharge, and since the person who allegedly conducted this crusade denied at trial any personal difficulties between himself and Hicks. . . . [T]he majority provides Hicks with no opportunity to produce evidence showing that the District Court's hypothesized explanation, first articulated six months after trial, is unworthy of credence. Whether Melvin Hicks wins or loses on remand, many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ.

Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent.

**Note**

*St. Mary's Honor Center v. Hicks* did not, as it turns, out, bring closure to the *McDonnell Douglas* controversy. In 2000, the Supreme Court came back to the issue in *Reeves v. Sanderson Plumbing Products*.

***Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000)**

Justice O'CONNOR delivered the opinion of the Court.

This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. We must also decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented here.

I

In October 1995, petitioner Roger Reeves was 57 years old and had spent 40 years in the employ of respondent, Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers. Petitioner worked in a department known as the "Hinge Room," where he supervised the "regular line." Joe Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Russell Caldwell, the manager of the Hinge Room and age 45, supervised both petitioner and Oswalt. Petitioner's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee.

In the summer of 1995, Caldwell informed Powe Chesnut, the director of manufacturing and the husband of company president Sandra Sanderson, that "production was down" in the Hinge Room because employees were often absent and were "coming in late and leaving early." Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. According to Chesnut's testimony, that investigation revealed "numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt." Following the audit, Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and

Caldwell be fired. In October 1995, Sanderson followed the recommendation and discharged both petitioner and Caldwell.

In June 1996, petitioner filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). At trial, respondent contended that it had fired petitioner due to his failure to maintain accurate attendance records, while petitioner attempted to demonstrate that respondent's explanation was pretext for age discrimination. Petitioner introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company had demonstrated age-based animus in his dealings with petitioner.

[After trial,] the jury returned a verdict in favor of petitioner, awarding him \$35,000 in compensatory damages . . . . The District Court denied respondent's motions [for a new trial].

The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual." The court explained, however, that this was "not dispositive" of the ultimate issue—namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." [T]he court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved in petitioner's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age.

We granted certiorari to resolve a conflict among the Courts of Appeals as to whether a plaintiff's *prima facie* case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

## II

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." . . . Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are

based principally on circumstantial evidence. . . . Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here. . . .

In this case, the evidence supporting respondent's explanation for petitioner's discharge consisted primarily of testimony by Chesnut and Sanderson and documentation of petitioner's alleged "shoddy record keeping." Chesnut testified that a 1993 audit of Hinge Room operations revealed "a very lax assembly line" where employees were not adhering to general work rules. As a result of that audit, petitioner was placed on 90 days' probation for unsatisfactory performance. In 1995, Chesnut ordered another investigation of the Hinge Room, which, according to his testimony, revealed that petitioner was not correctly recording the absences and hours of employees. Respondent introduced summaries of that investigation documenting several attendance violations by 12 employees under petitioner's supervision, and noting that each should have been disciplined in some manner. Chesnut testified that this failure to discipline absent and late employees is "extremely important when you are dealing with a union" because uneven enforcement across departments would keep the company "in grievance and arbitration cases, which are costly, all the time." He and Sanderson also stated that petitioner's errors, by failing to adjust for hours not worked, cost the company overpaid wages. Sanderson testified that she accepted the recommendation to discharge petitioner because he had "intentionally falsif[ied] company pay records."

Petitioner, however, made a substantial showing that respondent's explanation was false. First, petitioner offered evidence that he had properly maintained the attendance records. Most of the timekeeping errors cited by respondent involved employees who were not marked late but who were recorded as having arrived at the plant at 7 a.m. for the 7 a.m. shift. Respondent contended that employees arriving at 7 a.m. could not have been at their workstations by 7 a.m., and therefore must have been late. But both petitioner and Oswalt testified that the company's automated timeclock often failed to scan employees' timecards, so that the timesheets would not record any time of arrival. On these occasions, petitioner and Oswalt would visually check the workstations and record whether the employees were present at the start of the shift. They stated that if an employee arrived promptly but the timesheet contained no time of arrival, they would reconcile the two by marking "7 a.m." as the employee's arrival time, even if the employee actually arrived at the plant earlier. *Ibid.* On cross-examination, Chesnut acknowledged that the timeclock sometimes malfunctioned, and that if "people were there at their work station[s]" at the start of the shift, the supervisor "would write in seven o'clock." Petitioner also testified that when employees arrived before or stayed after their shifts, he would assign them additional work so they would not be overpaid.

Petitioner similarly cast doubt on whether he was responsible for any failure to discipline late and absent employees. Petitioner testified that his job only included reviewing the daily and weekly attendance reports, and that disciplinary writeups were based on the monthly reports, which were reviewed by Caldwell. Sanderson admitted that Caldwell, and not petitioner, was responsible for citing employees for violations of the company's attendance policy. Further, Chesnut conceded that there had never been a union grievance or employee complaint arising from petitioner's recordkeeping, and that the company had never calculated the amount of overpayments allegedly attributable to petitioner's errors. Petitioner also testified that, on the day he was fired, Chesnut said that his discharge was due to his failure to report as absent one employee, Gina Mae Coley, on two days in September 1995. But petitioner explained that he had spent those days in the hospital, and that Caldwell was

therefore responsible for any overpayment of Coley. Finally, petitioner stated that on previous occasions that employees were paid for hours they had not worked, the company had simply adjusted those employees' next paychecks to correct the errors.

Based on this evidence, the Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. . . .

In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*, [supra]. There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. . . . [H]owever, [in *St. Mary's Honor Center*], we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, at 511.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . .

This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See *Fisher v. Vassar College*, 114 F.3d [1332, 1338 (2<sup>nd</sup> Cir. 1997)] ("[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). . . .

### III

The remaining question is whether, despite the Court of Appeals' misconception of petitioner's evidentiary burden, respondent was nonetheless entitled to judgment as a matter of law.

Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law. In this case, in addition to establishing a *prima facie* case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for petitioner's firing. . . .

The District Court was therefore correct to submit the case to the jury, and the Court of Appeals erred in overturning its verdict.

For these reasons, the judgment of the Court of Appeals is reversed.

Justice GINSBURG, concurring.

The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case" . . . and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal. . . .

### Notes

1. *A defeat for antidiscrimination?* Some antidiscrimination law scholars objected to the *St. Mary's Honor Center v. Hicks* and *Reeves* decisions on the ground that they undermined the power of antidiscrimination law. "[I]n *Hicks*," charged Professor Jerome McCristal Culp, "the Court has again made the point that Title VII should not be too effective or reach too much of the real discrimination." Jerome McCristal Culp, Jr., *The Michael Jackson Pill*, 92 MICH. L. REV. 2613, 2621-22 (1994). Why would this be so, given that both *Hicks* and *Reeves* defend the idea that a plaintiff proving discrimination to a jury ought to win?

2. *The end of McDonnell-Douglas?* What is left of *McDonnell Douglas* after *St. Mary's* and *Reeves*? Professor Deborah Malamud's classic critique contends that "McDonnell Douglas-Burdine is reduced to nothing but an empty ritual." Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2324 (1995). Does the tort theory of *res ipsa loquitur* do more or less than the *McDonnell Douglas* arrangement?

Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit in Chicago has recently proposed getting rid of the *McDonnell Douglas* framework altogether:

Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason. Put differently, it seems to me that the time has come to collapse all these tests into one. We have already done so, when it comes to the trial stage of a case.

*Coleman v. Donahoe*, 667 F.3d 835, 863 (7<sup>th</sup> Cir. 2012) (Wood, J., concurring).

3. *An alternative vision of antidiscrimination law.* Justice Souter's dissent in *Hicks* presented an alternative approach to employment discrimination cases in which plaintiffs would be able to win damages without proving that their employer had discriminated against them. What might make Souter's approach appealing?

Consider the view of Judge Jon O. Newman, then Chief Judge of the U.S. Court of Appeals for the Second Circuit in 1997, when his Circuit tried to resolve the issue in an unusual en banc hearing:

The reason for permitting an inference of discrimination from a finding of pretext is evident. In the context of Title VII lawsuits, the likely motivation for a defendant, called upon in court to proffer an explanation for its adverse employment action, to proffer a *pretextual* explanation is to hide the true explanation of discrimination. At least, this is generally so in the absence of some plausible explanation for the pretextual proffer. As we have previously observed, "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."

*Fisher v. Vassar College*, 114 F.3d 1332, 1379 (Newman, C.J., dissenting).

Fisher involved a suit arising out of the denial of tenure to Cynthia Fisher, who had been an assistant professor of biology at Vassar in the 1980s. Judge Guido Calabresi put his own gloss on the burden shifting arrangement:

There are situations in which it makes sense to force the defendant to explain itself and its actions, once a plaintiff has shown facts which, *though too weak to demonstrate more probably than not that the defendant should be liable*, are nevertheless sufficiently linked to possible wrongdoing by the defendant to justify an explanation. In the end, whether one says that such a showing by the



plaintiff gives rise to an inference, a temporary presumption, or a prima facie case (or, for that matter, Thucydides or Mustard Plaster) is relatively unimportant. What counts is that we not let verbal confusions keep us from the result that Title VII—as long interpreted by the courts—seeks to achieve: that the plaintiff can force an explanation out of the defendant with relative ease, but that the defendant can only be held liable (once an answer is given) when a finding of discrimination is truly supported by the facts. The majority stays true to that course, and I therefore join it in this respect.

*Fisher v. Vassar College*, 114 F.3d at 1357–58 (Calabresi, J., concurring in part and dissenting in part). Does the information-forcing dimension of Calabresi’s approach to *Fisher* survive the Supreme Court’s decision in *Reeves*, which was decided three years later?

## B. Proving Disparate Impact

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin – but what does that mean in practice?

In the early years of the Civil Rights Act, lower courts ruled that there was no violation of Title VII unless an employer treated employees disparately on the basis of their race. However, in 1971, at the urging of the Nixon administration, and in accordance with the guidelines of the Equal Employment Opportunity Commission (EEOC), the Supreme Court decided that a neutral employment policy with a “disparate impact” on people in a protected classification could also violate Title VII. The precise meaning of this ruling, which came in the case of *Griggs v. Duke Power Co.*, has been contested for a half-century. All agree that its meaning was substantially reshaped in the 1989 case *Wards Cove Packing Co. v. Atonio*. The decision in *Wards Cove* was made in the same term in which the Court issued a major decision rejecting an affirmative action program as unconstitutional under the Equal Protection Clause. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

In 1991, Congress responded to *Wards Cove* by amending the Civil Rights Act and codifying the disparate impact standard. The two key cases and the 1991 statutory amendments follow.

### ***Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)**

BURGER, Chief Justice:

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants,

and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

[T]his proceeding was brought [in the U.S. District Court for the Middle District of North Carolina] by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed. Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any 'inside' department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. . . .

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals [for the Fourth Circuit] was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action. The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related. We granted the writ on these claims.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

The Court of Appeals’ opinion, and the partial dissent, agreed that, on the record in the present case, “whites register far better on the Company’s alternative requirements” than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . . . There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company’s judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used....

The Court of Appeals held that the Company had adopted the diploma and test requirements without any “intention to discriminate against Negro employees.” 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer’s intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as “built-in headwinds” for minority groups and are unrelated to measuring job capability.

The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

### Notes

1. *Administrative deference.* Note that the unanimous Court in *Griggs* (absent Justice William Brennan, who took no part in the case) refers to the guidelines of the EEOC as entitled to great deference: “The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission’s construction, this affords good reason to treat the guidelines as expressing the will of Congress.” *Id.* at 433-34.

2. *What is the standard for business necessity?* The courts at all levels accepted the finding that the aptitude tests in general – one of general intelligence, one of mechanical knowledge – were reputable. In light of this, and the vice president’s view that their use would improve the general quality of the workforce, what more is needed to prove their impact on job performance? In passing, the Court noted that the Company could have argued (though the Court doubted it would prevail) that the tests bore on the candidate’s likelihood to be promoted to higher positions in the company. If that is true, is that a legitimate business need? What magnitude of demonstrable performance improvement from the filtering mechanism should be required?

3. *How irrelevant is intent?* Is *Griggs* a case about the disparate impact of neutral standards? Or about the purposeful use of neutral standards to treat people differently on the basis of their race? The Court noted that the Company only began to require high school diplomas and aptitude tests after the Civil Rights Act went into effect. Do you think the Court would have decided differently, had those requirements been instated in 1955, the same year high school became required for the higher paid departments (in which only whites were employed, thus filtering out less educated whites)? What if anything does *Griggs* say about a non-bad-faith neutral standard that disparately impacts job applicants on the basis of race?

4. *Does Griggs require quotas?* Critics charged that *Griggs*, combined with the subsequent decision in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) (considering the showing an employer must make to establish that employee selection tests are sufficiently job-related to withstand attack under Title VII), effectively led to the death of employee-selection tests through overly strict adherence to unrealistic EEOC standards. Others charged that *Griggs* and *Albemarle Paper* required companies to adopt quotas to avoid costly litigation. See James G. Johnson, *Albermarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976).

5. *Modern “headwinds?”* One context for the Company’s decision was the explosion of the social sciences and psychology-inflected industrial organization in the 1960s. Does the ostensible meritocracy of the late twentieth and early twenty-first century erect its own headwinds? Are entry requirements for modern jobs and schools a way of compounding the results of past discrimination? Should the *Griggs* principle be understood to rule out the widespread use of preferences or proxies? What about a magazine or publisher that strongly prefers résumés listing Ivies or elite liberal arts colleges, rather than selecting employees or interns based on a standard, blindly-graded writing assignment? What if the blind-graded writing assignment produced a disparate impact along lines of race or some other prohibited Civil Rights Act classification?

6. *Griggs Power* provided that plaintiffs have established a prima facie case of an employment practice with a disparate impact, employers have the burden of proving the practice’s business necessity. But how does one make a prima facie case? The Court took up this question in *Wards Cove Packing Co.*:

***Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)**

WHITE, Justice:

The claims before us are disparate-impact claims, involving the employment practices of petitioners, two companies that operate salmon canneries in remote and widely separated areas of Alaska. . . . [B]ecause the canneries are located in remote regions, all workers are housed at the canneries and have their meals in company-owned mess halls.

Jobs at the canneries are of two general types: “cannery jobs” on the cannery line, which are unskilled positions; and “noncannery jobs,” which fall into a variety of classifications. Most

noncannery jobs are classified as skilled positions. Cannery jobs are filled predominantly by nonwhites: Filipinos and Alaska Natives. The Filipinos are hired through, and dispatched by, Local 37 of the International Longshoremen's and Warehousemen's Union pursuant to a hiring hall agreement with the local. The Alaska Natives primarily reside in villages near the remote cannery locations. Noncannery jobs are filled with predominantly white workers, who are hired during the winter months from the companies' offices in Washington and Oregon. Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.

In 1974, respondents, a class of nonwhite cannery workers who were (or had been) employed at the canneries, brought this Title VII action against petitioners. Respondents alleged that a variety of petitioners' hiring/promotion practices—*e.g.*, nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial stratification of the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race. Respondents also complained of petitioners' racially segregated housing and dining facilities. All of respondents' claims were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability.

[After a bench trial,] the District Court . . . rejected all of respondents' disparate-treatment claims. It also rejected the disparate-impact challenges involving the subjective employment criteria used by petitioners to fill these noncannery positions, on the ground that those criteria were not subject to attack under a disparate-impact theory. Petitioners' "objective" employment practices (*e.g.*, an English language requirement, alleged nepotism in hiring, failure to post noncannery openings, the rehire preference, etc.) were found to be subject to challenge under the disparate-impact theory, but these claims were rejected for failure of proof. Judgment was entered for petitioners.

On appeal, a panel of the Ninth Circuit affirmed, but that decision was vacated when the Court of Appeals agreed to hear the case en banc . . . . [T]he Court of Appeals held . . . that disparate-impact analysis could be applied to subjective hiring practices. The Ninth Circuit also concluded that in such a case, "[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer" to "prov[e] the business necessity" of the challenged practice. . . .

On remand, the [Ninth Circuit] panel . . . held that respondents had made out a *prima facie* case of disparate impact in hiring for both skilled and unskilled noncannery positions. The panel remanded the case for further proceedings, instructing the District Court that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity. Neither the en banc court nor the panel disturbed the District Court's rejection of the disparate-treatment claims.

[W]e granted certiorari for the purpose of addressing . . . the proper application of Title VII's disparate-impact theory of liability.

## II

In holding that respondents had made out a *prima facie* case of disparate impact, the Court of Appeals relied solely on respondents' statistics showing a high percentage of nonwhite workers

in the cannery jobs and a low percentage of such workers in the noncannery positions. Although statistical proof can alone make out a *prima facie* case, the Court of Appeals' ruling here misapprehends our precedents and the purposes of Title VII, and we therefore reverse.

"There can be no doubt," . . . "that the . . . comparison . . . fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." [citation omitted] It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case. . . .

It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a *prima facie* case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force." Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers -- and the long list of other "skilled" noncannery positions found to exist by the District Court -- by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a "disparate impact" on nonwhites.

One example illustrates why this must be so. Respondents' own statistics concerning the noncannery work force at one of the canneries at issue here indicate that approximately 17% of the new hires for medical jobs, and 15% of the new hires for officer worker positions, were nonwhite. If it were the case that less than 15 to 17% of the applicants for these jobs were nonwhite and that nonwhites made up a lower percentage of the relevant qualified labor market, it is hard to see how respondents, without more, would have made out a *prima facie* case of disparate impact. Yet, under the Court of Appeals' theory, simply because nonwhites comprise 52% of the cannery workers at the cannery in question, respondents would be successful in establishing a *prima facie* case of racial discrimination under Title VII.

Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was -- for some reason -- racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. . . .

### III

Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment practices of petitioners caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had was justified by business considerations. . . .

If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact. We consider these two components in turn.

#### (1)

Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above.

In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, or in the panel's decision on remand -- suggesting that the persuasion burden should shift to petitioners once respondents established a prima facie case of disparate impact -- its decisions were erroneous. "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." *Watson v. Fort Worth Bank & Trust*, 487 U.S.] at 997 (O'Connor, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. . . . The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity.



(2)

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.*, *supra*, at 425. If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson*, *supra*, at 998 (O'Connor, J.). . . .

#### IV

For the reasons given above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

[Justice BLACKMUN, dissenting:]

I fully concur in Justice Stevens' analysis of this case. Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination. It reaches out to make last Term's plurality opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the law, thereby upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases. It bars the use of internal work force comparisons in the making of a prima facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.

The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as Justice Stevens points out, resembles a plantation economy. *Post*, at 664, n. 4. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis.

Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against nonwhites -- is a problem in our society, or even remembers that it ever was. Cf. *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

[Justice STEVENS, dissenting:]

Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964 prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job. Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the "peculiar facts" of this lawsuit. Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force. I cannot join this latest sojourn into judicial activism.

I

....

The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose. "The touchstone is business necessity," the Court stressed. *Id.*, at 431. Because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation[,] . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.*, at 432 (emphasis in original). Congress has declined to act -- as the Court now sees fit -- to limit the reach of this "disparate-impact" theory, see *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977); indeed it has extended its application. This approval lends added force to the *Griggs* holding. . . .

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirmative defense of business necessity. Although the majority's opinion blurs that distinction, thoughtful reflection on common-law pleading principles clarifies the fundamental differences between the two types of "burdens of proof." In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. See, e. g., 2 Restatement (Second) of Torts §§ 328 A, 433 B (1965) (hereinafter Restatement). The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case. But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. See, e. g., Restatement §§ 454-461, 463-467. The plaintiff in turn may try to refute this affirmative defense. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the

plaintiff and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

In a disparate-treatment case there is no “discrimination” within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/Burdine* inquiry. In either instance, the employer may undermine the employee’s evidence but has no independent burden of persuasion.

In contrast, intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers -- regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a *prima facie* case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.

....

### III

The majority’s opinion begins with recognition of the settled rule that that “a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a ‘disparate-treatment’ case.” *Ante*, at 645-646. It then departs from the body of law engendered by this disparate impact theory, reformulating the order of proof and the weight of the parties’ burdens. Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me.

I respectfully dissent.

### Notes

1. *Partisan controversy*. Linda Greenhouse of the *New York Times* reported at the time of the *Wards Cove* decision that “the Supreme Court’s 5-to-4 decision in a major employment discrimination case on Monday has dispelled much of any remaining doubt about whether former President Ronald Reagan accomplished his goal of moving the Court in a more conservative direction on civil rights.” Linda Greenhouse, *Job Ruling Makes It Clear: Court Has Shifted Right*, NEW YORK TIMES (June 7, 1989). President Reagan’s Solicitor General, Charles Fried, by contrast, praised the decision for halting plaintiffs’ lawyers and some judges from using a “sensible rule [*Griggs*] to threaten employers with crushing liability if they used entirely reasonable employment qualifications.” Charles Fried, *Wall Street Journal*, June 16, 1989, 6:3.

2. *The narrowing of anti-discrimination law.* In the same term as *Wards Cove*, the Supreme court decided *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a landmark case which invalidated a minority set-aside program in Richmond, Virginia, giving preference to minority-owned businesses in the awarding of municipal contracts. Holding that the program violated the Equal Protection Clause, the court found there was not a compelling state interest in apportioning the contracts on the basis of race, and that the county had not shown that other remedial measures would have failed. Justices Marshall, Brennan, and Blackmun dissented.

3. *Judicial activism or judicial economy?* The majority in *Wards Cove* worried that the *Griggs* standard would lead to excessively costly litigation, as almost all employers are liable to be haled into court and forced to prove the business necessity of their hiring practices. The Court contended that liberal discovery standards would nevertheless make truly meritorious claims viable. Is this the right view?

### ***The Civil Rights Act of 1991.***

In the Civil Rights Act of 1991, Congress addressed several employment discrimination cases in which the Supreme Court had adopted interpretations of Title VII that were unfriendly for plaintiffs. Of particular interest to us here, in 1989 the Supreme Court revisited the *Wards Cove*. The law's relevant final text, which emerged from complicated negotiations between Senator John C. Danforth, a Republican from Missouri, and C. Boyden Gray, the White House counsel for George H.W. Bush, appears as follows:

#### ***Section 105. Burden of Proof in Disparate Impact Cases, 105 Stat. 1074-75 (Nov. 21, 1991).***

(a) Section 703 of the Civil Rights Act of 1964 . . . is amended by adding at the end the following new subsection:

“(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

“(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

“(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

“(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

“(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

“(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’ . . .”

### Notes

1. *Important drafting details.* The date referenced in the last quoted subsection had a specific purpose: *Wards Cove* was decided on June 5, 1989. The word “demonstrates” was defined in the 1991 Act for purposes of section 703(k)(1)(A)(i) as meaning “meets the burdens of production and persuasion.” 42 U.S.C. 2000e-(m).

2. *Legislative history for disparate impact.* The 1991 legislation included an unusual provision asserting that “No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice.” 105 Stat. at 1075. The interpretive memorandum, introduced by Senator John Danforth, is set out in full here:

Mr. DANFORTH. Mr. President, I ask unanimous consent that the attached interpretive memorandum be printed in the RECORD. There being no objection, the memorandum was ordered to be printed in the RECORD, as follows: . . . .

The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to *Wards Cove*-Business necessity/cumulation/ alternative business practice-the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as . . . height and weight requirements designed to measure strength . . . , the particular, functionally-integrated practices may be analyzed as one employment practice.

137 Cong. Rec. 15276 (daily ed., Oct 25, 1991).

3. *What do the 1991 Act disparate impact revisions mean?* Professor Michael Zimmer offered one especially crisp account of the meaning of the 1991 amendments for disparate impact claims. In Zimmer’s view,

Section 703(k)(1)(A)(ii) creates a new cause of action separate from the group disparate impact action created in subsection (i). . . . In [*Albemarle Paper Co.*

*v. Moody*], the United States Supreme Court created a three-step process to litigate disparate impact cases: (1) in his or her prima facie case, the plaintiff was required to prove that an employer's practice had a disparate impact on members of groups protected by Title VII; (2) the defendant could rebut the plaintiff's prima facie case by proving the challenged employment practice was job related and consistent with business necessity; (3) and further, even if the defendant succeeded in its rebuttal, the plaintiff could prevail on surrebuttal by proving pretext, meaning the defendant could have used other practices with less discriminatory impact that also served its legitimate interest.

Michael Zimmer, *Individual Disparate Impact Law*, 30 LOY. U. CHI. L.J. 473, 477 (1999). Professor Zimmer observes that “[m]ost attempts to construe the new section 703(k)(1)(A) deal with the impact of its language on this preexisting Albemarle Paper three-step process.” But in his view,

it is clear that section 703(k)(1)(A) creates two new disparate impact causes of action out of the three steps that were formally one cause of action under *Albemarle Paper*. The first cause of action, a group disparate impact action, arises under subsection (i) using the first two steps of the *Albemarle Paper* process. Under this action, the plaintiff has the burden of showing that an employer's practice had an adverse impact and that the defendant failed to meet its burden to rebut this claim with proof that the practice served a business necessity. Subsection (ii) creates a second cause of action, the individual disparate impact action, based on the third pretext step of the Albemarle Paper approach.

Section 703(k)(1)(A) subsection (i) sets forth the first cause of action, which includes two steps marked below by the imposed brackets:

An unlawful employment practice based on disparate impact is established under this subchapter only if--(i) [1] a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and [2] the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

The word “demonstrates,” used twice in section 703(k)(1)(A)(i), is defined in new section 701(m) as “meets the burdens of production and persuasion.” Taken together, these two steps clearly state that subsection (i) creates a cause of action for group disparate action much like the first two steps of the Albemarle Paper process--the plaintiff wins if he proves that the employer's practice had a disparate impact and the employer fails to justify the practice. Subsection (i), however, does not include the third pretext element of the Albemarle Paper process.

Joined to the opening phrase of section 703(k)(1)(A), subsection (ii) establishes individual disparate impact liability independent of the subsection (i) group disparate impact action:

An unlawful employment practice based on disparate impact is established under this subchapter only if--(i) . . .; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Because Congress joined the two subsections with the word “or,” it clearly intended to make subsections (i) and (ii) complete and independent causes of action. . . .

*Id.* at 478-79. Subsection (ii) in the 1991 amendments, Zimmer contends, “remakes disparate impact law into a strange, new two-step process with the plaintiff first proving the employer’s practice adversely affected a group protected by Title VII and second proving that an alternative existed that the employer refused to use.” *Id.* at 481.

Is Zimmer correct? What exactly is at stake in the distinctions among the *Wards Cove* approach and the 1991 Act approach?

## CHAPTER 9. PLAINTIFFS' CONDUCT

### A. Contributory and Comparative Negligence

#### 1. Contributory Negligence

##### ***Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809)**

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley J. at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did . . . .

BAYLEY, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

LORD ELLENBOROUGH, C.J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them.

One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.



## Notes

1. *A public policy rationale?* In just a few short paragraphs, *Butterfield* laid out the contributory negligence regime that would govern British and American tort law for over a century. Under the contributory negligence rule, a plaintiff's negligence acts as a complete bar to her recovery, even as against a negligent defendant. Why should that be so? The American jurist Charles Fisk Beach sought to explain the rule:

The reasons of the rule which denies relief to a plaintiff guilty of contributory negligence have been variously stated. The common law refuses to apportion damages which arise from negligence. This it does upon considerations of public convenience and public policy, and upon this principle, it is said, depends also the rule which makes the contributory negligence of a plaintiff a complete defense. For the same reason, when there is an action in tort, where injury results from the negligence of two or more persons, the sufferer has a full remedy against any one of them, and no contribution can be enforced between the tortfeasors. The policy of the law in this respect is founded upon the inability of human tribunals to mete out exact justice. A perfect code would render each man responsible for the unmixed consequences of his own default; but the common law, in view of the impossibility of assigning all effects to their respective causes, refuses to interfere in those cases where negligence is the issue, at the instance of one whose hands are not free from the stain of contributory fault, and where accordingly the impossibility of apportioning the damage between the parties does not exist, the rule is held not to apply.

"The true ground," says Dr. Wharton, "for the doctrine is that, by the interposition of the plaintiff's independent will, the causal connection between the defendant's negligence and the injury is broken." . . . [But, i]n my judgment no more satisfactory reason for the rule in question has been assigned than that which assumes it to have been founded upon considerations of public policy. We need not seek for any better reason for a rule of law than that, among all the possible rules that might be adopted, it is plainly the best—that indeed it is the only rule upon the subject for an instant practicable.

Charles Fisk Beach, Jr., *The Law of Contributory Negligence* 11-13 (1885).

2. *The public policy critique.* Are Professor Beach's policy considerations—when combined with contributory negligence's real-world application—convincing? By 1953, their luster had dimmed to at least some juries and state legislatures. William Prosser, a dean of the torts bar, wrote:

There has been much speculation as to why the rule thus declared found such ready acceptance in later decisions, both in England and in the United States. The explanations given by the courts themselves never have carried much conviction. Most of the decisions have talked about "proximate cause," saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a

meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant. Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The period of development of contributory negligence was that of the industrial revolution, and there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds. . . .

No one ever has succeeded in justifying that as a policy, and no one ever will.

William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468-9 (1953). Prosser's critique enjoyed wide acclaim in the following decades as state legislatures and state supreme courts began softening and repealing their contributory negligence regimes, swapping them out for various rules that allowed negligent plaintiffs to still recover some of their damages.

3. *Doctrinal ameliorations I: last clear chance.* The most notorious of these doctrines was the so-called rule of "last clear chance." The rule achieved a wide variety of forms but is perhaps best summarized as follows: "When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care." JOHN SALMOND, *LAW OF TORTS* 480 (8th ed. 1934). Last clear chance was thus an opposite to the "they started it!" defense in childhood squabbles; it was a "they finished it!" loophole to the harshness of contributory negligence regimes. As long as a negligent defendant had the "last clear chance" to stop an accident, a negligent plaintiff could still recover her damages from the defendant.

One difficulty was that, on a practical level, determining exactly who had possessed the last chance was often a tricky question. Professor Fleming James—Yale's great torts scholar of the first half of the twentieth century—identified this problem nearly one hundred years ago:

[Last clear chance] is still a matter of carefully measuring times and distances in an effort to find the last wrongdoer. The paths of a pedestrian and a street car cross at an acute angle. The pedestrian is walking with his back partly towards the car engrossed in thought; the motorman is counting his fares.

Before either wakes to the situation there is a collision. . . . [T]he pedestrian's right to recover will depend on whether, after he came into its path, the motorman could have stopped or slowed the car or given warning in time to prevent the accident. This calls for a determination of the relative speeds of the parties, the exact position of the car when plaintiff reached the crucial point, and a measurement of the efficiency of the available equipment.

On top of such measurement difficulties came absurd implications:

If the car had no brakes or warning device, the defendant will not be held [liable]. Nor will he be if the car was going so fast that the equipment was inadequate to prevent the accident after plaintiff has come into the zone of peril. . . . Under the formula, it will be seen, it is sometimes true that the greater the defendant's negligence, the less its liability. The trolley company may be held for its motorman's failure to look. But if we add to this failure enough other negligence (e.g., as to speed, or equipment) so that looking would not do any good, the trolley company will be let off. Similarly, if the motorman does look and is careful, the company cannot be held where defective equipment renders his care unavailing. It is in a better position, when it has supplied a bad brake but a good motorman, than when the motorman is careless but the brake efficient.

The last clear chance doctrine faced problems of principle as well. "The worst wrongdoer," James wrote simply but powerfully, "is by no means always a last wrongdoer, and there is the difficulty." James, *Last Clear Chance*, 47 YALE L.J. at 716-19 (internal quotations omitted).

4. *Doctrinal ameliorations II: subjectivizing the "reasonable person" standard.* In general, courts describe the standard they use to evaluate a plaintiff's allegedly negligent conduct as the same standard they use to evaluate a defendant's allegedly negligent conduct. In the Restatement formulation, it is the standard "of a reasonable man under like circumstances." RESTATEMENT (SECOND) OF TORTS § 464 (1965). To the extent that courts tailor this standard for particular plaintiffs—for example, for children and people with physical impairments—that tailoring supposedly follows the same rules as for defendants with those characteristics. *Id.* The case law also shows, however, that when courts apply these standards, conduct that might be deemed negligent when done by a defendant is not deemed negligent when done by a plaintiff. As the authors of the Restatement explain:

There may be circumstances in which a jury may reasonably conclude that a reasonable man would take more, or less, precaution for the protection of others than for his own safety. Thus the risk of harm to others may be more apparent, or apparently more serious, than the risk of harm to the actor himself; or the actor may have reasonable confidence in his own awareness of the risk, and his ability to avoid it, where he cannot reasonably have such confidence in the awareness or ability of others. He may have undertaken a responsibility toward another which requires him to exercise an amount of care for the protection of the other which he would not be required to exercise for his own safety. The relation of the parties, the particular circumstances, and all other relevant factors are to be taken into account. In the great majority of cases it is probably

true that the same conduct will constitute both negligence and contributory negligence, but it does not necessarily follow in all cases.

*Id.* at cmt. f.

The Restatement authors emphasize that these seemingly contradictory results are not a matter of different standards, but of differences in facts, which in turn affect how the standards apply. But as discussed in previous notes, *see supra* Chapter 4, Section A, courts sometimes *have* appeared to adjust the negligence standard when confronted with particularly sympathetic categories of plaintiffs. Consider, for example, plaintiffs who are mentally ill, or who have some other impairment that significantly affects their mental functioning. Where the plaintiff was completely incapable of apprehending the risk that the plaintiff's conduct created, courts have typically treated contributory negligence arguments as unavailing. And when confronted with plaintiffs with greater but still diminished ability to apprehend dangers, some jurisdictions expressly allow juries to take into account the plaintiff's actual mental capacities. The North Carolina Court of Appeals follows this approach: "where an injured plaintiff suffers from diminished mental capacity not amounting to insanity or total incompetence, it is a question for the trier of fact as to whether he exercised the required degree of care for his own safety, and the effect of his diminished mental faculties and capabilities may be taken into account in determining his ability to perceive and avoid a particular risk of harm"; "such a person should be held only to the exercise of such care as he was capable of exercising, i.e., the standard of care of a person of like mental capacity under similar circumstances." *Stacy v. Jedco Const., Inc.*, 457 S.E.2d 875, 879 (N.C. Ct. App. 1995). Courts appear more likely to take this view when the defendant has assumed some kind of caretaking or custodial role vis-à-vis the plaintiff. *See, e.g., Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989) (involving a former patient in a county mental health facility who alleged that the therapist at that facility sexually abused her). But even where this is true, courts have accorded less sympathetic treatment to plaintiffs who had notice of their condition and had some power to reduce the risks they posed to themselves. *See, e.g., Jankee v. Clark County*, 612 N.W.2d 297, 301-04 (Wis. 2000) (applying an objective "reasonable person" standard to a plaintiff patient who failed to take prescribed medication to address his manic depressive illness and was injured after attempting to escape from a psychiatric facility). Should tort law apply the same standard of care to plaintiffs and defendants? If you think different standards are appropriate, how might you articulate them?

5. *Contributory negligence in the jury box.* Even with puzzling efforts to establish ameliorative exceptions like last clear chance, contributory negligence seemed to be a ruthless, cut-and-dry rule that denied negligent plaintiffs any and all relief. But the rule often produced different results in practice. By 1933, one observer noted that while the rule remained on the books in all states, there was more to the story:

Liability in Torts is frequently more sentimental than rational. If anyone be shocked at this thesis let him cast a critical eye at what has happened to the doctrine of contributory negligence. This tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries, whose inability to perceive contributory negligence in suits against certain defendants is notorious; by the emotional antagonism of judges who have placed constrictions on the doctrine which suggest the more evident purpose to destroy

it entirely, rather than to attempt any logical limitation; by the popular prejudices of legislators who have pulled the teeth of the common-law dogma or damned it outright. Little remains to be written about contributory negligence save its obituary.

Charles L. B. Lowndes, *Contributory Negligence*, 22. GEO. L.J. 674 (1933). Two decades later, Prosser wrote similarly that the remedy for the defects of the contributory negligence rule “has been in the hands of the jury”:

Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one. There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out of the window and refuse even to reduce the recovery by so much as a dime. Above all there are many directed verdict cases where the plaintiff's negligence, however slight it may be in comparison with that of the defendant, is still clear beyond dispute, and the court has no choice but to declare it as a matter of law.

Prosser, *Comparative Negligence*, 51 MICH. L. REV. at 469.

Many observers in the middle of the 20th century reported that when faced with a slightly negligent plaintiff and a very negligent defendant, juries were appalled by the draconian consequences of the contributory negligence rule. So they just ignored it and reduced plaintiffs' recoveries by their proportional fault. See, e.g., Harry Kalven, Jr., *The Jury, The Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 167-68 (1958); Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957). In fact, in a before-and-after study of the contributory negligence rule, Professor Maurice Rosenberg concluded that there was no change in the size of plaintiffs' recoveries after the abolition of the rule, indicating that juries had been factoring in plaintiffs' negligence all along. Maurice Rosenberg, *Comparative Negligence in Arkansas: A “Before and After” Survey*, 13 ARK. L. REV. 89, 103 (1959).

### ***Contributory negligence outside of the courtroom***

Of course, even in the first half of the twentieth century, when there were far more trials than there are today, relatively few cases ever got to juries. The pervasiveness of settlement undermined the all-or-nothing character of the contributory negligence rule. A standard outcome in the settlement process was for settlement values simply to be discounted by the probability that the jury would return, or that the judge would insist on, a finding of contributory negligence. Risk-averse parties—often the plaintiffs—would have been willing to accept especially steep discounts from their damages in return for escaping the possibility of a devastating contributory negligence finding.

The limited application of the contributory negligence rule in settlement was perhaps most apparent in the work of the claims adjusters who settled tort claims for insurance

companies. In his classic sociological study of insurance claim adjusters, *Settled Out of Court*, Hugh Laurence Ross reported how they settled cases in the event of a plaintiff's negligence in contributory negligence states:

[A]djusters generally treat questionable liability [including situations where the plaintiff might be negligent] in bodily injury claims as a factor to lower their evaluation, but not to extinguish value. There is variation from office to office and from adjuster to adjuster in how this is done. Impressionistically, departure from the formalistic [contributory negligence] approach seems greatest in the metropolitan offices, and among adjusters who have been employed longest and who are the most legally sophisticated. The new employees, the supervisors, and the more naïve men seem more ready to endorse formalism in the matter. . . .

The facts appearing in [various data on insurance settlements] . . . indicate . . . that, controlling for liability and injury, the proportion of claimants recovering in the comparative negligence states is not higher than that in contributory negligence states. Although the average recovery in paid cases is somewhat higher in the comparative negligence states, the difference is not significant. It is not possible to press this analysis further with the number of cases available, and differences in region, urbanization, and other factors between the two groups of states hinder interpretation of these findings. However, the comparative negligence rule is not shown to produce necessarily higher settlements than the contributory negligence rule. Moreover, the comparative rule appears to offer a time savings in settling doubtful liability cases, which may benefit all parties to the negotiation.

Hugh Lawrence Ross, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 128, 211 (1970).

Yet for all the real-world limits on the contributory negligence rule's effect, or perhaps because of them, the rule gave way in virtually every state to a regime known as comparative negligence. Keeping in mind the public policy problem, consider the following two cases:

## ***2. Comparative Negligence***

### ***Li v. Yellow Cab Company of California, 532 P.2d 1226 (Cal. 1975)***

SULLIVAN, J.

The accident here in question occurred near the intersection of Alvarado Street and Third Street in Los Angeles. At this intersection Third Street runs in a generally east-west direction along the crest of a hill, and Alvarado Street, running generally north and south, rises gently to the crest from either direction. At approximately 9 p.m. on November 21, 1968, plaintiff Nga Li was proceeding northbound on Alvarado in her 1967 Oldsmobile. She was in the inside lane, and about 70 feet before she reached the Third Street intersection she stopped and then began a left turn across the three southbound lanes of Alvarado, intending to enter the

driveway of a service station. At this time defendant Robert Phillips, an employee of defendant Yellow Cab Company, was driving a company-owned taxicab southbound in the middle lane on Alvarado. He came over the crest of the hill, passed through the intersection, and collided with the right rear portion of plaintiff's automobile, resulting in personal injuries to plaintiff as well as considerable damage to the automobile.

The court, sitting without a jury, found as facts that defendant Phillips was traveling at approximately 30 miles per hour when he entered the intersection, that such speed was unsafe at that time and place, and that the traffic light controlling southbound traffic at the intersection was yellow when defendant Phillips drove into the intersection. It also found, however, that plaintiff's left turn across the southbound lanes of Alvarado "was made at a time when a vehicle was approaching from the opposite direction so close as to constitute an immediate hazard." The dispositive conclusion of law was as follows: "That the driving of [Nga Li] was negligent, that such negligence was a proximate cause of the collision, and that she is barred from recovery by reason of such contributory negligence."

Judgment for defendants was entered accordingly.

## I

"Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) TORTS, § 463. Thus the American Law Institute, in its second restatement of the law, describes the kind of conduct on the part of one seeking recovery for damage caused by negligence which renders him subject to the doctrine of contributory negligence. What the effect of such conduct will be is left to a further section, which states the doctrine in its clearest essence: 'Except where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him.' (*Id.* §] 467.)

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself . . . , has been the law of this state from its beginning. . . . Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks, in both the legislative<sup>1</sup> and the judicial arenas, seeking its amelioration or repudiation. We have undertaken a thorough reexamination of the matter, giving particular attention to the common law and statutory sources of the subject doctrine in this state. As we have indicated, this reexamination leads us to the conclusion that the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of

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<sup>1</sup> (See, for example, Sen. Bill No. 43 (1971 Reg. Sess.); Assem. Bill No. 694 (1971 Reg. Sess.); Sen. Bill No. 132 (1972 Reg. Sess.); Assem. Bill No. 102 (1972 Reg. Sess.); Sen. Bill No. 10 (1973 Reg. Sess.); Sen. Bill No. 557 (1973 Reg. Sess.); Assem. Bill No. 50 (1973 Reg. Sess.); Assem. Bill No. 801 (1973 Reg. Sess.); Assem. Bill No. 1666 (1973 Reg. Sess.); Sen. Bill No. 2021 (1974 Reg. Sess.).)

contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation . . . .

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: 'Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence . . . . It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis. . . .

It is in view of these theoretical and practical considerations that to this date 25 states, have abrogated the 'all or nothing' rule of contributory negligence and have enacted in its place general apportionment statutes calculated in one manner or another to assess liability in proportion to fault. In 1973 these states were joined by Florida, which effected the same result by Judicial decision. *Hoffman v. Jones* (Fla. 1973). We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery—and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.<sup>6a</sup>

. . .

## II

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin—its genesis being traditionally attributed to the opinion of Lord Ellenborough in *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B.1809)—the enactment of section 1714 of the Civil Code<sup>7</sup> in 1872 codified the doctrine as it stood at that date and, the argument continues, rendered it invulnerable to attack in the courts except on constitutional grounds . . . .

We have concluded that th[is] argument, in spite of its superficial appeal, is fundamentally misguided. . . . [I]t was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution. . . .

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<sup>6a</sup> In employing the generic term 'fault' throughout this opinion we follow a usage common to the literature on the subject of comparative negligence. In all cases, however, we intend the term to import nothing more than 'negligence' in the accepted legal sense. [Editors Note: In the advance sheets of the court's decision, the text at footnote 6a stated that comparative negligence allocated liability "in direct proportion to the extent of the parties' causal responsibility." Between the publication of the advance sheets and the publication of *Li* in the West Publishing Company reports, the court changed the text and added footnote 6a, which had not appeared in the advance sheets at all.]

<sup>7</sup> Section 1714 of the Civil Code has never been amended. It provides as follows: 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.'



## III

We are thus brought to the second group of arguments which have been advanced by defendants and the amici curiae supporting their position. Generally speaking, such arguments expose considerations of a practical nature which, it is urged, counsel against the adoption of a rule of comparative negligence in this state even if such adoption is possible by judicial means.

The most serious of these considerations are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties. One such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaluate relative negligence in such circumstances, and to compound this difficulty such an evaluation would not be *res judicata* in a subsequent suit against the absent wrongdoer. Problems of contribution and indemnity among joint tortfeasors lurk in the background. . . .

A second and related major area of concern involves the administration of the actual process of fact-finding in a comparative negligence system. The assigning of a specific percentage factor to the amount of negligence attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts. The temptation for the jury to resort to a quotient verdict in such circumstances can be great. . . . These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry . . . , and the utilization of special verdicts . . . or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence. . . .

Finally there is the problem of the treatment of willful misconduct under a system of comparative negligence. In jurisdictions following the 'all-or-nothing' rule, contributory negligence is no defense to an action based upon a claim of willful misconduct . . . and this is the present rule in California. As Dean Prosser has observed, "(this) is in reality a rule of comparative fault which is being applied, and the court is refusing to set up the lesser fault against the greater." PROSSER, TORTS, § 65. The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order, and under this conception it might well be urged that comparative negligence concepts should have no application when one of the parties has been guilty of willful and wanton misconduct. It has been persuasively argued, however, that the loss of deterrent effect that would occur upon application of comparative fault concepts to willful and wanton misconduct as well as ordinary negligence would be slight, and that a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct which falls short of being intentional. . . .

It remains to identify the precise form of comparative negligence which we now adopt for application in this state. Although there are many variants, only the two basic forms need be considered here. The first of these, the so-called 'pure' form of comparative negligence, apportions liability in direct proportion to fault in all cases. This was the form adopted by the Supreme Court of Florida in *Hoffman v. Jones*, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators.

. . .

The second basic form of comparative negligence, of which there are several variants, applies apportionment based on fault up to the point at which the plaintiff's negligence is equal to or greater than that of the defendant—when that point is reached, plaintiff is barred from recovery. Nineteen states have adopted this form or one of its variants by statute. The principal argument advanced in its favor is moral in nature: that it is not morally right to permit one more at fault in an accident to recover from one less at fault. Other arguments assert the probability of increased insurance, administrative, and judicial costs if a 'pure' rather than a '50 percent' system is adopted, but this has been seriously questioned. . . .

We have concluded that the 'pure' form of comparative negligence is that which should be adopted in this state. In our view the '50 percent' system simply shifts the lottery aspect of the contributory negligence rule to a different ground. As Dean Prosser has noted, under such a system '(i)t is obvious that a slight difference in the proportionate fault may permit a recovery; and there has been much justified criticism of a rule under which a plaintiff who is charged with 49 percent of a total negligence recovers 51 percent of his damages, while one who is charged with 50 percent recovers nothing at all.'<sup>22</sup> In effect 'such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result. The partial rule simply lowers, but does not eliminate, the bar of contributory negligence.' . . .

We also consider significant the experience of the State of Wisconsin, which until recently was considered the leading exponent of the '50 percent' system. There that system led to numerous appeals on the narrow but crucial issue whether plaintiff's negligence was equal to defendant's. . . . Numerous reversals have resulted on this point, leading to the development of arcane classifications of negligence according to quality and category. . . .

It remains for us to determine the extent to which the rule here announced shall have application to cases other than those which are commenced in the future. . . . [W]e hold that the present opinion shall be applicable to all cases in which trial has not begun before the date this decision becomes final in this court, but that it shall not be applicable to any case in which trial began before that date (other than the instant case)—except that if any judgment be reversed on appeal for other reasons, this opinion shall be applicable to any retrial. . . .

CLARK, J., dissenting.

I dissent. For over a century this court has consistently and unanimously held that Civil Code section 1714 codifies the defense of contributory negligence. Suddenly—after 103 years—the court declares section 1714 shall provide for comparative negligence instead. In my view, this action constitutes a gross departure from established judicial rules and role. . . .

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<sup>22</sup> This problem is compounded when the injurious result is produced by the combined negligence of several parties. For example in a three-car collision a plaintiff whose negligence amounts to one-third or more recovers nothing; in a four-car collision the plaintiff is barred if his negligence is only one-quarter of the total.

## Notes

1. *Courts versus legislatures.* Was the California Supreme Court right to think that the institutional authority to alter the contributory negligence rule properly lay with it rather than with the legislature? What are the relevant considerations in the question of institutional choice?

2. *The Restatement joins in.* The above case describes two main kinds of comparative negligence regimes: a “pure” form and a “50 percent” form. The Third Restatement recommends the pure form, asserting that where a plaintiff’s negligence is “a legal cause of an indivisible injury,” courts are to reduce a plaintiff’s recovery “in proportion to the share of responsibility the fact finder assigns to the plaintiff. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 7 (2000).

3. *Comparing negligence?* The *Li* court raises an interesting question in the course of adopting a comparative negligence regime: how exactly do we compare one party’s negligent act with another party’s different negligent act? Consider the facts of the *Li* case itself. How should a jury apportion percentages of fault to the plaintiff, who made a negligent left turn, and the defendant, who was driving over the speed limit? Is it 50-50? Or something else?

Alternatively, try comparing two parties’ faults when they do varying degrees of the same negligent act. Consider an accident between Car P (the plaintiff car) and Car D (the defendant car) on a road with a 35 mile per hour (mph) speed limit. Before the accident, Car P was driving 45 mph and Car D was driving 60 mph. Is their comparative fault 50-50, since they were both driving over the speed limit? Or should their comparative fault scale with each additional mile per hour they were driving over the speed limit, such that their fault split would be about 30-70? Or is driving 25 miles per hour over the speed limit exponentially more dangerous than driving 10 miles per hour over the speed limit, such that their fault split should be something more like 10-90?

Consider another wrinkle for comparative negligence regimes. In footnote 6a, the *Li* court attempted to clarify that California tort law forces judges and juries to compare parties’ respective faults rather than their respective causal responsibilities. The court modified the decision a month after it was published to clarify that California’s negligence regime would only focus on fault. But what’s the difference between a party’s fault and a party’s causal contribution? If the California Supreme Court was confused between the two, what are the chances that future courts and juries will understand the distinction?

Perhaps frustrated with questions like these, some state supreme courts have passed up their opportunities to adopt comparative negligence regimes:

***Coleman v. Soccer Ass'n. of Columbia*, 432 Md. 679 (2013).**

Thirty years ago, in *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 444 (1983), this Court issued a writ of certiorari to decide “whether the common law doctrine of contributory negligence should be judicially abrogated in Maryland and the doctrine of comparative negligence adopted in its place as the rule governing trial of negligence actions in this State.” In a comprehensive opinion by then Chief Judge Robert C. Murphy, the Court in *Harrison* declined to abandon the doctrine of contributory negligence in favor of comparative negligence, pointing out that such change “involves fundamental and basic public policy considerations properly to be addressed by the legislature.”

The petitioner in the case at bar presents the same issue that was presented in *Harrison*, namely whether this Court should change the common law and abrogate the defense of contributory negligence in certain types of tort actions. After reviewing the issue again, we shall arrive at the same conclusion that the Court reached in *Harrison*.

I.

The petitioner and plaintiff below, James Kyle Coleman, was an accomplished soccer player who had volunteered to assist in coaching a team of young soccer players in a program of the Soccer Association of Columbia, in Howard County, Maryland. On August 19, 2008, Coleman, at the time 20 years old, was assisting the coach during the practice of a team of young soccer players on the field of the Lime Kiln Middle School. While the Soccer Association of Columbia had fields of its own, it did not have enough to accommodate all of the program’s young soccer players; the Association was required to use school fields for practices. At some point during the practice, Coleman kicked a soccer ball into a soccer goal. As he passed under the goal’s metal top rail, or crossbar, to retrieve the ball, he jumped up and grabbed the crossbar. The soccer goal was not anchored to the ground, and, as he held on to the upper crossbar, Coleman fell backwards, drawing the weight of the crossbar onto his face. He suffered multiple severe facial fractures which required surgery and the placing of three titanium plates in his face. Coleman instituted the present action by filing a complaint, in the Circuit Court for Howard County, alleging that he was injured by the defendants’ negligence. The defendant and respondent, the Soccer Association of Columbia, asserted the defense of contributory negligence.

...

[T]he jury concluded that the Soccer Association of Columbia was negligent and that the Soccer Association’s negligence caused Coleman’s injuries. The jury also found that Coleman was negligent, and that his negligence contributed to his own injuries. Because of the contributory negligence finding, Coleman was barred from any recovery. . . .

II.

This Court last addressed the continuing viability of the contributory negligence doctrine in *Harrison v. Montgomery County Bd. of Educ.*, [decided in 1983]. In *Harrison*, the Court held that the contributory negligence principle remained the valid standard in Maryland negligence cases and that “any change in the established doctrine [was for] the Legislature.” 295 Md. at 463.

Chief Judge Murphy, for the Court in *Harrison*, began his review of the contributory negligence standard by tracing the standard's historical origins to Lord Chief Justice Ellenborough's opinion in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B.1809). . . . The *Harrison* opinion explained that, when the contributory negligence standard was first judicially adopted in the United States, the courts at the time were concerned that juries would award to plaintiffs sums that had the potential to stifle "newly developing industry." Early American courts were also concerned that they should not adopt a policy in which "courts . . . assist a wrongdoer who suffered an injury as a result of his own wrongdoing." . . .

The Court in *Harrison* also pointed out that, as of 1983, of the thirty-nine states that had adopted comparative negligence, thirty-one had done so by statute, with the eight remaining states having adopted the principle by judicial action. The Court noted that it was "clear" that legal scholars "favored" the comparative negligence standard . . . .

Nevertheless, the *Harrison* Court pointed to other considerations involved in changing the standard from contributory negligence to comparative negligence (295 Md. at 454–455):

Also to be considered is the effect which a comparative fault system would have on other fundamental areas of negligence law. The last clear chance doctrine, assumption of the risk, joint and several liability, contribution, setoffs and counterclaims, and application of the doctrine to other fault systems, such as strict liability in tort, are several of the more obvious areas affected by the urged shift to comparative negligence. Even that change has its complications; beside the 'pure' form of comparative negligence, there are several 'modified' forms, so that abrogation of the contributory negligence doctrine will necessitate the substitution of an alternate doctrine. Which form to adopt presents its own questions and the choice is by no means clear. . . . That a change from contributory to comparative negligence involves considerably more than a simple common law adjustment is readily apparent.

. . . *Harrison* concluded . . . :

[I]n considering whether a long-established common law rule—unchanged by the legislature and thus reflective of this State's public policy—is unsound in the circumstances of modern life, we have always recognized that declaration of the public policy of Maryland is normally the function of the General Assembly; that body, by Article 5 of the Maryland Declaration of Rights, is expressly empowered to revise the common law of Maryland by legislative enactment. The Court, therefore, has been particularly reluctant to alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State.

In the years immediately prior to *Harrison*, from 1966 to 1982, the Maryland General Assembly had considered twenty-one bills seeking to change the contributory negligence standard. None of the bills had been enacted. The *Harrison* Court accorded a great deal of weight to the General Assembly's failure to enact any of these bills, stating: "[T]he legislature's action in rejecting the proposed change is indicative of an intention to retain the contributory negligence doctrine."

The Court further pointed out that enactment of a comparative negligence standard is to be made, beginning with the initial inquiry of what form of comparative negligence to adopt, “pure” or one “of the several types of modified comparative negligence.” If Maryland’s common law were to change, the *Harrison* opinion explained, the decision as to which form of comparative negligence to adopt “plainly involves major policy considerations” of the sort best left to the General Assembly.

### III.

[P]etitioners and numerous amici in this case urge this Court to abolish the contributory negligence standard and replace it with a form of comparative negligence. They argue contributory negligence is an antiquated doctrine, that it has been roundly criticized by academic legal scholars, and that it has been rejected in a majority of our sister states. It is also pointed out that contributory negligence works an inherent unfairness by barring plaintiffs from any recovery, even when it is proven, in a particular case, that a defendant’s negligence was primarily responsible for the act or omission which resulted in a plaintiff’s injuries. It is said that contributory negligence provides harsh justice to those who may have acted negligently, in minor ways, to contribute to their injuries, and that it absolves those defendants from liability who can find any minor negligence in the plaintiffs’ behavior.

Petitioners correctly contend that, because contributory negligence is a court-created principle, and has not been embodied in Maryland statutes, this Court possesses the authority to change the principle. This Court has recognized that (*Ireland v. State*, 310 Md. 328, 331–332 (1987)),

[b]ecause of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in light of modern circumstances or increased knowledge. Equally well established is the principle that the common law should not be changed contrary to the public policy of this State set forth by the General Assembly. *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 141.

...

Since the *Harrison* case, the General Assembly has continually considered and failed to pass bills that would abolish or modify the contributory negligence standard. The failure of so many bills, attempting to change the contributory negligence doctrine, is a clear indication of legislative policy at the present time. . . . [T]he legislative policy in Maryland is to retain the principle of contributory negligence.

Dissenting Opinion by HARRELL, J., which BELL, C.J., joins.

Paleontologists and geologists inform us that Earth’s Cretaceous period (including in what is present day Maryland) ended approximately 65 million years ago with an asteroid striking Earth (the Cretaceous–Paleogene Extinction Event), wiping-out, in a relatively short period of geologic time, most plant and animal species, including dinosaurs. As to the last premise, they are wrong. A dinosaur roams yet the landscape of Maryland (and Virginia,

Alabama, North Carolina and the District of Columbia), feeding on the claims of persons injured by the negligence of another, but who contributed proximately in some way to the occasion of his or her injuries, however slight their culpability. The name of that dinosaur is the doctrine of contributory negligence. With the force of a modern asteroid strike, this Court should render, in the present case, this dinosaur extinct. It chooses not to do so. Accordingly, I dissent. . . .

### Notes

1. *The persistence of contributory negligence?* Is the *Coleman* court right to refrain from altering its long-settled rule on grounds of democratic values and institutional choice? Note that the legislature could switch the rule back to contributory negligence if the court had opted to follow *Li v. Yellow Cab*. As a result, the choice reduces to one about proper starting points and the court's role as an agenda-setter in the political process.

2. *The seat belt defense.* What happens when a plaintiff takes an action that does not directly cause an accident, but instead only aggravates her own injuries in that accident? Courts have struggled with this principle since the inception of the comparative negligence regime—one only has to look to the seat belt dilemma to grasp the problem.

Can a defendant prove a plaintiff's negligence by submitting evidence that the plaintiff was not wearing a seat belt during the accident? Under contributory negligence regimes, courts were hesitant to deny an un-seatbelted plaintiff's recovery outright. This may be because contributory negligence regimes were most prominent before cars were required to have seatbelts. Or, perhaps, the courts just found this application of contributory negligence "too harsh" for something that didn't even cause the accident. See VICTOR SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 4.06 (5th ed. 2013).

Perhaps more surprisingly, the vast majority of states have also been loath to allow defendants to raise a "seat belt defense" under comparative negligence regimes. For example, the state legislatures in Indiana, North Dakota, and Minnesota have all passed laws prohibiting evidence of a plaintiff's un-seatbeltedness from being used to prove negligence. IND. STAT. ANN. § 9-8-14-5; N.D. CENT. CODE § 39-21-41.2(3); *Cressy v. Grassman*, 536 N.W.2d 39 (Minn. App. 1995). Even Michigan—one of the few states that does allow a version of the seat belt defense in tort cases—limits damages reductions due to plaintiffs' seatbelt-related negligence to 5% of total damages. MICH. COMP. LAWS. ANN. § 257.710e.

In fact, the seat belt defense has not even gained traction in "Click It or Ticket" states that impose nominal criminal fines on drivers' failures to wear seatbelts. For example, New Mexican traffic police impose twenty-five to fifty dollar fines on all individuals who fail to wear a seat belt. N.M. STAT. ANN. §66-7-370 et seq. Yet the same statute authorizing the police to impose the fine also prohibits courts from finding a plaintiff negligent for failing to wear a seatbelt. How could this particular contradiction come to be? As Professor Schwartz suggests, "[t]he answer regarding a change in public policy was clear: voters know that seat belts are a good idea, but will not accept significant legal consequences for failure to use them." VICTOR SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 4.06 (5th ed. 2013).

## B. Assumption of Risk

Sometimes a plaintiff behaves in a careless and unreasonably dangerous manner, without taking conscious note of the risks involved. We call such behavior contributory or comparative negligence. Other times, however, a plaintiff enters into a course of conduct knowing the risks of that conduct. And in some of these situations, though not all, the law treats a plaintiff's knowledge of the risks as grounds for allocating those risks to the plaintiff—or at least to distributing those risks among the negligent parties according to their relative fault. We call these instances ones in which the plaintiff assumes the risk. A plaintiff may assume risks tacitly or impliedly, on one hand, or expressly, on the other. We will take up these two categories of assumption of the risk in turn in the materials that follow.

Assumption of the risk is hugely significant as a doctrine in modern tort law. Any number of social situations are covered by implied assumption of the risk rules, ranging from amateur and professional sporting events to amusement park rides and more. Indeed, myriad other social situations might be covered by implied assumption of the risk rules. Why not say, for example, that drivers assume the risk of automobile accidents on dangerous stretches of a highway? The common law of torts does not say any such thing. But why not? What is it about certain activities, and not about others, that warrants the creation of an implied assumption of the risk rule?

### 1. *Implied Assumption of Risk*

#### ***Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479 (N.Y. 1929)**

CARDOZO, C.J.

The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, N.Y. One of the supposed attractions is known as “the Flopper.” It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name, above the gate, ‘the Flopper,’ was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep



their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. 'I took a chance,' she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb, in that it stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard, or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment. . . . But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen.

*Volenti non fit injuria.* One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must have been taken to avert them. Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, 250,000 visitors were at the Flopper in a year. Some quota of accidents

was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall.

There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

POUND, CRANE, LEHMAN, KELLOG, and HUBBS, JJ., concur.

O'BRIEN, J., dissents . . .

### Notes

1. *Negligence in the Flopper case?* What, if anything, did the operator of the Flopper do wrong? If the answer is nothing, then why are we talking about the plaintiff's conduct? Isn't this a case in which the plaintiff loses simply because he cannot show negligence on the part of the defendant?

2. *Primary assumption of the risk.* Flopper-like cases are often said to deal with "primary assumption of risk." As the California Supreme Court has put it,

these are instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk—the category of assumption of risk that the legal commentators generally refer to as "primary assumption of risk."

*Knight v. Jewett*, 834 P.2d 696, 701 (Cal. 1992). (On "secondary assumption of risk," see the notes following *Landings Association, Inc. v. Williams*, *infra*.) Phrased differently, "primary assumption of risk" cases are ones where "the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever." *Id.* at 704. For example, imagine that a plaintiff is injured while skiing and the only allegedly negligent conduct that the plaintiff can point to is the defendant ski operation's provision of steep and bumpy ski runs—dangers that are inherent to the sport of skiing. Why craft an independent doctrine for such cases? Why aren't these simply dealt with as cases in which the defendant wins because the defendant did not breach a duty of care?

3. *A monster flopper?* Cardozo observes in the Flopper case that the outcome might be different “if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change.” One New Jersey theme park in the 1980s and 1990s may have been such a place. Customers reported 14 broken bones and 26 head injuries in 1984 and 1985. The park acquired its own ambulance. Six people died at the park between 1978 and 1996. Test dummies used to simulate rides were said to come out decapitated. One teenage customer recalled driving to the park with his friends. “It wasn’t ‘If someone gets hurt,’” he recalled, “it was ‘Who’s going to get hurt?’” Another long-time customer remembered “People were bleeding all over the place.” Did the notoriety and visible dangerousness of Action Park mean that its ordinary operation was not negligent as a matter of law? Or was Action Park so dangerous that people should not have been allowed to assume the risks it posed? Notably, a young New Jersey man named Cory Booker loved the place. “I’ve got stories 2 tell,” he tweeted in 2014. See James Barron, *People Were Bleeding All Over*, N.Y. TIMES, Oct. 19, 2019.

4. *The fellow servant rule.* Historically, many cases of primary assumption of the risk dealt with workplace risks. Workers in the pre-worker’s compensation era were regularly said to assume the risks of the work in which they were engaged. In *Lamson v. American Ax & Tool Co.*, 58 N.E. 585 (Mass. 1900), for example, the plaintiff was a painter of hatchets in the defendant’s manufacturing establishment. When the defendant installed a new axe rack, plaintiff complained to the superintendent of the factory that the new rack was dangerous. The superintendent answered that “he would have to use the racks or leave.” Plaintiff stayed and was injured when a hatchet fell from the rack. Massachusetts Supreme Judicial Court Chief Justice Oliver Wendell Holmes, Jr., soon to be appointed to the United States Supreme Court, ruled in favor of the defendant on the ground that Lamson had assumed the risk:

The plaintiff, on his own evidence, appreciated the danger more than any one else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of employment, but solely on the permanent conditions of the racks and their surroundings and the plaintiff’s continuing to work where he did. He complained, and was notified that he could go if he would not face the chance. He stayed and took the risk.

*Id.* at 585.

The assumption of the risk rule in the nineteenth- and early twentieth-century workplace encompassed the assumption of virtually all risks arising out of the negligence of a co-worker. This was the so-called “fellow servant rule.” Articulated most famously by Chief Justice Lemuel Shaw of Massachusetts (you will recall Shaw as the author of the opinion in *Brown v. Kendall*), the fellow servant rule was grounded in two theories. The first was that employees are better positioned than an employer to minimize the risks involved in the workplace:

Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect

of duty, and leave the service . . . . By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.

*Farwell v. Boston & Worcester R. Corp.*, 45 Mass. 49, 59 (1842). Does Shaw's description of the workplace hold true for modern firms? Did it hold true for railroad firms in the middle of the nineteenth century?

5. *Compensating wage premiums?* A second theoretical basis for the assumption of the risk rule was that even if employees were not better positioned, the employees' wages would be higher ex ante to reflect the allocation of the risk of work accidents to workers ex post; as Shaw put it, even if workers lost when they brought injury suits, their compensation was "adjusted accordingly." *Farwell*, 45 Mass. at 57.

Contemporary economists refer to this theory as the wage premium theory: employees earn, or so it is said, a higher wage to reflect the risks they face in the workplace. If the background tort rules make recovery for work accidents difficult, the wage will be higher still to reflect the true costs of the job to the employee. Conversely, if the risk of accidents were transferred to the employer (the theory goes) wages would decrease accordingly to reflect the employer's new costs.

Economists have tried hard to determine empirically whether wages adjust to reflect work accident risk and background tort rules. The evidence is split. Some have purported to find little or no effect of added risk on wages, especially among non-unionized workers. See Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 Indus. & Labor Relations Rev. 116 (1998). Others find considerable compensating wage differentials in risky workplaces. See W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 23 (2003) (finding that workers' wage differentials place an implicit value of \$3 to \$7 million dollars on the average worker life). Similarly, studies of the transition from tort to workers' compensation conclude that the shift to a more ex post compensation was accompanied by a reduction in wages, suggesting that workers traded off increased after-the-fact injury compensation for decreased ex ante risk premiums. See PRICE V. FISHBACK & SHAWN E. KANTOR, *PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* (2000).

Note that to the extent there are wage premiums, such premiums create a built-in market incentive for employers to improve safety conditions for their workers. Safer workplaces would allow employers to pay lower wages or attract better talent, since they would be more attractive places to work. One difficulty with this theory is that even if employees demand higher wages in return for the increased risks of certain industries, the evidence suggests that they usually do not have good enough information about the safety records of particular firms to demand firm-specific safety premiums. Indeed, even if compensating wage premiums exist, it seems highly implausible, given employees' limited information about the relevant risks, to think that the market wage for any given position accurately includes the risk of injury and the background tort rule. See Susan Rose-Ackerman, *Progressive Law and Economics*, 98 YALE L.J. 341, 355-57 (1988).

6. *Assumption of the risk is no longer a live doctrine in most workplaces.* The enactment of workers' compensation laws has displaced most tort suits between employer and employee. Today the most common setting for the doctrine of primary assumption of the risk is athletic events.

***Maddox v. City of New York*, 487 N.E.2d 553 (N.Y. 1985)**

MEYER, J.

[P]laintiff, a member of the New York Yankees team, was injured on June 13, 1975, when he slipped and fell during the ninth inning of a night game with the Chicago White Sox. . . . Plaintiff testified that he was playing centerfield and was fielding a fly ball hit to right centerfield, that he was running to his left and as he sought to stop running his left foot hit a wet spot and slid, but his right foot stuck in a mud puddle, as a result of which his right knee buckled. The knee injury required three separate surgical procedures and ultimately forced him to retire prematurely from professional baseball.

Plaintiff and his wife (hereafter collectively referred to as plaintiff) sued the city, as owner of Shea Stadium [predecessor stadium to the New York Mets's Citi Field], and the Metropolitan Baseball Club, Inc., as lessee. In a separate action plaintiff sued the general contractor who built Shea Stadium and the architect and the consulting engineer. Both actions charge that the drainage system was negligently designed, constructed or maintained. [The Appellate Division ruled in favor of defendants' motion for summary judgment. Maddox appealed, arguing that "he assumed the risks of the game, not of the playing field, which was in an unreasonably dangerous condition, that the risk had in any event been enhanced, that he had no choice but to continue to play, and that the evidence did not establish his subjective awareness that his foot could get stuck in the mud."]

In the instant case we deal not with express assumption of risk, but with assumption of risk to be implied from plaintiff's continued participation in the game with the knowledge and appreciation of the risk which his deposition testimony spelled out and which established his implied assumption as a matter of law. . . .

The risks of a game which must be played upon a field include the risks involved in the construction of the field, as has been held many times before. . . . [T]he assumption doctrine "applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on". . . .

There is no question that the doctrine requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk, but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff, and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport. In that context plaintiff's effort to separate the wetness of the field, which he testified was above the grass line, from the mud beneath it in which his foot became lodged must be rejected for not only was he aware that there was "some mud" in the centerfield area, but also it is a matter of common experience that water of sufficient depth to cover grass may result in the earth beneath being turned to mud. We do not deal here . . . with a hole in the playing field hidden by grass,

but with water, indicative of the presence of mud, the danger of which plaintiff was sufficiently aware to complain to the grounds keepers. It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results. Nor do the enhancement cases to which plaintiff refers in arguing that the risk of water on the field was enhanced by the failure to install proper drainage facilities avail plaintiff, for in each of those cases the enhanced risk that resulted was unknown to the particular plaintiff, whereas here the resulting risk (mud) was evident to plaintiff as is shown by his observation of mud and water and his complaints to the grounds keepers concerning the presence of water to the grass line.

Finally, although the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury dismissal of a complaint as a matter of law is warranted when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact. We are satisfied that this is such a case for, on the basis of those parts of plaintiff's deposition above set forth, the defense of assumption of risk was clearly established, and plaintiff has not, as it was his burden to do . . . present[ed] evidence in admissible form that he had no choice in the matter but to obey a superior's direction to continue notwithstanding the danger. Indeed, nothing in plaintiff's affidavit or in so much of his deposition as is contained in the record suggests that he acted under such an order or compulsion, nor can we agree, notwithstanding the dictum in or the irascibility of some baseball owners or managers, that we should infer that such an order had been given or that plaintiff acted under the compulsion of an unspoken order.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

WACHTLER, C.J., and JASEN, SIMONS, KAYE and ALEXANDER, JJ., concur.

TITONE, J., taking no part.

### *Notes*

1. *Elliot Maddox*. Elliot Maddox was a promising young member of a struggling Yankees team when he was injured. He never played effectively again. Why did Maddox not sue the Yankees? It was the Yankees, after all, that sent him out into the wet outfield and required him to play. The answer is that, as Maddox's employer, the Yankees were immune from suit in tort, though they were responsible for any workers' compensation benefits. Maddox's action against the city as owner of Shea Stadium and against the Mets as the stadium's lessee is emblematic of the way in which employers' workers' compensation immunity has generated pressure to bring tort actions against more distant tort defendants.

Note that fifteen years after the New York Court of Appeals decided his tort claim, Maddox was back in the news, this time for fraudulent worker's compensation claims. After getting work as a counselor in Florida's Division of Children and Families, Maddox filed a workers' compensation claim based on the knee injury he suffered in Shea Stadium in 1975. Now 51 years old, Maddox claimed that he was "at home in Coral Springs and too hobbled to

work.” The Tuscaloosa News, however, reported that in fact Maddox was running baseball camps.

Investigators with the Florida Division of Risk Management say they videotaped Maddox “walking, running, bending both knees, performing pitching windups and carrying equipment” during the times he claimed to be too injured to report to work.

*Tuscaloosa News*, Jan. 25, 2000, p. 3B. Maddox was arrested on charges of workers’ compensation fraud, grand theft, and perjury in official proceedings. He was eventually acquitted by a jury on all charges.

2. “*The Baseball Rule.*” Primary assumption of the risk also finds application in the class of cases brought by spectators at professional sporting events. The Missouri Supreme Court recently had occasion to set forth the so-called “Baseball Rule”:

[A]n overwhelming majority of courts recognized that spectators at sporting events are exposed to certain risks that are inherent merely in watching the contest. Accordingly, under what is described . . . as implied primary assumption of the risk, these courts held that the home team was not liable to a spectator injured as a result of such risks.

The archetypal example of this application of implied primary assumption of the risk is when a baseball park owner fails to protect each and every spectator from the risk of being injured by a ball or bat flying into the stands. Just as Missouri teams have led (and continue to lead) professional baseball on the field, Missouri courts helped lead the nation in defining this area of the law off the field. More than 50 years ago, this Court was one of the first to articulate the so-called “Baseball Rule”:

[W]here a baseball game is being conducted under the customary and usual conditions prevailing in baseball parks, it is not negligence to fail to protect all seats in the park by wire netting, and that the special circumstances and specific negligence pleaded did not aid plaintiff or impose upon the defendant a duty to warn him against hazards which are necessarily incident to baseball and are perfectly obvious to a person in possession of his faculties.

...

[W]hen due care has been exercised to provide a reasonable number of screened seats, there remains a hazard that spectators in unscreened seats may be struck and injured by balls which are fouled or otherwise driven into the stands. This risk is a necessary and inherent part of the game and remains after ordinary care has been exercised to provide the spectators with seats which are reasonably safe. It is a risk which is assumed by the spectators because it remains after due care has been exercised and is not the result of negligence on the part of the baseball club. It is clearly not an unreasonable risk to spectators which imposes a duty to warn [or protect].

[M]any dozens of cases around the country hold[] that, as long as some seats directly behind home plate are protected, the team owes “no duty” to spectators outside that area who are injured by a ball or bat while watching a baseball game.

*Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo. 2014).

Courts have been unwilling to allow the baseball rule to defeat all the tort claims that arise in this context. For instance, in *Maytnier v. Rush*, 225 N.E.2d 83 (Ill. App. 1967), an Illinois appellate court held that where the plaintiff was struck by an errant ball coming from the bullpen in Chicago’s Wrigley Field, rather than by a ball coming from the field, the baseball rule did not apply. Similarly, where the antics of the mascot at a minor league game distracted the plaintiff from the progress of the game, the court held that the baseball rule’s assumption of the risk argument did not defeat the plaintiff’s suit for injuries. *Lowe v. Cal. League of Prof’l Baseball*, 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997). Most recently, the Missouri Supreme Court held that the baseball rule of primary assumption of the risk did not apply where a hot dog thrown by the Kansas City Royals’ mascot between innings struck the plaintiff in the eye and detached his retina. *Coomer*, 437 S.W.3d at 184.

Note also that courts are not the only institution involved in fashioning the baseball rule. In *Maisonave v. Newark Bears*, 881 A.2d 700 (N.J. 2005), the New Jersey Supreme Court held that the baseball rule did not apply in a suit by a spectator injured by a foul ball while waiting at a concession stand in the stadium concourse. The next year, the New Jersey legislature passed a law limiting team liability for any “injuries which result from being struck by a baseball or a baseball bat anywhere on the premises during a professional baseball game.” N.J. STAT. ANN. § 2A53A-46 (2006).

3. *Amateur or “pick-up” sports.* Primary assumption of risk is a comprehensive doctrine that applies not only to spectators at professional sporting events, but also to players in amateur or even “pick-up” games. The Indiana Court of Appeals recently stated the doctrine as follows:

A participant in a sporting event, including any person who is part of the sporting event or practice involved such as players and coaches, does not have a duty to fellow participants to refrain from conduct which is *inherent and foreseeable in the play of the game*, even though such conduct may be negligent and may result in injury absent evidence that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity.

*Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004) (emphasis added).

In *Maddox*, the court reasoned that “a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport.” But the *Geiersbach* court suggests that any person participating in a sporting game, regardless of its level of professionalism or lack thereof, is deemed to have assumed risk inherent and foreseeable in the particular sport. Which is the better approach?



4. So far the cases we have seen have been primary assumption of the risk cases in which the doctrine of assumption of the risk is a different way of saying that the defendant did not breach a duty to the plaintiff. What about the next case: is this a case in which the defendant was not negligent? Or is this a case about the plaintiff's behavior creating a defense for a defendant whose conduct might have made it liable under other circumstances?

***Landings Association, Inc. v. Williams*, 728 S.E.2d 577 (Ga. 2012)**

MELTON, J.

[T]he Court of Appeals held that the trial court properly denied in part motions for summary judgment brought by The Landings Association, Inc., . . . finding that a question of fact remained as to whether The Landings . . . failed, pursuant to the law of premises liability, to take reasonable steps to protect Gwyneth Williams from being attacked and killed by an alligator in the planned residential community and golf club owned and/or managed by The Landings . . . .

As is relevant to our holding, the facts, in the light most favorable to Williams, show that, at the time of the alligator attack, Williams was house-sitting for her daughter and son-in-law at The Landings, a planned residential development with a golf course located on Skidaway Island off the Georgia coast. Before The Landings was developed, the land within and surrounding its boundaries was largely marsh, where indigenous alligators lived and thrived. In order to develop the property, The Landings entities installed a lagoon system which allowed enough drainage to create an area suitable for a residential development. After the project was completed in the 1970s, the indigenous alligators subsequently began to move in and out of The Landings through its lagoon systems.

Although alligators inhabited the area of The Landings before and after its establishment, no person had ever been attacked until the night of October 5, 2007, when Williams, who was 83 at the time, went for a walk near one of the lagoons near her daughter's home some time after 6:00 p.m. The following morning, Williams's body was found floating in the lagoon. Williams's right foot and both forearms had been bitten off. Later, an eight-foot alligator was caught in the same lagoon, and, after the alligator was killed, parts of Williams's body were found in its stomach.

The record shows that, prior to the attack, Williams was aware that the property was inhabited by alligators. Williams's son-in-law testified that, on at least one occasion, he was driving with Williams on property in The Landings when he stopped the car to allow Williams to look at an alligator. Williams's son-in-law also testified that Williams was, in fact, aware that there were alligators in the lagoons at The Landings and that he believed that Williams had a "normal" respect for wild animals. When asked whether he had ever discussed how to behave around wild alligators with Williams, her son-in-law responded: "No. There was never—quite frankly, there was never any reason to. I mean she was an intelligent person. She would—there was no question in my mind that—I guess I have to answer that as it's not like talking to a five year old child . . . stay away from alligators." In addition, Williams's son recalled a similar instance when he stopped the car to allow his mother to look at an alligator. At that time Williams mentioned that she did not like alligators and did not want to go anywhere near them.

Generally, in premises liability cases, . . . . “[t]he true ground of liability is the proprietor’s superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted.’ . . .”

In this case, testimony shows that Williams was aware that wild alligators were present around The Landings and in the lagoons. Therefore, she had knowledge equal to The Landings entities about the presence of alligators in the community. . . . Nonetheless, Williams chose to go for a walk at night near a lagoon in a community in which she knew wild alligators were present. This act undisputably shows that Williams either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so. . .

The dissent, like the Court of Appeals, attempts to avoid this conclusion by arguing that summary judgment for The Landings is precluded because there is no “competent evidence that the decedent knew there were alligators over seven feet in size living in the community or living in the lagoon in which [Williams’s] body was found.” While there is no doubt that Williams’s death was a tragic event, Williams was not incompetent. A reasonable adult who is not disabled understands that small alligators have large parents and are capable of moving from one lagoon to another, and such an adult, therefore, assumes the risk of an alligator attack when, knowing that wild alligators are present in a community, walks near a lagoon in that community after dark.

Judgment reversed.

BENHAM, J., dissenting.

I write because I respectfully disagree with the majority’s opinion reversing the decision of the Court of Appeals to allow this premises liability case to go to a jury. . . .

Notably absent from the majority’s opinion are facts which, if construed in appellees’ favor, require the denial of appellants’ motions for summary judgment. For example, the Landings Association had an advertised policy that it removed from the 151 lagoons in the community alligators which were seven feet long or larger and/or alligators which were aggressive toward humans or pets; the appellants did not patrol or inspect the lagoons in order to remove large or aggressive alligators according to its policy, but rather relied on residents and employees to report said animals; and appellants did not post signs near the lagoons warning guests about alligators. An expert opined that the over eight foot long, 130 pound alligator that attacked the decedent had likely been in the lagoon where the decedent’s body was found for some time because such mature alligators tend to be territorial and nest. There was also evidence in the record that the decedent called for help during the attack, but that appellants’ security forces, which were not trained in dealing with alligators, responded to the wrong location and then stopped investigating, assuming that the sounds in question were bird calls. . . .

Based on the facts presented at the time of summary judgment in this case, reasonable minds could differ as to the essential elements of appellees’ premises liability claim.

## Notes

1. *Secondary assumption of the risk.* In the Flopper case and in *Maddox*, we concluded that the assumption of the risk doctrine was an alternative way to say that the defendant breached no duty to the plaintiff. Is it correct to say that the Landings Association breached no duty to Gwyneth Williams? To ask this a different way: is it non-negligent as a matter of law for a development association to fail to take precautions against large alligators in the lagoons of a golf course and housing development? The court in *Landings Association* does not say so. Instead, the court seems to focus on Mrs. Williams's own conduct as the grounds for its conclusion that the defendant is not liable.

This feature of the decision makes *Landings Association* a case of what commentators call "secondary assumption of the risk." As the California Supreme Court has put it, secondary assumption of the risk cases comprise "those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty." *Knight v. Jewett*, 834 P.2d 696, 701 (Cal. 1992). But there is a puzzle. Recall that primary assumption of the risk cases turned out simply to be cases of no duty and no breach repackaged into a new doctrinal formulation. Secondary assumption of the risk turns out to be a repackaging of a different doctrine as well, the doctrine of comparative or contributory negligence. It is no defense to show that the plaintiff encountered a reasonable risk and proceeded with her conduct notwithstanding that reasonable risk. People knowingly take reasonable risks all the time. We do it on highways every day when we take the risk of being struck and injured. But since our doing so is deemed reasonable, we are not deemed comparatively or contributorily negligent.

Secondary assumption of the risk requires that the defendant show that the plaintiff knowingly took an unreasonable risk. In this sense, secondary assumption of the risk is simply a subcategory of contributory or comparative negligence. In some comparative negligence states like California, this means that "cases involving 'secondary assumption of risk'" have simply been "merged into [a] comprehensive comparative fault system." *Knight*, 834 P.2d at 701.

If primary assumption of the risk and secondary assumption of the risk are both different doctrines in disguise, perhaps we should not have them at all. For much of the twentieth century, leading jurists thought so. In a Federal Employers' Liability Act case from 1943, Associate Justice Felix Frankfurter put it this way:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contrary ideas.

*Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943) (Frankfurter, J., concurring). As Justice Frankfurter saw it, "the phrase 'assumption of risk' gave judicial expression to a social policy that entailed much human misery." *Id.* Indeed, some commentators sympathetic to Frankfurter's view took him a step further and concluded that the "doctrine [of implied assumption of risk] deserves no separate existence . . . and is simply a confusing way of stating

certain no-duty rules.” Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 187–188 (1968); *see also* Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906).

2. *The durability of assumption of the risk.* Notwithstanding the withering critique in the middle of the last century, the doctrinal label “assumption of the risk” has proven exceedingly durable. The *Restatement (Second) of Torts* retained the language, despite criticism. And in some jurisdictions, assumption of the risk in the secondary sense has neither been done away with, nor treated as a mere subcategory of comparative negligence. That is the lesson of the *Landings Association* case: Georgia is a comparative fault state, but the Georgia Supreme Court treated Mrs. Williams’s conduct as different from ordinary unreasonable conduct. Her conscious decision to take the risk in question did not get factored in on the balance alongside that of the Landings Association in a comparative fault analysis, as the California approach of *Knight v. Jewett* would require. To the contrary, the court treated her conscious decision to walk as grounds for holding the Landings Association not liable at all.

One observer views *Landings Association* and similar cases as indicating that “[r]eports of the death of assumption of risk are slightly exaggerated.” Professor Simons acknowledges that the majority of states have folded secondary assumption of risk into their comparative negligence regimes, but he suggests that the doctrine’s legacy lives on, especially in courts’ duty analyses:

[T]he supposed legal irrelevance of “consent” to a risk of harm, celebrated by the modern “merger” approach, is overstated. And the supposition that consensual norms have been completely replaced by norms of reasonableness is also incorrect. A number of courts do continue to recognize assumption of risk as a distinct substantive doctrine (and not simply as a label for other doctrines). Moreover, even abolitionist courts recognize numerous no-duty doctrines that implicitly rely upon a consensual rationale of the sort that underlies many versions of assumption of risk.

Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 U.C.L.A. L. REV. 481 (2002).

In one sense, secondary assumption of the risk in jurisdictions like Florida may function as a kind of holdover of contributory negligence doctrine in the era of comparative fault. But Professor Simons offers an intriguing defense of the continued use of the assumption of the risk doctrine in the secondary sense:

[I]t is firmly established that consent to an intentional tort precludes liability, yet this doctrine appears to rest, not on whether the consenting victim acted “reasonably” or “unreasonably” in choosing to consent, but instead on precisely the type of consensual rationale that many traditional courts emphasized in recognizing assumption of a risk of the defendant’s negligence. Why should the reasonableness of the victim’s decision be irrelevant in the intentional tort context yet (as the modernists claim) critical in determining when a victim of negligence may recover? Advocates of abolishing assumption of risk should find this puzzling.

*Id.* at 483. Is Simons’s analogy to consent in intentional torts persuasive?

## 2. *Express Assumption of the Risk*

The controversy over express assumption of the risk is a different kind of debate. Few jurists, if any, think that enforcing an express agreement to assume some risk is incoherent as a conceptual matter. But there is sharp disagreement over whether enforcing such agreements and allowing the law of contracts to displace the law of torts is a good idea. Consider the next case:

### ***Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995)**

JOHNSON, J.

While skiing at Killington Ski Area, plaintiff Robert Dalury sustained serious injuries when he collided with a metal pole that formed part of the control maze for a ski lift line. Before the season started, Dalury had purchased a midweek season pass and signed a form releasing the ski area from liability. The relevant portion reads:

#### RELEASE FROM LIABILITY AND CONDITIONS OF USE

1. I accept and understand that Alpine Skiing is a hazardous sport with many dangers and risks and that injuries are a common and ordinary occurrence of the sport. As a condition of being permitted to use the ski area premises, I freely accept and voluntarily assume the risks of injury or property damage and release Killington Ltd., its employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, actions or omissions of employees or agents of the ski area or from my participation in skiing at the area, accepting myself the full responsibility for any and all such damage or injury of any kind which may result. . . .

Dalury and his wife filed a complaint against defendants, alleging negligent design, construction, and replacement of the maze pole. Defendants moved for summary judgment, arguing that the release of liability barred the negligence action. The trial court, without specifically addressing plaintiffs' contention that the release was contrary to public policy, found that the language of the release clearly absolved defendants of liability for their own negligence . . . .

We agree with defendants that the release was quite clear in its terms. Because we hold the agreement is unenforceable, we proceed to a discussion of the public policy that supports our holding.

I.

This is a case of first impression in Vermont. While we have recognized the existence of a public policy exception to the validity of exculpatory agreements, in most of our cases, enforceability has turned on whether the language of the agreement was sufficiently clear to reflect the parties' intent.

Even well-drafted exculpatory agreements, however, may be void because they violate public policy. According to the Restatement, an exculpatory agreement should be upheld if it is (1) freely and fairly made, (2) between parties who are in an equal bargaining position, and (3) there is no social interest with which it interferes. The critical issue here concerns the social interests that are affected . . . .

The leading judicial formula for determining whether an exculpatory agreement violates public policy was set forth by Justice Tobriner of the California Supreme Court [in *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963)]. An agreement is invalid if it exhibits some or all of the following characteristics:

[1.] It concerns a business of a type generally thought suitable for public regulation. [2.] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3.] The party holds [it]self out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4.] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [the party's] services. [5.] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6.] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents.

*Id.* at 445-46. Applying these factors, the court concluded that a release from liability for future negligence imposed as a condition for admission to a charitable research hospital was invalid. Numerous courts have adopted and applied the *Tunkl* factors.

We recognize that no single formula will reach the relevant public policy issues in every factual context. . . . [W]e conclude that ultimately the “determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.” [quoting *Wolf v. Ford*, 644 A.2d 522, 527 (Md. 1994)].

## II.

Defendants urge us to uphold the exculpatory agreement on the ground that ski resorts do not provide an essential public service. They argue that they owe no duty to plaintiff to permit him to use their private lands for skiing, and that the terms and conditions of entry ought to be left entirely within their control. Because skiing, like other recreational sports, is not a necessity of life, defendants contend that the sale of a lift ticket is a purely private matter, implicating no public interest. We disagree.

Whether or not defendants provide an essential public service does not resolve the public policy question in the recreational sports context. The defendants' area is a facility open to the public. They advertise and invite skiers and nonskiers of every level of skiing ability to

their premises for the price of a ticket . . . Thousands of people ride lifts, buy services, and ski the trails. Each ticket sale may be, for some purposes, a purely private transaction. But when a substantial number of such sales take place as a result of the seller's general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises. . . .

The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. Defendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.

If defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries. It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control. . . .

Defendants argue that the public policy of the state, as expressed in the "Acceptance of inherent risks" statute, indicates a willingness on the part of the Legislature to limit ski area liability. Therefore, they contend that public policy favors the use of express releases such as the one signed by plaintiff. On the contrary, defendants' allocation of responsibility for skiers' injuries is at odds with the statute. The statute places responsibility for the "inherent risks" of any sport on the participant, insofar as such risks are obvious and necessary. A ski area's own negligence, however, is neither an inherent risk nor an obvious and necessary one in the sport of skiing. . . .

Reversed and remanded.

### Notes

1. *The Tunkl factors*. Why single out the factors listed in the *Tunkl* case rather than others? How sound is the argument that the *Dalury* court makes about a tipping point in the defendant's incentives to maintain a safe ski area?

2. *Divergent caselaw*. While the broad version of the proposition at the core of *Tunkl* has gained wide acceptance, *Tunkl* itself has proven susceptible to a range of interpretations. Substantial disagreement persists on when it is properly invoked and how it should be applied. Take, for instance, the issue front and center in *Dalury*: the enforceability of ski waivers. While some courts (as in *Hanks v. Powder Ridge Restaurant*, 885 A.2d 734 (Conn. 2005)) have adopted the *Dalury* analysis wholesale, others (like the court in *Platzer v. Mammoth Mountain*, 128 Cal. Rptr. 2d 885 (Cal. App. 2002)) have rejected its central contention that there is a legitimate public policy rationale for voiding these waivers.

More generally, the question of whether to permit *ex ante* waivers of tortfeasors' liability for negligence is answered in widely divergent ways in different states and by different courts. For instance, in *Schrier v. Beltway Alarm*, 553 A.2d 1316 (Md. Ct. Spec. App. 1987), a decision later cited approvingly by that state's highest court, a Maryland appellate court held that a waiver signed by a store owner limiting the liability of an alarm company was not void as against public policy even where the store owner was shot in a burglary as a result of the alleged failure of the alarm company to contact the police. In a case nearly at the other extreme, the New Mexico Supreme Court held in *Berlangieri v. Running Elk*, 76 P.3d 1098 (N.M. 2003), that a waiver the defendant sought to apply to bar recovery for injuries the plaintiff had suffered while horseback riding was unenforceable as against public policy.

The following chart, created from "recreation-, fitness-, and sports-related waiver cases from throughout the country," conveys some sense of the state-by-state variability in this area:

**Liability of Courts to Enforce a Well-Written Liability Waiver for Adult Participants**

| POOR        | FAIR          | GOOD          |                | EXCELLENT            |
|-------------|---------------|---------------|----------------|----------------------|
| Connecticut | Arizona       | Alabama       | New Jersey     | Admiralty Law        |
| Hawaii      | Maine         | Arkansas      | New Mexico     | Colorado             |
| Louisiana   | Mississippi   | Alaska        | New York       | Delaware             |
| Virginia    | Nevada        | California    | North Carolina | District of Columbia |
| Wisconsin   | Oregon        | Florida       | Oklahoma       | Georgia              |
|             | Rhode Island  | Idaho         | Pennsylvania   | Iowa                 |
|             | West Virginia | Illinois      | Puerto Rico    | Massachusetts        |
|             |               | Indiana       | South Carolina | Minnesota            |
|             |               | Kansas        | South Dakota   | North Dakota         |
|             |               | Kentucky      | Tennessee      | Ohio                 |
|             |               | Maryland      | Texas          |                      |
|             |               | Michigan      | Utah           |                      |
|             |               | Missouri      | Vermont        |                      |
|             |               | Montana       | Virgin Islands |                      |
|             |               | Nebraska      | Washington     |                      |
|             |               | New Hampshire | Wyoming        |                      |

adapted from DOYCE J. COTTON & MARRY B. COTTON, *WAIVERS & RELEASES OF LIABILITY* (10th ed. 2019).

What the *Tunkl* court itself observed still apparently holds true: "No definition of the concept of public interest can be contained within the four corners of a formula. The concept, always the subject of great debate, has ranged over the whole course of the common law; rather than attempt to prescribe its nature, we can only designate the situations in which it has been applied." 383 P.2d at 444.

3. *Bargaining power?* One of the factors that the Restatement, *Tunkl*, and Justice Johnson of Vermont all seem to think important is the superior bargaining power of the party requiring the waiver. But does superior bargaining power explain such waivers of liability? Professor Duncan Kennedy, long one of American law's most outspoken critics from the left and a leader of the Critical Legal Studies movement of the 1970s and 1980s, famously argued against the invocation of the bargaining power rationale. Consider Kennedy's criticism of the bargaining power rationale.



Kennedy observes that a common criticism of consumer contracts is that “buyers as a group lacked enough bargaining power to force sellers to agree” to the buyers’ preferred terms. The basic theory is that groups such as tenants of consumers “lack[] the bargaining power necessary to impose it on oligopolistic sellers.” But as Kennedy sees it, this argument cannot explain the terms in any particular contract:

At least in the form stated, this argument is just wrong. If tenants were willing to pay the cost to landlords of a warranty of habitability, why would landlords, operating in a capitalist economy in which profit is supposedly the motive of economic activity, refuse to provide it? It seems clear that in the actual housing market, some tenants, in exchange for very high, luxury rents, obtain levels of landlord service far in excess of those required by any nondisclaimable warranties. If landlords are just perversely, or cruelly, or irrationally unwilling to provide these terms even though tenants will pay for them, how can the luxury rental market exist? I think the conclusion is inescapable that under the assumption that there are no problems of information or other transaction costs, the beneficiaries of compulsory duties could have those duties written into contracts, if they were willing to pay the obligors what they cost (plus a “normal” profit). Under these circumstances, the decision maker makes the duties compulsory or non-waivable precisely because he believes that people value them so little they won’t buy them of their own accord.

Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 MD. L. REV. 563, 608-09 (1982).

Kennedy insists that the fact of market power alters only the price term of a contract between a tenant and a landlord or a consumer and a seller; it does not alter the other substantive terms, such as the allocation of personal injury risks. Why? Because, as Kennedy observes, “even a monopolist has an interest in providing contract terms if buyers will pay him their cost, plus as much in profit as he can make for alternate uses of his capital.” In the *Dalury* case, for example, the monopolist provider of skiing services is presented with the question of whether to also sell insurance for injuries incurred in the course of those services. If consumers prefer to save the money that such insurance would cost—if they prefer the cash to the insurance, despite the risks entailed—the monopolist will not go into this new line of business; it will sell lift tickets that disclaim liability. If at least some consumers prefer tickets with insurance despite their higher cost, then we should expect to see the skiing services provider offer such tickets, all things being equal. But in neither case does the fact of unequal bargaining power alter the fact that the parties have a shared interest in choosing the contract terms that maximize their joint welfare. The “only question,” Kennedy insists, is whether the consumer or the tenant is willing to pay for terms that are favorable to them.

The basic point is that if both sides have good information, it makes no difference that consumers can’t haggle in particular transactions, and it makes no difference that the sellers’ lawyers draft the contracts. The profit motive will induce them to provide any legal duty consumers will pay for. Consumers exercise power in the market not through their conduct during individual transactions, but through the mechanism of demand, backed by dollars. They can control according to their desires what is offered for sale even if each of them is individually powerless in every single transaction. . . .

*Id.* It follows for Kennedy that unequal bargaining power cannot be an explanation of particular substantive terms in consumer contracts. There should thus be no need for courts to impose compulsory duties in such contexts:

[U]nder our assumptions the compulsory term must be worth less to buyers than it costs sellers (or sellers would provide it without compulsion), [yet] it is also true that the term will almost certainly be worth something. Buyers would, in a free market, pay more for the commodity with the duties attached than for the commodity alone . . . .

*Id.*

4. *Poverty.* What arguments (if any) remain against enforcing the terms of the contract struck between *Dalury* and *S-K-I*? Professor Kennedy does note at least one limit on his analysis:

[D]emand, of course, is limited by income. If buyers had a lot more income, they might well demand all the duties the decision maker is now requiring them to purchase. Buyers as a group may regard a transaction without these duties as a moral horror. They may buy only with deep regret, believing that they have a right to the commodity-plus-the-duty rather than just the commodity. They may believe that a just society would allocate them enough purchasing power so that it was open to them to buy the commodity-plus-the-duty without having to sacrifice some other good they regard as a necessity. In all these senses, it is true that consumers lack the bargaining power to make the sellers provide the duty. Consumers are too poor, given the other things they want to do or have to do with their money, to induce sellers to provide something that, under the free contract model, sellers don't have to provide unless the price is right.

Kennedy, *Distributive and Paternalist Motives*, *supra*. If Kennedy is right that poverty rather than unequal bargaining power explains the substantive terms of consumer contracts, what is the implication for adjudication? Should pro-consumer terms be compulsory, as the *Dalury* court concluded? Or are compulsory terms counterproductive from the perspective of the poor consumer's welfare?

5. *Arbitration.* One striking feature of the world of tort waivers is that consumers are typically *not* asked to agree to arbitrate tort claims. They are more typically asked to waive those claims altogether. Why would that be? Note that some medical care providers such as Kaiser Permanente ask their patients to agree up front to binding arbitration in the event of a medical malpractice claim. In some states, the enforceability of such agreements has been called into doubt. *See, e.g., Hernandez v. Crespo*, 211 So.3d 19 (Fl. 2016).

6. *Waivers in popular culture.* Don't miss Donald Glover's *Saturday Night Live* send-up of modern waiver practice.

Begin at the 1:05 mark. <https://www.youtube.com/watch?v=6F8mJZkP-Hg>

***Waivers in Modern Life: One Professor's Waivers***

Reviewing the following waivers (some of which reflect the author's own sadly tame risk-taking). Which do you think are enforceable and which are not? Note that the first waiver comes right on the heels of *Dalury* in Vermont.



# SKI RENTAL AGREEMENT

STOWE MOUNTAIN RESORT  
STOWE, VERMONT 05672  
(802) 253-7311



M99516

|  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
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| NAME LAST  |      |             |       |               |                |  |  |  |  | FIRST   |  |  |  |  |  |  |  |  |  |
| W. + +   |      |             |       |               |                |  |  |  |  | J. O. H.  |  |  |  |  |  |  |  |  |  |
| HOME ADDRESS STREET  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
|  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| CITY   |      |             |       |               | STATE/PROV.    |  |  |  |  | ZIP   |  |  |  |  |  |  |  |  |  |
| New York   |      |             |       |               | NY             |  |  |  |  | 10027   |  |  |  |  |  |  |  |  |  |
| HOME PHONE   |      |             |       |               |                |  |  |  |  | LOCAL ACCOMMODATIONS  |  |  |  |  |  |  |  |  |  |
| 212 555 5555   |      |             |       |               |                |  |  |  |  | Golden-Castle   |  |  |  |  |  |  |  |  |  |
| TODAY'S DATE   |      |             |       |               | # DAYS RENTING |  |  |  |  | CIRCLE LAST DAY RENTAL  |  |  |  |  |  |  |  |  |  |
| 03/20/04   |      |             |       |               | 63             |  |  |  |  | <input type="checkbox"/> MON <input type="checkbox"/> TUE <input type="checkbox"/> WED <input type="checkbox"/> THU <input type="checkbox"/> FRI <input type="checkbox"/> SAT <input checked="" type="checkbox"/> SUN |  |  |  |  |  |  |  |  |  |
| WEIGHT   |      |             |       |               | HEIGHT         |  |  |  |  | AGE   |  |  |  |  | CIRCLE SKIER TYPE  |  |  |  |  |
| LBS.   |      |             |       |               | FT. IN.        |  |  |  |  |   |  |  |  |  | <input type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III<br>SEE CHART |  |  |  |  |
| <b>DAMAGE INSURANCE</b>  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| For an additional \$4.00, we will insure your rental equipment against breakage. If accepted, we will absorb the cost of repair. Otherwise renter assumes risk or damage. This does not cover lost or stolen equipment and is not available on demo equipment. |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| DAMAGE INSURANCE ACCEPTED? <input checked="" type="checkbox"/> YES PAY \$4.00 <input type="checkbox"/> NO<br>INITIAL: 3FW  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| <input checked="" type="checkbox"/> <b>Ski Package (Skis/Boots, Poles)</b><br><input type="checkbox"/> <b>Helmet</b> ID# _____<br><input type="checkbox"/> <b>Skis Only</b> <input type="checkbox"/> <b>Poles Only</b> 30                                      |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| <b>DO NOT WRITE BELOW THIS LINE</b>  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| <b>BOOTS</b> <input type="checkbox"/> CHECK IF GUEST SUPPLIED  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| SIZE   | ID # | SOLE LENGTH | TRACK | TECH INITIALS | DATE           |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| 30   |      | 345         | 30    | NS            | 3/12           |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| <b>SKIS</b> <input type="checkbox"/> CHECK IF GUEST SUPPLIED   |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| <b>INDICATOR SETTINGS</b>  |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| SIZE   | ID # | TOE         | HEEL  | TECH INITIALS | DATE           |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| 177  | 7730 | 6.5         |       | OV            | 3/12           |  |  |  |  |   |  |  |  |  |  |  |  |  |  |
| RENTALS DUE BACK BY:   |      |             |       |               |                |  |  |  |  | DEPOSIT   |  |  |  |  |  |  |  |  |  |
| <input type="checkbox"/> 4:15 pm <input type="checkbox"/> 9:15 pm  |      |             |       |               |                |  |  |  |  | <input type="checkbox"/> CREDIT CARD IMPRINT <input checked="" type="checkbox"/> # IN PARTY<br><input type="checkbox"/> DRIVER LICENSE<br>PARTY NAME  |  |  |  |  |  |  |  |  |  |
| <b>COMPLETE BACK OF FORM</b>   |      |             |       |               |                |  |  |  |  |   |  |  |  |  |  |  |  |  |  |

CUSTOMER

## SKI RENTAL AGREEMENT EXPRESS ASSUMPTION OF RISKS & FORUM SELECTION AGREEMENT

PLEASE READ CAREFULLY & SIGN BOTTOM

- I accept for use as is, the equipment listed on this form and accept full responsibility for the care of this equipment while it is in my possession.
- I will be responsible for the replacement, at full retail value, of any equipment rented from the Stowe Mountain Resort Rental Shops, under this agreement, which is not returned to the shop.
- I agree to return all rental equipment to this location by the agreed date in clean condition to avoid any additional charges.
- There are no refunds on rental equipment.
- I accept and clearly understand that there are inherent and other risks involved in winter sports activities, that injuries are a common and ordinary occurrence of these sports, and freely assume all those risks and any injury.
- a Ski Rentals:** I understand that the ski/boots/binding system will not release or retain at all times or under all circumstances, nor is it possible to predict every situation in which it will release or retain, and is therefore no guarantee of my safety.
- b SnowBlade Rentals:** I understand that in SnowBlade use, the binding system will not ordinarily release during use; these bindings are not designed to release as a result of the forces generated during normal operation.
- c Helmet Rentals:** I understand that no helmet can protect the user from all foreseeable impacts or injury. However for maximum protection, the helmet must fit snugly and the retention system must be fastened securely at all times. If the helmet experiences an impact, it should be returned to the Rental shop for inspection.
- I have made no misrepresentations to the Stowe Mountain Resort Rental shops in regard to my height, weight, age or riding type.
- All instructions on the use of my rental equipment have been made clear to me, and I understand the use and function of my equipment. I agree to verify that the visual indicator settings to be recorded on this form for downhill ski equipment agree with the number appearing in the visual indicator windows of the equipment to be listed on this form.
- I agree not to transfer any part of this rental equipment to any other user. In the event the undersigned does transfer any part of the equipment in violation of this agreement, he/she agrees to indemnify this provider of this skiing equipment against any claim, demand, losses or damages arising out of the injury or property damage through use of said equipment.
- Furthermore, in consideration of this equipment being rented and provided to me at my request and further in consideration of all of the above, I freely and willingly accept and voluntarily assume all risk of property damage, personal injury, or death which occurs at Stowe Mountain Resort and which results from my participation in winter sports activities, and the inherent risk of such activities as they are defined herein. I understand and am aware that no helmet or protective gear can protect the wearer from all impact.
- I further agree that the phrase "inherent risks" means those risks which are listed in this agreement, or those that can be reasonably inferred therefrom and include but are not limited to changing weather conditions: surface and/or subsurface snow conditions as they may from time to time exist and may change or be affected by weather, skier, or other participant usage, and whether such conditions consist of ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut up snow, and/or machine made or machine enhanced snow; other conditions including bare spots, forest growth and debris, stumps and trees, streambeds and other natural objects and/or collisions with such objects; collisions with lift towers, signs, post, fences, or other enclosures, water and/or air pipes or other man-made structures, and/or their components such as hydrants used in snow making or for other necessary purposes whether or not these objects are padded or shielded; collisions with well marked or plainly visible snowmobiles, snow grooming, and other over snow vehicles or equipment; variations in steepness of terrain including but not limited to roads and/or other terrain modifications or variations in terrain that occur naturally or as a result of slope design, weather changes, snow making and/or snow grooming operations, or participants usages.
- I have carefully read this Rental Agreement and Express Assumption of Risk and fully understand its contents. I further agree that this contract is binding upon myself, my heirs and assigns, and to the extent that I am signing this document on behalf of any minor, I represent and guarantee that I have full authority to do so realizing the full binding effect of this contract on them as well as myself.
- I agree that any dispute arising under this contract and/or from any use by me of any of the premises or facilities at Stowe Mountain Resort shall be litigated exclusively in the Superior Court of Lamoille County, Vermont, or the U.S. District Court for the District of Vermont.
- I further agree to abide by all terms of any rules of conduct for sports participants posted at Stowe Mountain Resort or contained in its seasonal trail maps or brochures.

NOTICE: FAILURE TO RETURN THE RENTAL PROPERTY WITHIN 72 HOURS AFTER DELIVERY TO YOU OR NOTICE TO RETURN, OR WITHIN 15 DAYS AFTER THIS AGREEMENT HAS EXPIRED, OR THE PRESENTING OF FALSE, FICTITIOUS, OR MISLEADING IDENTIFICATION MAY BE CONSIDERED AS EVIDENCE OF AN INTENTION TO COMMIT LARCENY.

15. To the fullest extent allowed by law, I agree to release from liability, and to indemnify and hold harmless, Stowe Mountain Resort, its owners, agents and employees, and the manufacturers of the equipment provided to me.

16. This document is a legally binding contract, but is not intended to assert any claims or defenses which are prohibited by law. If any portion of this agreement is deemed unenforceable, the remainder shall be given full force and effect.

USER'S SIGNATURE \_\_\_\_\_ DATE 3/12/04

PARENT/GUARDIAN'S SIGNATURE IF USER IS A MINOR \_\_\_\_\_ DATE \_\_\_\_\_

L.S. (SEAL)

### RELEASE, WAIVER AND ASSUMPTION OF RISK AGREEMENT

In consideration of being allowed to use the facilities and participate in the sport of hang gliding and/or paragliding and other activities provided by **Peak To Peak Paragliding, LLC** (the "**Flight School**"), the undersigned pilot (**Pilot**) (and the parent or legal guardian of **Pilot** if **Pilot** is a minor), for themselves, their personal representatives, heirs, executors, next of kin, spouses, minor children and assigns, do agree as follows:

- A. I have read the Federal Aviation Administration rules that grant me permission to fly hang gliders and paragliders (Part 103 of the FAA Regulations) and I understand that FAA permission for my hang gliding or paragliding flight is premised upon me assessing the dangers involved and my assumption of all responsibility for my personal safety.
- B. I represent that I have fulfilled my obligation under the law - that I have personally assessed the dangers involved in hang gliding and/or paragliding, and I assume all responsibility for my personal safety.
- C. **DEFINITIONS** - The following definitions apply to terms used in this **Agreement**:
1. "**PARTICIPATION IN THE SPORT**" means launching/kiting (and/or assisting another in launching/kiting), flying (whether as pilot in command or otherwise) and/or landing (including, but not limited to, crashing) a hang glider or paraglider.
  2. "**SPORTS INJURIES**" means personal injury, bodily injury, death, property damage and/or any other personal or financial injury sustained by **Pilot** as a result of **Pilot's PARTICIPATION IN THE SPORT** and/or as a result of the administration of any USHPA programs (for example: the Pilot Proficiency System), and, if **Pilot** is under 18 years of age, "**SPORTS INJURIES**" also includes the personal injury, bodily injury, death, property damage and/or any other personal or financial injury sustained by **Pilot's** parents and legal guardians, as a result of **Pilot's PARTICIPATION IN THE SPORT** and/or as a result of the administration of any USHPA programs.
  3. "**RELEASED PARTIES**" means the following, including their owners, officers, directors, agents, spouses, employees, officials (elected or otherwise), members, independent contractors, sub-contractors, lessors and lessees:
    - a) The **Flight School**;
    - b) The United States Hang Gliding and Paragliding Association, a California Non-profit Corporation (USHPA);
    - c) The Professional Air Sports Association, a North Carolina Non-profit Corporation (PASA);
    - d) Each USHPA Certified Instructor, Mentor, Observer, Examiner, or Administrator that has ever been involved in **Pilot's** flying activities;
    - e) Each of the person(s) sponsoring and/or participating in the administration of **Pilot's** proficiency rating(s);
    - f) Each of the hang gliding and/or paragliding organizations that are chapters of USHPA;
    - g) The United States Of America and each of the city(ies), town(s), county(ies), State(s) and/or other political subdivisions or governmental agencies within whose jurisdictions **Pilot** launches, flies and/or lands;
    - h) Each of the property owners on or over whose property **Pilot** may launch, fly and/or land; and
    - i) All persons involved, in any manner, in the sports of hang gliding and/or paragliding at the location(s) where **Pilot PARTICIPATES IN THE SPORT**, except for hang glider pilots and paraglider pilots who are not members of USHPA. "All persons involved" includes, but is not limited to, spectators, hang glider pilots, paraglider pilots, powered ultralight pilots, assistants, drivers, instructors, schools, observers, examiners, administrators, owners of hang gliding equipment and owners of paragliding equipment.
- D. I FOREVER RELEASE AND DISCHARGE THE **RELEASED PARTIES** FROM ANY AND ALL LIABILITIES, CLAIMS, DEMANDS, OR CAUSES OF ACTION THAT I MAY HEREAFTER HAVE FOR **SPORTS INJURIES**, HOWEVER CAUSED, EVEN IF CAUSED IN WHOLE OR IN PART BY THE ACTION, INACTION OR NEGLIGENCE (WHETHER ACTIVE OR PASSIVE) OF ANY OF THE **RELEASED PARTIES**, TO THE FULLEST EXTENT ALLOWED BY LAW.
- E. I WILL NOT SUE OR MAKE A CLAIM against any of the **RELEASED PARTIES** for loss or damage on account of **SPORTS INJURIES**. If I violate this agreement by filing such a suit or making such a claim, I will pay all attorneys' fees and costs of the **RELEASED PARTIES**.
- F. I agree that Agreement shall be governed by and construed in accordance with the laws of the State of California. Any lawsuit concerning **SPORTS INJURIES** or otherwise arising under, in connection with or incident to this Agreement must be filed, if at all, within twelve (12) months of the accrual of such cause of action. Each of the **RELEASED PARTIES**, whether or not parties to this Agreement, are intended beneficiaries of this Agreement and each of them may enforce each and every provision of this Agreement against me as though they were parties to this Agreement.

**BRANFORD RIVER PADDLESPTS LLC,**

**READ CAREFULLY BEFORE SIGNING**

**RENTAL AGREEMENT AND RELEASE OF LIABILITY**

In consideration of being allowed to participate in the Branford River Paddlesports LLC, Paddle Sport Rental program, their agents, owners, officers, volunteers, participants, employees, and all other persons or entities acting in any capacity on their behalf (hereinafter collectively referred to as Branford River Paddlesports LLC,).

I, the undersigned:

X John Witt

X Teddy Witt

X Gus Witt

(PLEASE PRINT all names):

**TIME OUT:** \_\_\_\_\_

**TIME BACK:** \_\_\_\_\_

**EQUIPMENT #** \_\_\_\_\_

I fully understand and acknowledge that activities involved in this program is significant and have: (a) inherent risks, dangers and hazards and such exists in my use of equipment and my participation in activities; (b) my participation in such activities and/or use of such equipment may result in injury or illness including, but not limited to bodily injury, disease, strains, fractures, partial and/or total paralysis, death or other ailments that could cause serious disability; (c) these risks and dangers may be caused by the negligence of the owners, employees, officers or agents of Branford River Paddlesports LLC, the negligence of the participants, the negligence of others, accidents, breaches of contract, the forces of nature or other causes. Risks and dangers may arise from foreseeable or unforeseeable causes including, but not limited to, guide decision making, including that a guide may misjudge terrain, weather, trail or river route location, and water level, risks of falling out of or drowning while on a stand up paddle board or kayak and such other risks, hazards and dangers that are integral to kayaking and stand up paddle boarding and/or use of equipment, I, knowingly and freely assume all risks and dangers known and unknown and assume liability for any losses and/or damages to equipment, whether caused in whole or in part by the negligence or other conduct of the owners, agents, officers, or employees of Branford River Paddlesports LLC, or by any other person. I willingly agree to comply with the stated terms and conditions for participation. If I observe a unusual hazard during my participation, I will remove myself from participation and alert a member of Branford River Paddlesports LLC, immediately;

I, on behalf of myself, my personal representatives and my heirs hereby voluntarily agree to release, waive, discharge, hold harmless, defend and indemnify Branford River Paddlesports LLC, and Branford Landing INC. and its owners, agents, officers and employees from any and all claims, actions or losses for bodily injury, property damage, wrongful death, loss of services or otherwise which may arise out of my use of equipment or my participation in kayaking or stand up paddle boarding activities. I specifically understand that I am releasing, discharging and waiving any claims or actions that I may have presently or in the future for the negligent acts or other conduct by the owners, agents, officers or employees of Branford River Paddlesports LLC.

The Venue of any dispute that may arise out of this agreement or otherwise between the parties to which Branford River Paddlesports LLC, or its agents is a party shall be in the CT Superior Court in New Haven County.

I HAVE READ THE ABOVE WAIVER AND RELEASE I, FULLY UNDERSTAND IT'S TERMS AND FREELY AND VOLUNTARILY WITHOUT INDUCEMENT GIVEN UP MY RIGHTS. BY SIGNING IT AND UNDERSTAND MY INTENTION TO EXEMPT AND RELIEVE BRANFORD RIVER PADDLESPTS LLC, FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE OR WRONGFUL DEATH CAUSED BY NEGLIGENCE OR ANY OTHER CAUSE.



## RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT (Athletics)

I hereby give my consent for \_\_\_\_\_ (NAME OF STUDENT) to participate as a member of an athletic team \_\_\_\_\_ (NAME OF TEAM/ACTIVITY) in athletic events at the Modesto City Schools and travel with the school representative on authorized school trips. Member of an athletic team shall be defined as that term is used under California *Education Code* Section 32220 as follows:

(c) "Member of an athletic team" means member of any extramural athletic team engaged in athletic events on or outside the school grounds, maintained or sponsored by the educational institution or a student body organization thereof. "Member of an athletic team" also includes members of school bands or orchestras, cheerleaders and their assistants, pompon girls, team managers and their assistants, and any student or pupil selected by the school or student body organization to directly assist in the conduct of the athletic event, including activities incidental thereto, but only while such members are being transported by or under the sponsorship or arrangements of the educational institution or a student body organization thereof to or from a school or other place of instruction and the place at which the athletic event is being conducted.

I, the undersigned, hereby release and discharge the Modesto City Schools District, its officers, employees, agents, servants and volunteers (herein collectively referred to as the "district") from all liability arising out of or in connection with the above-described event(s), including but not limited to all practice sessions or all liabilities associated with any and all claims related to such event(s) that might be filed on behalf of or for the above-named student. For the purposes of this agreement, liability means all claims, demands, losses, causes of action, suits or judgments of any and every kind that occurs during or incidental to the above-described event(s), including but not limited to all practice sessions, and that results from any cause whether caused by the negligence of the district or otherwise.

I hereby agree to indemnify and save and hold harmless the district from any loss, liability, damage, or cost they may incur arising out of or related to the event(s), including but not limited to all practice sessions, whether caused by the negligence of the district or otherwise.

I HEREBY ASSUME FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE ARISING OUT OF OR RELATED TO THE EVENT(S), INCLUDING BUT NOT LIMITED TO ALL PRACTICE SESSIONS, WHETHER CAUSED BY THE NEGLIGENCE OF THE DISTRICT OR OTHERWISE.

I HEREBY ACKNOWLEDGE THAT THE ACTIVITIES IN THE EVENT(S) INVOLVE NUMEROUS RISKS OF INJURY AND MAY INVOLVE THE RISK OF SERIOUS INJURY AND/OR DEATH AND/OR PROPERTY DAMAGE. THE UNDERSIGNED ALSO EXPRESSLY ACKNOWLEDGES THAT INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE DISTRICT.

I hereby agree that this release and waiver of liability, assumption of risk, and indemnity agreement extends to all acts of negligence by the district, including negligent rescue operations, and is intended to be as broad and inclusive as is permitted by the laws of the state of California, and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND FULLY UNDERSTANDS ITS TERMS AND THAT THE UNDERSIGNED HAS GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT AND HAS SIGNED IT FREELY AND VOLUNTARILY WITHOUT INDUCEMENT OF ANY KIND OR GUARANTEE BEING MADE AND THE UNDERSIGNED INTENDS BY HIS/HER SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

\_\_\_\_\_  
SIGNATURE OF PARENT/GUARDIAN OR STUDENT  
(Parent/Guardian must sign if student is a minor not yet age 18 or older)

\_\_\_\_\_  
DATE

DISTRIBUTION: White - Athletic Department

Yellow - Parent/Guardian or Student

7/2006RM

**Note**

*Parental Waivers.* Does your assessment of the considerations underlying the assumption of the risk doctrine change when the person who signed a waiver promising to assume the risk is not the injured party, but a parent or guardian? Should a parent's assumption of the risk via waiver agreement be effective when they are claiming to assume the risk for their child?

When presented with these questions, most states void the agreement as being against public policy—either by applying the *Tunkl* factors laid out in *Dalury*, or by noting the special interests of the state in protecting minors. In *Cooper v. Aspen Skiing*, 48 P.3d 1229 (Colo. 2002), for example, the Colorado Supreme Court held that a waiver signed by a parent when signing her 17-year old son up for ski racing instruction was void as against public policy. “In the tort context especially,” the court said, “a minor should be afforded protection not only from his own improvident decision to release his possible prospective claims . . . but also from unwise decisions made on his behalf by parents who are routinely asked to release their child’s claims for liability.” *Id.* at 1234.

A few states permit parental waivers. The Maryland Court of Appeals (that state’s highest court), for instance, held a parent’s waiver of their child’s right to sue enforceable, noting that parents are entrusted with a wide range of decisions touching directly on their child’s safety. *BJ’s Wholesale Club v. Rosen*, 80 A.3d 345 (Md. 2013). And in 2003—the year after the Colorado Supreme Court had held such waivers unenforceable in *Aspen Skiing*—the Colorado legislature passed a law permitting parents to waive their child’s right to sue. COLO. REV. STAT. ANN. § 12-22-107.



## CHAPTER 10. CAUSATION

“The word ‘cause’ is . . . an altar to an unknown God.”

—William James, *The Principles of Psychology* (1891)

The cases and materials in this book have so far assumed an important background constraint on the allocation of losses in tort law. We have limited the allocations to those parties who might be characterized in some conventional way as having been causes of the injury in question.

But the causation requirement is famously puzzling. Why do we even have a causation requirement? If our exclusive goal were compensation, for example, a causation requirement might be perverse. Why not call on Jeff Bezos or Mark Zuckerberg to provide the compensation, regardless of any causal connection to the injury in question? A sensible system of state-based social insurance would ask about compensation needs, not about who caused what to whom. Moreover, such causal reasoning is notoriously complex. When we label something a cause of something else, when we reason in terms of cause and effect, we are doing more than describing an objective state of affairs. We are telling deeply value-laden stories about the world. To talk in terms of causation is very often to smuggle normative premises into an inquiry ostensibly designed to help guide us toward normative conclusions.

### A. Causation: An Introduction

What do we mean when we say that someone caused injury to another? Even this simple formulation turns out not to be so simple after closer examination. A century ago, justices McKenna and Holmes found themselves working through some of the intricacies of this seemingly simple idea:

***LeRoy Fibre Co. v. Chicago, M. & S. P. Railway*, 232 U.S. 340 (1914)**

[Plaintiff LeRoy Fibre Co. was in the business of producing tow from flax straw, a raw material in textile manufacturing, that it stored in rows of stacks in a lot adjacent to a railroad right-of-way. The lot’s fence ran parallel to the railroad tracks 50 feet from the center of the tracks. The first row of flax lay 25 feet from the fence; a second row lay 35 feet from the fence. On a day in April, 1907, high winds blew sparks from the engine of a passing train into the stacks of flax, causing a fire and destroying the flax. When LeRoy Fibre sued, a jury returned a verdict for the defendant railroad on the ground that plaintiff had been contributorily negligent. Plaintiff appealed on the grounds that it was not contributory negligent as a matter of law. The Court certified three questions for its consideration, the first of which was whether it was “a question for the jury whether the owner was also negligent, without other evidence than that the railroad company preceded the owner in the establishment of its business, that the property was inflammable in character, and that it was stored near the railroad right of way and track.”]

McKENNA, J.

The questions certified present two facts— 1) The negligence of the railroad was the immediate cause of the destruction of the property. (2) The property was placed by its owner near the right of way of the railroad, but on the owner's own land.

It will be observed, the use of the land was of itself a proper use—it did not interfere with nor embarrass the rightful operation of the railroad. . . . [T]he questions certified . . . are but phases of the broader one, whether one is limited in the use of one's property by its proximity to a railroad; or, to limit the proposition to the case under review, whether one is subject in its use to the careless as well as to the careful operation of the road . . . . That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law and takes from him the assumption, and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and "live cinders" were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. . . .

The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong, you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction.

HOLMES, J., partially concurring:

As a general proposition people are entitled to assume that their neighbors will conform to the law; that a negligent tort is unlawful in as full a sense as a malicious one, and therefore that they are entitled to assume that their neighbors will not be negligent. Nevertheless . . . if a man stacked his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the road by the oscillating result of an inquiry by the jury whether the road had used due care. I should say that although of course he had a right to put his flax where he liked upon his own land, the liability of the

railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train. I take it that probably many, certainly some, rules of law based on less than universal considerations are made absolute and universal in order to limit those over refined speculations that we all deprecate, especially where such rules are based upon or affect the continuous physical relations of material things. The right that is given to inflict various inconveniences upon neighboring lands by building or digging, is given, I presume, because of the public interest in making improvement free, yet it generally is made absolute by the common law. It is not thought worth while to let the right to build or maintain a barn depend upon the speculations of a jury as to motives. . . .

Here certainly, except in a clear case, we should call in the jury. I do not suppose that any one would call it prudent to stack flax within five feet of the engines or imprudent to do it at a distance of half a mile, and it would not be absurd if the law ultimately should formulate an exact measure . . . but at present I take it that . . . we should let the jury decide whether seventy feet was too near . . . .

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. . . . Negligence is all degree, —that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist, and the simple universality of the rules in the Twelve Tables, or the *Leges Barbarorum*, there lies the culture of two thousand years.

### Notes

1. *Holmes and McKenna*. Justice Holmes remains one of the most well-respected jurists and scholars to have served on the Court. He is known, in particular, for his criticisms of legal reasoning based on formal concepts such as “rights.” Holmes’s opinions, including his dissent in *LeRoy Fibre*, anticipated much of the so-called “realist” jurisprudence of the twentieth century. Justice McKenna, on the other hand, had neither the respect of his peers, nor an overarching jurisprudential approach to the law. When William Howard Taft became chief justice seven years after the decision in *LeRoy Fibre*, he found McKenna to be (in his words) “the worst and most embarrassing member of the Court,” often unable to draft opinions without substantial guidance from others.

Which jurist gets the better of the argument in *LeRoy Fibre*? What is the difference between McKenna’s and Holmes’s conception of causation in the case? Is McKenna’s method one that can easily be applied to other cases? Does it avoid the difficulty of “refinements and confusing considerations” that Holmes seems to admit his own approach necessarily entails?

2. *Coase on causation*. In thinking about these questions, consider Ronald Coase’s view of causation, which many commentators see as parallel to Holmes’s view from a half-century before.

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be

allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. [Take, for example,] the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighboring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops. What answer should be given, of course, is not clear unless we know the value of what is obtained as well as the value of what is sacrificed to gain it. . . . In the case of the cattle and crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place. . . . If we are to discuss the problem in terms of causation, both parties cause the damage.

R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON 1 (1960). Coase's criticism of causal reasoning as a way of allocating moral responsibility implicitly challenges Justice McKenna's decision in *LeRoy Fibre*. Coase insists that it is the height of foolishness to insist that the railroad "caused" the injury to the flax manufacturer. If the flax farmer plaintiff is able to recover damages from the railroad, or obtain an order that the railroad cease its dangerous operations, then it would be just as true to say that the flax manufacturer "caused" injury to the railroad.

As Coase and Holmes see it, the real question is not one about causation in the sense of who caused harm to whom. The only real question is about what our social values are, though we may articulate our tacit judgments about those social values in the form of causal language. We say "A hit B" because we have decided that A is properly thought of as responsible for the collision of A's hand with B's nose. It would be just as true to say that B hit A, since if it weren't for B's nose being where it was at the crucial moment, A's fist would have passed harmlessly through the air. Of course, it sounds silly to say any such thing. But that is because our causal conventions embody the normative judgments we have already made about the situation in question. We say A caused injury to B because we have already evaluated the moral structure of the situation and found A's conduct wanting. The causal statement "A hurt B" doesn't advance the moral inquiry; it states the outcome of the moral inquiry. That being the case, Coase and Holmes seem to say, the only reasonable way to think about the question is to decide which allocation of the harm (or which causal statement) best embodies a society's preferred policy goals.

Much of twentieth- and twenty-first-century social policy starts from the clear-headed vantage point that jurists like Holmes and economists like Coase afford. But is McKenna's alternative really so misbegotten? Note, for one thing, that McKenna offers jurists a clean and easy way to measure causation, one pegged to crossings of real property borders. Holmes's

alternative seems awfully fuzzy by contrast. Is this one of those instances in which, moving forward, all we really need is a clear rule that the parties can deal with as they see fit?

3. *Calabresi on causation.* Judge Guido Calabresi agrees with Holmes and Coase that causation is essentially a functional concept, one that can usually only be made sense of by reference to the goals we bring to it: meat or crops, cakes or medicine. But Calabresi adds an extra consideration that may make more sense of McKenna's formalist approach, though it undoubtedly takes that approach in directions that McKenna probably never anticipated:

[T]he use of such concepts [as causation] has great advantages over explicit identification and separation of the goals. Terms with an historical, common law gloss permit us to consider goals (like spreading) that we do not want to spell out or too obviously assign to judicial institutions. Because, like all moral terms, causal terms have to have meanings of their own that cannot be changed as a result of one person's analysis, they enable us to resist political pressures that would, if a more "goal conscious," antiseptic language were employed, result in a mixture of goals thought to be less desirable. Finally, and probably most importantly, they enable the introduction of goals we have not been able to spell out or to analyze, but which nonetheless, together with analyzed goals, form part of that set of relationships we call "justice."

...

I am optimistic about our ability to use concepts, like cause, to promote analyzed goals, and, like John Stuart Mill, I am skeptical of our ability to analyze all our goals and, in addition, to acknowledge all that we can analyze. Thus, I am inclined to believe that the requirement of causation . . . will survive . . . rather than be replaced by direct appeals to those clearly identified goals which, by and large, those requirements seem to serve.

Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

4. *Hart and Honoré on causation.* Some leading authorities on the common law of causation have pushed back against the functionalist turn in causation. In the mid-20th century, H. L. A. Hart and Anthony Honoré bemoaned the Legal Realists' "transition from the exhilarating discovery that complex words like 'cause' cannot be simply defined and have no 'one true meaning' to the mistaken conclusion that they have no meaning worth bothering about at all, but are used as a mere disguise for arbitrary decision or judicial policy." H.L.A. HART & ANTHONY HONORÉ, *CAUSATION IN THE LAW* 3 (1959). Hart and Honoré argue that courts are not surreptitiously insinuating policy into their decisions, but that "the plain man's causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies . . . ." *Id.* at 1. Objecting to the legal realist view that "the distinction between causes and mere conditions is *wholly* without objective or factual warrant," *id.* at 29, Hart and Honoré appeal to a shared understanding of causation, arguing that cultural conventions and "common sense" draw "the line between cause and mere condition." *Id.* at 31.

In addition to the appeal to common sense, Hart and Honoré stress the human element of causation in the law. They present the example of someone who has died with high levels of arsenic in his blood:

. . . this is up to a point an explanation of his death and so the cause of it: but we usually press for a further and more satisfying explanation and may find that someone deliberately put arsenic in the victim's food. This is a fuller explanation in terms of human agency; and of course we speak of the poisoner's action as the cause of the death; though we do not withdraw the title of cause from the presence of arsenic in the body—this is now thought of as an ancillary, the 'mere way' in which the poisoner produced the effect. Once we have reached this point, however, we have something which has a special *finality* at the level of common sense . . .

*Id.* at 39-40 (emphasis added).

In clarifying their understanding liability-defeating coincidence, Hart and Honoré insist that we can usefully rely on standards of "common knowledge":

'ordinary knowledge', what is 'commonly known', and the 'ordinary person' . . . are determinate enough not to be a simple verbal cloak for a court's uncontrolled discretion or policy. They will certainly serve to distinguish from the case of the falling tree the case (not a coincidence) where after a fire is negligently lit the evening breeze drives the flames towards the house which they destroy.

*Id.* at 154.

## **B. Causation-in-Fact**

In making a negligence claim, it is not enough to show that there is a precaution that the defendant could have taken. The plaintiff typically must also show that if the defendant had taken the precaution, the harm complained of would not have occurred.

*New York Central RR. Co. v. Grimstad*, 264 F. 334 (2d Cir. 1920)

WARD, J.

This is an action . . . to recover damages for the death of Angell Grimstad, captain of the covered barge Grayton, owned by the defendant railroad company. The charge of negligence is failure to equip the barge with proper life-preservers and other necessary and proper appliances, for want of which the decedent, having fallen into the water, was drowned.

The barge was lying on the port side of the steamer Santa Clara, on the north side of Pier 2, Erie Basin, Brooklyn, loaded with sugar in transit from Havana to St. John, N. B. The

tug Mary M, entering the slip between Piers 1 and 2, bumped against the barge. The decedent's wife, feeling the shock, came out from the cabin, looked on one side of the barge, and saw nothing, and then went across the deck to the other side, and discovered her husband in the water about 100 feet from the barge holding up his hands out of the water. He did not know how to swim. She immediately ran back into the cabin for a small line, and when she returned with it he had disappeared . . .

[The jury returned a finding of negligence against the barge owner defendant for failure to equip the barge with life buoys. But on appeal, the Second Circuit concluded that a showing of negligence was not sufficient to establish liability:]

On . . . whether a life buoy would have saved the decedent from drowning, we think the jury were left to pure conjecture and speculation. A jury might well conclude that a light near an open hatch or a rail on the side of a vessel's deck would have prevented a person's falling into the hatch or into the water, in the dark. But there is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, that is, sooner than she got the small line, or, if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if he did, it would have prevented him from drowning.

The court erred in denying the defendant's motion to dismiss the complaint at the end of the case.

Judgment reversed.

### Notes

1. *Loss causation.* The causation requirement in tort law typically requires that the loss complained of by the plaintiff be one that would not have happened but for the negligence of the defendant. But why should we have a causation requirement? Does it advance the loss-spreading, deterrence, or corrective justice goals of the law? If the burden of carrying a life buoy is less than its expected benefit, why does it matter that Judge Ward is skeptical Grimstad would have survived? Note that the loss causation requirement even works to exonerate a defendant in negligence-per-se cases involving violations of safety statutes. A Massachusetts plaintiff injured while jumping out of a burning building sued his landlord for failing to provide statutorily required fire-fighting appliances and moved to have the judge direct a verdict on his behalf. The Massachusetts Supreme Court found that the plaintiff still needed to prove that he would not have had to jump out the window if he had been able to access those fire-fighting appliances. *Wainwright v. Jackson*, 291 Mass. 100 (1935).

Loss causation is often especially salient in failure to warn cases, where the cost of a warning is particularly low compared to the possible harms. In *Willett v. Baxter Int'l*, 929 F.2d 1094 (5th Cir. 1991), for example, the Fifth Circuit found a plaintiff's decision to proceed with a medical procedure in the face of a known four percent risk strongly suggested that an additional 0.03 percent risk "would not have changed his decision."

2. *Insurance and causation.* The law of insurance deals with loss causation very differently. For example, before the passage of the Patient Protection and Affordable Care Act, health insurance companies could and did rescind coverage for failure to disclose a pre-existing condition that had nothing to do with the source of the current claim. In other words, even if a policyholder's failure to disclose did not cause the insurance company to pay out, the insurance company was still entitled to rescind coverage. Eleanor D. Kinney, *For Profit Enterprise in Health Care: Can It Contribute to Health Reform?*, 36 AM. J. L. & MED. 405 (2010). In other areas of insurance, such as life insurance, rescission is still generally permitted as a remedy for even innocent misrepresentations by the policyholder. Brian Barnes, *Against Insurance Rescission*, 120 YALE L.J. 328 (2010). As Judge Calabresi puts it, insurance law substitutes "transaction causation" for "loss causation." Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449, 456 (2013).

So far we have proceeded as if causation is either on or off, yes or no. But what happens when causation-in-fact can only be expressed in terms of probabilities? The next case introduces the problem, which subsequent sections pursue further.

***Stubbs v. City of Rochester*, 124 N.E. 137 (N.Y. 1919)**

[Plaintiff alleged that he contracted typhoid fever due to drinking contaminated water from the defendant city's water service. Rochester had two systems of water supply: one for drinking, from Hemlock Lake, and another (the so-called "Holley" system water) for fire purposes in the business district. Holley water was pumped from the Genesee river near the center of the city. In May 1910, the negligence of the city's employees caused Holley water to mix with Hemlock water. In June, the city received "numerous complaints . . . from inhabitants, consumers of the Hemlock water, residing or employed in the vicinity of Brown street bridge, in substance that the water was roily, dirty, and had an offensive odor." After a delayed response, health officials notified the public in September "through the newspapers not to drink the water without boiling it [and] thereupon notified the water department that the Hemlock water was contaminated." The Health Department investigated beginning in early October, "upwards of three months after many complaints had been made to it." The Department identified the source of the contamination at the Brown street bridge. The plaintiff, a resident of the city of Rochester and a machinist, was employed by a firm whose place of business was at the corner of Allen and Platt streets, about one block from the Brown street bridge. After trial, the court entered judgment for the defendant on the ground that the plaintiff had failed to show that the defendant's conduct was the cause of his injuries. Plaintiff appealed.]

HOGAN, J. The important question in this case is, Did the plaintiff produce evidence from which inference might reasonably be drawn that the cause of his illness was due to the use of contaminated water furnished by defendant. Counsel for respondent argues that, even assuming that the city may be held liable to plaintiff for damages caused its negligence in furnishing contaminated water for drinking purposes: (a) The evidence adduced by plaintiff fails to disclose that he contracted typhoid fever by drinking contaminated water; (b) that it was incumbent upon the plaintiff to establish that his illness was not due to any other cause to which typhoid fever may be attributed for which defendant is not liable. The evidence does



disclose several causes of typhoid fever, which is a germ disease, the germ being known as the typhoid bacillus, which causes may be classified as follows:

First. Drinking of polluted water. Second. Raw fruits and vegetables in certain named localities where human excrement is used to fertilize the soil are sometimes sources of typhoid infection. Third. The consumption of shellfish, though not a frequent cause. Fourth. The consumption of infected milk and vegetables. Fifth. The housefly in certain localities. Sixth. Personal contact with an infected person by one who has predilection for typhoid infection and is not objectively sick with the disease. Seventh. Ice, if affected with typhoid bacilli. Eighth. Fruits, vegetables, etc., washed in infected water. Ninth. The medical authorities recognize that there are still other causes and means unknown. This fact was developed on cross-examination of physicians called by plaintiff.

. . . . The plaintiff, having been nonsuited at the close of his case, is entitled to the most favorable inference deducible from the evidence. That plaintiff, on or about September 6th, 1910, was taken ill, and very soon thereafter typhoid fever developed, is not disputed. That he was employed in a factory located one block distant from the Brown street bridge, in which Hemlock Lake water was the only supply of water for potable and other purposes, and that the water drawn from faucets in that neighborhood disclosed that the water was roily and of unusual appearance, is not questioned. And no doubt prevails that the Holley system water was confined to the main business part of the city for use for fire purposes and sprinkling streets, and is not furnished for domestic or drinking purposes.

The evidence of the superintendent of waterworks of the city is to the effect that Hemlock Lake water is a pure wholesome water free from contamination of any sort at the lake, and examinations of the same are made weekly; that the Holley water is not fit for drinking purposes, taken as it is from the Genesee river. Further evidence was offered by plaintiff by several witnesses, residents in the locality of Brown street bridge, who discovered the condition of the water at various times during July, August, and September, and made complaint to the water department of the condition of the same. Dr. Goler, a physician and health officer of the city, was called by plaintiff, and testified that in September, when complaint was made to him by a resident of the district, he went to the locality, visited houses in the immediate neighborhood, found that the water drawn from the faucet of the Hemlock supply looked badly and smelled badly. He took a sample of the water to the laboratory, and had it examined by a chemist, who found that it contained an increase in solids, and very many times, that is, 20 to 30 times, as much chlorine or common salt as is found in the domestic water supply—the presence of chlorine in excessive quantities indicates contamination in that quantity, bad contamination and usually sewage contamination. . . . [Dr. Goler then] made an investigation as to the reported cases of typhoid fever in the city in the months of August, September, and October, for the purpose of determining the number of cases, where the cases came from, what gave rise to it, and he stated that in his opinion the outbreak of typhoid was due to polluted water, contaminated as he discovered afterwards by sewage. In answer to a hypothetical question embracing generally the facts asserted by plaintiff the witness testified that he had an opinion as to the cause of the infection of plaintiff, and such opinion was that it was due to contaminated water.

Dr. Dodge, of the faculty of the University of Rochester, a professor of biology, also bacteriologist of the city of Rochester, about October 1st made an analysis of samples of water . . . [and found] evidence of [colon bacillus]. Dr. Brady, the physician who attended the

plaintiff, and Dr. Culkin both testified that in their opinion the plaintiff contracted typhoid fever from drinking polluted water.

Plaintiff called a witness who resided on Brown street, about two minutes' walk from the bridge, and proved by her that she drank water from the Hemlock mains in the fall of 1910 and was ill with typhoid fever. Thereupon counsel for defendant stipulated that 57 witnesses which the plaintiff proposed to call will testify that they drank water from the Hemlock taps in the vicinity of the district west of the Genesee river and north of Allen street in the summer and fall of 1910, and during said summer and fall suffered from typhoid fever, that in view of the stipulation such witnesses need not be called by plaintiff, and the stipulation shall have the same force and effect as though the witnesses had been called and testified to the facts.

The plaintiff resided with his wife some three miles distant from the factory where he was employed. The water consumed by him at his house outside the infected district was Hemlock water. The only water in the factory was Hemlock water, and he had there an individual cup from which he drank. He was not outside of the city during the summer of 1910. Therefore the only water he drank was in the city of Rochester.

A table of statistics as to typhoid fever in the city of Rochester for the years 1901-1910, . . . disclose[s] that the number of typhoid cases in the city in 1910 was 223, an excess of 50 cases of any year of the nine years preceding. Recalling that complaints as to water commenced in the summer of 1910, and as shown by the evidence that typhoid fever does not develop until two or three weeks after the bacilli have been taken into the system, in connection with the fact that the source of contamination was not discovered until October, the statistics disclose that of the 223 cases of typhoid in the city in the year 1910, 180 cases appear during the months of August, September, October, and November as against 43 cases during the remaining eight months, 35 of which were prior to August and 8 in the month of December, two months after the source of contamination of the water was discovered.

The evidence on the trial discloses that at least 58 witnesses, residents of the district, drank the contaminated water and suffered from typhoid fever in addition to plaintiff; thus one-third of the 180 cases during the months stated were shown to exist in that district.

Counsel for respondent asserts that there was a failure of proof on the part of plaintiff, in that he did not establish that he contracted disease by drinking contaminated water, and in support of his argument cites a rule of law that when there are several possible causes of injury for one or more of which a defendant is not responsible, plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which defendant was responsible. He submits that it was essential for plaintiff to eliminate all other of seven causes from which the disease might have been contracted. . . . I do not believe the rule stated to be as inflexible as claimed for. If two or more possible cause exist, for only one of which a defendant may be liable, and a party injured established facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable, the party has complied with the spirit of the rule.

The plaintiff was employed in the immediate locality where the water was contaminated. He drank the water daily. The consumption of contaminated water is a very frequent cause of typhoid fever. In the locality there were a large number of cases of typhoid fever, and near to 60 individuals who drank the water and had suffered from typhoid fever in

that neighborhood appeared as witnesses on behalf of plaintiff. The plaintiff gave evidence of his habits, his home surroundings, and his method of living, and the medical testimony indicated that his illness was caused by drinking contaminated water. Without reiteration of the facts disclosed on the trial I do not believe that the case on the part of plaintiff was so lacking in proof as matter of law that his complaint should be dismissed. On the contrary, the most favorable inferences deducible from the plaintiff were such as would justify a submission of the facts to a jury as to the reasonable inferences to be drawn therefrom, and a verdict rendered thereon for either party would rest, not in conjecture, but upon reasonable possibilities.

The judgment should be reversed, and a new trial granted, costs to abide the event.

CARDOZO, POUND, and ANDREW, JJ., concur.

HISCOCK, C. J., and CHASE and McLAUGHLIN, JJ., dissent.

Judgment reversed, etc.

### Notes

1. *Causation in Stubbs?* Public health studies from the same era found that in northern states, typhoid fever typically peaked in August, September, and October in Northern states (including New York):

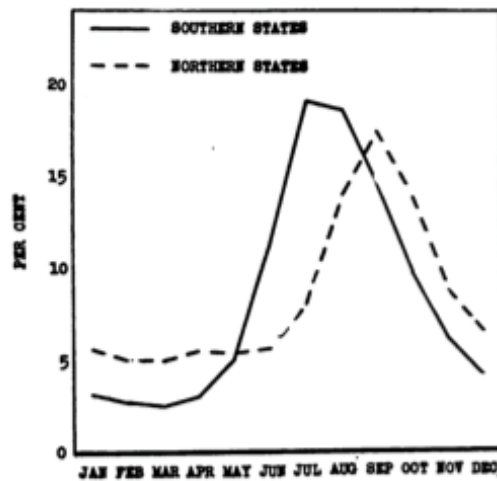


FIGURE II—Percentage seasonal distribution of typhoid fever for a year of mean incidence calculated for the period 1912-1928

TABLE II  
PERCENTAGE SEASONAL DISTRIBUTION OF TY-  
PHOID FEVER FOR A YEAR OF MEAN  
INCIDENCE CALCULATED FOR THE  
PERIOD 1912-1928

| Month | Nine Combined Southern States | Nine Combined Northern States |
|-------|-------------------------------|-------------------------------|
| Jan.  | 3.15                          | 5.61                          |
| Feb.  | 2.73                          | 5.00                          |
| Mar.  | 2.46                          | 4.87                          |
| Apr.  | 2.97                          | 5.43                          |
| May   | 5.02                          | 5.26                          |
| June  | 11.37                         | 5.64                          |
| July  | 18.99                         | 7.88                          |
| Aug.  | 18.63                         | 13.70                         |
| Sept. | 14.64                         | 17.42                         |
| Oct.  | 9.75                          | 13.80                         |
| Nov.  | 6.16                          | 8.78                          |
| Dec.  | 4.15                          | 6.61                          |

G. E. Harmon, *Seasonal Distribution of Typhoid Fever—Southern and Northern States*, 20 AM J. PUBLIC HEALTH NATIONS 395, 398 (1930).

Given the background seasonal variation in typhoid rates, what is the likelihood that Mr. Stubbs' typhoid was caused by the City's negligence? Would he be able to demonstrate by a preponderance of the evidence that his injury was caused by the City's negligence? Note that even if Stubbs cannot show causation—indeed, even if no single plaintiff can show causation—it is nearly certain that there were people in Rochester who were injured by Rochester's negligence, in the sense that they would not have become ill but for that negligence. The difficulty is knowing which of the typhoid victims are in that category.

2. *Toxic torts*. Difficulties in proving causation bedevil toxic tort cases. Epidemiological data are usually admissible to prove causation, but often that data does not rise to the level of a preponderance of the evidence. See Shelly Brinker, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289 (1999).

While state courts are open to the use of epidemiological data, they impose a variety of standards to ensure its reliability and applicability. Some states require proof of both general causation (that a type of toxin is capable of increasing the risk of a certain type of harm) and specific causation (that the toxin caused the harm to this plaintiff). See, e.g., *King v. Burlington N. Santa Fe Ry. Co.*, 277 Neb. 203 (2009); *Terry v. Caputo*, 115 Ohio St. 3d 351 (2007); *Blanchard v. Goodyear Tire & Rubber Co.*, 2011 Vt. 85 (2011). In Iowa, this approach has led to different specialists providing evidence for general causation (generally epidemiologists) and specific causation (typically physicians). *Ranes v. Adam Labs, Inc.*, 778 N.W.2d 677, 690 (Iowa 2010). Texas requires that the epidemiological studies offered to show general causation must be studies of patients substantially similar to the plaintiff, which can be a high bar for plaintiffs. *Daniels v. Lyondell-Citgo Ref. Co.*, 99 S.W.3d 722 (Tex. App. Houston 1st Dist. 2003).

3. *Martin v. Herzog redux*. The decision in *Martin v. Herzog*, which we encountered above in our section on statutes and negligence per se, offers one possible solution to the problem. Judge Cardozo concluded his opinion in *Martin* with the following discussion of the relationship between a finding of breach and the burden of showing a causal connection between breach and injury:

We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster . . . . We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals. If nothing else is shown to break the connection, we have a case, prima facie sufficient, of negligence contributing to the result. There may indeed be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and

by the lights of the approaching car. Her position is that if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference, but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute.

*Martin v. Herzog*, 228 N.Y. 164, 170 (1920). For Cardozo, the combination of the statute requiring headlights and the fact that it was nighttime creates a prima facie case of causation, permitting but not requiring a jury finding of causation. Given that the statute already plays a role in determining whether not using headlights was negligent, does it make sense for the statute to play a role again in causation? Should it play a stronger or weaker role than creating a presumption? Three quarters of a century after *Martin v. Herzog*, Judge Calabresi took up this question in the context of FDA dosing guidelines.

***Zuchowicz v. United States*, 140 F.3d 381 (2d Cir. 1998)**

CALABRESI, J.

The defendant, the United States of America, appeals from a judgment of the United States District Court for the District of Connecticut (Warren W. Eginton, Judge). This suit under the Federal Tort Claims Act was originally filed by Patricia Zuchowicz, who claimed to have developed primary pulmonary hypertension, a fatal lung condition, as a result of the defendant's negligence in prescribing an overdose of the drug Danocrine. Following Mrs. Zuchowicz's death in 1991, her husband, Steven, continued the case on behalf of his wife's estate, claiming that the defendant was responsible for her death. After a bench trial, the district court awarded the plaintiff \$ 1,034,236.02 in damages.

There is no doubt in the case before us either as to the injury or as to the defendant's wrong; both are conceded. The only issue is causation.

The facts, as determined by the district court, are as follows. On February 18, 1989, Mrs. Zuchowicz filled a prescription for the drug Danocrine [often prescribed to treat infertility problems] at the Naval Hospital pharmacy in Groton, Connecticut. The prescription erroneously instructed her to take 1600 milligrams of Danocrine per day, or twice the maximum recommended dosage. The defendant has stipulated that its doctors and/or pharmacists were negligent and violated the prevailing standard of medical care by prescribing this wrong dosage.

Mrs. Zuchowicz took the 1600 milligrams of Danocrine each day for the next month. Thereafter, from March 24 until May 30, she took 800 milligrams per day. While taking Danocrine she experienced abnormal weight gain, bloating, edema, hot flashes, night sweats, a racing heart, chest pains, dizziness, headaches, acne, and fatigue. On May 30, she was examined by an obstetrician/gynecologist in private practice who told her to stop taking the

Danocrine. During the summer, she continued to experience severe fatigue and chest tightness and pain, and began having shortness of breath. In October 1989, she was diagnosed with primary pulmonary hypertension (“PPH”), a rare and fatal disease in which increased pressure in an individual’s pulmonary artery causes severe strain on the right side of the heart. At the time she was diagnosed with the disease, the median life expectancy for PPH sufferers was 2.5 years. Treatments included calcium channel blockers and heart and lung transplantation.

Mrs. Zuchowicz was on the waiting list for a lung transplant when she became pregnant. Pregnant women are not eligible for transplants, and pregnancy exacerbates PPH. Mrs. Zuchowicz gave birth to a son on November 21, 1991. She died one month later, on December 31, 1991. . . .

In order for the causation requirement to be met, a trier of fact must be able to determine, by a preponderance of the evidence, that the defendant’s negligence was responsible for the injury. In this case, defendant’s negligence consisted in prescribing an overdose of Danocrine to Mrs. Zuchowicz. For liability to exist, therefore, it is necessary that the fact finder be able to conclude, more probably than not, that the overdose was the cause of Mrs. Zuchowicz’s illness and ultimate death. The mere fact that the exposure to Danocrine was likely responsible for the disease does not suffice.

The problem of linking defendant’s negligence to the harm that occurred is one that many courts have addressed in the past. A car is speeding and an accident occurs. That the car was involved and was a cause of the crash is readily shown. The accident, moreover, is of the sort that rules prohibiting speeding are designed to prevent. But is this enough to support a finding of fact, in the individual case, that speeding was, in fact, more probably than not, the cause of the accident? The same question can be asked when a car that was driving in violation of a minimum speed requirement on a super-highway is rear-ended. Again, it is clear that the car and its driver were causes of the accident. And the accident is of the sort that minimum speeding rules are designed to prevent. But can a fact finder conclude, without more, that the driver’s negligence in driving too slowly led to the crash? To put it more precisely—the defendant’s negligence was strongly causally linked to the accident, and the defendant was undoubtedly a but for cause of the harm, but does this suffice to allow a fact finder to say that the defendant’s negligence was a but for cause?

At one time, courts were reluctant to say in such circumstances that the wrong could be deemed to be the cause. They emphasized the logical fallacy of post hoc, ergo propter hoc, and demanded some direct evidence connecting the defendant’s wrongdoing to the harm. . . .

All that has changed, however. And, as is so frequently the case in tort law, Chief Judge Cardozo in New York and Chief Justice Traynor in California led the way. In various opinions, they stated that: if (a) a negligent act was deemed wrongful because that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm. Where such a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor.

Thus, in a case involving a nighttime collision between vehicles, one of which did not have the required lights, Judge Cardozo stated that lights were mandated precisely to reduce

the risk of such accidents occurring and that this fact sufficed to show causation unless the negligent party demonstrated, for example, that in the particular instance the presence of very bright street lights or of a full moon rendered the lack of lights on the vehicle an unlikely cause. See *Martin v. Herzog*.

The case before us is a good example of the above-mentioned principles in their classic form. The reason the FDA does not approve the prescription of new drugs at above the dosages as to which extensive tests have been performed is because all drugs involve risks of untoward side effects in those who take them. Moreover, it is often true that the higher the dosage the greater is the likelihood of such negative effects. At the approved dosages, the benefits of the particular drug have presumably been deemed worth the risks it entails. At greater than approved dosages, not only do the risks of tragic side effects (known and unknown) increase, but there is no basis on the testing that has been performed for supposing that the drug's benefits outweigh these increased risks. It follows that when a negative side effect is demonstrated to be the result of a drug, and the drug was wrongly prescribed in an unapproved and excessive dosage (i.e. a strong causal link has been shown), the plaintiff who is injured has generally shown enough to permit the finder of fact to conclude that the excessive dosage was a substantial factor in producing the harm.

In fact, plaintiff's showing in the case before us, while relying on the above stated principles, is stronger. For plaintiff introduced some direct evidence of causation as well. On the basis of his long experience with drug-induced pulmonary diseases, one of plaintiff's experts, Dr. Matthay, testified that the timing of Mrs. Zuchowicz's illness led him to conclude that the overdose (and not merely Danocrine) was responsible for her catastrophic reaction.

Under the circumstances, we hold that defendant's attack on the district court's finding of causation is meritless.

### Notes

1. *Self-proving causation?* Professor Kenneth Abraham at the University of Virginia calls *Zuchowicz* the most notorious example of what he labels "self-proving causation cases," by which he means instances where the fact that the defendant acted negligently is the only evidence available that the defendant's negligence caused the injury. "[M]any torts scholars," according to Abraham, are skeptical of *Zuchowicz* for this reason. He goes on, however, to suggest that the "circumstantial" use of evidence in *Zuchowicz* is far from unique and actually permeates our understanding of causation in even the most straightforward of scenarios. Consider, for example, *Reynolds v. Texas & Pacific Railway Co.* 37 La. Ann. 694 (La. 1885), in which a plaintiff sought damages from the defendant railroad after falling down a dimly lit stairwell between the train depot and a railway car. The defendant argued that the accident would have occurred even *with* adequate lighting and that the plaintiff had therefore failed to prove causation. The appellate court rejected this argument and sustained the district court's judgment in favor of the plaintiff. "[W]here the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence," the court explained, "the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect." *Id.* at 698. The same logic arguably undergirds *Zuchowicz*, making the case far less radical than some torts scholars believe. Do you agree with Professor Abraham that *Zuchowicz* and *Reynolds* are analogous? To the extent

that you were concerned about “self-proving causation” when reading *Zuchowicz*, does this note adequately address your concerns? Why or why not?

2. *Causation as policy.* In her article “Chancy Causation,” Professor Alexandra Lahav argues that in cases like *Zuchowicz*, which emphasize the probabilistic dimensions of causation, courts decide whether the causation requirement is satisfied or not on the basis of policy intuitions. “[T]he doctrine of causation . . . in tort law,” she argues, “reflects a social decision to balance protection from harm” against the freedom to act. That is, “the causal connection is fundamentally *normative*, not factual.” Thus, if cigarette use has been proven to increase the risk of lung cancer, and we have asked whether a particular smoker’s brand of choice caused that particular smoker’s lung cancer, our answer to the causation question, Lahav argues, is ultimately about values. It is about what strikes us as a fair balance between some “peoples’ interests in security in [their] bodies and property” and other peoples’ “interest in engaging in actions which may infringe on that security.” Alexandra D. Lahav, *Chancy Causation in Tort Law*, J. TORT L. (2022).

3. *FDA-approved Causation.* Note that there is some scientific justification for Judge Calabresi’s approach in the FDA’s basic methodology. FDA approval of a particular dosage is based on a “dose-response curve,” which measures that sensitivity of the patient’s reaction to a particular dosage. Is Judge Calabresi’s ruling justified by the science, or by the uncertainty, of causation? What evidence could a defendant offer to counter the plaintiff’s evidence of causation? Will this move over-deter or under-deter negligence in dosing?

4. *Bendectin: A case study.* The story of Bendectin, a morning sickness pill, reveals some of the pitfalls of using the tort system to manage drug safety. Bendectin was widely used in the 1960s and 1970s. However, some scientific studies showed an association between Bendectin and various types of birth defects, including musculoskeletal deformities, brain damage, and cancer. On the basis of these studies, hundreds of plaintiffs sued Merrell Dow, the maker of Bendectin, and many of them won large awards. In 1983, after years of these suits, Merrell Dow pulled Bendectin from the market, saying that the high cost of liability insurance made the drug no longer profitable. The American College of Obstetricians and Gynecologists objected, saying that morning sickness was severe enough in some women to pose a serious health risk and the withdrawal of Bendectin would leave a “significant therapeutic gap.” Jane E. Brody, *Shadow of Doubt Wipes Out Bendectin*, N.Y. TIMES, Jun. 19, 1983. Hospitalization rates of pregnant women for nausea and vomiting (symptoms Bendectin treats) doubled after the drug was removed from the market. Melanie Ornstein, Adrienne Einarson & Gideon Koren, *Bendectin/Diclectin for Morning Sickness: A Canadian Follow-up of an American Tragedy*, 9 REPROD. TOXICOLOGY 1, 2-3 (1995).

Decades later, Bendectin has been vindicated. In 2013, the FDA approved Bendectin (under the new name Declegis) for use in the American market based on decades of experience with Bendectin in Europe (where it remained available) and on new evidence discrediting earlier studies. American obstetricians have long believed that Bendectin is safe, and had been prescribing a combination of other drugs that closely resembles Bendectin for years as an off-label treatment for morning sickness. Liz Neporent, *FDA Approves Morning Sickness Drug Once Feared Unsafe*, ABC NEWS, Apr. 9, 2013.



How did this happen? One review of transcripts from six Bendectin trials showed that juries have some systematic biases in evaluating scientific evidence. Every study has imperfections, and cross-examination excessively highlighted those imperfections, potentially causing juries to disregard the high-quality studies cited by Merrell Dow. Juries had trouble weighing the scientific credentials of opposing experts. Juries also appear to have had difficulty understanding the relative importance of various types of data (epidemiological studies, animal studies, in vitro studies, etc.) and to have excessively discounted the epidemiological studies from Merrell Dow, which indicated that Bendectin did not increase the risk of birth defects at a population level. “If the legal process tends to cause all experts to appear equally qualified,” concludes one observer, “it also causes all science to appear equally worthy.” Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 47 (1993).

5. *Epidemiological causation and Daubert hearings.* The Bendectin trials left their mark on the procedures for high-stakes tort cases. The Supreme Court, in a Bendectin case, laid out a new standard under the Federal Rules of Evidence for allowing expert testimony to go to the jury:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue . . . .

We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

*Daubert v. Merrell Dow Pharms*, 509 U.S. 579 (1993). So-called “*Daubert* hearings,” as these pre-trial hearings described in *Daubert* have become known, have dramatically changed how torts suits are litigated. Plaintiffs must get their experts through the *Daubert* hearing to the jury in order to avoid being dismissed on summary judgment. Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281 (2007). The percentage of civil trials in products liability cases that were dismissed on summary judgment jumped from 21% for 48% in the years after the *Daubert* decision. Lloyd Dixon & Brian Gill, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION (2001). Overall, the percentage of torts cases in federal court resolved by trial has fallen from 16.5% in 1963 to 2.2% in 2002. While all subject areas have seen declines in the percentage of cases resolved by trial, torts have experienced a disproportionate drop. Torts cases constituted 55% of all federal trials in 1962; today they make up only 23% of trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466 (2004).

6. *Agent Orange*. Agent Orange was an herbicide used by the U.S. military in the Vietnam War to eliminate the foliage that provided cover to North Vietnamese forces. From 1965 to 1970, thousands of American soldiers and millions of Vietnamese civilians were exposed to the herbicide. Throughout the 1970s, evidence began to accumulate that Agent Orange was highly toxic, linked to cancer and other conditions in people exposed to the substance and birth defects in their children. In 1979, veterans filed a lawsuit against the manufacturers of Agent Orange, and their cases were consolidated into a single multi-district litigation in New York. Agent Orange was a classic indeterminate plaintiff case; the herbicide may well have increased the risk of some injuries, but it was difficult to say exactly how much risk it added and even harder to identify which plaintiffs would not have suffered their injuries without Agent Orange. The lawsuit dragged on for years until Judge Jack Weinstein was assigned to the case. Brilliant and daring (and controversial), Judge Weinstein wielded all the tools he was allowed to use, and possibly some he wasn't, to pressure the parties into a settlement. The \$180-million compensation fund created for the plaintiffs was one of the largest and most complex mass tort settlements the country had seen. Judge Weinstein then dismissed the claims of the veterans who had opted out of the class on summary judgment, concluding that they had failed to establish that Agent Orange was the cause of their injuries. The dismissal came despite multiple credentialed expert witnesses for the plaintiffs testifying about studies contending that Agent Orange may have caused the harms the plaintiffs suffered. Critics have contended ever since that Weinstein delved into questions of the applicability and reliability of the studies that were properly left for a jury. For a detailed account, see Peter Schuck's classic treatment, *Agent Orange on Trial* (1987).

7. *Bisphenol A*. Bisphenol A (BPA), a ubiquitous industrial chemical in plastics, food packaging, baby bottles, and other areas, cuts against the conventional dose-response wisdom. While standard toxicology studies indicated that Bisphenol A is safe, new studies that look at significantly lower doses of Bisphenol A show that Bisphenol A may have harmful effects in infants. U.S. FOOD AND DRUG ADMINISTRATION, *Bisphenol A: Use in Food Contact Application*, Mar. 2013, available at <https://perma.cc/2KBA-K3QX>. Unlike almost all drugs (such as Danocrine, the drug in *Zuchowicz*), Bisphenol A is actually more likely to cause harm when consumed in small doses by infants because the hormone receptors of infants are more likely to confuse Bisphenol A for estrogen when it is present in very low doses, but not when it is present in the higher doses tested in the traditional toxicological studies. A confounding difficulty in measuring the effect of Bisphenol A is that most people are exposed to low doses of Bisphenol A through hundreds of daily interactions with packaging, plastics, or even paper receipts. Frederick S. vom Saal & Claude Hughes, *An Extensive New Literature Concerning Low-Dose Effects of Bisphenol A Shows the Need for a New Risk Assessment*, 113 ENVIRON. HEALTH PERSPECT. 926 (2005). In 2008, major manufacturers of baby bottles voluntarily removed Bisphenol A from their products, due to public pressure, as the FDA continued to study the issue. Press Release, Ct. Attorney Gen. Office, *Attorney Gen. Announces Baby Bottle Makers Agree to Stop Using BPA; Calls for Legislative Ban* (Mar. 5, 2009), available at <https://perma.cc/GV98-DCB3>. Does the existence of toxins like Bisphenol A, which follow a different dose response curve, challenge the rationale behind Judge Calabresi's rule in *Zuchowicz*?

The actual Bisphenol A multi-district litigation was dismissed on summary judgment, on the grounds that the plaintiffs failed to state a cognizable injury; the plaintiffs attempted to claim damages for their purchase of BPA-containing products, not any medical injuries that

resulted from contact with BPA. *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 687 F. Supp. 2d 897 (W.D. Mo. 2009). If a plaintiff did present a claim for damages based on development disabilities caused by BPA, would you, as a judge, attempt to find creative means (industry liability theories, statistical causation, judicially brokered settlements) to manage to get relief for the plaintiffs? Or would you dismiss the case, believing that other branches of government are best suited to manage such complex problems?

8. *Should the Causation Requirement (Sometimes) Be Eliminated?* In suits where the plaintiff alleges that a toxic substance has caused injury, Professor Margaret Berger has called the standard causation model “blind to the realities of scientific uncertainty and corporate behavior” and “inconsistent with notions of moral responsibility underlying tort law.” Margaret A. Berger, *Eliminating General Causation: Notes towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997). Of particular concern, she argues, are the incentives that the causation requirement gives prospective defendants to refrain from investigating the potential harm of their activities, lest they produce discoverable documents that may prove detrimental in litigation. She cites numerous cases where large firms “did not test [their] product adequately initially, failed to impart information when potential problems emerged, and did not undertake further research in response to adverse information.” *Id.* Professor Berger proposes a model by which the plaintiff’s burden would be to prove a defendant’s failure to “reveal substantial information highly relevant to assessing the potential risk” of its activities related to an alleged injury. That established, the burden of persuasion would shift to the defendant “(1) to prove in general that certain adverse health reactions could not plausibly arise from exposure to defendant’s product, or (2) to reduce damages by proof that a particular plaintiff’s injury is attributable or partly attributable to another cause.” *Id.* Would Professor Berger’s proposal effectively address the problems she identified? How would you compare Professor Berger’s proposed approach to causation to the one advanced in *Zuchowicz*?

### C. Lost Chances and Indeterminate Plaintiffs

A variation on the problem of statistical evidence arises when the plaintiff suffers a harm that was likely to have happened even if the defendant had not acted in such a way as to increase the risk of that harm still further. How can any such plaintiff show by a preponderance of the evidence that, but for the defendant’s act, the injury would not have occurred? The classic case is medical malpractice on patients with severe illnesses:

#### ***Herskovits v. Group Health Coop.*, 664 P.2d 474 (Wash. 1983)**

This appeal raises the issue of whether an estate can maintain an action for professional negligence as a result of failure to timely diagnose lung cancer, where the estate can show probable reduction in statistical chance for survival but cannot show and/or prove that with timely diagnosis and treatment, decedent probably would have lived to normal life expectancy.

Both counsel advised that for the purpose of this appeal we are to assume that the respondent Group Health Cooperative of Puget Sound and its personnel negligently failed to diagnose Herskovits' cancer on his first visit to the hospital and proximately caused a 14 percent reduction in his chances of survival. [The trial court granted summary judgment for the defendant]. It is undisputed that Herskovits had less than a 50 percent chance of survival at all times herein . . . .

The complaint alleged that Herskovits came to Group Health Hospital in 1974 with complaints of pain and coughing . . . . In mid-1974, there were chest pains and coughing, which became persistent and chronic by fall of 1974. A December 5, 1974, entry in the medical records confirms the cough problem. Plaintiff contends that Herskovits was treated thereafter only with cough medicine. . . . In the early spring of 1975, Mr. and Mrs. Herskovits went south in the hope that the warm weather would help. Upon his return to the Seattle area with no improvement in his health, Herskovits visited Dr. Jonathan Ostrow on a private basis for another medical opinion. Within 3 weeks, Dr. Ostrow's evaluation and direction to Group Health led to the diagnosis of cancer. In July of 1975, Herskovits' lung was removed, but no radiation or chemotherapy treatments were instituted. Herskovits died 20 months later, on March 22, 1977, at the age of 60. . . . Dr. Ostrow testified that if the tumor was a "stage 1" tumor in December 1974, Herskovits' chance of a 5-year survival would have been 39 percent. In June 1975, his chances of survival were 25 percent assuming the tumor had progressed to "stage 2". Thus, the delay in diagnosis may have reduced the chance of a 5-year survival by 14 percent. . . .

The ultimate question raised here is whether the relationship between the increased risk of harm and Herskovits' death is sufficient to hold Group Health responsible. Is a 36 percent (from 39 percent to 25 percent) reduction in the decedent's chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative. To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.

Causing reduction of the opportunity to recover (loss of chance) by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses, injury. . . . We reverse the trial court and reinstate the cause of action.

PEARSON, J., concurring.

We must decide whether Dr. Ostrow's testimony established that the act complained of (the alleged delay in diagnosis) "probably" or "more likely than not" caused Mr. Herskovits' subsequent disability. In order to make this determination, we must first define the "subsequent disability" suffered by Mr. Herskovits. Therein lies the crux of this case, for it is possible to define the injury or "disability" to Mr. Herskovits in at least two different ways. First, and most obviously, the injury to Mr. Herskovits might be viewed as his death. Alternatively, however, the injury or disability may be seen as the reduction of Mr. Herskovits' chance of surviving the cancer from which he suffered.

Therefore, although the issue before us is primarily one of causation, resolution of that issue requires us to identify the nature of the injury to the decedent. Our conception of the injury will substantially affect our analysis. If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case. . . .

If, on the other hand, we view the injury to be the reduction of Mr. Herskovits' chance of survival, our analysis might well be different. Dr. Ostrow testified that the failure to diagnose cancer in December 1974 probably caused a substantial reduction in Mr. Herskovits' chance of survival. . . .

One approach, and that urged by defendant, is to deny recovery in wrongful death cases unless the plaintiff establishes that decedent would probably have survived but for defendant's negligence. This approach is typified by *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97 (Ohio 1971). The court in that case affirmed a directed verdict for defendant where the only evidence of causation was that decedent had a chance "maybe some place around 50%" of survival had defendant not been negligent. . . .

My review of these cases persuades me that the preferable approach to the problem before us is that [advanced by] the thoughtful discussion of a recent commentator. King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981).

King's basic thesis is explained in the following passage, which is particularly pertinent to the case before us.

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

To illustrate, consider the case in which a doctor negligently fails to diagnose a patient's cancerous condition until it has become inoperable. Assume further that even with a timely diagnosis the patient would have had only a 30% chance of recovering from the disease and surviving over the long term. There are two ways of handling such a case. Under the traditional approach, this loss of a not-better-than-even chance of recovering from the cancer would not be compensable because it did not appear more likely [than] not that the patient would have survived with proper care. Recoverable damages, if any, would depend on the extent to which it appeared that cancer killed the patient sooner than it would have with timely diagnosis and treatment, and on the extent to which the delay in diagnosis aggravated the patient's condition, such as by causing additional pain. A more rational approach, however, would allow recovery for the loss of the chance of cure even though the chance was not better than even. The probability of long-term survival would be reflected in the amount of damages awarded for the loss of the chance. While the plaintiff

here could not prove by a preponderance of the evidence that he was denied a cure by the defendant's negligence, he could show by a preponderance that he was deprived of a 30% chance of a cure.

90 YALE L.J. at 1363–64.

Under the all or nothing approach, typified by *Cooper v. Sisters of Charity*, a plaintiff who establishes that but for the defendant's negligence the decedent had a 51 percent chance of survival may maintain an action for that death. The defendant will be liable for all damages arising from the death, even though there was a 49 percent chance it would have occurred despite his negligence. On the other hand, a plaintiff who establishes that but for the defendant's negligence the decedent had a 49 percent chance of survival recovers nothing.

...

These reasons persuade me that the best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury. Therefore, I would hold that plaintiff has established a prima facie issue of proximate cause by producing testimony that defendant probably caused a substantial reduction in Mr. Herskovits' chance of survival.

...

Finally, it is necessary to consider the amount of damages recoverable in the event that a loss of a chance of recovery is established. Once again, King's discussion provides a useful illustration of the principles which should be applied.

To illustrate, consider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of a chance, and that chance-interest should be completely redressed in its own right. Under the proposed rule, the plaintiff's compensation for the loss of the victim's chance of surviving the heart attack would be 40% of the compensable value of the victim's life had he survived (including what his earning capacity would otherwise have been in the years following death). The value placed on the patient's life would reflect such factors as his age, health, and earning potential, including the fact that he had suffered the heart attack and the assumption that he had survived it. The 40% computation would be applied to that base figure.

(Footnote omitted.) 90 YALE L.J. at 1382. I would remand to the trial court for proceedings consistent with this opinion.

### Notes

1. *The end of preponderance of the evidence?* The majority and the concurrence disagree deeply on how to proceed in the face of the so-called "lost chance" problem. Does the

*Herskovits* majority opinion give up the preponderance of the evidence standard in order to provide a remedy for plaintiffs with low probabilities of survival?

2. *Lost chance confusion.* What does the lost chance approach of Judge Pearson entail? For one thing, how do we measure the chance that has been lost? Note that the majority opinion offers us at least two different approaches: an absolute reduction in the chance of living, calculated using simple subtraction ( $39-25=14$ ), and also a proportional reduction expressing the reduction as a percentage of the total preexisting chance ( $39-25 / 39 = 36$ ). Still another way to express the lost chance would be as an estimate of the probability that *Herskovits*'s death was caused by the defendant's negligent nondiagnosis ( $14/75 = 19$ ). Which of these three approaches is the right way to express the chance that has been lost by the plaintiff? The court in *Herskovits* barely grasped the difference between them, but it matters which approach we choose.

3. *A probabilistic approach to causation -- or recognition of a novel injury?* What exactly are courts doing when they apply the lost chance doctrine? The probabilistic view holds that the lost chance doctrine is a kind of statistical technique for overcoming the limits on our capacity to know the key causation question: whether the plaintiff's death would not have happened but for the defendant's negligent act. When individualized causal reasoning fails, this view holds, the lost chance doctrine provides an actuarial alternative that preserves some of the public policy goals of tort law. In particular, under this approach, the lost chance doctrine seems to satisfy the deterrence goal by pushing back onto negligent defendant doctors (in the aggregate) precisely the amount of social harm they caused in the world. A different way of saying the same thing is that this view of lost chance achieves an ex ante expected cost of medical malpractice identical to that which would be achieved by perfect knowledge about causation.

In 2008, the Massachusetts Supreme Judicial Court (SJC) adopted a different view of what the lost chance doctrine means. According to the SJC, the lost chance doctrine is not an alteration of the traditional proof of causation. Instead, it is a doctrine that recognizes a new tort-law-protected entitlement: a right in the chance of survival. The Court explained its view as follows:

“[I]njury” need not mean a patient’s death. Although there are few certainties in medicine or in life, progress in medical science now makes it possible, at least with regard to certain medical conditions, to estimate a patient’s probability of survival to a reasonable degree of medical certainty. That probability of survival is part of the patient’s condition. When a physician’s negligence diminishes or destroys a patient’s chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome. Thus we recognize loss of chance not as a theory of causation, but as a theory of injury.

*Matsuyama v. Birnbaum*, 890 N.E.2d 819, 832 (Mass. 2008), *abrogated on other grounds by Doull v. Foster*, 163 N.E.3d 976 (Mass. 2021). Among other things, the Court added, this

conception of the lost chance doctrine is more “consistent with our law of causation, which requires that plaintiffs establish causation by a preponderance of the evidence.” Here, “the plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's injury, where the injury consists of the diminished likelihood of achieving a more favorable medical outcome.” *Id.* at 832.

As for how to value the lost chance of a better outcome, the Court shed some light on this in the part of the decision upholding the “proportional damages” approach used at trial: the jury determined damages flowing from the death to have been \$875,000, but then discounted the damages to 37.5% of that amount, on the basis of the plaintiff's 37.5% chance of survival at the time of the negligent treatment (and, effectively, 0% chance of survival after the negligent treatment). Such an approach “aims to ensure that a defendant is liable in damages only for the monetary value of the *portion* of the decedent's prospects that the defendant's negligence destroyed,” the Court explained. *Id.* at 839.

As of 2022, many states have chosen to allow plaintiffs to recover damages for “loss of chance,” with some following the *Herskovits* approach, e.g., *Aasheim v. Humberger*, 695 P.2d 824 (Mont. 1985), and others adopting the variation on display in *Matsuyama*, e.g., *Perez v. Las Vegas Medical Ctr.*, 805 P.2d 589 (Nev. 1991); *Smith v. Providence Health & Services—Oregon*, 393 P.3d 1106 (Or. 2017). Some states, however, have rejected “loss of chance” entirely, reasoning that it is basically incompatible with tort theory. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 405 (Tex. 1993) (“The true harm remains Ms. Kramer's ultimate death. Unless courts are going to compensate patients who “beat the odds” and make full recovery, the lost chance cannot be proven unless and until the ultimate harm occurs.”); *Cohan v. Med. Imaging Consultants, P.C.*, 900 N.W.2d 732, 741 (Neb. 2017) (declining to adopt “loss of chance” because doing so would “reduce the standard of causation to a mere possibility rather than a preponderance of the evidence and allow for lawsuits in which the patient involved had only a slight chance of survival even prior to the medical professional's negligent conduct”). Still other states have followed a middle path. In Oklahoma, for example, there is a lowered standard to get past summary judgment in loss-of-chance cases, but the plaintiff still must prove to the jury that it was more likely than not that the defendant's negligence caused the harm. *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987).

Notably, these cases all involved allegedly negligent medical treatment. Does the lost-chance approach have a place outside medical malpractice?

4. *The statistical revolution in tort causation.* Causation cases from *Stubbs* to *Matsuyama* and beyond have raised deep questions about the place of statistical knowledge in American law. What role should statistics play in our judicial system? Laurence Tribe expresses hesitancy about the reliance on statistics in trials:

It would be a terrible mistake to forget that a typical lawsuit, whether civil or criminal, is only in part an objective search for historical truth. It is also, and no less importantly, a ritual—a complex pattern of gestures comprising what Henry Hart and John McNaughton once called “society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts.” One element, at least, of that ritual of conflict-settlement is the presence and functioning of the jury—a cumbersome and imperfect institution, to be sure,



but an institution well calculated, at least potentially, to mediate between “the law” in the abstract and the human needs of those affected by it. Guided and perhaps intimidated by the seeming inexorability of numbers, induced by the persuasive force of formulas and the precision of decimal points to perceive themselves as performing a largely mechanical and automatic role, few jurors—whether in criminal cases or in civil—could be relied upon to recall, let alone to perform, this humanizing function, to employ their intuition and their sense of community values to shape their ultimate conclusions.

Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971). On the other hand, Daniel Shavero argues that the use of statistics allows society to reduce the problem of systematic errors. Daniel Shavero, *Statistical Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530 (1989).

## D. The Problem of Multiple Tortfeasors

When multiple tortfeasors are responsible for an injury to a plaintiff, the usual rule for apportioning liability among them is “joint and several liability.” Under joint liability, each defendant may be held individually liable for the whole amount of the injury. Under several liability, each defendant bears only her or his share of the damages. “Joint and several” liability, therefore, means that the plaintiff can choose to sue any or all defendants for the full amount and that any defendants held liable by the plaintiff may apportion the damages among themselves and bring in any further parties who ought to bear a share of the damages. The principal effect of joint and several liability, as compared to several liability, is to allocate to the defendants the risk that any one of them will become insolvent on the defendants, not on the plaintiff. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17. Is that the right policy decision in torts?

In recent years, tort reform statutes have often adopted variations on joint and several liability. Utah abolished joint and several liability altogether, creating by statute the rule that all losses can be apportioned, even if they would have been considered indivisible at common law. UTAH CODE ANN. § 78B-5-818; see *Egbert v. Nissan Motor Co.*, 228 P.3d 737 (Utah 2010). Wisconsin took a slightly narrower approach and only abolished joint liability in cases in which the plaintiffs were contributorily negligent. WIS. STAT. § 895.045. New Hampshire abolished joint and several liability for any defendants who were less than 50% at fault, but held that non-parties to the suit would be included in the fault calculation. This put the plaintiff in the strange position of defending non-parties against defendants, who would attempt to pin the blame on absent actors. *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793, 803 (2006). Illinois similarly removed joint and several liability for parties less than 25% responsible but included immune parties in the apportionment of fault. This is particularly damaging to workers pursuing claims against parties other than their employer for workplace-related injuries, because the employer (who is immunized from tort suits by worker's compensation laws) is often held to be the primary party at fault and other parties (such as product manufacturers with deep pockets) are only required to pay a small portion of the total damages. See *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1032 (Ill. 2002).

Apportionment questions, of course, presume more than one defendant who is liable for *something*. Sometimes, however, multiple defendant cases can raise the question of whether *anyone* may be held liable at all.

***Kingston v. Chicago & N. W. R. Co.*, 191 Wis. 610, 613 (1926)**

We therefore have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property, from which point the united fire bore down upon and destroyed the property. We therefore have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

It is settled in the law of negligence that any one of two or more joint tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. . . .

[The court observed, however, that in some circumstances, a defendant who wrongfully set a fire might not be responsible for tort damages]. From our present consideration of the subject we are not disposed to criticise the doctrine which exempts from liability a wrongdoer who sets a fire which unites with a fire originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, as to be enveloped or swallowed up by the greater holocaust, and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause.

But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect, the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.

According to well settled principles of negligence, it is undoubted that if the proof disclosed the origin of the northwest fire, even though its origin be attributed to a third person, the railroad company, as the originator of the northeast fire, would be liable for the entire damage. There is no reason to believe that the northwest fire originated from any other than human agency. It was a small fire. It had traveled over a limited area. It had been in existence but for a day. For a time it was thought to have been extinguished. It was not in the nature of a raging forest fire. The record discloses nothing of natural phenomena which could have given rise to the fire. It is morally certain that it was set by some human agency.

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer . . . . Granting that the union of that fire with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that by reason of such union with a fire of such character the fire set by him was not the proximate cause of the damage . . . .

The fact that the northeast fire was set by the railroad company, which fire was a proximate cause of plaintiff's damage, is sufficient to affirm the judgment.

### Notes

1. *Doctrinal puzzles.* In deciding whether to hold the railroad company liable for damage to the plaintiff's property, why should it matter whether the northwest fire was caused by human or natural forces? Should it matter which fire was larger, if each fire was sufficient to destroy the property? The court accepted that it would be a viable defense for the railroad company to prove either that the northeast fire had natural causes or that the northeast fire was larger, but simply shifted the burden of proof to the defendant to establish those facts. What is the rationale behind this? What if one of the two fires reached the plaintiff's property before the other? One hour before the other? One minute?

2. *Multiple sufficient causes and the substantial factor test.* The *Kingston* case is a classic example of the problem of multiple sufficient causes. If each fire would have destroyed the plaintiff's property regardless of the other, then neither fire can be said to be a necessary or "but-for" cause of the plaintiff's loss. But to let wrongdoers off the hook because there was more than one of them hardly seems wise. One way courts handle the question of multiple sufficient causation is by asking whether the defendant's actions were a "substantial factor" in causing the harm to the plaintiff. One of the first uses of the substantial factor test was in a classic "two fires" case by the Minnesota Supreme Court. The Court upheld jury instructions that laid out the following contingency: "Assume that defendant's engine did set the bog fire, but that some greater fire swept over it before it reached plaintiff's land, then and in that event defendant is not liable, unless the bog fire was a substantial factor in causing plaintiff's damage." *Anderson v. Minneapolis, S. P. & S. S. M. R. Co.*, 179 N.W. 45, 46 (Minn. 1920). The Restatement (Second) of Torts, published in the 1960's, explicitly addressed the question of multiple sufficient causes, stating that if the defendant's conduct is one of multiple sufficient causes, it is a "substantial factor." RESTATEMENT (SECOND) OF TORTS, § 432(2). As we will see in the subsequent material, the "substantial factor" language has also been applied outside of the situation of multiple sufficient causes.

## E. Alternative Liability and Indeterminate Defendants

Some multiple defendant cases present a problem of uncertainty about the identity of the plaintiff's injurer.

### *Summers v. Tice*, 33 Cal. 2d 80 (1948)

[Plaintiff sued two defendants, his hunting companions, for injuries resulting from being struck in the face by bird shot. The plaintiff prevailed at trial and the defendants appealed.] The plaintiff and the two defendants were hunting quail on the open range. . . . In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a 10-foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. . . .

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tortfeasors, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries—the shooting by Tice or that by Simonson.

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury.

This reasoning has recently found favor in this court. In a quite analogous situation this court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. (*Ybarra v. Spangard*). There the court was considering whether the patient could avail himself of *res ipsa loquitur*, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury . . . . The judgment is affirmed.

### *Note*

The *Summers* court uses a shift in the burden of persuasion to solve the evidentiary problem in a case between two defendants governed by a preponderance standard. But is

shifting the burden of persuasion sufficient in a case with more than two possible defendants? The pharmaceutical disaster known as DES raised this problem.

***Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980)**

MOSK, J.

This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

...

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother . . . for the purpose of preventing miscarriage. . . .

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children. [In particular, DES causes adenosis ("precancerous vaginal and cervical growths which may spread to other areas of the body") as well as cancerous vaginal and cervical growths known as adenocarcinoma, a "fast-spreading and deadly disease.")]

...

Plaintiff [who developed a malignant bladder tumor and who suffered from adenosis, for which she underwent regular and painful monitoring] seeks compensatory damages of \$1 million and punitive damages of \$10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

[The trial court dismissed plaintiff's complaint on the ground that plaintiff could not identify which defendant had manufactured the drug that caused her injuries.] . . .

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers since 1947. According to a note in the Fordham Law Review, estimates of the number of women who took the drug during pregnancy range from 1 ½ million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent. (Comment, DES and a Proposed Theory of Enterprise Liability (1978) 46 Fordham L. Rev. 963, 964-967 (hereafter Fordham Comment).) . . .

We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury resulted from an accidental event . . . or from the use of a defective product. . . .

There are, however, exceptions to this rule. . . .

## I

[The Court first rejected plaintiffs' contention that the "alternative liability" theory of *Ybarra v. Spangard* and *Summers v. Tice* applied. The Court asserted that *Summers's* alternative liability theory did not require the plaintiff to show that the defendants had better access to information on the causation question. Nonetheless, the Court reasoned that there was "an important difference between the situation involved in *Summers* and the present case":]

There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. [T]he rule in *Summers* . . . , as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.

## II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. . . . The elements of this doctrine are prescribed in section 876 of the Restatement of Torts. The section provides, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." . . .

[The Court, however, concluded that the allegations in the complaint] do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings . . . .

There is no allegation here that each defendant knew the other defendants' conduct was

tortious toward plaintiff, and that they assisted and encouraged one another to inadequately test DES and to provide inadequate warnings. Indeed, it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act. Thus, there was no concert of action among defendants within the meaning of that doctrine.

### III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, “enterprise liability.” This theory was suggested in *Hall v. E. I. Du Pont de Nemours & Co., Inc.* (E.D.N.Y.1972) 345 F. Supp. 353. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association. . . . The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in the plaintiffs’ injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury.

The [*Hall*] court [Weinstein, J.] reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. . . .

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. Moreover, in *Hall*, the conclusion that the defendants jointly controlled the risk was based upon allegations that they had delegated some functions relating to safety to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels. To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. . . .

[S]ince the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry.

## IV

If we were confined to the theories of *Summers* and *Hall*, we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Company* (1944), 150 P.2d 436 [we will read *Escola* in our materials on products liability later in this book], recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. . . .

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, “(t)he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. . . . These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff’s injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. . . .

[W]e hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If



at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.<sup>28</sup>

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. . . .

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. . . . It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault or partial indemnity, the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. . . .

We are not unmindful of the practical problems involved in defining the market and determining market share, but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.<sup>30</sup>

The judgments are reversed.

BIRD, C.J., and NEWMAN and WHITE, JJ., concur.

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<sup>28</sup> The Fordham Comment explains the connection between percentage of market share and liability as follows: "(I)f X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect (footnote omitted), it is close enough so that defendants' objections on the ground of fairness lose their value."

<sup>30</sup> The dissent concludes by implying the problem will disappear [if] the Legislature appropriates funds "for the education, identification, and screening of persons exposed to DES." While such a measure may arguably be helpful in the abstract, it does not address the issue involved here: damages for injuries which have been or will be suffered. Nor, as a principle, do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California.

RICHARDSON, J., dissenting.

Although the majority purports to change only the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. “Market share” liability thus represents a new high water mark in tort law. The ramifications seem almost limitless . . . .

The majority now expressly abandons the . . . traditional requirement of some causal connection between defendants’ act and plaintiffs’ injury in the creation of its new modified industry-wide tort. . . .

[Among other things, Justice Richardson observed that] it is readily apparent that “market share” liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in California. On the assumption that no other state will adopt so radical a departure from traditional tort principles, it may be concluded that under the majority’s reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs’ injuries despite the fact that their “substantial” aggregate market share may be considerably less. . . .

[Suggesting that the DES case might be the “only the tip of the iceberg,” Justice Richardson argued that the majority had crafted an illegitimately redistributive rule:]

The majority attempts to justify its new liability on the ground that defendants herein are “better able to bear the cost of injury resulting from the manufacture of a defective product.” This “deep pocket” theory of liability, fastening liability on defendants presumably because they are rich, has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation than herein appears. But as a general proposition, a defendant’s wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. . . . A system priding itself on “equal justice under law” does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant’s wealth. . . .

[Quoting from a recent dismissal of a DES case by another court, Justice Richardson contended that] “[T]he social and economic benefits from mobilizing the industry’s resources in the war against disease and in reducing the costs of medical care are potentially enormous. The development of new drugs in the last three decades has already resulted in great social benefits. The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level of industry investment in pharmaceutical R & D.”]

CLARK and MANUEL, JJ., concur.

### Notes

1. *From Summers to Sindell?* Does the holding in *Sindell* necessarily follow from *Summers v. Tice*? What would be the rationale for treating this case differently?

2. *A New York variation.* Other states dealing with the same DES problem adopted different approaches than the California Supreme Court did in *Sindell*. Consider New York, for example:

We choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants.

To be sure, a defendant cannot be held liable if it did not participate in the marketing of DES for pregnancy use; if a DES producer satisfies its burden of proof of showing that it was not a member of the market of DES sold for pregnancy use, disallowing exculpation would be unfair and unjust. Nevertheless, because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.

Finally, we hold that the liability of DES producers is several only, and should not be inflated when all participants in the market are not before the court in a particular case. We understand that, as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages. However, we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility.

*Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989). *Sindell* attempted to incorporate the idea that market share approximates the probability that the defendant's product caused the plaintiff's harm. *Hymowitz*, by contrast, explicitly severed the causal connection between the injured plaintiff and the liable defendant. Is this a justifiable evolution of the common law to deal with a unique type of problem? Or is this an example of courts trying to solve a problem that they are not institutionally suited to handle?

No other forum adopted *Hymowitz*'s national market share liability. This created the strange consequence that DES manufacturers whose market share in New York was higher than their national market share benefitted relative to manufacturers whose market share in New York was lower than their national market share, due to the different rules in each jurisdiction. Wisconsin and Washington both chose approaches where defendants were liable based on some probability that they caused the injury, which was measured by a combination of market share and other facts in each trial. Defendants in those states were exculpated if they

could prove that the plaintiff did not ingest their product. *Collins v. Lilly & Co.*, 116 Wis. 2d 166 (1984); *Martin v. Abbott Labs.*, 102 Wash 2d 581 (1984).

Are the conflicting effects of different rules in each state a reason why state tort law may be ill-suited to handle this type of national problem?

3. *Lead poisoning and market share.* When is market share liability an appropriate solution? Pennsylvania distinguished the DES cases to deny recovery on a market share theory in suits brought by minor victims of lead poisoning suffered in homes painted over decades with paint from unidentified paint manufacturers.

[T]he relevant time period in question is far more extensive than the relevant time period in a DES case. In this case, [plaintiff Skipworth] cannot identify any particular application, or applications, of lead paint which have caused Skipworth's health problems. Thus, they "pinpoint" a more than one hundred year period from the date the house was built until the lead paint ceased being sold for residential purposes as the relevant time period. In contrast, the relevant time period in a DES case is necessarily limited to the nine months that the patient ingesting the product was pregnant.

The difficulty . . . is that entities who could not have been the producers of the lead paint which injured [plaintiff Skipworth] would almost assuredly be held liable. Over the one hundred year period at issue, several of the pigment manufacturers entered and left the lead paint market.

*Skipworth v. Lead Industries Association*, 690 A. 2d 169, 233-34 (Pa. 1997). The court further noted that:

[L]ead paint, as opposed to DES, is not a fungible product. All DES used for treatment of pregnant women was manufactured according to an identical formula and presented an identical risk of harm. In contrast, it is undisputed that lead pigments had different chemical formulations, contained different amounts of lead, and differed in potential toxicity. . . . [I]n this case, apportioning liability based upon a manufacturer defendant's share of the market (even if it were possible to obtain an accurate statistic considering the lengthy relevant time period at question) would not serve to approximate that defendant's responsibility for injuries caused by its lead paint. For example, a manufacturer whose lead product had a lower bioavailability than average would have caused less damage than its market share would indicate.

Are either of these distinctions persuasive?

4. *Commingled products.* After cases like *Skipworth*, some observers thought that market share liability had no future. The giant litigation over a gasoline additive in the Southern District of New York, however, suggested otherwise. Methyl tertiary butyl ether ("MTBE") is a gasoline additive that has been found leaking from underground storage tanks around the United States and that has contaminated the water supply in many communities. Plaintiffs in

a litigation before Judge Shira Scheindlin could not identify the manufacturers of the MTBE responsible for the chemical that had ended up in the Suffolk County, Long Island water supply. But Judge Scheindlin allowed the plaintiffs to go ahead on what she called a “commingled product theory” that closely resembles the market share theory:

A reasonable jury could conclude that most defendants’ gasoline contributed to contamination in at least some of the wells at some point. To exempt defendants from liability, when plaintiffs have proven the other elements of their claims, simply because plaintiffs are unable to deconstruct the molecules of the commingled gasoline to identify the manufacturers of each gallon of spilled gasoline is unjust. To avoid such a result, New York courts have often “modif[ied] the rules of personal injury liability, in order ‘to achieve the ends of justice in a more modern context’ and . . . to overcome ‘the inordinately difficult problems of proof caused by contemporary products and marketing techniques.’” . . .

The commingled product theory lies somewhere between market share and concurrent wrongdoing. It is similar to concurrent wrongdoing—a theory that allows multiple tortfeasors to be held jointly and severally liable when each tortfeasor’s independent actions combine to produce the same wrong—because it addresses a situation in which multiple defendants have contributed to an indivisible injury. It is similar to market share in that it shifts the burden to defendants to exculpate themselves from liability.

The theory is different from market share liability, however, in an important way. Market share liability was developed in the context of plaintiffs’ inability to identify which manufacturer had produced the defective product—diethylstilbestrol (“DES”) pills. Each plaintiff in the DES cases had ingested pills that were manufactured by only one defendant, but no one could determine which of a small number of manufacturers made those exact pills. When holding all manufacturers of the generic pill liable under market share, courts recognized that all but one of them did *not* cause the plaintiff’s injury.

Here, by contrast, because the gasoline that has contaminated plaintiffs’ wells was undeniably the commingled product of numerous manufacturers, there is a good chance that many of the defendants held liable, if not the majority, actually *did* cause plaintiffs’ injury. In this sense, the commingled product theory is closer to traditional causation than market share liability.

*In re MTBE Products Liability Litigation*, 91 F. Supp. 2d 259 (S.D.N.Y. 2008). While Judge Scheindlin purports to distinguish between the MTBE cases and the DES cases, it seems that many of the same practical problems in apportioning fault are still involved. These include the practical problems identified by *Skipworth* as a reason not to use market share liability in the lead poisoning cases. At trial the jury found for the plaintiffs, but did so on grounds that did not require it to make a decision on the commingled products theory. *See In re MTBE Products Liability Litigation*, 725 F.3d 65, 117 n. 39 (2d Cir. 2013).

### ***The Substantial Factor Test Revisited***

By the 1970s and 1980s, the substantial factor test began to appear outside two-fires type cases such as *Kingston*. In 1973, the Fifth Circuit used the substantial factor language to resolve an indeterminate defendant issue in an asbestos case. The plaintiff had clearly suffered injuries from his exposure to asbestos, but could not prove by a preponderance of the evidence that any particular defendant had supplied the asbestos. The Court found that because each defendant had some role in the cumulative asbestos exposure, each was a “substantial factor” in the injury and could be held liable. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973). This application of the substantial factor test was adopted by most states and covered toxic exposure cases including diethylstilbestrol (DES) and environmental damages. See, e.g., *Queen City Terminals v. General Am. Transp. Corp.*, 73 Ohio St. 3d 609 (1995); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (Cal. 1980). For more, see John D. Rue, *Returning to the Roots of the Bramble Bush: The “But For” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 *FORDHAM L. REV.* 2679, 2695 (2003);

The substantial factor test’s role in lowering the plaintiff’s burden of proving causation has come under significant criticism due to the inherent vagueness of the language and because of claims that it has imposed additional liability on defendants disproportionate to their actual contribution to the plaintiff’s injury. Joseph Sanders, Michael D. Williams & William C. Powers, Jr., *Symposium: A Tribute to Professor David Fischer: The Insubstantiality of the “Substantial Factor” Test for Causation*, 73 *MO. L. REV.* 399 (2008); Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 *ENVTL. L.J.* 549 (1995).

The Third Restatement of Torts, published in 2003, returned to but-for causation and removed the substantial factor language, with a separate section imposing liability on defendants where their conduct was one of multiple sufficient causes. The comments stated that the “substantial factor” test had not “withstood the test of time, as it has proved confusing and been misused.” *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM*, § 26, cmt. J. The comment backed away from using the substantial factor language to limit liability where the defendant’s action was not a “substantial” enough cause. It also rejected the use of the substantial factor language to impose liability where the defendant’s conduct was not a but-for cause, though the Restatement editors simultaneously recognized the difficulty of uncertain defendant cases like *Summers* and *Sindell*. The Third Restatement gives courts the flexibility to “decide, based on the availability of evidence and on policy grounds, to modify or shift the burden of proof for factual cause” in order to cope with these challenging cases. *Id.*

The Third Restatement’s approach has had a mixed reception. Federal courts have applied it in interpreting causation in federal statutes. See, e.g., *June v. Union Carbide Corp.*, 577 F.3d 1234, 1239 (10th Cir. 2009) (causation in Price-Anderson Act). Several states have cited it generally for the proposition that but-for causality is the default standard of causality. See, e.g., *Thompson v. Kaczinski*, 774 N.W.2d 829, 839 (Iowa 2009). However, many states still use the “substantial factor” analysis in toxic tort cases, without even commenting on the Third Restatement’s rejection of that language. See, e.g., *Betz v. Pneumo Abex LLC*, 615 Pa. 504, 524 (2012); *Dixon v. Ford Motor Co.*, 433 Md. 137, 150 (2013).

Judge Calabresi has criticized the Third Restatement approach as being potentially “too certain.” He asks whether the market share liability doctrine or other creative solutions to recent problems in tort doctrine would have evolved under the strict but-for test. *See Rue, Returning to the Roots of the Bramble Bush, supra*, at 2732. Is the flexibility provided by the inherent vagueness of the substantial factor test a tool of judicial economy, by giving judges flexibility to structure new doctrine? Or is it a confusing phrase that leads the law to solve problems best left to other branches of government?

## F. Causation Beyond Torts

Causation is not an issue in torts alone, of course. Courts and legislatures have drawn heavily on torts principles in developing causation standards in a wide range of fields.

### 1. *The Criminal Law*

The paradigmatic example of multiple sufficient causes is captured eloquently by Justice Antonin Scalia in *Burrage v. United States*, 134 S. Ct. 881, 890 (2014):

[C]ourts have not *always* required strict but-for causality, even where criminal liability is at issue. The most common (though still rare) instance of this occurs when multiple sufficient causes independently, but concurrently, produce a result. . . . To illustrate, if “A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head . . . also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds,” A will generally be liable for homicide even though his conduct was not a but-for cause of B’s death (since B would have died from X’s actions in any event).

However, the Court does not always deviate from the but-for approach in multiple sufficient causation cases. Justice Scalia’s opinion in *Burrage* proceeded to apply the but-for causation test to a sentencing statute that provided for a higher penalty for drug distribution crimes where death “results from” the crime. The Court found that the phrase “results from” in the statute required that the drug offense be a necessary cause of the death and that a defendant convicted of drug distribution crimes could not be subjected to the heightened penalty where there were multiple sufficient causes of the death of the purchaser.

The Court’s *Burrage* decision seems to recognize the substantial factor approach for liability purposes but not for sentencing purposes. Does this make sense? More generally, why construe Congress’s use of the phrase “results from” as applying only to deaths that would not have happened but-for the relevant crime, rather than as applying to deaths that fall within one of the causation doctrines that we find in the ordinary law of torts? Justice Scalia cited the “rule of lenity,” which favors interpreting ambiguous statutes in favor of a criminal defendant.

## 2. Environmental Law

In *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012), the Environmental Protection Agency (EPA) required NCR Corp., one of several polluters, to undertake cleanup efforts. NCR did so for some time, and then stopped, alleging that it had already completed its fair apportionment of the cleanup effort. The 7th Circuit held that because each tortfeasor's acts were sufficient causes, and because apportionment of blame was therefore impossible, the EPA had the discretion to command NCR to undertake up to all of the cleanup efforts. In parallel cases where NCR attempted to recover from the other polluting companies, it failed because other companies successfully pleaded that NCR was exclusively aware of the significant risks of the toxic product.

However, where apportionment is possible, courts may use creative means to arrive at a numerical division of fault. In *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599 (2009), a distributor of a toxic pesticide and a railroad transporting that pesticide were both found liable for spills in a particular site. The district court apportioned the liability of the railroad by multiplying together the percentage of land owned by the railroad (19%), the percentage of time period that the railroad was operating on the site (45%), the percentage of the chemicals released by the railroad that led to the cleanup effort (66%), and an allowance for calculation errors (50%), arriving at 9% liability for the railroad. The Ninth Circuit overturned the district court, finding that because there was no evidence that the size of the land owned or the duration of pollution were a reliable measure of the harm caused by the parties, the district court did not have a "reasonable basis" for apportionment. The Supreme Court overturned the Ninth Circuit to hold that the district court did have a "reasonable basis" for apportionment because its 50% "allowance for calculation errors" was sufficient to compensate for any underlying errors in the methodology.

From a deterrence perspective, how does agency discretion in spreading cleanup costs affect the incentives of polluters and the EPA? Is judicial intervention to apportion costs a reasonable alternative to joint and several liability?

## 3. Securities Litigation

Securities fraud cases include a requirement of "reliance," a showing that the fraudulent statement was the necessary cause of the investor's purchase of the security. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court created a rebuttable presumption that any investor relies on a material fraudulent statement, because investors all buy and sell at a market price which reflects publicly available information, including the fraudulent statement. Notably, most securities litigation takes place in class actions. Under *Basic*'s causation presumption, the plaintiffs can simply show that the fraudulent statement materially impacted the market price, which all members in the class were affected by, rather than having to show that each individual in the class relied on the fraudulent statement. This is a way of making the focus of the case rest on issues that are common to the class (whether the market price was influenced by the fraudulent statement) rather than issues specific to each individual within the class. See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

Why create a presumption of causation in securities fraud cases?



In the different substantive areas discussed above, courts and Congress used different conceptions of causation. Were there unique features of each substantive area that shaped the approach to dealing with the general problem of causation?

#### **4. Psychological Conventions around Causation**

Our perceptions of causation are shaped by some systematic and surprising quirks of psychology. For example, people tend to attribute causation to wishes, even when there is no possible mechanism for causal interaction. One study showed that subjects asked to visualize a basketball player successfully make a shot before he took it felt that they had caused the player to make his shot—even though they had no interaction with the player at any time. Even spectators watching the person visualize the successful shot agreed that the visualization had caused the successful shot. This works with harm as well; people believe that if they poke a doll symbolic of a victim with a needle while wishing ill on the victim, and that victim subsequently reported a headache, they are the cause of the headache. Emily Pronin, Sylvia Rodriguez, Daniel M. Wegner & Kimberly McCarthy, *Everyday Magical Powers: The Role of Apparent Mental Causation in the Overestimation of Personal Influence*, 91 J. PERSONALITY & SOC. PSYCHOL. 218 (2006). In the torts context, this means that jurors' perceptions of the defendant's wishes for the plaintiff may influence their perception of whether the defendant caused harm to the plaintiff. People are also more likely to attribute cause to people they are more focused on. For example, when viewing a filmed conversation between two people, viewers are more likely to find a particular party caused the outcome of the conversation if the camera was focused on that party's face. G. Daniel Lassiter et al., *Illusory Causation: Why It Occurs*, 13 PSYCHOL. SCI. 299 (2002). This may mean that a jury will be more likely to find causation from parties that the jury sees more. Do these psychological biases make you feel differently about the ability of the torts system to determine questions of causation? Do you think judges or juries are more likely to commit these kinds of errors?

## CHAPTER 11. ANTIDISCRIMINATION LAW MODULE #3 -- CAUSATION AND DISCRIMINATION CLAIMS

Courts also face complex causation questions in employment discrimination cases. The classic problem of multiple sufficient causes arose in the case of *Price Waterhouse v. Hopkins*:

### A. The Mixed Motive Problem

#### *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, and the Court of Appeals for the District of Columbia Circuit affirmed. We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. . . . [T]he firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. . . .

Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—

were “held” for reconsideration the following year.<sup>1</sup> Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins’ office showcased her successful 2-year effort to secure a \$25 million contract with the Department of State, labeling it “an outstanding performance” and one that Hopkins carried out “virtually at the partner level.” Despite Price Waterhouse’s attempt at trial to minimize her contribution to this project, Judge Gesell specifically found that Hopkins had “played a key role in Price Waterhouse’s successful effort to win a multi-million dollar contract with the Department of State.” Indeed, he went on, “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.”

The partners in Hopkins’ office praised her character as well as her accomplishments, describing her in their joint statement as “an outstanding professional” who had a “deft touch,” a “strong character, independence and integrity.” Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as “extremely competent, intelligent,” “strong and forthright, very productive, energetic and creative.” . . . Evaluations such as these led Judge Gesell to conclude that Hopkins “had no difficulty dealing with clients and her clients appear to have been very pleased with her work” and that she “was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.”

On too many occasions, however, Hopkins’ aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins’ brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins’ perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners’ negative remarks about Hopkins—even those of partners supporting her—had to do with her “interpersonal skills.” Both “[s]upporters and opponents of her candidacy,” stressed Judge Gesell, “indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.”

There were clear signs, though, that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.” But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas

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<sup>1</sup> Before the time for reconsideration came, two of the partners in Hopkins’ office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. . . .

Beyer advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” . . .

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins’ interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins’ candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court’s ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. . . . We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the employer to make its proof by clear and convincing evidence.

## II

....

### A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.<sup>3</sup> Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of “for cause” legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

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<sup>3</sup> We disregard, for purposes of this discussion, the special context of affirmative action.

otherwise adversely affect his status as an employee, *because of* such individual's . . . sex.”<sup>5</sup> We take these words to mean that gender must be irrelevant to employment decisions. To construe the words “because of” as colloquial shorthand for “but-for causation,” as does Price Waterhouse, is to misunderstand them.

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) (“to fail or refuse”), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the words “because of” do not mean “*solely* because of,”<sup>7</sup> we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

To attribute this meaning to the words “because of” does not, as the dissent asserts, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a “cause” of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply “in the air” unless we can identify at least one of them as a but-for cause of the object’s movement. Events that are causally overdetermined, in other words, may not have any “cause” at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision. . . .

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer’s remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute’s maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court. . . .

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<sup>5</sup> In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that “tended to deprive” a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

<sup>7</sup> Congress specifically rejected an amendment that would have placed the word “solely” in front of the words “because of.” 110 Cong. Rec. 2728, 13837 (1964).

. . . . The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute’s legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, co-managers of the bill in the Senate, is representative of this general theme.<sup>8</sup> According to their memorandum, Title VII “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.” 110 Cong. Rec. 7247 (1964). . . .

The central point is this: while an employer may not take gender into account in making an employment decision . . . it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability<sup>10</sup> only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII’s balance of rights.

. . . .

### III

The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.

Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. . . .

Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals’ judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

*It is so ordered.*

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<sup>8</sup> We have in the past acknowledged the authoritativeness of this interpretive memorandum, written by the two bipartisan “captains” of Title VII.

<sup>10</sup> Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership’s proof could only limit the relief she received. She relies on Title VII’s § 706(g), which permits a court to award affirmative relief when it finds that an employer “has intentionally engaged in or is intentionally engaging in an unlawful employment practice,” and yet forbids a court to order reinstatement of, or backpay to, “an individual ... if such individual was refused ... employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–5(g) (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g)—a provision defining remedies—to influence the substantive commands of the statute. We think that this provision merely limits courts’ authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer’s discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions.

Justice WHITE, concurring in the judgment.

It is not necessary to get into semantic discussions on whether the [correct] approach is “but-for” causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. [T]he District Court found that the employer was motivated by both legitimate and illegitimate factors. And here . . . Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner’s action. Rather, as Justice O’CONNOR states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action. . . .

In mixed-motives cases . . . there is no one “true” motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. . . .

. . . . In my view . . . there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.\*

Justice O’CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins’ candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation [rather than the remedy phase of the litigation]. I thus concur in the judgment of the Court. My disagreement stems from the plurality’s conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. . . . I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.

I

. . . . I disagree with the plurality’s dictum that the words “because of” do not mean “but-for” causation; manifestly they do. . . . The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

[I]n the area of tort liability, from whence the dissent’s “but-for” standard of causation

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\* I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.

is derived, the law has long recognized that in certain “civil cases” leaving the burden of persuasion on the plaintiff to prove “but-for” causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the “but-for” cause of the plaintiff’s injury. *See, e.g., Summers v. Tice*, 199 P.2d 1, 3-4 (Cal. 1948). The same rule has been applied where the effect of a defendant’s tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. *See Kingston v. Chicago & N. W. R. Co.*, 211 N.W. 913, 915 (Wis. 1927) (“Granting that the union of that fire [caused by defendant’s negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that ... the fire set by him was not the proximate cause of the damage.”) . . .

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant’s “breach of duty” was the “but-for” cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action,

at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy. (Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60, 67 (1956)).

Like the common law of torts, the statutory employment “tort” created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides “the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges” of discrimination in employment. The second goal of Title VII is “to make persons whole for injuries suffered on account of unlawful employment discrimination.”

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex. . . . At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer’s discriminatory motivation “caused” the employment decision. The employer



has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

....

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. . . .

[T]he evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. . . .

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern. . . .

Justice KENNEDY, with whom the Chief Justice and Justice SCALIA join, dissenting. . . .

I

The plurality describes this as a case about the standard of *causation* under Title VII, but I respectfully suggest that the description is misleading. Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. . . .

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong. Rec. 7213 (1964). Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives. . . .

If a motive is not a but-for cause of an event, then by definition it did not make a difference to the outcome. The event would have occurred just the same without it. . . . Any standard less than but-for . . . simply represents a decision to impose liability without causation. . . .

One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. . . .

No one contends . . . that sex must be the sole cause of a decision before there is a Title VII violation. . . . Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause. . . . The plurality seems to say that since we know the words “because of” do not mean “solely because of,” they must not mean “because of” at all. This does not follow, as a matter of either semantics or logic. . . .

The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer’s showing as an “affirmative defense.” This is nothing more than a label . . . . [T]he import of today’s decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence. . . .

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made “because of” sex. Here the District Court found that the “comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose,” and that “[b]ecause plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board’s decision had not been tainted by sexually based evaluations.” Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

## Notes

1. *Distinguishing and preserving McDonnell Douglas-Burdine Burden Shifting.* The plurality opinion in *Hopkins* contends that there is no tension between the causation theory it proposes and the burden shifting arrangement of the *McDonnell Douglas* sequence that we read about in an earlier module on employment discrimination. In the view of the plurality, *McDonnell Douglas-Burdine* cases arise when the parties dispute which one of two or more factors was a necessary cause of the adverse employment decision in question. The approach in *Hopkins*, by contrast, arises when there are multiple sufficient causes, only one of which is impermissible under the statute:

Our holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. . . . Where

a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was “the ‘true reason’ ” (Brief for Petitioner 20 (emphasis added)) for the decision—which is the question asked by *Burdine*. Oblivious to this last point, the dissent would insist that *Burdine*’s framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. . . .

Is the plurality’s distinction sound? The dissenters were not so certain.

2. *The 1991 Civil Rights Act.* In *Hopkins*, the entire Court (including the plurality of four, and justices O’Connor and White) held that a plaintiff loses where the employer-defendant is able to show that the adverse employment action would have happened regardless of discrimination.

Two years later, Congress enacted the Civil Rights Act of 1991, which amended Title VII and overruled the *Hopkins* holding as to causation in Title VII employment discrimination cases based on race, color, religion, sex, or national origin. The 1991 amendments added Section 703(m) to Title VII:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C.A. § 2000e-2(m). After the 1991 Act, a plaintiff can establish liability without also establishing but-for causation. But the 1991 Act did not completely undo the significance of but-for causation in Title VII cases. To the contrary, the 1991 amendments altered the remedies available to plaintiffs in cases where the adverse employment action would have happened regardless of the illegitimate motive. The 1991 amendments provided that

On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [back pay].

42 U.S.C.A. § 2000e-5(g)(2)(B). After the 1991 Act, an employee has to prove only that discrimination was a “motivating factor” in the discharge decision, a standard that allows plaintiffs to prevail even if the discriminatory conduct is neither necessary nor sufficient to the employment decision. But Congress limited damages for plaintiffs who cannot prove that discrimination was a necessary or but-for cause of the adverse employment action in question. Such plaintiffs are eligible only for a declaratory judgment, attorney’s fees, and certain types of injunctive relief.

What is a “motivating factor” if it is not a necessary factor? Is a motivating factor the same as a causal link in the law of tort causation? What about “substantial factor” from the tort doctrine? See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006); Brian S. Clarke, *A Better Route through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723 (2013).

3. *Age discrimination and the causation puzzle.* Congress’s 1991 amendments notably left out certain forms of employment discrimination claims from its Section 703(m) provision on motivating factors. In *Gross v. FBL Financial Services*, the Court declined to extend either the logic of the *Hopkins* plurality or of the Civil Rights Act of 1991 to age discrimination claims. In *Gross*, the financial services firm FBL demoted 54-year-old plaintiff Jack Gross and reassigned some of his duties to 40-year-old Lisa Kneeskern. Justice Thomas wrote an opinion for a bare majority of the Court ruling that age discrimination claimants must prove that age discrimination was a necessary cause of the adverse employment decision:

Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). The ADEA provides, in relevant part, that “[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” 29 U.S.C. § 623(a)(1) (emphasis added).

The words “because of” mean “by reason of: on account of.” 1 Webster’s Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining “because of” to mean “By reason *of*, on account *of*” (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining “because” to mean “by reason; on account”). Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (explaining that the claim “cannot succeed unless the employee’s protected trait actually played a role in [the employer’s decisionmaking] process *and had a determinative influence on the outcome*” (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a

plaintiff must prove that age was the “but-for” cause of the employer’s adverse decision. . . . [Cf.] W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) (“An act or omission is not regarded as a cause of an event if the particular event would have occurred without it”).

It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the “but-for” cause of the employer’s adverse action.

*Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-77 (2009).

Justice Stevens dissented. Joined by justices Souter, Ginsburg, and Breyer, Justice Stevens contended that the majority ought to have adopted the plurality and concurring approach in *Hopkins*, which rejected the traditional but-for test of tort law. Justice Stevens’s dissent charged that:

The “but-for” causation standard endorsed by the Court today was advanced in Justice Kennedy’s dissenting opinion in *Price Waterhouse v. Hopkins*, a case construing identical language in Title VII of the Civil Rights Act of 1964. Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII.

*Gross*, 557 U.S. at 180-81 (Stevens, J., dissenting).

4. *Retaliation claims: back to but-for causation again.* The Court also insisted on but-for causation in sex- or race-based retaliation claims, which arise when an employee alleges that an employer has retaliated against an employee for raising a race or gender discrimination claim.

In *University of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), Justice Kennedy took up a Title VII retaliation claim in which a medical doctor of Middle Eastern descent alleged that his supervisor had harassed him on the basis of his ethnicity and retaliated against him when he complained. Addressing the retaliation claim, Justice Kennedy wrote:

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.

*Id.* at 342. Observing that the Court had required but-for causation in *Gross* under the Age Discrimination in Employment Act, the Court ruled that the same was true for retaliation claims

under Title VII, notwithstanding Congress’s 1991 alteration of the causation standard for direct Title VII claims.

This case requires the Court to define the proper standard of causation for Title VII retaliation claims. Causation in fact—*i.e.*, proof that the defendant’s conduct did in fact cause the plaintiff’s injury—is a standard requirement of any tort claim, see Restatement of Torts § 9 (1934) (definition of “legal cause”); § 431, Comment *a* (same); § 279, and Comment *c* (intentional infliction of physical harm); § 280 (other intentional torts); § 281(c) (negligence). This includes federal statutory claims of workplace discrimination.

In the usual course, this standard requires the plaintiff to show “that the harm would not have occurred” in the absence of—that is, but for—the defendant’s conduct. Restatement of Torts § 431, Comment *a* (negligence); § 432(1), and Comment *a* (same); see § 279, and Comment *c* (intentional infliction of bodily harm); § 280 (other intentional torts); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, and Comment *b* (2010) (noting the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes, but observing that “cases invoking the concept are rare”). See also Restatement (Second) of Torts § 432(1) (1963 and 1964) (negligence claims); § 870, Comment *l* (intentional injury to another); cf. § 435a, and Comment *a* (legal cause for intentional harm). It is thus textbook tort law that an action “is not regarded as a cause of an event if the particular event would have occurred without it.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984). This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself.

*Id.* at 346-47. Observing that Title VII’s antiretaliation provision provides that it is unlawful “for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter,” the Court per Justice Kennedy concluded that the statute’s language (“because he has opposed . . .”) entailed a but-for causation requirement. Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented on the ground that retaliation claims are discrimination claims based on the characteristic Congress immunized from adverse employment actions, and that therefore they should be governed by the 1991 statute’s altered causation standard. Justice Ginsburg argued that:

Contrary to the Court’s suggestion, the word “because” does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff’s injury, but-for causation is problematic. See, *e.g.*, 1 Restatement (Third) of Torts § 27, Comment *a*, p. 385 (2005) (noting near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist) (hereinafter Restatement Third); Restatement of Torts § 9, Comment *b*, p. 18 (1934) (legal cause is a cause that is a “substantial factor in bringing about the harm”).

When an event is “overdetermined,” *i.e.*, when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to

prevail upon showing that either sufficient condition created the harm. Restatement Third § 27, at 376–377. In contrast, under the Court’s approach (which it erroneously calls “textbook tort law”), a Title VII plaintiff alleging retaliation *cannot* establish liability if her firing was prompted by both legitimate and illegitimate factors. . . .

This point, lost on the Court, was not lost on Congress. When Title VII was enacted, Congress considered and rejected an amendment that would have placed the word “solely” before “because of [the complainant’s] race, color, religion, sex, or national origin.” See 110 Cong. Rec. 2728, 13837–13838 (1964). Senator Case, a prime sponsor of Title VII, commented that a “sole cause” standard would render the Act “totally nugatory.” *Id.*, at 13837. Life does not shape up that way, the Senator suggested, commenting “[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.”

*Id.* at 383-85.

5. *A policy behind deviating from but-for causation?* What is it about race and gender employment discrimination claims that justifies deviation from the but-for causation standard? Is it the difficulty of determining the reasons behind a decision, the evidentiary advantage an employer has over an employee, the public policy importance of discouraging discrimination, or something else? Do any of these characteristics change for age discrimination or retaliation claims?

6. *Race-based university admissions litigation and the cause-in-fact problem.* A different causation issue arises in constitutional antidiscrimination law involving claims arising under the Equal Protection Clause of the Fourteenth Amendment. In particular, causation questions have arisen for equal protection claims challenging race-based programs. Should plaintiffs have to show that the challenged program caused their exclusion from the state benefit in question?

This causation question arose in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, decided by the U.S. Supreme Court in 1993. In *Associated General Contractors*, the plaintiff association challenged a minority preference program in the awarding of city contracts. Justice Thomas, writing for the Court’s majority, held that the contractors’ association had constitutional standing to sue even though it hadn’t shown that any of its members would have received a contract absent the minority preference:

In *Turner v. Fouche*, 396 U.S. 346 (1970), a Georgia law limiting school board membership to property owners was challenged on equal protection grounds. We held that a plaintiff who did not own property had standing to challenge the law, and although we did not say so explicitly, our holding did not depend upon an allegation that he would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position.

We confronted a similar issue in *Clements v. Fashing*, 457 U.S. 957 (1982). There, a number of officeholders claimed that their equal protection rights were violated by the “automatic resignation” provision of the Texas Constitution, which requires the immediate resignation of some (but not all) state officeholders upon their announcement of a candidacy for another office. Noting that the plaintiffs had alleged that they would have announced their candidacy were it not for the consequences of doing so, we rejected the claim that the dispute was “merely hypothetical,” and that the allegations were insufficient to create an “actual case or controversy.” Citing *Turner v. Fouché*, we emphasized that the plaintiffs’ injury was the “obstacle to [their] candidacy,” 457 U.S., at 962; we did not require any allegation that the plaintiffs would actually have been elected but for the prohibition.

The decision that is most closely analogous to this case, however, is *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), where a twice-rejected white male applicant claimed that a medical school’s admissions program, which reserved 16 of the 100 places in the entering class for minority applicants, was inconsistent with the Equal Protection Clause. Addressing the argument that the applicant lacked standing to challenge the program, Justice Powell concluded that the “constitutional requirements of Art. III” had been satisfied, because the requisite “injury” was the medical school’s “decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race.” *Id.*, at 281, n. 14 (emphasis added) (principal opinion). Thus, “even if Bakke had been unable to prove that he would have been *admitted* in the absence of the special program, it would not follow that he lacked standing.” *Id.*, at 280–281, n. 14 (emphasis added). . . .

Singly and collectively, these cases stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the “injury in fact” is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program like Jacksonville’s need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.

*NE Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664–66 (1993). The Court explained in a footnote that “[i]t follows from our definition of ‘injury in fact’ that petitioner has sufficiently alleged both that the city’s ordinance is the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury.” *Associated Gen. Contractors*, 508 U.S. at 666 n.5.

Are affirmative action cases like this one analogous to the lost chance cases in the law of medical malpractice? Recall that in tort, courts have been exceedingly reluctant to extend



lost chance logic outside the medical malpractice area. Why is it appropriate to the affirmative action context? If the lost chance theory is appropriate to constitutional equal protection cases, why not adopt in all mixed-motive cases under Title VII and related employment discrimination statutes?

## **B. *Bostock* and *TransUnion*: A Renaissance for “But-For” Causation?**

Several recent decisions at the Supreme Court in 2020 and 2021 have taken up the causation question in antidiscrimination law – one famously, and the other behind the scenes, but perhaps just as significantly. The decisions have pressed the but-for causation standard to the fore in new ways. Has the Court been correct to recommit the law to the but-for standard in antidiscrimination cases? What is the significance of doing so?

### ***Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)**

Justice GORSUCH delivered the opinion of the Court.

... Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. ...

I

... Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status. ...

Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. ...

A

The only statutorily protected characteristic at issue in today’s cases is “sex” ...

... [T]he statute prohibits employers from taking certain actions “because of” sex. And, as this Court has previously explained, “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’” In the language of law, this means that Title VII’s “because of” test incorporates the “simple” and “traditional” standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened “but for” the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added “solely” to indicate that actions taken “because of” the confluence of multiple factors do not violate the law. . . . But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a “motivating factor” in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. . . .

## B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. . . .

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because

homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. . . .

When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach. . . .

III

....

A

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something . . . if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But [this premise is] mistaken. . . .

. . . Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. . . .

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice ALITO, with whom Justice THOMAS joins, dissenting.

. . . .

The Court's . . . argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are “attracted to men,” and “to the employer's mind” the two employees are “materially identical” except that one is a man and the other is a woman. The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, “race, color, religion, sex, [and] national origin.” 42 U.S.C. § 2000e–2(a)(1), Title VII allows employers to decide whether two employees are “materially identical.” Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in two ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, but its example does not show that sex necessarily played any part in the employer's thinking.

## Notes

1. *Evaluating the Implications of Bostock*. Some observers embrace the but-for causation standard in antidiscrimination law. Professor Katie Eyer argues:

Centering this approach has the potential to address many of the pathologies that currently plague both statutory and constitutional antidiscrimination law. The search for a particular individual bad actor (or actors) becomes far less relevant if the but-for principle is the central defining principle of disparate treatment doctrine, since the question can be asked without defining the precise role of particular individuals in producing the discriminatory action. So too, the search for a strong form of self-aware conscious intent should not be dispositive if our central focus is on whether the outcome would have been different “but for” the protected class of those affected [since self-aware intent certainly may be helpful to proving “but for,” but is not defining of it].

Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1627 (2021). Eyer contends that “the but-for principle” may “provide a stronger foundation” for “equality-promoting doctrines.” *Id.* She cites the “stereotyping principle,” the theory of “negligent discrimination,” and the disparate impact doctrine as areas of the law that are consistent with or bolstered by the introduction of more counterfactual causation reasoning. *Id.* at 1627-28.

Critics, however, contend that the but-for approach is internally incoherent and that it badly misapprehends the moral and legal questions at issue. Consider the argument offered by philosopher Robin Dembroff and law professor Issa Kohler-Hausmann:

[Our conceptual framing] indicates an important shortcoming of using but-for causation as a litmus test for discrimination. Using the Court’s but-for test, we must answer whether or not sex “caused” the outcome. But to do so, *you have to delimit the relevant possible worlds for the counterfactual*, meaning you must designate what to change and what to hold fixed. And which counterfactual worlds we entertain determine whether or not we find that the relevant outcome (e.g., the firing) would have obtained. The Majority holds that the employee’s sex was a but-for cause of being fired because they only entertain worlds where the biological sex and sexual orientation of the plaintiff have been changed (i.e., lesbian compared to a straight man, or gay man compared to a straight woman). By contrast, Alito holds that it is *not* a but-for cause because he only entertains worlds where the biological sex, not the sexual orientation, of the plaintiff [has] been changed (i.e., lesbian compared to gay man).

The takeaway is that once we take “because of sex” to mean “sex as a but-for cause” there is nothing in either the text of Title VII or the nature of causation that requires any particular view as to which counterfactual possibilities are the relevant ones to consider. Should we consider possible worlds where we toggle the plaintiff’s biological sex but hold constant the plaintiff’s male-sex sexual attractions (as the Majority proposes), or possible worlds in which we toggle the plaintiff’s biological sex and hold constant the plaintiff’s same-sex sexual attraction (as the Dissent proposes)? . . . And yet, the legal question of [liability] turns on the answer because the defendant is treated worse than those similarly

situated under the first formulation, and not under the second. Therefore, even if we adopt the Court’s but-for reading of Title VII, then, we [are] left at an impasse regarding whether a plaintiff’s sex was the “but- for” cause of a particular outcome.

Dembroff & Kohler-Hausmann, *Supreme Confusion About Causality at the Supreme Court*, 25 CUNY L. REV. (forthcoming 2022). Thus, according to Dembroff and Kohler-Hausmann, the Court’s decision misapplies the basic law of causation from tort and permits the Court to make normative judgments “under the guise of facts about causal inference.” *Id.* See the following discussion:

Within tort law . . . the ambiguity inherent to [but-for] tests is ameliorated by the structure of the legal question at hand. The question, in cases of tort law, is not simply whether certain damages would have occurred but-for the defendant’s actions; it is instead whether those damages would have occurred but-for the defendant’s wrongful, duty-defying, or negligent actions. In other words, the use of the but-for causal test within tort law is set up, not to tell us whether the defendant’s behavior is the cause of the plaintiff’s loss, but instead to tell us whether their duty-defying behavior is the cause of the plaintiff’s loss. . . .

Rather than follow tort law, and outline its counterfactual question using [a normative showing], the Court over and over again assumes that mere causal relations will deliver a normative result—specifically, a determination of whether or not discrimination occurred. Rather than take discrimination to be an event that may or may not have caused a bad outcome, the Court treats the plaintiff’s social status as an event that, if a but-for cause of some bad outcome, renders the defendant’s conduct discriminatory. In tort law, but-for causation is an independent element of a tort claim. It is not a way to prove that a normative element—breach of duty—occurred. But in the context of antidiscrimination law, the Court recasts causation as an evidentiary route to proving that the defendant’s conduct was discriminatory.

*Id.* Benjamin Eidelson makes a similar point, in part drawing on Kohler-Hausmann and Dembroff.

[T]he Court has indeed failed to provide[] a coherent, general account of what it means for an action to be taken “because of” an attribute in the sense relevant to claims of disparate treatment. To be sure, *Bostock* purported to answer just that question by appealing to the familiar idea of “but-for” causation. And in so doing, it arguably built on other recent decisions construing anti-discrimination requirements in similar terms [citing *Gross* and *Nassar* from the previous section]. But the critics are right to say that this “simple test” is not nearly as simple as advertised. As the *Bostock* dissenters were quick to point out, if Gerald Bostock had been a woman rather than a man—but had still been attracted to people of the same sex—he (now she) would still have been fired. “But for” Bostock’s sex, then, his fate might have been just the same: Everything depends on which other traits one chooses to hold constant in the counterfactual comparison. Without principled criteria for making such judgments, *Bostock*’s test is not simple so much as it is vacuous.

Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022). Eidelson observes that an array of questions are now arising after *Bostock* that the Court’s but-for model struggles to resolve:

If discrimination against gays and lesbians inherently involves sex discrimination under the “but-for” theory, does discrimination based on pregnancy as well? What about discrimination against people who are bisexual or pansexual (and whose aggregate set of sexual attractions or practices would thus offend an employer irrespective of the employee’s own sex)? Does *Bostock*’s protection for transgender individuals—whom the Court understood to be “persons with one sex identified at birth and another today”—extend to nonbinary people, who identify neither as men nor as women today? What does *Bostock*’s “but-for” analysis mean for the “sex stereotyping” theory articulated in *Price Waterhouse v. Hopkins*, which was emphasized by advocates and lower courts but nearly ignored in the Court’s opinion? And what does *Bostock*’s analysis mean for protected characteristics unrelated to sex, gender, and sexuality? For example, does discrimination based on cultural practices that have a racial valence constitute discrimination “because of [an] individual’s race”? Does discrimination based on a person’s status within the Indian caste system constitute “national origin” discrimination? And how should a *Bostock*-style textualist evaluate the panoply of discrimination claims based on intersectional identities or the conjunction of a protected trait with an unprotected one (as in so-called “sex-plus” cases)?

*Id.* Eidelson instead proposes what he calls a “dimensional account,” arguing that Title VII’s “because of” language

is better read to prohibit making decisions based on any facts about what a person is like in the named dimensions. . . . On this understanding, the fact of a person’s being Black is a prohibited ground of decision-making, but so, too, is the fact of her being of a different race than her spouse, or the fact of her being of the same race as most existing employees. A decision made on any of these grounds would be made on account of the person’s race in the requisite sense: it is made based on a fact about what she is like “race-wise,” or in respect of race. And that, in essence, is why *Bostock* was rightly decided: not because Gerald Bostock would have been treated better if his sex had been female, as the Court insisted, but because he would have been treated better if his sex had been different than the sex of his desired romantic partners—full stop. In short, disparate-treatment prohibitions make it unlawful to disfavor people because of properties—including relational properties—that they possess partly in virtue of how they stand in the dimensions enumerated in the statute.

*Id.*

2. Three months before issuing the opinion in *Bostock*, the Supreme Court issued an opinion in another antidiscrimination causation case, again written by Justice Gorsuch: *Comcast Corporation v. National Association of African American-Owned Media*, 140 S.Ct. 1009 (2020). In *Comcast*, the plaintiffs were television content producers who argued that defendant Comcast Corporation, a cable television broadcaster, had violated the Civil Rights

Act of 1866, codified at 42 U.S.C. § 1981, by refusing to enter into an agreement with the plaintiffs on the basis of the plaintiffs' race. The relevant part of the Civil Rights Act of 1866, better known as Section 1981, guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." But the defendants contended that even if its employees had disfavored the plaintiffs because they were African American, there could be no Section 1981 cause of action because the quality of the plaintiffs' content was an independent and sufficient cause of the decision not to go forward with an agreement. The plaintiffs contended that they need only show that race was a "motivating factor," not that race was a but-for cause of the injury. The Court disagreed:

It is "textbook tort law" that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. [citing *University of Texas Southwestern Medical Center v. Nassar* and the Dobbs treatise on torts]. Under this standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred. This ancient and simple "but for" common law causation test, we have held, supplies the "default" or "background" rule against which Congress is normally presumed to have legislated when creating its own new causes of action. . . .

[Plaintiff] seems to argue that a § 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision, not a but-for cause of its injury. . . . But, taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule. . . .

[Plaintiff] tries to salvage something from the 1991 law. [Plaintiff] reminds us that one of the amendments to § 1981 defined the term "make and enforce contracts" to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). In all this, [Plaintiff] asks us to home in on one word, "making." By using this particular word, [Plaintiff] says, Congress clarified that § 1981(a) guarantees not only the right to equivalent contractual *outcomes* (a contract with the same final terms), but also the right to an equivalent contracting *process* (no extra hurdles on the road to securing that contract). And, [Plaintiff] continues, if the statute addresses the whole contracting process, not just its outcome, a motivating factor causation test fits more logically than the traditional but-for test. . . .

This debate, we think, misses the point. Of course, Congress could write an employment discrimination statute to protect only outcomes or to provide broader protection. But, for our purposes today, none of this matters. The difficulty with [Plaintiff's] argument lies in its mistaken premise that a process-oriented right necessarily pairs with a motivating factor causal standard. The inverse argument—that an outcome-oriented right implies a but-for causation standard—is just as flawed. *Either* causal standard could conceivably apply regardless of the legal right § 1981 protects. We need not and do not take any position on whether § 1981 as amended protects only outcomes or protects processes too, a question not passed on below or raised in the petition for certiorari. Our point is simply that a § 1981 plaintiff first must show that he was deprived of the protected right and then establish causation—and that these two steps are analytically distinct.



While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the "same" legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person. . . .

*Id.* at 1014-18. Note in the case, that two lonely law professors appealed to cases of multiple sufficient causation and to a line of nineteenth-century intentional tort cases not requiring injury or causation in order to argue to the Court that the but-for standard was not in fact the "textbook" standard or the "general rule." See Brief of Tort Scholars as Amici Curiae in Support of Respondent, *Comcast Corp. v. National Association of African American-Owned Media*, No. 18-1171, September 27, 2019. The Court's opinion paid them no mind. Sigh.

Justice Gorsuch wrote for a nearly unanimous Court. (Justice Ginsburg concurred in part and concurred in the judgment.) But does the Court's *Comcast* opinion have a lurking Dembroff / Kohler-Hausmann / Eidelson problem? Why in the analysis is the plaintiff's race switched at the moment of Comcast Corporation's decision to contract or not, but not also in the long history of the plaintiff's development as a television and media content producer? Is there a neutral or formal justification for holding the plaintiff's race constant until the moment of contracting?

3. *From Causation to Standing?* The *Bostock* and *Comcast* cases elevate the place of but-for causation in antidiscrimination law. A second, seemingly unrelated case, *TransUnion v. Ramirez*, 141 S.Ct. 2190 (2021), may turn but-for causation into a constitutional test of the standing necessary to sustain federal court jurisdiction under Article III of the U.S. Constitution.

In 1970, Congress passed the Fair Credit Reporting Act (FCRA) to promote fair and accurate credit reporting while protecting consumer privacy. The Act creates a private cause of action for consumers to sue for certain violations. Beginning in 2002, the credit reporting agency TransUnion introduced a "Name Screen Alert" product to allow clients conducting credit checks to cross-check the consumer's first and last name with a Treasury Department-curated "Office of Foreign Assets Control" (OFAC) list of terrorists, drug traffickers, and serious criminals. As a result of the product's indiscriminate searching method, any citizen with a matching first and last name could be erroneously tagged as a potential match and thus found uncreditworthy (among other things). Sergio Ramirez, the named plaintiff in this case, was one such individual. He sued, and sought class certification for a class of 8,185 TransUnion customers whose credit files contained OFAC alerts. The parties agreed that 6,332 class members' files had never been provided to third parties while marked with an OFAC alert. When the Court took up the question of whether those 6,332 class members had standing to sue in a federal court, it revisited the but-for causation standard. Justice Kavanaugh explained the problem as follows:

Article III confines the federal judicial power to the resolution of “Cases” and “Controversies.” For there to be a case or controversy under Article III, the plaintiff must have a “ ‘personal stake’ ” in the case—in other words, standing. . . .

[Thus, to] establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. . . .

Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only “the rights of individuals,” and that federal courts exercise “their proper function in a limited and separated government.” Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. . . .

What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that “history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.” . . .

The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.

Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. . . .

Importantly, this Court has rejected the proposition that “a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” . . . .

For standing purposes, therefore, an important difference exists between (i) a plaintiff’s statutory cause of action to sue a defendant over the defendant’s violation of federal law, and (ii) a plaintiff’s suffering concrete harm because of the defendant’s violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant’s statutory violation may sue that private defendant over that violation in federal court. . . .

[If] the law of Article III did not require plaintiffs to demonstrate a “concrete harm,” Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. . . .

A regime where Congress could freely authorize *un-harmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch’s Article II authority. We accept the “displacement of the democratically elected branches when necessary to decide an actual case.” But otherwise, the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.

*Id.* at 2207. The Court held that “class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim.” *Id.* at 2214. Justices Thomas, Breyer, Sotomayor, and Kagan dissented.

4. *Evaluating the Implications of TransUnion*. Professors Daniel Solove and Danielle Citron suggest that if *TransUnion* and its predecessor case *Spokeo* are carried to their logical conclusion, longstanding private rights of action may “no longer be viable in federal court.” Daniel Solove & Danielle Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 65 (2021). What does *TransUnion* suggest for cases where multiple sufficient causes mean that no discernable harm was caused by the relevant discriminatory conduct? What about Title VII cases in which discrimination was a “motivating factor” but not a but-for cause? After *TransUnion*, are the federal courts constitutionally permitted to hear motivating factor claims under Congress’s 1991 Civil Rights Act? For a sense of the shock-waves being generated by this bold extension of the doctrine of but-for causation, see Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 272 (2021); Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. (forthcoming 2022) (describing *TransUnion* as a “leap into the abyss”). Can plaintiffs in the race-based admissions cases like *Bakke* show a “concrete harm” for *TransUnion* standing if they would not have been admitted absent the race-based policy?

## CHAPTER 12. PROXIMATE (“LEGAL”) CAUSE

“If I am to feel guilt, then surely it is for something that I should not have done, when I knew I shouldn’t do it, and when that something harmed others. But even then, how can I be responsible for all the consequences?”

–Zia Haider Rahman, *In the Light of What We Know: A Novel* 38 (2014)

### A. Introduction

In order to recover damages in a negligence suit, the plaintiff must show not only factual causation, but also something more: what lawyers call “proximate cause” or “legal cause.” The doctrine of proximate cause stands for the idea that the plaintiff should not be able to recover if the plaintiff has not shown an appropriate relationship between the negligent act and the harm complained of, even if the defendant’s negligence has—in fact—caused the plaintiff’s injury. Some injuries, courts say, are too remote from the negligence in question to be properly charged to the defendant’s conduct. Other injuries are not unduly remote, and so are properly attached to the defendant’s conduct. As you read the following cases, ask yourself how courts distinguish remote from proximate harms. Is the doctrine of proximate cause different from the foreseeability dimension that we studied in the negligence analysis in Chapter 4? Given that these are all cases in which the defendant’s conduct was necessary in producing the plaintiff’s injury, is it appropriate to call this doctrine a type of “causation” at all? Many jurists have answered no to both questions. There is no denying that the doctrine of proximate causation has played a prominent role in torts cases since nearly the beginning of modern tort law. But a lurking question remains: Why do we have it?

The next case is an old classic. Its outcome no longer reflects current law. Keep that in mind! But the basic factual set-up offers a crisp illustration of the basic conundrum dealt with by the doctrine of proximate cause: how far down a chain of cascading harms does a tortfeasor’s liability extend?

#### ***Ryan v. New York Central R.R.*, 35 N.Y. 210, 215 (1866)**

HUNT, J.

On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff’s house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it.

A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. . . . So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails? . . .

I . . . place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not infrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote. . . .

To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would

be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offense committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid. . . .

The remoteness of the damage, in my judgment, forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case.

Judgment should be affirmed.

### Notes

1. *Rationales for Ryan.* Few tort jurists today think that liability ought to be cut off as sharply as the *Ryan* court believed. But virtually all observers agree that at some point, where some point is represented by the letter Z, there ought to be a distinction between the first house and the House of Z. But where do we draw the line between proximate and remote damages? Judge Hunt's opinion in *Ryan* offers up a whole laundry list of possible ways to articulate the key distinction. He talks about ordinariness, nature, expectations, accident, and immediacy. Which of these rationales, if any, explains the location of the line as the *Ryan* court sees it?

2. *An insurance explanation?* One explanation articulated in the *Ryan* decision for cutting off liability is that even if none of these doctrinal formulations hold, the plaintiff could have insured his property against fire. The defendant, by contrast, could not take out a policy on the plaintiff's property because in 1866 liability insurance was unavailable on the theory that it was against public policy. For a long time, liability insurance had been thought to create dangerous incentives for careless conduct. Some say it still does! Yet not long after *Ryan* was decided, the law in most states began to permit liability insurance. Today, it is pervasive.

Today, the law permits people and firms to purchase liability insurance protecting the policy-holder's interest in insuring against tort damages judgments. Sometimes, as in automobile insurance regulations, the law not only permits but requires liability insurance. If you have owned a car, you have almost certainly bought a liability insurance policy yourself. Some of you will have bought liability insurance as part of an apartment renter's insurance policy, or perhaps a homeowners' policy.

If liability insurance had been widespread in 1866, would *Ryan* have come out the other way?

Note that today, *Ryan* is almost certainly not a good statement of the law: Courts today virtually always draw the line between proximate injuries and remote ones more broadly than Judge Hunt did. Although never explicitly overruled, *Ryan* was soon distinguished into

oblivion. In 1872, the New York Court of Appeals held that there was proximate cause where a railroad negligently started a fire that spread from its own property to the property of others. *Webb v. Rome, W. & O. R. Co.*, 49 N.Y. 420, 428 (1872) (“We are not to be controlled by the authority [Ryan] more than we are by that of the long line of cases which preceded it . . .”). Later interpretations of these two contrary cases in subsequent railroad fire cases have landed firmly on the side of *Webb*, not *Ryan*. E.g., *Frace v. New York, L. E. & W. R. Co.*, 143 N.Y. 182, 189 (1894) (“The *Ryan* case should not be extended beyond the precise facts which appear therein. Even if correctly applied in that case, the principle ought not to be applied to other facts. See *Webb v. Railroad Co.* . . .”).

One further puzzle to consider in conjunction with *Ryan* is this: If plaintiffs have property insurance against fire damages, and if defendants have liability insurance against tort damages, who ought to pay for damages that could be covered by both? Should tort law be involved at all once there is first-party property insurance? Tort liability in such cases essentially becomes a battle between or among insurers over which insurer will register the loss. At the extreme, in a fully insured world, we could imagine tort law becoming a field exclusively occupied by insurers duking it out over whose bottom line takes a hit when losses from fire spread through a town like Syracuse. We will take up this insurance question at greater length in Chapter 10 when we look at the law of damages in torts. For now, suffice it to say that the relevant doctrines here are: (a) the so-called “collateral source rule,” which holds that the damages owed by a tortfeasor to a plaintiff are not affected by compensation received by that plaintiff from a third (or “collateral”) source, and (b) the doctrine of subrogation, which allows an insurer to step into the shoes of its insured and prosecute a tort claim against a defendant who breached a duty to the insurer’s insured. Does it make sense to allow tort suits under these conditions? What if it means that tort law’s administrative expenses are spent on battles among insurers?

3. *PG&E and the New Fire Cases.* In November 2018, the deadliest wildfire in California’s history, the “Camp Fire,” killed eighty-six people and destroyed approximately fourteen thousand buildings. Lawsuits currently proceeding against utility company Pacific Gas and Electric (PG&E) identify PG&E power lines as the origin of the fire. PG&E, facing the possibility of billions of dollars in liability, filed for bankruptcy in January 2019. See Ariel Cohen, *Part I: PG&E Gets Burned for California Wildfires*, FORBES (Feb. 7, 2019). If California operated under the *Ryan* rule, the issue of proximate causation would prevent such extended liability. California courts, however, have expressly declined to follow the decision in *Ryan*, leaving it to the jury to draw the line for proximate causation on a case-by-case basis. See *Butcher v. Vaca Val. R. Co.*, 8 P. 174, 175 (Cal. 1885) (quoting *Henry v. S. Pac. R. Co.*, 50 Cal. 176, 183 (1875)) (“[C]onsidering the long dry season of California and the prevalence of certain winds in our valleys, . . . it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct, or proximate consequence of the original firing.”).

Note that it is possible PG&E will be held liable for the wildfire even if it was not negligent due to California’s “inverse condemnation” theory. Under the inverse condemnation theory, a privately-owned public utility company may be held strictly liable for wildfire injuries caused by its power lines, essentially on the grounds that such injuries are a kind of taking by an official body for which just compensation is required. See, e.g., *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424 (Ct. App. 1999). This is true regardless of whether the injury was

foreseeable, so long as it constitutes an “actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed.” *Id.* at 429 (quoting *Albers v. Los Angeles Cty.*, 398 P.2d 129 (Cal. 1965) (en banc)). Note that the court in this sentence seems to suggest that there could be unforeseeable injuries that are nonetheless proximately caused.

Inverse condemnation principles might not be needed for PG&E to be held liable in this case. It seems likely that PG&E could have foreseen a devastating fire caused by its power lines given its role in five out of ten of California’s most destructive fires since 2015. Commentators have suggested moreover that PG&E may have had a lax attitude toward fire safety in comparison with other public utility companies such as San Diego Gas & Electric. See Ivan Penn et al., *How PG&E Ignored Fire Risks in Favor of Profits*, N.Y. TIMES, Mar. 18, 2019. Non-compliance with statutes regulating the amount of space between vegetation and powerlines could also provide evidence of negligence. See, e.g., CAL. PUB. RES. CODE § 4292 (requiring the removal of tree limbs within a ten-foot radius of a utility pole); *Id.* § 4293 (requiring certain clearances depending on the voltage running through the power lines).

Meanwhile, PG&E’s liability is expected to increase the price of electricity for consumers and hamper the long-term climate change agenda of California by reducing PG&E investments in cleaner energy. See Sammy Roth, *PG&E Files for Bankruptcy: Here’s Why that Could Mean Bigger Electricity Bills*, L.A. TIMES, Jan. 29, 2019. Bankruptcy proceedings may also reduce the recovery of plaintiffs as they compete with other creditors for PG&E’s assets.

Needless to say, the law has come a long way since *Ryan* cut off liability at the first house. Nonetheless, *Ryan* still stands for the proposition that in some cases, negligence and causation-in-fact will not be enough to justify liability. The next case offers another, quite different example of this general point.

***Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899)**

The plaintiff was a motorman in the employ of the Wilkesbarre & Wyoming Valley Traction Company, on its line running from Wilkesbarre to the borough of Sugar Notch. The ordinance by virtue of which the company was permitted to lay its track and operate its cars in the borough of Sugar Notch contained a provision that the speed of the cars while on the streets of the borough should not exceed eight miles an hour. On the line of the road, and within the borough limits, there was a large chestnut tree, as to the condition of which there was some dispute at the trial. . . . On the day of the accident the plaintiff was running his car on the borough street in a violent windstorm, and as he passed under the tree it was blown down, crushing the roof of the car, and causing the plaintiff’s injury. There is some conflict of testimony as to the speed at which the car was running, but it seems to be fairly well established that it was considerably in excess of the rate permitted by the borough ordinance. We do not think that the fact that the plaintiff was running his car at a higher rate of speed than eight miles an hour affects his right to recover. It may be that in doing so he violated the ordinance by virtue of which the company was permitted to operate its cars in the streets of the borough, but he certainly was not, for that reason, without rights upon the streets. Nor can it be said that the speed was the cause of the accident, or contributed to it. It might have been otherwise if the tree had fallen before the car reached it, for in that case a high rate of speed might have rendered



it impossible for the plaintiff to avoid a collision which he either foresaw or should have foreseen. . . . The testimony, however, shows that the tree fell upon the car as it passed beneath. With this phase of the case in view, it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the accident at the moment when the tree blew down. This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. . . .

The judgment is affirmed.

**Note**

*What principle does Berry v. Borough of Sugar Notch stand for?* Guido Calabresi calls it the principle of "causal link": negligent conduct is only linked to the harm at issue in the relevant way, Calabresi argues, if it increases the risk of that harm. Tort actions, in other words, do not lie in cases of pure coincidence.

## **B. Unexpected Harm**

***Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994)**

On February 15, 1989, on an icy road in Missouri, a semi-tractor and trailer rear-ended a van in which Loras J. Benn was a passenger. In the accident, Loras suffered a bruised chest and a fractured ankle. Six days later he died of a heart attack. . . .

At trial, the estate's medical expert, Dr. James E. Davia, testified that Loras had a history of coronary disease and insulin-dependent diabetes. Loras had a heart attack in 1985 and was at risk of having another. Dr. Davia testified that he viewed "the accident that [Loras] was in and the attendant problems that it cause[d] in the body as the straw that broke the camel's back" and the cause of Loras's death. Other medical evidence indicated the accident did not cause his death.

Based on Dr. Davia's testimony, the estate requested an instruction to the jury based on the "eggshell plaintiff" rule, which requires the defendant to take his plaintiff as he finds him, even if that means that the defendant must compensate the plaintiff for harm an ordinary person would not have suffered. . . . The district court denied this request.

The jury returned a verdict for the estate in the amount of \$17,000 for Loras's injuries but nothing for his death. In the special verdict, the jury determined the defendant's negligence in connection with the accident did not proximately cause Loras's death. . . .

The estate claims that the court erred in failing to include, in addition to its proximate cause instruction to the jury, a requested instruction on the eggshell plaintiff rule. Such an

instruction would advise the jury that it could find that the accident aggravated Loras's heart condition and caused his fatal heart attack. . . .

A tortfeasor whose act, superimposed upon a prior latent condition, results in an injury may be liable in damages for the full disability. . . . This rule deems the injury, and not the dormant condition, the proximate cause of the plaintiff's harm. . . . This precept is often referred to as the "eggshell plaintiff" rule, which has its roots in cases such as *Dulieu v. White & Sons*, [1901] 2 K.B. 669, 679, where the court observed:

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

. . .

The eggshell plaintiff rule rejects the limit of foreseeability that courts ordinarily require in the determination of proximate cause. PROSSER & KEETON § 43, at 291 ("The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable. . . ."). Once the plaintiff establishes that the defendant caused some injury to the plaintiff, the rule imposes liability for the full extent of those injuries, not merely those that were foreseeable to the defendant. RESTATEMENT (SECOND) OF TORTS § 461 (1965) ("The negligent actor is subject to liability for harm to another although a physical condition of the other . . . makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.").

[The court reversed the judgment of the trial court and remanded the case for a new trial.]

### Notes

1. *Eggshell skulls*. Why not treat Mr. Benn like the plaintiff in *Ryan*? There are strong arguments for doing so. Among other things, note that the so-called "eggshell plaintiff" rule, which holds that the defendant takes the plaintiff as she finds him, means that unforeseeably valuable limbs or lives will produce unexpectedly large damages. Driving negligently in such a way as to break tennis champion Serena Williams's right arm, or to injure one of virtuoso cellist Yo-Yo Ma's hands, for example, will produce far greater damages than, say, running into law professor John Witt's shoulder. But the rule of *Benn v. Thomas* holds the defendant liable for the damages to the plaintiff the defendant happens to find—even if there was no notice of the special risks in question. Should people with special vulnerabilities be required to insure themselves against losses—or perhaps to take special precautions against those losses? Should it matter if the unusual vulnerability is the result of an unusually valuable asset (Williams's arm, Ma's hand, etc.) as opposed to an unusual liability like an eggshell skull?

Arguments in favor of the eggshell plaintiff rule do exist. Consider what would happen if the law put the burden of unexpected harm on plaintiffs like Mr. Benn, rather than on

defendants like Thomas. What would the measure of damages be? Note that the risk of unexpectedly high damages in eggshell skull plaintiff cases is matched by opportunities for unexpectedly low damages when defendants turn out to be unforeseeably robust or when their damages turn out, for whatever reason, to be unusually low.

2. *Whence the vulnerability?* Does it make a difference whether Mr. Benn had an underlying heart condition because of a congenital defect, because of poor health habits of his own, or because of prior conduct by a third party? What about prior negligent conduct by a third party?

3. *The bounds of eggshell liability.* How far in time does the eggshell skull plaintiff rule extend? In *Hannebaum v. Drenzo & Bomier*, a woman slipped and fell in the defendant's building. Four years later, she was diagnosed with multiple sclerosis and sued the defendant claiming that her fall was a precipitating factor of the M.S. The court held that the defendants were entitled to argue to the jury that the plaintiff would have acquired multiple sclerosis even in the absence of the fall, but that the plaintiff was also entitled to argue to the jury that the fall precipitated the onset of the disease. *Hannebaum v. Drenzo & Bomier*, 162 Wis. 2d 488, 493 (Ct. App. 1991). Is there a time lag so large that such cases should not go to the jury? Is it four years, fourteen years, or forty years?

4. *Eggshell property?* Should the eggshell rule apply to property damage as well as personal injury cases? On the one hand, the logic of the personal injury cases plausibly translates to cases of property damage. Just as defendants get the benefit of unforeseeably sturdy properties, we might conclude that they ought to be required to pay full damages for unforeseeably delicate properties. On the other hand, the eggshell rule sometimes shifts costs away from lowest cost avoiders. This is true for personal injury cases, too, but in general prospective plaintiffs may be better able to cure underlying vulnerabilities in their property than in their bodies. Moreover, property liability is unbounded in a way that liability for personal injury is not. Damages for destruction of, say, the tower at One World Trade Center because of some structural vulnerability would produce damages in the billions. (It cost \$4 billion to build.)

Whatever the merits of the question, the eggshell plaintiff rule has been held to apply not only to bodies but also to property. The Third Restatement provides that "When harm to property is of a greater magnitude or different type than might be expected because of a characteristic of the property, the harm is within the scope of the actor's liability." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM, § 31 cmt. d (2010). One case illustrating this principle involved a defendant who drove his car into the plaintiff's motel and, in so doing, dented an air conditioning unit in such a way as to cause a gas leak and ultimately an explosion. The court held the defendant liable for all damages resulting from the building's having exploded and invoked the eggshell plaintiff rule in its explanation. *Colonial Inn Motor Lodge, Inc. v. Gay*, 680 N.E.2d 407, 416 (Ill. App. Ct. 1997) ("[T]he evidence suggests that a building rather than a person may have had an 'eggshell skull.'"). The Supreme Court of New South Wales in Australia similarly applies the eggshell rule to property, holding "there is no justification" for distinguishing between personal injury and property damage and

any such distinction would generate “immense practical difficulty.” *McColl v Dionisatos*, [2002] NSWSC 276.

Applying the eggshell plaintiff rule to property opens up the prospect of radically unforeseeable damages. Note that this problem will often be ameliorated by findings of comparative or contributory negligence. Any skyscraper that collapses because of a negligently dented air conditioner is likely to have been negligently maintained or constructed. At least one commentator suggests that the thin skull rule does not apply to damage to property in part because it tends to conflict with the doctrine of foreseeability. See P. J. Rowe, *Demise of the Thin Skull Rule*, 40 MODERN L. REV. 377, 381-82 (1977). The substantial weight of the authority is to the contrary, but one wonders. We’ll return to this question below in our discussion of the opinions in *The Wagon Mound Cases*.

Is the next case simply an eggshell property case?

***In re Polemis*, 3. K.B. 560 (1921)**

[Plaintiffs, the owners of a ship, chartered a ship to defendants, the charterers, by contract. The contract stated that the charterers would not be liable for damages caused by “[an] act of God, the King’s enemies, [or] loss or damage from fire on board in hulk of craft, or on shore . . . .” Under the control of the charterers, the ship docked in Casablanca and was unloaded by local stevedores. The ship was carrying large quantities of petrol and benzene in the lower hold. As stevedores were unloading the ship, one stevedore accidentally dropped a plank into the hold. The plank struck the hold and created a spark, which in turn ignited the petrol and benzene, and set the ship ablaze. Plaintiffs sued the defendants for the value of the vessel. After arbitration, where the plaintiffs prevailed, a lower court upheld the arbitration award. Defendants appealed.]

BANKES, L.J.

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants’ servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants’ junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

The other point relied upon by the appellants was that the damage having been caused by fire they were protected by clause 21 of the charterparty [governing loss by fire]. To this it was replied that the clause had no application in the case of a fire caused by the negligence of

the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence.

For these reasons I think that the appeal fails, and must be dismissed with costs.

WARRINGTON, L.J.

[I]t is contended that "a person guilty of negligence is not responsible in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated." . . .

The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. . . . [B]ut when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." . . . In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board. . . . On the whole in my opinion the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.

. . . I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. . . . In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. . . . In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

## Notes

1. *Directness*? All three judges agree that the foreseeability of harm affects only the assessment of negligence, not whether the defendant is liable for the full extent of damages—at least of damages that are “direct” consequences.

Does this “directness” language actually clarify the standard? We can add directness to the list of formulations offered in the *Ryan* case.

2. *Unexpected types*? What about the suggestion of appellant’s junior counsel? The argument, as recounted and then rejected in the opinion, was that when the damages are of a different type than might reasonably have been expected, such damages are remote. Is this a sound distinction?

## The Wagon Mound Cases

The *Polemis* rule soon ran aground off the coast of Australia in the *Wagon Mound* Cases. These were two independent lawsuits arising out of the same incident in a port near Sydney, Australia. The incident began when a ship, the Wagon Mound, took on furnace oil as cargo in Mort Bay. One of the hatches to the Wagon Mound’s tank was left open as the tank was filling with furnace oil, causing oil to spill out of the ship and float on the surface of Mort Bay. After taking on the furnace oil, the Wagon Mound left the bay. At the same time in another part of the bay, two other ships, the Corrimal and the Audrey D., were being refitted by Mort’s Dock and Engineering Company. The refitting involved significant welding by the Mort’s Dock engineers. Upon seeing the spill, the works manager of Mort’s Dock, Mr. Parkin, telephoned an agent of the Wagon Mound, Mr. Durack. Mr. Durack assured Mr. Parkin that normal work could safely continue. Two and a half days later, the welding work ignited the oil, causing a large fire. The fire damaged the Mort Dock and both ships being refitted. In *Wagon Mound (No. 1)*, Mort’s Dock sued the Wagon Mound for damage to the dock. In *Wagon Mound (No. 2)*, the owners of the Corrimal and the Audrey D. sued the Wagon Mound for damage to their ships.

### *Wagon Mound (No. 1)*

***Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng. Co., [1961] A.C. 454***

[Plaintiff brings suit for damage to the dock caused by a fire from the ignition of oil negligently discharged by Defendant’s ship, the Wagon Mound. Plaintiff prevailed at trial, and Defendants appealed.]

[The lower court judge] made the all important finding, which must be set out in his own words. “The *raison d’être* of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water.” . . .

The learned Judge held that apart from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon

them and interfered with their use of the slips. He said “The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage which may be insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which beyond question was a direct result of the escape of the oil.” It is upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage.

. . . It is inevitable that first consideration should be given to the case of *In re Polemis* . . . . For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that [lower court] was constrained to decide the present case in favour of the respondents. . . .

There can be no doubt that the decision of the Court of Appeal in *Polemis* plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences whether reasonably foreseeable or not. The generality of the proposition is perhaps qualified by the fact that each of the Lords Justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not “direct” whatever that may mean. . . .

[A review of the subsequent history of the *Polemis* rule shows that the] authority of *Polemis* has been severely shaken though lip-service has from time to time been paid to it. In their Lordships’ opinion it should no longer be regarded as good law. . . . For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be “direct.” It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour. . . .

After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule by substituting “direct” for “reasonably foreseeable” consequence leads to a conclusion equally illogical and unjust. . . .

[I]f it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was “direct” or “natural,” equally it would be wrong that he should escape liability, however “indirect” the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done. Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence . . . .

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents’ action so far as it related to damage caused by the negligence of the appellants be dismissed with costs . . . .

***Wagon Mound (No. 2)***

***Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co., [1966] 1 A.C. 617***

[Plaintiff, owner of vessels undergoing repair in the Mort Bay, brings suit against Defendant, owner of the Wagon Mound, for damage caused to vessels in the same fire at issue in Wagon Mound No. 1. The lower court found that Defendant was not liable under negligence claims, but was liable under nuisance claims. Defendants appealed.]

In The Wagon Mound (No. 1) the finding on which the Board proceeded was that of the trial judge: “the defendant did not know and could not reasonably be expected to have known that [the oil] was capable of being set afire when spread on water.” In the present case the evidence led was substantially different from the evidence led in The Wagon Mound (No. 1) and the findings of Walsh J. are significantly different. That is not due to there having been any failure by the plaintiffs in The Wagon Mound (No. 1) in preparing and presenting their case. The plaintiffs there were no doubt embarrassed by a difficulty which does not affect the present plaintiffs. The outbreak of the fire was consequent on the act of the manager of the plaintiffs in The Wagon Mound (No. 1) in resuming oxy-acetylene welding and cutting while the wharf was surrounded by this oil. So if the plaintiffs in the former case had set out to prove that it was foreseeable by the engineers of the Wagon Mound that this oil could be set alight, they might have had difficulty in parrying the reply that this must also have been foreseeable by their manager. Then there would have been contributory negligence and at that time contributory negligence was a complete defence in New South Wales. . . .

[H]ere the findings show that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship’s chief engineer. . . .

[A] properly qualified and alert chief engineer would have realised there was a real risk here . . . . If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant’s servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

In the present case the evidence shows that the discharge of so much oil onto the water must have taken a considerable time, and a vigilant ship’s engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship’s engineer probably ought to have known that this had in fact happened before. . . .

Accordingly, their Lordships will humbly advise Her Majesty that the appeal and the cross-appeal should be allowed and that the judgment for the respondents in the sums of £80,000 and £1,000 should be affirmed.

***Notes***

1. *Foreseeability?* The *Wagon Mound Cases* adds “foreseeability” as an alternative doctrinal formula in our now quickly growing catalog of doctrinal formulations for the proximate cause inquiry. Does foreseeability compare favorably with the directness test of



*Polemis*? Does it clarify the doctrine? The fact that the lower courts in the *Wagon Mound Cases* disagree on the reasonable foreseeability of the fire is not promising.

One problem is that the foreseeability standard does not specify anything about the level of generality at which the foreseeability inquiry is to be pitched. If the question is pitched abstractly as whether harm to the vessel in the *Polemis* case, for example, is a reasonably foreseeable result of the dropping of the board into the hull, the answer is obviously yes. But if the question is more particular—if instead we ask whether the destruction by fire of the vessel is a reasonably foreseeable result of dropping the board into the hull—the answer may be no. The entire foreseeability inquiry turns on the level of generality of the analysis.

Stunningly, there is very little law on the question of the appropriate level of generality. It is commonly said that the particularities of the harm in question need not be reasonably foreseeable; nor does the law require that the particular manner in which it came about be reasonably foreseeable. See, e.g., *Kirlin v. Halerson*, 758 N.W.2d 436, 451 (S.D. 2008) (“[T]he exact harm need not be foreseeable. Rather, the harm need only be within the class of reasonably foreseeable hazards that the duty exists to prevent.”). Thus, in California “it is settled that what is required to be foreseeable is the general character of the event or harm—e.g., being struck by a car while standing in a phone booth—not its precise nature or manner of occurrence.” *Bigbee v. Pacific Tel. & Telegraph Co.*, 665 P.2d 947, 952 (Cal. 1983). But courts dismissing tort claims for lack of foreseeability often seem to characterize the inquiry in much more particularized fashion. Thus, for example, in *Mussivand v. David*, 544 N.E.2d 265, 272 (Ohio 1989), the Ohio Supreme Court explained that foreseeability in that case turned on whether it was reasonably foreseeable to the defendant paramour not that his venereal disease might cause harm to another, nor even that his lover might pass on the defendant’s undisclosed venereal disease to a third party, but that she might pass on the disease to her spouse in particular. In California, the state Supreme Court has suggested that even though foreseeability need only be general, foreseeability in the proximate causation inquiry nonetheless requires a “focused, fact-specific inquiry.” *Ballard v. Uribe*, 715 P.2d 624, 628 n.6 (Cal., 1986). In *Laabs v. S. Cal. Edison Co.*, 97 Cal. Rptr. 3d 241, 251 (Ct. App. 2009), the California Court of Appeal conceded that the foreseeability inquiry ought to take place at some sort of a general level, but concluded nonetheless that the question before it was whether it was reasonably foreseeable to the defendant when it erected its roadside telephone pole that vehicles might leave “a roadway where vehicle speeds commonly reach 62 miles per hour or more and strik[e] a fixed concrete light pole placed 18 inches away from the curb.”

On the oscillation in levels of generality in the caselaw, see generally Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1885-86 (2011).

2. *Functional considerations.* One of the puzzles of the two *Wagon Mound* cases is to figure out why the trial courts came to different conclusions about the foreseeability of fire from the furnace oil on the water.

Former dean of the University of Chicago Law School and torts scholar Saul Levmore attempts to resolve the tension between the two *Wagon Mound* cases by looking at pragmatic reasons to treat the cases differently:

[T]he first Wagon Mound case concerns a plaintiff that is contributorily negligent [at a time before courts in Australia recognized comparative negligence]—but also a defendant that is poised to escape the scene with no liability at all. In such a situation, the moral might be, clever courts will nevertheless allow contributory negligence to apply so long as they see other cases on the horizon with which to deter the first wrongdoer. *Mort's Dock* fails to recover because it was likely careless, and the Wagon Mound is made to pay in No. 2 in order to prevent it from going completely free. But the important thing is to see that the Wagon Mound cases involve multiple parties, multiple losses, and very likely, an informed and sophisticated court that was able to make the entire story—spread out over multiple cases including one that might be filed later on—come out right. Taken one at a time, the cases seem inconsistent, but viewed as a whole and in the context of the overall goals of the tort system, the results are quite elegant.

Saul Levmore, *The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*, in *TORTS STORIES*, 129, 146-47 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

Levmore's explanation is striking for its disavowal of the significance of doctrine, at least in the proximate causation area. What matters, Levmore suggests, is not the verbal formulation adopted (direct, foreseeable, etc.) but the purposes and functions of tort liability in the particular context at issue. If the formal doctrine is not helpful in resolving cases, then do judges have any alternative but to rely on functional or practical considerations in making decisions? What should those functional considerations be? Note that if Levmore is correct, this is an example of a situation where judges made their decisions based on considerations not openly discussed in their opinion. Writing when he was a professor, Judge Calabresi suggested in the last chapter that this was commonplace and not necessarily a bad thing. Was he right?

3. *Unexpected types of harm?* Some cases involve harm to the plaintiff that was in some way different than the harm that might have been expected to be caused by the defendant's negligence. In *Doughty v. Turner Manufacturing Co.*, an employee was injured when an asbestos cement cover inadvertently slid into a cauldron of boiling sodium cyanide. The cement cover sunk into the cauldron, submerged, and then exploded out the cauldron due to an unexpected chemical reaction, shooting shards of asbestos cement across the room and injuring the plaintiff. The trial judge ruled for the plaintiff on the grounds that it was negligent for the employer to let the cement cover fall into the cauldron because it might have splashed the employee and that the employer was liable for all the consequences of his negligent act (including the unexpected explosion). The appellate court reversed, holding that splashes are in "quite a different category" than the unforeseeable explosion. *Doughty v. Turner Manufacturing Co.*, [1964] 1 Q.B. 518.

The courts reached a different conclusion in *Hughes v. Lord Advocate*. In that case, workers repairing underground wires left an open manhole unattended. They covered the manhole with a tent and left lighted lamps around the tent as a warning. A boy entered the tent and knocked one of the lamps into the hole. The lamp exploded, causing serious burns. The defendant argued that it should only be held liable for the damage that might have been expected from the negligent act—burning from the lamps, not an unforeseeable explosion. The

court disagreed, holding that “the distinction drawn between burning and explosion is too fine to warrant acceptance.” *Hughes v. Lord Advocate*, [1963] A.C. 837. Should the “type” of harm matter?

Other cases deal with unexpected harms where the surprise comes not from a new chemical reaction but rather from an unexpected vulnerability of the plaintiff. In *Smith v. Brain Leech & Co.*, the plaintiff was injured in a workplace accident when a fleck of molten metal hit him on the lip. The injury ultimately became cancerous, likely because the plaintiff had worked in the gas industry for many years and was thus prone to cancer (by the court’s reasoning). The defendant argued that it should be liable only for the burn, and not the cancer, because it was not the true cause of the cancer. The court held otherwise:

The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim. . . . Accordingly, I find that the [full damages of the plaintiff’s death] are damages for which the defendants are liable.

*Smith v. Brain Leech & Co.*, [1962] Q.B. 405.

Judge Henry Friendly reached a slightly different conclusion when faced with a similar vulnerable plaintiff case. In *Steinhauser v. Hertz Corp.*, the plaintiff was injured in a car accident. Shortly after the accident, she became schizophrenic. At trial, the expert testimony indicated that while the plaintiff had pre-psychotic tendencies before the accident, the accident was the triggering event that pushed her into full-blown schizophrenia. Judge Friendly held that while the plaintiffs were allowed to recover based on a triggering event theory of causation, that argument would in fact affect the damages they could receive. He wrote, “if a defendant ‘succeeds in establishing that the plaintiff’s pre-existing condition was bound to worsen an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant’s negligence.’” *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173-74 (2d Cir. 1970).

If we agree that eggshell skull plaintiffs should be able to recover, what is the appropriate measure of damages? Should courts attempt to calculate the probability that some other event might have triggered the plaintiff’s underlying vulnerability? Over what time horizon should the court run this calculation?

4. *Eggshell Property Revisited.* Does the decision in *Wagon Mound I* cut against the applicability of the eggshell plaintiff rule to property damages? At least in cases with two different “types” of property damage? One commentator thought the decision in *Wagon Mound I* might prompt a narrower eggshell plaintiff rule:

Whether the special sensitivity rule must be discarded since *The Wagon Mound*, or whether it survives that decision, will have to be judicially determined. If it survives, what are its limits? Is it a rule relating only to special sensitivity of the person, or does it extend to special sensitivity of property? . . .

It seems obvious that . . . the thin skull rule must either be denied or carefully restricted. The most obvious way of restricting it would be to confine it to injury to the person . . .

Glanville Williams, *The Risk Principle*, 77 L. Q. REV. 179, 194-95 (1961). Note that the *Steinhauser* decision suggests that there may be limits on the eggshell plaintiff rule in personal injury cases, too, at least where the injuries in question are sufficiently unusual.

5. *The “harm within the risk” test.* Imagine that an exterminator leaves a container of rat poison unlabeled near a stove. Imagine further that it was wrongful or negligent to have done so because the poison might find its way into food. Then, when the stove is lit, the container of rat poison explodes. Is the defendant liable for the burns suffered by the chef? See *Larrimore v. American National Ins. Co.*, 89 P.2d 340 (Okla. 1939). The conventional answer is no: the negligence in question inhered in the risk of poisoning, not the risk of exploding.

One way to explain this is to say that the harm of which the plaintiff complains must be within the risk the defendant’s wrongful conduct produced. Indeed, for a century leading jurists have offered this “harm within the risk” principle as a way to explain the limits of liability. See Joseph Bingham, *Some Suggestions Concerning “Legal Cause” at Common Law (Pt. I)*, 9 COLUM. L. REV. 16 (1909). Given the awkwardness of alternative tests such as directness and foreseeability, many have hoped that harm-within-the-risk might offer a substitute test for proximate causation. The Third Restatement asks “whether there is an intuitive relationship between the act(s) alleged and the damages at issue (that is, whether the conduct was wrongful because that type of damage might result).” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM, § 29 (2010).

Not everyone is persuaded that the harm within the risk approach is a useful alternative to other proximate causation tests. For example, does the harm within the risk test solve the problem of the choice of specificity with which to define the relevant harm and risk? Imagine that someone attempts to eat the rat poison, but chokes on it and dies of asphyxiation rather than poisoning. Should we characterize the risk of leaving the unlabeled poison broadly, by calling it a risk of physical injury or death? Or should we define the risk narrowly, by treating it as a risk of poisoning? Likewise, we can characterize the harm to the plaintiff broadly as “physical injury” or narrowly as “choking”?

Another difficulty with the harm within the risk test might be that it has difficulty explaining some of the cases. Is the eggshell skull plaintiff rule from *Benn v. Thomas* reconcilable with the harm within the risk principle? How about the *Polemis* case? For criticism of the harm within the risk principle, see Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQ. L. 33 (2002).

## C. Unexpected Manner

Injuries sometimes happen in the darndest ways, and when they do, proximate causation questions often arise. A recurring problem arises when intervening actors contribute to, aggravate, or are otherwise involved in the harm about which the plaintiff complains. Consider the following classic example:

### ***Brauer v. New York Cent. & H.R.R. Co.*, 103 A. 166, 168 (N.J. 1918)**

This is a case of a grade crossing collision. . . . The complaint avers that the horse was killed, and the wagon and harness and the cider and barrels with which the wagon was loaded were destroyed. What happened was that as a result of the collision, aside from the death of the horse and the destruction of the wagon, the contents of the wagon, consisting of empty barrels and a keg of cider, were scattered, and probably stolen by people at the scene of the accident. The driver, who was alone in charge for the plaintiff, was so stunned that one of the railroad detectives found him immediately after the collision in a fit. There were two railroad detectives on the freight train to protect the property it was carrying against thieves, but they did nothing to protect the plaintiff's property. The controversy on the question of damages is as to the right of the plaintiff to recover the value of the barrels, cider, and blanket. . . . It is . . . argued that the defendant's negligence was not in any event the proximate cause of the loss of this property, since the act of the thieves intervened. The rule of law exempting the one guilty of the original negligence from damage due to an intervening cause is well settled. The difficulty lies in the application. . . .

The negligence which caused the collision resulted immediately in such a condition of the driver of the wagon that he was no longer able to protect his employer's property; the natural and probable result of his enforced abandonment of it in the street of a large city was its disappearance; and the wrongdoer cannot escape making reparation for the loss caused by depriving the plaintiff of the protection which the presence of the driver in his right senses would have afforded. . . .

A railroad company which found it necessary or desirable to have its freight train guarded by two detectives against thieves is surely chargeable with knowledge that portable property left without a guard was likely to be made off with. Again, strictly speaking, the act of the thieves did not intervene between defendant's negligence and the plaintiff's loss; the two causes were to all practical intent simultaneous and concurrent; it is rather a case of a joint tort than an intervening cause. . . .

The judgment is affirmed, with costs.

GARRISON, J., dissenting.

The collision afforded an opportunity for theft of which a thief took advantage, but I cannot agree that the collision was therefore the proximate cause of loss of the stolen articles. Proximate cause imports unbroken continuity between cause and effect, which, both in law and in logic, is broken by the active intervention of an independent criminal actor. This established rule of law is defeated if proximate cause is confounded with mere opportunity for crime. A

maladjusted switch may be the proximate cause of the death of a passenger who was killed by the derailment of the train or by the fire or collision that ensued, but it is not the proximate cause of the death of a passenger who was murdered by a bandit who boarded the train because of the opportunity afforded by its derailment. This clear distinction is not met by saying that criminal intervention should be foreseen, for this implies that crime is to be presumed, and the law is directly otherwise. . . .

### Notes

1. *A rationale?* What is the court's rationale for extending the damages to the loss of the cider? Does it matter that the driver was stunned?

2. *Bealism to the rescue?* One attempt to refine or clarify the doctrine of proximate causation has been to adopt formal distinctions between remote and non-remote damages. In *Pittsburg Reduction Co. v. Horton*, 113 S.W. 647 (Ark. 1908), the defendant left a dynamite cap on its unenclosed premises that one school boy, Charlie Copple (age 10), picked up and traded to another school boy, the plaintiff, Jack Horton (age 13). While Horton was cleaning it, the cap exploded, maiming his hand so badly that doctors had to amputate the plaintiff's hand. The court found that there was an insufficient connection between the defendant and the plaintiff because Charlie Copple's mother knew that the caps were for some kind of explosive, even if she didn't know they contained combustible material, and nevertheless still allowed her son to carry the caps to school. The court reasoned that Copple's mother's conduct

broke the causal connection between the original negligent act of appellant and the subsequent injury of the plaintiff. It established a new agency, and the possession of Charlie Copple of the caps or shells was thereafter referable to the permission of his parents and not to the original taking. Charlie Copple's parents having permitted him to retain possession of the caps, his further acts in regard to them must be attributable to their permission, and were wholly independent of the original negligence of appellants.

*Id.* at 649. Some scholars at the time, notably Joseph Henry Beale, embraced the formalism of discrete causal connections and agencies that could be newly established or cleanly broken by the parties' actions. Beale even introduced the quasi-Newtonian language of active force and coming to rest to explain proximate cause:

If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risk loss, we say that the injury thereby created is a proximate consequence of the defendant's act . . . .

On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from the defendant's act.

Beale, *The Proximate Consequences of An Act*, 33 HARV. L. REV. 633, 650, 651, 656 (1920).

Objecting that Beale's approach was a retreat into meaningless abstractions, the legal realist scholar and later judge Jerome Frank wasted no time in attacking what he perjoratively termed "Bealism." The "Bealist," Frank objected,

dematerializes the fact he purports to describe; the vagueness of his vocabulary aids him to avoid recognizing contradictions and absurdities which his assertions involve. Contentless words supply "a stable verbal support for inexact, nebulous and fluctuating conceptions." Such dematerialized but sonorous terms as Uniformity, Continuity, Universality, when applied to law by the legal Absolutist, have the same capacity for emotional satisfaction that terms like Oneness, Eternity, or The True, have when applied by the metaphysician to the Absolute.

JEROME FRANK, LAW AND THE MODERN MIND 67 (1930). In *Scott v. Shepherd*, which we read in Chapter 3, Blackstone sought to resolve the distinction between proximate and remote damages with the concepts of directness and indirectness. Does Blackstone's effort give you confidence that courts might be able to resolve questions of proximate causation with metaphysical concepts like the ones Beale offers?

3. *All things considered judgments.* The dissenter in *Brower* forcefully protests against extending the causal chain when an intervening criminal act occurs. The majority, however, insists that there is no general rule for proximate cause and intervening criminal acts. Instead, in the majority's approach, what the field of proximate causation consists of is highly contextual, all-things-considered judgments about the particular damages in question. Consider the next case, which takes up an intervening act of gross negligence:

***McLaughlin v. Mine Safety Appliances Co.*, 181 N.E.2d 430 (N.Y. 1962)**

FOSTER, J.

Frances Ann McLaughlin, an infant six years of age, was visiting her uncle and aunt in West Deering, New Hampshire, during the Summer of 1952. While bathing in Whittemore Lake, she almost drowned and was carried from the lake in an unconscious condition. The local lifeguard administered first aid, and the Bennington Volunteer Fire Department was summoned. A fire department truck arrived shortly thereafter, and two men removed a resuscitator and some blankets from the truck. The resuscitator was placed over the infant's mouth, and she was wrapped in blankets by a woman who identified herself as a nurse.

More heat was needed to revive the child, so the firemen returned to the truck and obtained some boxes containing 'heat blocks'. The blocks were removed from their containers by the firemen who activated them and turned them over to the nurse. The nurse proceeded to apply several of them directly to the child's body under the blankets. Subsequently, the child began to heave about and moan. At this point, the infant was taken, still wrapped in the blankets, to a doctor's car and placed on the back seat. The heat blocks had fallen out from under the blankets. After a short stay at the doctor's office, the infant was taken home, and that evening blisters were observed about her body. It was soon ascertained that she was suffering from third degree burns, and she was taken to the Peterborough Hospital where she underwent extensive treatment.

The ‘M-S-A Redi-Heat Blocks’, which were applied to the infant’s body and caused the burns, were manufactured by Catalyst Research Corporation for defendant and packaged in defendant’s cardboard container at defendant’s plant and were sold and distributed by defendant to industrial houses, government agencies and departments for use in emergency. . . . The block was covered in its entirety by a red woolen insulating material called ‘flocking’ which appeared and felt like a ‘blanket’ or ‘flannel’ covering or just ordinary “wool.” Tests made upon the device indicated that the block attained a high surface temperature of 204 degrees Fahrenheit within two minutes after triggering. . . .

Affixed to each block on top of the ‘flocking’ was an oval-like label containing the trade name of the block, and the name and design of the defendant. The blocks and two cartridges were sold in cardboard containers. . . . On the opposite face of the container, three small diagrams were printed, demonstrating how to activate the blocks, and alongside the diagrams in small print were the ‘Instructions for use’ [included]: . . . ‘Wrap in insulating medium, such as pouch, towel, blanket or folded cloth.’

The particular heat blocks involved were sold by defendant for use by the Bennington Fire Department in 1947 or 1948. At the time of the sale, defendant’s representative demonstrated the proper mode of use in the Town Hall. Several firemen were present. The representative warned everyone that the heat block was to be covered with a towel or some other material to keep the block from coming into contact with the skin.

Among the firemen who were present at the scene of the accident herein was Paul Traxler. He testified that he had been present when defendant’s representative demonstrated the blocks; that he recalled being told not to use the blocks without further insulating them; that, furthermore, instructional classes had been held as to proper use of the blocks prior to the accident; that he was fully aware that the blocks were to be wrapped in a towel or blanket before they were used; and that he had told the ‘nurse’ at the scene to wrap up the blocks before using. Nevertheless, the blocks were applied directly to the infant’s person under the blankets, while the fireman, Traxler, who had activated the blocks, stood next to her and watched. The infant’s aunt could recall no warning given by the firemen to the nurse as to the danger in applying the unwrapped blocks to the infant’s body.

This action was commenced by the infant and her father for loss of services against the defendant, the exclusive distributor of the heat blocks, upon the theory that it had failed adequately to warn the public of the danger involved in the use of the blocks and to properly ‘instruct’ ultimate users as to the ‘proper application of the said blocks’.

After a jury trial in Supreme Court, Nassau County, a verdict was returned in favor of the infant plaintiff, and in favor of her father. . . .

But the true problem presented in this case is one of proximate causation, and not one concerning the general duty to warn or negligence of the distributor. . . . [A]fter the jury retired, they returned and asked this question: ‘Your Honor, if we, the jury, find that the M. S. A. Company was negligent in not making any warning of danger on the heat block itself, but has given proper instructions in its use up to the point of an intervening circumstance (the nurse who was not properly instructed), is the M. S. A. Company liable?’



The trial court answered as follows:

Ladies and gentlemen of the jury, if you find from the evidence that the defendant, as a reasonably prudent person under all of the circumstances should have expected use of the block by some person other than those to whom instruction as to its use had been given, either by the wording on the container or otherwise, and that under those circumstances a reasonably prudent person would have placed warning words on the heat block itself, . . . then the defendant would be liable.

Counsel for the defendant excepted to that statement. The jury then returned its verdict for the plaintiffs.

From the jury's question, it is obvious that they were concerned with the effect of the fireman's knowledge that the blocks should have been wrapped, and his apparent failure to so advise the nurse who applied the blocks in his presence. The court in answering the jury's question instructed, in essence, that the defendant could still be liable, even though the fireman had knowledge of the need for further insulation, if it was reasonably foreseeable that the blocks, absent the containers, would find their way from the firemen to unwarned third persons. . . .

In the case before us, the jury obviously believed that the fireman, Traxler, had actual knowledge of the need for further insulation, and the jury was preoccupied with the effect of his failure to warn the nurse as she applied the blocks to the plaintiff's person. The jury also could have believed that Traxler removed the blocks from the containers, thereby depriving the nurse of any opportunity she might have had to read the instructions printed on the containers, and that Traxler actually activated the blocks, turned them over, uninsulated, to the nurse for her use, and stood idly by as they were placed directly on the plaintiff's wet skin.

Under the circumstances, we think the court should have charged that if the fireman did so conduct himself, without warning the nurse, his negligence was so gross as to supersede the negligence of the defendant and to insulate it from liability. . . .

It short, whether or not the distributor furnished ample warning on his product to third persons in general was not important here, if the jury believed that Traxler had actual notice of the danger by virtue of his presence at demonstration classes or otherwise, and that he deprived the nurse of her opportunity to read the instructions prior to applying the blocks. While the distributor might have been liable if the blocks had found their way into the hands of the nurse in a more innocent fashion, the distributor could not be expected to foresee that its demonstrations to the firemen would callously be disregarded by a member of the department. . . .

The judgment should be reversed and a new trial granted, with costs to abide the event.

VAN VOORHIS, J., dissenting [DYE, J., concurring in the dissent].

The recovery by plaintiff should not, as it seems to us, be reversed on account of lack of foreseeability or a break in the chain of causation due to any intervening act of negligence on the part of a volunteer fireman. These heat blocks were dangerous instrumentalities unless

wrapped in “insulating” media, “such as pouch, towel, blanket or folded cloth” as the instructions on the container directed. What happened here was that the container, with the instructions on it, was thrown away, and the nurse who applied the heat block was unaware of this safety requirement. In our minds the circumstance that the fireman who knew of the danger failed to warn the nurse, even if negligent, did not affect the fact, as the jury found it, that this was a risk which the manufacturer of the heat block ought to have anticipated in the exercise of reasonable care, nor intercept the chain of causation. . . .

**Note**

What if anything—makes the behavior of Traxler, the bystanding firefighter, so different from the bystanders in *Brower*? Do you think the court is right in assuming that the jury, in asking a question to the trial judge, was actually concerned with Traxler’s behavior?

How much of *McLaughlin* survived the next case?

***Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980)**

At about 7:15 P.M. on the evening of September 30, 1969, plaintiff William Nallan was shot in the back by an unknown assailant as he leaned over to sign a guest register that had been placed on a desk located in the lobby of a midtown Manhattan office building owned and operated by defendants. It is assumed by all parties that the assailant, who has never been caught, was a would-be assassin whose purpose was to retaliate against Nallan for his efforts to uncover certain corrupt practices in the labor union in which Nallan was an active member. Nallan ultimately recovered from his wounds, and, some time thereafter, he and his wife commenced the instant negligence action against the building owner and manager, seeking recompense for his personal injuries and her loss of services. On this appeal from an order of the Appellate Division, which affirmed a judgment in favor of defendants, the sole question presented is whether the facts adduced at the trial were sufficient to establish a prima facie case of negligence against the two defendants. . . .

[Plaintiffs] contended that, by employing an attendant to keep an eye on the building lobby, defendant Helmsley-Spear had, in effect, assumed an obligation to provide at least minimal protection from criminal intruders for visitors who entered the building after business hours. The lobby attendant’s absence from his assigned post, according to plaintiffs, represented a lack of due care in the performance of this assumed obligation. Hence, plaintiffs argued, Helmsley-Spear was liable for plaintiff Nallan’s injuries to the extent that the injuries were a foreseeable and proximate consequence of its negligence. . . .

[W]e turn our attention to the question whether there was evidence on the record from which the jury could have concluded that defendants’ omission was the legal or proximate cause of plaintiff Nallan’s injury. In this regard, it was plaintiffs’ burden to show that defendants’ conduct was a substantial causative factor in the sequence of events that led to Nallan’s injury. Of course, the fact that the “instrumentality” which produced the injury was the criminal conduct of a third person would not preclude a finding of “proximate cause” if the intervening agency was itself a foreseeable hazard.

Here, there was expert testimony in the record that the mere presence of an official attendant, even if unarmed, would have had the effect of deterring criminal activity in the building's lobby. This was so, according to plaintiffs' expert, whether the crime in question was one of random violence or was a deliberate, planned "assassination" attempt such as apparently occurred in this case. The clear implication of the expert testimony was that a would-be assailant of any type would be hesitant to act if he knew he was being watched by a representative of the building's security staff. Contrary to the reasoning of the majority at the Appellate Division, it would seem to us that the deterrent effect described by plaintiffs' expert witness would exist whether the lobby guard was a "trained observer" or, as here, was an ordinary attendant with no special expertise in the area of building security, since that fact would make no difference from the potential assailant's point of view. Thus, the jury in this case might well have inferred from the available evidence that the absence of an attendant in the lobby at the moment plaintiff Nallan arrived was a "proximate" cause of Nallan's injury. Accordingly, it cannot be said that plaintiffs failed to introduce evidence sufficient to make out a *prima facie* case. For all of the foregoing reasons, the order of the Appellate Division should be reversed. . . .

### Notes

1. *Nallan versus McLaughlin*. Does it make sense that the criminal conduct in *Nallan* doesn't cut off liability, but the grossly negligent conduct in *McLaughlin* does? Or does *Nallan* overrule *McLaughlin*?

2. *The Restatement approach*. Both the Second and Third Restatements address the question of intervening actors, but in slightly different ways. The Second Restatement uses the language of "superseding causes" that cut off liability, but specifically excludes criminal or negligent acts from being a superseding cause if those acts were a foreseeable consequence of the defendant's negligence or if the likelihood of those acts was the reason why the defendant's conduct was negligent. RESTATEMENT (SECOND) OF TORTS, §§ 448, 449. The Third Restatement abandons the "superseding" language from the Second Restatement, but it arrives at much the same conclusions. The Third Restatement holds that defendants will be liable, despite intervening actors, for all damages that "result from the risks that made the [defendant's] conduct tortious." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. AND EMOT. HARM, § 34 (2010). The Third Restatement explicitly states that this extends to harm that befalls rescuers. *Id.*, § 32.

The *Restatement (Second) of Torts* offers this principle to try to make sense of the cases:

The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.

RESTATEMENT (SECOND) OF TORTS § 449 cmt. b. The Restatement approach evokes the harm-within-the-risk principle. Is it susceptible to the same difficulties?

3. *Proximate Cause in Modern Warfare.* During the protracted armed conflict between the U.S. and Iraq, drivers working as independent contractors in Iraq for the private military support company Halliburton, its subsidiary Kellogg Brown Root, and various other subsidiaries (collectively “KBR”) sought to recover damages for injuries they received in the so-called “Good Friday Massacre,” a 2004 attack on a convoy in which several drivers were killed and others injured. The plaintiff drivers alleged, among other things, that KBR failed to halt its convoys even though it knew that conditions had become unsafe. KBR responded by citing the intervening actions of the Army, which chose the convoy’s route, and of the Iraqi insurgents, who fired on the convoy. The Fifth Circuit rejected KBR’s argument and allowed the suit to proceed:

KBR [the defendant] argues that no determination as to causation can be made without examining whether the Army fulfilled its contractual duty to provide force protection for the KBR convoys. Assuming that Plaintiffs could establish all other elements of their claims, they must still demonstrate that the acts or omissions of KBR—as opposed to those of the Army or Iraqi insurgents—proximately caused their injuries. KBR has made clear that, were a trial to be held, its defense would involve the alleged inadequacy of the Army’s intelligence gathering, route selection and defensive response to the attacks that actually occurred. In other words, KBR would make the case that Plaintiffs’ injuries were not caused by KBR’s actions or inactions, but by the insurgents’ attack and the Army’s failure to provide adequate protection of the convoy.

The Plaintiffs counter KBR’s argument by pointing to a familiar theory of tort law that permits recovery even though another actor or cause intervenes to be the direct cause of injury. . . . According to the Restatement, “[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.” . . . Texas courts have applied this theory of liability in previous cases. . . .

*Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

The *Lane* litigation was one of several suits arising out of the same accident. After the plaintiffs survived Halliburton / KBR’s motion to dismiss at the Fifth Circuit in 2008, the defendants filed a separate motion for summary judgment. The defendants successfully argued that the plaintiffs’ claim was precluded by the Defense Base Act, a federal law that includes a workers’ compensation program applicable to civilian employees of American contractors working on or around overseas military bases. *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012). The *Lane* plaintiffs had already settled before the 2012 decision of the Fifth Circuit, but the *Fisher* plaintiffs had refused to settle and found themselves out of luck.

Another example of proximate causation at work in Iraq arises out of the Foreign Claims Act, 10 U.S.C. § 2734, which authorizes the United States military to offer

compensation to overseas civilian victims of injury suffered because of U.S. military operations so long as the injury in question did not arise out of combat. In an effort to preserve good will and win hearts and minds, U.S. judge advocates at the Bagram Air Force Base in Kabul compensated a number of civilian Afghan victims after a firefight in Kabul between coalition forces and the Taliban. How did the judge advocates circumvent the statutory prohibition on compensating victims injured in combat? They went further back the causal chain to a “skidding, out-of-control, no-brakes descent” of a U.S. armored truck down the mountain road into Kabul that had preceded the firefight.

The difficulty here (as any torts lawyer worth her boots will observe) is that the decision to make the Kabul claims into motor vehicle claims stretches the chain of causation dangerously close to its breaking point. Tort principles generally require that the injuries complained of be the proximate or reasonably foreseeable outcome of the negligent act in question. In the Kabul case, this required the claims commissioners to conclude that the shooting deaths of the Afghan claimants in Kabul were the reasonably foreseeable result of something like negligent brake maintenance at the Bagram Air Force base.

John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOYOLA L.A. L. REV. 1455, 1479 (2008).

### ***A Proximate Cause Case Study: Subsequent Negligent Medical Care***

For the most part, the law deals with unexpected intervening causes in an ad hoc, all-things-considered style. But now and then, a particular type of fact sequence recurs with sufficient frequency that the law crystalizes its contextual standards (“foreseeability” or “directness,” for example) into hard-edged rules. The eggshell skull plaintiff rule is one such doctrine. The effort of the New York Court of Appeals in *McLaughlin* to establish a hard rule against liability in instances of intervening gross negligence might be another failed attempt at such a rule. A further example arises out of the phenomenon of negligent medical care that exacerbates the initial harm caused by a tortfeasor.

In *Stoleson v. United States*, Judge Posner reviewed the claim of Helen Stoleson—the woman with the “dynamite heart” as *Time Magazine* described her in 1971. Stoleson developed a heart condition caused by exposure to nitroglycerine in the munitions plant at which she worked. After bringing a tort claim against the federal government for negligently failing to protect employees at the plant from overexposure to nitroglycerine, Stoleson was awarded \$53,000 in compensatory damages for her heart condition. However, the federal district judge rejected her claim for damages arising out of the hypochondriacal symptoms that ensued. Although Judge Posner upheld the district judge, he noted that Stoleson would have had a good claim if she could have shown the hypochondriacal symptoms to have been caused by “the treatment—even the negligent treatment—of the injury” by a third party such as a treating physician:

If a pedestrian who has been run down by a car is taken to a hospital and because of the hospital’s negligence incurs greater medical expenses or suffers more pain and suffering than he would have if the hospital had not been

negligent, he can collect his incremental as well as his original damages from the person who ran him down, since they would have been avoided if that person had used due care. So here, if the government had been careful Mrs. Stoleson would have had no occasion to consult Dr. Lange and might therefore not have become a hypochondriac.

*Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir. 1983).

The principle described by Posner in *Stoleson* is well-established in the common law of torts, and it has been widely applied not just to downstream injuries arising out of negligent medical treatment, but also to downstream injuries arising out of negligent transportation.

Consider *Pridham v. Cash & Carry Building Center*, a wrongful death case. In *Pridham*, the decedent was shopping at a retail building supplies store when paneling fell on him, knocking him down and covering his body. As the court described, it, “When the panels were removed, [decedent] lay flat on his back on the floor, his head in a pool of blood.” Decedent “was placed on an orthopedic stretcher which was in turn placed upon the ambulance cot and carried into the vehicle.” En route to the hospital, however, the driver suffered a heart attack, causing the ambulance “to swerve from the road and strike a tree. The cot was pushed forward through the glass partition separating the driver compartment from the rear of the ambulance.” The decedent died later that same day.

The trial court in *Pridham* charged the jury that “if the defendant is liable to the plaintiff-decedent in this case, he is also liable for any additional bodily harm resulting from normal efforts of third persons in rendering aid . . . which the other’s injury reasonably requires irrespective of whether such acts are done in a proper or in a negligent manner. . . . [I]f you . . . find the injuries suffered in the ambulance crash were as a result of a normal effort of third persons in rendering aid which the decedent Pridham required, then the defendant would be liable to the plaintiff for those [injuries].” The New Hampshire Supreme Court upheld the instruction:

The instruction given by the trial court is based on the principle that if a tortfeasor’s negligence causes harm to another which requires the victim to receive medical, surgical or hospital services and additional bodily harm results from a normal effort of persons rendering such services, whether done in a proper or negligent manner, the original tortfeasor’s negligence is a legal cause of the injuries received because of the injury party’s involuntary submission to such services. . . . It is to be noted that the rule enunciated applies even if the services rendered were not negligent. . . . If the services are rendered negligently, the rule based on questions of policy makes the negligence of the original tortfeasor a proximate cause of the subsequent injuries suffered by the victim. . . . In such a case there is no need to charge the jury about the different types of causes which may come into play. . . . Medical services necessitated by the negligence of a tortfeasor are in most cases administered in a hospital. The conveyance of Pridham by ambulance to a hospital was a necessary step in securing medical services required by the accident at Cash & Carry. Therefore the rule holding the original tortfeasor liable for additional harm from medical care rendered because of the original injury should be extended

to, and include, injuries sustained while being transported to a hospital where medical services can be obtained.

359 A.2d 193, 197-98 (N.H. 1976).

*Pridham* was cited and followed recently in *Anaya v. Superior Court*, in which a wrongful death claim against the City of Los Angeles was upheld against a motion to dismiss for remoteness grounds. The decedent was injured in an automobile accident involving a city garbage truck and then killed when the helicopter transporting her to the hospital crashed. 93 Cal. Rptr. 2d 228 (Cal. App. 2000).

What about other kinds of injury aggravations? In *Wagner v. Mittendorf*, 134 N.E. 539 (N.Y. 1922), plaintiff broke his leg because of defendant's negligence. After the plaster cast was removed, plaintiff's physicians encouraged him to walk to strengthen his leg muscles. Plaintiff's crutches slipped and he fell, rebreaking the leg at the same point at which it had first been broken by defendant's negligence. The New York Court of Appeals upheld the award to the plaintiff of the incremental damages arising out of the second break.

Torts commentators have often wondered whether *Wagner* allows for a stopping point. "What if the plaintiff must use crutches permanently and is killed ten years later in a fire because of his inability to run away?" Does the defendant become an insurer for all foreseeable downstream injuries that would not have happened but for the defendant's negligent act? See MARK FRANKLIN & ROBERT RABIN, TORT LAW AND ALTERNATIVES 404 (7th ed. 2001).

### ***Rule of Thumb for No Proximate Cause?***

In Ohio, the common law embraces a "no proximate cause" rule for police officers involved in police chases that injure third parties. The rule states that "when a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is not the proximate cause of those injuries," unless the officer acts in an "extreme or outrageous" manner. *Whitfield v. Dayton*, 167 Ohio App.3d 172 (2d Dist. 2006).

The "no proximate cause" rule allows Ohio courts to supplant a fact-intensive proximate cause inquiry with a general rule of thumb that police are not liable for these kinds of injuries. The Ohio police chase rule is the inverse of the rule in many states for subsequent negligent medical care.

Should courts use the doctrine of proximate cause to grant immunity to police officers in chase cases, or ought they use some other doctrine? Does it matter what doctrinal hook courts use to deliver these kinds of outcomes?

## D. Unexpected Person

Just as accidents can happen in the darndest of ways, they can happen to the darndest of people as well.

### ***Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (N.Y. 1928)**

CARDOZO J:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." FREDERICK POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920) . . . The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury" . . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the



waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. . . . [T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. . . . It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye. . . . Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. . . . The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e. g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

ANDREWS, J., dissenting.

. . . Upon these facts may [the plaintiff] recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence. . . .

But we are told that “there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.” This, I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a

wrong not only to those who happen to be within the radius of danger but to all who might have been there—a wrong to the public at large. Such is the language of the street. Such is the language of the courts when speaking of contributory negligence. . . . As was said by Mr. Justice Holmes many years ago, “the measure of the defendant’s duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.” Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.

It may well be that there is no such thing as negligence in the abstract. “Proof of negligence in the air, so to speak, will not do.” In an empty world negligence would not exist. It does involve a relationship between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife’s services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers its payment of the negligent incendiary. We speak of subrogation—of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act, wrongful as to the insured, has also injured the company. Even if it be true that the fault of father, wife or insured will prevent recovery, it is because we consider the original negligence not the proximate cause of the injury.

In the well-known *Polemis Case*, Scrutton, L. J., said that the dropping of a plank was negligent for it might injure “workman or cargo or ship.” Because of either possibility the owner of the vessel was to be made good for his loss. The act being wrongful the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is.

The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise.

If this be so, we do not have a plaintiff suing by “derivation or succession.” Her action is original and primary. Her claim is for a breach of duty to herself—not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff’s rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the consequences. It does not matter that they

are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. . . .

What we do mean by the word “proximate” is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor’s. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor’s fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. . . .

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. . . . This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result. When a lantern is overturned the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration—the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind. . . .

Mrs. Palsgraf was standing some distance away. How far cannot be told from the record—apparently twenty-five or thirty feet. Perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief “it cannot be denied that the explosion was the direct cause of the plaintiff’s injuries.” So it was a substantial factor in producing the result—there was here a natural and continuous sequence—direct connection. The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

### Notes

1. *Cardozo versus Andrews*. Are Judges Cardozo and Andrews debating how to define proximate cause or whether this is a case about proximate cause? What is it, precisely, that divides them?

2. *Where's the negligence?* Was the guard's act in pushing the passenger negligent in the first place if he could not have possibly known that the package contained explosives, as both Justices Cardozo and Andrews concede? Would Cardozo vote differently if the package had been labeled "WARNING: CONTAINS EXPLOSIVES"?

3. *Cardozo's inconsistency?* Judge Cardozo, the author of the majority opinion in *Palsgraf*, reached a different conclusion when asked whether a defendant is liable for harm that befalls the rescuer of someone the defendant injured. What, if anything, distinguishes *Palsgraf* from the next case?

### ***Wagner v. International R. Co.*, 232 N.Y. 176, 178-182 (N.Y. 1921)**

CARDOZO, J.

The defendant operates an electric railway between Buffalo and Niagara Falls. There is a point on its line where an overhead crossing carries its tracks above those of the New York Central and the Erie. A gradual incline upwards over a trestle [a supporting structure for a bridge] raises the tracks to a height of twenty-five feet. A turn is then made to the left at an angle of from sixty-four to eighty-four degrees. After making this turn, the line passes over a bridge, which is about one hundred and fifty-eight feet long from one abutment to the other. Then comes a turn to the right at about the same angle down the same kind of an incline to grade. Above the trestles, the tracks are laid on ties, unguarded at the ends. There is thus an overhang of the cars, which is accentuated at curves. On the bridge, a narrow footpath runs between the tracks, and beyond the line of overhang there are tie rods and a protecting rail.

Plaintiff and his cousin Herbert boarded a car at a station near the bottom of one of the trestles. Other passengers, entering at the same time, filled the platform, and blocked admission to the aisle. The platform was provided with doors, but the conductor did not close them. Moving at from six to eight miles an hour, the car, without slackening, turned the curve. There was a violent lurch, and Herbert Wagner was thrown out, near the point where the trestle changes to a bridge. The cry was raised, "Man overboard." The car went on across the bridge, and stopped near the foot of the incline. Night and darkness had come on. Plaintiff walked

along the trestle, a distance of four hundred and forty-five feet, until he arrived at the bridge, where he thought to find his cousin's body. He says that he was asked to go there by the conductor. He says, too, that the conductor followed with a lantern. Both these statements the conductor denies. Several other persons, instead of ascending the trestle, went beneath it, and discovered under the bridge the body they were seeking. As they stood there, the plaintiff's body struck the ground beside them. Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing, and fell.

The trial judge held that negligence toward Herbert Wagner would not charge the defendant with liability for injuries suffered by the plaintiff unless two other facts were found: First, that the plaintiff had been invited by the conductor to go upon the bridge; and second, that the conductor had followed with a light. Thus limited, the jury found in favor of the defendant. Whether the limitation may be upheld, is the question to be answered.

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

The defendant says that we must stop, in following the chain of causes, when action ceases to be "instinctive." By this, is meant, it seems, that rescue is at the peril of the rescuer, unless spontaneous and immediate. If there has been time to deliberate, if impulse has given way to judgment, one cause, it is said, has spent its force, and another has intervened. In this case, the plaintiff walked more than four hundred feet in going to Herbert's aid. He had time to reflect and weigh; impulse had been followed by choice; and choice, in the defendant's view, intercepts and breaks the sequence. We find no warrant for thus shortening the chain of jural causes. We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction; that the sight of the one must have aroused the impulse to the other; in short, that there must be unbroken continuity between the commission of the wrong and the effort to avert its consequences. If all this be assumed, the defendant is not aided. Continuity in such circumstances is not broken by the exercise of volition. So sweeping an exception, if recognized, would leave little of the rule. "The human mind," as we have said, "acts with celerity which it is sometimes impossible to measure." The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.

The defendant finds another obstacle, however, in the futility of the plaintiff's sacrifice. He should have gone, it is said, below the trestle with the others; he should have known, in view of the overhang of the cars, that the body would not be found above; his conduct was not responsive to the call of the emergency; it was a wanton exposure to a danger that was useless. We think the quality of his acts in the situation that confronted him was to be determined by the jury. Certainly he believed that good would come of his search upon the bridge. . . . Indeed, his judgment was confirmed by the finding of the hat. . . . "Errors of judgment," however, would not count against him, if they resulted "from the excitement and confusion of the moment". The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportioned to the time and the event.

Whether Herbert Wagner's fall was due to the defendant's negligence, and whether plaintiff in going to the rescue, as he did, was foolhardy or reasonable in the light of the emergency confronting him, were questions for the jury.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

### Notes

1. *Rules versus standards.* In this opinion, Cardozo asserts that a defendant should always foresee harm to a rescuer, because "danger invites rescue." Cardozo's rescue rule is thus something like the rule for subsequent negligent medical care: it is a rule of thumb that cuts through the case-by-case contextual inquiries into considerations such as foreseeability. Of course, there may be some situations where rescue is more or less likely, depending on whether the person can call for help, whether there are other people around to respond, etc. Why would Cardozo impose a categorical rule that rescue is foreseeable? Why not allow juries to decide the foreseeability of rescue on a case-by-case basis?

2. *Reconciling Palsgraf and Wagner?* In *Palsgraf*, Cardozo was concerned that the tortious act, pushing by the guard, was not a wrong with respect to Mrs. Palsgraf. Yet in *Wagner*, he maintains that any tortious act is a wrong with respect to a rescuer. What explains the different treatment of two people who were in fact injured by the tortious act?

## E. Completely Unexpected?

Late in the winter of 1959, each of the strands of proximate causation came together in a spectacular, and thankfully not catastrophic, accident on the Buffalo River in upstate New York.

### *Petition of Kinsman Transit Co. (Kinsman Transit I), 338 F.2d 708 (2d Cir. 1964)*

FRIENDLY, J.

We have here six [interlocutory] appeals . . . . The litigation, in the District Court for the Western District of New York, arose out of a series of misadventures on a navigable portion of the Buffalo River during the night of January 21, 1959. . . . We shall summarize the facts as found by [Judge Burke, the District Court Judge]:

The Buffalo River flows through Buffalo from east to west, with many turns and bends, until it empties into Lake Erie. Its navigable western portion is lined with docks, grain elevators, and industrial installations; during the winter, lake vessels tie up there pending resumption of navigation on the Great Lakes, without power and with only a shipkeeper aboard. About a mile from the mouth, the City of Buffalo maintains a lift bridge at Michigan Avenue. Thaws and rain frequently cause freshets to develop in the upper part of the river and its

tributary, Cazenovia Creek; currents then range up to fifteen miles an hour and propel broken ice down the river, which sometimes overflows its banks.

On January 21, 1959, rain and thaw followed a period of freezing weather. The United States Weather Bureau issued appropriate warnings which were published and broadcast. Around 6 P.M. an ice jam that had formed in Cazenovia Creek disintegrated. Another ice jam formed just west of the junction of the creek and the river; it broke loose around 9 P.M.

The MacGilvray Shiras, owned by The Kinsman Transit Company, was moored at the dock of the Concrete Elevator, operated by Continental Grain Company, on the south side of the river about three miles upstream of the Michigan Avenue Bridge. She was loaded with grain owned by Continental. [The Shiras was negligently positioned such that ice floats accumulated against it, eventually causing the boat to separate from the dock and drift downstream. The shipkeeper negligently misfired the anchor, causing a jam and preventing the anchors from stopping the downstream movement of the ship.] . . .

Careening stern first down the S-shaped river, the Shiras, at about 11 P.M., struck the bow of the Michael K. Tewksbury, owned by Midland Steamship Line, Inc. . . . The collision caused the Tewksbury's mooring lines to part; she too drifted stern first down the river, followed by the Shiras. The collision caused damage to the Steamer Drucken-miller which was moored opposite the Tewksbury.

[A]t about 10:43 P.M., Goetz, the superintendent of the Concrete Elevator, telephoned Kruptavich, another employee of Continental, that the Shiras was adrift; Kruptavich called the Coast Guard, which called the city fire station on the river, which in turn warned the crew [employed by the City of Buffalo] on the Michigan Avenue Bridge, this last call being made about 10:48 P.M. Not quite twenty minutes later the watchman at the elevator where the Tewksbury had been moored phoned the bridge crew to raise the bridge. Although not more than two minutes and ten seconds were needed to elevate the bridge to full height after traffic was stopped, assuming that the motor started promptly, the bridge was just being raised when, at 11:17 P.M., the Tewksbury crashed into its center. The bridge crew consisted of an operator and two tenders; a change of shift was scheduled for 11 P.M.

The inference is rather strong, despite contrary testimony, that the operator on the earlier shift had not yet returned from a tavern when the telephone call from the fire station was received; that the operator on the second shift did not arrive until shortly before the call from the elevator where the Tewksbury had been moored; and that in consequence the bridge was not raised until too late.

The first crash was followed by a second, when the south tower of the bridge fell. The Tewksbury grounded and stopped in the wreckage with her forward end resting against the stern of the Steamer Farr, which was moored on the south side of the river just above the bridge. The Shiras ended her journey with her stern against the Tewksbury and her bow against the north side of the river. So wedged, the two vessels substantially dammed the flow, causing water and ice to back up and flood installations on the banks with consequent damage as far as the Concrete Elevator, nearly three miles upstream. Two of the bridge crew suffered injuries. Later the north tower of the bridge collapsed, damaging adjacent property. . . .



[After finding that the intermediate ships in the accident did not act negligently, that the city was not negligent in maintaining the river, and that the owners of the Shiras could not be held liable beyond the value of the vessel itself under an old admiralty law doctrine limiting vessel owner liability in the absence of personal negligence by the owner, Judge Friendly concluded (i) that the City of Buffalo was at fault as a matter of negligence per se under a federal statute requiring that drawbridges be staffed at all times; and (ii) that the last clear chance doctrine did not make the City the exclusive party bearing the liability. He then turned to the case's difficult proximate cause issue: "(iii) the effect of the allegedly unexpected character of the events leading to much of the damage—and here of the *Palsgraf* case."]

The very statement of the case suggests the need for considering *Palsgraf v. Long Island R.*, 162 N.E. 99 (N.Y. 1928), and the closely related problem of liability for unforeseeable consequences.

Certainly there is no general principle that a railroad owes no duty to persons on station platforms not in immediate proximity to the tracks, as would have been quickly demonstrated if Mrs. Palsgraf had been injured by the fall of improperly loaded objects from a passing train. . . . Neither is there any principle that railroad guards who jostle a package-carrying passenger owe a duty only to him; if the package had contained bottles, the Long Island would surely have been liable for injury caused to close bystanders by flying glass or spurting liquid. The reason why the Long Island was thought to owe no duty to Mrs. Palsgraf was the lack of any notice that the package contained a substance demanding the exercise of any care toward anyone so far away; Mrs. Palsgraf was not considered to be within the area of apparent hazard created by whatever lack of care the guard had displayed to the anonymous carrier of the unknown fireworks. The key sentences in Chief Judge Cardozo's opinion are these:

Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. Liability can be no greater where the act is inadvertent.

162 N.E. at 101.

We see little similarity between the *Palsgraf* case and the situation before us. The point of *Palsgraf* was that the appearance of the newspaper-wrapped package gave no notice that its dislodgement could do any harm save to itself and those nearby, and this by impact, perhaps with consequent breakage, and not by explosion. In contrast, a ship insecurely moored in a fast flowing river is a known danger not only to herself but to the owners of all other ships and structures down-river, and to persons upon them. No one would dream of saying that a shipowner who "knowingly and willfully" failed to secure his ship at a pier on such a river "would not have threatened" persons and owners of property downstream in some manner. The shipowner and the wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence. . . . Similarly the foreseeable consequences of the City's failure to raise the bridge were not limited to the Shiras and the Tewksbury. Collision plainly created a danger that the bridge towers might fall onto adjoining property, and the crash of two uncontrolled lake vessels, one 425 feet and the other 525 feet long, into a bridge over a swift ice-ridden stream, with a channel only 177 feet wide, could

well result in a partial damming that would flood property upstream. As to the City also, it is useful to consider, by way of contrast, Chief Judge Cardozo's statement that the Long Island would not have been liable to Mrs. Palsgraf had the guard wilfully thrown the package down. If the City had deliberately kept the bridge closed in the face of the onrushing vessels, taking the risk that they might not come so far, no one would give house-room to a claim that it "owed no duty" to those who later suffered from the flooding. Unlike Mrs. Palsgraf, they were within the area of hazard.

Since all the claimants here met the *Palsgraf* requirement of being persons to whom the actors owed a "duty of care," we are not obliged to reconsider whether that case furnishes as useful a standard for determining the boundaries of liability in admiralty for negligent conduct . . . . But this does not dispose of the alternative argument that the manner in which several of the claimants were harmed, particularly by flood damage, was unforeseeable and that recovery for this may not be had—whether the argument is put in the forthright form that unforeseeable damages are not recoverable or is concealed under a formula of lack of "proximate cause."

So far as concerns the City, the argument lacks factual support. Although the obvious risks from not raising the bridge were damage to itself and to the vessels, the danger of a fall of the bridge and of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought. And the same can be said as to the failure of Kinsman's shipkeeper to ready the anchors after the danger had become apparent. The exhibits indicate that the width of the channel between the Concrete Elevator and the bridge is at most points less than two hundred fifty feet. If the Shiras caught up on a dock or vessel moored along the shore, the current might well swing her bow across the channel so as to block the ice floes, as indeed could easily have occurred at the Standard Elevator dock where the stern of the Shiras struck the Tewksbury's bow. At this point the channel . . . was further narrowed by the presence of the Druckenmiller moored on the opposite bank. Had the Tewksbury's mooring held, it is thus by no means unlikely that these three ships would have dammed the river. Nor was it unforeseeable that the drawbridge would not be raised since, apart from any other reason, there was no assurance of timely warning. What may have been less foreseeable was that the Shiras would get that far down the twisting river, but this is somewhat negated both by the known speed of the current when freshets developed . . . .

Continental's position on the facts is stronger. It was indeed foreseeable that the improper construction and lack of inspection of the [mooring] might cause a ship to break loose and damage persons and property on or near the river—that was what made Continental's conduct negligent. With the aid of hindsight one can also say that a prudent man, carefully pondering the problem, would have realized that the danger of this would be greatest under such water conditions as developed during the night of January 21, 1959, and that if a vessel should break loose under those circumstances, events might transpire as they did. But such post hoc step by step analysis would render 'foreseeable' almost anything that has in fact occurred; if the argument relied upon has legal validity, it ought not be circumvented by characterizing as foreseeable what almost no one would in fact have foreseen at the time.

The effect of unforeseeability of damage upon liability for negligence has recently been considered by the Judicial Committee of the Privy Council, *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound)*, (1961) 1 All E.R. 404. The Committee there disapproved the proposition, thought to be supported by *In Re Polemis and Furness*,

*Withy & Co. Ltd.*, (1921) 3 K.B. 560 (C.A.), “that unforeseeability is irrelevant if damage is ‘direct.’” We have no difficulty with the result of *The Wagon Mound*, in view of the finding, 1 All E.R. at 407, that the appellant had no reason to believe that the floating furnace oil would burn, see also the extended discussion in *Miller S.S. Co. v. Overseas Tankship (U.K.) Ltd.*, *The Wagon Mound No. 2*, (1963) 1 Lloyd’s Law List Rep. 402 (Sup. Ct. N.S.W.). On that view the decision simply applies the principle which excludes liability where the injury sprang from a hazard different from that which was improperly risked, see fn. 9. Although some language in the judgment goes beyond this, we would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken—the current, the ice, and the physical mass of the Shiras, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation. The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated.

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are ‘direct,’ and the damage, although other and greater than expectable, is of the same general sort that was risked. . . . Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise serious doubt whether the concept is meaningful; indeed, we wonder whether the British courts are not finding it necessary to limit the language of *The Wagon Mound* as we have indicated.

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculcate him further rather than limit his liability. This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient’s life, few judges would impose liability on any of the parties here, although the agreement in result might not be paralleled by similar unanimity in reasoning; perhaps in the long run one returns to Judge Andrews’ statement in *Palsgraf*, 162 N.E. at 104 (dissenting opinion). “It is all a question of expediency, . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.” It would be pleasant if greater certainty were possible, see PROSSER, TORTS 262, but the many efforts that

have been made at defining the locus of the “[u]ncertain and wavering line,” 162 N.E. 99, are not very promising; what courts do in such cases makes better sense than what they, or others, say. Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the operators’ negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo’s taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae. We go only so far as to hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability. Other fact situations can be dealt with when they arise.

MOORE, J., concurring and dissenting.

I do not hesitate to concur with Judge Friendly’s well-reasoned and well-expressed opinion as to limitation of Kinsman’s liability, the extent of the liability of the City of Buffalo, Continental and Kinsman for the damages suffered by the City, the Shiras, the Tewksbury, the Druckenmiller and the Farr and the division of damages.

I cannot agree, however, merely because “society has come to rely increasingly on insurance and other methods of loss-sharing” that the courts should, or have the power to, create a vast judicial insurance company which will adequately compensate all who have suffered damages. Equally disturbing is the suggestion that “Here it is surely more equitable that the losses from the operators’ negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo’s taxpayers than left with the innocent victims of the flooding.” . .

My dissent is limited to that portion of the opinion which approves the awarding of damages suffered as a result of the flooding of various properties upstream. I am not satisfied with reliance on hindsight or on the assumption that since flooding occurred, therefore, it must have been foreseeable. In fact, the majority hold that the danger “of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought.” But believing that “anyone” might be too broad, they resort to that most famous of all legal mythological characters, the reasonably “prudent man.” Even he, however, “carefully pondering the problem,” is not to be relied upon because they permit him to become prudent “With the aid of hindsight.”

The majority, in effect, would remove from the law of negligence the concept of foreseeability because, as they say, “The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are ‘direct.’” Yet lingering thoughts of recognized legal principles create for them lingering doubts because they say: “This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.” The very example given, namely, the patient who dies because the doctor is delayed by the destruction of the bridge, certainly presents a

direct consequence as a factual matter yet the majority opinion states that “few judges would impose liability on any of the parties here,” under these circumstances.

### Notes

1. *The Palsgraf requirement.* In his opinion in *Kinsman Transit (I)*, Judge Henry Friendly ruled that “all the claimants here met the *Palsgraf* requirement of being persons to whom the actors owed a duty.” 338 F.2d at 722. In making this determination, the court placed considerable weight on the fact that all the claimants were riparian property owners located downstream of the Shiras’s mooring. An insecurely moored ship, Judge Friendly reasoned, posed “a known danger not only to herself but to the owners of all other ships and structures down-river.” The court observed in a footnote that “The facts here do not oblige us to decide whether the [parties liable for negligently mooring the Shiras] could successfully invoke *Palsgraf* against claims of owners of shore-side property upstream from the [site at which the Shiras had been moored].” What result if an upstream owner brought claims against *Kinsman Transit* and the City of Buffalo?

2. *Deep pockets?* Judge Moore’s dissent specifically criticizes Friendly’s opinion for placing losses, however unforeseeable, on the party with the best ability to absorb losses—the City. What are his reasons for advocating not taking into account the ability of the parties to bear losses? Do you think there’s an easy line to draw between the potential plaintiffs who are upstream property owners and the potential plaintiff who suffered due to the delayed doctor?

3. *Kinsman Transit and the future of baseball.* The ship that touched off the events leading to the *Kinsman Transit* case was the MacGilvray Shiras. The Shiras was owned by the Kinsman Transit Company, which in turn was owned by Henry Steinbrenner. Its vice president and treasurer was George Steinbrenner, Henry’s son. What Judge Friendly could not have guessed was that his decision in the *Kinsman Transit* case would powerfully shape the modern history of the greatest game and the greatest team known to mankind. Some years after the incident in question, George purchased the New York Yankees.

The Buffalo River accident took place in January 1959. On December 8, 1958, George Steinbrenner visited Buffalo to work out the plans for the mooring of the Shiras. Steinbrenner left Buffalo four days later and went on vacation to Florida. He did not return to Buffalo until after the accident.

In the litigation leading up to *Kinsman Transit*, a central question (mostly omitted above) was whether the Kinsman Transit Company could make use of a safe haven in the law of admiralty that limits the liability of a ship owner to the value of the ship unless the owner had knowledge of, or was in privity with, the act giving rise to the ship’s liability. Judge Friendly determined that neither Henry nor George knew of the negligent mooring of the Shiras. Moreover, Judge Friendly ruled that

there is every indication that nothing different would have been done if George Steinbrenner had been on the scene during the final mooring as he had entrusted

the operation to one admittedly more competent to oversee it than he was.

*Kinsman Transit I*, 338 F.2d at 715.

Judge Friendly's conclusion was therefore that the liability of the Kinsman Transit Company was limited to the value of the Shiras. (This is very likely why the court did not need to resolve the question of Kinsman Transit's liability to upstream riparian property owners.) One result was that the taxpayers of the City of Buffalo bore the lion's share of the damages from the flooding.

A far more important result was that George Steinbrenner went on to purchase and transform the then-moribund New York Yankees with money he had been able to keep by virtue of the fact that he was less competent than his employees. Steinbrenner's sons own the Yankees to this day.

4. *Kinsman Transit II*. In *Kinsman Transit II*, decided a little more than three years after *Kinsman Transit I*, the Second Circuit upheld the dismissal of claims brought by plaintiff Cargill, which owned grain being stored in a ship downstream of the drawbridge, and Cargo Carriers, which was contractually obligated to unload corn from a ship moored upstream of the drawbridge. After the accident, which blocked Cargill's grain from getting to the grain elevators located upstream of the drawbridge, Cargill was forced to purchase replacement grain to meet contractual obligations it had to deliver grain. Cargo Carriers, in turn, was required to rent expensive equipment to complete the job of unloading the corn because an ice jam caused by the flooding had formed between the dock and the ship from which Cargo Carriers was unloading the corn. The tug boats and icebreakers that would ordinarily have cleared the ice jam were located downstream of the drawbridge and unable to get past the drawbridge after the accident.

Judge Irving Kauffman wrote the opinion for the Second Circuit, affirming the dismissal of Cargill's and Cargo Carriers' claims:

When the instant case was last here, we held—although without discussion of the Cargill and Cargo Carriers claims—that it was a foreseeable consequence of the negligence of the City of Buffalo and Kinsman Transit Company that the river would be dammed. . . . It would seem to follow from this that it was foreseeable that transportation on the river would be disrupted and that some would incur expenses because of the need to find alternative routes of transportation or substitutes for goods delayed by the disaster.<sup>5</sup> It may be that the specific manner was not foreseeable in which the damages to Cargill and Cargo Carriers would be incurred but such strict foreseeability—which in

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<sup>5</sup> In a claim not before us on this appeal, Judge Burke denied recovery to the Buffalo Transit Company for its expenses in rerouting its buses until a new bridge became available . . . . He found that the defendants did not know that the transit company had a right to use the bridge. It would certainly not stretch the concept of foreseeability as it is developed in the cases to hold that it is "reasonably foreseeable" that buses use major river bridges. . . .

practice would rarely exist except in hindsight—has not been required.<sup>6</sup>

We need not decide which, if any, defendants owed Cargill a duty of care with respect to its unrelated claims based on the Gillies' [the Gillies was the ship in which Cargill's grain was located] immobility, since even if Palsgraf is satisfied, compensation may be precluded where—as here—the relationship between the negligence and the injury becomes too tenuous. . . . We recognize that frequently identical questions are involved whether we speak in terms of “duty” or some other standard for determining where recovery should be denied. [citing Prosser at 283]

On the previous appeal we stated aptly: “somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.” . . . We believe that this point has been reached with the Cargill and Cargo Carriers claims. Neither the Gillies nor the [boat on which the Cargo Carrier corn was stored] suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic along the river.<sup>7</sup> Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. “The law does not spread its protection so far.” [quoting Justice Holmes in *Robins Dry Dock*.]<sup>8</sup>

In the final analysis, the circumlocution whether posed in terms of “foreseeability,” “duty,” “proximate cause,” “remoteness,” etc. seems unavoidable. As we have previously noted,[] we return to Judge Andrews' frequently quoted statement in *Palsgraf*: “It is all a question of expediency . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”

*Kinsman Transit II*, 388 F.2d at 824-25.

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<sup>6</sup> We previously held that “all the claimants here met the *Palsgraf* . . . requirement of being persons to whom the actor owed a ‘duty of care.’” . . .

<sup>7</sup> The claim of Cargo Carriers is the more troublesome of the two because [the boat on which the corn was stored] was struck by either the Shiras or the [second boat] and where there is physical damage to a vessel the owner can recover for the loss of its use until repairs are completed. . . . But apparently Cargo Carriers has not sought recovery for physical damage to the Farr. And, as we understand the facts, the Farr could have been unloaded without additional expense were it not for the fact that the tugs which ordinarily are used to break up ice jams were caught below the Michigan Avenue Bridge.

<sup>8</sup> Although to reason by example is often merely to restate the problem, the following illustration may be an aid in explaining our result. To anyone familiar with N.Y. traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to ‘clock in’ an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners.

5. *An insurance rationale?* In deliberating over the *Kinsman Transit* case, Judge Friendly recommended to his colleagues that insurance should play a role in the case's resolution. "If there were any way in which the doctrine could be manipulated so as to correspond with probable insurance that would be fine," he wrote, "and in our case one may guess there to be more likelihood that the property owners were insured against flood damages than that Continental's liability insurance would be equal to the strain." DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 309 (2012). Did Judge Friendly's decision succeed in placing losses with the better insured parties?

## F. Proximate Cause Beyond Torts

### 1. Proximate Cause and Criminal Law

Proximate causation is an issue that courts wrestle with in contexts outside of torts. For example, the "exclusionary rule" in criminal law generally holds that evidence obtained in violation of the Fourth Amendment is inadmissible. For example, in *Hudson v. Michigan*, 547 U.S. 586 (2006), a criminal defendant was convicted based on a search of his house that revealed large quantities of guns and firearms. However, the police violated the "knock and announce" rule for executing the search warrant. The Supreme Court ruled that evidence obtained in violation of that rule was still admissible because the Fourth Amendment violation was not sufficiently related to the evidence obtained in the search to have the "taint" of illegality. Justice Scalia, writing for the Court, explained that "but-for causality is only a necessary, not sufficient, condition for suppression . . . [because it] can be too attenuated to justify exclusion." He dictated a balancing test to determine whether the exclusion's "deterrence benefits outweigh its substantial social costs" of potentially letting guilty defendants avoid conviction to limit excessive exclusion. There are similar proximate cause devices in statutory regimes, including limiting damages in RICO (Racketeer Influenced and Corrupt Organizations Act) cases, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992), and antitrust cases, *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983). For a broader discussion of proximate cause in other contexts, see Sandra Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199 (2013).

### 2. Proximate Cause and Consequential Damages

The famous contracts case, *Hadley v. Baxendale*, is commonly cited for the proposition that a breaching party in a contract is only liable for those damages that arise naturally from the breach, or which might "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." These formulations ("arising naturally," "reasonably . . . in the contemplation," and "probable result") sound quite similar to cases on proximate cause that used language like ordinary and natural, direct consequences, foreseeability, etc. The conventional wisdom, however, is that the concept of proximate cause in torts is much more expansive than consequential damages in contract. There is, for example, widespread agreement that damages are recoverable in tort under an eggshell skull theory that would not be recoverable under *Hadley v. Baxendale*. See



Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 26 CASE. W. RES. L. REV. 286 (1985).

Does it make sense to have different foreseeability standards for different causes of action—sometimes causes of action (as in products liability cases) that may appear in the same complaint? Why should contracts have a stricter foreseeability standard than torts?

## CHAPTER 13. THE DUTY PROBLEM

We have now walked through the basic steps of the tort cause of action in most unintentional torts case. It turns out, however, that there is still one more hurdle for the enterprising plaintiff's lawyer and her client. For even when a defendant has acted negligently, and even when that negligent action was a necessary antecedent and a legal cause of the plaintiff's injury, and even when the plaintiff has not acted negligently or assumed the risk herself, sometimes she still cannot recover. The principal reason for this doctrinally is the doctrine of duty. For in tort, the obligation of reasonable care is not a general duty owed to all the world. It is a domain-specific duty, owed to many third parties under many circumstances, to be sure, but not to all people at all times.

The question of whether legal duty is properly an independent component of the inquiry in a torts case has been hotly contested for nearly a century now. Critics argue that to conclude that there was or was not a legal duty in a particular case is inevitably question begging and circular. Critics point out further that the kinds of factors that courts consider in determining whether a legal duty exists are precisely the kinds of factors the judge and jury are to consider at other stages of the inquiry. Defenders, by contrast, argue that the duty stage of the analysis is critical for understanding the relational character of tort law's corrective justice project.

One thing that the defenders' argument has going for it is that historically, there have been an extraordinary array of areas in our social life to which the common law of torts attaches a special limited tort duty of care—or simply no duty of care at all. Having built up the negligence action in the past five chapters, the common law (at least in its traditional structure) sometimes seemed to dismantle the negligence action in virtually every significant domain of social life

In this chapter, we run through the principal social situations in which the law of torts recognizes no duty of reasonable care. Areas of limited or no duty abound. Historically, they have virtually covered the field of tort law, so much so (as the torts scholar Robert Rabin has observed) that the negligence cause of action barely existed until the middle of the nineteenth century. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

The second half of the twentieth century witnessed the gradual erosion of these domains of limited or no duty of care and the concomitant expansion of the negligence action. The first example of a limited duty rule we take up below, however, is the classic rule holding that there is generally no duty to rescue. This rule is still running strong today. The nonexistence of such a duty to rescue, many say, is a powerful piece of evidence for the centrality of duty in our basic ideas about tort law.

## A. Is There a Duty to Rescue?

It is well settled—and yet enduringly controversial—that the common law of torts imposes no general duty to rescue. The person who encounters an unconscious stranger face down in a puddle on the sidewalk has no tort duty to turn the stranger's head, even if the person knows the stranger to be in imminent danger of death by drowning, and even if the person knows that the costs to herself of rescuing the stranger would be minimal.

Why should tort law adopt such a morally startling proposition? We have no doubt that the person who declines to assist in such a situation has behaved in a shocking and morally deplorable fashion. But despite the *moral* obligation to assist in such a case, the law declines to attach a *legal* obligation.

### 1. Cases

#### ***Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976)**

LEVIN, J.

On the evening of August 26, 1966, Siegrist and Farwell drove to a trailer rental lot to return an automobile which Siegrist had borrowed from a friend who worked there. While waiting for the friend to finish work, Siegrist and Farwell consumed some beer.

Two girls walked by the entrance to the lot. Siegrist and Farwell attempted to engage them in conversation; they left Farwell's car and followed the girls to a drive-in restaurant down the street.

The girls complained to their friends in the restaurant that they were being followed. Six boys chased Siegrist and Farwell back to the lot. Siegrist escaped unharmed, but Farwell was severely beaten. Siegrist found Farwell underneath his automobile in the lot. Ice was applied to Farwell's head. Siegrist then drove Farwell around for approximately two hours, stopping at a number of drive-in restaurants. Farwell went to sleep in the back seat of his car. Around midnight Siegrist drove the car to the home of Farwell's grandparents, parked it in the driveway, unsuccessfully attempted to rouse Farwell, and left. Farwell's grandparents discovered him in the car the next morning and took him to the hospital. He died three days later of an epidural hematoma.

At trial, plaintiff [the father of the decedent] contended that had Siegrist taken Farwell to the hospital, or had he notified someone of Farwell's condition and whereabouts, Farwell would not have died. A neurosurgeon testified that if a person in Farwell's condition is taken to a doctor before, or within half an hour after, consciousness is lost, there is an 85 to 88 per cent chance of survival. Plaintiff testified that Siegrist told him that he knew Farwell was badly injured and that he should have done something.

The jury returned a verdict for plaintiff and awarded \$15,000 in damages. The Court of Appeals reversed, finding that Siegrist had not assumed the duty of obtaining aid for Farwell

and that he neither knew nor should have known of the need for medical treatment.

....

“A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” Prosser, Torts (4th ed.), § 53, p 324. . . .

Siegrist contends that he is not liable for failure to obtain medical assistance for Farwell because he had no duty to do so.

Courts have been slow to recognize a duty to render aid to a person in peril. Where such a duty has been found, it has been predicated upon the existence of a special relationship between the parties; in such a case, if defendant knew or should have known of the other person’s peril, he is required to render reasonable care under all the circumstances. . . .

Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning. Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell’s condition and whereabouts would be “shocking to humanitarian considerations” and fly in the face of “the commonly accepted code of social conduct.” *Hutchinson v. Dickie*, 162 F.2d 103, 106 (6th Cir. 1947) [(finding that a host had an affirmative duty to try to rescue a guest who had fallen off the host’s yacht)]. “[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists.” Prosser, *supra*, § 53, at 327.

Farwell and Siegrist were companions engaged in a common undertaking; there was a special relationship between the parties. Because Siegrist knew or should have known of the peril Farwell was in and could render assistance without endangering himself he had an affirmative duty to come to Farwell’s aid.

The Court of Appeals is reversed and the verdict of the jury reinstated.

***Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993)**

This case arises upon a reversal by the court of appeals of summary judgment in favor of the defendant. The court of appeals held that defendant, the owner and operator of a private boat on Lake Minnetonka, had a duty to warn plaintiff, a guest on the boat, that water surrounding the boat was too shallow for diving. We reverse and reinstate judgment in favor of defendant.

The facts are undisputed for the purpose of this appeal. On Sunday, August 9, 1986, Jeffrey Harper (“Harper”) was one of four guests on Theodor Herman’s (“Herman”) 26-foot boat, sailing on Lake Minnetonka. Harper was invited on the boat outing by Cindy Alberg Palmer, another guest on Herman’s boat. Herman and Harper did not know each other prior to this boat outing. At the time Herman was 64 years old, and Harper was 20 years old. Herman

was an experienced boat owner having spent hundreds of hours operating boats on Lake Minnetonka similar to the one involved in this action. As owner of the boat, Herman considered himself to be in charge of the boat and his passengers. Harper had some experience swimming in lakes and rivers, but had no formal training in diving.

After a few hours of boating, the group decided to go swimming and, at Herman's suggestion, went to Big Island, a popular recreation spot. Herman was familiar with Big Island, and he was aware that the water remains shallow for a good distance away from its shore. Harper had been to Big Island on one previous occasion. Herman positioned the boat somewhere between 100 to 200 yards from the island with the bow facing away from the island in an area shallow enough for his guests to use the boat ladder to enter the water, but still deep enough so they could swim. The bottom of the lake was not visible from the boat. After positioning the boat Herman proceeded to set the anchor and lower the boat's ladder which was at its stern.

While Herman was lowering the ladder, Harper asked him if he was "going in." When Herman responded yes, Harper, without warning, stepped onto the side of the middle of the boat and dove into approximately two or three feet of water. As a result of the dive, Harper struck the bottom of the lake, severed his spinal cord, and was rendered a C6 quadriplegic.

Harper then brought suit, alleging that Herman owed him a duty of care to warn him that the water was too shallow for diving. On October 23, 1991, the trial court granted Herman's motion for summary judgment, ruling that the law does not impose such a duty. In reversing the trial court, the court of appeals concluded that Herman voluntarily assumed a duty to exercise reasonable care when he allowed Harper onto his boat, and that the duty of care included warning Harper not to dive because he knew that the water was "dangerously shallow." . . .

The sole issue on appeal is whether a boat owner who is a social host owes a duty of care to warn a guest on the boat that the water is too shallow for diving.

Harper alleges that Herman owed him a duty to warn of the shallowness of the water because he was an inexperienced swimmer and diver, whereas Herman was a veteran boater. Under those circumstances, Harper argues, Herman should have realized that Harper needed his protection.

We have previously stated that an affirmative duty to act only arises when a special relationship exists between the parties. "The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action . . . unless a special relationship exists . . . between the actor and the other which gives the other the right to protection." . . .

Harper argues that a special relationship requiring Herman to act for his protection was created when Herman, as a social host, allowed an inexperienced diver on his boat. Generally, a special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. Restatement (Second) of Torts § 314A (1965). Under this rule, a special relationship could be found to exist between the parties only if Herman had

custody of Harper under circumstances in which Harper was deprived of normal opportunities to protect himself.<sup>2</sup> These elements are not present here.

The record before this court does not establish that Harper was either particularly vulnerable or that he lacked the ability to protect himself. Further, the record does not establish that Herman held considerable power over Harper's welfare, or that Herman was receiving a financial gain by hosting Harper on his boat. Finally, there is nothing in the record which would suggest that Harper expected any protection from Herman; indeed, no such allegation has been made.

The court of appeals found that Herman owed Harper a duty to warn him of the shallowness of the water because Herman knew that it was "dangerously shallow." We have previously stated that "[a]ctual knowledge of a dangerous condition tends to impose a special duty to do something about that condition." . . . However, superior knowledge of a dangerous condition by itself, in the absence of a duty to provide protection, is insufficient to establish liability in negligence. Thus, Herman's knowledge that the water was "dangerously shallow" without more does not create liability. . . . In this case, Harper was not deprived of opportunities to protect himself, and Herman was not expected to provide protection.

"There are many dangers, such as those of fire and water, . . . which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child . . . ." Restatement (Second) of Torts § 339 cmt. j (1965). If a child is expected to understand the inherent dangers of water, so should a 20-year-old adult. Harper had no reasonable expectation to look to Herman for protection, and we hold that Herman had no duty to warn Harper that the water was shallow.

Reversed and judgment in favor of defendant reinstated.

## Notes

1. *A stark no duty rule.* It is worthwhile recalling precisely what the *Harper v. Herman* court means when it holds that Herman had no special relationship with Harper and thus was not obligated to warn Harper. Even if Herman *knew* that Harper was about to dive into dangerously shallow water, even if Harper announced his intention, and even if Herman foresaw with perfect foresight the devastating effects Harper's dive would have and knew that he could save Harper with a simple word at virtually no cost to himself, the court's analysis

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<sup>2</sup> Prosser describes a circumstance in which one party would be liable in negligence because another party was deprived of normal opportunities for self-protection as occurring when

the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. . . . [S]uch relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.

W. Page Keeton et al., *Prosser and Keeton on the Laws of Torts* § 56, at 374 (5th ed. 1984).

would remain the same. No legal obligation to assist means no liability, no matter how clear the costlessness of the rescue and the costs of the likely injury.

2. *Can Farwell and Harper be reconciled?* The *Farwell* court treats the defendant's knowledge of the plaintiff's risky position as grounds for recognizing a special relationship. The *Harper* court, by contrast, seems to suggest that the fact of the defendant's knowledge is not a reason to recognize a duty to render assistance, but rather merely a reason to think that the defendant may have breached such a duty when a special relationship establishing such a duty can be said to exist for independent reasons. What is at stake in these two different approaches, as is so often the case in the duty inquiry, is the allocation of decisionmaking authority between judge and jury. If the existence of a duty turns on factual questions such as the defendant's knowledge of the risks, then the jury will have considerable influence on the duty determination. But if the duty determination, as in *Harper*, is made independent of the particular facts in a particular case, then courts will be able to make those judgments on their own. Each approach creates its own dilemmas. The fact-intensive approach of *Farwell* begs the question of why the very same factors that help decide the existence of a duty—a defendant's knowledge of the risks, the costs of precautions, etc.—then reappear at the breach stage of the analysis to help decide whether the defendant breached the duty. By contrast, the *Harper* court approach leaves one wondering what the relevant considerations would be for recognizing a special relationship between the parties; is the special relationship category exhausted by the short list of historical special relations?

3. *Acts and omissions.* The no-duty rule posits that there is no general duty to act, merely a duty in acting to behave reasonably in the actions one does undertake. Omissions, as opposed to actions, do not give rise to legal responsibility.

But why are either of these cases properly characterized as cases in which the defendant omitted to act rather than as cases in which the defendant was engaged in a course of conduct. Why, in other words, are they treated as omission cases rather than action cases?

There is little doubt that a driver who fails, either negligently or intentionally, to apply the brake when he sees a pedestrian cross dangerously in front of him has driven in a wrongful manner. Of course we could characterize the driver as having omitted to act—as having omitted to apply the brake. But we don't. Note that one important feature of this hypothetical is that the driver is causally connected to the risk in which the pedestrian finds himself. Yet the same is true in both *Farwell* and *Harper*. Why don't we see the drinking buddy as having engaged in a negligent course of action in setting out on an adventure in the dangerous parking lots of the American suburban wilderness? Didn't *Farwell* engage in a course of conduct much like the driver who omits to brake? Herman could be said to have engaged in a kind of negligent boating. Professors Kenneth Abraham and Leslie Kendrick contend that "most of the so-called affirmative duty cases actually are conventional negligence cases of a particular sort: those in which the defendant is not exclusively responsible for creating the danger to the plaintiff." Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649 (2019).

One view is that there are no bedrock principles on which the act / omission distinction rests, but that there are merely social conventions and intuitions about when a person can be

said to be in some way responsible for another's loss. The difficulty, of course, is that to say this is not very helpful, since the aim of tort law is precisely to identify who should bear a given loss, especially in cases where the social conventions become controversial.

4. *The utilitarian critique.* What principle explains the rule of no duty to rescue? A century ago, legal scholar James Barr Ames suggested that the general no-duty rule was a kind of failure of imagination that prevented adoption of a more targeted and nuanced rule that would more closely produce utilitarian outcomes:

The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not. But ought the law to remain in this condition? Of course any statutory duty to be benevolent would have to be exceptional. The practical difficulty in such legislation would be in drawing the line. But that difficulty has continually to be faced in the law. We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad track could be punished and be made to compensate the widow of the man drowned and the wounded child. . . . These illustrations suggest a possible working rule. One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death of great bodily harm follows as a consequence of his inaction, shall . . . make compensation to the party injured or to his widow and children in case of death.

*James Barr Ames, The Law and Morals, 22 HARV. L. REV. 97. 109-10, 112-13 (1908).*

More recently, those with a utilitarian streak have tried to find welfare-based reasons to explain the general rule. They aim further to characterize the traditional hard-and-fast rule as slowly giving way to a legal framework that recognizes a duty to rescue, at least in some domains. Judge Posner depicted the situation thus:

Various rationales have been offered for the seemingly hardhearted common law rule: people should not count on nonprofessionals for rescue; the circle of potentially liable nonrescuers would be difficult to draw (suppose a person is drowning and no one on the crowded beach makes an effort to save him—should all be liable?); altruism makes the problem a small one and liability might actually reduce the number of altruistic rescues by depriving people of credit for altruism (how would they prove they hadn't acted under threat of legal liability?); people would be deterred by threat of liability from putting themselves in a position where they might be called upon to attempt a rescue, especially since a failed rescue might under settled common law principles give rise to liability, on the theory that a clumsy rescue attempt may have interfered with a competent rescue by someone else. . . .

Whatever the validity of these explanations for the common law rule, they have been held to be overborne in three types of case. The three types are typically said to involve a "special relationship" between rescuer and victim. . . .



The first type of case is where the rescuer had either assumed, explicitly or implicitly, a contractual duty to rescue the victim. . . .

In the second type of case, the victim was in the rescuer's custody and thus without access to alternative rescuers. . . . These cases are readily assimilated to cases of the first type . . . .

The third class consists of cases in which the victim's peril had been caused by the putative rescuer himself—even if he had caused it nonnegligently. . . .

In short . . . when the rescuer either has assumed explicitly or implicitly a duty of rescue, or has caused the injury, the reasons behind the common law rule fall away and the rule is bent.

*Stockberger v. United States*, 332 F.3d 479 (7th Cir. 2003) (Posner, J.)

5. *A rights-based answer.* The more common observation has been to insist that the rule of no duty to rescue reveals something deeply anti-utilitarian underlying the law of torts. Professor Richard Epstein made the argument especially energetically four decades ago, insisting that the rule against a duty to rescue was fundamental to human freedom:

Under Ames' good Samaritan rule, a defendant in cases of affirmative acts would be required to take only those steps that can be done "with little or no inconvenience." But if the distinction between causing harm and not preventing harm is to be disregarded, why should the difference in standards between the two cases survive the reform of the law? The only explanation is that the two situations are regarded at bottom as raising totally different issues, even for those who insist upon the immateriality of this distinction. Even those who argue, as Ames does, that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—a good in itself not explainable in terms of its purported social worth. . . .

Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197-200 (1973).

Epstein goes on to ask whether a middle-class resident of a western market economy might be legally obligated under Ames's rule to say yes when asked to provide \$10 to a private charity to save the life of a starving child. What about the second time? The third? Epstein attacks the idea of a duty to rescue on the grounds that "it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins." Moreover, and perhaps more interestingly, Epstein observes that compulsory assistance threatens the very existence of the domain of charity.

Judge Posner responds that a duty to rescue, properly understood, would vindicate the contractual liberty that Epstein seeks to achieve, not defeat it:

Suppose that if all of the members of society could somehow be assembled they would agree unanimously that, as a reasonable measure of mutual protection, anyone who can warn or rescue someone in distress at negligible cost to himself (in time, danger, or whatever) should be required to do so. These mutual promises of assistance would create a contract that Epstein would presumably enforce since he considers the right to make binding contracts a fundamental one. However, there are technical obstacles—in this case insurmountable ones—to the formation of an actual contract among so many people. Transaction costs are prohibitive. If, moved by these circumstances, a court were to impose tort liability on a bystander who failed to assist a person in distress, such liability would be a means of carrying out the original desires of the parties just as if it were an express contract that was being enforced.

Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 460-61 (1979). Others have argued that taking a potential rescuer's previous contributions into account would supply the principled stopping point that Epstein worries does not exist. See T. M. SCANLON, WHAT WE OWE EACH OTHER 224 (1998).

6. *Moral heuristics?* Still another view—one rooted deep in the nineteenth-century intellectual history of utilitarianism—is that the rule against a duty to rescue is the kind of moral mistake that “common sense morality” (in philosopher Henry Sidgwick's phrase from his *The Methods of Ethics* 425 (1907)) or the “morality of the multitude” (in John Stuart Mill's cutting formulation from his *Utilitarianism* (1879)) makes when it encounters unusual situations in which the conventional moral norms fail to advance the general happiness. Cass Sunstein has recently advanced this argument in an updated form:

It is worth considering the possibility that the act-omission distinction operates as a heuristic . . . . From the moral point of view, harmful acts are generally worse than harmful omissions, in terms of both the state of mind of the wrongdoer and the likely consequences of the wrong. A murderer is typically more malicious than a bystander who refuses to come to the aid of someone who is drowning; the murderer wants his victim to die, whereas the bystander need have no such desire. In addition, a murderer typically guarantees death, whereas a bystander may do no such thing. (I put to one side some complexities about causation.) But in terms of either the wrongdoer's state of mind or the consequences, harmful acts are not *always* worse than harmful omissions. The moral puzzles arise when life, or a clever interlocutor, comes up with a case in which there is no morally relevant distinction between acts and omissions, but when moral intuitions . . . strongly suggest that there must be such a difference. . . .

In such cases, we might hypothesize that moral intuitions reflect an overgeneralization of principles that usually make sense—but that fail to make sense in the particular case . . . .

Cass Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

If Mill, Sidgwick, and Sunstein are correct—if the confusion around the no-duty rule is the result of what Sidgwick called the “Unconscious Utilitarianism” of everyday moral distinctions such as act and omission—what should the law do? On the one hand, Mill urged us to see such situations as ones of moral confusion to be corrected by an explicit utilitarian calculus such as the one contained in Ames’s proposal. On the other hand, common sense morality’s value as a proxy or heuristic for complex utilitarian calculations might be undermined if the law dropped the pretense of common sense morality in hard cases. The use of everyday morality as a proxy for utilitarianism might, as Sidgwick observed, require the rule makers to mislead the public about the real basis of the moral rules. HENRY SIDGWICK, *THE METHODS OF ETHICS* 447 (7th ed. 1981).

7. *Unconscious utilitarianism or unconscious altruism?* Sunstein suggests that many moral judgments are the product of automatic, prereflective intuitions. But will conscious reflection produce happier results in the low-cost easy rescue cases?

Reflection may not lead people to act in the ways we might like. Psychologists David Rand and Ziv Epstein surveyed dozens of anecdotal reports from people who undertook heroic rescues of strangers, such as saving an elderly woman from drowning in her car. They found that these altruistic individuals overwhelmingly reported their decision-making processes as dominated by instinct, not a deliberative weighing of pros and cons. David G. Rand & Ziv G. Epstein, *Risking Your Life without a Second Thought: Intuitive Decision-Making and Extreme Altruism*, 9 PLOS ONE, 1 (2014).

Rand and numerous other researchers find that players in economic games tend to make more selfish choices the more time they are given to deliberate. Pressuring players to decide quickly, by putting them under time constraints or cognitive load, leads them to behave more cooperatively. It is as if deliberation promotes selfishness and intuition favors altruism. David G. Rand, *Cooperation, Fast and Slow: Meta-Analytic Evidence for a Theory of Social Heuristics and Self-Interested Deliberation*, 27 PSYCHOL. SCI. 1192 (2016). Rand concludes that each of us is prone, for evolutionary reasons, to be an unthinking altruist and a calculating *homo economicus*.

8. *Conceptual thickets and the limited duty rules.* One way to avoid the conceptual thickets of the utilitarian approach would be to insist (as Epstein insisted) that the rule of no duty to rescue is not utilitarianism in disguise at all. The rule of no duty to rescue seems much more plausibly defended as a recognition of the moral impoverishment of the utilitarian view. The rule embodies the nuanced relational character of moral obligation and tort liability in liberal societies. We don’t have generalized duties to all comers. We have only more particular duties, including sometimes particular duties to aid particular people from particular risks. The tort law rule on the duty to rescue, in this view, simply embodies the basic structure of morality.

In this sense, the duty to rescue is a perfect introduction to the limited-duty and no-duty rules that follow in the rest of this chapter. Ever since beginning to study the negligence cause of action, we have assumed a duty of reasonable care. But in many different domains of social life there is no such duty; at the very least, the duty that inheres in such domains is different from the generic duty of reasonable care. Some influential torts jurists, as we shall see, believe that the domain-specific character of tort law is a mistake that ought to be

suppressed in favor of a generic reasonableness test. Relevant relational considerations, they say, need not be ignored, since they can be and are brought out in the analysis of the reasonableness of the parties' actions. Others equally prominent in the field object and insist that the domain specificity and relational character of our moral and legal obligations do and ought to appear in the formal doctrine of duties of care.

## **2. Liability for Good Samaritans?**

No matter what the basis for the limits on the common law duty to rescue, some states have altered the common law rule by statute and created limited duties to rescue along the lines of the proposal advanced by Ames a century ago. The statutes often address a further question that arises when someone has chosen to act as a Good Samaritan and provided help to someone in need. What happens when the rescue goes awry?

### ***Swenson v. Waseca Mutual Insurance Co.*, 653 N.W.2d 794 (Minn. 2002)**

ANDERSON, J.

On January 19, 1998, Kelly Swenson, 13 years old, injured her leg when the snowmobile she was driving struck a drainage culvert in the north ditch. . . . Swenson apparently dislocated her knee during the accident. With Swenson at the time of the accident were her sister and three friends.

Lillian Tiegs, a passing motorist, in response to waving from Swenson's companions, stopped her vehicle on the shoulder of Highway 19 and asked if any assistance was necessary. Tiegs first attempted to summon help by calling 911, but she was unable to raise a signal on her cell phone. Tiegs then agreed to drive Swenson to the hospital in New Prague. The rest of Swenson's group decided to drive their snowmobiles to the home of Tiegs, less than a quarter of a mile away from the scene of the accident. The plan was to leave the snowmobiles at the Tiegs residence and then ride in the Tiegs' van to the hospital.

After Swenson was placed in the van, Tiegs attempted to make a U-turn from the westbound side of the highway to the eastbound lane. Before Tiegs had completed the U-turn, a tractor-trailer exceeding the posted speed limit and traveling in the eastbound lane struck the passenger side of the Tiegs' van. Kelly Swenson died as a result of injuries she sustained in this accident.

The Swenson family brought a wrongful-death action against both the tractor-trailer driver and Tiegs. The Swensons settled with the driver of the tractor-trailer and then brought an under insured-motorist claim against Waseca Mutual, the insurer for Tiegs. Waseca Mutual moved for summary judgment, alleging that under Minnesota's Good Samaritan law, Tiegs was immune from liability. . . . The district court . . . concluded that Tiegs . . . was entitled to immunity. . . .

Minnesota's Good Samaritan law has two main components. The statute imposes a duty to help on anyone present "at the scene of an emergency" who "knows another person is exposed to or has suffered grave physical harm," provided that the person can lend assistance without danger or peril to themselves. . . . The second component of the statute, in dispute here, provides immunity to any person who: without compensation or the expectation of compensation, renders emergency

care, advice, or assistance at the scene of an emergency or *during transit* to a location where professional medical care can be rendered, . . . unless the person acts in a willful and wanton or reckless manner in providing the care, advice, or assistance. (Emphasis added).

Appellant contends that the Good Samaritan law’s “during transit” provision does not apply to the mere act of driving an injured party from the scene of an accident to a hospital. Instead appellant argues that the “during transit” provision only protects those who provide some sort of emergency care while the person is being transported to a health-care facility. . . .

In light of the fact that professional emergency medical technicians are already under a duty to provide competent care, appellant’s interpretation would only protect those laypersons providing emergency care in a vehicle and in transit to a health-care facility while a third person drives the vehicle. Such a narrow interpretation of the law offers little protection. Nor does it offer much encouragement to a layperson to help others in peril. . . .

To hold, as appellant urges, that transportation is not a protected activity and not eligible for immunity under the provisions of the Good Samaritan law would have the perverse effect of discouraging an entire class of responses to emergency circumstances. Absent a clear legislative direction that transportation is not a covered activity under the immunity statute, we are not willing to adopt appellant’s argument. We hold that transportation of an injured person by non-emergency personnel is a protected activity under the immunity provisions of the Good Samaritan law. . . .

[W]e affirm the district court’s grant of summary judgment.

## **B. Landowners and Occupiers**

The traditional common law rule held that the owners or occupiers of land (hereinafter “LOOO’s”) owed no obligation of reasonable care to trespassers upon that land, and further that they owed only a limited duty toward social guests to warn such guests of known latent hazards.

### ***United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922)**

HOLMES, J.

This is a suit brought by the respondents against the petitioner to recover for the death of two children, sons of the respondents. The facts that for the purposes of decision we shall assume to have been proved are these. The petitioner owned a tract of about twenty acres in the outskirts of the town of Iola, Kansas. Formerly it had there a plant for the making of sulphuric acid and zinc spelter. In 1910 it tore the buildings down but left a basement and cellar, in which in July, 1916, water was accumulated, clear in appearance but in fact dangerously poisoned by sulphuric acid and zinc sulphate that had come in one way or another from the petitioner’s works, as the petitioner knew. The respondents had been travelling and encamped at some distance from this place. A travelled way passed within 120 or 100 feet of it. On July 27, 1916, the children, who were eight and eleven years old, came upon the petitioner’s land, went into the water, were poisoned and died. . . . At the trial the Judge

instructed the jury that if the water looked clear but in fact was poisonous and thus the children were allured to it the petitioner was liable. The respondents got a verdict and judgment, which was affirmed by the Circuit Court of Appeals.

. . . If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it would have been entitled to assume that they would obey the law and not trespass. . . . On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.

In *Railroad Co. v. Stout*, the well-known case of a boy injured on a turntable, it appeared that children had played there before to the knowledge of employees of the railroad, and in view of that fact and the situation of the turntable near a road without visible separation, it seems to have been assumed . . . that the railroad owed a duty to the boy. Perhaps this was as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation. A license was implied . . . .

In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty. There can be no general duty on the part of a land-owner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there. . . .

[T]he petitioner is [not] liable for poisoned water not bordering a road, not shown to have been the inducement that led the children to trespass . . . and not shown to have been the indirect inducement because known to the children to be frequented by others. It is suggested that the roads across the place were invitations. A road is not an invitation to leave it elsewhere than at its end.

Judgment reversed.

### Notes

1. *The common law rules.* At common law, the standard of care owed a visitor depended on whether the visitor was an “invitee,” a “licensee,” or a “trespasser.”

An invitee is someone whom the landowner or occupier (LOOO) has invited onto the LOOO’s property in the expectation that the LOOO will benefit from the invitee’s presence. A business guest, for example, is an invitee. See, e.g., *Corley v. Evans*, 835 So.2d 30 (2003) (a person who was shot at a crawfish boil that charged admission is an invitee); *Mann v. Safeway Stores, Inc.*, 95 Idaho 732 (1974) (a supermarket patron is an invitee); and *Triangle Motors of Dallas v. Richmond et al.*, 152 Tex. 354 (1953) (a plumber who was injured while trying to repair the LOOO’s drain is an invitee). But not all invitees are business guests. See *Thomas v.*

*St. Mary's Roman Catholic Church*, 283 N.W.2d 254 (1979) (a member of a visiting basketball team playing in the school's gym is an invitee). Traditionally, LOOOs owed invitees a duty of reasonable care.

A licensee is someone whom a LOOO has allowed—but not necessarily invited—onto his property. The key difference between licensees and invitees is that the former do not bestow any tangible benefits on the landowner. So, for example, the West Virginia Supreme Court has held that a person who is injured taking a shortcut across a property with the owner's permission is a licensee. *Hamilton v. Brown*, 157 W.Va. 910 (1974). In most states, social guests are considered licensees. See *Cobb v. Clark*, 265 N.C. 194 (1965) (a social guest who fell down the landowners' stairs is a licensee). This is true regardless of whether the social guest and the landowner are family members. *Wolfson v. Chelist*, 284 S.W.2d 447 (Mo. 1955) (holding that a social guest who was injured on her sister's property is a licensee). Traditionally, a LOOO had two basic duties to licensees: to warn them of hidden dangers (but typically only those hidden dangers of which the LOOO was aware) and to refrain from willfully, wantonly, or recklessly injuring them.

A trespasser is someone who enters or remains on a property without the LOOO's permission. See *Buch v. Amory MFG. Co.*, 69 N.H. 257 (1898) (a child who entered a factory without the owner's permission and then got his hand caught in a machine is a trespasser). Traditionally, a LOOO's only duty to trespassers was to refrain from willfully, wantonly, or recklessly harming them.

2. *The expansion of the invitee class.* Over the past century and a half, courts have expanded the definition of “invitee” to include people who once would have been considered licensees. The invitee class has been expanded to include children injured in stores where their parents are shopping (*Hecht Co. v. Jacobsen*, 180 F.2d 13 (D.C. Cir. 1950)), swimmers who drown in pools that are open to the public (*Rovegno v. San Jose Knights of Columbus Hall Assn.*, 108 Cal. App. 591 (1930)), and even alumni on campus for their college reunions (*Guilford v. Yale University*, 128 Conn. 449 (1942)).

Public employees have been some of the biggest beneficiaries of this trend. Public employees fit awkwardly into the traditional tripartite scheme: Many have jobs that require them to legally enter private property for reasons that benefit the public but directly benefit neither themselves nor the landowners. This has created problems for courts attempting to apply the traditional rule—especially as the reach of the regulatory state has expanded into new areas. For the most part, courts have resolved these classification questions in favor of public employees, extending invitee status to census takers (*Glassbrook v. Manhi Realty Corp.*, 108 N.Y.S.2d 652 (1951)), letter carriers (*Sutton v. Penn*, 238 Ill. App. 182 (1925)), municipal garbage collectors (*Toomey v. Sanborn*, 146 Mass. 28 (1888)), revenue inspectors (*Anderson & Nelson Distilleries Co. v. Hair*, 103 Ky. 196 (1898)), meat inspectors (*Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951)), building inspectors (*Fred Howland, Inc. v. Morris*, 143 Fla. 189 (1940)), health inspectors (*Jennings v. Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. Ct. App. 1952)), and so on. Police officers and firefighters, however, continue to be classified as licensees in most jurisdictions where the traditional rule is still applied. See, e.g., *Furstein v. Hill*, 218 Conn. 610 (1991).

The traditional common law rule often led to outcomes that seemed shocking, at least to many, if not to the hardened sensibilities of Justice Holmes. This was especially so where the circumstances seemed to indicate that the defendant's negligence was especially apparent. In such cases, cutting off the negligence inquiry by imposing the common law's limited duty for the occupiers and owners of land seemed particularly galling. Consider the next case.

***Banker v. McLaughlin*, 146 Tex. 434 (1948)**

TAYLOR, J.

James McLaughlin brought this suit against H. F. Banker to recover damages for the death of his minor son (five years and ten months old). The trial court awarded judgment in plaintiff's favor on the jury's verdict for \$15,200. The Court of Civil Appeals, under the view that the award was excessive, caused a remittitur to be filed which reduced the judgment to \$6,000. The case is here on Mr. Banker's application for the writ.

The child met his death on June 19, 1945, by drowning in a large hole, or pit, of water on Forest Park Subdivision, a homesite addition which Mr. Banker, the owner, at that time and since, was in the process of developing and marketing . . . .

Plaintiff brought the suit, alleging the ownership of the subdivision by Mr. Banker, the digging of the hole by the owner which, as plaintiff alleged, made the spot (when the hole filled with water) especially attractive to children, and dangerous; and that it attracted to it the child, James McLaughlin, Jr. He alleged the owner's negligence in creating on his premises (without warning devices or protective measures of any character) such dangerous condition where he knew or should have known that children played.

The owner answered by general denial, and further by special answer that the child was neither a licensee nor an invitee but was a trespasser, and that the drowning was an accident occasioned by no fault of his. . . .

At the time the child was drowned about 50 families (40 of which had small children) were living in Forest Park Subdivision; and numerous children were living in contiguous group settlements. . . . The pool is located on the east side of Lot 10 of Block 7.

Mr. McLaughlin's home (about 200 yards distant) is west of the pit on the back of Lots 15 and 16, Block 1, a small two-room house, the second purchased after Mr. Banker began marketing the homesites. The general surroundings about the pool from the standpoint of the record are described by the following bits of testimony of witnesses who saw them: As indicated by the name (Forest Park) the addition was a wooded area. One could "get to it (the pool) without any trouble"; about the pit "there was quite a bit of . . . vegetation, and quite a bit of grass"; that there was a truck "road or trail" out there; people went "back in there to have picnics"; it was "open" there, "all except some small bushes and grass"; about "the scene of this pit" there were "small bushes, where the trucks ran over them and beat them down"; there were "no trees" right at the hole or "around it"; in the "spring and summer" there would be "wild flowers and things like that growing there." Defendant himself testified that the pool was accessible to those located where plaintiff was "if they wanted to wade through grass and weeds and brush."



The waterhole itself is designated on the plat. The bank “down to the water . . . was straight off, then it had a sharp incline to the bottom”; the bank “was pretty slanting, and whenever I stepped off in there I slid on to the bottom; it (the water) came up to my chin”; the water was “well over the head of a child five or six years old”; when I (one of the searchers for the child) “got there it (the pool) was full of water”; were no outlets to it, however; “the banks were a straight off drop.”

The utility of the pool to the owner was negligible after he ceased excavating there for dirt for street grading purposes. . . . Mr. Banker’s own testimony indicates also that the expense necessary to be incurred, if any, to eliminate the danger would have been small, if not trivial.

The excavation was from 5 to 8 feet deep “at the very shallowest place.” It appears that soon after its use as a dirt supply had been discontinued it filled up with water so that its depth would not be ascertained by children unless (contrary to the nature of children) they are of such mature years and experience that they would measure the depth (as the average adult who could not swim would do) before entering the water.

The jury found not only that the pit, or pool, was attractive to children, but that it was dangerous, and did attract to it the McLaughlin child. It was found in answer to one special issue that the pit was unusually attractive and in answer to a separate issue that it was dangerous to children. That it was dangerous to children is not open to question under the record. . . .

The following features of the facts and circumstances of the case are determinative of the correctness of the action of the Court of Civil Appeals in affirming the trial court’s judgment: (a) the place where the condition was maintained was one upon which the possessor knew or should have known that small children would likely frequent the place and play about it; (b) the condition was one of which the possessor knew, or should have known involved an unreasonable risk of death or serious bodily harm to such children; (c) the child, because of its tender years, did not realize the risk involved in going into the pool; and (d) the utility, if any, to Mr. Banker of eliminating the danger was slight as compared to the probability of injury resulting therefrom. . . .

We overrule all of the points of error presented in the application of petitioner and affirm the judgment of the Court of Civil Appeals which affirms that of the trial court. It is so ordered.

### *Note*

*Attractive nuisances.* As originally formulated, the traditional rule sharply limited the ability of injured non-invitees to recover from LOOOs. Over time courts carved out exceptions to the traditional rule’s rigid formula. Perhaps the biggest exception is the one the courts have created for child trespassers. Under the so-called “attractive nuisance” doctrine, a LOOO can be held liable for injuries to a child trespasser if those injuries were caused by an “attractive” artificial hazard on the landowner’s property. The theory is that when a landowner maintains a hazard on his premises that he knows some children will find alluring, he impliedly invites those children to trespass. The child trespassers, then, become the equivalent of invitees, and so the LOOO owes them a duty of reasonable care.

Many jurisdictions have adopted the definition of attractive nuisance laid out in Section 339 of the Restatement (Second) of Torts (1965). To satisfy the Restatement's definition of an attractive nuisance, the following five conditions must be met: (1) the hazard must be located in an area where the LOOO knows or should know that children are likely to trespass; (2) the landowner must know (or have reason to know) that the hazard poses a serious risk of death or bodily harm to such children; (3) the child trespassers must not appreciate the danger posed by the hazard; (4) the risk that the hazard poses to child trespassers must outweigh the hazard's utility to the LOOO and the burden of eliminating the hazard; and (5) the LOOO must fail to exercise reasonable care to eliminate or mitigate the hazard. In addition, the hazard must be an artificial condition; a natural condition such as a stream typically cannot be an attractive nuisance. *See, e.g., Fitch v. Selwyn Village*, 234 N.C. 632 (1951) (holding that a stream is not an attractive nuisance).

Courts have found a wide array of hazards to be attractive nuisances. Some of the earliest attractive nuisance cases involved unsecured railroad turntables. In *Barrett v. Southern Pacific Railroad*, 91 Cal. 296 (1891), for example, the California Supreme Court held that a railroad was liable for the injuries that an eight-year-old boy sustained playing on one of its turntables, which the railroad had left unguarded and accessible to the public. In *Afton Electric Co. v. Harris*, 49 Wyo. 367 (1936), the Wyoming Supreme Court held that an easily climbable light pole with uninsulated electric wires at the top constituted an attractive nuisance. In *Kopczynski v. Barger*, 887 N.E.2d 928 (2008), the Indiana Supreme Court held that a trampoline may constitute an attractive nuisance.

Over time, however, some courts came to think that managing the exceptions to the common law rule for entrants onto land was more cumbersome than it was worth.

***Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)**

PETERS, J.

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action. . . .

[In November, 1963, plaintiff Rowland was injured while using the bathroom fixtures in Nancy Christian's apartment. Rowland was a social guest in the apartment when the porcelain handle of one of the water faucets broke in his hand, severing tendons and nerves of his right hand. The parties agreed that Christian knew of the dangerous condition of the faucet and that she had requested her landlord to fix it several weeks earlier. Rowland's depositions offered evidence that he did not know of the condition of the faucet and that it was concealed; Christian testified in an affidavit that Rowland knew of the defect in the faucet and that the defect was obvious from ordinary inspection. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and \$100,000 general damages.]

Section 1714 of the Civil Code provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." . . .

. . .

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

One of the areas where this court and other courts have departed from the fundamental concept that a man is liable for injuries caused by his carelessness is with regard to the liability of a possessor of land for injuries to persons who have entered upon that land. It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism.

The departure from the fundamental rule of liability for negligence has been accomplished by classifying the plaintiff either as a trespasser, licensee, or invitee and then adopting special rules as to the duty owed by the possessor to each of the classifications. Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them.

Although the invitor owes the invitee a duty to exercise ordinary care to avoid injuring him, the general rule is that a trespasser and licensee or social guest are obliged to take the premises as they find them insofar as any alleged defective condition thereon may exist, and that the possessor of the land owes them only the duty of refraining from wanton or willful injury. The ordinary justification for the general rule severely restricting the occupier's liability to social guests is based on the theory that the guest should not expect special precautions to be made on his account and that if the host does not inspect and maintain his property the guest should not expect this to be done on his account.

An increasing regard for human safety has led to a retreat from this position, and an exception to the general rule limiting liability has been made . . . for the protection of the licensee has been imposed . . . in cases involving dangers known to the occupier. . . .

Another exception to the general rule limiting liability has been recognized for cases where the occupier is aware of the dangerous condition, the condition amounts to a concealed trap, and the guest is unaware of the trap. . . .

The cases dealing with the active negligence and the trap exceptions are indicative of the subtleties and confusion which have resulted from application of the common law principles governing the liability of the possessor of land. Similar confusion and complexity exist as to the definitions of trespasser, licensee, and invitee.

In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards “imposing on owners and occupiers a single duty of reasonable care in all circumstances.”

*Kermarec v. Compagnie Generale*, 358 U.S. 625, 630-31 [(1959) (Stewart, J.)].

The courts of this state have also recognized the failings of the common law rules relating to the liability of the owner and occupier of land. In refusing to apply the law of invitees, licensees, and trespassers to determine the liability of an independent contractor hired by the occupier, we pointed out that application of those rules was difficult and often arbitrary. In refusing to apply the common law rules to a known trespasser on an automobile, the common law rules were characterized as “unrealistic, arbitrary, and inelastic,” and it was pointed out that exceedingly fine distinctions had been developed resulting in confusion and that many recent cases have in fact applied the general doctrine of negligence embodied in section 1714 of the Civil Code rather than the rigid common law categories test. . . .

Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.

Without attempting to labor all of the rules relating to the possessor’s liability, it is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant’s conduct, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.

Although in general there may be a relationship between the remaining factors and the classifications of trespasser, licensee, and invitee, there are many cases in which no such relationship may exist. Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite

may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, i.e., the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers. The last of the major factors, the cost of insurance, will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

...

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

... The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Once the ancient concepts as to the liability of the occupier of land are stripped away, the status of the plaintiff relegated to its proper place in determining such liability, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. [W]e must assume defendant Miss Christian was aware that the faucet handle was defective and dangerous, that the defect was not obvious, and that plaintiff was about to come in contact with the defective condition, and under the undisputed facts she neither remedied the condition nor warned plaintiff of it. Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it. . . .

The judgment is reversed.

### Notes

1. *The state of premises liability law.* The decision in *Rowland v. Christian* ushered in a new era in premises liability law. By 1977, nine years after *Rowland* was decided, seven states

had followed California's lead, abolishing the traditional status-based distinctions, while another five had abolished the invitee-licensee distinction but retained the distinction between trespassers and non-trespassers.

In more recent decades, though, the *Rowland* standard has met with significant opposition, slowing its advance. In 1971, the Colorado Supreme Court adopted the *Rowland* standard in *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. 1971), but the state legislature reinstated the traditional status-based distinctions in 1990. In 1975, the Rhode Island Supreme Court adopted the *Rowland* standard in *Marioenzi v. DiPonte, Inc.*, 333 A.2d 127 (R.I. 1975), but the court partially overturned *Marioenzi* 19 years later, holding that although LOOs owe both licensees and invitees a duty of reasonable care, they have a limited duty to trespassers (see *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1057 (R.I. 1994)). Even California, the birthplace of the *Rowland* standard, has backtracked: a 1985 state statute shields LOOs from liability for an entrant's injuries if the entrant committed one of 25 specified felonies while on the LOO's property. Today, only eight states (including California) hold LOOs to the *Rowland* standard—the same number as in 1977. In 17 states and the District of Columbia, LOOs owe invitees and licensees—but not trespassers—a duty of reasonable care. In the other 25 states, some version of the traditional tripartite rule remains in place.

2. *Rowland's practical implications.* What are the real-world implications of adopting a *Rowland*-like standard? How much of an effect does abolishing status distinctions have on the outcomes of cases? In *Rowland*, the California Supreme Court sided with the plaintiff, a social guest whose hand was injured by a broken faucet, on the grounds that a fact-finder could reasonably conclude that the social host had negligently failed to warn the plaintiff of the danger. But the court could have reached the same conclusion by applying the traditional rule; in most states the traditional rule imposed a duty of reasonable care to warn licensees of precisely these kinds of hidden dangers.

More generally, outcomes in cases decided under the *Rowland* standard may generally track those that would have been reached under the older common law rules. Consider for example trespassers injured engaged in dangerous activity. Such trespassers typically lose whether we apply the old-fashioned rule of no duty, see *Cates v. Beauregard Elec. Co-op., Inc.*, 328 So. 2d 367 (La. 1976) (holding that trespassing plaintiff who cut defendant's electrical wire could not recover for injuries resulting from electrocution), or whether we apply *Rowland's* general foreseeability and reasonableness standard, see *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994) (holding that trespassing plaintiffs who were injured in a motorcycle crash on defendant's property could not recover for injuries).

3. *The open-and-obvious rule.* Despite *Rowland's* opening of landowners and occupiers' liability, many states hold that LOOs are not liable for injuries caused by open and obvious dangers, absent extenuating circumstances. When a danger is sufficiently obvious, the thinking goes, it is unnecessary for a LOO to warn occupiers of its existence.

In some jurisdictions, the open-and-obvious doctrine operates as a factor in determining the plaintiff's comparative negligence. See *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 147 (1990). Where an open and obvious risk is unreasonably dangerous, a plaintiff will be

deemed comparatively negligent to have run the risk. See *Lugo v. Ameritech Corp.*, 464 Mich. 512, 516 (2001). Another approach is to treat the openness and obviousness of a danger as a factor in determining the reasonableness of a LOOO's behavior. See *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 152 (Nev. 2012). At least six states have done away with the Open-and-Obvious Rule altogether, folding the concept of obviousness into their comparative negligence calculations. See, e.g., *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978).

In New York, however, which has abolished the traditional status categories, a more robust version of the Open-and-Obvious Rule still exists. The general rule in New York is that “a landowner has no duty to warn of an open and obvious danger,” with a possible exception for cases where the LOOO has reason to anticipate the harm to the occupier. *Tagle v. Jakob*, 97 N.Y.2d 165, 169 (2001).

4. *Condominiums, co-ops, and housing developments.* What about housing collectives in which tort duties among the members could be displaced by contract? In at least some condominium developments, the practice is to use homeowners' insurance as a substitute for tort causes of action. Consider the following model condominium document:

1.c. Each Unit Owner and Executive Board hereby waives and releases any and all claims which he or it may have against any other Unit Owner, the Association, the Executive Board and members thereof, the Declarant and their respective employees and agents, for damage to the Common Elements, the Units, or to any personal property located in the Units or Common Elements, caused by fire or other casualty or any act or omission of any such party to the extent that such damage is covered by fire or other form of hazard insurance.

RONALD B. GLAZER, PENNSYLVANIA CONDOMINIUM LAW AND PRACTICE art. 15 (3d ed. 1995). What does it mean that homeowners' associations sometimes express a preference for insurance over tort?

5. *The Rowland factors.* The *Rowland v. Christian* case is famous in American law both for what it said about the duties of LOOOs and for its enumeration of various “considerations” that should inform assessments of duty more generally. In California, the “Rowland factors” became a touchstone for lower courts as they considered whether to recognize previously unrecognized duties of care and whether to place limits on existing duties. Keep these factors in mind as you read the cases in Section D of this chapter, below. On the current status of the *Rowland* factors, see in particular the notes following *In re September 11 Litigation*, *infra*.

## C. Negligent Infliction of Emotional Distress

Recall that in Chapter 1 we encountered the tort of assault, which is a centuries-old cause of action for intentional infliction of emotional harm, namely fear of an unlawful contact. We also encountered the newer tort of intentional infliction of emotional distress, which allows

recovery even in the absence of apprehension of contact. What happens when emotional harm arises accidentally?

***Mitchell v. Rochester Railway*, 45 N.E. 354 (N.Y. 1896)**

MARTIN, J.

The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. . . . The learned counsel for the respondent in his brief very properly stated that, "The consensus of opinion would seem to be that no recovery can be had for mere fright. . . ."

. . . Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. . . .

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. . . .



Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed, and the order of the Trial Term granting a nonsuit affirmed, with costs.

### **Notes**

1. *Injuries and impacts.* One mystery of the *Mitchell* decision is why the court insists on a requirement of immediate physical injury. Mitchell suffered a physical injury in the form of the miscarriage. At the very least, her body was caused to strike the ground when she fell. Nor is there any indication of inordinate time between the negligence of the defendant and the miscarriage, and there was certainly no time lag between the defendant's negligence and Mitchell's fall. In subsequent years, the basic holding of *Mitchell* came to be explained as having not so much to do with the absence of an immediate physical injury as with the absence of a physical impact between some instrumentality in the negligent defendant's control and the plaintiff.

Why did the *Mitchell* court hold that there was no common law cause of action for negligent infliction of emotional distress, absent some physical impact? Recall that the tort of assault does not require a showing of physical impact.

2. *A gender bias?* Plaintiffs in early negligent infliction of emotional distress cases were often women. Did the common law's exclusion of stand-alone emotional distress damages indicate a bias against women? According to Professors Martha Chamallas and Linda Kerber, it did. The early doctrine of emotional distress, they argue, "marginaliz[ed] . . . the harm suffered by women." In particular, Professors Chamallas and Kerber note that

[t]he law of torts values physical security and property more highly than emotional security. . . . This apparently gender-neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned. The law has often failed to compensate women for recurring harms—serious though they may be in the lives of women—for which there is no precise masculine analogue. This phenomenon is evident in the history of tort law's treatment of fright-based physical injuries, a type of claim historically brought more often by female

plaintiffs. . . . These claims were classified in the law as emotional harms and a number of special doctrinal obstacles were created to contain recovery in such cases. . . . The inequity of the doctrines comprising the law of fright not surprisingly reflected and reinforced inequities present in the larger social and cultural settings.

Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814, 864 (1990). Some scholars object that the difficulty of discerning causation in such cases is a better explanation for the doctrine. See Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175, 203 (2001).

3. *Narrower tests.* Is there a narrower way to accomplish the goals articulated by the *Mitchell* court? Another case involving a woman plaintiff raised that question some seventy years after *Mitchell*.

***Falzone v. Busch*, 214 A.2d 12 (N.J. 1965)**

PROCTOR, J.

Charles Falzone, was standing in a field adjacent to the roadway when he was struck and injured by defendant's negligently driven automobile. The second count alleges that the plaintiff, Mabel Falzone, wife of Charles, was seated in his lawfully parked automobile close to the place where her husband was struck and that the defendant's negligently driven automobile "veered across the highway and headed in the direction of this plaintiff," coming "so close to plaintiff as to put her in fear for her safety." As a direct result she became ill and required medical attention. There is no allegation that her fear arose from apprehension of harm to her husband.

The Law Division granted the defendant's motion for summary judgment on the second . . . count . . . , holding that it was constrained to follow the existing New Jersey rule that where there is no physical impact upon the plaintiff, there can be no recovery for the bodily injury or sickness resulting from negligently induced fright. . . .

[S]ince a decision of our former Supreme Court in 1900, *Ward v. West Jersey & Seashore R.R. Co.*, it has been considered settled that a physical impact upon the plaintiff is necessary to sustain a negligence action.

In *Ward*, the complaint alleged that the plaintiff, while driving on a highway, was permitted without warning from defendant railroad to drive upon a public crossing of its tracks in the face of an approaching train; that the defendant, by improperly lowering the gates before the plaintiff was off the tracks, subjected him to "great danger of being run down and killed by said train" and caused him to be "shocked, paralyzed, and otherwise injured." . . . Three reasons for denying recovery were set forth in the opinion. The first was that physical injury was not the natural and proximate result of the negligent act. . . .

Second, the court concluded that since this was the first action of its kind in New Jersey, the consensus of the bar must have been that no liability exists in the absence of impact. . . . The third reason was “public policy” which the court explained by quoting with approval from *Mitchell v. Rochester Ry. Co.* . . .

We think that the reasons assigned in *Ward* for denying liability are no longer tenable, and it is questionable if they ever were. . . .

[T]hree rules of law inconsistent with the *Ward* doctrine have developed. It has been held that where a person is injured attempting to avoid a hazard negligently created by another, he may recover for the physical consequences of fright even though the immediate injury suffered was slight and was not a link in the causal chain. Thus, in *Buchanan v. West Jersey R.R. Co.*, [1890] . . . a woman standing in a railroad station threw herself to the platform to avoid being struck by a protruding timber on a passing train. . . . The court allowed recovery even though her fright, and not the injury, if any, sustained in the fall, caused her physical suffering. Our courts have also been willing to allow recovery for physical injury traceable directly to fright when there is any impact, however inconsequential or slight. The application of this rule was illustrated in *Porter v. Delaware, Lackawanna & W.R.R. Co.* [1906], where a woman became ill as the result of her shock at seeing a railroad bridge fall near the place where she was standing. She testified that something fell on her neck and that dust entered her eyes. In allowing recovery for the physical consequences of her fright, the court said either the small injury to her neck or the dust in her eyes was a sufficient “impact” to distinguish the case from *Ward*. And third, recovery has been permitted where physical suffering resulted from a willfully caused emotional disturbance.

The second reason given in *Ward* for denying recovery was that the absence of suits of this nature in New Jersey demonstrated the concurrence of the bar with the rule of no liability. . . . [A] sufficient answer is that the common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression.

Public policy was the final reason given in *Ward* for denying liability. The court was of the opinion that proof or disproof of fear-induced physical suffering would be so difficult that recovery would often be based on mere conjecture and speculation, and that the door would be opened to extensive litigation in a class of cases where injury is easily feigned. . . . However, the problem of tracing a causal connection from negligence to injury is not peculiar to cases without impact and occurs in all types of personal injury litigation. . . . [D]ifficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact of the truth of her claim.

As to the possibility of actions based on fictitious injuries, a court should not deny recovery for a type of wrong which may result in serious harm because some people may institute fraudulent actions. Our trial courts retain sufficient control, through the rules of evidence and the requirements as to the sufficiency of evidence, to safeguard against the danger that juries will find facts without legally adequate proof. Moreover, the allowance of recovery in cases where there has been an impact, however slight, negates the effectiveness of the no impact rule as a method of preventing fraudulent claims. As stated by Dean McNiece in his comprehensive article dealing with tort liability for psychic injuries, “it is quite as simple to feign emotional disturbance plus slight impact and get in ‘under the wire’ of one of the exceptions as it is to feign emotional disturbance sans impact.” (McNiece, “Pyschic Injury and

Liability in New York,” 24 *St. John’s L. Rev.* 1, 31 (1949)). . . .

Our conclusion is that *Ward* should no longer be followed in New Jersey. We are not dealing with property law, contract law or other fields where stability and predictability may be crucial. We are dealing with torts where there can be little, if any, justifiable reliance and where the rule of *stare decisis* is admittedly limited. We hold, therefore, that where negligence causes fright from a reasonable fear of immediate personal injury, which fright is adequately demonstrated to have resulted in substantial bodily injury or sickness, the injured person may recover if such bodily injury or sickness would be regarded as proper elements of damage had they occurred as a consequence of direct physical injury rather than fright. Of course, where fright does not cause substantial bodily injury or sickness, it is to be regarded as too lacking in seriousness and too speculative to warrant the imposition of liability.

We recognize that where there is no impact a defendant may be unaware of the alleged incident and thus not forewarned to preserve evidence upon which he might base his defense. However, this consideration should not be sufficient to bar a meritorious claim. . . .

### Notes

1. *The common law process.* The process by which the *Mitchell / Ward* rule gave way to the *Falzone* alternative is a classic pattern in common law development. After a rule is set at time 1, exceptions and caveats limit and undermine at time 2 until eventually at time 3 it has lost much of its persuasiveness and usefulness. Indeed, after the exceptions have accumulated, courts may no longer be able to identify any kind of useful project advanced by the original rule.

2. *Falzone’s adoption.* Currently, twelve states and the District of Columbia have adopted *Falzone’s* zone of danger test in adjudicating negligent infliction of emotional distress claims: Alabama, *Walmart Stores, Inc. v. Bowers*, 752 So. 2d 1201 (Ala. 1999); Colorado, *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (en banc); Delaware, *Robb v. Pa. R.R.*, 210 A.2d 709 (Del. 1965); District of Columbia, *Jane W. v. President & Dirs. of Georgetown Coll.*, 863 A.2d 821 (D.C. 2004); Illinois, *Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1 (Ill. 1983); Maryland, *Resavage v. Davies*, 86 A2d 879 (Md. 1952); Minnesota, *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764 (Minn. 2005); Missouri, *Asaro v. Cardinal Glennon Mem’l Hosp.*, 799 S.W.2d 595 (Mo. 1990) (en banc); New York, *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984); North Dakota, *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); South Dakota, *Nielson v. AT&T Corp.*, 597 N.W.2d 434 (S.D. 1999); Utah, *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179 (Utah 1992); and Vermont, *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999).

3. *Beyond the zone of danger?* The rule in *Falzone* may have been an improvement over *Mitchell*. But it still left unaddressed a class of cases in which the plaintiff was not in the zone of danger but nonetheless has demonstrable emotional injuries caused by the defendant’s tortious conduct. Should such plaintiffs lose even where it seems indisputable that they suffered injuries that were caused by the negligence of the defendant? This is the question that the California Supreme Court took up in 1968:

***Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)**

TOBRINER, J.

That the courts should allow recovery to a mother who suffers emotional trauma and physical injury from witnessing the infliction of death or injury to her child for which the tortfeasor is liable in negligence would appear to be a compelling proposition. . . .

Nevertheless, past American decisions have barred the mother's recovery. Refusing the mother the right to take her case to the jury, these courts ground their position on an alleged absence of a required "duty" of due care of the tortfeasor to the mother. Duty, in turn, they state, must express public policy; the imposition of duty here would work disaster because it would invite fraudulent claims and it would involve the courts in the hopeless task of defining the extent of the tortfeasor's liability. In substance, they say, definition of liability being impossible, denial of liability is the only realistic alternative.

We have concluded that neither of the feared dangers excuses the frustration of the natural justice upon which the mother's claim rests. . . .

In the instant case plaintiff's first cause of action alleged that on or about September 27, 1964, defendant drove his automobile in a southerly direction on Bluegrass Road near its intersection with Clover Lane in the County of Sacramento, and at that time plaintiff's infant daughter, Erin Lee Dillon, lawfully crossed Bluegrass Road. The complaint further alleged that defendant's negligent operation of his vehicle caused it to "collide with the deceased Erin Lee Dillon resulting in injuries to decedent which proximately resulted in her death." . . .

[Plaintiff brought three causes of action: one for the death of her daughter Erin; a second on behalf of another daughter, Cheryl, for the "great emotional disturbance and shock and injury" to her nervous system caused by her "close proximity to" and personal witnessing of the collision; and a third on her own behalf for "great emotional disturbance and shock and injury to her nervous system" arising because she "was in close proximity to the . . . collision and personally witnessed said collision." Defendant moved for judgment on the pleadings as to the second two counts, contending that "No cause of action is stated in that allegation that plaintiff sustained emotional distress, fright or shock induced by apprehension of negligently caused danger or injury or the witnessing of negligently caused injury to a third person. . . . Even where a child, sister or spouse is the object of the plaintiff's apprehension no cause of action is stated . . . unless the complaint alleges that the plaintiff suffered emotional distress, fright or shock as a result of fear for his own safety. . . ." The trial court sustained defendant's motion as to the mother because she was not within the zone of danger and denied that motion as to the second daughter, Cheryl, because of the possibility that she was within such zone of danger or feared for her own safety.]

[T]he complaint here presents the claim of the emotionally traumatized mother, who admittedly was not within the zone of danger, as contrasted with that of the sister, who may have been within it. The case thus illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. . . . We have . . . held that impact is not necessary for recovery. The zone-of-danger concept must, then, inevitably collapse

because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of impact. . . .

Normally the simple facts of plaintiff's complaint would establish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal.

The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, *Law of Torts*, supra, at pp. 332-333.)

The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards. "It must not be forgotten that 'duty' got into our law for the very purpose of combatting what was then feared to be a dangerous delusion (perhaps especially prevalent among juries imbued with popular notions of fairness untempered by paramount judicial policy), viz., that the law might countenance legal redress for all foreseeable harm." (Fleming, *An Introduction to the Law of Torts* (1967) p. 47.)

. . .

1. This court in the past has rejected the argument that we must deny recovery upon a legitimate claim because other fraudulent ones may be urged.

. . . The rationale apparently assumes that juries, confronted by irreconcilable expert medical testimony, will be unable to distinguish the deceitful from the bona fide. . . .

In the first instance, the argument proceeds from a doubtful factual assumption. Whatever the possibilities of fraudulent claims of physical injury by disinterested spectators of an accident, a question not in issue in this case, we certainly cannot doubt that a mother who sees her child killed will suffer physical injury from shock. . . .

In the second instance, and more fundamentally, the possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises. . . .

Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility . . . offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious. . . . [W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.

2. The alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases.

In order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable.

In the absence of “overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty. . . .” As a classic opinion states: “The risk reasonably to be perceived defines the duty to be obeyed. . . .” (*Palsgraf v. Long Island R.R. Co.* (1928) . . . [162 N.E. 99].) Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. (See Keeton, *Legal Cause in the Law of Torts* (1963) 18-20 . . . ).

We cannot now predetermine defendant’s obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.

We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

The evaluation of these factors will indicate the degree of the defendant’s foreseeability: obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person’s injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case.

In light of these factors the court will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability . . . contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. . . .

[T]he history of the cases does not show the development of a logical rule but rather a series of changes and abandonments. Upon the argument in each situation that the courts draw a Maginot Line to withstand an onslaught of false claims, the cases have assumed a variety of postures. At first they insisted that there be no recovery for emotional trauma at all. . . . They then

abandoned the requirement for physical impact but insisted that the victim fear for her own safety . . . , holding that a mother could recover for fear for her children's safety if she simultaneously entertained a personal fear for herself. . . . The final anomaly would be the instant case in which the sister, who observed the accident, would be granted recovery because she was in the "zone of danger," but the *mother*, not far distant, would be barred from recovery.

The successive abandonment of these positions exposes the weakness of artificial abstractions which bar recovery contrary to the general rules. As the commentators have suggested, the problem should be solved by the application of the principles of tort, not by the creation of exceptions to them. Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion. . . .

The judgment is reversed.

### Notes

1. *The triumph of foreseeability.* Consider the relationship between *Dillon* and the *Rowland* case, which we read in the materials on landowners and occupiers' liability. Each aims to replace a long-standing common law rule with a generalized foreseeability approach.

2. *Landmarks in the featureless generality of foreseeability.* The *Dillon* court did try to add some handholds in the otherwise featureless generality of the reasonableness standard. Justice Tobriner mentioned proximity in space, closeness in time, and nearness of relationship as three guiding principles for courts trying to determine which plaintiffs may bring causes of action for negligent infliction of emotional distress.

For forty-five years, California courts have struggled to apply the *Dillon* factors of time, space, and relationship. The goal of *Dillon* was to eliminate the arbitrary distinctions between cases where recovery is permitted and cases where it is not. But some observers argue that the *Dillon* factors have reintroduced the very arbitrary distinctions the court aimed to banish from the law. Consider that a father who witnesses his child's stillbirth as a result of negligent medical care may recover, see *Austin v. Regents of Univ. of Cal.*, 89 Cal. App. 3d 354 (1979), but that a father who receives real-time knowledge that his newborn baby has been delivered stillborn but does not witness the delivery cannot recover, see *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977). Nor can a mother who watches her daughter die as a result of a negligent misdiagnosis she did not observe, see *Jansen v. Children's Hosp. Med. Ctr.*, 31 Cal. App. 3d 22 (1973). A mother who arrives at the scene seconds after her son is injured in an explosion can recover, see *Archibald v. Braverman*, 275 Cal. App. 2d 253 (1969), but parents who arrive at the scene of a car accident "seconds after" their daughters were killed cannot, see *Parsons v. Superior Court*, 81 Cal. App. 3d 506 (1978). Nor can a mother who arrives at the scene of a car accident five minutes after her infant daughter dies, see *Arauz v. Gerhardt*, 68 Cal. App. 3d 937 (1977). Is there any good reason to doubt the emotional trauma experienced by any of these emotional distress plaintiffs?



Twenty years after *Dillon* was decided, the California Supreme Court announced that the *Dillon* factors ought to be viewed as rules so as to achieve predictability and consistency in future negligent infliction of emotional distress cases. See *Thing v. La Chusa*, 771 P.2d 814, 827 (Cal. 1989) (en banc). Is rule-based consistency reconcilable with the elimination of arbitrary distinctions between cases at the margin? Or does consistency and predictability necessarily reintroduce the kind of distinctions that the *Dillon* court described as arbitrary? Do *Dillon* and *La Chusa* simply rebuild another Maginot Line? For the first generation of post-*Dillon* cases, see George W. VanDeWeghe, Jr., *California Continues to Struggle with Bystander Claims for Negligent Infliction of Emotional Distress: Thing v. La Chusa*, 24 LOY. L. REV. 89, 93-96 (1990).

3. *Dillon's reception.* Currently, thirty-one states have adopted *Dillon's* bystander proximity test in adjudicating negligent infliction of emotional distress claims: Alaska, *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986); Arizona, *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (en banc); California, *Thing v. La Chusa*, 771 P.2d 814, 827 (Cal. 1989) (en banc); Connecticut, *Carrol v. Allstate Ins. Co.*, 815 A.2d 119 (Conn. 2003); Florida, *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); Hawaii, *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970); Indiana, *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000); Iowa, *Barnill v. Davis*, 300 N.W.2d 104 (Iowa 1981); Kentucky, *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012); Louisiana, *Maney v. Evans*, 780 So. 2d 1136 (La. Ct. App. 2001); Maine, *Michaud v. Great N. Nekoosa Corp.*, 715 A.2d 955 (Me. 1998); Massachusetts, *Migliori v. Airborne Freight Corp.*, 690 N.E.2d 413 (Mass. 1998); Michigan, *Hesse v. Ashland Oil, Inc.*, 642 N.W.2d 330 (Mich. 2002); Mississippi, *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982); Montana, *Versland v. Caron Transp.*, 671 P.2d 583 (Mont. 1983); Nebraska, *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 513 N.W.2d 870 (Neb. 1994); Nevada, *State v. Eaton*, 710 P.2d 1370 (Nev. 1985); New Hampshire, *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003); New Jersey, *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980); New Mexico, *Folz v. State*, 797 P.2d 246 (N.M. 1990); North Carolina, *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85 (N.C. 1990); Ohio, *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); Pennsylvania, *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979); Rhode Island, *Marchetti v. Parsons*, 638 A.2d 1047 (R.I. 1994); South Carolina, *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465 (S.C. 1985); Tennessee, *Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996); Texas, *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); Washington, *Gain v. Carroll Mill Co.*, 787 P.2d 553 (Wash. 1990) (en banc); West Virginia, *Jones v. Sanger*, 512 S.E.2d 590 (W. Va. 1998); Wisconsin, *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001); and Wyoming, *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986).

4. *Gender bias, redux.* Interestingly, the disparate impact on women of the traditional common law rule—if it really existed—may have dissipated, or at least transformed itself. One study in Australia concluded that women are more likely than men to recover for emotional distress claims. The study also found that women bring substantially more emotional distress claims than men. See Prue Vines, Mehera San Roque & Emily Rumble, *Is Nervous Shock Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia*, 18 TORT L. REV. 9, 16 (2010). Are such findings cause for celebration or critique?

5. *Crystals and mud in tort law.* The *Dillon* court's reference to the cyclical character of the effort to build new lines of defense in emotional distress cases has a parallel in the law of

property, where the distinguished scholar Carol Rose describes cycles of what she calls “crystals” and “mud” in the law. Property is, if anything, populated more heavily by hard-and-fast rules than torts is. Yet even in property, Rose detects a persistent oscillation from crystalline rules to muddy standards and back again. A crystal such as the rule in *Mitchell* gets messy with an intermediate position in *Falzone* and then gives way completely to the muddy standard of the reasonable foreseeability standard in *Dillon*, only to see the pendulum swing back again. Same with the old common law rule for landowners and occupiers, which allows exceptions in attractive nuisance and other especially sympathetic cases and then gives way entirely in *Rowland*—only to be revived, once again, in recent years.

What are the virtues and characteristic vices associated with these two legal styles? Why the ceaseless swings between them? As Rose observes, the persistent cycling between crystals and mud suggests that the quest to figure out once and for all which legal style is better may be a futile one:

[T]he history of property law tells us that we seem to be stuck with both. Even when we choose one . . . , the choice seems to dissolve, and instead of really choosing, we seem to oscillate between them. Because this pattern recurs so often in so many areas, it is difficult to believe that it is due to abnormal foolishness or turpitude, or that it can be permanently overcome by a more thoughtful or more virtuous choice . . . .

Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). Rules and standards—crystals and mud—are legal technologies that each have powerfully appealing virtues and gravely troubling flaws.

If Rose is right, then it would have been shocking if *Dillon* turned out to be the final word on the problem of emotional distress. And sure enough, it was not. In 1997, the distinctive crisis of thousands upon thousands of claims by injured workers and others against asbestos manufacturers led the United States Supreme Court to revisit the basic problem of negligently inflicted emotional injuries:

***Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997)**

BREYER, J.

The basic question in this case is whether a railroad worker negligently exposed to a carcinogen (here, asbestos) but without symptoms of any disease can recover under the Federal Employers’ Liability Act (FELA or Act) for negligently inflicted emotional distress. We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease. . . .

I.

Respondent, Michael Buckley, works as a pipefitter for Metro-North, a railroad. For three years (1985-1988) his job exposed him to asbestos for about one hour per working day. During that time Buckley would remove insulation from pipes, often covering himself with insulation dust that contained asbestos. Since 1987, when he attended an “asbestos awareness”

class, Buckley has feared that he would develop cancer—and with some cause, for his two expert witnesses testified that, even after taking account of his now-discarded 15-year habit of smoking up to a pack of cigarettes per day, the exposure created an added risk of death due to cancer, or to other asbestos-related diseases, of either 1% to 5% (in the view of one of plaintiff's experts), or 1% to 3% (in the view of another). Since 1989, Buckley has received periodic medical checkups for cancer and asbestosis. So far, those check-ups have not revealed any evidence of cancer or any other asbestos-related disease.

Buckley sued Metro-North under the FELA, a statute that permits a railroad worker to recover for an “injury . . . resulting . . . from” his employer's “negligence.” . . . His employer conceded negligence, but it did not concede that Buckley had actually suffered emotional distress, and it argued that the FELA did not permit a worker like Buckley, who had suffered no physical harm, to recover for [such] injuries. After hearing Buckley's case, the District Court dismissed the action. The court found that Buckley did not “offer sufficient evidence to allow a jury to find that he suffered a real emotional injury.” And, in any event, Buckley suffered no “physical impact”; hence any emotional injury fell outside the limited set of circumstances in which, according to this Court, the FELA permits recovery. . . . [S]ee *Consolidated Rail Corporation v. Gottshall* [U.S. 1994]. . . .

Buckley appealed, and the Second Circuit reversed. . . . Buckley's evidence, it said, showed that his contact with the insulation dust (containing asbestos) was “massive, lengthy, and tangible,” and that the contact “would cause fear in a reasonable person.” Under these circumstances, the court held, the contact was what this Court in *Gottshall* had called a “physical impact”—a “physical impact” that, when present, permits a FELA plaintiff to recover for accompanying emotional distress. . . .

## II

The critical question before us in respect to Buckley's “emotional distress” claim is whether the physical contact with insulation dust that accompanied his emotional distress amounts to a “physical impact” as this Court used that term in *Gottshall*. In *Gottshall*, an emotional distress case, the Court interpreted the word “injury” in FELA § 1, a provision that makes “[e]very common carrier by railroad . . . liable in damages to any person suffering injury while . . . employed” by the carrier if the “injury” results from carrier “negligence.” In doing so, it initially set forth several general legal principles applicable here. *Gottshall* described FELA's purposes as basically “humanitarian.” It pointed out that the Act expressly abolishes or modifies a host of common-law doctrines that previously had limited recovery. It added that this Court has interpreted the Act's language “liberally” in light of its humanitarian purposes. But, at the same time, the Court noted that liability under the Act rests upon “negligence” and that the Act does not make the railroad “the insurer” for all employee injuries. The Court stated that “common-law principles,” where not rejected in the text of the statute, “are entitled to great weight” in interpreting the Act, and that those principles “play a significant role” in determining whether, or when, an employee can recover damages for “negligent infliction of emotional distress.”

The Court also set forth several more specific legal propositions. It recognized that the common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within certain specific categories that amount to recovery-permitting exceptions.

The law, for example, does permit recovery for emotional distress where that distress accompanies a physical injury . . . , and it often permits recovery for distress suffered by a close relative who witnesses the physical injury of a negligence victim, e.g., *Dillon v. Legg*, [Cal. 1968] . . . . The Court then held that FELA § 1, mirroring the law of many States, sometimes permitted recovery “for damages for negligent infliction of emotional distress,” and, in particular, it does so where a plaintiff seeking such damages satisfies the common law’s “zone of danger” test. It defined that test by stating that the law permits “recovery for emotional injury” by

those plaintiffs who *sustain* a physical impact as a result of a defendant’s negligent conduct, or who are placed in immediate risk of physical harm by that conduct.

The case before us, as we have said, focuses on the italicized words “physical impact.” The Second Circuit interpreted those words as including a simple physical contact with a substance that might cause a disease at a future time, so long as the contact was of a kind that would “cause fear in a reasonable person.” In our view, however, the “physical impact” to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk. . . .

[C]ommon-law precedent does not favor the plaintiff. Common-law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress, and some courts permit a plaintiff who exhibits a physical symptom of exposure to recover . . . . But with only a few exceptions, common-law courts have denied recovery to those who, like Buckley, are disease and symptom free. . . .

[T]he general policy reasons to which *Gottshall* referred—in its explanation of why common-law courts have restricted recovery for emotional harm to cases falling within rather narrowly defined categories—militate against an expansive definition of “physical impact” here. Those reasons include: (a) special “difficult[y] for judges and juries” in separating valid, important claims from those that are invalid or “trivial”; (b) a threat of “unlimited and unpredictable liability”; and (c) the “potential for a flood” of comparatively unimportant, or “trivial,” claims.

To separate meritorious and important claims from invalid or trivial claims does not seem easier here than in other cases in which a plaintiff might seek recovery for typical negligently caused emotional distress. . . .

More important, the physical contact at issue here—a simple (though extensive) contact with a carcinogenic substance—does not seem to offer much help in separating valid from invalid emotional distress claims. That is because contacts, even extensive contacts, with serious carcinogens are common. See, e.g., Nicholson, Perkel, & Selikoff, *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980-2030*, 3 Am. J. Indust. Med. 259 (1982) (estimating that 21 million Americans have been exposed to work-related asbestos); . . . . They may occur without causing serious emotional distress, but sometimes they do cause distress, and reasonably so, for cancer is both an unusually threatening and unusually frightening disease. The relevant problem, however, remains one of evaluating a claimed emotional reaction to an *increased* risk of dying. An external circumstance—

exposure—makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? The evaluation problem seems a serious one.

The large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of “unlimited and unpredictable liability.” Does such liability mean, for example, that the costs associated with a rule of liability would become so great that, given the nature of the harm, it would seem unreasonable to require the public to pay the higher prices that may result? [citing Priest, 96 YALE L.J. 1521 (1987)]. The same characteristics further suggest what *Gottshall* called the problem of a “flood” of cases that, if not “trivial,” are comparatively less important. In a world of limited resources, would a rule permitting immediate large- scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease? Cf. J. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS. TORT LITIGATION* 10-11, 141 (1995); Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541 (1992).

We do not raise these questions to answer them (for we do not have the answers), but rather to show that general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well. . . .

For the reasons stated, we reverse the determination of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

[Justice Ginsburg, joined by Justice Stevens, separately concurred in this part of the Court’s judgment. In Ginsburg’s view, “Buckley’s extensive contact with asbestos particles in Grand Central’s tunnels . . . constituted ‘physical impact’ as that term was used in *Gottshall*.” Nonetheless, Ginsburg found that Buckley had failed to “present objective evidence of severe emotional distress” and concluded therefore that his emotional distress claim failed.]

## Notes

1. *Resistance to Dillon.* The Supreme Court’s *Buckley* decision is not alone in its skepticism for the *Dillon* approach. It may even stand for a broader resistance to *Dillon*’s heavy reliance on an open-ended and case-by-case reasonableness analysis. Nearly fifty years after *Dillon*, seven states still do not recognize claims for the negligent infliction of emotional distress absent physical impact, retaining the old rule of *Mitchell v. Rochester Railway*. For cases retaining the common law rule, see Arkansas, *Mechs. Lumber Co. v. Smith*, 752 S.W.2d 763 (Ark. 1988); Georgia, *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000); Idaho, *Evans v. Twin Falls Cnty.*, 796 P.2d 87 (Idaho 1990); Kansas, *Hopkins v. State*, 702 P.2d 311 (Kan. 1985); Oklahoma, *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 916 P.2d 241 (Okla.

1996); Oregon, *Hammond v. Cent. Lane Commc'ns Ctr.*, 816 P.2d 593 (Or. 1991) (en banc); and Virginia, *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973).

Justice Breyer's opinion in *Buckley* does not, however, merely restate the generalized fears of a glut of litigation cited by the state courts in cases like *Mitchell* and *Ward*. Instead, Justice Breyer's decision rests largely on a very specific policy consideration: the risk that paying emotional distress damages for fear of cancer now might deplete funds available later for the victims of deadly asbestos-related diseases like mesothelioma.

2. *Buckley and medical monitoring damages.* *Buckley* also advanced a separate claim for damages arising out of increased medical monitoring costs. In a separate part of Justice Breyer's opinion for the Court, not excerpted above, he assumed that an "exposed plaintiff can recover related reasonable medical monitoring costs if and when he develops symptoms." But to the extent that the Second Circuit had recognized a distinct "tort law cause of action [under the FELA] permitting . . . the recovery of medical cost damages in the form of a lump sum" absent such symptoms, the Supreme Court drew back. Justice Breyer noted that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." In Breyer's view, this fact threatened "both a 'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed . . .) and the systemic harms that can accompany 'unlimited and unpredictable liability' (for example, vast testing liability adversely affecting the allocation of scarce medical resources)." Breyer noted, for example, that while "*Buckley* here sought damages worth \$950 annually for 36 years, 'the average settlement for plaintiffs injured by asbestos' between 1988 and 1993 'was about \$12,500.'" (Nonmalignant plaintiffs received settlements averaging still less: \$8,810.)

Breyer also observed that "a traditional, full-blown ordinary tort liability rule would ignore the presence of existing alternative sources of payment" such as health insurance or statutorily-mandated monitoring for asbestos injuries, "thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources . . . might provide monitoring in any event."

Accordingly, the Court rejected *Buckley*'s medical monitoring claim. In doing so, however, the Court declined to "express any view here about the extent to which the FELA might, or might not, accommodate medical cost recovery rules more finely tailored" than the lump-sum full-recovery rule advocated by the plaintiff and adopted by the Second Circuit.

Justices Ginsburg and Stevens dissented from the majority's decision to order the dismissal of *Buckley*'s medical monitoring claim:

The Court of Appeals held that a medical monitoring claim is solidly grounded, and this Court does not hold otherwise. Hypothesizing that *Buckley* demands lump-sum damages and nothing else, the Court ruminates on the appropriate remedy without answering the anterior question: Does the plaintiff have a claim for relief? *Buckley* has shown that Metro-North negligently exposed him to "extremely high levels of asbestos," and that this exposure warrants "medical monitoring in order to detect and treat [asbestos-related] diseases as they may

arise.” . . . Buckley’s expert medical witness estimated the annual costs of proper monitoring at \$950. We do not know from the Court’s opinion what more a plaintiff must show to qualify for relief.

521 U.S. at 448 (Ginsburg, J., concurring and dissenting).

3. *Norfolk & Western v. Ayres*: *The limits of Buckley*. What about plaintiffs with mental anguish alongside physical symptoms caused by asbestos exposure? Did *Buckley*’s rationale extend to their emotional distress claims as well? The Supreme Court took up this question six years after *Buckley* in *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003).

In *Norfolk & Western*, the Court clarified that “mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker” when they are “associated with, or ‘parasitic’ on, a physical injury.”

Distinguishing *Metro-North v. Buckley*, the Court contended that the “universe of potential claimants” with asbestosis symptoms in fear of cancer claims would be “only a fraction” of those exposed to asbestos, citing studies indicating that “of persons exposed to asbestos after 1959, only 2 percent had asbestosis when first examined.” *Norfolk & Western*, 538 U.S. at 157.

Finally, the Court acknowledged concerns it had articulated in the late 1990s in class action asbestos cases: “The ‘elephantine mass of asbestos cases’ lodged in state and federal courts, we again recognize, ‘defies customary judicial administration and calls for national legislation.’ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).” But Justice Ginsburg insisted that courts must nonetheless “resist pleas of the kind Norfolk has made, essentially to reconfigure established liability rules because they do not serve to abate today’s asbestos litigation crisis.” *Norfolk & Western*, 538 U.S. at 166.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O’Connor and Breyer dissented from the majority’s holding on the fear of cancer claims at issue on the grounds that neither the Court’s prior FELA interpretations nor common law principles compelled or justified the majority view. Moreover, Justice Kennedy contended that “the realities of asbestos litigation,” *id.* at 167, warranted holding that asbestos plaintiffs suffering from asbestosis should not be able to recover for fear of future cancer. In particular, Justice Kennedy expressed concern that those asbestos plaintiffs who eventually contract diseases such as mesothelioma, for example, would be less likely to be able to recover damages “for the simple reason that, by the time [they were] entitled to sue for the cancer, the funds available for compensation in all likelihood will have disappeared, depleted by verdicts awarding damages for unrealized fear, verdicts the majority is so willing to embrace.” *Id.* at 168.

Justice Breyer added a separate dissenting opinion, emphasizing that “the Second Restatement neither gives a definition of the kind of ‘emotional disturbance’ for which recovery is available nor otherwise states that recovery is available for any kind of emotional disturbance whatsoever.” *Id.* at 182.

The underlying history underscores the openness of the legal question and the consequent uncertainty as to the answer. When Congress enacted the Federal Employers' Liability Act (FELA) in 1908, the kinds of injury that it primarily had in mind were those resulting directly from physical accidents, such as railway collisions and entanglement with machinery.

"Given the legal uncertainty," Justice Breyer wrote, "this Court, acting like any court interpreting the common law . . . should determine the proper rule of law through reference to the underlying factors that have helped to shape related 'emotional distress' rules. Those factors argue for the kind of liability limitation that Justice Kennedy has described." *Id.* at 182-84.

4. *Whither negligent infliction of emotional distress?* What is the current state of play in the oscillation of crystals and mud in the law of negligently inflicted emotional distress? Where do *Dillon*, *Buckley*, and *Ayers* leave the law in this area?

## **D. To Whom Does a Defendant Owe a Duty?**

### **1. The Duty Debate (Part 1)**

Now that we have seen a few examples of the duty analysis in action, it is worth stepping back and taking a brief look at the theoretical debates that scholars have carried on about the subject. We will return to these debates at the end of this section, but for now consider a classic statement from one of the leading twentieth-century critics of the duty inquiry followed by a more recent defense of the duty idea from two leading torts scholars from closer to our own time:

***William L. Prosser, Handbook of the Law of Torts § 31, at 180, 185 (1941)***

The statement that there is or is not a duty [of care] begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. . . . The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff.

***John Goldberg & Benjamin Zipursky, The Moral of MacPherson 146 U. PA. L. REV. 1733, 1810-11 (1998)***

[Prosser] insists that conceptual categories must be incoherent unless they are tied to specific utilitarian goals, such as deterrence, compensation or



administrative ease. Prosser was not able to recognize the possibility of a principle that links the justification for imposing a duty to compensate a plaintiff with the question of whether the defendant had actually breached a duty to the plaintiff. This principle treats liability-imposition as having a normative structure and significance apart from its instrumental value.

What is the nub of the disagreement between Prosser, on the one hand, and Goldberg and Zipursky, on the other?

When mid-twentieth-century torts jurist William Prosser—the long-time dean at the University of California at Berkeley—argued that the duty stage of the tort analysis was redundant, his critique represented the culmination of legal realists’ functional analysis of tort law in the early twentieth century. The same generation of lawyers that critiqued such traditional doctrinal notions as causation and fault made “duty” a principal target of their functionalist project. A half-century later, their view continues to be influential. The Third Restatement, for example, recommends that typical torts cases ought not involve a separate duty analysis at all; duty or modified duty determinations, the Third Restatement urges, should be limited to “exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b), cmt. a (2010).

Nonetheless, the duty concept remains a separate analytic stage in virtually every American jurisdiction. And of late, distinguished jurists like Harvard’s Goldberg and Fordham’s Zipursky (authors of the excerpt above) have defended the duty analysis and countered Prosser’s long-standing realist argument against it. Defenders of the duty principle insist that the idea of particular relational duties is central to the normative structure of tort law. Rejecting the realists’ instrumental or functional ideas of duty, scholars like Goldberg and Zipursky argue that duty embodies the essential bilateral structure of tort law’s duties: duties that do not run to the whole world, but that run (as Cardozo’s *Palsgraf* opinion suggested) to particular people and perhaps even exclusively for certain wrongfully imposed risks. Functional theories of tort law, on this view, do not capture what tort law does—namely, require the repair of losses because they are wrongful with respect to certain people. The duty element of the analysis (according to its defenders, anyway) focuses the torts inquiry on the defendant’s wrongfulness and on the significance of that wrongfulness for the plaintiff’s injuries and for whether defendant has an obligation to repair those injuries. *See generally* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L. REV. 695, 699-709 (2003).

Keep the debate in mind as you read the cases. Ask yourself the question: Who has the better of the argument over duty in American tort law?

## 2. Cases and Materials

### ***Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985)**

KAYE, J.

On July 13, 1977, a failure of defendant Consolidated Edison's power system left most of New York City in darkness. In this action for damages allegedly resulting from the power failure, we are asked to determine whether Con Edison owed a duty of care to a tenant who suffered personal injuries in a common area of an apartment building, where his landlord—but not he—had a contractual relationship with the utility. We conclude that in the case of a blackout of a metropolis of several million residents and visitors, each in some manner necessarily affected by a 25-hour power failure, liability for injuries in a building's common areas should, as a matter of public policy, be limited by the contractual relationship. . . .

Plaintiff, Julius Strauss, then 77 years old, resided in an apartment building in Queens. Con Edison provided electricity to his apartment pursuant to agreement with him, and to the common areas of the building under a separate agreement with his landlord, defendant Belle Realty Company. As water to the apartment was supplied by electric pump, plaintiff had no running water for the duration of the blackout. Consequently, on the second day of the power failure, he set out for the basement to obtain water, but fell on the darkened, defective basement stairs, sustaining injuries. In this action against Belle Realty and Con Edison, plaintiff alleged negligence against the landlord, in failing to maintain the stairs or warn of their dangerous condition, and negligence against the utility in the performance of its duty to provide electricity.

Plaintiff moved for partial summary judgment against Con Edison (1) to estop it from contesting the charge of gross negligence in connection with the blackout, and (2) to establish that Con Edison owed a duty of care to plaintiff. He argued that Con Edison was prohibited from denying it was grossly negligent by virtue of the affirmed jury verdict in *Food Pageant v. Consolidated Edison* [a prior case arising out of the same blackout], and that it owed plaintiff a duty even though he was “not a customer of Consolidated Edison in a place where the accident occurred.” Con Edison cross-moved for summary judgment dismissing the complaint, maintaining it had no duty to a noncustomer.

The court granted the motion insofar as it sought collateral estoppel regarding gross negligence, and denied Con Edison's cross motion to dismiss the complaint, finding a question of fact as to whether it owed plaintiff a duty of care. The Appellate Division reversed and dismissed the complaint against Con Edison. Citing *Moch Co. v. Rensselaer Water Co.*, the plurality concluded that “Con Ed did not owe a duty to plaintiff in any compensable legal sense.” Justice Gibbons dissented, finding extension of the duty tolerable here because “[t]he tenants of the building in question constitute a defined, limited and known group of people.” On public policy grounds, we now affirm the Appellate Division order dismissing the complaint against Con Edison.

A defendant may be held liable for negligence only when it breaches a duty owed to the plaintiff. The essential question here is whether Con Edison owed a duty to plaintiff, whose

injuries from a fall on a darkened staircase may have conceivably been foreseeable, but with whom there was no contractual relationship for lighting in the building's common areas.

Duty in negligence cases is defined neither by foreseeability of injury . . . nor by privity of contract. As this court has long recognized, an obligation rooted in contract may engender a duty owed to those not in privity, for “[t]here is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use” (*MacPherson v. Buick Motor Co.*). In *Fish v. Waverly Elec. Light & Power Co.*, for example, an electric company which had contracted with the plaintiff's employer to install ceiling lights had a duty to the plaintiff to exercise reasonable care. And in *Glanzer v. Shepard*, a public weigher, hired by a seller of beans to certify the weight of a particular shipment, was found liable in negligence to the buyer.

But while the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, “to limit the legal consequences of wrongs to a controllable degree” . . . and to protect against crushing exposure to liability . . . “In fixing the bounds of that duty, not only logic and science, but policy play an important role.” . . . The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied.

Considerations of privity are not entirely irrelevant in implementing policy. Indeed, in determining the liability of utilities for consequential damages for failure to provide service—a liability which could obviously be “enormous,” and has been described as “*sui generis*,” rather than strictly governed by tort or contract law principles (*see*, Prosser and Keeton, Torts § 92, at 663 [5th ed] )—courts have declined to extend the duty of care to noncustomers. For example, in *Moch, supra*, a water works company contracted with the City of Rensselaer to satisfy its water requirements. Plaintiff's warehouse burned and plaintiff brought an action against the water company in part based on its alleged negligence in failing to supply sufficient water pressure to the city's hydrants. The court denied recovery, concluding that the proposed enlargement of the zone of duty would unduly extend liability. . . .

In the view of the Appellate Division dissenter, *Moch* does not control because the injuries here were foreseeable and plaintiff was a member of a specific, limited, circumscribed class with a close relationship with Con Edison. The situation was thought to be akin to *White v. Guarente*, where an accounting firm was retained by a limited partnership to perform an audit and prepare its tax returns. As the court noted there, the parties to the agreement contemplated that individual limited partners would rely on the tax returns and audit. Refusing to dismiss a negligence action brought by a limited partner against the accounting firm, the court said, “the services of the accountant were not extended to a faceless or unresolved class of persons, but rather to a known group possessed of vested rights, marked by a definable limit and made up of certain components.” . . .

Central to these decisions was an ability to extend the defendant's duty to cover specifically foreseeable parties but at the same time to contain liability to manageable levels. . . . Here, insofar as revealed by the record, the arrangement between Con Edison and Belle Realty was no different from those existing between Con Edison and the millions of other customers it serves. . . . When plaintiff's relationship with Con Edison is viewed from this

perspective, it is no answer to say that a duty is owed because, as a tenant in an apartment building, plaintiff belongs to a narrowly defined class.

Additionally, we deal here with a system-wide power failure occasioned by what has already been determined to be the utility's gross negligence. If liability could be found here, then in logic and fairness the same result must follow in many similar situations. For example, a tenant's guests and invitees, as well as persons making deliveries or repairing equipment in the building, are equally persons who must use the common areas, and for whom they are maintained. Customers of a store and occupants of an office building stand in much the same position with respect to Con Edison as tenants of an apartment building. . . . [P]ermittting recovery to those in plaintiff's circumstances would, in our view, violate the court's responsibility to define an orbit of duty that places controllable limits on liability. . . .

In sum, Con Edison is not answerable to the tenant of an apartment building injured in a common area as a result of Con Edison's negligent failure to provide electric service as required by its agreement with the building owner. Accordingly, the order of the Appellate Division should be affirmed, with costs.

MEYER, J., dissenting.

My disagreement with the majority results not from its consideration of public policy as a factor in determining the scope of Con Ed's duty, but from the fact that in reaching its public policy conclusion it has considered only one side of the equation . . . .

As Professors Prosser and Keeton have emphasized, "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . ."

. . . .

The majority's blind acceptance of the notion that Consolidated Edison will be crushed if held liable to the present plaintiff and others like him ignores the possibility that through application to the Public Service Commission Con Ed can seek such reduction of the return on stockholders' equity . . . , or increase in its rates, or both, as may be necessary to pay the judgments obtained against it. It ignores as well the burden imposed upon the persons physically injured by Con Ed's gross negligence or, as to those forced to seek welfare assistance because their savings have been wiped out by the injury, the State. Doing so in the name of public policy seems particularly perverse, for what it says, in essence, is the more persons injured through a tortfeasor's gross negligence, the less the responsibility for injuries incurred.

WACHTLER, C.J., and SIMONS, ALEXANDER and TITONE, JJ., concur with KAYE, J.

MEYER, J., dissents and votes to reverse in a separate opinion in which JASEN, J., concurs.

## Notes

1. *Liability for public utilities.* Unlike the New York Court of Appeals in *Moch* and *Strauss*, other courts have refused to immunize utility companies from liability incurred by third parties. After the New York Court of Appeals decided *Moch*, the Pennsylvania Supreme Court held that a defendant-utility company could be liable for negligence even though the plaintiff had no contractual relationship with the defendant. *See Doyle v. South Pittsburgh Water Co.*, 199 A.2d 875, 878 (Pa. 1964). After the New York Court of Appeals decided *Strauss*, the New Jersey Supreme Court refused to immunize a defendant-utility company from liability arising outside of a contractual relationship. *See Weinberg v. Dinger*, 524 A.2d 366, 378 (N.J. 1987).

The Restatement (Third) of Torts criticizes *Moch*. In particular, the Restatement notes:

[t]he difficulty with [*Moch*] is that the provision of utilities creates an expectation of and reliance on continued service. When the utility ceases to supply service, the omission is much like ceasing to provide warning signals at a railroad crossing. . . . [R]eliance on the utility's continuing to provide its services is a cause of harm.

RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 42 cmt. i (2012). Nevertheless, the New York Court of Appeals continues to apply *Strauss* and *Moch*, even in cases that do not involve utility companies. *See, e.g., Espinal v. Melville Snow Contrs.*, 773 N.E.2d 485, 489 (N.Y. 2002) (holding that defendant snow removal company owed the injured party no duty of care because the defendant contracted with the injured party's employer, not the injured party himself).

2. *Scholarly reaction to Strauss.* Certain scholars have criticized the *Strauss* court's reasoning. For example, Professors Goldberg and Zipursky have stated that the plaintiff's case for a duty was particularly strong in *Strauss* because "the very point in providing electricity to building owners is to provide for the needs and safety of their tenants." John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 719 (2001). The *Strauss* court, however, was concerned about the monetary burden "imposed on New York's major electrical supplier" if the defendant-utility company was negligent. *Id.* Thus, the court disguised a policy rationale by issuing a "no duty decision." *Id.* (Query: was providing for the needs and safety of tenants "the very point" of providing electricity? Or was the point of providing electricity to provide for the needs and safety of tenants at reasonable cost to those tenants, while providing reasonable return for ComEd's shareholders?) Other scholars have stated that New York courts "act like a legislature when deciding duty in [cases like *Strauss*]." Anthony J. Sebok, *What's Law Got to Do with It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 516 (2001). Does a court have a non-legislative option in such cases?

Professor Daniel Farber has praised the *Strauss* court: "*Strauss* created a triage rule, identifying a subclass of victims (those in privity of contract with the utility) whose claims seemed particularly deserving to the court. . . . [This rule] at least establish[es] the possibility of cutting potentially unmanageable cases down to size." Daniel A. Farber, *Tort Law in the*

*Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1128 (2009).

3. *Policy arguments?* What other policy arguments would support the *Strauss* and *Moch* courts' holdings? One court has considered consumer welfare as a reason to immunize utility companies from liability. According to the court's analysis, liability would increase utility companies' costs, which would be passed on to consumers in the form of higher utility rates. In contrast to insurance premiums, which vary according to the risk of loss, higher rates would be uniform for all consumers. The class of insurance company customers would form an ersatz insurance pool—but one in which the low-risk consumers would subsidize high-risk consumers. See *Reimann v. Monmouth Consol. Water Co.*, 87 A.2d 325, 327 (N.J. 1952), *overruled by Weinberg v. Dinger*, 524 A.2d 366, 378 (N.J. 1987). Why won't the costs be borne, as the dissenter in *Strauss* objected, by the utility company's shareholders in the form of lower returns to capital or by the company's employees in the form of lower wages? Determining the incidence of tort liability in settings characterized by networks of contracts turns out to be exceedingly complicated and to turn on the relative elasticities of supply and demand in the networks of markets (capital, labor, consumer) in which the relevant firms are involved. Sometimes the best one can say is that the incidence of a new tort liability is an empirical question. See, e.g., Price Fishback & Shawn Kantor, *Prelude to the Welfare State: The Origins of Workers' Compensation* (2000) (employing sophisticated econometric techniques to conclude that the enactment of workers' compensation statutes created costs that were borne in part by employers and in part by employees in the form of lower wages).

4. *Subrogation claims.* Ought insurance companies be able to sue utility companies to recover losses sustained by the homeowners and tenants they insure? Some courts do not allow these subrogation claims on the theory that such a liability scheme would doubly harm consumers: if liability is imposed, the theory goes, consumers would not only pay homeowners' or renters' insurance to cover future risks but would also pay higher water rates to utility companies. *Franklin Mut. Ins. Co. v. Jersey Cent. Power & Light Co.*, 902 A.2d 885, 887 (N.J. 2006); *William Bufford & Co. v. Glasgow Water Co.*, 2 S.W.2d 1027, 1029 (Ky. 1928). (Won't premiums decrease to reflect the lower costs of providing insurance where such subrogation actions are available?) An insurer may, however, bring subrogation claims against utility companies that negligently cause property damage in some way other than by a service disruption. See *E & M Liquors, Inc. v. Public. Serv. Elec. & Gas Co.*, 909 A.2d 1141, 1143 (N.J. App. Div. 2006).

5. What about one party's obligations to exercise reasonable care in controlling another? The next materials take up this problem.

***Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970)**

WILKEY, J.

The appellee apartment corporation states that there is “only one issue presented for review . . . whether a duty should be placed on a landlord to take steps to protect tenants from foreseeable criminal acts committed by third parties.” The District Court as a matter of law held that there is no such duty. We find that there is, and that in the circumstances here the applicable standard of care was breached. . . .

I

The appellant, Sarah B. Kline, sustained serious injuries when she was criminally assaulted and robbed at approximately 10:15 in the evening by an intruder in the common hallway of an apartment house at 1500 Massachusetts Avenue. This facility, into which the appellant Kline moved in October 1959, is a large apartment building with approximately 585 individual apartment units. It has a main entrance on Massachusetts Avenue, with side entrances on both 15th and 16th Streets. At the time the appellant first signed a lease a doorman was on duty at the main entrance twenty-four hours a day, and at least one employee at all times manned a desk in the lobby from which all persons using the elevators could be observed. The 15th Street door adjoined the entrance to a parking garage used by both the tenants and the public. Two garage attendants were stationed at this dual entranceway; the duties of each being arranged so that one of them always was in position to observe those entering either the apartment building or the garage. The 16th Street entrance was unattended during the day but was locked after 9:00 P.M.

By mid-1966, however, the main entrance had no doorman, the desk in the lobby was left unattended much of the time, the 15th Street entrance was generally unguarded due to a decrease in garage personnel, and the 16th Street entrance was often left unlocked all night. The entrances were allowed to be thus unguarded in the face of an increasing number of assaults, larcenies, and robberies being perpetrated against the tenants in and from the common hallways of the apartment building. These facts were undisputed, and were supported by a detailed chronological listing of offenses admitted into evidence. The landlord had notice of these crimes and had in fact been urged by appellant Kline herself prior to the events leading to the instant appeal to take steps to secure the building.

Shortly after 10:00 P.M. on November 17, 1966, Miss Kline was assaulted and robbed just outside her apartment on the first floor above the street level of this 585 unit apartment building. This occurred only two months after Leona Sullivan, another female tenant, had been similarly attacked in the same commonway.

II

At the outset we note that of the crimes of violence, robbery, and assault which had been occurring with mounting frequency on the premises at 1500 Massachusetts Avenue, the assaults on Miss Kline and Miss Sullivan took place in the hallways of the building, which were under the exclusive control of the appellee landlord. Even in those crimes of robbery or assault committed in individual apartments, the intruders of necessity had to gain entrance

through the common entry and passageways. These premises fronted on three heavily traveled streets, and had multiple entrances. The risk to be guarded against therefore was the risk of unauthorized entrance into the apartment house by intruders bent upon some crime of violence or theft.

While the apartment lessees themselves could take some steps to guard against this risk by installing extra heavy locks and other security devices on the doors and windows of their respective apartments, yet this risk in the greater part could only be guarded against by the landlord. No individual tenant had it within his power to take measures to guard the garage entranceways, to provide scrutiny at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building, to provide additional locking devices on the main doors, to provide a system of announcement for authorized visitors only, to close the garage doors at appropriate hours, and to see that the entrance was manned at all times.

The risk of criminal assault and robbery on a tenant in the common hallways of the building was thus entirely predictable; that same risk had been occurring with increasing frequency over a period of several months immediately prior to the incident giving rise to this case; it was a risk whose prevention or minimization was almost entirely within the power of the landlord; and the risk materialized in the assault and robbery of appellant on November 17, 1966.

### III

. . . As a general rule, a private person does not have a duty to protect another from a criminal attack by a third person. We recognize that this rule has sometimes in the past been applied in landlord-tenant law, even by this court. Among the reasons for the application of this rule to landlords are: judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another resulting therefrom; the oftentimes difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

But the rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living, particularly in the circumstances of this case. The rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. The landlord is no insurer of his tenants' safety, but he certainly is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.

. . .



Other relationships in which similar duties have been imposed include landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient, and carrier-passenger. In all, the theory of liability is essentially the same: that since the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated. However, there is no liability normally imposed upon the one having the power to act if the violence is sudden and unexpected provided that the source of the violence is not an employee of the one in control.

...

Upon consideration of all pertinent factors, we find that there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling.

...

#### IV

[I]n the last analysis the standard of care is the same—reasonable care in all the circumstances. The specific measures to achieve this standard vary with the individual circumstances. It may be impossible to describe in detail for all situations of landlord-tenant relationships, and evidence of custom amongst landlords of the same class of building may play a significant role in determining if the standard has been met.

In the case at bar, appellant's repeated efforts to introduce evidence as to the standard of protection commonly provided in apartment buildings of the same character and class as 1500 Massachusetts Avenue at the time of the assault upon Miss Kline were invariably frustrated by the objections of opposing counsel and the impatience of the trial judge. . . . The record as to custom is thus unsatisfactory, but its deficiencies are directly chargeable to defendant's counsel and the trial judge, not appellant.

We therefore hold in this case that the applicable standard of care in providing protection for the tenant is that standard which this landlord himself was employing in October 1959 when the appellant became a resident on the premises at 1500 Massachusetts Avenue. The tenant was led to expect that she could rely upon this degree of protection. While we do not say that the precise measures for security which were then in vogue should have been kept up (e.g., the number of people at the main entrances might have been reduced if a tenant-controlled intercom-automatic latch system had been installed in the common entryways), we do hold that the same relative degree of security should have been maintained.

The appellant tenant was entitled to performance by the landlord measured by this standard of protection whether the landlord's obligation be viewed as grounded in contract or in tort. As we have pointed out, this standard of protection was implied as an obligation of the lease contract from the beginning. Likewise, on a tort basis, this standard of protection may be taken as that commonly provided in apartments of this character and type in this community, and this is a reasonable standard of care on which to judge the conduct of the landlord here.

V

Given this duty of protection, and the standard of care as defined, it is clear that the appellee landlord breached its duty toward the appellant tenant here. . . .

Having said this, it would be well to state what is not said by this decision. We do not hold that the landlord is by any means an insurer of the safety of his tenants. His duty is to take those measures of protection which are within his power and capacity to take, and which can reasonably be expected to mitigate the risk of intruders assaulting and robbing tenants. The landlord is not expected to provide protection commonly owed by a municipal police department; but as illustrated in this case, he is obligated to protect those parts of his premises which are not usually subject to periodic patrol and inspection by the municipal police. We do not say that every multiple unit apartment house in the District of Columbia should have those same measures of protection which 1500 Massachusetts Avenue enjoyed in 1959, nor do we say that 1500 Massachusetts Avenue should have precisely those same measures in effect at the present time. Alternative and more up-to-date methods may be equally or even more effective.

. . .

The landlord is entirely justified in passing on the cost of increased protective measures to his tenants, but the rationale of compelling the landlord to do it in the first place is that he is the only one who is in a position to take the necessary protective measures for overall protection of the premises, which he owns in whole and rents in part to individual tenants.

Reversed and remanded to the District Court for the determination of damages.

### Notes

1. *Kline's durability*. D.C. courts have continued to apply *Kline*. See, e.g., *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902 (D.C. Cir. 2006). Other federal courts of appeal and most state supreme courts have also applied *Kline* in similar contexts. See, e.g., *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984); *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986). One state supreme court, however, has limited *Kline's* holding to situations in which the landlord either agrees to provide security or creates a physical defect that foreseeably increases the risk of criminal attack. See *Ward v. Inishmann Assocs.*, 931 A.2d 1235 (N.H. 2007).

2. *High-rent protections for slum prices?* Does the *Kline* court decision purport to give the plaintiff 1959 protections for 1966 prices? What if the rental market would no longer support the kinds of staffing that the building had employed in 1959? One way to think of *Kline* is as a case requiring that landlords make highly salient at the time of lease renewals certain reductions in the quality of the services offered to tenants. Had the landlord brought staffing reductions to the plaintiff-tenant's attention each year at the time her lease was renewed, would the case come out differently? What if the landlord also disclosed crime statistics for the building so that the plaintiff-tenant had possessed full information about the risks at hand? Even if competitor buildings were offering better staffing and higher security, such disclosures

might offer powerful arguments against liability. Indeed, the arguments against landlord liability might be stronger if competitor buildings offered better security services, since that would make it clear that the tenant could have pursued a higher security living option in the market if she had so desired. Of course, many tenants would not have been able to afford the higher security apartments. But if a tenant prefers low security and concomitantly low rent payments, shouldn't a landlord be able to offer this combination? Does the alternative deny certain low-income tenants a low-cost housing option?

Note that none of these arguments necessarily go to the question of whether the landlord in *Kline* had a duty of reasonable care. They are probably best thought of as considerations in determining whether the defendant's conduct breached its duty of care to the plaintiff.

3. *Duties versus liabilities.* A recent variation on *Kline* arose in Illinois, where Detroy Marshall, III, was eating in a Winnebago County Burger King when a car crashed through the restaurant's wall and killed him. In the wrongful death suit against Burger King that followed, the court observed that the defendants' arguments about the great costs that would be imposed on them by a finding of a duty to protect against such third party drivers was deeply flawed:

Defendants argue that businesses will incur an immense financial burden if required to protect their invitees from out-of-control automobiles and that the protective measures businesses take will make buildings everywhere less aesthetically pleasing. These arguments are based on mistaken assumptions about the nature of a duty of care. Recognizing that the duty of reasonable care that businesses owe to their invitees applies to cases where invitees are injured by out-of-control automobiles is not the same as concluding the duty has been breached because a business failed to take a certain level of precaution. Nor is it the same as concluding that the breach was the proximate cause of an invitee's injuries. In short, merely concluding that the duty applies does not constitute an automatic, broad-based declaration of negligence liability.

*Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006).

The *Marshall* court concluded that the duty of reasonable care owed by the restaurant to the plaintiff included an obligation to take reasonable precautions against the risk of injury to customers by automobiles driven against the restaurant's exterior walls.

Other jurisdictions have been reluctant to adopt the *Marshall* court's reasoning. The Indiana Court of Appeals has held that business owners owe a duty to business invitees in vehicular collision cases, see *Schoop's Rest. v. Hardy*, 863 N.E.2d 451 (Ind. Ct. App. 2007), but has not officially overruled a previous case that held the opposite, see *Fawley v. Martin's Supermarkets, Inc.*, 618 N.E.2d 10 (Ind. Ct. App. 1993). Some jurisdictions have declined to recognize such a duty. See, e.g., *Albert v. Hsu*, 602 So. 2d 895 (Ala. 1992); *Glick v. Prince Italian Foods, Inc.*, 514 N.E.2d 100 (Mass. App. Ct. 1987); *Howe v. Stubbs*, 570 A.2d 1203 (Me. 1990); *Carpenter v. Stop-N-Go Markets of Ga., Inc.*, 512 So. 2d 708 (Miss. 1987); *Watkins v. Davis*, 308 S.W.2d 906 (Tex. Civ. App. 1957).

***Ennabe v. Manosa*, 319 P.3d 201 (Cal. 2014)**

WERDEGAR, J.

. . . On the evening of April 27, 2007, defendant Jessica Manosa (Manosa) hosted a party at a vacant rental residence owned by her parents, defendants Carlos and Mary Manosa, without their consent. The party was publicized by word of mouth, telephone, and text messaging, resulting in an attendance of between 40 and 60 people. The vast majority of attendees were, like Manosa, under 21 years of age.

For her party, Manosa personally provided \$60 for the purchase of rum, tequila, and beer. She also provided cups and cranberry juice, but nothing else. Two of Manosa's friends, Mario Aparicio and Marcello Aquino, also provided money toward the initial purchase of alcohol, and Aquino purchased the alcoholic beverages for the party with this money. The beer was placed in a refrigerator in the kitchen, and the tequila and "jungle juice" (a mixture of rum and fruit juice) were placed outside on a table at the side of the house. Manosa did not have a license to sell alcoholic beverages.

Guests began to arrive at the party around 9:00 p.m., entering through a side gate in the yard. Aquino heard Manosa ask Todd Brown to "stand by the side gate to kind of control the people that came in and if he didn't know them, then charge them some money to get into the party." Brown thereafter served as a "bouncer," standing at the gate and charging uninvited guests an admission fee of \$ 3 to \$ 5 per person. Once inside, partygoers enjoyed music played by a disc jockey Manosa had hired and could help themselves to the beer, tequila, and jungle juice.

Thomas Garcia, who had not been invited and was unknown to Manosa, testified that a "big, tall, husky, Caucasian dude" was charging an entrance fee to get into the party. Garcia paid \$20 so that he and three or four of his friends could enter. The person who took Garcia's money, presumably Brown, told him alcoholic beverages were available if he wanted them. Mike Bosley, another uninvited guest, declared he was charged \$ 5 to enter the party. Brown eventually collected between \$ 50 and \$ 60 in entrance fees, and this money was used to buy additional alcohol sometime during the party. The record is unclear whether any attendees brought their own alcoholic beverages or whether Manosa provided the only alcohol consumed on the premises.

Sometime before midnight, decedent Andrew Ennabe arrived at the party; he was Manosa's friend and an invited guest. Thomas Garcia and his friends arrived about 30 minutes later and were charged admission. Ennabe and Garcia, both under 21 years of age, were visibly intoxicated on arrival. Garcia in particular exhibited slurred speech and impaired faculties. By his own reckoning, he had consumed at least four shots of whiskey before arriving. Although Garcia later denied drinking anything at Manosa's party, other guests reported seeing him drinking there.

Once inside the gate, Garcia became rowdy, aggressive, and obnoxious. He made obscene and vaguely threatening comments to female guests, and either he or a friend dropped his pants. While Manosa claimed she was neither aware of Garcia's presence nor that he was causing problems with other guests, Garcia was eventually asked to leave for his inappropriate behavior. Ennabe and some other guests escorted Garcia and his friends off the premises and

ultimately to their car. One of Garcia's friends spit on Ennabe, prompting Ennabe to chase him into the street. Garcia, who by this time was driving away, ran over Ennabe, severely injuring him. Ennabe later died from his injuries.

Plaintiffs Faiez and Christina Ennabe, on behalf of themselves and the estate of their son, filed a wrongful death action against defendant Manosa and her parents. . . . Defendants moved for summary judgment or adjudication, claiming plaintiffs could not show defendants were liable under section 25602.1, which permits liability for certain persons who serve alcohol to obviously intoxicated minors, and that they were entitled to civil immunity. . . . The trial court granted defendants' motion for summary judgment on all causes of action . . . . The Court of Appeal affirmed.

We granted plaintiffs' petition for review.

. . .

For the better part of the 20th century, California case law held that a person who furnished alcoholic beverages to another person was not liable for any damages resulting from the latter's intoxication. . . . The Legislature . . . declin[ed] to enact a contrary statutory scheme that would permit civil liability . . . although it enacted legislation making the selling or furnishing of an alcoholic beverage to an obviously intoxicated person a misdemeanor in 1953. . . . This court first departed from the general common law rule of nonliability in 1971 when, noting the trend in a majority of other states, we ruled that a vendor could be liable for selling alcoholic beverages to an obviously intoxicated person who thereafter inflicted injury on third persons.

Five years later . . . , this court broadened the scope of potential liability.

Finally, in 1978, this court extended [liability] to noncommercial social hosts, reasoning that a private person who serves alcohol in a noncommercial setting to an obviously intoxicated guest with the knowledge that person intends to drive a vehicle while in an intoxicated state fails to act with reasonable care. . . .

The Legislature responded . . . by expressly abrogating their holdings and largely reinstating the previous common law rule that the consumption of alcohol, not the service of alcohol, is the proximate cause of any resulting injury. . . . : "No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages."

. . . [The Legislature also enacted civil immunity]: "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage [to any habitual or common drunkard or to any obviously intoxicated person] . . . shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage." . . . This "sweeping civil immunity" . . . was intended "to supersede evolving common law negligence principles which would otherwise permit a finding of liability under the[se] circumstances"

The third prong of the legislative response to this court's recognition of potential liability in alcohol cases authorized a "single statutory exception to the broad immunity created

by the 1978 amendments.” . . . Newly enacted section 25602.1 . . . concerned underage drinkers and authorized a cause of action against licensees . . . who sell, furnish, or give away alcoholic beverages to obviously intoxicated minors who later injure themselves or others. . . .

Section 25602.1’s exception to immunity now embraces those required to be licensed and those who sell alcohol on military bases. In addition, the Legislature excepted from the rule of civil immunity “any other person” who sells alcohol to an obviously intoxicated minor.

In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff’s injuries or death, section 25602.1—the applicable statute in this case—permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was “any other person” (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a sale occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away—even to an obviously intoxicated minor—retains his or her statutory immunity. . . .

[D]efendant urges us to embrace the Court of Appeal’s reasoning, which found no sale because “there [was] no transfer of title to an alcoholic beverage at the time the entrance fee [was] paid,” and that “it is difficult, if not impossible, to determine which individual or individuals held title to the alcoholic beverages consumed by Garcia.” But the [statutory] definition of a sale . . . is broad enough to encompass indirect sales; the statute requires simply a transfer of title, not necessarily a transfer of possession of a particular drink. . . .

[I]t [is not] difficult to discern when title to a drink passed to Garcia. Although his payment of the admission fee did not entitle him to, say, take possession of all the alcohol at the party, nor did he at that time necessarily take title to any particular drink, when Garcia did pour himself a drink and begin to consume it, title to that drink clearly passed to him. We conclude the plain meaning of a “sale,” . . . includes Garcia’s payment of the entrance fee for Manosa’s party, irrespective of the fact possession of a particular drink did not occur immediately upon payment. . . .

Because [Manosa] sold Garcia alcoholic beverages at her party, [the statute] permits “a cause of action [to] be brought [against her] by or on behalf of any person who has suffered injury or death.”

. . .

Noting that alcohol is “furnished at an infinite variety of social settings hosted by nonlicensees—from gallery openings, bar mitzvahs, weddings, political fundraisers and charity events—where admission is not ‘free’ and financial contributions from attendees are expected or required,” defendant argues by a *reductio ad absurdum* that this court would wreak havoc on the “social fabric of modern life.” . . . The assertion is exaggerated. One does not normally charge guests an entrance fee to attend bar mitzvahs, weddings, or gallery openings, and the provision of alcoholic beverages to guests invited to such events typically is governed by social

host immunity. (Even if a host at such an event charged his or her guests for alcohol, such payment would simply raise questions of licensure, and civil liability could attach only if the host sold alcohol to an obviously intoxicated minor.) In any event, in contrast to how Manosa conducted herself at her party, ordinary social hosts do not use bouncers, allow uninvited strangers into their homes, or extract an entrance fee or cover charge from their guests. Nor does maintaining the social fabric of our society depend on protecting from civil liability those persons who would sell alcoholic beverages to minors who are already visibly intoxicated.

...

The decision of the Court of Appeal is reversed and the case remanded for further proceedings consistent with our opinion.

### Note

*Social hosts and liquor sales.* Historically, an injured third party could not sue a social host or liquor vendor for providing alcohol to a tortfeasor. Courts refused to impose liability in these situations for three reasons. First, courts held that the consumption, not the sale or provision, of alcohol caused the injury. Second, courts regarded the intoxicated tortfeasor's act as an intervening, superseding cause. Third, courts believed that intoxicated individuals were largely responsible for their own actions. LaDonna Hatton, Note, *Common Law Negligence Theory of Social Host Liability for Serving Alcohol to Obviously Intoxicated Guests*, 26 B.C. L. REV. 1249, 1249-50 (1985).

Courts gradually began to impose liability on liquor vendors under a negligence theory. *See, e.g., Lopez v. Maez*, 651 P.2d 1269 (N.M. 1982). In the mid-1980s, courts also began to impose liability on social hosts under a negligence theory. *See, e.g., Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984).

Currently, thirteen states and the District of Columbia decline to impose liability on social hosts under a negligence theory. *See Cartwright v. Hyatt Corp.*, 460 F. Supp. 80 (D.D.C. 1978); *Mulvihill v. Union Oil Co. of Cal.*, 859 P.2d 1310 (Alaska 1993); *Shea v. Matassa*, 918 A.2d 1090 (Del. 2007); *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987); *Johnston v. KFC Nat. Mgmt. Co.*, 788 P.2d 159 (Haw. 1990); *Charles v. Seigfried*, 651 N.E.2d 154 (Ill. 1995); *Thies v. Cooper*, 753 P.2d 1280 (Kan. 1988); *Harriman v. Smith*, 697 S.W.2d 219 (Mo. Ct. App. 1985); *Pelzek v. Am. Legion*, 463 N.W.2d 321 (Neb. 1990); *McGee v. Alexander*, 37 P.3d 800 (Okla. 2001); *Ferreira v. Stack*, 652 A.2d 965 (R.I. 1995); *Garren v. Cummings & McCrady, Inc.*, 345 S.E.2d 508 (S.C. Ct. App. 1986); *Reeder v. Daniel*, 61 S.W.3d 359 (Tex. 2001); *Cox v. Malcolm*, 808 P.2d 758 (Wash. Ct. App. 1991).

Four state statutes immunize social hosts from liability. *See, e.g.,* ARK. CODE ANN. § 16-126-106 (2014); KY. REV. STAT. ANN. § 413.241 (West 2014); S.D. CODIFIED LAWS § 35-11-2 (2013); TENN. CODE ANN. § 57-10-101 (2014). Four states impose liability on social hosts only when they serve alcohol to minors. *See, e.g.,* IOWA CODE ANN. § 123.92 (2014); MINN. STAT. § 340A.90 (2014); MONT. CODE ANN. § 16-6-305(4) (2013); NEV. REV. STAT. § 41.1305 (2013).

Why should serving alcohol to social guests receive immunization from review for reasonableness when other ordinary social activities are governed uncontroversially by a reasonableness test? Is there a justification for providing special protections to the defendants in such cases, given that their liability only arises when their behavior is found to have been unreasonable under the circumstances?

***Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976)**

TOBRINER, J.

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend. This appeal ensued.

Plaintiffs' complaints predicate liability on . . . defendants' failure to warn plaintiffs of the impending danger. . . . Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana. . . .

The most important . . . consideration . . . in establishing duty is foreseeability. As a general principle, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.' . . . .

Although . . . under the common law, as a general rule, one person owed no duty to control the conduct of another nor to warn those endangered by such conduct, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. Applying this exception to the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care; as explained in section 315 of the Restatement Second of Torts, a duty of care may arise from either '(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection.'

Although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons. A doctor



must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others. . . .

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. . . .

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances.' . . .

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn. . . .

Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime. . . .

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . [u]nless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

. . .

The judgment of the superior court in favor of defendants . . . is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

## Notes

1. *The Restatement's catalog of special relationships with persons posing risks.* The *Tarasoff* opinion rests heavily on section 315 of the Second Restatement and its view of the significance of a "special relationship" between the defendant and a third party who poses risks to others. Since the *Tarasoff* decision, the Third Restatement has offered a nonexhaustive catalog of special relationships, including the relationship of a parent and a dependent child; a custodian and those in custody; employers and employees; and (as in *Tarasoff*) mental health care professionals and their patients. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 41 (2012). What makes these relationships special? Are there others that belong on this list?

2. *Common law limits on the Tarasoff rule.* Some courts, including the California Supreme Court, have limited *Tarasoff*'s holding to apply only when the psychotherapist knows that an "identifiable victim" is in danger. See, e.g., *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980); *Fraser v. United States*, 674 A.2d 811 (Conn. 1996). Other courts have held that psychotherapists owe no duty to victims at all. See, e.g., *State v. Cowles*, 151 P.3d 353 (Alaska 2006); *Santa Cruz v. Nw. Dade Cmty. Health Ctr., Inc.*, 590 So. 2d 444 (Fla. Dist. Ct. App. 1991); *Boulanger v. Pol*, 900 P.2d 823 (Kan. 1995); *Furr v. Spring Grove State Hosp.*, 454 A.2d 414 (Md. Ct. Spec. App. 1983); *Kehler v. Eudaly*, 933 S.W.2d 321 (Tex. App. 1996); *Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995).

3. *Negligent failure to diagnose.* *Tarasoff* involved a therapist who had predicted violence toward a specific individual and allegedly failed to fulfill the duty triggered by that prediction. In jurisdictions that have chosen to recognize the duty of care outlined in *Tarasoff*, should therapists also be subject to liability for *failing* to predict violence? In California, the answer initially appeared to be "yes." In *Hedlund v. Superior Court*, a case involving an alleged missed diagnosis and the patient's subsequent violent assault on the plaintiffs, the California Supreme Court noted that "[a] negligent failure to diagnose dangerousness in a *Tarasoff* action is as much a basis for liability as is a negligent failure to warn a known victim once such diagnosis has been made." 669 P.2d 41, 45 (Cal. 1983). In response to *Hedlund*, the California State Assembly disallowed civil lawsuits stemming from a psychotherapist's failure to predict violence. CAL. CIV. CODE § 43.92 (West 2013). In other jurisdictions, however, *Hedlund*-type actions still appear to be available. Consider *Perreira v. State*, 768 P.2d 1198 (Colo. 1989) (en banc), which stemmed from the shooting death of a police officer by an outpatient of a state mental health center. Prior to the shooting, the defendant doctor had been "of the opinion that [the patient] did not pose any risk of violence to others upon his release." The court held that the doctor "had a legal duty to exercise due care in determining whether [the patient] had a propensity for violence and, if released from his involuntary commitment, would thereby present an unreasonable risk of serious bodily harm to others, including a police officer in the position of [the plaintiffs' decedent]." *Id.* at 1205, 1220; see also *Bardoni v. Kim*, 390 N.W.2d 218, 222 (Mich. Ct. App. 1986) (emphasis added) (recognizing that a psychiatrist owes a duty of reasonable care to a third party if the psychiatrist (1) "knew or, according to the standards of his profession, *should have known* that his patient posed a serious threat of danger to others" and (2) "knew or *should have known* that his patient was dangerous specifically to the injured third party"). Published opinions suggest that

negligent diagnosis cases are rare, as compared to cases where a therapist predicted violence and then allegedly failed to take reasonable steps. Why might that be?

4. *The content of the Tarasoff duty.* Where a therapist owes a duty of care to a person who is at risk of injury from one of the therapist's patients, what conduct satisfies that duty? What conduct falls short? The case law is at times frustratingly vague. See, e.g., *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980) (recognizing that a therapist has a duty to "initiate whatever precautions are reasonably necessary to protect potential victims of his patient"). The authors of the Third Restatement identify some actions that may comprise part of this duty, including "providing appropriate treatment, warning others of the risks posed by the patient, seeking the patient's agreement to a voluntary commitment, [or] making efforts to commit the patient involuntarily." RESTATEMENT (THIRD) OF PHYSICAL AND EMOTIONAL HARMS § 41 cmt. g. Various courts have, at different times, found all these actions salient. See, e.g., *Hamman v. Cty. of Maricopa*, 775 P.2d 1122, 1223, 1128–29 (Ariz. 1989) (en banc) (considering that the psychiatrist did not review previous medical records, provide instructions to follow if the patient's condition worsened, or warn likely victims of the danger); *Petersen v. State*, 671 P.2d 230, 237 (Wash. 1983) (en banc) (noting the psychologist's failure to petition the court for the patient's temporary civil commitment); *Kuligoski v. Brattleboro Retreat*, 156 A.3d 436, 450–53 (Vt. 2016) (discussing whether therapists properly trained a patient's caretakers before discharge). Still, when courts discuss a therapist's duty of care to a third party, they seem chiefly concerned with the question of *to whom* the duty is owed, not *what conduct* satisfies that duty. Why might that be?

5. *Legislative responses.* State legislatures have responded to *Tarasoff* in different ways. Certain states provide that mental health professionals have an affirmative duty to take precautions against violent patients. See, e.g., IDAHO CODE ANN. § 6-1902 (2013); MICH. COMP. LAWS § 330.1946 (2014). Some states do not establish an affirmative duty, but have enacted legislation permitting mental health professionals to disclose patients' threats. See, e.g., FLA. STAT. § 456.059 (2013); MISS. CODE ANN. § 41-21-97 (2013). Other states have immunized mental health professionals from liability. See, e.g., DEL. CODE ANN. tit. 16, § 5402 (2014). A majority of states that impose an affirmative duty limit the duty to instances when the patient threatens a reasonably identifiable third party. See, e.g., CAL. CIV. CODE § 43.92 (West 2013); N.J. STAT. § 2A:62A-16 (2014); TENN. CODE ANN. § 24-1-207 (2013). Other states limit mental health professionals' duty to instances when the patient threatens a specified victim. See, e.g., COLO. REV. STAT. § 13-21-117 (2013). See generally Mary I. Wood, Comment, *Protective Privilege Versus Public Peril: How Illinois Has Failed to Balance Patient Confidentiality with the Mental Health Professional's Duty to Protect the Public*, 29 N. ILL. U. L. REV. 571, 584-85 (2009).

6. *A duty to prevent self-harm?* What should happen when the person who is at risk of injury and the person who might foreseeably cause the injury are one and the same? In *Nguyen v. Massachusetts Inst. of Tech.*, 96 N.E.3d 128 (Mass. 2018), Nguyen brought a wrongful death action against the university MIT after his son, a graduate student, committed suicide. Before the court could address Nguyen's negligence claims, it had to determine whether MIT had a duty to prevent student suicides:

In analyzing whether a duty to prevent suicide falls within the scope of the complex relationship that universities have with their students, we consider a number of factors used to delineate duties in tort law. *Irwin v. Ware*, 392 Mass. 745, 756 (1984). “Foremost among these is whether a defendant reasonably could foresee that he [or she] would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so.” *Irwin, supra*. A related factor is “reasonable reliance by the plaintiff [on the defendant], impeding other persons who might seek to render aid.” *Id.* Other factors that have been considered relevant to special relationships and the creation of a duty in the university context are the “degree of certainty of harm to the plaintiff; burden upon the defendant to take reasonable steps to prevent the injury; some kind of mutual dependence of plaintiff and defendant upon each other, frequently . . . involving financial benefit to the defendant arising from the relationship; moral blameworthiness of defendant’s conduct in failing to act; and social policy considerations involved in placing the economic burden of the loss on the defendant.” [quoting Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625, 2008].

....

The probability of the harm must of course be considered along with its gravity including the death of the student. . . . Thus, where a student has attempted to commit suicide while enrolled at the university or recently before matriculation or stated plans or intentions to commit suicide, that probability is sufficient to justify imposition of a duty on the university. The burden on the university is not insubstantial, but so is the financial benefit received from student tuition.

*Nguyen*, 96 N.E.3d at 142-144. The court went on to stress that a university’s duty to prevent student suicide is limited. Such a duty only exists if the university is aware of a student’s intentions to commit suicide or of a recent suicide attempt; even then, the court emphasized that a university will usually be able to discharge its obligations under its duty merely by initiating a reasonable suicide prevention protocol. Moreover, the court observed that the obligations of a university may decrease over time if, for example, the student appears no longer to be at risk of suicide.

In *Nguyen* itself, the court determined that “there was no duty created” to prevent Nguyen’s suicide, since Nguyen had neither communicated his intent to commit suicide nor attempted to commit suicide in the year prior to his matriculation. *Id.* at 146. Why do the factors listed by the court go to duty rather than breach? Put differently, is the court in *Nguyen* correct in thinking of the duty as never having come into existence, as opposed to not having been breached? How, if at all, does it matter which way the court organizes the analysis if the arrows point in the same direction?

7. *Duties of A for the Conduct of B?* Does a successor corporation, following bankruptcy, owe a duty to warn consumers about hazards associated with products manufactured and sold by the pre-bankruptcy corporation? General Motors manufactured millions of cars with a small defect in the vehicles’ ignition switches could lead to fatal accidents. Then in 2009 it went

through a bankruptcy reorganization and emerged as a new entity; the company that had manufactured the cars no longer existed.

Judge Jesse Furman in the Southern District of New York concluded that New GM owed a duty of care to the owners of Old GM's cars on the theory that tort "places the duty to protect the public from a dangerous defect on the entity that is best situated to protect the public against products that are a menace to safety." *In re Gen. Motors LLC Ignition Switch Litig.*, 154 F. Supp. 3d 30, 39 (S.D.N.Y. 2015) (quoting *Okla. Gas & Elec. Co. v. McGraw-Edison Co.*, 834 P.2d 980, 984-85 (Okla.1992)). Where New GM had "assumed service and repair duties" for Old GM products," *id.*, and where New GM had a continuing "contractual warranty duty . . . to Old GM vehicles, the court concluded that New GM had a tort duty to warn purchasers of Old GM vehicles. *In re Gen. Motors LLC Ignition Switch Litig.*, 154 F. Supp. 3d 30, 40-41 (S.D.N.Y. 2015) (internal quotation marks omitted).

***In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003)**

HELLERSTEIN, J.

The injured, and the representatives of the thousands who died from the terrorist-related aircraft crashes of September 11, 2001, are entitled to seek compensation. By act of Congress, they may seek compensation by filing claims with a Special Master established pursuant to the Air Transportation Safety and System Stabilization Act of 2001 . . . . Or they may seek compensation in the traditional manner, by alleging and proving their claims in lawsuits, with the aggregate of their damages capped at the limits of defendants' liability insurance. If they choose the former alternative, their claims will be paid through a Victim Compensation Fund from money appropriated by Congress, within a relatively short period after filing. Claimants will not have to prove fault or show a duty to pay on the part of any defendant. The amount of their compensation, however, may be less than their possible recovery from lawsuits, for non-economic damages are limited to \$250,000, economic damages are subject to formulas that are likely to be less generous than those often allowable in lawsuits, and punitive damages are unavailable. . . .

[A small number of the victims' families, as well as some people injured, and ten owners of damaged property sued the airlines, the airport security companies, the airport operators, the airplane manufacturer, and the operators and owners of the World Trade Center. Defendants moved for dismissal on the grounds that they owed a duty to the crew and passengers on the planes, but did not owe any duty to "ground victims." The Port Authority and World Trade Center Properties argued that "they did not owe a duty to protect occupants in the towers against injury from hijacked airplanes and, even if they did, the terrorists' actions broke the chain of proximate causation, excusing any negligence" by the World Trade Center Defendants. Boeing argued "that it did not owe a duty to ground victims or passengers, and that any negligence on its part was not the proximate cause for the harms suffered by the plaintiffs."] . . .

## A. Aviation Defendants' Motions to Dismiss

[Judge Hellerstein first addressed the claims by New York ground victims against the aviation defendants.] “The threshold question in any negligence action is: does the defendant owe a legally recognized duty of care to plaintiff?” . . . The injured party must show that a defendant owed not merely a general duty to society but a specific duty to the particular claimant, for “without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.” . . .

One additional consideration, the [New York] Court of Appeals added, is that “the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.” . . .

Plaintiffs allege that the Aviation Defendants negligently failed to carry out their duty to secure passenger aircraft against potential terrorists and weapons smuggled aboard. . . . Plaintiffs argue that the Aviation Defendants employed their security measures specifically to guard against hijackings, and knew or should have known that the hijacking of a jumbo jet would create substantial risks of damage to persons and property, not only to passengers and crew, but also to people and property on the ground. . . .

Airlines typically recognize responsibility to victims on the ground. . . . However, counsel [for the airline defendants] did not concede duty in relation to those killed and injured on the ground in the September 11, 2001 aircraft crashes. . . . The distinction, in his opinion, is “no[t][a] difference in kind,” but “the law of extraordinary consequences [which] can sometimes draw a distinction based on degree.” . . . He explained:

We are in an area of policy and there are lines to be drawn that may occasionally seem arbitrary. But what really distinguishes our case from [the hypothetical example of an airplane crash into Shea Stadium while taking off from, or landing at, La Guardia airport] is the intentional intervening acts of the third party terrorists.<sup>7</sup>

. . . As defense counsel commented, “we are in an area of policy,” where “the existence and scope of a tortfeasor’s duty is . . . a legal question for the courts” . . .

It is the court’s job to “fix the duty point by balancing factors,” including the following:

the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.

[Citing *532 Madison Avenue*.]

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<sup>7</sup> While defense counsel raised the issue of proximate causation during the oral argument, the issue was not briefed. Counsel suggested, without legal citation, that the extraordinary nature of the attacks, involving intervening acts by the terrorists, should negate the duty air carriers owed to ground victims.

[In] *532 Madison Avenue*, [the] Court of Appeals acknowledged that “[p]olicy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs.” . . . If those who suffered financial losses were to be allowed to sue, the Court of Appeals held, “an indeterminate group in the affected areas” would be able to recover. . . . If, however, the field of plaintiffs was to be limited to those who “suffered personal injury or property damage” as a result of defendants’ negligence, the limitation would “afford . . . a principled basis for reasonably apportioning liability,” and be “historically” consistent with New York precedents. . . .

The cases before me involve claims to recover for personal injuries, death, or property damage. They fall within the line drawn by the New York Court of Appeals in *532 Madison Avenue*. . . . I therefore hold that the Aviation Defendants owed a duty of care, not only to their passengers to whom they concede they owed this duty, but also to victims on the ground.

[P]laintiffs are favored by the first of the factors set out above, for plaintiffs and society generally could have reasonably expected that the screening performed at airports by the Aviation Defendants would be for the protection of people on the ground as well as for those in airplanes.

. . .

The second factor to consider is “the proliferation of claims.” . . . Proliferation, however, should not be mistaken for size of number. . . . Their number may be large, tragically large, and the potential liability may be substantial if negligence and cause is proven, but the class is not indefinite and claims at this point cannot proliferate. Furthermore, the defendants will be liable only if plaintiffs sustain their burden of proof. . . . Thus, “the likelihood of unlimited or insurer-like liability,” the third factor of *532 Madison Avenue*, does not weigh heavily against a finding of duty.

The fourth factor of *532 Madison Avenue* is “disproportionate risk and reparation allocation.” This inquiry probes who was best able to protect against the risks at issue and weighs the costs and efficacy of imposing such a duty. The airlines, and the airport security companies, could best screen those boarding, and bringing objects onto, airplanes. The same activities reasonably necessary to safeguard passengers and crew are those that would protect the public as well. . . . This case is thus distinguishable from other cases where courts did not find a duty to protect against third-party conduct. . . . [I]n *Hamilton [v. Aku-Tech]*, for example] the court held that gun manufacturers did not owe a duty to victims of gun violence for negligent marketing and distribution of firearms. The connection between the manufacturers, criminal wrongdoers, and victims was too remote, running through many links in a long chain, from manufacturer, distributor or wholesaler, retailer, legal purchasers, unlawful possessors, and finally to the victims of gun violence. . . .

Unlike *Hamilton* and *Waters*, the Aviation Defendants could best control the boarding of airplanes, and were in the best position to provide reasonable protection against hijackings and the dangers they presented, not only to the crew and passengers, but also to ground victims. Imposing a duty on the Aviation Defendants best allocates the risks to ground victims posed by inadequate screening, given the Aviation Defendants’ existing and admitted duty to screen passengers and items carried aboard.

Lastly, recognition of a duty on the part of the Aviation Defendants would not substantially expand or create “new channels of liability,” the fifth and last factor of 532 *Madison Avenue*. New York courts have found on other occasions that aircraft owners and operators owe a duty to those on the ground who may be harmed or sustain property damage resulting from improper or negligent operation of an aircraft. . . . Although these cases involved injuries resulting from negligent operation or maintenance of airplanes, rather than negligence in regulating the boarding of airplanes, there is no principled distinction between the modes of negligence. . . .

*iii. Scope of Duty to Ground Victims: the Issue of Foreseeability*

Defendants argue that the ground victims lost their lives and suffered injuries from an event that was not reasonably foreseeable, for terrorists had not previously used a hijacked airplane as a suicidal weapon to destroy buildings and murder thousands. Defendants contend that because the events of September 11 were not within the reasonably foreseeable risks, any duty of care that they would owe to ground victims generally should not extend to the victims of September 11. . . .

Construing the factual allegations in the light most favorable to the plaintiffs, I conclude that the crash of the airplanes was within the class of foreseeable hazards resulting from negligently performed security screening. While it may be true that terrorists had not before deliberately flown airplanes into buildings, the airlines reasonably could foresee that crashes causing death and destruction on the ground was a hazard that would arise should hijackers take control of a plane. . . . While the crashes into the particular locations of the World Trade Center, Pentagon, and Shanksville field may not have been foreseen, the duty to screen passengers and items brought on board existed to prevent harms not only to passengers and crew, but also to the ground victims resulting from the crashes of hijacked planes . . . .

B. World Trade Center Defendants’ Motions to Dismiss

*i. Background*

The Port Authority of New York and New Jersey and WTC Properties LLC move to dismiss all claims brought against them as owners and operators of the World Trade Center for loss of life, personal injury, and damage to nearby property and businesses resulting from the collapse of the Twin Towers. . . .

*ii. Existence and Scope of Duty*

The WTC Defendants contend that they owed no duty to “anticipate and guard against crimes unprecedented in human history.” Plaintiffs argue that defendants owed a duty, not to foresee the crimes, but to have designed, constructed, repaired and maintained the World Trade Center structures to withstand the effects and spread of fire, to avoid building collapses caused by fire and, in designing and effectuating fire safety and evacuation procedures, to provide for the escape of more people.

The existence of a duty owed by the WTC Defendants to its lessees and business occupants has been clearly set out in New York law. “A landowner has a duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition” . . . ,



including the duty to adopt reasonable fire-safety precautions . . . , regardless of the origin of the fire . . . .

The duty of landowners and lessors to adopt fire-safety precautions applies to fires caused by criminals. . . . Likewise, the WTC Defendants owed a duty to the occupants to create and implement adequate fire safety measures, even in the case of a fire caused by criminals such as those who hijacked flights 11 and 175 on September 11, 2001. . . .

I hold that the WTC Defendants owed a duty to the plaintiffs, and that plaintiffs should not be foreclosed from being able to prove that defendants failed to exercise reasonable care to provide a safe environment for its occupants and invitees with respect to reasonably foreseeable risks.

[The court then reasoned that the rule of supervening causation from the doctrine of proximate cause did not preclude a judgment for the plaintiff against the WTC defendants because while “generally, an intervening intentional or criminal act severs the liability of the original tort-feasor,” that “doctrine has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable.” Turning to the Boeing defendant, the court further concluded that as manufacturer of the airplanes in question, Boeing also owed a duty of reasonable care to the air and ground victims in the case: “the danger that a plane could crash if unauthorized individuals invaded and took over the cockpit,” the court concluded, “was the very risk that Boeing should reasonably have foreseen.”]

### Notes

1. *The September 11 Fund*. Recall that Congress created the September 11 Victim Compensation Fund in the aftermath of the September 11 tragedy. The Fund allowed victims to recover through a no-fault basis if they promised not to sue airlines and other potential defendants. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy*, 10 HARV. NEGOTIATION L. REV. 135, 137 (2005).

Ninety-seven percent of victims applied for compensation through the Fund. As the Fund’s filing deadline loomed closer, a number of litigants dropped their suits and recovered through the Fund. Nearly two months before the deadline, only sixty percent of victims had applied for compensation from the Fund. But hours before the deadline “there was a mad rush to file.” Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11 Victim Compensation Fund*, 24 YALE L. & POL’Y REV. 1, 29 (2006).

2. *The lawsuits*. While the Victim Compensation Fund provided compensation to 97% of the ground victims in the terrorist attacks of September 11th, the relatives of 95 victims chose to sue in court. Judge Alvin Hellerstein presided over all 95 cases. In the past, terrorism victims have not successfully recovered against third parties. See Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL U. L. REV. 719, 722 (2003) (noting that victims of the Oklahoma City bombing and 1993 World Trade Center

attacks did not recover against third parties under a negligence theory). But this time the outcomes were more complex.

Between the beginning of the lawsuit in 2002 and 2005, 13 out of the original 95 cases settled. Judge Hellerstein reviewed each settlement for fairness and reasonableness, but otherwise the settlements were confidential. *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008).

In January 2006, Judge Hellerstein suggested the use of mediators to encourage further settlements; the initial mediation sessions brought lawyers for the plaintiffs and defendants together with some success—12 additional cases settled. However, Sheila Birnbaum, the chief mediator, suspected that many of the plaintiffs wanted the “opportunity to tell the story of their loss and express their feelings to a representative of the Court [or] to a representative of the airlines and to personally receive expressions of condolences for their loss from the airlines.” *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 557 (S.D.N.Y. 2009). Birnbaum invited the victims’ families to mediation sessions where they were able to express their side of the story to representatives of the defendant.

Additionally, many of the remaining cases were being delayed by extensive discovery. In an effort to speed up the cases, Judge Hellerstein separated the question of liability from the question of damages and ordered that damages-only discovery and damages-only jury trials in six cases; as Hellerstein later wrote, “[b]oth sides objected because of the absence of precedents, but they acquiesced upon reconsideration, and when it became clear that I was determined to proceed. The experiment was successful. After some discovery, and without the need of any trials, all six cases settled and more followed.” *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 554 (S.D.N.Y. 2009).

By involving victims’ families in mediation and by separating the liability questions from the damages questions, all but three of the original 95 cases settled by March 4, 2009. Ultimately, none of the 95 cases went to trial. The last plaintiff settled on September 20, 2011. Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Suit*, N.Y. TIMES, Sep. 20, 2011.

3. *Return of the Rowland factors?* Recall that in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), the California Supreme Court set forth “a number of considerations” for courts to take into account when deciding whether to depart from the fundamental principle (under California law) that “[e]veryone is responsible . . . for an injury occasioned to another by his want of ordinary care . . . except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.” The “major” considerations, according to *Rowland*, are:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

443 P.2d at 564. How do these considerations relate to the various “factors” that Judge Hellerstein set forth in his decision in *In re September 11 Litigation* when deciding how far, and to whom, the aviation defendants’ duty of care extended?

The California Supreme Court clarified its understanding of the *Rowland* factors in *Brown v. USA Taekwondo*, 483 P.3d 159 (Cal. 2021), a case involving a coach’s sexual abuse of minor athletes and the alleged responsibility of the United States Olympic Committee, among other defendants. The plaintiff athletes argued that even if the Committee did not have a “special relationship” with the coach or with the athletes—that is, the kind of relationship that would trigger an affirmative duty to protect the athletes from the coach (see Parts A and D of this chapter)—the *Rowland* factors nonetheless counseled in favor of recognizing a duty of care in this case. The court disagreed. “The multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing duty,” Justice Kruger explained, “but instead as a means for deciding whether to limit a duty derived from other sources.” *Id.* at 166. Why do you think the California Supreme Court took pains to close off this apparently “freestanding means of establishing duty”?

A California appeals court applied the approach set forth in *Brown* in the 2021 case *Doe v. Roman Catholic Archbishop of Los Angeles*, 285 Cal.Rptr.3d 613 (Cal. Ct. App. 2021), which posed the question: “Does a church have a duty to protect children from sexual abuse by clergy while the children are attending religious school or participating in other church-sponsored programs?” The court began by finding that a “special relationship” existed between the plaintiff Doe and the defendant. “Doe and his parents relied on the Archdiocese for Doe’s protection,” the court explained, and “the Archdiocese had ‘superior control over the means of protection.’” *Id.* at 624. The court went on to consider each of the *Rowland* factors and determined that they did not justify “excusing or limiting” the defendant’s duty to protect Doe. *Id.* at 625-33.

For another take on the use of *Rowland*-type factors to analyze duty, consider the Utah Supreme Court’s discussion of the issue in *B.R. ex rel. Jeffs v. West*, 275 P.3d 228 (Utah 2012):

Our cases have identified several factors relevant to determining whether a defendant owes a duty to a plaintiff, including: (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) “public policy as to which party can best bear the loss occasioned by the injury”; (5) “other general policy considerations.” Not every factor is created equal, however. . . . [S]ome factors are featured heavily in certain types of cases, while other factors play a less important, or different, role. . . . [T]he legal-relationship factor is typically a “plus” factor—used to impose a duty where one would otherwise not exist, such as where the act complained of is merely an omission. . . . [T]he final three factors . . . are typically “minus” factors—used to eliminate a duty that would otherwise exist.

*Id.* at 230; see also *Mower v. Baird*, 422 P.3d 837, 843 (Utah 2018) (applying the “*Jeffs* factors” to conclude that “a treating therapist owes a duty of care to a nonpatient parent in the treatment of the parent’s minor child for potential sexual abuse alleged against that parent”).

### 3. *The Duty Debate (Part 2)*

Contemporary debates include whether no-duty decisions should be categorical or case-specific. Dilan Esper and Gregory Keating argue that duty articulates the moral obligations that guide conduct, and these obligations must therefore be decided in broad categorical fashion or they cannot provide this guidance. Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 282 (2006). John Goldberg and Benjamin Zipursky, by contrast, argue that duties are case-specific because the moral obligation to exercise care depends on the particular facts of any given relationship between a plaintiff and a defendant. John C.P. Goldberg & Benjamin Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 340 (2006). The Third Restatement sides with the categorical view in those exceptional instances in which (as the Restatement authors see it) a separate duty analysis is appropriate. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §7, cmt. I (2010).

Another debate concerns whether foreseeability should be a component of duty. Scholars who emphasize the significance of the duty inquiry, even if as an inquiry to be made in unusual boundary-policing cases, argue that duty determination must include consideration of the foreseeability of a plaintiff’s injury. Esper & Keating, *supra*, at 327. By contrast, those who believe that duty is redundant adopt the view that breach and proximate cause already accommodate considerations of foreseeability such that they need not reappear in the duty analysis. See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 722-26; see also RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §7, cmt. j (2010) (recommending that courts not use foreseeability in duty determinations and limit no-duty rulings to articulated policy or principle).

## E. Pure Economic Loss

Courts have often announced that pure economic loss, much like pure emotional distress, is not recoverable in actions for negligence. Consider the following case, which both states the rule and at least in part questions it:

***People Express Airlines, Inc. v. Consolidated Rail Corporation*, 100 N.J. 246 (1985)**

HANDLER J.

This appeal presents a question that has not previously been directly considered: whether a defendant’s negligent conduct that interferes with a plaintiff’s business resulting in purely economic losses, unaccompanied by property damage or personal injury, is compensable in tort. . . .

I.

Because of the posture of the case—an appeal taken from the grant of summary judgment for the defendant railroad, subsequently reversed by the Appellate Division—we must accept plaintiff’s version of the facts as alleged. The facts are straight-forward.

On July 22, 1981, a fire began in the Port Newark freight yard of defendant Consolidated Rail Corporation (Conrail) when ethylene oxide manufactured by defendant BASF Wyandotte Company (BASF) escaped from a tank car, punctured during a “coupling” operation with another rail car, and ignited. The tank car was owned by defendant Union Tank Car Company (Union Car) and was leased to defendant BASF.

The plaintiff asserted at oral argument that at least some of the defendants were aware from prior experiences that ethylene oxide is a highly volatile substance; further, that emergency response plans in case of an accident had been prepared. When the fire occurred that gave rise to this lawsuit, some of the defendants’ consultants helped determine how much of the surrounding area to evacuate. The municipal authorities then evacuated the area within a one-mile radius surrounding the fire to lessen the risk to persons within the area should the burning tank car explode. The evacuation area included the adjacent North Terminal building of Newark International Airport, where plaintiff People Express Airlines’ (People Express) business operations are based. Although the feared explosion never occurred, People Express employees were prohibited from using the North Terminal for twelve hours.

The plaintiff contends that it suffered business-interruption losses as a result of the evacuation. These losses consist of cancelled scheduled flights and lost reservations because employees were unable to answer the telephones to accept bookings; also, certain fixed operating expenses allocable to the evacuation time period were incurred and paid despite the fact that plaintiff’s offices were closed. No physical damage to airline property and no personal injury occurred as a result of the fire.

According to People Express’ original complaint, each defendant acted negligently and these acts of negligence proximately caused the plaintiff’s harm. An amended complaint alleged additional counts of nuisance and strict liability based on the defendants’ undertaking an abnormally dangerous activity, as well as defective manufacture or design of the tank car, causes of action with which we are not concerned here. Defendants filed answers and cross-claims for contribution pursuant to the Joint Tortfeasors Contribution Law.

Conrail moved for summary judgment, seeking dismissal of the complaint and cross-claims against it; the motion was opposed by plaintiff, People Express, and defendants BASF and Union Car. The trial court granted Conrail’s summary judgment motion on the ground that absent property damage or personal injury economic loss was not recoverable in tort. Defendants BASF and Union Car subsequently sought summary judgment dismissing the complaint; the trial court also granted these motions based on the same reasoning. . . .

II.

The single characteristic that distinguishes parties in negligence suits whose claims for economic losses have been regularly denied by American and English courts from those who have recovered economic losses is, with respect to the successful claimants, the fortuitous

occurrence of physical harm or property damage, however slight. It is well-accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses. Nevertheless, a virtually *per se* rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century . . . .

The reasons that have been advanced to explain the divergent results for litigants seeking economic losses are varied. Some courts have viewed the general rule against recovery as necessary to limit damages to reasonably foreseeable consequences of negligent conduct. This concern in a given case is often manifested as an issue of causation and has led to the requirement of physical harm as an element of proximate cause. In this context, the physical harm requirement functions as part of the definition of the causal relationship between the defendant's negligent act and the plaintiff's economic damages; it acts as a convenient clamp on otherwise boundless liability. . . . The physical harm rule also reflects certain deep-seated concerns that underlie courts' denial of recovery for purely economic losses occasioned by a defendant's negligence. These concerns include the fear of fraudulent claims, mass litigation, and limitless liability, or liability out of proportion to the defendant's fault.

The assertion of unbounded liability is not unique to cases involving negligently caused economic loss without physical harm. Even in negligence suits in which plaintiffs have sustained physical harm, the courts have recognized that a tortfeasor is not necessarily liable for *all* consequences of his conduct. While a lone act can cause a finite amount of physical harm, that harm may be great and very remote in its final consequences. A single overturned lantern may burn Chicago. Some limitation is required; that limitation is the rule that a tortfeasor is liable only for that harm that he proximately caused. Proximate or legal cause has traditionally functioned to limit liability for negligent conduct. Duty has also been narrowly defined to limit liability. Compare the majority and dissenting opinions in *Palsgraf*. . . .

It is understandable that courts, fearing that if even one deserving plaintiff suffering purely economic loss were allowed to recover, all such plaintiffs could recover, have anchored their rulings to the physical harm requirement. While the rationale is understandable, it supports only a limitation on, not a denial of, liability. The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses. . . . In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims. The asserted inability to fix crystalline formulae for recovery on the differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.

Further, judicial reluctance to allow recovery for purely economic losses is discordant with contemporary tort doctrine. The torts process, like the law itself, is a human institution designed to accomplish certain social objectives. One objective is to ensure that innocent victims have avenues of legal redress, absent a contrary, overriding public policy. . . . This reflects the overarching purpose of tort law: that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.

Other policies underlie this fundamental purpose. Imposing liability on defendants for their negligent conduct discourages others from similar tortious behavior, fosters safer products

to aid our daily tasks, vindicates reasonable conduct that has regard for the safety of others, and, ultimately, shifts the risk of loss and associated costs of dangerous activities to those who should be and are best able to bear them. . . .

### III.

. . .

Judicial discomfiture with the rule of nonrecovery for purely economic loss throughout the last several decades has led to numerous exceptions in the general rule. Although the rationalizations for these exceptions differ among courts and cases, two common threads run throughout the exceptions. The first is that the element of foreseeability emerges as a more appropriate analytical standard to determine the question of liability than a *per se* prohibitory rule. The second is that the extent to which the defendant knew or should have known the particular consequences of his negligence, including the economic loss of a particularly foreseeable plaintiff, is dispositive of the issues of duty and fault.

One group of exceptions is based on the “special relationship” between the tortfeasor and the individual or business deprived of economic expectations. Many of these cases are recognized as involving the tort of negligent misrepresentation, resulting in liability for specially foreseeable economic losses. Importantly, the cases do not involve a breach of contract claim between parties in privity; rather, they involve tort claims by innocent third parties who suffered purely economic losses at the hands of negligent defendants with whom no direct relationship existed. . . .

The special relationship exception has been extended to auditors, *see H. Rosenblum, Inc. v. Adler* (independent auditor whose negligence resulted in inaccurate public financial statement held liable to plaintiff who bought stock in company for purposes of sale of business to company; stock subsequently proved to be worthless); surveyors, *see Rozny v. Marnul*, (surveyor whose negligence resulted in error in depicting boundary of lot held liable to remote purchaser); [and] termite inspectors, *see Hardy v. Carmichael* (termite inspectors whose negligence resulted in purchase of infested home liable to out-of-privity buyers)[, among others]. . . .

A related exception in which courts have allowed recovery for purely economic losses has been extended to plaintiffs belonging to a particularly foreseeable group, such as sailors and seamen, for whom the law has traditionally shown great solicitude. *See Carbone v. Ursich*, 209 F.2d 178 (9th Cir.1953) (plaintiff seaman recovered lost wages resulting from lack of work while the ship on which they were employed, damaged through defendant’s negligence, was being repaired) . . . .

Particular knowledge of the economic consequences has sufficed to establish duty and proximate cause in contexts other than those already considered. . . .

These exceptions expose the hopeless artificiality of the *per se* rule against recovery for purely economic losses. When the plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by defendant’s negligence, and liability can be limited fairly, courts have endeavored to create exceptions to allow recovery. . . .

The . . . theme that may be extracted from these decisions rests on the specificity and strictness that are infused into the definitional standard of foreseeability. The foreseeability standard that may be synthesized from these cases is one that posits liability in terms of where, along a spectrum ranging from the general to the particular, foreseeability is ultimately found. . . .

We hold therefore that a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.

We stress that an identifiable class of plaintiffs is not simply a foreseeable class of plaintiffs. For example, members of the general public, or invitees such as sales and service persons at a particular plaintiff's business premises, or persons travelling on a highway near the scene of a negligently-caused accident, such as the one at bar, who are delayed in the conduct of their affairs and suffer varied economic losses, are certainly a foreseeable class of plaintiffs. Yet their presence within the area would be fortuitous, and the particular type of economic injury that could be suffered by such persons would be hopelessly unpredictable and not realistically foreseeable. Thus, the class itself would not be sufficiently ascertainable. An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted. [Citing *Strauss v. Belle Realty Co.*] . . .

[T]he judgment of the Appellate Division is modified, and, as modified, affirmed. The case is remanded for proceedings consistent with this opinion.

### *Note*

Across the river, in New York, the high court of the state (the Court of Appeals) has adopted a stricter version of the pure economic loss rule. Consider the following case. Which approach is the better one?

**532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 750 N.E.2d 1097 (N.Y. 2001)**

KAYE, C.J.

The novel issues raised by these appeals—arising from construction-related disasters in midtown Manhattan—concern . . . a landholder's duty in negligence where plaintiffs' sole injury is lost income . . . .

Two of the three appeals involve the same event. On December 7, 1997, a section of the south wall of 540 Madison Avenue, a 39-story office tower, partially collapsed and bricks, mortar and other material fell onto Madison Avenue at 55th Street, a prime commercial



location crammed with stores and skyscrapers. The collapse occurred after a construction project, which included putting 94 holes for windows into the building's south wall, aggravated existing structural defects. New York City officials directed the closure of 15 heavily trafficked blocks on Madison Avenue—from 42nd to 57th Street—as well as adjacent side streets between Fifth and Park Avenues. The closure lasted for approximately two weeks, but some businesses nearest to 540 Madison remained closed for a longer period.

In *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, plaintiff operates a 24-hour delicatessen one-half block south of 540 Madison, and was closed for five weeks. The two named plaintiffs in the companion case, *5th Ave. Chocolatiere v. 540 Acquisition Co.*, are retailers at 510 Madison Avenue, two blocks from the building, suing on behalf of themselves and a putative class of “all other business entities, in whatever form, including but not limited to corporations, partnerships and sole proprietorships, located in the Borough of Manhattan and bounded geographically on the west by Fifth Avenue, on the east by Park Avenue, on the north by 57th Street and on the South by 42nd Street.” Plaintiffs allege that shoppers and others were unable to gain access to their stores during the time Madison Avenue was closed to traffic. Defendants in both cases are Finlandia Center (the building owner), 540 Acquisition Company (the ground lessee) and Manhattan Pacific Management (the managing agent).

On defendants' motions in both cases, [the trial court] dismissed plaintiffs' negligence claims on the ground that they could not establish that defendants owed a duty of care for purely economic loss in the absence of personal injury or property damage . . . . In *5th Ave. Chocolatiere*, plaintiffs' additional claims for gross negligence and negligence per se were dismissed on the ground that plaintiffs could not establish a duty owed by defendants . . . .

*Goldberg Weprin & Ustin v. Tishman Constr.* involves the July 21, 1998 collapse of a 48-story construction elevator tower on West 43rd Street between Sixth and Seventh Avenues—the heart of bustling Times Square. Immediately after the accident, the City prohibited all traffic in a wide area of midtown Manhattan and also evacuated nearby buildings for varying time periods. Three actions were consolidated—one by a law firm, a second by a public relations firm and a third by a clothing manufacturer, all situated within the affected area. Plaintiff law firm sought damages for economic loss on behalf of itself and a proposed class “of all persons in the vicinity of Broadway and 42nd Street, New York, New York, whose businesses were affected and/or caused to be closed” as well as a subclass of area residents who were evacuated from their homes. . . .

Noting the enormity of the liability sought, including recovery by putative plaintiffs as diverse as hot dog vendors, taxi drivers and Broadway productions, [the trial court] concluded that the failure to allege personal injury or property damage barred recovery in negligence. The court further rejected recovery for strict liability, and dismissed both the public nuisance claim (because plaintiff was unable to show special damages) and the private nuisance claim (because plaintiff could not show that the harm threatened only one person or relatively few).

The Appellate Division affirmed dismissal of the *Goldberg Weprin* complaint, concluding that, absent property damage, the connection between defendants' activities and the economic losses of the purported class of plaintiffs was “too tenuous and remote to permit recovery on any tort theory” . . . . The court, however, reinstated the negligence . . . claims of plaintiffs 532 Madison and 5th Ave. Chocolatiere, holding that defendants' duty to keep their

premises in reasonably safe condition extended to “those businesses in such close proximity that their negligent acts could be reasonably foreseen to cause injury” (which included the named merchant plaintiffs) . . . , and that, as such, they established a special injury distinct from the general inconvenience to the community at large. Two [of the five] Justices dissented, urging application of the “economic loss” rule, which bars recovery in negligence for economic damage absent personal injury or property damage. The dissenters further concluded that the public nuisance claims were properly dismissed because plaintiffs could not establish special injury.

We now reverse in *532 Madison and 5th Ave. Chocolatiere* and affirm in *Goldberg Weprin & Ustin*.

### Plaintiffs’ Negligence Claims

Plaintiffs contend that defendants owe them a duty to keep their premises in reasonably safe condition, and that this duty extends to protection against economic loss even in the absence of personal injury or property damage. Defendants counter that the absence of any personal injury or property damage precludes plaintiffs’ claims for economic injury.

The existence and scope of a tortfeasor’s duty is, of course, a legal question for the courts, which “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurerlike liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability” . . . . At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions.

As we have many times noted, foreseeability of harm does not define duty . . . . Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant’s act.

A duty may arise from a special relationship that requires the defendant to protect against the risk of harm to plaintiff . . . . Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk . . . . That duty, however, does not extend to members of the general public . . . . Liability is in this way circumscribed, because the special relationship defines the class of potential plaintiffs to whom the duty is owed.

In *Strauss v. Belle Realty Co.* we considered whether a utility owed a duty to a plaintiff injured in a fall on a darkened staircase during a citywide blackout. While the injuries were logically foreseeable, there was no contractual relationship between the plaintiff and the utility for lighting in the building’s common areas. As a matter of policy, we restricted liability for damages in negligence to direct customers of the utility in order to avoid crushing exposure to the suits of millions of electricity consumers in New York City and Westchester.

Even closer to the mark is *Milliken & Co. v. Consolidated Edison Co.*, in which an underground water main burst near 38th Street and 7th Avenue in Manhattan. The waters flooded a subbasement where Consolidated Edison maintained an electricity supply substation, and then a fire broke out, causing extensive damage that disrupted the flow of electricity to the Manhattan Garment Center and interrupting the biannual Buyers Week. Approximately 200 Garment Center businesses brought more than 50 lawsuits against Con Edison, including plaintiffs who had no contractual relationship with the utility and who sought damages solely for economic loss. Relying on *Strauss*, we again held that only those persons contracting with the utility could state a cause of action. We circumscribed the ambit of duty to avoid limitless exposure to the potential suits of every tenant in the skyscrapers embodying the urban skyline.

A landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them . . . . We have never held, however, that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses. . . .

Plaintiffs' reliance on *People Express Airlines v. Consolidated Rail Corp.* . . . is misplaced. There, a fire started at defendant's commercial freight yard located across the street from plaintiff's airport offices. A tank containing volatile chemicals located in the yard was punctured, emitting the chemicals and requiring closure of the terminal because of fear of an explosion. Allowing the plaintiff to seek damages for purely economic loss, the New Jersey court reasoned that the extent of liability and degree of foreseeability stand in direct proportion to one another: the more particular the foreseeability that economic loss would be suffered as a result of the defendant's negligence, the more just that liability be imposed and recovery permitted. The New Jersey court acknowledged, however, that the presence of members of the public, or invitees at a particular plaintiff's business, or persons traveling nearby, while foreseeable, is nevertheless fortuitous, and the particular type of economic injury that they might suffer would be hopelessly unpredictable. Such plaintiffs, the court recognized, would present circumstances defying any appropriately circumscribed orbit of duty. We see a like danger in the urban disasters at issue here, and decline to follow *People Express*.

Policy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs. The *Goldberg Weprin* class, for example, would include all persons in the vicinity of Times Square whose businesses had to be closed and a subclass of area residents evacuated from their homes; the *5th Ave. Chocolatiere* class would include all business entities between 42nd and 57th Streets and Fifth and Park Avenues. While the Appellate Division attempted to draw a careful boundary at storefront merchant-neighbors who suffered lost income, that line excludes others similarly affected by the closures—such as the law firm, public relations firm, clothing manufacturer and other displaced plaintiffs in *Goldberg Weprin*, the thousands of professional, commercial and residential tenants situated in the towers surrounding the named plaintiffs, and suppliers and service providers unable to reach the densely populated New York City blocks at issue in each case.

As is readily apparent, an indeterminate group in the affected areas thus may have provable financial losses directly traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses (*see also, Matter of Kinsman Tr. Co.*, [II]) . . . . In such circumstances, limiting the scope of defendants' duty to those who have, as a result of these events, suffered personal

injury or property damage—as historically courts have done—affords a principled basis for reasonably apportioning liability.

We therefore conclude that plaintiffs’ negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed.

## Notes

1. *The pure economic loss rule.* Virtually all states adopt some version of the economic loss rule in actions for negligence. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 646 (2d ed. 2011). Alaska and New Jersey purport to reject the rule altogether. See *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Ala. 1987). The Supreme Court of California allows recovery for economic losses under certain conditions, including the relationship between the parties, the foreseeability of the losses, and the culpability of the defendant. See *J’Aire Corp v. Gregory*, 598 P.2d 60 (Cal. 1979).

Purely economic losses are typically not available in nuisance cases. See, e.g., *Conley v. Amalgamated Sugar Co.*, 263 P.2d 705 (Idaho 1953); *Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984). Similarly, a number of courts reject pure economic loss claims in trespass and product liability claims. See, e.g., *Dale v. Grant*, 34 N.J.L. 142 (1870) (holding that purely economic damage in an action for trespass is not recoverable); *Moore v. Pavex, Inc.*, 514 A.2d 137 (Pa. 1986) (refusing to allow business owners to recover for purely economic damage in a products liability action).

2. *Functions of the pure economic loss rule?* One role of the pure economic loss rule is to preserve a boundary between tort cases and contract cases. The U.S. Supreme Court has asserted that without the pure economic loss rule, “contract law would drown in a sea of tort.” *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (holding that a purchaser of turbines was limited to its contract rights against a manufacturer-seller when the malfunction in question caused damage only to the product itself). Why does it matter whether the plaintiff-purchaser had contract rights or tort rights? Tort damages remedies often include consequential damages such as lost profits while contract damages typically do not. More generally, restricting parties to their contract rights allows the parties to tailor their rights and responsibilities as they see fit. Were the pure economic loss rule abandoned, the Uniform Commercial Code’s capacity to govern the resolution of disputes concerning sale of goods might be undermined by the application of tort principles. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH & LEE L. REV. 523, 551 (2009). What is at stake in preserving the place of contract law and the U.C.C.?

3. *Business interruption insurance.* One of the justifications for the economic loss rule is that the rule allocates the risk of economic loss to “the party best situated to assess the risk of his or her economic loss, to assume, allocate, or insure against that risk.” *Below v. Norton*, 751 N.W.2d 351, 726 (Wis. 2008). But is business interruption insurance really available? Insurers offering business interruption insurance typically require a showing of damage to physical assets in order to trigger business interruption coverage. In other words, the insurance policies

very often contain the same limit on recovery under the policy that the courts impose in tort suits. Courts regularly uphold denials of coverage where the policy excludes payment for business interruption absent physical damage. *See, e.g., Peerless Dyeing Co., Inc. v. Industrial Risk Insurers*, 573 A.2d 541 (Pa. 1990).

4. *Brand tarnishment?* What about economic losses that arise when the market devalues a product based on notorious negligent conduct by the manufacturer? This question became central to a consumer class action against General Motors following a series of headline-grabbing automobile recalls over the course of 2014. Plaintiff-consumers advanced a broad theory of harm by “brand devaluation” under which G.M.’s wrongful conduct tarnished its brand and hurt its customers by “resulting in lower resale values across the board for the brand’s products.” In re *Gen. Motors LLC Ignition Switch Litig.*, 14-MD-2543, 2016 WL 3920353, at \*7 (S.D.N.Y. July 15, 2016) (Furman, J.). Judge Furman rejected this “unprecedented theory of damages,” on the ground that the theory would mean “that every time a manufacturer sells a product, it vouches not just for the value and functionality of that product, but also the product’s resale value *and* the brand’s continuing good name.” *Id.* Is it the right decision to immunize manufacturers against a whole class of social harms arising of their conduct? Even for plaintiffs also suffering property damage or personal injury?

## F. Relational Interests

The law of torts recognizes a variety of relational interests as well as personal interests. Historically, plaintiffs could recover for the loss of services of an injured servant, slave, child, or wife. Until the early part of the last century, actions for seduction allowed a husband or father to recover for the seduction of his wife or daughter. Still today, a third party’s tortious interference with a contractual relationship may be actionable.

One of the most striking relational interests, however, is the loss of consortium claim. Consider the following materials:

### 1. Spouses

In *Diaz v. Eli Lilly* (Mass. 1973), Milagros Diaz alleged that the defendant Eli Lilly negligently manufactured a fungicide that caused severe bodily injuries to her husband, and that as a consequence, she “suffered a loss of the consortium of [her husband], including his ‘services, society, affection, companionship, (and) relations.’” The trial court dismissed the claim on the ground that Massachusetts law recognized no loss of consortium claim by wives for injuries to their husbands. The Massachusetts Supreme Judicial Court reversed. Justice Benjamin Kaplan reviewed the history of the action for negligent interference with consortium:

In olden days, when married women were under legal disabilities corresponding to their inferior social status, any action for personal or other injuries to the wife was brought in the names of the husband and wife, and the husband was ordinarily entitled to the avails of the action as of his own property.

The husband had, in addition, his own recourse by action without even nominal joinder of the wife against those who invaded the conjugal relationship, for example, by criminal conversation with or abduction of his wife. At one time the gravamen of the latter claims for loss of consortium was the deprivation of the wife's services conceived to be owing by the wife to the husband: the action was similar to that of a master for enticement of his servant. Later the grounds of the consortium action included loss of the society of the wife and impairment of relations with her as a sexual partner, and emphasis shifted way from loss of her services or earning capacity. The defendant, moreover, need not have infringed upon the marital relation by an act of adultery or the like, for he could inflict similar injuries upon the husband in the way of loss of consortium by an assault upon the wife or even a negligent injury. Meanwhile, what of the wife's rights? She had none analogous to the husband's. The husband was of course perfectly competent to sue without joinder of the wife for injuries to himself, and there was no thought that the wife had any legal claim to the husband's services or his sexual or other companionship—any claim, at any rate, in the form of a cause of action for third-party damage to the relationship.

302 N.E.2d 555, at 556-57 (Mass. 1973). “[T]he coming in of the married women's acts in the mid-nineteenth century” raised new challenges for the action for negligent interference with consortium. In Massachusetts, early twentieth-century courts finally decided not to allow loss of consortium actions by either husbands or wives. Elsewhere, however, “[i]t was held very widely that husbands still retained their consortium rights, the element of loss of wives' services and earnings, however, being excluded from the husbands' recoveries as belonging to the wives themselves . . . .” 302 N.E.2d at 557. (Kaplan attributed this to “the reluctance of judges to accept the women's emancipation acts.” *Id.*).

Since the 1950s, Justice Kaplan continued, there had grown a “movement of opinion in this country . . . toward recognizing a right of action in either spouse for loss of consortium due to negligent injury of the other”:

We should be mindful of the trend although our decision is not reached by a process of following the crowd. Without attempting a count of the decisions, we may summarize the position roughly as follows. The right of the husband has long been acknowledged in a very substantial majority of the jurisdictions. The right of the wife, first confirmed in *Hittaffer v. Argonne Co. Inc.* (D.C. Cir. 1950), . . . has now been established in perhaps half the American jurisdictions: the result has been achieved in some States by overruling relatively recent precedent in point. In certain jurisdictions the wife's right has been denied although the husband's right is still affirmed—a regrettable solecism. . . . Having in the first Restatement of Torts published in 1938 affirmed the husband's right and denied the wife's in accordance with the then weight of authority, the American law Institute in Restatement Second will state that the husband and wife have the right on equal terms, adding the requirement—in recognition of the significant procedural point—that where possible the consortium claim must be joined with the claim for bodily injury. . . .

To a few critics the idea of a right of consortium seems no more than an anachronism harking back to the days when a married woman was a chattel

slave, and in a formulation such as that of the new Restatement they would find a potential for indefinitely expansion of a questionable liability. But that formulation, reflecting a strong current of recent decisions, is a natural expression of a dominant (and commonplace) theme of our modern law of torts, namely, that presumptively there should be a recourse for a definite injury to a legitimate interest due to a lack of the prudence or care appropriate to the occasion. That it would be very difficult to put bounds on an interest and value it is a possible reason for leaving it without protection at least in the form of an action for money damages. But the law is moderately confident about the ability of the trier (subject to the usual checks at the trial and appellate levels) to apply common sense to the question. The marital interest is quite recognizable and its impairment may be definite, serious, and enduring, more so that the pain and suffering or mental or psychic distress for which recovery is now almost routinely allowed in various tort actions. The valuation problem here may be difficult but is not less manageable. Nor does it follow that if the husband-wife relationship is protected as here envisaged, identical protection must be afforded by analogy to other relationships from that of parent-child in a lengthy regress to that of master-servant; courts will rather proceed from case to case with discerning caution.

302 N.E.2d at 561-63. The *Diaz* court thus recognized symmetrical causes of action for negligent interference with the relationship between spouses. A few states still resist the cause of action. See, e.g., *Boucher v. Dixie Medical Center*, 850 P.2d 1179 (Utah 1992), followed with reservations by *Figueroa v. United States*, 64 F. Supp.2d 1125 (D. Utah 1999).

## 2. Children

Most courts allow fathers and mothers to bring action for loss of the companionship of a child. See, e.g., *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993). The decision to allow such actions seems to have been eased by the long existence at common law of actions by fathers for the loss of their children's services.<sup>2</sup> The early modern common law also allowed fathers to recover for the lost earning capacity of children injured by the tortious act of a third party. In the twentieth century, and especially in the second half of the twentieth century, courts reasoned that "[t]he remedy of loss of a minor's earning capacity during minority is of diminishing significance" and that "today's relationship between parents and children is, or should be, more than that between master and servant." *Davis v. Elizabeth General Medical Center*, 548 A.2d 528 (N.J. 1988) (quoting *Shockley v. Prier*, 225 N.W. 2d 495 (Wis. 1975)).

The question whether to allow actions by children for loss of the companionship and society of a parent has been more controversial. In *Borer v. American Airlines* (Cal. 1977), for example the California Supreme Court upheld the dismissal of loss of consortium actions by nine children of a woman injured by falling lighting equipment. According to Justice Tobriner, writing for the Court in *Borer*, loss of consortium claims must be narrowly limited because they involve "intangible injury for which money damages do not afford an accurate measure or suitable recompense." Moreover, "recognition of a right to recover for such losses in the

<sup>2</sup> On the transition from actions for loss of services to actions for loss of support, see John Fabian Witt, *From Loss of Services to Loss of Support*, 25 LAW & SOC. INQ. 717 (2000).

present context . . . may substantially increase the number of claims asserted in ordinary accident cases, the expense of settling or resolving such claims, and the ultimate liability of the defendants.” 563 P.2d 858, 860 (Cal. 1977).

The current trend appears to be toward extending loss of consortium actions to children for injuries to their parents. The Massachusetts Supreme Judicial Court, for example, allowed such actions in *Ferriter v. Daniel O’Connell’s Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980). Squarely rejecting *Borer*, the *Ferriter* court allowed dependent children to recover loss of consortium where they could establish a dependence that was “rooted in . . . filial needs for closeness, guidance and nurture” and in which they could show injury to such needs. 413 N.E.2d at 696. One recent decision allowing children’s loss of consortium actions identified “15 courts and two state legislatures [that] have recognized the claim of children for loss of parental consortium.” *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1977). Citing “[t]he ‘ancient fallacy’ . . . that children do not have identity as individuals and as members of the family separate from the parents” and a “legislatively expressed public policy . . . to strengthen and encourage the family” the Kentucky Supreme Court has held that “it is only logical to recognize that children have a right to be compensated for their losses when such harm has been caused to them by the wrongdoing of another. It is the purpose of all tort law to compensate one for the harm caused by another and to deter future wrongdoing.” *Id.* at 320.

Courts have been considerable more reluctant—even in the face of the modern trend—to allow such claims where the victim parent objects to or refuses to cooperate in the suit. Such cases typically involve suits sponsored by one parent against a third party for injuries to a second, now-estranged parent. See, e.g., *Jacoby. Brinckerhoff*, 735 A.2d 347 (Conn. 1999); *J.A.H., ex rel R.M.H. v. Wadle & Associates*, 589 N.W.2d 256 (Iowa 1999).

### 3. Unmarried partners

Unmarried partners have typically had no action for loss of consortium. This is generally true for “unmarried cohabiting couples with a ‘stable and significant relationship . . . parallel to a marital relationship.’” *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988).

In 2003, however, the New Mexico Supreme Court made that state the first jurisdiction in the United States to allow loss of consortium actions by unmarried domestic partners.<sup>3</sup>

Claimants must prove an “intimate familial relationship” with the victim in order to recover for loss of consortium. *Dunphy*.<sup>4</sup> “Persons engaged to be married and living together may foreseeably fall into that category of relationship. “[G]iven the widespread reality and acceptance of unmarried cohabitation, a reasonable person would not find the “such a cohabitant’s] emotional trauma to be ‘remote and unexpected.’” *Id.*

<sup>3</sup> New Mexico, interestingly enough, has also allowed grandparents to recover for the loss of the consortium of a grandchild in certain cases. See *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774 (N.M. 1998).

<sup>4</sup> *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994), sought to outline the universe of claimants in negligent infliction of emotional distress cases.



Of course, not everyone who is engaged to be married, living together, or assuming the roles of husband and wife (common law or not) will be entitled to recover. The claimant must prove a close familial relationship with the victim. . . . Courts should presume that such a relationship exists if the couple fits into one of the above categories, but a myriad of factors should be considered to determine whether the relationship was significant enough to recover.

That standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements. [Quoting *Dunphy* (internal quotation marks and citation omitted).]

66 P.3d at 957. The *Lozoya* court responded to the defendant's argument that the rule it was announcing would be unadministrable by observing certain limits:

First, a person can only have an intimate familial relationship with one other person at any one time. That is to say, if a person is married to a different person than the victim of the tort, the claim will be barred. In the case of claims by unmarried cohabitants, the relationship between the claimant and the victim must be demonstrated to be committed and exclusive. . . . Second, the burden of proving that an intimate familial relationship existed will be on the claimant, with a presumption that this exists if the parties were engaged, married or met the general test for common law marriage. The defendant should not have the burden of "fighting off" multiple claims for loss of consortium.

66 P.3d at 958. In the *Lozoya* case, the Court concluded by reversing the trial judge's entry of a directed verdict for the defendant on the loss of consortium claim lodged by Sara Lozoya for injuries to Ubaldo Lozoya. Sara and Ubaldo were not married at the time of the car accident that gave rise to the lawsuit.

In the present case, we cannot deny that Ubaldo and Sara enjoyed a relationship that was very similar, if not identical, to that of the typical married couple, or that a reasonable jury could so find. They had lived together in a house that they owned together for at least fifteen years. They had three children whom they raised together. They carried the same last name, and they generally enjoyed spending time with one another and participating in social events as a couple. Further, their intent to be committed to one another indefinitely is evidenced by their marriage shortly after the first accident, despite Ubaldo's debilitating injuries.

*Id.* Several courts have specifically declined to adopt *Lozoya*. See *Robinson v. Hartzell Propeller*, 276 F. Supp. 2d 412 (E.D. Pa. 2003); *Milberger v. KBHL, LLC*, 486 F. Supp. 1156, 1165 (D. Hawaii 2007); *Conner v. Hodges*, 333 P.3d 130 (Idaho 2014); *Bailey v. Allderdice*, No. 54618-0-I, 2005 Wash. App. LEXIS 2542 (Wash. Sept. 26, 2005).

What about same-sex couples? The era before marriage equality produced questions about the relational interests of non-married queer partners. In August 2014, the Connecticut Supreme Court allowed loss of consortium claims from “members of couples who were not married when the tortious conduct occurred, but who would have been married if the marriage had not been barred by state law.” *Mueller v. Tepler*, 95 A.3d 1011, 1023 (Conn. 2014). A federal district court in New Jersey rejected a same sex partner’s loss of consortium claim where the claim arose out of injuries suffered before enactment of the state’s civil union statute, which authorizes loss of consortium claims between partners. Was it significant that the plaintiff and her same-sex partner did not enter into a civil union once the New Jersey civil union statute was enacted, and still had not entered into such a union at the time of the court’s decision? See *Brigando v. Walt Disney World Co.*, No. 06-1191 (SRC), 2007 WL 3124702 (D.N.J. Oct. 23, 2007).

Do unmarried couples, including same sex couples, have a better argument for loss of consortium, or a worse argument, after the legalization of same-sex marriage? What would a future reversal of the constitutional right to same-sex marriage mean for tort actions arising out of relational interests between unmarried romantic partners?

## G. Tort Immunities

So far we’ve seen a number of domains carved out from the standard of reasonableness. We’ve read that there is no general duty to rescue; that there are limited duties imposed on landowners and occupiers; that the remedies for emotional distress injuries, economic losses, and relational harms are highly constrained. We’ve also seen that any number of unusual or unexpected harms are held to be outside an actor’s obligations.

In addition to these doctrines, there are a number of long-standing immunity doctrines in the common law that bar suits altogether on the basis of the status of the defendant. Some of these immunity doctrines have been substantially cut back. But many of them are still robust.

The result is that in various social settings, tort defendants are protected by a limited- or no-duty rule or an immunity doctrine. As these protections multiply, it becomes unclear what the general rule of American tort law is. Is there a general rule of liability for harms caused by unreasonable acts, with specific exceptions? Or is there instead a general rule of no liability, with special exceptions for certain harms caused by unreasonable acts?

### 1. Intrafamilial Immunities

Traditionally, under the common law of coverture, courts prevented suits between spouses because of their supposed metaphysical unity or the husband’s authority. As the English jurist William Blackstone put it, “husband and wife” were “one person in law,” and “the very being or legal existence of the woman” was “suspended during the marriage” or “incorporated and consolidated into that of the husband.” Blackstone, *Commentaries on the*

*Laws of England*, bk. 1, ch. 15 (1765). In the nineteenth century, the Married Woman's Property Acts enacted in most states allowed wives to bring actions against their husbands for property torts, such as trespass and conversion. But courts continued to enforce spousal immunity for personal torts such as battery, citing concerns for marital harmony or fraud and collusion. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 441 (1989). Indeed, on one account, courts adopted wider and wider ideas about marital privacy that effectively immunized domestic abusers (mostly male) from damages. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Today, most states have rejected these rationales and abrogated spousal immunity, at least as a doctrinal matter. See, e.g., *Leach v. Leach*, 227 Ark. 599 (1957). The Second Restatement adopts this approach. RESTATEMENT (SECOND) OF TORTS § 895F (1979).

Similarly, most states have abrogated traditional parental immunity, either doing so entirely (*Gibson v. Gibson*, 3 Cal.3d 914 (1971)), or at least cutting back significantly on the immunity of parents for torts to their children. States adopting something less than complete abolition of parental immunity typically allow a child's tort lawsuit except those arising out of acts of parental authority or discretionary parental responsibility. See *Goller v. White*, 20 Wis. 2d 402 (Wis. 1963). Some states persist with robust versions of parental immunity, applying it even in cases of non-custodial parents. See *Ascutto v. Farricielli*, 711 A.2d 708 (Conn. 1998).

Despite doctrinal liberalization, intrafamilial tort suits continue to face serious practical obstacles. Most tort suits are viable because some form of liability insurance offers the hope that there will be assets to collect in the event of success. But notwithstanding doctrinal changes, many insurance companies write exclusions of intrafamilial claims into their insurance policies. Why do insurance companies write such exclusions into their policies? The worry is collusive suits in which family members collude to extract money from the insurer.

Some state legislatures have barred such insurance exclusions with respect to mandatory automobile insurance. See, e.g., Ohio Rev. Code § 3937.46 (2017); *Rupert v. Stienne*, 528 P.2d 1013, 1016-17 (Nev. 1974). Some defend prohibiting such exclusions on the ground that the exclusions function as an end-run around the conscious policy change of the courts to allow intrafamilial suits. But note that requiring insurers to offer insurance against intrafamilial torts may effectively require families that are safe to subsidize the insurance of families that are dangerous. One alternative for insurers would be to develop intrusive mechanisms for monitoring the parenting of their insureds, which would allow them to terminate policies for families with children at risk, or to charge such families higher premiums.

Does the pervasiveness of exclusion in liability policies (other than vehicular liability policies) mean that, as a practical matter, tort law is only a mechanism for governing intrafamilial conduct in wealthy families?

## 2. Charitable Immunity

American courts long embraced a doctrine of charitable immunity. See, e.g., *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876). This was a distinctively American rule; English courts allowed tort suits against charitable enterprises. American courts reasoned

that subjecting charities to liability would redirect their resources, preventing them from conducting their charitable activities in accordance with the public good. Courts often rationalized the immunity on the theory that the charity's funds had been entrusted to the organization by donors for specific purposes that did not include paying damages to tort victims. They sometimes contended that the usual *respondeat superior* doctrines were inapplicable outside the for-profit context. When the plaintiff was a beneficiary of the charitable enterprise, courts cited a doctrine of implied waiver. *See Dille v. St. Luke's Hospital*, 355 Mo. 436 (1946).

Over time, states created exceptions to the doctrine of charitable immunity, for example, by recognizing a cause of action for strangers while continuing to bar suits by beneficiaries. *See, e.g., Byrd Theatre Foundation v. Barnett*, 754 S.E.2d 299 (Va. 2014); *Alabama Baptist Hosp. Bd. v. Carter*, 226 Ala. 109 (1932). Today, most states have abrogated the immunity altogether. *See, e.g., President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942). The Second Restatement, for example, discourages any such immunity. RESTATEMENT (SECOND) OF TORTS § 895E (1979). Some states preserve the immunity, *e.g., George v. Jefferson Hosp. Ass'n*, 987 S.W.2d 710 (Ark. 1999). In other states, legislatures restored a weakened immunity, such as caps on damage awards against charities, *see, e.g., Mass. Gen. L. Ch. 231, § 85* (\$20,000), or a restriction of liability to cases of gross negligence, *see, e.g., Crowley v. Bob Jones University*, 234 S.E.2d 879 (S.C. 1977), or a restriction of liability to strangers rather than beneficiaries, *see, e.g., N.J. Stat. Ann. 2A:53A-7* (2017).

### 3. Employers' Immunity

As you will recall from Chapter 5, the common law of employers' liability famously set out a formidable panoply of employer defenses, including assumption of the risk and contributory negligence, which made it difficult for many employees to recover for injuries arising out of the negligence of their employers. Since the enactment of workers' compensation laws beginning a century ago, most employers have had to pay administrative compensation for workplace injuries.

The workers' compensation regime, however, has brought its own form of common law immunity. The New York compensation program, for example, provides that

[t]he liability of an employer [under the workers' compensation law] shall be exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death . . . .

N.Y. WORK. COMP. LAW § 11. Workers' compensation programs like the one in New York thus offer a form of tort immunity, immunizing employers from common law tort liability as the quid pro quo for employees' new statutory no-fault compensation claim. Other common law countries have adopted workers' compensation systems without immunity: injured employees in Great Britain, for example, choose between tort suits or compensation claims after being injured. Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. 6, c. 41 (Eng.). Moreover, the leading early statute in the United States also offered injured workers a choice between a common law action and a workers' compensation claim. But as we saw in the case

of *Ives v. South Buffalo Railway* above in Chapter 3, the courts struck down this first compensation statute as unconstitutional. Virtually all the compensation statutes that followed adopted the immunity provision in the current New York statute.

This distinctive feature of American employers' immunity is qualified by the fact that, as we saw briefly in Chapter 3, injured employees may still bring products liability actions against third-party product manufacturers for injuries arising out of the workplace, and that those manufacturers in some states may then implead the employer, effectively producing the employee-versus-employer tort suits characteristic of the pre-workers' compensation era. By some estimates, two-thirds of common law products liability suits arise out of workplace injuries. We will read more about products cases in the next chapter, Chapter 9.

#### 4. Sovereign Immunity

Since at least the time of King Edward I, the common law held that the King could do no wrong. The King's courts were his own creation and therefore could not hold him to account, especially not for money damages. In the United States, the doctrine of sovereign immunity has persisted, despite the absence of a king, though with substantial alterations.

Why did sovereign immunity exist? The doctrine of sovereign immunity originated in the king's personal immunity. According to Blackstone, sovereign immunity was conceptually required as a consequence of the King's supremacy: "no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction him. For all jurisdiction implies superiority of power . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235. Because of the impossibility of subjecting the king to a court's jurisdiction, "the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong . . ." *Id.* at 238.

In the United States, Justice Joseph Story and Learned Hand offered two additional justifications for the doctrine, more consistent with the country's republican character.

The government itself is not responsible for the misfeasances or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.

STORY ON AGENCY § 319 (1839).

If it were possible to confine . . . the complaints to the guilty, it would be monstrous to deny recovery. The justification is . . . that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial . . . would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance,

it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

*Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950).

Some early post-revolutionary states allowed actions against themselves in the state courts, though usually they made any damages payments contingent on a subsequent (and discretionary) appropriation by the legislative branch. But for most of American history, sovereign immunity and its rationales meant that petitions to the state legislatures for discretionary compensation in private bills—rather than lawsuits in the state courts—were the standard mechanism for gaining redress from the state for wrongs.

In the middle of the twentieth century, however, many states and the federal government shifted from private bills by waiving their sovereign immunity and allowing, subject to certain limits, lawsuits against themselves for injuries. At the federal level, the Federal Tort Claims Act of 1946 set the terms that govern the liability of the federal government to this day. Consider the following case:

***Baum v. U.S.*, 986 F.2d 716 (4th Cir. 1993)**

WIDENER, J.

This appeal requires us to examine the scope of the discretionary function exception to the limited waiver of sovereign immunity provided for in the Federal Tort Claims Act . . . . Appellants Price A. Baum and Margaret Leedy were injured in an automobile accident in which their vehicle penetrated a guardrail on a bridge over the Baltimore-Washington Parkway, causing them to fall to the roadway below. The bridge and guardrail system was owned and maintained by the United States Department of Interior, National Park Service. Baum and Leedy brought suit against the United States pursuant to the FTCA, claiming negligence in the design, construction, and maintenance of the guardrail system in question. The district court dismissed the action on the government's motion, holding that all of the government actions complained of were inherently ones involving choice and policy considerations, and thus fell within the discretionary function exception to the FTCA. Finding no error, we affirm.

I

The accident giving rise to the instant action occurred on May 24, 1987, when Baum was driving [and] Leedy was a passenger in Baum's van. In their complaints Baum and Leedy allege that a vehicle being driven westbound on Route 198 by one Michael Massey crossed into the eastbound lane on or near the bridge and collided with the driver's side of Baum's van. Following the collision, the Baum vehicle caromed off the south side of the road and ran into a curved stone bridge approach adjacent to the eastbound lanes. That collision, in turn, caused the van to rebound across the eastbound and westbound lanes of the bridge on Route 198. There the van went over a curb, crossed a sidewalk, and hit a steel bridge rail mounted on cast iron bridge posts. The guardrail gave way upon impact and the van fell 22 feet to the southbound lanes of the Baltimore-Washington parkway.

...

[Baum and Leedy brought suit under the FTCA claiming their injuries were the result of the negligence of the National Park Service in designing, constructing, and maintaining the guardrail.] The government moved for dismissal or, in the alternative, summary judgment on the grounds that the actions of the government with respect to the guardrail fell within the discretionary function exception to the FTCA and that the negligence action was thus barred by sovereign immunity. On May 23, 1991 the district court granted the government's motion and dismissed the case. Baum and Leedy now appeal from that dismissal.

## II

### A

The FTCA waives the sovereign immunity of the United States so that the government may be liable in tort “in the same manner and to the same extent as a private individual under like circumstances . . . .” 28 U.S.C. § 2674. This broad waiver of immunity is tempered by a rather extensive list of exceptions found at 28 U.S.C. § 2680. The instant case involves one of the more important, and certainly one of the most often-contested, exceptions, the discretionary function exception of 28 U.S.C. § 2680(a). That exception provides that the FTCA’s waiver of the federal immunity “shall not apply to—[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused.”

The discretionary function exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals” [citing *United States v. Varig Airlines*]. The Supreme Court has further identified the purpose of the exception as follows:

Congress wished to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took “steps to protect the Government from liability that would seriously handicap efficient government operations.”

*Varig Airlines*.

...

In [*Berkovitz v. United States*] and [*United States v. Gaubert*], the Court settled upon and then clarified a two-tier analysis for identifying discretionary functions. When evaluating a claim under the FTCA, we must ask first whether the governmental action complained of “involves an element of judgment or choice.” The inquiry boils down to whether the government conduct is the subject of any mandatory federal statute, regulation, or policy prescribing a specific course of action. If such a mandatory statute, regulation, or policy

applies, then the conduct involves no legitimate element of judgment or choice and the function in question cannot be said to be discretionary.

...

If no such mandatory statute, regulation, or policy applies to remove the challenged conduct from the choice and judgment of the government, then we move to the second tier of the *Berkovitz-Gaubert* analysis and ask whether the choice or judgment involved is one “based on considerations of public policy.” This requirement is consistent with and mandated by the general purpose underlying the FTCA and the discretionary function exception, i.e., to balance Congress’ desire to allow redress of injuries suffered through the negligence of government actors against the need to protect the government from being hobbled in the discharge of its policy-driven duties by tort suits. In *Gaubert*, the Court provided an illustration of the operation of this requirement that we think particularly helpful in its application:

There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official’s decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Finally, we note one further point with respect to the application of the second element of the foregoing analysis that we believe *Gaubert* clarified. Rather than requiring a fact-based inquiry into the circumstances surrounding the government actor’s exercise of a particular discretionary function, we are of opinion that a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy. To quote the Court:

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

*Gaubert*, 499 U.S. at \_\_\_\_ n.7, 111 S.Ct. at 1275 n.7.

...



## B

Baum and Leedy argue that the National Park Service was negligent in designing and constructing the bridge guardrail in question in that cast iron, rather than cast steel, was used to construct the posts holding the steel bridge rail. The National Park Service constructed the bridge in the early 1950's. Second, they claim the Park Service negligently failed to maintain the guardrail system during the time preceding their accident. We address separately the two types of claims.

## 1

As to the design and construction claim, . . . Baum and Leedy's only real allegation of negligence appears to be that the selection of cast iron as the material for the guardrail posts fell below an objective standard of reasonableness; thus we inquire whether any law or official policy of that period mandated the exclusive use of cast steel in such projects.

Baum and Leedy strive mightily to find in the legislation authorizing construction of the Baltimore-Washington Parkway a specific Congressional mandate from which the Park Service deviated in constructing the guardrail as it did. They suggest that the following portion of that legislation constitutes such a mandate:

The [Baltimore-Washington] parkway shall be constructed, developed, operated, and administered as a limited access road primarily to provide a protected, safe, and suitable approach for passenger-vehicle traffic to the National Capital . . . .

We are of opinion that this very general, sweeping language is insufficient to remove questions of design and construction of guardrails on the parkway from the discretion of the National Park Service. . . . Surely such language cannot be interpreted as removing all safety-related decisions from the discretion of the agency administering the project.

Finding no mandatory law governing the design and construction of the parkway guardrails, we turn to the second element of the *Berkovitz-Gaubert* analysis: whether the choice of materials to be used in the guardrails is a choice of the type that normally involves considerations of public policy. The question of what materials to use in such a project is also fundamentally described as a question of how to allocate limited resources among competing needs. Considered in this light, we are of opinion that the Park Service's decision in this regard plainly was one bound up in economic and political policy considerations. As the Court [in *Gaubert*] has stated in the related context of a regulatory agency, "[w]here Congress has delegated the authority . . . to the executive branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception." . . . Accordingly, we concur with the district court's dismissal of the claims related to design and construction.

## 2

Next we turn to Baum and Leedy's argument that the Park Service negligently maintained the guardrail system in the years preceding their accident. . . . [W]e find no mandatory statute, regulation, or policy governing the Park Service's maintenance of bridges

or guardrails on park property; thus maintenance, like design and construction, is a function subject to the judgment of the Park Service. The only remaining question, then, is whether Park Service judgments involving when and how to maintain its bridges and guardrails are of the type normally involving considerations of economic, social, or political policy.

Here we begin by examining exactly what Baum and Leedy contend that the Park Service should have done in the way of “maintenance” of the guardrail system in this case. As we have described, the allegedly defective guardrail system was comprised of a steel guardrail supported by cast iron posts. Despite Baum and Leedy’s allegation of negligence in what they call the “maintenance” of the guardrail system, nowhere have they suggested that the allegedly defective condition of the guardrail system could have been remedied by any action short of outright replacement of the cast iron posts. Indeed, Baum and Leedy appear not to dispute the government’s assertion that the only act of maintenance that could have put the guardrail in compliance with current engineering standards is outright replacement.

In light of the nature of Baum and Leedy’s maintenance argument, we are of opinion that the Park Service’s judgment in this regard falls as squarely within the discretionary function exception as do its decisions with respect to design and construction. The decision of how and when to replace a major element of a substantial public facility is, like the decisions involving design and construction, at bottom a question of how best to allocate resources. . . . While we do not suggest that every maintenance decision of every government actor is so policy-based as to fall within the discretionary function exception, on the facts of this case we should reach no other result.

The judgment of the district court is accordingly affirmed.

### Notes

1. *Plaintiffs occasionally prevail.* While the discretionary function exception often bars plaintiffs from recovering against the government, the 1988 case of *Berkovitz v. United States* shows that plaintiffs can prevail. Two-month-old Kevin Berkovitz contracted polio within one month of taking an oral polio vaccine approved by the FDA. The Berkovitz family sued, alleging that the FDA had failed to follow its own policy of testing all vaccine lots. The Third Circuit held that the licensing and release of polio vaccines are wholly discretionary actions protected by the discretionary function exception. The Supreme Court, however, found that the government had “adopted a policy of testing all vaccine lots for compliance with safety standards and preventing the distribution to the public of any lots that fail to comply.” The Court concluded, therefore, that the Berkovitz family’s complaint was directed at a government action that involved no policy discretion. Justice Thurgood Marshall, writing for a unanimous Court, explained that “the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” 486 U.S. 531, 536 (1988).

2. Exception swallowing the rule? The discretionary function exception sometimes seems to undo FTCA liability altogether. Is there really a negligence maintenance claim that could survive the Baum court? Consider the Sixth Circuit case *Rosebush v. United States*, in which

a child fell into a fire pit at a national park campsite maintained by the Forest Service. The majority in *Rosebush* held that the choice of whether to install a grating or railing over the fire pit fell within the discretionary function exception. Dissenting Judge Gilbert Merritt had this to say about the exception:

Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act.

...

I do not agree that the Forest Service's decision regarding whether to place a grating, a railing, or a warning near a campfire pit is the kind of judgment that the discretionary function exception was designed to shield. In *Gaubert*, the Supreme Court explained that the discretionary function exception protects only governmental actions and decisions "grounded in the policy of the regulatory regime." The reasoning behind the exception was to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Although I agree with the majority that safety precautions involve some judgment, I do not agree that the decision of the United States Forest Service in this case is grounded in the "policy of the regulatory regime." I fail to see a social, economic, or political policy behind a decision regarding whether to place gratings or railings or signs near a fire pit to make it safer for the public.

*Rosebush v. U.S.*, 119 F.3d 438 (6th Cir. 1997).

3. *Other exceptions to the FTCA.* The discretionary function exception is not the only exception to the FTCA's waiver of sovereign immunity. 28 U.S.C. § 2680. The FTCA also excludes, inter alia, certain claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of . . . property by any officer of customs or excise or any other law enforcement officer," 28 U.S.C. § 2680(c); certain intentional tort claims against "law enforcement officers," 28 U.S.C. § 2680(h); "[a]ny claim arising out of the combatant activities of the military . . . during a time of war," 28 U.S.C. § 2680(j); and "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k).

Recent Supreme Court decisions clarify the boundaries of these exceptions. In *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008), the Court ruled that the detention of property exception covers all law enforcement officers, not only those who enforce customs or excise laws. Similarly, in *Millbrook v. United States*, 569 U.S. 50 (2013), the Court ruled that the FTCA's intentional tort exception extends all acts or omissions that arise within the scope of a law enforcement officer's employment, regardless of whether they are engaged in investigative or law enforcement activity. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court denied relief to a Mexican alien who alleged that he was unlawfully abducted from Mexico and arrested in the United States. The Court ruled that the foreign country exception barred the claim. In *Smith v. United States*, 507 U.S. 197 (1993), the Court ruled that the exception applies to Antarctica.

4. *A panoply of exceptions.* The FTCA waives sovereign immunity where “a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346 b(1). In *United States v. Olson*, 546 U.S. 43 (2005), the Supreme Court unanimously reversed the Ninth Circuit’s ruling that the FTCA waives sovereign immunity where a state or municipal entity would be liable.

The FTCA provides that “[t]he United States . . . shall not be liable for interest prior to judgment or for punitive damages.” 28 U.S.C. § 2674. In *FAA v. Cooper*, 132 S. Ct. 1441 (2012), the Supreme Court denied punitive damages to a pilot who sued the FAA, DOT, and SSA for disclosing his HIV positive status in violation of the Privacy Act of 1974. However, in *Molzof v. United States*, 502 U.S. 301 (1992), the Court ruled that the exception does not bar damages for loss of enjoyment of life and future medical expenses when their recovery does not depend on any proof that the defendant engaged in intentional or egregious misconduct and their purpose is not to punish.

5. *Katrina canal breaches litigation.* In the aftermath of Hurricane Katrina, Louisiana residents brought a lawsuit against the Army Corp of Engineers (“Corps”), seeking compensation for flooding damages.

The government’s defense rested in part on the discretionary-function exception (“DFE”) to the Federal Tort Claims Act (“FTCA”), alleging that the Corps’s conduct in question constituted a discretionary function of a federal agency. Plaintiffs disputed the application of DFE based on three grounds, which the Fifth Circuit Court of Appeals described as follows:

First, they claim that the impact-review requirement of the National Environmental Policy Act (“NEPA”) constituted a legal mandate that overrides the Corps’s discretion. Next, they maintain that one or more project authorizations created a non-discretionary duty to armor the banks of MRGO. Finally, they argue that the critical calculation made by the Corps in waiting to armor MRGO was an erroneous scientific judgment, not a decision susceptible to public-policy considerations.

696 F.3d 436, 449 (5th Cir. 2012).

A panel of the Fifth Circuit initially held that the DFE defense did not immunize the government against damages caused by Katrina’s effects on MRGO. *Id.* at 391. Reasoning that the immunity defense under the DFE required that the conduct in question involve “an element of judgment or choice” and constitute “governmental actions and decisions based on considerations of public policy,” the panel rejected the discretionary function defense. *Id.* at 392 (quoting *Freeman v. United States*, 556 F.3d 326, 337 (5th Cir. 2009)). In particular, the court found that the Corps’s delay in armoring the banks failed to satisfy the second prong of the requirement, as the delay did not involve “a decision rooted in public-policy considerations” but “an erroneous scientific judgment.” *Id.* at 394.

On rehearing, however, the panel reversed itself, finding that the government enjoyed DFE immunity:

there is ample record evidence indicating the public-policy character of the Corps's various decisions contributing to the delay in armoring Reach 2. Although the Corps appears to have appreciated the benefit of foreshore protection as early as 1967, the record shows that it also had reason to consider alternatives (such as dredging and levee "lifts") and feasibility before committing to an armoring strategy that, in hindsight, may well have been optimal. The Corps's actual reasons for the delay are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations. Whatever the actual reasons for the delay, the Corps's failure to armor timely Reach 2 is shielded by the DFE.

696 F.3d 436, 451 (5th Cir. 2012) (footnote omitted).

6. *Local governmental immunity?* Local governments in the United States were initially deemed to have the same liability as private corporations. But beginning in the middle of the nineteenth century, courts began to distinguish between local governments in their governmental capacity, in which they would enjoy sovereign immunity of the state, and local governments in their proprietary capacity, in which they would not. *See Note, Municipal Tort Liability*, 7 DUKE L.J. 142, 142-43 (1958). Today, the state-level waivers of sovereign immunity typically waive the sovereign immunity of local governments in their governmental capacity. Nonetheless, questions of local government tort liability continue to raise tricky problems. Consider the next case, which gripped New York City for nearly a decade after the 1959 events that led to it:

***Riss v. City of New York*, 22 N.Y.2d 579 (1968)**

BREITEL, J.

This appeal presents, in a very sympathetic framework, the issue of the liability of a municipality for failure to provide special protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered dire personal injuries for lack of such protection. The facts are amply described in the dissenting opinion and no useful purpose would be served by repetition. The issue arises upon the affirmance by a divided Appellate Division of a dismissal of the complaint, after both sides had rested but before submission to the jury.

It is necessary immediately to distinguish those liabilities attendant upon governmental activities which have displaced or supplemented traditionally private enterprises, such as are involved in the operation of rapid transit systems, hospitals, and places of public assembly. Once sovereign immunity was abolished by statute the extension of liability on ordinary principles of tort law logically followed. To be equally distinguished are certain activities of government which provide services and facilities for the use of the public, such as highways, public buildings and the like, in the performance of which the municipality or the State may be liable under ordinary principles of tort law. The ground for liability is the provision of the services or facilities for the direct use by members of the public.

In contrast, this case involves the provision of a governmental service to protect the public generally from external hazards and particularly to control the activities of criminal wrongdoers. . . . The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.

Before such extension of responsibilities should be dictated by the indirect imposition of tort liabilities, there should be a legislative determination that that should be the scope of public responsibility . . . .

It is notable that the removal of sovereign immunity for tort liability was accomplished after legislative enactment and not by any judicial arrogation of power (Court of Claims Act, s 8). It is equally notable that for many years, since as far back as 1909 in this State, there was by statute municipal liability for losses sustained as a result of riot . . . . Yet even this class of liability has for some years been suspended by legislative action . . . , a factor of considerable significance.

When one considers the greatly increased amount of crime committed throughout the cities, but especially in certain portions of them, with a repetitive and predictable pattern, it is easy to see the consequences of fixing municipal liability upon a showing of probable need for and request for protection. To be sure these are grave problems at the present time, exciting high priority activity on the part of the national, State and local governments, to which the answers are neither simple, known, or presently within reasonable controls. To foist a presumed cure for these problems by judicial innovation of a new kind of liability in tort would be foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts.

. . .

For all of these reasons, there is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area of tort liability for police protection to members of the public. Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses.

Accordingly, the order of the Appellate Division affirming the judgment of dismissal should be affirmed.

KEATING, J., dissenting.

Linda Riss, an attractive young woman, was for more than six months terrorized by a rejected suitor well known to the courts of this State, one Burton Pugach. This miscreant, masquerading as a respectable attorney, repeatedly threatened to have Linda killed or maimed

if she did not yield to him: "If I can't have you, no one else will have you, and when I get through with you, no one else will want you." In fear for her life, she went to those charged by law with the duty of preserving and safeguarding the lives of the citizens and residents of this State. Linda's repeated and almost pathetic pleas for aid were received with little more than indifference. Whatever help she was given was not commensurate with the identifiable danger. On June 14, 1959 Linda became engaged to another man. At a party held to celebrate the event, she received a phone call warning her that it was her "last chance." Completely distraught, she called the police, begging for help, but was refused. The next day Pugach carried out his dire threats in the very manner he had foretold by having a hired thug throw lye in Linda's face. Linda was blinded in one eye, lost a good portion of her vision in the other, and her face was permanently scarred. After the assault the authorities concluded that there was some basis for Linda's fears, and for the next three and one-half years, she was given around-the-clock protection. . . .

Linda has turned to the courts of this State for redress, asking that the city be held liable in damages for its negligent failure to protect her from harm. With compelling logic, she can point out that, if a stranger, who had absolutely no obligation to aid her, had offered her assistance, and thereafter Burton Pugach was able to injure her as a result of the negligence of the volunteer, the courts would certainly require him to pay damages. (Restatement, 2d, Torts, s 323.) Why then should the city, whose duties are imposed by law and include the prevention of crime (New York City Charter, s 435) and, consequently, extend far beyond that of the Good Samaritan, not be responsible? . . .

What makes the city's position particularly difficult to understand is that, in conformity, to the dictates of the law, Linda did not carry any weapon for self-defense (former Penal Law, s 1897). Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her.

It is not a distortion to summarize the essence of the city's case here in the following language: "Because we owe a duty to everybody, we owe it to nobody." Were it not for the fact that this position has been hallowed by much ancient and revered precedent, we would surely dismiss it as preposterous. To say that there is no duty is, of course, to start with the conclusion. The question is whether or not there should be liability for the negligent failure to provide adequate police protection.

. . . The city invokes the specter of a "crushing burden" . . . if we should depart from the existing rule and enunciate even the limited proposition that the State and its municipalities can be held liable for the negligent acts of their police employees in executing whatever police services they do in fact provide. . . .

The fear of financial disaster is a myth. The same argument was made a generation ago in opposition to proposals that the State waive its defense of "sovereign immunity." The prophecy proved false then, and it would now. The supposed astronomical financial burden does not and would not exist. No municipality has gone bankrupt because it has had to respond in damages when a policeman causes injury through carelessly driving a police car or in the thousands of other situations where, by judicial fiat or legislative enactment, the State and its subdivisions have been held liable for the tortious conduct of their employees. Thus, in the past four or five years, New York City has been presented with an average of some 10,000 claims each year. The figure would sound ominous except for the fact the city has been paying out less than \$8,000,000 on tort claims each year and this amount includes all those sidewalk defect

and snow and ice cases about which the courts fret so often. . . . Court delay has reduced the figure paid somewhat, but not substantially. Certainly this is a slight burden in a budget of more than six billion dollars (less than two tenths of 1%) and of no importance as compared to the injustice of permitting unredressed wrongs to continue to go unrepaired. That Linda Riss should be asked to bear the loss, which should properly fall on the city if we assume, as we must, in the present posture of the case, that her injuries resulted from the city's failure to provide sufficient police to protect Linda is contrary to the most elementary notions of justice. . . .

Another variation of the "crushing burden" argument is the contention that, every time a crime is committed, the city will be sued and the claim will be made that it resulted from inadequate police protection. . . . The argument is . . . made as if there were no such legal principles as fault, proximate cause or foreseeability, all of which . . . keep liability within reasonable bounds. No one is contending that the police must be at the scene of every potential crime or must provide a personal bodyguard to every person who walks into a police station and claims to have been threatened. They need only act as a reasonable man would under the circumstances. At first there would be a duty to inquire. If the inquiry indicates nothing to substantiate the alleged threat, the matter may be put aside and other matters attended to. If, however, the claims prove to have some basis, appropriate steps would be necessary. . . .

If the police department is in such a deplorable state that the city, because of insufficient manpower, is truly unable to protect persons in Linda Riss' position, then liability not only should, but must be imposed. It will act as an effective inducement for public officials to provide at least a minimally adequate number of police. If local officials are not willing to meet even such a low standard, I see no reason for the courts to abet such irresponsibility.

. . . We are not dealing here with a situation where the injury or loss occurred as a result of a conscious choice of policy made by those exercising high administrative responsibility. . . . There was no major policy decision taken by the Police Commissioner to disregard Linda Riss' appeal for help because there was absolutely no manpower available to deal with Pugach. This "garden variety" negligence case arose in the course of "day-by-day operations of government." . . . Linda Riss' tragedy resulted not from high policy or inadequate manpower, but plain negligence on the part of persons with whom Linda dealt . . . .

More significant, however, is the fundamental flaw in the reasoning behind the argument alleging judicial interference. . . . [I]ndirectly courts are reviewing administrative practices in almost every tort case against the State or a municipality, including even decisions of the Police Commissioner. Every time a municipal hospital is held liable for malpractice resulting from inadequate record-keeping, the courts are in effect making a determination that the municipality should have hired or assigned more clerical help . . . or should have done something to improve its record-keeping procedures . . . . Every time a municipality is held liable for a defective sidewalk, it is as if the courts are saying that more . . . resources should have been allocated to sidewalk repair . . . .

The truth of the matter, however, is that the courts are not making policy decisions for public officials. In all these municipal negligence cases, the courts are doing two things. First, they apply the principles of vicarious liability to the operations of government. Courts would not insulate the city from liability for the ordinary negligence of members of the highway department. There is no basis for treating the members of the police department differently.



Second, and most important, to the extent that the injury results from the failure to allocate sufficient funds and resources to meet a minimum standard of public administration, public officials are presented with two alternatives: either improve public administration or accept the cost of compensating injured persons. Thus, if we were to hold the city liable here for the negligence of the police, courts would no more be interfering with the operations of the police department than they ‘meddle’ in the affairs of the highway department when they hold the municipality liable for personal injuries resulting from defective sidewalks, or a private employer for the negligence of his employees. In other words, all the courts do in these municipal negligence cases is require officials to weigh the consequences of their decisions. If Linda Riss’ injury resulted from the failure of the city to pay sufficient salaries to attract qualified and sufficient personnel, the full cost of that choice should become acknowledged in the same way as it has in other areas of municipal tort liability. Perhaps officials will find it less costly to choose the alternative of paying damages than changing their existing practices.

...

What has existed until now is that the City of New York and other municipalities have been able to engage in a sort of false bookkeeping in which the real costs of inadequate or incompetent police protection have been hidden by charging the expenditures to the individuals who have sustained often catastrophic losses rather than to the community where it belongs, because the latter had the power to prevent the losses.

... At one time the government was completely immunized from this salutary control. This is much less so now, and the imposition of liability has had healthy side effects. In many areas, it has resulted in the adoption of better and more considered procedures just as workmen’s compensation resulted in improved industrial safety practices. To visit liability upon the city here will no doubt have similar constructive effects. ...

No doubt in the future we shall have to draw limitations just as we have done in the area of private litigation, and no doubt some of these limitations will be unique to municipal liability because the problems will not have any counterpart in private tort law. But if the lines are to be drawn, let them be delineated on candid considerations of policy and fairness and not on the fictions or relics of the doctrine of “sovereign immunity.” ... [H]aving undertaken to provide professional police and fire protection, municipalities cannot escape liability for damages caused by their failure to do even a minimally adequate job of it. ...

FULD, C.J., and BURKE, SCILEPPI, BERGAN and JASEN, JJ. concur with BREITEL, J.

### *Notes*

1. *Pugach’s Reward*. Burton Pugach, the man responsible for Linda Riss’s injury, was convicted of assault and sentenced to prison for his attack on Riss. During his fourteen years in prison, he continued to write love letters to her and also offered to help her navigate her disability (for example by, promising to get her a “Seeing Eye dog for Christmas”). Eight months after Pugach was paroled, he and Riss resumed their relationship. They married soon thereafter. In 1997, Pugach was indicted for sexually abusing and threatening to kill another woman. During his trial, Riss (then Riss Pugach) testified on her husband’s behalf. Despite

his conviction and subsequent imprisonment, they remained married. The film *Crazy Love* documents their relationship. *CRAZY LOVE* (Magnolia Pictures 2007). See also Ruth La Ferla, *What's Love Got to Do With It?*, N.Y. TIMES, May 27, 2007, at H1. In 2013, upon Linda Riss Pugach's death, *Crazy Love* filmmaker Dan Klores appeared to reconsider the use of the word "love" when explaining what led the couple to marry. He noted that at the time of her injury, Riss Pugach's "identity was centered around her physical beauty" and that "[w]hen she had a serious romance as a blind woman" (before marrying Pugach), "the suitor ran away" as soon as she removed her sunglasses. In Klores's estimation, Pugach effectively made himself the "one man" who saw Riss Pugach "as the beauty that she was," at least in her mind. Margalit Fox, *Linda Riss Pugach, Whose Life Was Ripped from Headlines, Dies at 75*, N.Y. TIMES, Jan. 23, 2013, at A1.

2. *Political accountability?* Does it matter that victims of injuries caused by the state have another way of holding their injurer accountable? The democratic electoral system offers a political accountability mechanism as an alternative to legal rights enforced through the courts? When a person is injured by the General Motors Company, a tort suit may be her only remedy. But when you are injured by the City of New York, you can vote the bums out.

3. *Potholes in the law.* State level waivers of sovereign immunity often include exceptions or special treatment for recurring problems.

Consider, for example, the lowly pothole. A New York statute immunizes the state from liability arising from pothole-related claims between November 1 and May 15—the season in which ice and snow creates the most severe pothole problems. N.Y. HIGH. LAW § 58 (McKinney 2014); see also Sam Roberts, *Taking on a Pothole Law: In Winter, New York State Rejects Drivers' Claims*, N.Y. TIMES, Apr. 29, 2014.

Ten states have statutory provisions that grant full immunity for injuries arising from pothole- or weather-related defects. See DEL. CODE ANN. tit. 10, § 4011 (2014); GA. CODE ANN. § 50-21-24 (2014); IDAHO CODE ANN. § 6-904 (2014); KAN. STAT. ANN. § 75-6104 (2014); MISS. CODE ANN. § 11-46-9 (2014); OKLA. STAT. tit. 51, § 155 (2014); OR. REV. STAT. § 30.265 (2014); S.C. CODE ANN. § 15-78-60 (2014); WYO. STAT. ANN. § 1-39-120 (2014); *Lane v. State*, 811 A.2d 190 (Vt. 2002).

4. *Local government liability for recreational activities.* Every winter a particular recreational activity creates a slippery slope problem for municipalities across much of the country.

Some worry that sledding liability exposes municipalities to vast liabilities, possibly increasing municipalities' insurance and tax rates. See Husna Haq, *More US Cities Ban Sledding. Will It Work?*, CHRISTIAN SCI. MONITOR (Jan. 5, 2015) (noting that Sioux City, Iowa, and Boone, Iowa, have paid millions to individuals injured while sledding in city parks). Thus, to limit potential liability, some municipalities like Dubuque ban sledding in many city parks. See *City of Dubuque, Iowa—City Council Proceedings Regular Session*, CITY OF DUBUQUE 2 (Jan. 5, 2015).

Other cities in Iowa have used non-legislative measures to decrease potential liability. For instance, Des Moines has added signs at sledding hills, warning sledders that they sled at their own risk. DES MOINES, IOWA, CODE § 74-117 (2013); Scott McFetridge, *Liability Concerns Prompt Some Cities to Limit Sledding*, ASSOC. PRESS (Jan. 4, 2015). Such signs likely shield municipalities from negligence claims. See *Hecht v. Des Moines Playground & Recreation Ass'n*, 287 N.W. 259, 264 (Iowa 1939) (holding that adequate warnings are “all that [a defendant’s duty of] reasonable and ordinary care require[s]”). Some states have enacted statutory immunization of state and local governments for injuries arising out of recreational injuries, as in Michigan and Wisconsin. MICH. COMP. LAWS § 691.1407 (2014); WIS. STAT. ANN. 895.52 (West 2014).

Which approach is better: closing the slope (Dubuque) or immunizing the municipality by warning signs (Des Moines) or enacting legislative immunity (Michigan and Wisconsin)? Even absent the immunization, liability will only exist where a municipality is found negligent, though municipalities will sometimes face litigation costs whether they are found negligent or not.

Interestingly, Dubuque’s restrictions have “spark[ed] . . . backlash” among residents. *Dubuque Officials Consider Opening More Parks to Sledding*, S.F. GATE (Jan. 17, 2015). In the wake of protests, Dubuque’s City Council amended its ordinance and opened more of the city’s parks for sledding. See *City of Dubuque, Iowa—City Council Proceedings Regular Session*, CITY OF DUBUQUE 5 (Jan. 20, 2015), <https://perma.cc/N564-DYBE>.

## 5. Government Officer Immunity

### a. Federal Officials

In the 19th century, federal officials who committed common law torts while serving their duties received no protection from the judiciary. The existence of a superior’s orders or an officer’s good faith belief in the legality of his actions provided no shield from personal liability. See Orval Edwin Jones, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 OKLA. L. REV. 285 (1984). The earliest federal case demonstrating this principle is *Little v. Barreme*, which arose from the seizure of a foreign vessel sailing from France by Naval captain George Little. 6 U.S. (2 Cranch) 170 (1804). Little had acted in compliance with a Presidential order authorizing the capture of any ship suspected of trading with the French during the Quasi-War. However, the Congressional act that the order sought to execute only authorized the seizure of ships sailing to any French port. The Court held that the President’s order did not “legalize an act which without those instructions would have been a plain trespass” and that Little was thus liable for damages. *Id.* at 179.

The judiciary’s early refusal to shield federal officials from liability did not necessarily leave such employees exposed to judgments. Instead, they were able to seek indemnification by petitioning Congress to pass private bills of reimbursement. Congress would often grant such requests, particularly when they stemmed from acts made in good faith fulfillment of their duties and without malicious intent. Indeed, roughly 60% of military officers who sought indemnification in the antebellum era were successful in receiving Congressional relief—including Captain Little himself. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs*

and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. REV. 1862, 1905 (2010). This case-by-case system of indemnification didn't undo *ex post* accountability for official acts. Instead, it gave both the courts and Congress shared responsibility in determining the propriety of an officer's acts.

The doctrine of immunity for common law torts committed in an official's course of duty developed slowly, beginning in the latter part of the century. See Theodore P. Stein, *Nixon v. Fitzgerald: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759-85 (1983). The Supreme Court first laid out the reasoning for officials' immunity in the case of *Bradley v. Fisher*, holding that a federal judge accused of maliciously ordering a lawyer's disbarment was absolutely immune from civil liability. 80 U.S. 335 (1871). The Court reasoned that personal liability would "destroy that independence without which no judiciary can be either respectable or useful." *Id.* at 347. 25 years later, the Court expanded immunity to federal officials in the President's cabinet in *Spalding v. Vilas*, echoing *Bradley* by stating cabinet officer liability for acts done in the scope of their duties would "seriously cripple the proper . . . administration of public affairs." 161 U.S. 483, 499 (1896). The Warren Court expanded this immunity to all federal executive officials in *Barr v. Matteo*, which relied on an additional policy justification that forcing officials to defend themselves against civil suits would "consume time and energies which would otherwise be devoted to governmental service . . . ." 360 U.S. 564, 571 (1959). In 1988, Congress legislated this immunity doctrine into law with the passage of the Westfall Act, whose purpose was "to protect federal employees from personal liability for common law torts committed within the scope of their employment . . . ." Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988).

### ***b. State Officials***

The history of official immunity for state officials begins, like that of their federal counterparts, with strict rules of official liability for common law torts. New York, for example, had a policy of broad liability buttressed by state indemnification. See Note, *Tort Liability of Administrative Officers in New York*, 28 ST. JOHN'S L. REV. 265 (1954). In the early case of *Hyde v. Melvin*, 11 Johns. 521 (N.Y. Sup. Ct. 1814), the Supreme Court of New York held a state militia captain liable for improperly forcing a militia member to perform his duties, despite acting under orders granting him authorization-in-fact to do so. As the 19th century unfolded, New York created absolute immunity for a limited set of officials whose duties were judicial or highly discretionary. See, e.g., *Wilson v. Mayor*, 1 Denio 585 (N.Y. Sup. Ct. 1845) (granting absolute immunity to mayors and aldermen executing discretionary powers). After the start of the Civil War, states expanded absolute immunity to low-level officials. David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 48 (1972). For example, New York expanded absolute immunity to the state highway commissioner, finding that while the statute that authorized the logging was unconstitutional, no liability existed because the commissioner's "duty was to execute the law as he found it." *Dexter v. Alfred*, 19 N. Y. Supp. 770, 771 (N.Y. Sup. Ct. 1892).

Unlike the federal government, however, the vast majority of states did not continue the expansion of absolute immunity to all officials. See 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 29.10, n. 44, at 825-26 (3d ed. 2006). Instead, states tend to shield low-level administrative officials, like prosecutors, with *qualified* immunity, which protects officials so long as they (1) use discretion (2) in good faith while (3) acting in the scope of their official

duties. *See, e.g., City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Ministerial officials—those that perform their duties not according to individual choice—are personally liable for common-law torts, regardless of their good faith or lack of malice. *See generally* Gray, *supra* notes 38-39, at 822-23. Many states, including New York, have enacted indemnification statutes to relieve low-level state employees held liable for acts performed in the course of their duties. *See* Carolyn Kearns, *Tort Liability of Administrative Officers in New York*, 62 ST. JOHN'S L. REV. 181 (1954).

### c. Constitutional Torts

Even as Congress and the courts worked to immunize federal officials from liability for *common law* torts, the Supreme Court created a new category of *constitutional* torts for which federal employees could be held personally liable. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the plaintiff sought damages from federal narcotics officers who had made a warrantless search of his house. The Court held that it was appropriate to hold such officials personally liable for violation of constitutionally protected interests where no other federal remedy was available. Congress may assume any judgments resulting from such constitutional torts, and indeed Congress has done just that. The federal government provides representation for officials in 98% of *Bivens* cases where such representation is requested. Moreover, indemnification of officers held liable in *Bivens* actions is “a virtual certainty.” Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76-77 (1999).

State officials, like their federal brethren, may be held personally liable for constitutional torts under a provision of the Civil Rights Act of 1871, which was passed to combat a wave of atrocities committed by the Ku Klux Klan in the South. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1982). Section 1 of the Act, now codified as Section 1983 of Title 42 of the United States Code, aimed to protect freedmen in the South by providing a cause of action against

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .

Section 1983 was narrowly construed by courts and ignored by prosecutors for nearly a century. But after the Supreme Court’s ruling in *Monroe v. Pape*, 365 U.S. 167 (1961), Section 1983 became a viable independent federal remedy against state and local officials for violations of federally protected rights.

States are not subject to Section 1983 actions because they are not “persons” within the meaning of the statute. Municipalities, by contrast, may be liable. But the Court has ruled that there is no vicarious Section 1983 liability for the constitutional torts of municipal employees. Municipal liability exists only when an official policy leads to the violation of a federally protected civil right. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690-91 (1978). Nevertheless, municipalities routinely indemnify police officers found liable in Section 1983 suits even when there is no official policy. Joanna C. Schwartz, *Police Indemnification*, 89

N.Y.U. L. REV. 885, 888-90 (2014); *see also* PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 85 (1983).

Does indemnification effectively replicate the economic structure of vicarious liability? Or should municipalities be vicariously liable for their employees' constitutional torts under Section 1983? What is at stake in the difference? Note that regardless how municipalities deal with the question of indemnity, civil rights lawsuits seem to have served poorly as tools for deterring police misconduct. Few police departments use information gleaned from tort suits to reshape their practices. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1032 (2010).

## 6. Statutory Immunity

### *The Protection of Lawful Commerce in Arms Act of 2005*

Congress can get into the immunity game, too. Recently it has done so with the Protection of Lawful Commerce in Arms Act, immunizing arms manufacturers and sellers from a broad array of potential tort liability. The Act prohibited the bringing of certain civil actions involving firearms in either the federal or the state courts. It defined those actions to include: "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." The legislation excluded from its immunity rule five categories of firearms injuries, as to which the civil actions may still be brought:

- (i) an action brought against a transferor [knowing that the firearm will be used to commit a crime of violence or drug trafficking crime], or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
- (ii) an action brought against a seller for negligent entrustment or negligence per se;
- (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ;
- (iv) an action for breach of contract or warranty in connection with the purchase of the product;
- (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage . . . .

15 U.S.C. § 7903(5)(A).

***City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008)**

MINER, J.

. . . [O]n June 20, 2000 . . . the City filed a complaint against the Firearms Suppliers seeking injunctive relief and abatement of the alleged public nuisance caused by the Firearms Suppliers’ distribution practices. The City claimed that the Firearms Suppliers market guns to legitimate buyers with the knowledge that those guns will be diverted through various mechanisms into illegal markets. . .

On October 26, 2005, the Protection of Lawful Commerce in Arms Act . . . became federal law. The PLCAA provides that any “qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.” . . .

On the day the PLCAA was enacted, the Firearms Suppliers moved to dismiss the Amended Complaint. . . . [T]he City argued that the Act did not bar its causes of action because this case fell within an exception to the forbidden qualified civil liability actions. . . . [A] suit may proceed when a plaintiff adequately alleges that a “manufacturer or seller of [firearms transported in interstate or foreign commerce] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms], and the violation was the proximate cause of the harm for which relief is sought.” . . . This provision has been called the “predicate exception,” which appellation we adopt. For purposes of this opinion, a statute upon which a case is brought under the predicate exception is referred to as a “predicate statute.” The predicate statute at issue in this case is New York Penal Law § 240.45, Criminal Nuisance in the Second Degree.<sup>5</sup> . . .

On December 2, 2005, the United States District Court for the Eastern District of New York (Weinstein, J.) . . . held that, “[b]y its plain meaning, New York [Penal Law § ] 240.45 satisfies the language of the predicate exception requiring a ‘statute applicable to the sale or marketing of [a firearm].’” . . .

The District Court certified its December 2, 2005 order for immediate appeal to this Court, pursuant to 28 U.S.C. § 1292(b). *Id.* at 298 (“There is a substantial ground for disagreement about a controlling issue of law—the applicability of the Act to the present litigation—and an immediate appeal may substantially advance the ultimate termination of the litigation.”). . . .

[W]e conclude that the City’s claim, predicated on New York Penal Law § 240.45, does not fall within an exception to the claim restricting provisions of the Act because that

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<sup>5</sup> N.Y. Penal Law § 240.45 provides, in pertinent part:

A person is guilty of criminal nuisance in the second degree when . . .

By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons. . . .

statute does not fall within the contours of the Act’s predicate exception. . . .

We conclude . . . that the meaning of the term “applicable” must be determined in the context of the statute. We find nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. . . .

We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the “lawful design, manufacture, marketing, distribution, importation, or sale” of firearms. Preceding subsection (a)(5), Congress stated that it had found that “[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Control Act.” 15 U.S.C. § 7901(a)(4). We think the juxtaposition of these two subsections demonstrates that Congress meant that “lawful design, manufacture, marketing, distribution, importation, or sale” of firearms means such activities having been done in compliance with statutes like those described in subsection (a)(4). . . .

[T]he legislative history of the statute supports the Firearms Suppliers’ proffered interpretation of the term “applicable.” United States Senator Larry E. Craig, a sponsor of the PLCAA, named the case at bar as an “example . . . of exactly the type of . . . lawsuit . . . this bill will eliminate.” . . . United States Representative Clifford B. Stearns, the sponsor of H.R. 800, the House version of the PLCAA, inserted similar comments into the PLCAA’s legislative history so that the “Congressional Record [would] clearly reflect some specific examples of the type of . . . lawsuit” the PLCAA would preclude. . . .

The case is remanded to the District Court with instructions to enter judgment dismissing the case as barred by the PLCAA.

KATZMANN, J., dissenting.

Unlike the majority, I believe this case may be simply resolved by looking only at the ordinary meaning of the words in the statute. . . .

As the district court correctly noted, 401 F. Supp.2d at 261, the ordinary meaning of the word “applicable” is clear; any attempt to read that word as meaning anything more than “capable of being applied” is a strained effort to read an ambiguity that does not exist into the statute. . . .

## Notes

1. *Other interpretations of the PLCAA’s “predicate exception.”* Family members of the victims of the 2012 Sandy Hook school shooting have doggedly pursued the gun industry for its role in that tragedy. In 2022, victims’ families settled with the gun manufacturer Remington for \$73 million after they convinced a court that the PLCAA did not bar one of their legal claims. Rick Rojas, Karen Zraic, & Troy Crosson, *Sandy Hook Families Settle with Gunmaker for \$73 Million Over Massacre*, N.Y. TIMES, Feb. 17, 2022, at A1. The claim that survived was based on an allegation that Remington marketed the Bushmaster XM15-E2S



semiautomatic rifle for criminal and violent purposes, amounting to an “unethical, oppressive, immoral, and unscrupulous” business practice and therefore a violation of a Connecticut consumer protection statute. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262 (Conn. 2019). According to the Connecticut Supreme Court, “[t]he regulation of advertising that threatens the public’s health, safety, and morals has long been considered a core exercise of the states’ police powers” and “Congress has not clearly manifested an intent to extinguish th[at] traditional authority.” *Id.* at 272.

2. *State statutes.* At the time of publication, there are thirty-four states that have enacted legislation shielding gun manufacturers and dealers from civil liability. *Gun Industry Immunity*, GIFFORDS L. CTR., <https://perma.cc/HZN7-BZ63> (last visited June 13, 2022). Other states, however, have moved in the other direction. In 2021, New York enacted novel legislation permitting liability for gun sellers, manufacturers, marketers, and importers based on a public nuisance theory of liability. At the time of publication, gun manufacturers have challenged this law (on preemption grounds and as an alleged violation of the “Dormant Commerce Clause”) and the law has survived. *Nat’l Shooting Sports Found. Inc. v. James*, no. 1:21-cv-1348 (MAD/CFH), 2022 U.S. Dist. LEXIS 93541 (N.D.N.Y. May 25, 2022).

### ***COVID Immunity Legislation***

The onset of the COVID-19 pandemic occasioned a wave of administrative and legislative actions to immunize businesses and healthcare workers from liability arising out of the virus.

The Public Readiness and Emergency Preparedness Act (PREP) authorizes the Department of Health and Human Services (HHS) to extend “immun[ity] from suit and liability . . . with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure,” so long as HHS has declared which countermeasures are covered. 42 U.S.C. § 247d-6d(a)(1). HHS invoked the PREP Act in March 2020, authorizing immunity for the manufacture, testing, development, distribution, administration and use of some COVID-19 “countermeasures.” Thus, health professionals and others allowed to administer these “covered” countermeasures, like the COVID-19 vaccine, are cloaked in immunity. *PREP Act Immunity from Liability for COVID-19 Vaccinators*, DEP’T OF HEALTH & HUM. SERVS., <https://perma.cc/J7EK-U88L> (last visited Jun. 15, 2022). Other people and entities covered by immunity include manufacturers (including suppliers of services related to medical devices and component manufacturers) and distributors of covered countermeasures. *Id.*; KEVIN LEWIS ET. AL, CONG. RSCH. SERV., RL46540, COVID-19 LIABILITY: TORT, WORKPLACE SAFETY, AND SECURITIES LAW 8-9 (2020). The “sole exception to the immunity from suit and liability of covered persons” is when “death or serious physical injury [was] proximately caused by willful misconduct . . . by such a covered person.” 42 U.S.C. § 247d-6d(d)(1).

Congress passed a further provision shielding individual volunteer healthcare professionals from liability for their acts and omissions while providing COVID-19 care. *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. 116-136, 134 Stat. 281.

State law further limited tort liability for SARS-CoV2 exposure. By early 2021—about a year after the arrival of the virus in the United States—over 30 states had passed some 180 laws purporting to shield certain defendants from COVID-19-related tort liability under certain conditions. *COVID-19 Liability Legislation*, NAT’L CONF. OF STATE LEGISLATURES 2 (Feb. 2021), <https://perma.cc/2CVA-K9ES>. Several states (e.g., Indiana, Virginia, Maryland, Louisiana) had already passed legislation conferring certain immunities on healthcare professionals and institutions upon a governor’s declaration of emergency. WEN SHEN, CONG. RSCH. SERV., LSB10508, COVID-19 AND LIABILITY LIMITATIONS FOR THE HEALTH CARE SECTOR 2 (2020).

Some states provided liability protection to healthcare professionals, see *Order of the Governor of the Commonwealth of Pennsylvania to Enhance Protections for Health Care Professionals*, COMMONWEALTH OF PA; other states extended immunity to healthcare facilities and institutions as well, see, e.g., S.B. 2333, 219th Leg., Reg. Sess. (N.J. 2020); GA. CODE ANN. § 51-16-1; Arz. Exec. Order 2020-27; Ill. Exec. Order No. 17, 2020-19; MASS. GEN. LAWS ch. 64 (2020). And while some states offered new immunity only for COVID-19 related care, see, e.g., 2020 Ky. Acts 73, others extended immunity to include non-COVID-19 care activities affected by the pandemic—for example, for schooling and education, see, e.g., H.B. 4402, 3d. Special Sess. (Or. 2020); Ill. Exec. Order No. 17, 2020-19; MASS. GEN. LAWS ch. 64 (2020); S.B. 704, 2019 Gen. Assembly (N.C. 2020); S.B. 3002, 3d. Special Sess. (Utah 2020). Some states even granted immunity for COVID-related personal injury claims to employers generally, provided they comply with federal, state, and local statutes and guidelines, see, e.g., 237 Mich. Pub. Acts (2020), or implement a plan to reduce virus transmission, see, e.g., H.B. 118, Session Law 2020-89, 2019 Sess. (N.C. 2020).

One puzzle is who actually benefited from such immunity legislation. There were very few COVID-19 personal injury suits. By the end of 2021, the COVID-19 lawsuit tracker created by the firm Hunton Andrews Kurth had recorded a mere 303 personal injury claims out of some 12,000 lawsuits arising out of the pandemic nationwide. See *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, <https://perma.cc/AB9G-5XHS> (last visited Jun. 15, 2022). (Of course, the number of suits is in part a function of the legal landscape and the immunity provisions that make filing suits less attractive.) But to the extent the pandemic immunity legislation had winners and losers, the principal winners may not have been main street businesses but instead Wall Street liability insurers. Nearly all liability insurance policies in place in 2020 covered liability for negligent exposure. Immunity thus *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, <https://perma.cc/AB9G-5XHS> (last visited Jun. 15, 2022). Immunity thus seems principally to have aided the bottom lines of insurers, not those of the businesses they insured. See John Czackes, Tom Baker, and John Fabian Witt, *Why We Don’t Need COVID-19 Immunity Legislation*, BALKINIZATION (Sept. 26, 2020), <https://perma.cc/M88T-P3RP>.

Early in the pandemic, Professors Daniel Hemel and Daniel Rodriguez proposed a narrower, purposive approach to COVID immunity: “A safe harbor from tort liability for businesses that inform customers about potential exposures within 24 hours of the business receiving notice that one of its employees or another customer on its premises had covid-19.” Such an approach might accomplish the goals of immunity while enhancing the value of tort liability in a pandemic. Nonetheless, neither state legislatures nor the Congress seem to have taken up the Hemel-Rodriguez proposal. See Daniel Hemel & Daniel Rodriguez, *We can’t stop the pandemic unless we change liability law*, WASH. POST, Jul. 28, 2020; Daniel Hemel &

Daniel B. Rodroquez, *A Public Health Framework for COVID-19 Business Liability*, 7 J. L. & BIOSCIENCES 1 (2020).

### ***Protest Immunities?***

A number of states have legislation offering drivers certain forms of immunity to those who injure certain protesters. Three states—Florida, Iowa, and Oklahoma—enacted versions of such legislation in the wake of protests following the murder of a Black man named George Floyd by police in Minneapolis, Minnesota, in 2020. Thirteen more considered such legislation but did not enact it. See Jim Puzzanghera, *In Harm's Way: Putting the Law on the Driver's Side*, BOSTON GLOBE, Nov. 2, 2021. The laws themselves vary widely. In Iowa, the state legislature mostly restated the existing common law rule, offering immunity to drivers who injure certain protesters so long as the driver exercised “due care.” In Florida, by contrast, legislation enacted in early 2021 purported to immunize defendants from damages where the injuries in question “arose from” conduct “in furtherance of a riot.” See Protest Law Tracker, International Center for Non-Profit Law, <https://perma.cc/65ZX-PSCU> (last visited Jun. 15, 2022).

### ***7. Wartime and National Security Immunities***

Tort damages in wartime have received considerable attention in the past decade. There is no FTCA liability for claims arising out of combat activities of the U.S. armed forces, since the Act declined to waive sovereign immunity for such claims. 28 U.S.C. s. 2680(j). But in armed conflict featuring frequent collisions between U.S. armed forces and civilian populations, the absence of a tort remedy has seemed to be a strategic problem in situations where American Humvees, tanks, and trucks inevitably run into civilians’ homes, animals, and family members. See John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L. REV. 1455 (2008).

The Foreign Claims Act (FCA), first enacted during World War I, aims to offer a remedy where tort doesn’t reach. The FCA authorizes the U.S. Armed Forces to pay monetary compensation to the inhabitants of foreign countries for torts committed against them by the in non-combat operations. A claimant seeking relief under the FCA must file a grievance with a Foreign Claims Commission (“FCC”), a quasi-judicial body established by the Army to handle foreign tort claims. The FCCs, which consist of between one and three commissioned officers, are authorized to approve payouts of varying size, depending primarily on the number of officers sitting on the panel. A one-officer commission may approve damages of up to \$2,500, unless that one officer is a Judge Advocate, in which case the figure rises to \$15,000. A three-officer commission, however, may authorize payment of up to \$50,000 for a single claim, or \$100,000 for multiple claims arising from the same incident. The Secretary of the Army must authorize all payments in excess of \$100,000. Alleged torts stemming from combat activities are barred from consideration, and any national of a country at war with the United States must be deemed “friendly” by the local military commander before becoming eligible to pursue a claim under the FCA. Furthermore, all claimants must file within two years of the occurrence in question.

FCCs decide claims on the basis of prevailing local tort law for both liability and damages. Once a claimant accepts the payment authorized by the FCC, the claim is considered satisfied in full, and the claimant releases the United States from any further liability arising from the incident at issue. If a claim is denied, the claimant may request that the commission reconsider the case. Failing that, the claimant may request further review by a higher military authority—either the Judge Advocate General (JAG) or the Secretary of the relevant branch of the military (or her designee). Any mistake committed by the FCC in either law or fact permits the JAG or Secretary to reexamine the case and correct the error. Beyond that, however, only fraud, substantial new evidence, or an error in calculation justifies further review.

Because neither the FTCA nor the FCA waives sovereign immunity for torts committed by the United States overseas, the federal judiciary has no jurisdiction to hear claims of this sort either in the first instance or on appeal. Therefore, the procedure offered by the local FCC stands as the only recourse for individuals harmed by American forces overseas.

Another place where liability questions have arisen in the armed conflicts of the past decade is with respect to *Bivens* liability for torture. In *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), the Second Circuit declined to recognize *Bivens* liability for torture resulting from the government’s policy of extraordinary rendition. Maher Arar, a Syrian-born Canadian citizen, was detained by the INS while on a layover at JFK Airport in New York. After twelve days in custody, he was removed to Syria, where he underwent confinement and torture. Arar alleged, *inter alia*, that government officials had violated his Fifth Amendment substantive due process rights by deporting him to a foreign country to face coercive interrogation. The district court dismissed Arar’s claim, and the Second Circuit affirmed on the grounds that extending *Bivens* liability to cases involving extraordinary rendition would have the “tendency to affect diplomacy, foreign policy, and the security of the nation.” *Id.* at 574.

The dissenters objected to reaching the merits of the *Bivens* claim and argued instead in favor of deciding the case on the narrower grounds of the state secrets doctrine. They would have allowed Arar’s claim to proceed, though they conceded that it would almost certainly fail once the government asserted the state secrets privilege upon remand. *Id.* at 638 (Calabresi, J., dissenting) (“holding that Arar, *even if all of his allegations are true*, has suffered no remediable constitutional harm *legitimizes* the Government’s actions in a way that a state secrets dismissal would not”).

Other circuits have been no more willing than the Second to extend *Bivens* liability to cases involving allegations of torture arising out of U.S. national security programs. Both the D.C. Circuit, *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011), and the Seventh Circuit, *Vance v. Rumsfeld*, 701 F.3d 193, 202 (7th Cir. 2012), have dismissed *Bivens* actions for post-9/11 torture as prohibitively threatening to important government interests. Only the Fourth Circuit, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), has taken the approach favored by the *Arar* dissenters and declined to reach the merits of the *Bivens* claim, relying instead the state secrets doctrine in its dismissal of the case. As of yet, no federal court has recognized a *Bivens* action for damages arising from torture in the extended national security state.

## 8. Immunity Reconsidered

If one thinks about all the areas in which common law immunities, limited common law duties, or special doctrines such as the rule of pure economic loss or the doctrines of negligent infliction of emotional distress, it can sometimes seem as if the negligence action is hemmed in on all sides. At common law, injury victims found immunity doctrines blocking their path if they were injured at home, at work, by the government, or when receiving medical care from charitable hospitals. Entire categories of harm were unrecoverable.

Fifty years ago, it seemed apparent that the historical trend was toward abolishing limited duties and immunities. See Robert Rabin, *Tort Law in Transition: Tracing the Patterns of Sociological Change*, 23 VAL. U. L. REV. 1, 26 (1988). Beginning in the 1980s, however, that trend slowed and even reversed. Today, the trend in the area of limited duties and immunities seems to some considerably less certain.

At the very same time, in the past fifty years, tort law has witnessed the important but uncertain expansion of a very different doctrine, one that seems to expand liability rather than contracting it: liability without fault.

## CHAPTER 14. MODERN NON-FAULT LIABILITY?

For most of this book, we have been focused on torts that involve wrongful behavior, either intentional or unintentional. We have allocated hundreds of pages to explicating the cause of action for negligence. But from the very outset of the course, we have entertained the possibility of other, non-fault based liability standards in the law of unintentional torts. This chapter picks up this non-fault strand in the law and asks whether there ought to be strict liability for unintended harm—and, if so, under what circumstances?

We begin with a startling observation: we have actually been dealing in a form of non-fault liability for weeks. The doctrine is called *respondeat superior*; it establishes the vicarious liability of employers, without regard to the fault of the employer, for certain tortious acts of their employees.

### A. Vicarious Liability

*Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968)

FRIENDLY, J.

While the United States Coast Guard vessel Tamaroa was being overhauled in a floating drydock located in Brooklyn's Gowanus Canal, a seaman returning from shore leave late at night, in the condition for which seamen are famed, turned some wheels on the drydock wall. He thus opened valves that controlled the flooding of the tanks on one side of the drydock. Soon the ship listed, slid off the blocks and fell against the wall. Parts of the drydock sank, and the ship partially did—fortunately without loss of life or personal injury. The drydock owner sought and was granted compensation by the District Court for the Eastern District of New York in an amount to be determined . . . ; the United States appeals.

. . .

The Tamaroa had gone into drydock on February 28, 1963; her keel rested on blocks permitting her drive shaft to be removed and repairs to be made to her hull. The contract between the Government and Bushey provided in part:

(o) The work shall, whenever practical, be performed in such manner as not to interfere with the berthing and messing of personnel attached to the vessel undergoing repair, and provision shall be made so that personnel assigned shall have access to the vessel at all times, it being understood that such personnel will not interfere with the work or the contractor's workmen.

Access from shore to ship was provided by a route past the security guard at the gate, through the yard, up a ladder to the top of one drydock wall and along the wall to a gangway leading to the fantail deck, where men returning from leave reported at a quartermaster's shack.

Seaman Lane, whose prior record was unblemished, returned from shore leave a little after midnight on March 14. He had been drinking heavily; the quartermaster made mental note that he was "loose." For reasons not apparent to us or very likely to Lane, he took it into his head, while progressing along the gangway wall, to turn each of three large wheels some twenty times; unhappily, as previously stated, these wheels controlled the water intake valves. After boarding ship at 12:11 A.M., Lane mumbled to an off-duty seaman that he had "turned some valves" and also muttered something about "valves" to another who was standing the engineering watch. Neither did anything; apparently Lane's condition was not such as to encourage proximity. At 12:20 A.M. a crew member discovered water coming into the drydock. By 12:30 A.M. the ship began to list, the alarm was sounded and the crew were ordered ashore. Ten minutes later the vessel and dock were listing over 20 degrees; in another ten minutes the ship slid off the blocks and fell against the drydock wall.

The Government attacks imposition of liability on the ground that Lane's acts were not within the scope of his employment. It relies heavily on § 228(1) of the Restatement of Agency 2d which says that "conduct of a servant is within the scope of employment if, but only if: . . . (c) it is actuated, at least in part by a purpose to serve the master." Courts have gone to considerable lengths to find such a purpose, as witness a well-known opinion in which Judge Learned Hand concluded that a drunken boatswain who routed the plaintiff out of his bunk with a blow, saying "Get up, you big son of a bitch, and turn to," and then continued to fight, might have thought he was acting in the interest of the ship. . . . It would be going too far to find such a purpose here; while Lane's return to the Tamaroa was to serve his employer, no one has suggested how he could have thought turning the wheels to be, even if—which is by no means clear—he was unaware of the consequences.

In light of the highly artificial way in which the motive test has been applied, the district judge believed himself obliged to test the doctrine's continuing vitality by referring to the larger purposes *respondeat superior* is supposed to serve. He concluded that the old formulation failed this test. We do not find his analysis so compelling, however, as to constitute a sufficient basis in itself for discarding the old doctrine. It is not at all clear, as the court below suggested, that expansion of liability in the manner here suggested will lead to a more efficient allocation of resources. As the most astute exponent of this theory has emphasized, a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident. Calabresi, *The Decision for Accidents: An Approach to Non-fault Allocation of Costs*, 78 HARV. L. REV. 713, 725-34 (1965). And the suggestion that imposition of liability here will lead to more intensive screening of employees rests on highly questionable premises, see Comment, *Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1301-04 (1961). The unsatisfactory quality of the allocation of resource rationale is especially striking on the facts of this case. It could well be that application of the traditional rule might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the

future,<sup>6</sup> while placing the burden on shipowners is much less likely to lead to accident prevention.<sup>7</sup> It is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve *respondeat superior*'s loss spreading function. . . . But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility . . . , and this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*.

A policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since *respondeat superior*, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. It is in this light that the inadequacy of the motive test becomes apparent. Whatever may have been the case in the past, a doctrine that would create such drastically different consequences for the actions of the drunken boatswain in *Nelson* and those of the drunken seaman here reflects a wholly unrealistic attitude toward the risks characteristically attendant upon the operation of a ship. We concur in the statement of Mr. Justice Rutledge in a case involving violence injuring a fellow-worker, in this instance in the context of workmen's compensation:

Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. . . . These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.

. . .

Put another way, Lane's conduct was not so "unforeseeable" as to make it unfair to charge the Government with responsibility. We agree with a leading treatise that "what is reasonably foreseeable in this context [of *respondeat superior*] . . . is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence . . . The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his own part. The proper test here bears far more resemblance to that which limits liability for workmen's compensation than to the test for negligence. The employer should be held to expect risks, to the public also, which arise 'out of and in the course of' his employment of labor." 2 HARPER & JAMES, THE LAW OF TORTS 1377-78 (1956). . . . Here it was foreseeable that crew members crossing the drydock might do damage, negligently or even intentionally, such as pushing a Bushey employee or kicking property into the

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<sup>6</sup> The record reveals that most modern drydocks have automatic locks to guard against unauthorized use of valves.

<sup>7</sup> Although it is theoretically possible that shipowners would demand that drydock owners take appropriate action, see Coase, The Problem of Social Cost, 3 J.L. & Economics 1 (1960), this would seem unlikely to occur in real life.



water. Moreover, the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation. Once all this is granted, it is immaterial that Lane's precise action was not to be foreseen. . . .

One can readily think of cases that fall on the other side of the line. If Lane had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock, the Government would not be liable; the activities of the "enterprise" do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general. . . . We agree with the district judge that if the seaman "upon returning to the drydock, recognized the Bushey security guard as his wife's lover and shot him," . . . vicarious liability would not follow; the incident would have related to the seaman's domestic life, not to his seafaring activity . . . , and it would have been the most unlikely happenstance that the confrontation with the paramour occurred on a drydock rather than at the traditional spot. Here Lane had come within the closed-off area where his ship lay . . . to occupy a berth to which the Government insisted he have access, . . . and while his act is not readily explicable, at least it was not shown to be due entirely to facets of his personal life. The risk that seamen going and coming from the Tamaroa might cause damage to the drydock is enough to make it fair that the enterprise bear the loss. It is not a fatal objection that the rule we lay down lacks sharp contours; in the end, as Judge Andrews said in a related context, "it is all a question [of expediency,] \* \* \* of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (dissenting opinion).

. . .

Affirmed.

### Notes

1. *Why respondeat superior?* The *Ira Bushey* case takes for granted the well-established proposition that employers are liable for the torts of their employees so long as those torts arise within the scope of the employment, properly defined. Why should this be so? Note that we are not talking about cases where an employer negligently supervises its employees, or fails to use reasonable care in making hiring decisions. These would be independent grounds for suing the employer in negligence. The distinctive feature of vicarious liability is that the employer is liable without regard to whether the employer did anything unreasonable or otherwise tortious.

Observe also that employers' vicarious liability does not vitiate employee liability: *Ira Bushey & Sons* could have sued Seaman Lane instead of, or in addition to, his employer. Similarly, the United States (as Lane's employer) could have pursued an indemnification claim against Seaman Lane for the damages it had to pay out to *Ira Bushey & Sons*. But employers rarely pursue such claims against their employees. For one thing, individual employees often lack assets or the appropriate insurance; in other words, they are frequently judgment proof and so not worth suing. In addition, bringing damages claims against one's own employees

can have negative effects on workplace morale. Employers typically decide that it is better simply to bear the burden of the damages they incur from their employees' conduct.

2. *The Restatement approach.* Judge Friendly focuses on one piece of the Restatement test for the scope of employment—the requirement that the conduct of the servant be “actuated, at least in part, by a purpose to serve the master.” Section 228(1) of *The Restatement (Second) of Agency* further provides that conduct is within the scope of employment only if “it is of the kind he is employed to perform” and “it occurs substantially within the authorized time and space limits.” In cases of intentional violence by one servant against another, such violence is only within the scope of employment if “the use of force is not unexpected by the master.” RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

3. *The back-story to Ira Bushey.* In the district court opinion, District Judge Jack B. Weinstein took a different approach than Judge Friendly: instead of rejecting law and economics in his decision, Judge Weinstein used a “law and economics analysis” to impose liability on the United States. DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 264 (2012). Citing then-Professor Guido Calabresi, Judge Weinstein held that liability should be imposed on the employer because the employer can “obtain insurance more cheaply than those who may be injured.” *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 530 (E.D.N.Y. 1967).

On appeal, while Judge Friendly was uncharacteristically out of the office, his law clerk, a recent Yale Law School graduate named Bruce Ackerman (now a professor at Yale) drafted an opinion affirming the economic approach adopted by Judge Weinstein and drawing on the economics of his torts teacher, Guido Calabresi. As the story goes, Judge Friendly returned from the office, rewrote the opinion, and soundly rejected the Calabresian approach to imposing liability. All that remained of the substance of the law clerk's draft was the opinion's dismissive discussion of the economic approach the draft had taken.

When later asked about Judge Friendly's opinion, Calabresi remarked, “[The] irony is that Friendly got it right and Bruce [Ackerman] got it wrong. I cite the case as a great judge's response to academic theory on the basis of his own experience and intuition.” DORSEN, HENRY FRIENDLY, at 266. Is that right? What is the basis on which our “deeply rooted sentiments,” as Friendly describes them, lead us to decide that the costs in question are characteristic of being an employer of seamen rather than characteristic of being a dry dock?

4. *Vicarious liability and tort theory.* Vicarious liability is pervasive. As one recent commentator puts it, “most tort suits are filed against businesses, and most businesses . . . are sued for the acts of their employees.” See Alan Calnan, *The Distorted Reality of Civil Recourse Theory*, 60 CLEVELAND L. REV. 159, 181 (2012). Though we have not paused to notice, the doctrine has been involved in many of the cases we have read in this book to this point. It is necessarily involved in every tort case against a corporate defendant, since corporations can only act through their agents. Virtually every products liability case is a *respondeat superior* case. Every municipal liability case is. Most cases arising out of economic activity seem to be vicarious liability cases, since so much economic activity is collective or group activity in one way or another.

The prevalence of vicarious liability may have important implications for the basic logic of tort law. For although the field is often conceived of as a law of wrongs, vicarious liability means that many and perhaps even most tort defendants have not done anything wrong at all. Only their employees have acted wrongfully. And yet we hold these blameless employers liable nonetheless. If we add this to the fact that most cases against non-corporate defendants feature liability insurance in which the insurer—not the defendant—will pay the damages, if any, we can only conclude that virtually all tort damages are paid by a party whom no one thinks has acted in a wrongful manner. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1754 (1996).

5. *Vicarious liability in sexual abuse cases.* Professor Martha Chamallas argues that courts apply the doctrine of vicarious liability inconsistently in sex abuse cases:

[E]mployers are automatically liable for torts committed by their employees “in the course and scope of their employment.” . . . In sexual abuse cases, however, the “course and scope of employment” test has been applied much more restrictively. Courts are far less likely to hold employers vicariously liable for sexual abuse committed by employees, even as compared to other cases of non-sexual, intentional torts.

Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136 (2013). For example, in *Lisa M. v. Henry Mayo Newhall Memorial Hosp.*, 907 P.2d 358 (Cal. 1995), the California Supreme Court refused to hold a hospital vicariously liable when its medical technician molested a nineteen-year-old pregnant woman during the performance of an ultrasound. The court also refused to hold a school district liable for a teacher’s molestation of a ninth grader during an extra-curricular activity sanctioned by school. *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948 (Cal. 1989).

Chamallas argues that such cases reflect a misguided notion that sexual misconduct is unique and a tendency to fixate on the psychological state of the offender, while ignoring the significance of situational factors. Cases such as *Lisa M.* and *John R.*, Chamallas argues, frame the sex offender as an outsider, when, in significant part, the individual offender is part of the institution or enterprise.

Chamallas recommends a different approach to sex abuse cases, inspired by the Canadian Supreme Court’s decision in *Bazley v. Curry*, [1999] 2 S.C.R. 534 (Can. B.C.). In *Bazley*, the court held liable a non-profit organization—which operated treatment facilities for emotionally disturbed children—for its employee’s abuse of children under its care. The court based its ruling on the finding that the abuse constituted a risk characteristic of the enterprise. And thus, Chamallas proposes the following rule: “*Vicarious liability shall be imposed if an employer materially increases the risk of tortious action either by conferring power or authority on its employees over vulnerable persons or by regularly placing its employees in situations of intimate or personal contact with clients, customers, or other potential victims.*” Chamallas, *supra*, at 187 (emphasis in original). For a counterargument skeptical of the claim that sex cases have been treated differently in the doctrine, see John Goldberg, *When is Sexual Abuse Within the Scope of Employment?*, JOTWELL (November 21, 2014), <https://perma.cc/FKY7-JA3W>.

## B. Wild and Abnormally Dangerous Animals

### *Rhodes v. MacHugh*, 361 P.3d 260 (Wash. 2015)

SIDDOWAY, C.J.

Comments to § 23 of the *Restatement (Third) of Torts*, which deals with strict liability imposed on the owners of abnormally dangerous animals, observe that the common law has been satisfied overall with the generalization that livestock are not excessively dangerous, but “[i]n the future, courts might wish to give consideration to *particular genders* ... of a species that involve danger levels uncommon for the species itself.” *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 23 cmt. e (2010) (emphasis added). In this case, Jay Rhodes asks us to hold the owner of a ram (a male sheep) strictly liable for harm caused by the ram on account of the ram’s gender-based dangerousness, rather than any abnormal dangerousness of which the owner was aware.

...

#### FACTS AND PROCEDURAL BACKGROUND

Jay Rhodes and Rodney MacHugh are longtime friends and neighbors. Both men live in Richland and have farmed for decades. Mr. Rhodes has raised cows, horses, and occasionally pigs and goats, but he described the summer of 2012 as “my first excursion with sheep. And an unfortunate one.” Mr. MacHugh has bred sheep for over 30 years. Because Mr. MacHugh’s land is prone to flooding, Mr. Rhodes has allowed Mr. MacHugh to keep some of his livestock on Mr. Rhodes’s property.

In the summer of 2012, Mr. MacHugh and Mr. Rhodes went to a livestock yard in Lewiston, Idaho, where Mr. MacHugh purchased a ram to replace his existing ram . . . .The replacement ram was eight or nine months old and weighed in the neighborhood of 150 pounds. It showed no vicious tendencies. The men took it directly to Mr. Rhodes’s property where, for the following month, it caused no problems. In the weeks before Mr. MacHugh put the ram in with ewes, Mr. Rhodes described it as “real friendly. He’d come up to me several times when I was changing water, and I’d pet him.”

On August 20, 2012, Mr. Rhodes went into his yard to turn on his sprinklers. By that time, Mr. MacHugh had put several ewes in the pasture with the ram. Mr. Rhodes walked past them and toward the five-foot sprinklers in the pasture. Just as he touched the valve at the top of the sprinklers, the ram butted him from behind, knocking him to the ground. According to Mr. Rhodes, the ram continued to “jump up in the air and then he’d hit me with his head,” knocking him out “a couple of times,” for as much as 30 minutes. Fortunately, a neighbor who stopped by to bring Mr. Rhodes some cantaloupes saw what was going on. . . . [S]he began throwing her cantaloupes at the ram, which was sufficiently distracted that Mr. Rhodes was able to crawl to the gate. She helped him out and slammed the gate on the charging ram. Mr. Rhodes, then 82 years old, suffered a concussion, five broken ribs, and a broken sternum and shoulder. He was hospitalized for 16 days.

Mr. Rhodes filed this action in an effort to recover for his injuries. He did not contend

that the ram was abnormally dangerous, and he refused to accuse his friend of negligence, testifying, “I don’t think Mr. MacHugh thought there was anything wrong” with the ram. For his part, Mr. MacHugh admitted that he had owned as many as three “mean” rams over the years, but that “on my place, if they’re the least bit mean, they go real quick.” He testified that he had selected this ram because it was the “friendliest” of three that the seller had raised on a bottle after their mother died.

Because Mr. Rhodes relied exclusively on a theory of strict liability that he asked the court to extend to the owners of all rams, not just those known to be abnormally dangerous, the parties presented the legal issue to the trial court on summary judgment. Mr. MacHugh’s motion for summary judgment dismissing the claim was granted. Mr. Rhodes appeals.

#### ANALYSIS

The sole issue on appeal is whether summary judgment in favor of Mr. MacHugh was proper because he is not strictly liable for harm caused by a ram he did not know to be abnormally dangerous. . . .

For more than a century, the rule in Washington regarding liability for harm caused by a domestic animal [defined by the *Restatement (Second) of Torts* as one “that is by custom devoted to the service of mankind at the time and in the place in which it is kept.” *Restatement (Second) of Torts* § 506(2) (1977)] has been:

“The owner or keeper of a domestic animal not naturally inclined to commit mischief, while bound to exercise ordinary care to prevent injury being done by it to another, is not liable for such injury if the animal be rightfully in the place when the mischief is done, unless it is affirmatively shown, not only that the animal was vicious, but that the owner or keeper had knowledge of the fact. When such scienter exists, the owner or keeper is accountable for all the injury such animal may do, without proof of any negligence or fault in the keeping, and regardless of his endeavors to so keep the animal as to prevent the mischief.”

. . . .

Washington cases are consistent with the *Restatement (Second) of Torts* (1977). In *Arnold v. Laird*, 621 P.2d 138 (1980), our Supreme Court noted that the *Restatement (Second)* “recognizes two separate causes of action” against the owner of a domestic animal that causes injury. Under section 509, strict liability applies where the animal “has known dangerous propensities abnormal to its class.” Section 518, on the other hand, “provides that if there are no known abnormally dangerous propensities, the owner is liable only if he is negligent in failing to prevent the harm. The amount of care required is commensurate with the character of the animal.”

Mr. Rhodes concedes that rams have not historically been regarded as being inherently dangerous animals. . . . Nevertheless, relying on a comment to § 23 of the most recent *Restatement*, he asks that we recognize that “[t]he dangerous propensities of rams are well-known and strict liability should attach, and this whether the animal is ‘domestic’ or otherwise.”

The language of § 23 of the *Restatement (Third)* is similar to that of *Restatement (Second)* § 509 [“An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal’s category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.” *Restatement (Third)* § 23, at 303 (2010)], yet the comments to § 23 propose a possible gender-or breed-based modification of the general rule treating domestic animals as not excessively dangerous. Comment *e* states, in part:

Overall, the common law has been satisfied with the generalization that livestock and dogs are not excessively dangerous and has applied this generalization to all livestock and dogs. *In the future, courts might wish to give consideration to particular genders or breeds of a species that involve danger levels uncommon for the species itself. If so, it might be appropriate to impose strict liability, without individualized scienter, on the owner of such an animal.*

*Restatement (Third)* § 23 cmt. *e* (emphasis added). Mr. Rhodes asks us to act on this acknowledgment and common knowledge that while ewes may be timid, rams are known to be dangerous.

Prior versions of the *Restatement* have not overlooked the different temperament of male domestic animals . . . . But historically the framework of liability for negligence has been viewed as adequate to address gender differences, and refusing to broaden strict liability has also been justified by policy reasons.

The *Restatement (Second)* recognizes the relatively dangerous propensities of male domestic animals such as bulls, stallions, and rams but characterizes them as normal to their class. As the comments to § 509 observe, “[T]hese animals have been kept for stud purposes from time immemorial so that the particular danger involved in their dangerous tendencies has become a normal incident of civilized life.” *Restatement (Second)* § 509 cmt. *e*; . . . . In other words, a ram has not been considered “abnormally” dangerous for purposes of applying strict liability under § 509 because its dangerous propensities are “normal” for its species.

It is also for policy reasons that owners of male domestic animals have not been held to a standard of strict liability, because often it is the very characteristics that cause the males to be dangerous that make them useful to society. The comments to § 518 of the *Restatement (Second)* observe that “[t]he high temper normal to stud animals is so inseparable from their usefulness for breeding purposes that they are not kept at the risk of the liability stated in § 509.” *Restatement (Second)* § 518 cmt. *f*. . . .

The law is not oblivious to the greater risk posed by male livestock used for breeding in the context of liability for negligence, and greater precautions are typically required in light of their characteristics. . . . As the comments to § 518 explain, “the keeper of a bull or stallion is required to take greater precautions to confine it to the land on which it is kept and to keep it under effective control when it is taken from the land than would be required of the keeper of a cow or gelding.” *Restatement (Second)* § 518 cmt. *g*.

“Rules of law ... should not be changed for light or transient causes; but, when time and events prove the need for a change, changed they must be.” Here, the utility of domestic animals remains undiminished. Those who raise them and face the greatest exposure to

relatively more dangerous genders or breeds will be familiar with their characteristics. Third parties continue to have recourse for an owner's negligence, and owners are required to take greater precautions to confine and control animals in light of their characteristics. Mr. Rhodes's unfortunate excursion with Mr. MacHugh's ram does not persuade us that the limited scope of strict liability that Washington has historically imposed on the owners of domestic animals should be enlarged.

Affirmed.

### **Note**

*Wild animals.* Tort law holds possessors of wild animals to the same level of responsibility as possessors of abnormally dangerous animals. In the Restatement formulation: "A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm." RESTATEMENT (SECOND) OF TORTS § 507(1) (1977). Note that as with abnormally dangerous animals, the possessor of a wild animal is not strictly liable for any harm that the animal causes—only "harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know." RESTATEMENT (SECOND) OF TORTS § 507(2) (1977). Can you imagine a concrete scenario in which this language would allow a possessor of a wild animal to avoid being held strictly liable for an injury the animal caused?

## **C. Abnormally Dangerous Activities**

### ***Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969)**

FULD, C.J.

The principal question posed on this appeal is whether a person who has sustained property damage caused by blasting on nearby property can maintain an action for damages without a showing that the blaster was negligent. Since 1893, when this court decided the case of *Booth v. Rome, Watertown and Ogdensburg Terminal Railroad*, 140 N.Y. 267 (1893), it has been the law of this State that proof of negligence was required unless the blast was accompanied by an actual physical invasion of the damaged property—for example, by rocks or other material being cast upon the premises. We are now asked to reconsider that rule.

The plaintiff Spano is the owner of a garage in Brooklyn which was wrecked by a blast occurring on November 27, 1962. There was then in that garage, for repairs, an automobile owned by the plaintiff Davis which he also claims was damaged by the blasting. Each of the plaintiffs brought suit against the two defendants who, as joint venturers, were engaged in constructing a tunnel in the vicinity pursuant to a contract with the City of New York. The two cases were tried together, without a jury, in the Civil Court of the City of New York, New York County, and judgments were rendered in favor of the plaintiffs. The judgments were reversed

by the Appellate Term and the Appellate Division affirmed that order, granting leave to appeal to this court.

It is undisputed that, on the day in question (November 27, 1962), the defendants had set off a total of 194 sticks of dynamite at a construction site which was only 125 feet away from the damaged premises. Although both plaintiffs alleged negligence in their complaints, no attempt was made to show that the defendants had failed to exercise reasonable care or to take necessary precautions when they were blasting. Instead, they chose to rely, upon the trial, solely on the principle of absolute liability either on a tort theory or on the basis of their being third-party beneficiaries of the defendants' contract with the city. At the close of the plaintiff Spano's case, when defendants' attorney moved to dismiss the action on the ground, among others, that no negligence had been proved, the trial judge expressed the view that the defendants could be held liable even though they were not shown to have been careless. The case then proceeded, with evidence being introduced solely on the question of damages and proximate cause. Following the trial, the court awarded damages of some \$ 4,400 to Spano and of \$329 to Davis.

On appeal, a divided Appellate Term reversed that judgment, declaring that it deemed itself concluded by the established rule in this State requiring proof of negligence. . . .

In our view, the time has come for this court to make that "announcement" and declare that one who engages in blasting must assume responsibility, and be liable without fault, for any injury he causes to neighboring property.

The concept of absolute liability in blasting cases is hardly a novel one. The overwhelming majority of American jurisdictions have adopted such a rule. (See PROSSER, TORTS [2d ed.], § 59, p. 336; RESTATEMENT (THIRD) TORTS, §§ 519, 520, comment *e*; Ann.) Indeed, this court itself, several years ago, noted that a change in our law would "conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass."

We need not rely solely, however, upon out-of-state decisions in order to attain our result. In . . . *Hay v. Cohoes Co.*, 2 N.Y. 159 . . . , for example, the defendant was engaged in blasting an excavation for a canal and the force of the blasts caused large quantities of earth and stones to be thrown against the plaintiff's house, knocking down his stoop and part of his chimney. The court held the defendant *absolutely* liable for the damage caused, stating:

It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. Hence the maxim *sic utere tuo, &c.* The defendants had the right to dig the canal. The plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself



a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

Although the court in *Booth* drew a distinction between a situation—such as was presented in the *Hay* case—where there was “a physical invasion” of, or trespass on, the plaintiff’s property and one in which the damage was caused by “setting the air in motion, or in some other unexplained way” (140 N. Y., at 279, 280), it is clear that the court, in the earlier cases, was not concerned with the particular manner by which the damage was caused but by the simple fact that any explosion in a built-up area was likely to cause damage. Thus, in *Heeg v. Licht*, 80 N. Y. 579 . . . , the court held that there should be absolute liability where the damage was caused by the accidental explosion of stored gunpowder, even in the absence of a physical trespass:

“The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. . . . The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, . . . In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application.”

Such reasoning should, we venture, have led to the conclusion that the *intentional* setting off of explosives—that is, blasting—in an area in which it was likely to cause harm to neighboring property similarly results in absolute liability. However, the court in the *Booth* case rejected such an extension of the rule for the reason that “[to] exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other.” 140 N. Y., at 281. The court expanded on this by stating, “This sacrifice, we think, the law does not exact. Public policy is promoted by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this.”

This rationale cannot withstand analysis. The plaintiff in *Booth* was not seeking, as the court implied, to “exclude the defendant from blasting” and thus prevent desirable improvements to the latter’s property. Rather, he was merely seeking compensation for the damage which was inflicted upon his own property as a result of that blasting. The question, in other words, was not *whether* it was lawful or proper to engage in blasting but *who* should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby. Viewed in such a light, it clearly appears that *Booth* was wrongly decided and should be forthrightly overruled.

In more recent cases, our court has already gone far toward mitigating the harsh effect of the rule laid down in the *Booth* case. Thus, we have held that negligence can properly be inferred from the mere fact that a blast has caused extensive damage, even where the

plaintiff is unable to show “the method of blasting or the strength of the charges or the character of the soil or rock.” . . . But, even under this liberal interpretation . . . , it would still remain possible for a defendant who engages in blasting operations—which he realizes are likely to cause injury—to avoid liability by showing that he exercised reasonable care. Since blasting involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person who engages in such an activity to impose this risk upon nearby persons or property without assuming responsibility therefor.

. . . The principle thrust of [defendants’] argument is directed not to the requisite standard of care to be used but, rather, to . . . the proof adduced on the issue of causation.

. . . Although the evidence adduced by the plaintiffs on th[e] question [of causation] was entirely circumstantial, it may not be said that it was insufficient as a matter of law. The plaintiffs’ principal witness was a contractor who had leased a portion of the premises from Spano. It was his testimony that there was no damage on or to the premises prior to November 27; that he had heard an explosion at about noon on that day while he was working some three blocks away and that, when he returned a few hours later, the building “was cracked in the wall . . . the window broke, and the cement floor all pop up.” In addition, an insurance adjuster, an expert with wide experience in handling explosion claims, who inspected the damage to Davis’s car, testified that the damage was evidently “caused by a concussion of one form or another.” The defendants’ expert attributed the damage to another cause—poor maintenance and building deterioration—but, admittedly, the defendants were engaged in blasting operations in the area at the time and, as the Appellate Term expressly found, the inference that this was the cause of the damage could properly be drawn. Even though the proof was not insufficient as a matter of law, however, the Appellate Division affirmed on the sole ground that no negligence had been proven against the defendants and thus had no occasion to consider the question whether, in fact, the blasting caused the damage. That being so, we must remit the case to the Appellate Division so that it may pass upon the weight of the evidence. . . .

The order appealed from should be reversed, with costs, and the matter remitted to the Appellate Division for further proceedings in accordance with this opinion.

Order reversed. . . .

## Notes

1. *What is an abnormally dangerous activity?* As the *Spano* court indicates, the blasting rule has been extended in the Restatement to include abnormally dangerous activities more generally. The standard view is that abnormally dangerous activities include explosives and “high-energy activities.” See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS’ LAW OF TORTS § 443 (2d ed. 2014). Courts have ruled that the category encompasses gasoline explosions, *Nat’l Steel Serv. Ctr, Inc. v. Gibbons*, 319 N.W.2d 269 (Iowa 1982), and fireworks injuries, *Klein v. Pyrodyne Corp.*, 810 P.2d 917 (Wash. 1991). Courts, however, do not consider gasoline and related fuels to be abnormally dangerous when they are stored, *McLane v. Nw. Nat’l Gas Co.*, 467 P.2d 635 (Or. 1970), or used as fuels, *Allison v. Ideal Laundry & Cleaners*, 55 S.E.2d 281 (S.C. 1949). Courts similarly do not consider electricity to be

abnormally dangerous when it is transported over uninsulated or insulated powerlines. *Kent v. Gulf States Utils. Co.*, 418 So. 2d 493 (La. 1982).

Courts have held that using toxic materials to kill pests may be an abnormally dangerous activity. *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948). The same is true with using toxic substances to protect crops. *See Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961). At least one court has held that storing radioactive material may be considered an abnormally dangerous activity. *See In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986 (9th Cir. 2008) (amended opinion).

Some observers have blamed hydraulic fracturing (or “fracking”) for explosions, groundwater contamination, and even flammable tap water. *See, e.g.,* Abrahm Lustgarten, *Does Natural Gas Drilling Make Water Burn?*, SCI. AM., Apr. 27, 2009. A number of academic articles have argued that fracking should be considered an abnormally dangerous activity. *See, e.g.,* Leonard S. Rubin, *Frack to the Future: Considering a Strict Liability Standard for Hydraulic Fracturing Activities*, 3 GEO. WASH. J. ENERGY & ENVIRO. L. 117 (2012). Courts have been less enthusiastic. *See, e.g., Ely v. Cabot Oil & Gas Corp.*, 38 F.Supp.3d 518 (M.D. Pa. 2014); *Williams v. Amoco Prod. Co.*, 734 P.2d 1113 (Kan. 1987). Wyoming has held *all* oil and gas drilling to be abnormally dangerous, *Hull v. Chevron, U.S.A., Inc.*, 812 F.2d 584, 589 (10th Cir. 1987). But as of the summer of 2017, no state had applied the doctrine to fracking *in particular*.

2. *The Restatements.* Both the Restatement (Second) and (Third) of Torts impose strict liability on abnormally dangerous activities. The two Restatements, however, have different definitions of “abnormally dangerous activities.” The Restatement (Third) classifies an activity as abnormally dangerous if “(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20(b)(1)-(2) (2010). By contrast, the Restatement (Second) laid out a series of factors to be considered in classifying an activity as abnormally dangerous. Those factors include: (a) a “high degree of risk of some harm” to others; (b) a likelihood that such harm would be great; (c) an “inability to eliminate the risk by the exercise of reasonable care”; (d) the “extent to which the activity is not a matter of common usage”; (e) the “inappropriateness” of the setting in which the activity takes place; and (f) the extent to which the activity’s dangerousness outweighs its “value to the community.” RESTATEMENT (SECOND) OF TORTS § 520 (1977).

3. *The case of the cannibal minks.* In 1942, the Utah Supreme Court decided *Madsen v. East Jordan Irrigation Co.*, 125 P.2d 794 (Utah 1942). The case arose when the defendant, in repairing its canal, “blasted with explosives, causing vibrations and noises which frightened the mother mink and caused 108 of them to kill 230 of their ‘kittens.’” The plaintiff sued for damages, arguing that the defendant was strictly liable for the lost mink kittens. The court rejected the claim and explained that even though Utah law did not require any concussive effect to invoke the doctrine of strict liability for blasting, still a blaster was not liable for all damages caused by its activities:

[H]e who fires explosives is not liable for every occurrence following the explosion which has a semblance of connection to it. Jake's horse might become so excited that he would run next door and kick a few ribs out of Cy's jersey cow, but is such a thing to be anticipated from an explosion? Whether the cases are concussion or nonconcussion, the results chargeable to the nonnegligent user of explosives are those things ordinarily resulting from an explosion. Shock, air vibrations, thrown missiles are all illustrative of the anticipated results of explosives; they are physical as distinguished from mental in character. The famous Squib case does not mitigate what has been said in the preceding lines. That was a case where the mental reaction was to be anticipated as an instinctive matter of self-preservation. In the instant case, the killing of their kittens was not an act of self-preservation on the part of the mother mink but a peculiarity of disposition which was not within the realm of matters to be anticipated. Had a squib been thrown and suddenly picked up by a dog, in fun, and carried near another, it is ventured that we would not have had a famous Squib case, as such a result would not have been within the realm of anticipation.

*Madsen*, 125 P.2d at 795. Does the question of the relative risk reduction capacity of the parties help to explain the outcome in *Madsen*? If *Madsen* is correctly decided, is *Spano*? Isn't the *Spano v. Perini Corp.* garage the equivalent of the cannibal mink in *Madsen*? When a plaintiff's property is damaged by percussive force and vibrations is it as likely, as it is in cases of physical impact, that the defendant blaster was better positioned to reduce the risks than the plaintiff property owner?

4. *A notice principle.* Contrast *Madsen* with *Wadsworth v. Marshall*, 34 A. 30 (Me. 1896). In *Wadsworth*, a blast from the defendant's mine frightened the plaintiff's horse, thereby injuring the plaintiff. A state statute required that "persons engaged in blasting . . . give . . . notice" to parties that were in close proximity to the blasting, but the defendant failed to do so. Because the defendant failed to abide by the statute, the court held the defendant "liable for the consequences of his negligence, if no negligence of the plaintiff contributed to the injury. If it did, plaintiff cannot recover. The established doctrine of contributory negligence, as a defense, applies to this class of actions." *Id.* at 32.

***Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990)**

POSNER, J.

American Cyanamid Company, the defendant in this diversity tort suit governed by Illinois law, is a major manufacturer of chemicals, including acrylonitrile, a chemical used in large quantities in making acrylic fibers, plastics, dyes, pharmaceutical chemicals, and other intermediate and final goods. On January 2, 1979, at its manufacturing plant in Louisiana, Cyanamid loaded 20,000 gallons of liquid acrylonitrile into a railroad tank car that it had leased from the North American Car Corporation. The next day, a train of the Missouri Pacific Railroad picked up the car at Cyanamid's siding. The car's ultimate destination was a

Cyanamid plant in New Jersey served by Conrail rather than by Missouri Pacific. The Missouri Pacific train carried the car north to the Blue Island railroad yard of Indiana Harbor Belt Railroad, the plaintiff in this case, a small switching line that has a contract with Conrail to switch cars from other lines to Conrail, in this case for travel east. The Blue Island yard is in the Village of Riverdale, which is just south of Chicago and part of the Chicago metropolitan area.

The car arrived in the Blue Island yard on the morning of January 9, 1979. Several hours after it arrived, employees of the switching line noticed fluid gushing from the bottom outlet of the car. The lid on the outlet was broken. After two hours, the line's supervisor of equipment was able to stop the leak by closing a shut-off valve controlled from the top of the car. No one was sure at the time just how much of the contents of the car had leaked, but it was feared that all 20,000 gallons had, and since acrylonitrile is flammable at a temperature of 30 degrees Fahrenheit or above, highly toxic, and possibly carcinogenic . . . the local authorities ordered the homes near the yard evacuated. The evacuation lasted only a few hours, until the car was moved to a remote part of the yard and it was discovered that only about a quarter of the acrylonitrile had leaked. Concerned nevertheless that there had been some contamination of soil and water, the Illinois Department of Environmental Protection ordered the switching line to take decontamination measures that cost the line \$981,022.75, which it sought to recover by this suit.

One count of the two-count complaint charges Cyanamid with having maintained the leased tank car negligently. The other count asserts that the transportation of acrylonitrile in bulk through the Chicago metropolitan area is an abnormally dangerous activity, for the consequences of which the shipper (Cyanamid) is strictly liable to the switching line . . . . After the district judge denied Cyanamid's motion to dismiss the strict liability count . . . the switching line moved for summary judgment on that count— and won. . . . [The district judge then awarded the switching line plaintiff \$981,022.75 in damages and dismissed the plaintiff's negligence claim with prejudice. Cyanamid appealed the entry of judgment on the abnormally dangerous strict liability claim and the switching line cross-appealed, challenging the dismissal of the negligence count.]

The question whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route is a novel one in Illinois . . . .

The key provision is section 520 [of the *Restatement (Second) of Torts*], which sets forth six factors to be considered in deciding whether an activity is abnormally dangerous and the actor therefore strictly liable.

The roots of section 520 are in nineteenth-century cases. The most famous one is *Rylands v. Fletcher*, . . . but a more illuminating one in the present context is *Guille v. Swan*. . . . In *Guille*, a man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then-state of ballooning it was impossible to make a pinpoint landing.

*Guille* is a paradigmatic case for strict liability. (a) The risk (probability) of harm was great, and (b) the harm that would ensue if the risk materialized could be, although luckily was not, great (the balloonist could have crashed into the crowd rather than into the vegetables). The confluence of these two factors established the urgency of seeking to prevent such accidents. (c) Yet such accidents could not be prevented by the exercise of due care; the technology of care in ballooning was insufficiently developed. (d) The activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable riskiness. (e) The activity was inappropriate to the place in which it took place—densely populated New York City. The risk of serious harm to others (other than the balloonist himself, that is) could have been reduced by shifting the activity to the sparsely inhabited areas that surrounded the city in those days. (f) Reinforcing (d), the value to the community of the activity of recreational ballooning did not appear to be great enough to offset its unavoidable risks.

These are, of course, the six factors in section 520. They are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control. The interrelations might be more perspicuous if the six factors were reordered. One might for example start with (c), inability to eliminate the risk of accident by the exercise of due care. . . . The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less ((e)), or by reducing the scale of the activity in order to minimize the number of accidents caused by it ((f)). . . . Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980). By making the actor strictly liable—by denying him in other words an excuse based on his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident. . . . The greater the risk of an accident ((a)) and the costs of an accident if one occurs ((b)), the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability. Finally, if an activity is extremely common ((d)), like driving an automobile, it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.

The largest class of cases in which strict liability has been imposed under the standard codified in the *Second Restatement of Torts* involves the use of dynamite and other explosives for demolition in residential or urban areas. RESTATEMENT, *supra*, § 519, cmt. d. . . . Explosives are dangerous even when handled carefully, and we therefore want blasters to choose the location of the activity with care and also to explore the feasibility of using safer substitutes (such as a wrecking ball), as well as to be careful in the blasting itself. Blasting is not a commonplace activity like driving a car, or so superior to substitute methods of demolition that the imposition of liability is unlikely to have any effect except to raise the activity's costs.

Against this background we turn to the particulars of acrylonitrile. [W]e have been given no reason . . . for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars. . . .

[A]lthough acrylonitrile is flammable even at relatively low temperatures, and toxic, it is not so corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, with average) care. No one suggests, therefore, that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness—whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can . . . be shown in court, such accidents are adequately deterred by the threat of liability for negligence.

It is true that the district court purported to find as a fact that there is an inevitable risk of derailment or other calamity in transporting “large quantities of anything.” . . . This is not a finding of fact, but a truism: anything can happen. The question is, how likely is this type of accident if the actor uses due care? For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well. This also means, however, that the amici curiae who have filed briefs in support of Cyanamid cry wolf in predicting “devastating” effects on the chemical industry if the district court's decision is affirmed. If the vast majority of chemical spills by railroads are preventable by due care, the imposition of strict liability should cause only a slight, not as they argue a substantial, rise in liability insurance rates, because the incremental liability should be slight. The amici have momentarily lost sight of the fact that the feasibility of avoiding accidents simply by being careful is an argument *against* strict liability. . . .

The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest date for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation. East St. Louis, which is also in Illinois, handled the second highest volume. . . . With most hazardous chemicals (by volume of shipments) being at least as hazardous as acrylonitrile, it is unlikely—and certainly not demonstrated by the plaintiff—that they can be rerouted around all the metropolitan areas in the country, except at prohibitive cost. Even if it were feasible to reroute them one would hardly expect shippers, as distinct from carriers, to be the firms best situated to do the rerouting. Granted, the usual view is that common carriers are not subject to strict liability for the carriage of materials that make the transportation of them abnormally dangerous, because a common carrier cannot refuse service to a shipper of a lawful commodity. RESTATEMENT, *supra*, § 521. Two courts, however, have rejected the common carrier exception. . . . If it were rejected in Illinois, this would weaken still further the case for imposing strict liability on shippers whose goods pass through the densely inhabited portions of the state.

The difference between shipper and carrier points to a deep flaw in the plaintiff's case. Unlike *Guille* . . . and unlike the storage cases, beginning with *Rylands* itself, here it is not the actors—that is, the transporters of acrylonitrile and other chemicals—but the manufacturers, who are sought to be held strictly liable. . . . A shipper can . . . designate the route of his shipment if he likes, . . . but is it realistic to suppose that shippers will become students of railroading in order to lay out the safest route by which to ship their goods? Anyway, rerouting is no panacea. Often it will increase the length of the journey, or compel the use of poorer track, or both. When this happens, the probability of an accident is increased, even if the consequences of an accident if one occurs are reduced; so the expected accident cost, being the product of the probability of an accident and the harm if the accident occurs, may rise. . . . It is easy to see how the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile. It is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical. This is therefore not an apt case for strict liability. . . .

[T]he plaintiff overlooks the fact that ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas. . . . Natural gas is both flammable and poisonous, but the operation of a natural gas well is not an ultrahazardous activity. . . . [T]he manufacturer of a product is not considered to be engaged in an abnormally dangerous activity merely because the product becomes dangerous when it is handled or used in some way after it leaves his premises, even if the danger is foreseeable. . . . The plaintiff does not suggest that Cyanamid should switch to making some less hazardous chemical that would substitute for acrylonitrile in the textiles and other goods in which acrylonitrile is used. Were this a feasible method of accident avoidance, there would be an argument for making manufacturers strictly liable for accidents that occur during the shipment of their products (how strong an argument we need not decide). Apparently it is not a feasible method.

The relevant activity is transportation, not manufacturing and shipping. This essential distinction the plaintiff ignores. But even if the plaintiff is treated as a transporter and not merely a shipper, it has not shown that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create—perhaps quixotically—incentives to relocate the activity to nonpopulated areas, or to reduce the scale of the activity, or to switch to transporting acrylonitrile by road rather than by rail. . . . It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic. Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare.

The briefs hew closely to the Restatement, whose approach to the issue of strict liability is mainly *allocative* rather than *distributive*. By this we mean that the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there. At argument, however, the plaintiff's lawyer invoked distributive considerations by pointing out that Cyanamid is a huge firm and the Indiana Harbor Belt Railroad a fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred.



Well, so what? A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability. Tracing the incidence of a cost is a complex undertaking which the plaintiff sensibly has made no effort to assume, since its legal relevance would be dubious. We add only that however small the plaintiff may be, it has mighty parents: it is a jointly owned subsidiary of Conrail and the Soo line. . . .

The judgment is reversed . . . and the case remanded for further proceedings, consistent with this opinion, on the plaintiff's claim for negligence.

Reversed and remanded, with directions.

### Notes

1. *Commentary on Indiana Harbor Belt Railroad*. A number of scholars have weighed in on Judge Posner's decision. According to Professor David Rosenberg, Judge Posner took an unnecessarily narrow view of strict liability's potential benefits. Instead of recognizing that strict liability could "reduce the frequency and amount of risky activity," Judge Posner only focused on strict liability's ability to end dangerous activities, thus "dismissing strict liability's potential benefits." David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 120 HARV. L. REV. 1210, 1216 (2007).

According to Professor Alan Sykes, Judge Posner could have held that the appellant, Indiana Harbor Belt Railroad, assumed the risk by accepting shipments from the appellee, American Cyanamid Company. Alan O. Sykes, *Strict Liability Versus Negligence in Indiana Harbor*, 74 U. CHI. L. REV. 1911, 1928-29 (2007). According to the Restatement (Second) of Torts, assumption of risk is a defense against liability arising from abnormally dangerous activities. RESTATEMENT (SECOND) OF TORTS § 523 (1977). According to Professor Sykes, such an approach would have been "a simpler way to dispose of the case than the questionable analysis of the Restatement factors to which Judge Posner devoted most of his opinion." *Id.* at 1929.

According to Professor Klass, *Indiana Harbor Belt Railroad* establishes an insurmountable standard for plaintiffs pleading strict liability in the Seventh Circuit:

By [*Indiana Harbor Belt Railroad*], the Seventh Circuit . . . set out a very narrow role for strict liability in modern tort law—one that puts a significant burden on plaintiffs to bring in statistical, historical, and technical expert evidence to essentially prove an impossible hypothetical: that no amount of care under any circumstances would allow the particular activity to be performed safely.

Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 960 (2004).

2. *The “shale revolution.”* The transformation in the American natural gas industry and the boom in the oil and gas business in places like North Dakota has arguably made *Indiana Harbor Belt Railroad’s* holding more significant than ever. Rail shipments of oil are steadily increasing. Moreover, oil companies prefer shipping by rail to shipping via pipeline because pipeline construction is more capital-intensive and controversial.

The increase in rail shipping, however, has led to a spate of accidents. In July 2013, a train carrying North Dakota oil through Quebec derailed and exploded, killing 47 people and destroying virtually an entire small town. In November 2013, a train carrying crude oil derailed in Alabama. A month later, a train carrying crude oil collided with a derailed train carrying grain, forcing the evacuation of Casselton, North Dakota. Although no one was hurt in the explosion, experts believe that the explosion was relatively harmless only because of luck; had the train exploded near a “more populated town,” people would have been injured. In January and February 2014, two derailments took place in Pennsylvania, one in the remote western part of the state, the other in densely populated Philadelphia. At the end of April 2014, an oil train derailed and burst into flames near Lynchburg, Virginia, spilling 30,000 gallons of crude oil into the James River.

The U.S. Department of Transportation has called the transporting of crude oil by rail “an imminent hazard” to the public. Jad Mouwad, *U.S. issues Safety Alert for Oil Trains*, N.Y. TIMES, May 7, 2014. According to the Association of American Railroads, however, “99.9977% of rail hazmat shipments . . . reach their destination without a spill.” In the last decade, the Association contends, “pipelines have spilled 474,441 barrels of oil,” but rail cars have only spilled 2,268 barrels of oil. Bryan Walsh, *North Dakota Derailment Shows Dark Side of America’s Oil Boom*, TIME, Dec. 31, 2013, available at <https://perma.cc/5Y5C-LQPK>.

Should an increase in shipments of dangerous chemicals on the nation’s railroads change the way we think about Judge Posner’s *Indiana Harbor Belt Railroad* opinion?

## D. Nuisance

Nuisance is one of the most amorphous and protean areas of the law of torts. Classically, the common law divides up the law of nuisance into two categories: private and public. Private nuisances are unreasonable interferences with the use and enjoyment of land. Public nuisances are unreasonable interferences with a right of the general public. Both doctrines rely heavily on conceptions of what counts as reasonable under the circumstances. In this sense, both doctrines share a lot in common with the law of negligence. But as we shall see, both doctrines also contain significant domains of strict or ostensibly strict liability.

## 1. Private Nuisance

### ***Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. App. 1959)**

PER CURIAM.

This is an interlocutory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the Fontainebleau Hotel, owned and operated by the appellants. Appellee, plaintiff below, owns the Eden Roc Hotel, which was constructed in 1955, about a year after the Fontainebleau, and adjoins the Fontainebleau on the north. Both are luxury hotels, facing the Atlantic Ocean. The proposed addition to the Fontainebleau is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-story tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the Fontainebleau (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; [and] further, that the construction of such addition on the north side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president . . . . It was also alleged that the construction would interfere with the easements of light and air enjoyed by plaintiff and its predecessors in title for more than twenty years [which is the length of Florida's rule of property rights by so-called "adverse possession," or possession by claim of right]. . . .

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him . . . as follows:

The ruling is not based on any alleged presumptive title nor prescriptive right of the plaintiff to light and air . . . . It is not based on any zoning ordinance nor on any provision of the building code of the City of Miami Beach . . . . It is based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the Fontainebleau will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the Fontainebleau is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief.

This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do

any injury to his neighbor. . . . It means only that one must use his property so as not to injure the lawful rights of another. . . .

No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land. . . . And the English doctrine of “ancient lights” has been unanimously repudiated in this country. . . .

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite. . . .

We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. . . . But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. . . .

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

Reversed with directions.

### Notes

1. *The doctrine of ancient lights.* According to William Blackstone, the ancient lights doctrine prohibits one from “erect[ing] a house or other building . . . [that] obstructs [others’] ancient lights and windows.” 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 216-17. In England, the ancient lights doctrine enabled landowners to enforce their right to light by bringing a nuisance claim against alleged tortfeasors.

In contrast to English courts, American courts have refused to apply the doctrine of ancient lights. Why has American jurisprudence diverged from English jurisprudence?

According to one court, American judges have rejected the ancient lights doctrine to encourage economic development. *See Parker v. Foote*, 19 Wend. 309, 318 (N.Y. Sup. Ct. 1838) (noting that the doctrine could not “be applied in growing cities and villages of this country without working the most mischievous consequences”); *see also Klein v. Gehrung*, 25 Tex. Supp. 232, 238 (1860) (“The doctrine of ancient lights is not much relished in this country, owing to the rapid changes and improvements in our cities and villages.”).

2. *A malice exception?* Although American courts have repudiated the doctrine of ancient lights, malice is one of the few exceptions that some courts recognize to the ancient lights doctrine in the United States. Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1667-68 (2011). Thus, courts regularly prohibit a defendant from building a “spite wall” or “spite fence” if the “structure interferes with a neighbor’s access to light, air, or a view if the [defendant’s] motivation is . . . malicious.” *Id.* at 1668. Courts that recognize the malice rule typically require plaintiffs to show that malice was the sole, if not predominant, motivation for the defendants’ actions. *Wilson v. Handley*, 119 Cal. Rptr. 2d 263 (Ct. App. 2002).

Why does the Florida court in the *Fontainebleau* case reject the malice rule and permit the spite wall?

3. *The epic battle between the Fontainebleau and the Eden Roc.* The spite wall in *Fontainebleau*, pictured below, was built by the angered owner of the Fontainebleau Hotel when his business partner defected to a competitor and built a new hotel—the Eden Roc—directly to his north. Both hotels aimed to set new standards for luxury in the Miami hotel trade. Leading celebrities of the 1950s, including Elizabeth Taylor and Lucille Ball, appeared regularly at the Eden Roc. Frank Sinatra filmed movies at the Fontainebleau and spent long stays there in the 1960s.

In the image below, the curved building and accompanying S-shaped beach structure form the original Fontainebleau. The white structure in the far lower right-hand corner is the Eden Roc Hotel. The spite wall forms the northern face of the long tower running east to west along the northern property line of the Fontainebleau. The shadow cast on the Eden Roc pool area was especially pronounced in the popular winter months.



Florida State Photographic Collection, *Florida Memory*, <https://perma.cc/NF2T-VYCE>

Here is another image, which makes the effects of the wall on the Eden Roc pool especially clear:



Florida State Photographic Collection, *Florida Memory*, <https://perma.cc/9PJP-4NB6>

After losing in its litigation effort, the Eden Roc made renovations to lessen the effects of the spite wall. In the summer of 1960, the Eden Roc built a new pool area on a raised platform 20 feet off the ground on the far northeastern corner of its property so as to minimize the shadow cast during the winter height of the season. The sun, announced the Miami News, would once again “shine on the Eden Roc the year around.” Herb Kelly, *Eden Roc to Start on Pool*, MIAMI NEWS, June 28, 1960, at 28. Today, the spite wall no longer blocks sunlight at the Eden Roc Hotel’s pool. In 2011, during a course of renovations, the Eden Roc constructed a twenty-one-story tower directly along the north face of the spite wall.

4. *Reasonable interferences?* The Florida court resolved the *Fontainebleau* case by finding that the Eden Roc had no protectable interest in the light and air crossing over its neighbor’s property. The case was thus concluded without taking into account the character of the interference with the Eden Roc’s property interests. Suppose, however, the court had concluded that the Eden Roc did have a protectable interest? At this point, the question would

be a classic nuisance question: does the defendant's infringement on the plaintiff's property interest constitute an actionable infringement?

In the law of private nuisance,

one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities.

*Copart Industries, Inc. v. Consolidated Edison Co.*, 362 N.E.2d 968, 971 (N.Y. 1977). The view of the Second Restatement is essentially identical. See RESTATEMENT (SECOND) OF TORTS § 822.

When is an invasion of private use and enjoyment of land unreasonable? The Restatement takes the position that an intentional invasion of another's interest in land is unreasonable if (a) "the gravity of the harm outweighs the utility of the actor's conduct" or (b) "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." RESTATEMENT (SECOND) OF TORTS § 826.

What part of this definition of private nuisance, if any, amounts to liability without fault?

***Ensign v. Walls*, 34 N.W.2d 549 (Mich. 1948)**

CARR, J.

Defendant herein has for some years past carried on at 13949 Dacosta Street, in the city of Detroit, the business of raising, breeding and boarding St. Bernard dogs. Plaintiffs are property owners and residents in the immediate neighborhood. Claiming that the business conducted by defendant constituted a nuisance as to them and their property, plaintiffs brought suit for injunctive relief. The bill of complaint alleged that obnoxious odors came from defendant's premises at all times, that the continual barking of the dogs interfered with and disturbed plaintiffs in the use and enjoyment of their respective properties, that the premises were infested with rats and flies, and that on occasions dogs escaped from defendant's premises and roamed about the neighborhood. Defendant in her answer denied that her business was conducted in such a manner as to constitute a nuisance, and claimed further that she had carried on the business at the premises in question since 1926, that she had invested a considerable sum of money in the purchase of the property and in the subsequent erection of buildings thereon, and that under the circumstances plaintiffs were not entitled to the relief sought.

On the trial of the case testimony was offered on behalf of the parties tending to substantiate their respective claims as set forth in the pleadings. . . . The trial judge inspected the premises of the defendant, and it appears from the record that his observations confirmed, in many respects at least, the proofs offered by plaintiffs with reference to the existing



conditions. Decree was entered enjoining the carrying on of the business at the location in question after the expiration of 90 days from the entry of the decree, and requiring defendant to abate, within the period of time stated, the nuisance found to exist. . . .

The record discloses that the plaintiffs, or the majority of them at least, have moved into the neighborhood in recent years. In view of this situation it is claimed by defendant that, inasmuch as she was carrying on her business of raising, breeding and boarding dogs on her premises at the time plaintiffs established their residences in the neighborhood, they cannot now be heard to complain. Such circumstance may properly be taken into account in a proceeding of this nature in determining whether the relief sought ought, in equity and good conscience, to be granted. Doubtless under such circumstances courts of equity are more reluctant to restrain the continued operation of a lawful business than in instances where it is sought to begin in a residential district a business of such character that it will constitute a nuisance. . . .

Defendant cites and relies on prior decisions of this Court in each of which consideration was given to the circumstance that the parties seeking relief had established residences near the business the operation of which was sought to be enjoined. That such a circumstance may properly be considered in any case of this character in determining whether equitable relief should be granted is scarcely open to question. However it is not necessarily controlling. Looking to all the facts and circumstances involved, the question invariably presented is whether the discretion of the court should be exercised in favor of the parties seeking relief. In the case at bar the trial court came to the conclusion that the nuisance found by him to exist ought to be abated, and that such action was necessary in order to protect the plaintiffs in their rights and in the use and enjoyment of their homes. It may be assumed that new residences will be built in the community in the future, as they have been in the past, and that in consequence the community will become more and more thickly populated. This means of course that the injurious results of the carrying on of defendant's business, if the nuisance is not abated, will be greater in the future than it has been in the past. Such was obviously the view of the trial judge, and we cannot say that he abused his discretion in granting relief. . . .

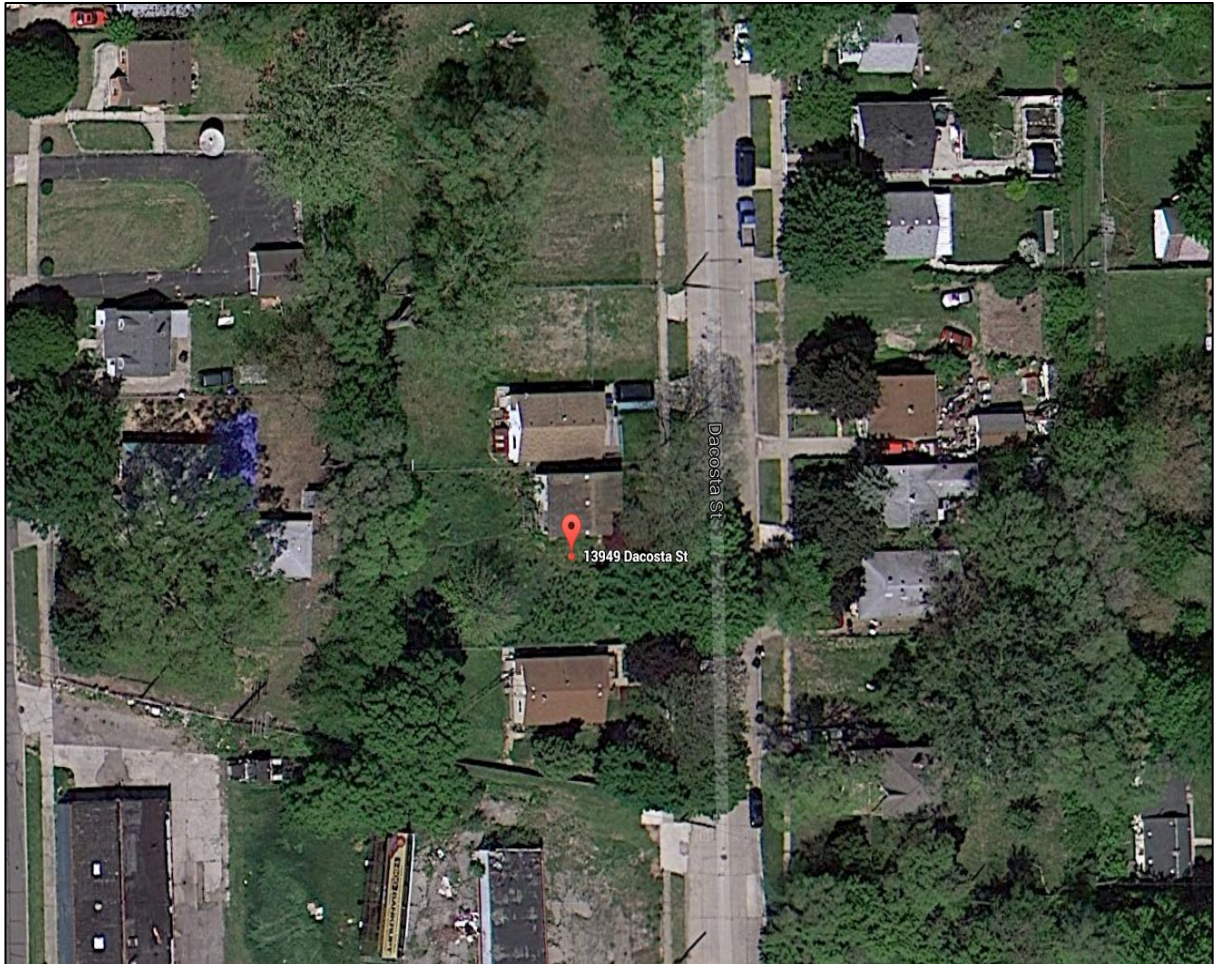
The decree of the circuit is affirmed. Plaintiffs may have costs.

### Notes

1. *The logic of collective action.* Why did the court think it necessary to enjoin the defendant in *Ensign v. Walls*? Why not simply put the homeowners to the burden of purchasing the property if they did not like its use as a kennel? More concretely, the homeowners could have paid the property owner to cease operations and to write into the property deed a restriction on any similar use of the property in the future.

The problem comes into view if we look at the surrounding properties from above. Go ahead, use the satellite function in Google Maps on a laptop or a handheld or some such device. Use it to look at 13949 Dacosta Street, Detroit, Michigan, zip code 48223. The defendant's property, located in the middle of the Google Earth image below, had been encroached on such that by the time of the litigation it was ringed by a circle of new homes—homes that had arrived

thanks to the mid-century boom in the Detroit auto industry, which had in turn caused the footprint of Detroit to grow considerably, sending new homes for auto workers further and further out into what had been rural and remote land only a short time previously.



Source: Google Satellite image of 13949 Dacosta Street, Detroit, Michigan 48223

Imagine that the new homeowners ringing the defendant at 13949 Dacosta did in fact suffer greatly from the noise and smell and side effects of the kennel. Imagine further that they would in the aggregate have been willing to pay the defendant property owner an amount that she would have found sufficient to induce her to part with the right to operate a kennel on the property. There is nonetheless good reason to think that this transaction will not happen even where all the parties would be, by hypothesis and by their own lights, made better off by it. The difficulty is that no one of the new homeowners can capture the benefits of purchasing the property owner's right to operate a kennel or other noxious business. Those benefits will be shared with all the new homeowners in the ring. But each one of those homeowners would prefer that one of their neighbors be the one to make the payment that will benefit them all. The result is a classic collective action problem: absent some powerful mechanism for promoting cooperation among the homeowners, it is very likely that the surrender of the 13949 Dacosta owner's right to certain noxious uses will not take place. *See generally* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

Put in the terms adopted by Ronald Coase, which we first encountered in Chapter 2, the collective action problem here is a kind of transaction cost that is obstructing the allocation in the market of entitlements to their highest value users. The court's injunction cuts through the failure of the market and imposes the socially optimal outcome.

Or, at least what it hopes is the socially optimal outcome. Note that the existence of the collective action problem means that the court had better be right in its judgment of what the right outcome is. Once the entitlement is allocated to the neighbors, the owner of 13949 Dacosta is unlikely to be able to buy it back, even if for some reason she values being a kennel owner in that lot more highly than her neighbors value being free from the noise and smells and inconveniences. The problem is the flip side of the same collective action problem that would have hindered the neighbors from buying the right to run the kennel from her in the first place. If each neighbor retains the right to enjoin her from running the kennel, she will have to acquire the right to run the kennel from all the neighbors. But each neighbor will have a powerful incentive to hold out and become the last obstacle to the kennel. The last hold out is in a powerful position to extract virtually all the value of the project as a condition to his or her permission.

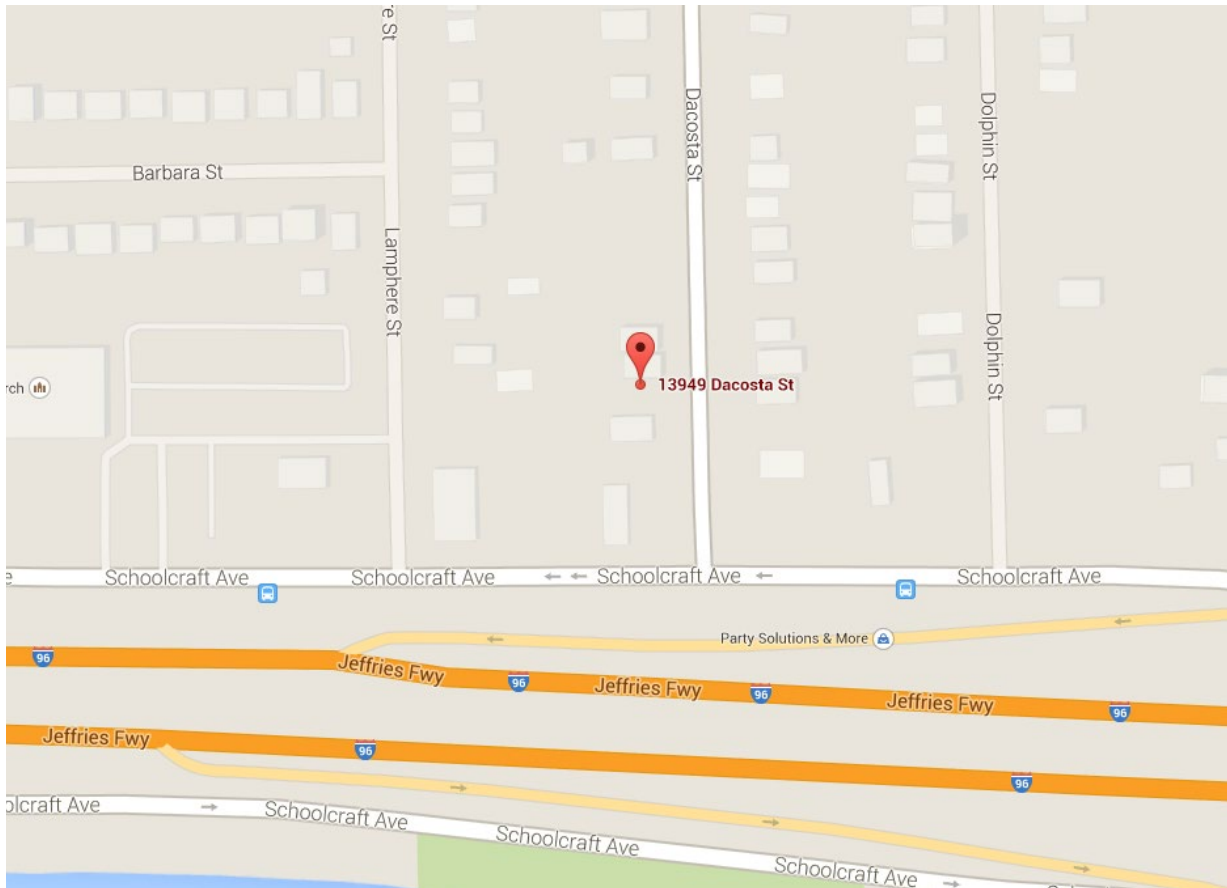
Collective action problems here mean that a mistake by the court will not likely be remedied by the marketplace.

2. *Coming to the nuisance.* In nuisance cases, courts give priority in time significant weight. For example, defendants who “move[] hog production to an established residential neighborhood” are unlikely to escape liability. Similarly, a plaintiff who moves into “a neighborhood of small factories” is unlikely to bring a successful nuisance claim. DOBBS, HAYDEN & BUBLICK, DOBBS’ LAW OF TORTS § 401 (2014). Priority in time, however, is not dispositive in nuisance cases. See RESTATEMENT (SECOND) OF TORTS § 840D (1979) (“The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable.”). As *Ensign v. Walls* illustrates, plaintiffs in nuisance cases may still recover if they come to the nuisance (i.e., they move or acquire land after the alleged nuisance has come into existence).

According to Professor Robert Ellickson, a majority of jurisdictions may award plaintiffs damages or injunctive relief even though plaintiffs came to the nuisance. Ellickson observes that remedies in such cases may be inappropriate where plaintiffs who build residences in close proximity to a factory or feedlot have thereby “failed to mitigate damages.” On the other hand, the rationale for remedies is that the existence of a first in time rule creates a race to develop lest the use of Parcel A preclude certain uses of neighboring Parcel B. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 759 (1973).

3. *Social policy in a decentralized regime.* Subsequent events suggest that the court's solution in *Ensign* was tragically but unforeseeably short-sighted. Not long after *Ensign* was decided, Congress authorized funds to build an interstate highway near Dacosta Street. See Federal-Aid Highway Act of 1956, 23 U.S.C. 48 (2012). Look back at the Google Maps image you visited above. The interstate that resulted, known as I-96, passes within 200 feet of 13949

Dacosta Street. The noise and smell from the kennel would soon have been completely overwhelmed by the noises and smells of massive eighteen-wheel trucks carrying the products of industrial Detroit to the great American post war markets.



Google Maps image of 13949 Dacosta Street, Detroit, Michigan 48223

We might think of this as a cost of the decentralized structure of American policymaking. State courts do not—and realistically cannot—coordinate with Congress when developing regulatory solutions to collective action problems.

4. *Doing market failure one better?* The great problem in cases like Dacosta is that the court seems to be left with the obligation to make an extraordinarily all-things-considered judgment as to which use for 13949 Dacosta is better: simple quiet residential use, or a semi-industrial kennel use? The likelihood that markets will fail to rectify an improper initial allocation of the entitlement looms. But what if we could identify a solution, at least in some cases, that would put the ball back in the hands of the parties themselves? This is what the innovation in the next case tries to accomplish.

***Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970)**

BERGAN, J.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied. . . .

The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable. It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

The cement making operations of defendant have been found by the court at Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be



sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in focus in *Whalen v. Union Bag & Paper Co.* A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was “a lower riparian owner.” The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of “the slight advantage to plaintiff and the great loss that will be inflicted on defendant” an injunction should not be granted. “Such a balancing of injuries cannot be justified by the circumstances of this case,” Judge Werner noted. He continued: “Although the damage to the plaintiff may be slight as compared with the defendant’s expense of abating the condition that is not a good reason for refusing an injunction.”

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not “unsubstantial,” . . . injunction would follow. This states a rule that had been followed in this court with marked consistency. . . .

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was \$185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant’s operations. . . . [T]he court chooses the latter alternative. . . .

[T]o grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance. . . .

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

### Notes

1. *Collective action problems redux.* In *Boomer*, as in *Ensign*, it is highly likely that the market will not be able to resolve the problem in a manner that achieves the socially optimal outcome. An injunction to the plaintiffs would allow any one plaintiff to shut down the plant by refusing consent. Just as in *Ensign*, every plaintiff will thus have an incentive to hold out to extract as much value from the plant as possible. The difference in *Boomer*, however, is that the conditional injunction dischargeable by a payment of permanent damages allocates the entitlement to the plaintiffs—but allows the defendant to reacquire that entitlement, if it chooses, at a price set by the court. Unlike in *Ensign*, the court's initial allocation is not determinative of the allocation of the entitlement. Why? Because the court's setting of a price at which the defendant can force the plaintiffs into parting with their entitlement means that no plaintiff can hold out. In the event that the value of the cement plant is not sufficient to justify paying for the right to operate the plant, then the entitlement will stay with the plaintiffs and the plant will shut down, at least until some better technology comes on board that allows the plant to operate without causing a nuisance, or that reduces the damages sufficiently so as to make paying for the right to operate worthwhile. For the general conceptual framework, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972).

2. *The secret logic of tort law?* Calabresi and Melamed take the analysis of *Boomer* a step further. The injunction in cases like *Ensign*, they say, allocates the entitlement in question to the plaintiffs and protects that entitlement with a *property rule*. The damages remedy in *Boomer* also allocates the entitlement in question to the plaintiffs. But it protects that entitlement with a different remedy, namely a *liability rule*. The difference is that the liability

rule allows others to separate the entitlement holder from the entitlement at a price set by the court without gaining the consent of the entitlement holder.

Why would one select a liability rule rather than a property rule as the better remedy? Calabresi and Melamed focus on transaction costs. In those settings in which we think that transaction costs are low enough that the market will allocate resources to their highest value users, property rules will be perfectly adequate. But when transaction costs lead us to think that the market will not allocate resources to their highest value users, liability rules allow actors to decide to go ahead with conduct so long as that conduct can pay its way.

At this stage, Calabresi and Melamed make a breathtaking claim. They contend that the ongoing character of the injury in nuisance cases, and the availability of the injunction remedy for such ongoing cases, reveal for us a logic underlying tort cases more generally. In those cases, too, the tort remedy is simply a substitute for the marketplace. Cases of completed injuries between strangers, they suggest, are essentially cases in which the transaction costs were sufficiently high that we allowed the defendant to impose the risk and indeed injury on the plaintiff without the plaintiff's consent, at the cost of having to pay damages after the fact. We could of course protect plaintiffs' interests in their bodily integrity or property as against negligent conduct by a property rule; such a regime might lead to punitive damages or perhaps even criminal punishment in order to force actors to negotiate up front with possible victims. But we don't adopt this approach. In tort law, we allow people to impose risk and injury on others—so long as they are willing to pay for it.

Calabresi and Melamed's "View of the Cathedral" (to echo the title of their classic article) posits a logic for private law generally—for the law of contract, property, and tort. In this logic, tort law's liability rules substitute for the entitlements of property law when market failures prevent the law of contract from achieving the right social outcomes. Tort law, in other words, allows actors like the cement plant in *Boomer* or a driver in an ordinary automobile accident case to compel others to bear some of the risks generated by their activity in return for a price set by the courts. And it typically does so in areas in which the transaction cost obstacles to getting consent up front are simply too great, either because the consent would have to come from unreachable strangers (the highway case) or because collective action problems and strategic behavior are likely to prevent an actor from gaining consent.

3. *Tort and contract in "the Cathedral."* Some say that the Calabresi / Melamed view of tort reduces tort law to a sort of contract law substitute: one designed to recreate contract's virtues in those areas that contracts and the market are otherwise unable to reach. How plausible a reading of the law of torts is this? Consider the cases and materials we have reviewed in the past nine chapters. What, for example, would the Calabresi / Melamed theory hold for relational cases, *i.e.*, cases where there is a contract or relationship between the parties such that transaction costs have not been insuperable? Are these cases in which the terms of the contract itself ought to govern the torts resolution? Would tort be swallowed up into contract in such cases? Or does tort law supply something independent in such cases such that it is not simply reduceable to contract?

4. *Markets and inequality.* One critique of the Cathedral is that market-mimicking liability rules may reflect and reproduce economic inequality. In the context of pollution, if



liability rules are imposed, polluting defendants are incentivized to relocate to poorer neighborhoods where the damages to the neighbors will be less. Even more troublingly, it may sometimes be the case that the residents of poorer neighborhoods will accept lower monetary compensation for putting up with pollution. Imagining for the moment that this is so, should we respect such deals?

Note further that even if the Cathedral's liability rules reflect economic inequality in this way, they do so no more than ordinary tort law does. As we will see in Chapter 10, ordinary tort law takes correction of the status quo ante as its goal, without regard to the distributive justice or lack thereof of the regime requiring repair.

Moreover, one should ask what the alternatives are. The alternative to compulsory transactions is not that pollution will magically be allocated fairly among all members of society. The alternative is that pollution siting will be a product of the political process – a process that tends to privilege the wealthy and powerful. Looking around America's cities today, who can say that the pollution-causing facilities have been sited fairly as between poor and wealthy neighborhoods? At the very least, the Cathedral approach would provide compensation to those living in the affected areas—something the political process can rarely say for itself.

5. *A long history for the Cathedral?* Although *Boomer* treats the doctrine of undue hardship as an innovation in New York tort law, Professor Douglas Laycock notes that the nuisance defense of undue hardship was “long established in New York and elsewhere.” Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)* 1 (Univ. of Va. Law Sch. Pub. Law & Legal Theory Research Paper Series No. 2012-27, 2012), <https://perma.cc/2LZS-YMEY>; see also Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301 (1990) (noting that several New York cases that were not recognized in *Boomer* balanced remedies at the hardship stage). The undue hardship doctrine allowed a nuisance defendant to convert an injunction against its activities into a damages obligation to the victims of pollution or other nuisance effects. In New York in particular, the defense of undue hardship had been considered at the remedy stage in other cases. *E.g., Squaw Island Freight Terminal Co. v. City of Buffalo*, 7 N.E.2d 10, 14 (N.Y.1937) (allowing the City of Buffalo to continue dumping sewage on the condition that it pay plaintiffs permanent damages for the injury caused by the sewage).

6. *The Calabresi / Melamed 2x2 Matrix*. The three cases we have read so far in this section can be summarized on the matrix below, with entitlements running down the left column and remedies running across the top row:

|                          | Injunction (Property Rule)       | Damages (Liability Rule) |
|--------------------------|----------------------------------|--------------------------|
| Entitlement to Plaintiff | <i>Ensign v. Walls</i>           | <i>Boomer</i>            |
| Entitlement to Defendant | <i>Fontainebleau Hotel Corp.</i> | <i>Box 4</i>             |

Adapted from James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 444 (1995).

What about the lower right quadrant? The so-called “Box 4” seemed likely to remain empty until just as Calabresi and Melamed were publishing their article, the Supreme Court of Arizona decided a case that seemed to match Box 4 perfectly:

***Spur Industries v. Del Webb Development Co.*, 494 P.2d 700 (Ariz. 1972)**

CAMERON, J.

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company’s Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?

2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway . . . .

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the

Agua Fria River, though land to the east remained dependent upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities . . . .

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feedlots . . . . The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for \$ 15,000,000 or \$ 750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres. *See Exhibit A above.*

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2 1/2 miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell. . . .

Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot. . . . The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned.

[The court concluded that the operations of Spur Industries constituted an enjoined nuisance. But that did not end the inquiry:]

A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity . . . . In addition to protecting the public interest . . . courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called “coming to the nuisance” cases, the courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being *primarily agricultural*, any opinion reflecting the value of such property must take this factor into account. . . .

People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. . . . But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages. *Dill v. Excel Packing Company* . . . .

“. . . [A] party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. . . .” *Gilbert v. Showerman*.

Were Webb the only party injured, we would feel justified in holding that the doctrine of “coming to the nuisance” would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city. . . .

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

### Notes

1. *Filling in Box 4.* The *Spur Industries* case filled in the formerly empty Box 4 of the matrix in the notes above. The court allocated the entitlement to the defendant Spur Industries—but protected that entitlement with a liability rule rather than a property rule. That is to say, the court allowed the developer to seize the entitlement from the feedlot owner without the latter’s consent in return for a payment of damages set not in the marketplace but by the court.

|                          | Injunction (Property Rule)       | Damages (Liability Rule) |
|--------------------------|----------------------------------|--------------------------|
| Entitlement to Plaintiff | <i>Ensign v. Walls</i>           | <i>Boomer</i>            |
| Entitlement to Defendant | <i>Fontainebleau Hotel Corp.</i> | <i>Spur Industries</i>   |

Adapted from James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 444 (1995).

One question here is why authorize the developer to force a transaction on the feedlot owner? After all, a Coasean observer might object that if real estate development is preferable to feedlot operations, then the parties will reallocate the entitlement accordingly. Under such circumstances, the developer and the feedlot owner might be expected to enter into a transaction in which the developer pays the feedlot owner to get the latter to cease its noxious operations. There are no transaction impediments to finding one another, as there are in a typical highway case. And there are no multi-party collective action problems causing individual rationality to diverge from social rationality.

One possible answer is that this is a case of “bilateral monopoly” in which there is only one possible buyer and one possible seller of the right to engage in noxious operations on the feedlot in question. Economists have long observed that settings of bilateral monopoly such as a unionized labor force and a monopsonist employer often entail considerable friction—for example, labor strikes—as the parties struggle for control of the surplus value that any such transaction would generate. In such settings, perhaps the idea is that the courts can step in and cut off the friction that would otherwise transpire as the parties battled over the right price.

Perhaps in the *Spur Industries* case, such friction would be especially undesirable because it would come at the expense of the third-party homeowners who are suffering the effects of the feedlot's continued operations.

Note that the rarity of the *Spur Industries* case is that the beneficiaries of the injunction were represented by a single entity, the developer, who was in a position to make payments to acquire the entitlement from the feedlot owner. Had the homeowners been a class of plaintiffs in their individual capacities, it is not clear how such a remedy would work.

2. *The thin edge of the wedge?* Some scholars disagree with the holding in *Spur Industries*. For example, Professor Richard Epstein contends that the outcome in *Spur Industries* suggests that “the polluter has property rights in the activities that generated the pollution.” Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2104 (1997). Instead of paying the polluter, Professor Epstein argues that the plaintiff should be able to obtain an injunction without having to “purchase it.” According to Professor Epstein, “there is no reason why the plaintiff should have to buy for a second time land that she purchased before.” *Id.* at 2105.

3. *The empirics of bargaining around injunctions.* Do parties in the real world behave as the Calabresi / Melamed model suggests? Dean Ward Farnsworth at the University of Texas at Austin studied twenty cases litigated to judgment and resulting in injunctions. Professor Farnsworth found that parties in private nuisance cases are often acrimonious and do not prefer money damages; thus, these parties were unwilling to bargain around the injunction. Crucially, they were perfectly able to bargain. There were no transaction costs preventing them from doing so. But they declined to do so. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside The Cathedral*, 66 U. CHI. L. REV. 1, 30 (1999).

Does Dean Farnsworth's study suggest that parties to suits are not bargainers as the Cathedral model posits? One response is to observe that Farnsworth examined cases that were litigated to judgment—not cases that were settled. But almost all cases are settled. Recall our discussion of settlement back in Chapter 1. Who doesn't settle? Parties peculiarly committed, or just mistakenly committed, to idiosyncratic values in the underlying dispute. So it should hardly be surprising that the cases in Farnsworth's sample didn't reach deals after injunctions issued. They had ample opportunity to reach such deals long before the final stage of the litigation, and those few who had been unwilling to make a deal in the run-up to the final judgment should hardly have been expected to enter into one thereafter.

## 2. Public Nuisance

The *Restatement (Second) of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.” Whether an interference with a “right common to the public” is unreasonable depends on whether it significantly interferes with “the public health, the public safety, the public peace, the public comfort or the public convenience”; whether it is “proscribed by a statute, ordinance or administrative regulation”;

and whether it is “of a continuing nature or has produced a permanent or long-lasting effect.” RESTATEMENT (SECOND) OF TORTS § 821B (1979).

Both government entities and private individuals may bring claims for public nuisance. A government entity bringing a claim must have “authority as a public official or public agency to represent the state or a political subdivision in the matter.” RESTATEMENT (SECOND) OF TORTS § 821C (1979).

Private individuals bringing public nuisance claims must make a further showing. They must show that they “suffered harm of a kind different from that suffered by other members of the public. . . .” RESTATEMENT (SECOND) OF TORTS § 821C (1979). How do courts determine whether a private plaintiff’s harm is different in kind? Consider the following two cases:

***Leo v. General Electric Co.*, 538 N.Y.S.2d 844 (N.Y. App. Div. 1989)**

HARWOOD, J.

We are called upon to determine whether commercial fishermen and their representative associations are aggrieved by the discharge of pollutants into public waters, resulting, for reasons of public safety, in a ban by the New York State Department of Environmental Conservation (hereinafter DEC) on the sale of striped bass throughout New York State. We hold that the plaintiffs have standing to maintain the instant action. . . . We therefore conclude that the Supreme Court properly declined to dismiss the complaint.

It is not disputed that over a 30-year period the defendant discharged a total of at least 500,000 pounds of polychlorinated biphenyls (hereinafter PCBs) from two of its manufacturing plants into the Hudson River. The PCBs collected on the river floor and were absorbed by the marine life, including the striped bass, a species which returns to the Hudson River each year to spawn. When the defendant became aware of the highly toxic effect of PCBs is one of the issues to be determined in this litigation. In 1975 the DEC commenced a proceeding to enforce various provisions of the Environmental Conservation Law against the defendant and to enjoin or limit its discharge of PCBs. Following an interim finding that defendant was responsible for the presence of PCBs in the Hudson River and its marine life, that proceeding was settled and, apparently in 1977, the defendant ceased all discharge of PCBs into the Hudson River. Subsequent studies showed that excessively high levels of PCBs had been absorbed by the striped bass, and, in 1985, the DEC imposed a ban on the sale of striped bass fished from the lower Hudson and western Long Island waters. . . . It appears that the ban will remain in effect for some time to come. Methods for removal of PCBs from the Hudson River are still under study by the DEC and the United States Environmental Protection Agency.

The individual plaintiffs, each a member of one of the plaintiff associations, are commercial fishermen who, as a means of earning a livelihood, fish the Hudson River or the waters of Long Island. The plaintiffs allege in their complaint that the defendant intentionally discharged PCBs into the river in spite of its awareness of their toxicity and in reckless disregard of the consequences. They also allege that the defendant negligently allowed PCBs to enter the river through percolation and runoff from contaminated earth used by the defendant

as a dumping ground, and that the defendant intentionally or recklessly failed to adopt effective means for the removal of PCBs from the river. The plaintiffs claim that the sale of striped bass accounted for a substantial part of a commercial fisherman's income, that as commercial fishermen they have a special interest in use of public waters, that this special interest was invaded by the defendant's pollution of the water and contamination of the fish and, in effect, that the defendant's creation of a public nuisance had and will continue to have a devastating effect upon the individual plaintiffs' ability to earn a living. As indicated, they seek damages and injunctive relief.

Pollution of navigable public waters which causes death to or contamination of fish constitutes a public nuisance. It is settled law in this State that, in the absence of special damage, a public nuisance is subject to correction only by a public authority. . . . If there is some injury peculiar to a plaintiff, a private action premised on a public nuisance may be maintained. . . . Allegations of pecuniary injury may be sufficient to satisfy the peculiar injury test . . . so long as the injuries involved are not common to the entire community exercising the same public right. . . .

[A]ssuming the allegations of the complaint to be true, as we must on a motion to dismiss, the breadth and depth of the tragedy do not preclude a determination that a peculiar or special harm has also been done to these plaintiffs: diminution or loss of livelihood is not suffered by every person who fishes in the Hudson River or waters of Long Island . . . ; the harm alleged is peculiar to the individual plaintiffs in their capacity as commercial fishermen and goes beyond the harm done them as members of the community at large. . . .

Accordingly, the order should be affirmed . . . .

**532 *Madison Avenue Gourmet Foods, Inc. v. Finlandia Center*, 750 N.E.2d 1097 (N.Y. 2001)**

KAYE, C.J.

[Recall the facts of 532 *Madison Ave.* from Chapter 8 above, where we looked at the part of the opinion dealing with the pure economic loss rule. The case arose out of a building collapse in midtown Manhattan. In addition to a cause of action for negligence and economic loss, the plaintiffs in several underlying cases—including a law firm and several retailers—brought claims for public nuisance:]

Plaintiffs contend that they stated valid causes of action for public nuisance, alleging that the collapses forced closure of their establishments, causing special damages beyond those suffered by the public.

A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority. . . .



A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large. . . . This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public . . . .

A nuisance is the actual invasion of interests in land, and it may arise from varying types of conduct. . . . In the cases before us, the right to use the public space around Madison Avenue and Times Square was invaded not only by the building collapses but also by the City's decision, in the interest of public safety, to close off those areas. Unlawful obstruction of a public street is a public nuisance, and a person who as a consequence sustains a special loss may maintain an action for public nuisance. . . . Indeed, "in a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion of trade inevitably follows diversion of travel."

The question here is whether plaintiffs have suffered a special injury beyond that of the community so as to support their damages claims for public nuisance. We conclude that they have not.

In *Burns Jackson* we refused to permit a public nuisance cause of action by two law firms seeking damages for increased expenses and lost profits resulting from the closure of the New York City transit system during a labor strike. We concluded that, because the strike was so widespread, every person, firm and corporation conducting a business or profession in the City suffered similar damage and thus the plaintiffs could not establish an injury different from that of the public at large.

While not as widespread as the transit strike, the Madison Avenue and Times Square closures caused the same sort of injury to the communities that live and work in those extraordinarily populous areas. As the trial court in [one of the underlying cases] pointed out, though different in degree, the hot dog vendor and taxi driver suffered the same kind of injury as the plaintiff law firm. Each was impacted in the ability to conduct business, resulting in financial loss. When business interference and ensuing pecuniary damage is "so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn." While the degree of harm to the named plaintiffs may have been greater than to the window washer, per diem employee or neighborhood resident unable to reach the premises, in kind the harm was the same.

*Leo v General Elec. Co.* . . . is inapposite. . . . Plaintiffs were able to establish that their injuries were special and different in kind, not merely in degree: a loss of livelihood was not suffered by every person who fished the Hudson. By contrast, every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods. Thus, in that the economic loss was "common to an entire community and the plaintiff[s] suffer[ed] it only in a greater degree than others, it is not a different kind of harm and the plaintiff[s] cannot recover for the invasion of the public right." RESTATEMENT (SECOND) OF TORTS § 821C, cmt. h.

## Notes

1. *Private attorneys general in public nuisance?* Should private individuals be able to bring claims for public nuisance? According to Professor Thomas Merrill, the rule that allows private parties to bring public nuisance claims arose out of a “mistaken reading of an old precedent.” Professor Merrill writes that the doctrine rests on a sixteenth-century English case that Merrill contends correctly refused to allow a private party to bring an action for public nuisance:

In a separate opinion, one of the judges, Fitzherbert, argued that under certain circumstances private persons should be allowed to sue for what would otherwise constitute a public nuisance. He offered the hypothetical of a defendant who digs a trench across a highway, causing injury to a horse and rider. The obstruction of the highway would be a public nuisance, subject to indictment in local criminal court (the “leet”). Fitzherbert thought that the injured rider would nevertheless also have an action “to recover his damages that he had by reason of this special hurt.”

Fitzherbert’s hypothetical was cited much later by English and American courts and by the authors of the *Restatement*, to mean that the injured rider could sue for public nuisance. What Fitzherbert more likely meant was that the action for public nuisance did not preclude the rider from bringing a separate action for damages based on what in his day was called an action on the case or what we would today call negligence. In other words, digging the trench in the road gave rise to two causes of action: a public action to abate the injury to the general public, and a private action to recover damages for personal injury.

Merrill contends that the action that Fitzherbert’s hypothetical contemplated was not an action on the public nuisance but rather a simple action for negligence. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 13-14 (2011).

2. *Private lawyers and public nuisance.* Even where there is no special injury to a particular plaintiff or class of plaintiffs, the private torts bar has become deeply involved in recent years in the pursuit of public nuisance claims. State attorneys general and city corporation counsel’s offices have hired private lawyers, typically on a contingency fee, to prosecute high-stakes public nuisance claims on behalf of the public. The law firms bringing these cases have the high-octane motivation of the contingent fees in what are often very high-value claims. But they do not face the obstacles that private litigants face when bringing public nuisance claims. On the phenomenon generally, see Margaret H. Lemos, *Privatizing Government Litigation*, 104 GEO. L.J. 515 (2016); Eric Lipton, “Lawyers Create Big Paydays by Coaxing Attorneys General to Sue,” *New York Times*, Dec. 18, 2014.

The Rhode Island lead paint litigation described below was precisely such a case: litigated by private plaintiffs’ lawyers on behalf of the state itself as the party to the litigation. In Rhode Island the lead paint case ended poorly for the plaintiffs’ lawyers. A more recent litigation in California has ended very differently.

***Lead Paint and Public Nuisance: Two Stories***

***Peter B. Lord, Three Companies Found Liable in Lead-Paint Nuisance Suit***, Providence Journal, Thursday, February 23, 2006

PROVIDENCE — Six Rhode Islanders yesterday made up the first jury in the country to find major corporations liable for creating a public nuisance by making lead-based paints that have poisoned thousands of children. The verdict may cost the companies billions of dollars.

The jury ordered Sherwin Williams Co., Millennium Holdings and NL Industries to abate, or clean up, the paints that were used generations ago on thousands of Rhode Island homes. . . .

The value of Sherwin Williams stock began to plummet within moments of the verdict. By the end of the day, the value of the company's shares dropped by nearly 18 percent—a loss totaling \$1.3 billion. The value of NL Industries stock dropped by 8 percent, for a total loss of \$642 million. . . .

The biggest potential expenditures are the abatement costs. The state argued that 240,000 houses in Rhode Island have lead paint on them that must be removed. Assuming an average expense of \$10,000 per house, the total cost would be about \$2.4 billion.

. . . Attorney General Patrick C. Lynch . . . pointed out that children continue to be poisoned by lead paints and there were victims in nearly every community in Rhode Island last year. . . .

The losing companies had little to say. They issued a statement from spokesperson Bonnie Campbell that said, "This is but one step in a lengthy process and there are a number of issues still to be decided by the Court."

***Joe Nocera, The Pursuit of Justice, or Money?***, N.Y. Times, December 8, 2007

"If I don't bring the lead paint industry to its knees in three years, I will give them my boat."

So declared Ronald L. Motley to The Dallas Morning News in the fall of 1999—and why not? In addition to being the owner of a very large yacht, Mr. Motley is also one of the country's pre-eminent plaintiffs' lawyers, the titular head of the 70-lawyer firm Motley Rice, based in Charleston, S.C. . . .

The state [of Rhode Island], with the help of its friends at Motley Rice, recently unveiled an abatement plan that would require the companies to pay for the inspection of a staggering 240,000 homes as well as thousands of other structures like hospitals and day care centers, and remove lead from most of them. The estimated cost for doing this—almost surely

understated—is \$2.4 billion, with a hefty chunk of that going to the lawyers, of course. Never mind that for the vast majority of homes, the far better and cheaper solution is simply to keep them maintained. . . .

One thing I couldn't help wondering was why the gasoline makers weren't subject to these kinds of lawsuits. After all, gasoline, not pigment, was the primary cause of elevated blood lead levels back in the day. When I mentioned this to David Rosner, a Columbia professor who has served as an expert witness for the plaintiffs, he reassured me.

"I think there might be a suit like that filed next week," he said.

**Peter B. Lord, R.I. High Court Overturns Lead Paint Verdict**, PROVIDENCE JOURNAL, July 2, 2008

PROVIDENCE — The Rhode Island Supreme Court yesterday brought an abrupt end to the state's nine-year campaign to force some of the nation's major corporations to clean up the lead-based paints that the state believes poisoned tens of thousands of Rhode Island children.

In a unanimous 4 to 0 ruling, the court overturned a string of decisions by Superior Court Judge Michael A. Silverstein and a verdict by a six-person jury that found the companies created a public nuisance by making and selling the paints. . . .

By day's end, the price of Sherwin Williams' stock rose 6.4 percent, while NL Industries was up 4.6 percent.

***Rhode Island v. Lead Industries Association*, 951 A.2d 428 (R.I. 2008)**

. . . We agree with defendants that the public nuisance claim should have been dismissed at the outset because the state has not and cannot allege that defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island. We reach this conclusion with a keen realization of how limited the judicial system often is. We believe that the following recent observation by this Court in another case is equally applicable to this case:

"The American judicial system as it exists today is admirable: it is the product of many decades of fine-tuning of an already excellent substantive and procedural construct which this country took with it when it parted ways with England. Nevertheless, our judicial system is not a panacea that can satisfy everyone who has recourse to it. Some wrongs and injuries do not lend themselves to full redressment by the judicial system." *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 188 (R.I.2008).

## 1 History of Public Nuisance

. . . “At common law public nuisance came to cover a large, miscellaneous and diversified group of minor offenses . . .” RESTATEMENT (SECOND) TORTS § 821B, cmt. b at 40. Notably, all these offenses involved an “interference with the interests of the community at large-interests that were recognized as rights of the general public entitled to protection.” *Id.*

Public nuisance as it existed in English common law made its way to Colonial America without change. . . . In time, public nuisance became better known as a tort, and its criminal counterpart began to fade away in American jurisprudence. As state legislatures started enacting statutes prohibiting particular conduct and setting forth criminal penalties there was little need for the broad, vague, and anachronistic crime of nuisance. RESTATEMENT (SECOND) TORTS § 821B, cmt. c at 88. . . .

## 2 Public Nuisance in Rhode Island

As the law of public nuisance began to take hold in Rhode Island, it reflected the principle “so long ago laid down by Lord Holt, that ‘in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to the said law.’” *Aldrich v. Howard*, 7 R.I. 199, 213 (1862) (quoting *Couch v. Steel*, 3 Ellis and Blackburn, (77 Eng. C.L.R.) 411). Some of Rhode Island’s earliest cases involved activities designated as “common nuisances” by the General Assembly. Those cases recognized that “‘a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby \* \* \*.’” *State v. Keeran*, 5 R.I. 497, 511 (1858). *See also State v. Paul*, 5 R.I. 185, 194 (1858) (an action for abatement of a public nuisance may be brought “by those who are specially injured or obstructed”).

In Rhode Island, actions to abate public nuisances originally were brought in the form of an indictment. *Keeran*, 5 R.I. at 511; *Paul*, 5 R.I. at 194. Today, the state Attorney General is empowered to bring actions to abate public nuisances. *See* G.L. 1956 § 42-9-2 (vesting the Attorney General with the power to commence a public nuisance suit) and G.L. 1956 § 10-1-1 (providing that “[w]hensoever a nuisance is alleged to exist, the attorney general . . . may bring an action in the name of the state . . . to abate the nuisance”).

. . .

This Court has defined public nuisance as “an unreasonable interference with a right common to the general public.” . . . “[I]t is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.” . . . Put another way, “public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all.” . . .

This Court recognizes three principal elements that are essential to establish public nuisance: (1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred. . . .

A necessary element of public nuisance is an interference with a public right—those indivisible resources shared by the public at large, such as air, water, or public rights of way. The interference must deprive all members of the community of a right to some resource to which they otherwise are entitled. See RESTATEMENT (SECOND) TORTS § 821B, cmt. g at 92. The *Restatement (Second)* provides much guidance in ascertaining the fine distinction between a public right and an aggregation of private rights. “Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.” *Id.* . . .

Although the state asserts that the public’s right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance. The state’s allegation that defendants have interfered with the “health, safety, peace, comfort or convenience of the residents of the [s]tate” standing alone does not constitute an allegation of interference with a public right. . . . The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way. . . . Expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended, as we discuss *infra*. In declining to adopt such a widespread expansion of the law, we are mindful of the words of Edmund Burke that “bad laws are the worst sort of tyranny.” 1 Edmund Burke, *The Works of Edmund Burke: With a Memoir* 318 (1860).

. . .

The enormous leap that the state urges us to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally. Were we to hold otherwise, we would change the meaning of public right to encompass all behavior that causes a widespread interference with the private rights of numerous individuals.

The Illinois Supreme Court recently hypothesized on the effect of a broader recognition of public right. In *Beretta*, the Illinois Supreme Court considered whether there was a public right to be “free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago.” *Beretta U.S.A. Corp.*, 290 Ill. Dec. 525, 821 N.E.2d at 1114. In concluding that there was not, the court acknowledged the far-reaching effects of a decision otherwise. *Id.* 290 Ill. Dec. 525, 821 N.E.2d at 1116. The court speculated that

“[i]f there is public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.” *Id.*

In taking the analogy a step further, the court considered the effect of other product misuse, stating:

“Similarly, cell phones, DVD players, and other lawful products may be misused by drivers, creating a risk of harm to others. In an increasing number of jurisdictions, state legislatures have acted to ban the use of these otherwise legal products while driving. A public right to be free from the threat that other drivers may defy these laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be, or are likely to be, used by drivers, distracting them and causing injury to others.” *Id.*

Like the *Beretta* court, we see no reason to depart from the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way.

Even had the state adequately alleged an interference with a right common to the general public, which we conclude it did not, the state’s complaint also fails to allege any facts that would support a conclusion that defendants were in control of the lead pigment at the time it harmed Rhode Island’s children.

The state filed suit against defendants in their capacity “either as the manufacturer of . . . lead pigment . . . or as the successors in interest to such manufacturers” for “the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the [s]tate of Rhode Island.” For the alleged public nuisance to be actionable, the state would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment at the time it caused injury to children in Rhode Island—and there is no allegation of such control.

The New Jersey Supreme Court applied these same elements to the lead paint litigation in that jurisdiction and likewise held that public nuisance was an improper cause of action. The court emphasized that were it “to permit these complaints to proceed, [it] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance.” *In re Lead Paint Litigation*, 924 A.2d at 494. We agree.

### *Note*

*Not with a bang but a whimper.* Many critics have contended that this is for the good. Lead-poisoning rates, they observe, have declined sharply over the past two decades. “In 1998, 3,437 children tested before they entered school in Rhode Island had elevated lead levels, which can cause neurological problems ranging from loss of intelligence to behavior and attention problems.” More recent studies found that the “the number of new cases dropped to 614.” Moreover, “[d]uring that period, state, federal and local governments have spent millions of dollars cleaning up lead paints.” Lord, “R.I. high court overturns lead-paint verdict,” *supra*.

The California litigation brought under much the same theory has had a different fate:

***County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292 (Cal. App. 6th Dist. 2006)**

MIHARA, J.

A group of governmental entities acting for themselves, as class representatives, and on behalf of the People of the State of California, filed a class action against a group of lead manufacturers. The governmental entities alleged that the manufacturers . . . should be required to abate the public nuisance created by lead paint. . . . The superior court sustained the manufacturers' demurrers to the public nuisance causes of action. . . .

We conclude that the superior court's rulings were erroneous as to plaintiffs' public nuisance . . . cause[] of action. We therefore reverse the judgment. . . .

The public nuisance cause of action . . . alleged that the People had "a common right to be free from the detrimental [e]ffects . . . of Lead in homes, buildings, and property in the State of California." Yet "Lead is present on large numbers of homes, buildings, and other property throughout the State of California," "is injurious to the health of the public" and constitutes a nuisance. "Defendants are liable in public nuisance in that they created and/or contributed to the creation of and/or assisted in the creation and/or were a substantial contributing factor in the creation of the public nuisance" by: "[e]ngaging in a massive campaign to promote the use of Lead on the interiors and exteriors of private residences and public and private buildings and for use on furniture and toys;" failing to warn the public about the dangers of lead; selling, promoting and distributing lead; trying to discredit evidence linking lead poisoning to lead; trying to stop regulation and restrictions on lead; and trying to increase the market for lead. Plaintiffs alleged that the lead distributed by defendants "inevitably has deteriorated and/or is deteriorating and/or will deteriorate thereby contaminating these homes, buildings, and property" and exposing people to lead. The remedy sought was abatement "from all public and private homes and property so affected throughout the State of California."

Defendants . . . claim that no public nuisance cause of action may be pleaded against a manufacturer of a product that creates a health hazard because such hazards are remediable solely through products liability. . . . [T]hey claim that, even where the facts would otherwise constitute a public nuisance, a cause of action does not lie because the underlying cause of the public nuisance is a product for which *only* a products liability cause of action will lie.

"*Anything* which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance." Cal. Civ. Code, § 3479 (italics added). "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons . . . ." Cal. Civ. Code, § 3480. . . .

"[P]ublic nuisances are offenses against, or interferences with, the exercise of *rights common to the public*." *People ex rel. Gallo v. Acuna*[], 929 P.2d 596 (Cal. 1997)]. "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoined [or abatable], the interference must be both *substantial* and *unreasonable*." *Id.*



It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted. *Id.*

Santa Clara, SF, and Oakland . . . alleged that lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property. Clearly their complaint was adequate to allege the existence of a public nuisance . . . . The next question was whether defendants could be held responsible for this public nuisance.

“[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.” (*City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 39 [Cal. Ct. App. 2004] . . .)

Here, Santa Clara, SF, and Oakland alleged that defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though defendants had known for nearly a century that such a use of lead paint was hazardous to human beings. . . .

Yet defendants claim that they may not be held liable on a public nuisance cause of action because two Court of Appeal opinions have held that public nuisance is an inappropriate cause of action against a product manufacturer for a nuisance caused by the product. They rely on the Second District Court of Appeal’s decision in *City of San Diego v. U.S. Gypsum Co.* [30 Cal. App. 4th 575 (Cal. Ct. App. 1995)] and the First District Court of Appeal’s decision in *Modesto*. . . .

*San Diego* and *Modesto* are distinguishable from the case before us. Here, the representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement*. Santa Clara, SF, and Oakland are *not* seeking *damages* for injury to *their* property or the cost of remediating *their* property. Liability is not based merely on production of a product or failure to warn. Instead, liability is premised on defendants’ *promotion of lead paint for interior use* with knowledge of the hazard that such use would create. This conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product . . . .

A *representative* public nuisance cause of action seeking *abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use* is *not* “essentially” a products liability action “in the guise of a nuisance action” and does not threaten to permit public nuisance to “become a monster that would devour in one gulp the entire law of tort . . . .”

The judgment is reversed. The superior court is directed to (1) vacate its order sustaining the demurrer to the representative public nuisance cause of action in the third amended complaint and enter a new order overruling the demurrer to that cause of action. . . . Plaintiffs shall recover their costs on appeal.

**Note**

In December 2013, a California trial court awarded damages to the plaintiffs in the amount of \$1.1 billion, later increased to \$1.5 billion. An intermediate California appellate court affirmed most of the judgment in November 2017. *People v. Conagra Grocery Products Co.*, 17 Cal. App. 5th 51 (Cal. App. 6th Dist. 2017). The California Supreme Court declined to review the case in February 2018. In October 2018, the U.S. Supreme Court denied certiorari, putting an end to nearly two decades of litigation and leaving in place the damages award, including a \$409 million abatement fund. *ConAgra Grocery Prod. Co. v. California*, 139 S. Ct. 377 (2018); see also Greg Stohr, *Supreme Court Rejects Lead-Paint Maker Appeals in \$400 Million Case*, BLOOMBERG, Oct. 15, 2018.

Few other efforts to deploy the public nuisance doctrine for broad social policy ends have had as much success as the California lead paint case. The next case, arising out of a creative effort to deploy public nuisance in New Jersey, is more typical of the outcomes of such cases.

***Camden County v. Beretta*, 273 F.3d 536 (3d Cir. 2001)**

PER CURIAM.

The Camden County Board of Chosen Freeholders (hereinafter “Camden County”) contends that handgun manufacturers, because of their marketing and distribution policies and practices, are liable under a public nuisance theory for the governmental costs associated with the criminal use of handguns in Camden County. The District Court, in a 53-page opinion, dismissed the complaint. . . . We affirm the order of the District Court.

I.

In its Second Amended Complaint, Camden County alleged that Defendants’ conduct—the marketing and distribution of handguns—created and contributed to the widespread criminal use of handguns in the County. . . . The County invoked three theories of liability: negligence, negligent entrustment, and public nuisance. The County requested several forms of relief, including compensation for the additional costs incurred by the County to abate the alleged public nuisance (costs borne by the County’s prosecutor, sheriff, medical examiner, park police, correctional facility, and courts) . . . and other compensatory and punitive damages. The manufacturers countered that the County had failed to state claims on which relief could be granted and that, in any event, damages were barred by the municipal cost recovery rule. Moreover, the manufacturers contended that the claims were barred by New Jersey’s product liability statute, the Dormant Commerce Clause, and the Due Process Clause.

The District Court rejected all three of Camden County’s theories of liability and granted the defendants’ motion to dismiss the complaint. It dismissed the two negligence claims after its thorough six-factor analysis found proximate cause lacking. . . . It also found that the public nuisance claim was defective because the County had not alleged “the required element that the defendants exercised control over the nuisance to be abated.”

On appeal, Camden County has dropped the two negligence claims and pursues only the public nuisance claim. The County alleges that the manufacturers' conduct endangered public safety, health, and peace, and imposed inordinate financial burdens on the County's fisc. It argues that the defendants "knowingly facilitated, participated in, and maintain a handgun distribution system that provides criminals and youth easy access to handguns." Appellant's Brief at 2. Relying on general data about the marketing and distribution of handguns, the County argues that Defendants knowingly created the public nuisance of "criminals and youth with handguns." Appellant's Brief at 3 (emphasis in original).

The County makes the following pertinent factual allegations: the manufacturers release into the market substantially more handguns than they expect to sell to law-abiding purchasers; the manufacturers continue to use certain distribution channels, despite knowing (often from specific crime-gun trace reports produced by the federal Bureau of Alcohol, Tobacco, and Firearms) that those channels regularly yield criminal end-users; the manufacturers do not limit the number, purpose, or frequency of handgun purchases and do not supervise these sales or require their distributors to do so; the manufacturers' contracts with distributors do not penalize distributor practices that facilitate criminal access to handguns; the manufacturers design, produce, and advertise handguns in ways that facilitate sales to and use by criminals; the manufacturers receive significant revenue from the crime market, which in turn generates more sales to law-abiding persons wishing to protect themselves; and the manufacturers fail to take reasonable measures to mitigate the harm to Camden County. Appellant's Brief at 4-5. The County makes no allegation that any manufacturer violated any federal or state statute or regulation governing the manufacture and distribution of firearms, and no direct link is alleged between any manufacturer and any specific criminal act.

The manufacturers respond that the County's factual allegations amount to the following attenuated chain of events: (1) the manufacturers produce firearms at their places of business; (2) they sell the firearms to federally licensed distributors; (3) those distributors sell them to federally licensed dealers; (4) some of the firearms are later diverted by unnamed third parties into an illegal gun market, which spills into Camden County; (5) the diverted firearms are obtained by unnamed third parties who are not entitled to own or possess them; (6) these firearms are then used in criminal acts that kill and wound County residents; and (7) this harm causes the County to expend resources to prevent or respond to those crimes. Appellees' Brief at 3. The manufacturers note that in this chain, they are six steps removed from the criminal end-users. Moreover, the fourth link in this chain consists of acts committed by intervening third parties who divert some handguns into an illegal market.

## II.

Because this appeal presents a question of state law, we do not find it necessary to write at length. In brief, we agree with the District Court that the County has failed to state a valid public nuisance claim under New Jersey law.

### A.

A public nuisance is "'an unreasonable interference with a right common to the general public.'" *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985)] . . . . For

the interference to be actionable, the defendant must exert a certain degree of control over its source.

Traditionally, the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights. *See* PROSSER & KEETON ON TORTS § 86 at 617-18 (5th ed. 1984). In this 1984 edition of the hornbook, the authors lamented that “there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.” *Id.* at 616. They recommended dismissal of nuisance claims “not connected with land or with any public right, as mere aberration, adding to the vagueness of an already uncertain word. Unless the facts can be brought within one of the two categories mentioned, there is not, with any accurate use of the term, a nuisance.” *Id.* at 618-19. Since that edition, the scope of nuisance law appears to have returned to its more narrow focus on these two traditional areas, as courts “across the nation have begun to refine the types of cases amenable to a nuisance theory.” *City of Philadelphia v. Beretta*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000).

Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law “would become a monster that would devour in one gulp the entire law of tort.” *Tioga Public Sch. Dist. v. U.S. Gypsum Co.*[, 984 F.2d 915, 921 (8th Cir. 1993)]. . . . If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity.

B.

Within the narrower context of similar tort actions against handgun manufacturers around the country, a majority of courts have rejected these claims as a matter of law. In a few other courts, the claim was not dismissed outright, but each such case is distinguishable from the instant case. To extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court. *See City of Philadelphia*, 126 F. Supp. 2d at 910.

Even if public nuisance law could be stretched far enough to encompass the lawful distribution of lawful products, the County has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right. The District Court found this to be the “fatal defect” of the County’s claim . . . . The County argues that proximate cause, remoteness, and control are not essential to a public nuisance claim, i.e., that conduct that merely contributes to the source of the interference can be sufficient. But the relevant case law shows that, even if the requisite element is not always termed “control,” the New Jersey courts in fact require a degree of control by the defendant over the source of the interference that is absent here.

To connect the manufacture of handguns with municipal crime-fighting costs requires, as noted above, a chain of seven links. This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps,

the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use. The manufacturers may not be held responsible “without a more tangible showing that the defendants were a direct link the causal chain that resulted in the plaintiffs’ injuries, and that the defendants were realistically in a position to prevent the wrongs.” *Hamilton v. Beretta U.S.A. Corp. et al.*[, 264 F.3d 21 (2d Cir. 2001)] . . . (finding no duty because gun manufacturers did not control criminals with guns, and injuries were too remote).

A public-nuisance defendant can bring its own conduct or activities at a particular physical site under control. But the limited ability of a defendant to exercise control beyond its sphere of immediate activity may explain why public nuisance law has traditionally been confined to real property and violations of public rights. In the negligence context, this Court recently held that a defendant has no duty to control the misconduct of third parties. . . . We agree with the District Court that this logic is equally compelling when applied in the public nuisance context. . . . If independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable. . . .

Public nuisance is a matter of state law, and the role of a federal court ruling on a matter of state law in a diversity case is to follow the precedents of the state’s highest court and predict how that court would decide the issue presented. It is not the role of a federal court to expand or narrow state law in ways not foreshadowed by state precedent. Here, no New Jersey precedents support the County’s public nuisance claim or provide a sound basis for predicting that the Supreme Court of New Jersey would find that claim to be valid. While it is of course conceivable that the Supreme Court of New Jersey may someday choose to expand state public nuisance law in the manner that the County urges, we cannot predict at this time that it will do so.

### III

Because Camden County failed to state a cognizable public nuisance claim against the gun manufacturers under New Jersey law, the District Court’s order dismissing the County’s complaint is AFFIRMED.

### *Note*

Critics object that the use of public nuisance as a policy-making tool puts far too much authority in the hands of the judiciary. Judges, as the critics see it, are asked in public nuisance cases to make impossibly open-ended decisions, balancing a wide array of interests. Such decisions, critics insist, are better made by democratically accountable legislatures or by expert administrative agencies. Defenders of the nuisance causes of action, by contrast, observe that vindicating rights as against injury is a quintessential judicial function.

## E. Strict Liability for Products?

### 1. Beginnings

Few areas of twenty-first-century tort law are more important than the law of products liability. Products cases typically involve deep-pocket defendants. But proving product defects, especially in the design of a product, can be exceedingly difficult—and exceedingly expensive—to do.

For most of the history of modern tort law, products cases presented limited- or no-duty rules insulating product manufacturers from liability for injuries to the ultimate users of their products. Today, however, the doctrine contains strict liability principles. Partly in response to the difficulty of proving defects, the law holds certain product sellers and manufacturers liable without regard to fault for injuries arising out of product defects. But traditional negligence principles persist in the law of products liability as well. Note, for example, that a plaintiff seeking to invoke strict liability for a product injury still needs to show that the product was defective. Very often, that showing requires recourse to principles similar to those in the negligence standard.

But we are getting ahead of ourselves and starting with the end of the story. For a century, the leading case for the old rule of no-duty was the English decision in *Winterbottom v. Wright*.

#### ***Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch. of Pleas. 1842)**

[Defendant was a contractor for the supply of mail-coaches to the Postmaster-General whose agreement with the Postmaster-General specified that defendant would keep the coaches in “a fit, proper, safe, and secure state and condition.” Plaintiff was a mail coachman employed by a second contractor who had agreed to supply horses and coachmen. Plaintiff’s declaration alleged that the mail-coach “being then in a frail, weak, and infirm, and dangerous state and condition,” gave way while he was driving it, that the accident threw him from the coach, that “no other cause, circumstance matter or thing whatsoever” caused the accident, and that he was thereby left “lame for life.”]

LORD ABINGER, C.B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. . . . [T]he action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff

can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B. I am of the same opinion. The contract in this case was made with the Postmaster-General alone . . . . If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. . . .

GURNEY, B., concurred.

ROLFE, B. . . . This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

### Notes

1. *Liability by contract?* The *Winterbottom* regime was not a regime of no liability for injuries arising out of products. It was a regime of liability by contract—and liability by contract only. Had the plaintiff in *Winterbottom* made an arrangement by contract with his employer for compensation in the event of injury arising out of work, including injury caused by the negligence of the coach-maker, he would have had an action for damages under the contract.

Why limit damages to actions on contracts? Are there things to be said for such a limitation? Note that the existence of tort liability for products is still controversial today. Some scholars contend that tort liability for products is misguided and that we would be better off in the regime of *Winterbottom* against Wright. Professors Polinsky and Shavell, for

example, argue that product sellers and manufacturers are motivated to produce safe products by market forces: consumer products that are unreasonably dangerous will go unsold. They observe further that many products, such as pharmaceuticals, are designed, manufactured, and marketed under strict regulatory regimes designed to ensure safety.

Consequently, product liability might not exert a significant additional influence on product safety for many products—and empirical studies of several widely sold products lend support to this hypothesis. A second benefit of product liability is that it can improve consumer purchase decisions by causing product prices to increase to reflect product risks. But because of litigation costs and other factors, product liability may raise prices excessively and undesirably chill purchases. A third benefit of product liability is that it compensates victims of product-related accidents for their losses. Yet this benefit is only partial, for accident victims are frequently compensated by insurers for some or all of their losses. . . . Opposing the benefits of product liability are its costs, which are great.

A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

2. *The bystander problem.* What would the *Winterbottom* rule mean for injured bystanders and other injured third parties? Take for example a bystander to the coach accident in *Winterbottom* who is injured by the collapsing coach. Should such a person have an action against the coach-maker for injuries caused by the coach-maker's negligence? If not, why not? The answer cannot be that such plaintiffs ought to have protected themselves by contract. These people were not in a position to demand contractual protection against the risk of injury. They could, of course, purchase insurance against general risks of accident and injury. But why should the injured bystander bear these costs as a general matter rather than the coach-maker?

Regardless of the merits, the caselaw on product injuries began to develop certain exceptions to the *Winterbottom* privity rule. Eventually, the exceptions culminated in a decision by Judge Cardozo in the New York Court of Appeals.

***MacPherson v. Buick Motor Company*, 111 N.E. 1050 (N.Y. 1916)**

CARDOZO, J.

The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. . . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.



The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester* [6 N.Y. 397 (1852)]. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. ‘The defendant’s negligence,’ it was said, ‘put human life in imminent danger.’ A poison falsely labeled is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury. . . .

*Thomas v. Winchester* became quickly a landmark of the law. In the application of its principle there may at times have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself. The chief cases are well known, yet to recall some of them will be helpful. *Loop v. Litchfield* is the earliest. It was the case of a defect in a small balance wheel used on a circular saw. The manufacturer pointed out the defect to the buyer, who wished a cheap article and was ready to assume the risk. The risk can hardly have been an imminent one, for the wheel lasted five years before it broke. In the meanwhile the buyer had made a lease of the machinery. It was held that the manufacturer was not answerable to the lessee. . . .

These early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is *Devlin v. Smith*. The defendant, a contractor, built a scaffold for a painter. The painter’s servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care.

From *Devlin v. Smith* we pass over intermediate cases and turn to the latest case in this court in which *Thomas v. Winchester* was followed. That case is *Statler v. Ray Mfg. Co.*, [88 N.E. 1063 (N.Y. 1909)]. The defendant manufactured a large coffee urn. It was installed in a restaurant. When heated, the urn exploded and injured the plaintiff. We held that the manufacturer was liable. We said that the urn ‘was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed.’ It may be that *Devlin v. Smith* and *Statler v. Ray Mfg. Co.* have extended the rule of *Thomas v. Winchester*. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning. A large coffee urn . . . may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. . . .

We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place [a] limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything

in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract.

Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series as too remote to constitute, as to the ultimate user, an actionable wrong. . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

From this survey of the decisions, there thus emerges a definition of the duty of a manufacturer which enables us to measure this defendant's liability. Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in *Devlin v. Smith* supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be. . . .

We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests. Under the charge of the trial judge nothing more was required of it. The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger, the greater the need of caution. . . .

The judgment should be affirmed.

BARTLETT, C.J., dissenting. . . .

I do not see how we can uphold the judgment in the present case without overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to any one except his immediate vendee. The absence of such liability was the very point actually decided in the English case of *Winterbottom v. Wright*, and the . . . opinion of Chief Judge Ruggles in *Thomas v. Winchester* assumes that the law on the subject was so plain that the statement would be accepted almost as a matter of course. In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale in the case of the horse-drawn carriage.

HISCOCK, CHASE and CUDDEBACK, JJ., concur with CARDOZO, J., and HOGAN, J., concurs in result; WILLARD BARTLETT, C.J., reads dissenting opinion; POUND, J., not voting.

### *Notes*

1. *The dawn of the automobile.* So many of the founding moments in tort law arise out of the railroad. In *MacPherson*, we see a critical moment in the early development of the automobile economy. The Buick automobile in question probably resembled the Buick featured in the image below:



Source: Library of Congress, Prints and Photographs Division

As the caption to the image suggests, reliability was much discussed in the early days of the automobile.

2. *How radical is MacPherson?* One view of the *MacPherson* case is that it utterly rejects the old privity rule of *Winterbottom*. After the exceptions of *Devlin* and *Statler*, Cardozo seems to say, the old privity rule has given way to the kind of reasonable foreseeability test we saw in Chapter 8 in cases like *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (replacing the common law rules for trespassers, licensees, and invitees in landowner and occupier liability with a reasonable foreseeability standard) and *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)

(replacing the common law bar on actions for the infliction of negligent emotional distress with a reasonable foreseeability standard).

But other observers contend that Cardozo's opinion does not substitute what Holmes called "the featureless generality" of the reasonableness standard for the old crystal clarity of the privity rule. In this latter view, the *MacPherson* case aims to craft a new approach to the duty of the product manufacturer, one that does not abandon *Winterbottom*'s effort to be attentive to the specific moral obligations arising out of the particular kind of relationship at issue in products cases:

For Cardozo . . . the resolution . . . turned on the duty issue . . . [that] itself had meaning for him apart from the question of liability. Moreover, its meaning did not concern whether a manufacturer does, or should, have a duty to *compensate* such a plaintiff. The questions, according to the court, were whether Buick had a "duty of vigilance," whether it bore an "obligation to inspect," how great was the "need of caution," and how "strict[ ]" was the duty to which Buick had to conform its conduct.

John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1813 (1998). The answer to these questions, argue Goldberg and Zipursky, is not reducible to the kind of public policy functions that modern tort jurists often attribute to open-ended reasonableness tests.

Many, however, argued that neither of these interpretations of Cardozo's opinion in *MacPherson* went far enough. What was the basis for incursions on the *Winterbottom* rule? Presumably the ground for the proliferation of exceptions to the privity rule was a felt sense that the manufacturer should bear the costs of many of the injuries arising out of the modern consumer economy. If this was the intuition or policy ground behind the new approach, then why should a plaintiff in such a case have to show the defendant's negligence or fault? A California Supreme Court decision in 1944 extending the *res ipsa loquitor* doctrine in the products area seemed to embrace this policy intuition. And one justice, in his concurring opinion, took the idea a step further:

***Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453 (1944)**

GIBSON, C.J.

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. . . . This appeal is from a judgment upon a jury verdict in favor of plaintiff.

Defendant's driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet in front of and about three feet from the refrigerator. She then proceeded to take the bottles from the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had placed three bottles in the refrigerator and had moved the fourth bottle about 18 inches from the case 'it exploded in my hand.' The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels,

nerves and muscles of the thumb and palm of the hand.

[Plaintiff submitted evidence that the bottle had exploded and that carbonated bottled beverages can explode when improperly filled.] Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of *res ipsa loquitur*. . . .

Upon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant. It follows, therefore, that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled. . . .

It is true that defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process. It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled.

The judgment is affirmed.

TRAYNOR, J.

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick* established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection . . . or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is 'clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.' An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

[Traynor goes on to discuss a state statute that criminalizes, without proof of fault, the "manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food." The result is a kind of strict liability for manufacturers.]

The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product. This warranty is not necessarily a contractual one, for public policy requires that the buyer be insured at the seller's expense against injury. . . . The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. . . . Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty.

The liability of the manufacturer to an immediate buyer injured by a defective product follows without proof of negligence from the implied warranty of safety attending the sale. Ordinarily, however, the immediate buyer is a dealer who does not intend to use the product himself, and if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the dealer. . . .

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer's obligation to the consumer

must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

Rehearing denied; EDMONDS, J., dissenting.

### Notes

1. Justice Traynor's concurring opinion in *Escola* proposed to go a good deal further than Judge Cardozo had in *MacPherson*. What features of products cases would warrant such a step?

2. *Henningsen v. Bloomfield Motors*. One reason Traynor may have been skeptical of the negligence cause of action in the products context emerged in *Henningsen v. Bloomfield Motors* decided in New Jersey in 1960. In *Henningsen*, husband and wife purchased a new Plymouth from a dealer in 1955. Ten days later, while Mrs. Henningsen was driving the vehicle, it made a loud cracking noise, the steering wheel spun, and the car veered off the roadway and into a brick wall. When the Henningsens sued for damages, however, they were hard-pressed to present evidence of a defect in the automobile or of any negligence by either the dealer or the manufacturer. At the close of evidence, the trial judge awarded judgment to the defendant on the negligence claim.

Plaintiffs had also brought an action for breach of warranty. New Jersey, like many states, authorizes damages for personal injuries arising from breach of warranty. And such actions do not require any showing of negligence or fault on the part of the seller of a product, merely that the product not satisfy the warranties of fitness and merchantability. But the plaintiffs' warranty action faced an obstacle of its own. In fine print, the back of the sales agreement provided that there were "no warranties, express or implied" other than that "the manufacturer agrees to replace defective parts for 90 days after the sale or until the car has been driven 4,000 miles, whichever is first to occur." Moreover, defendants contended that the warranty only created obligations to the buyer, Mr. Henningsen, not to Mrs. Henningsen, who was not a party to the contract. Warranty liability, they contended, still required the privity that Cardozo had abolished in negligence actions in *MacPherson*.

The *Henningsen* court smashed through both of these obstacles. First, it held that third parties could bring actions on the warranty:

Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some



degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon the demands of social justice.

*Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960) (quotations and citations omitted). Then the court held that the warranty of merchantability was not disclaimable. "Automobile manufacturers," the court observed, "undertake large scale advertising programs over television, radio, in newspapers, magazines and all media of communication in order to persuade the public to buy their products," and "when a manufacturer engages in advertising in order to bring his goods and their quality to the attention of the public and thus to create consumer demand, the representations made constitute an express warranty running directly to a buyer who purchases in reliance thereon." *Id.* at 84. Citing "the gross inequality of bargaining position occupied by the consumer in the automobile industry" and claiming that "there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer," the court struck the express disclaimer of the warranty and allowed the plaintiffs to recover on an implied warranty of merchantability. *Id.* at 87.

After *Henningsen*, plaintiffs could bring warranty actions for personal injury without showing negligence even if the seller or manufacturer had attempted to disclaim the warranty. Such a warranty action was a species of contract claim. That meant that liability could only be had for injuries arising out of failures of the product to perform as impliedly or expressly warranted. But many observed that this warranty liability looked a lot like strict liability in tort. Meanwhile, back in California, Justice Traynor's idea in *Escola* soon made its way into a majority opinion in tort.

3. *Greenman v. Yuba Power Products*. Traynor had the opportunity to convert his *Escola* concurrence into the law of California in 1963. Plaintiff William Greenman, whose wife purchased him a power tool, was injured when the tool caused a piece of wood to strike him in the forehead. He brought implied and express warranty claims, as well as negligence claims, against both the retailer and the manufacturer. The defendants objected, however, that he had failed to give notice of the breach of warranty in reasonable time, as required in the law of warranties. Justice Traynor responded that "[t]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales," and he held that injured consumers were not subject to the notice requirement of the traditional law of warranties. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963). Once warranty actions had been allowed by third-parties and once warranties were no longer disclaimable, Traynor insisted that the basic distinctions between the warranty and tort causes of action had been abolished:

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

*Id.*

4. *Corrective justice without fault?* The *Escola* case and the rise of strict liability raises a question about whether corrective justice adequately accounts for the modern law of torts. If tort law is a law of wrongs, as the corrective justice view has it, how can there be liability without wrongful harm, as there seems to be in non-fault liability regimes? Gregory C. Keating has recently suggested one answer: that strict liability torts involve a “distinctive wrong,” namely, the wrong of “harming-without-repairing.” Gregory C. Keating, *Strict Liability Wrongs*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 292 (2014); *see also* Jules L. Coleman, *Some Reflections on Richard Brooks’s “Efficient Performance Hypothesis,”* 116 YALE L.J. POCKET PART 416 (2007), <https://perma.cc/T9DT-57GX> (arguing that strict liability falls in the category of tort liability in which the relevant wrong arises not merely out of injuring but out of injuring without providing compensation).

John Goldberg and Benjamin Zipursky justify the modern doctrine of strict liability by arguing that sometimes we simply owe duties to refrain from injuring others. In this view, a defendant acts wrongly when the defendant fails to live up to their obligation not to injure. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918-19 (2010).

5. *The Second Restatement Revolution.* Torts scholar William Prosser at the University of California, Berkeley called cases like *Henningsen* and *Greenman* an “assault on the citadel” of privity and negligence in products cases. William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1124-34 (1960). Prosser himself led the charge forward in 1965, when the American Law Institute published the Second Restatement of the law of torts—a restatement for which Prosser was the reporter. In section 402A, the Restatement set out a new account of the law of a seller’s liability for physical injuries to a user or consumer. Consider the next case, in which Ohio, like many states around the country in the 1960s and 1970s, adopted the Restatement approach.

Pay special attention to the *Restatement* section (Section 402A) set out by the court in footnote 2.

***Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977)**

CELEBREZZE, J.

On January 25, 1972, appellant, Beverly A. Temple, was operating a Warco 75 ton power punch press in the course of her employment at Superior Metal Products, Inc. (Superior). As Mrs. Temple placed an aluminum extrusion into the back die of the press, an unknown number of extrusions fell from the bolster plate, in front of her, onto the dual operating buttons, causing the press to close on her arms. As a result, Mrs. Temple’s hands and forearms were crushed, requiring amputation of both arms just below the elbow.

. . . The press was manufactured and sold in 1954 by Federal Machine & Welder Company, now Wean United, Inc. (Wean), to a division of the General Motors Corporation (G. M.). At the time of manufacture two hand-operated “run” buttons were mounted on the uprights of the press, at shoulder level. In July of 1971, the press was sold by G. M. to Turner Industries, and Turner immediately sold the press to Temple’s employer.

Upon receipt of the press, Superior personnel modified the operating control circuits by replacing the single clutch valve with a safer dual valve, and by replacing the original rotary switch. In addition, Superior installed new operating buttons which were manufactured by the Square D Company (Square D). Pursuant to a standard company policy, Superior's engineers positioned the buttons waist high, in an upward position, 24 inches apart. The press was then put into operation, stamping out metal bowls, no larger than nine inches in diameter.

On the day of the accident the dies were changed and 36 inch linear stock was run through the press. It is not disputed that the accident occurred when several pieces of the 36 inch stock fell off the bolster and bridged the dual operating buttons, thus simultaneously depressing them. Stated otherwise, it is clear that there was no malfunction in the press or in any of its component parts. . . .

[Mrs. Temple, along with her husband, sued the defendant as manufacturer of the press. The trial court granted summary judgment to the defendants; plaintiff appealed.]

I.

This is a products liability action brought under theories of negligence, implied warranty, and strict liability in tort. The latter two counts are virtually indistinguishable . . . .<sup>1</sup>

The paramount Ohio decision in the law of products liability is *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185 (Ohio 1966). In *Lonzrick* this court traced the "slow, orderly and evolutionary development" in this area . . . . Whereas [earlier cases had] imposed a warranty upon the manufacturer because of its advertising to the public, *Lonzrick* dispensed with this rationalization, and thus the doctrine of strict liability in tort was adopted by Ohio.

It is now well established that, in order for a party to recover based upon a strict liability in tort theory, it must be proven that: "(1) There was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss." . . .

Although acknowledging the absence of any mechanical malfunction, appellants contend that the power press was defective in that it was unreasonably dangerous and was placed in the hands of the user, Mrs. Temple, without adequate warning. This conception of defectiveness is premised upon Section 402A of the *Restatement of Torts 2d*,<sup>2</sup> Comment J,

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<sup>1</sup> Although we have referred to this theory of liability in various ways, including "strict liability in tort for breach of implied warranty of fitness for ordinary use"; "implied warranty, which is a form of strict liability in tort"; and "strict liability"; it is recognized that this fictional "warranty" differs from those found in the sale of goods, since many of the traditional defenses and requirements arising out of the law of contracts are inapplicable. See Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960).

<sup>2</sup> Section 402A . . . reads as follows:

Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if  
(a) the seller is engaged in the business of selling such a product, and

which states that: “In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . as to its use.” Although this court has never expressly adopted Section 402A as the standard for strict liability in tort, we did, in *Lonzrick*, supra, cite Section 402A, as well as *Greenman v. Yuba Power Products*, the first case to apply the principles underlying the section. Since *Greenman* was decided, the rule of the Restatement has been adopted or approved by the vast majority of courts which have considered it. Because there are virtually no distinctions between Ohio’s “implied warranty in tort” theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the *Restatement of Torts 2d*.

## II.

Under Section 402A, as well as under our case law, a plaintiff must prove that the product was defective at the time it left the seller’s hands. . . . Section 402A(1)(b) imposes strict liability only where the defective product reaches “the user or consumer without substantial change in the condition in which it is sold.”

The evidence of record reveals the prior to the date of the accident Superior had a company policy which specified that all power press activating buttons be located facing upward, waist high, 24 inches apart. Pursuant to this policy, upon receipt of the press, Superior altered the existing method of guarding by lowering the buttons, which were at that time shoulder high. Clearly, in relation to the danger of unintentional activation, this alteration was a “substantial change” within the meaning of Section 402A(1)(b). Indeed, it is our conclusion that there was no original defect of any sort in the punch press, and that, as a matter of law, Superior’s alteration of the safety device, coupled with the utilization of the press for the stamping of stock long enough to bridge the 24-inch gap between the buttons, was the sole responsible cause of the maiming of Mrs. Temple.

...

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.  
Judgment affirmed.

## Notes

1. *Completing the revolution.* Mrs. Temple may have lost her suit. But the Second Restatement nonetheless helped to touch off a transformation in product liability law. Before the Restatement, there had been a number of influential products liability decisions rejecting the long-standing negligence standard—opinions such as Traynor’s opinions in *Henningsen* and *Greenman*. But the Restatement provision proved to be highly influential. Before long,

- 
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
  - (2) The rule stated in Subsection (1) applies although
    - (a) the seller has exercised all possible care in the preparation and sale of his product, and
    - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Prosser expressed confidence that the assault had completely destroyed the seller defenses of privity and non-negligence. See William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

2. *Consumer expectations versus ex post cost benefit.* Despite the early exuberance of judges like Traynor and scholars like Prosser, and despite the ready adoption of the Restatement by states such as Ohio, the Second Restatement turned out to present a number of puzzles.

One leading puzzle in 402A's treatment of defective products was how to determine whether a product was "defective" and "unreasonably dangerous to the user." The Restatement purported to set out a standard of liability only for products that are defective and unreasonably dangerous. These are critical limitations. After all, no one thinks that kitchen knife manufacturers ought to be liable for cuts arising out of ordinary cooking activities. Without the limitation to *defective* products, the strict liability rule of 402A would threaten to create a liability so sweeping as to include even obviously absurd cases.

Here is the puzzle: Subsection (2)(a) indicates that liability exists even though the seller has "exercised all possible care" in the preparation and sale of the product. How, some torts jurists began to ask, could any product as to which all possible care had been given be described as defective? Such a seller or manufacturer, after all, might have lavished more care than the mere reasonable care required by the negligence standard. And yet the law imagined that such an immaculately carefully produced product might nonetheless be describable as defective. How could that be?

Two possible answers emerged to the puzzle of strict liability for defective products unreasonably dangerous to the user. The first was that defectiveness was to be measured not by reference to the care put into the product by the seller and manufacturer, but by reference to the reasonable expectations of the user. The consumer's expectations would be the yardstick for determining defectiveness.

A second answer to the puzzle of defectiveness hewed closer to the traditional negligence approach, but with a twist. A product could be characterized as defective, after all, even if all possible care had been put into its design and production, if the characterization was not made from the ex ante view but instead from the ex post perspective. That is, a product might have been made with all possible care at the time of its design and manufacture. It might have been a perfectly fine product given the state of the art at that time. But given what we know at the time of the trial, we might well conclude that the product is—given what we know now—substandard. This approach is essentially an ex post Learned Hand test: it takes the ex ante reasonable person test of the *Carroll Towing* case we read back in Chapter 4 and turns it around such that the cost-benefit test takes into account all that we know at the time of trial about the costs and benefits of the product's features.

## 2. Manufacturing Defects

One category of products cases involves allegations of defects in the manufacturing process. In these cases, the claim is not that the product was ineptly designed, but rather that a perfectly reasonably designed product was made in such a way that rendered it defective. *Escola* was such a case. And as *Escola* indicated, a chief problem in these cases is one of proof. How does a plaintiff prove an error in the production process?

### ***Speller v. Sears, Roebuck and Co.*, 790 N.E.2d 252 (N.Y. 2003)**

GRAFFEO, J.

In this products liability case, defendants—a product manufacturer and retailer—were granted summary judgment dismissing plaintiffs’ complaint. Because we conclude that plaintiffs raised a triable issue of fact concerning whether a defective refrigerator caused the fire that resulted in plaintiffs’ injuries, we reverse and reinstate the complaint against these defendants.

Plaintiffs’ decedent Sandra Speller died in a house fire that also injured her seven-year-old son. It is undisputed that the fire originated in the kitchen. Plaintiffs commenced this action against Sears, Roebuck and Co., Whirlpool Corporation and the property owner alleging negligence, strict products liability and breach of warranty. Relevant to this appeal, plaintiffs asserted that the fire was caused by defective wiring in the refrigerator, a product manufactured by Whirlpool and sold by Sears.

After discovery, defendants Sears and Whirlpool moved for summary judgment seeking dismissal of the complaint. Relying principally on a report issued by the New York City Fire Marshal, defendants rejected the refrigerator as the source of the fire, instead contending that a stovetop grease fire was the cause of the conflagration. Thus, they argued that their product was outside the chain of causation that resulted in plaintiffs’ damages.

In opposition to defendants’ motion for summary judgment, plaintiffs submitted excerpts from the depositions of two experts and an affidavit from a third, as well as other materials. Plaintiffs’ experts refuted the conclusions reached in the Fire Marshal’s report, opining that the fire started in the upper right quadrant of the refrigerator, an area with a concentration of electrical wiring. All three rejected the stove as the source of the fire. Plaintiffs also submitted portions of the deposition of a Whirlpool engineer retained as an expert by defendants. Although the engineer disputed that the fire originated in the refrigerator, he acknowledged that a fire would not occur in a refrigerator unless the product was defective.

Supreme Court denied defendants’ request for summary judgment, holding that plaintiffs’ submissions raised a triable issue of fact as to whether the fire was caused by a defect in the refrigerator. The Appellate Division reversed and granted the motion, dismissing the complaint as against Sears and Whirlpool. The Court reasoned that defendants’ evidence suggesting an alternative cause of the fire shifted the burden to plaintiffs to come forward with specific evidence of a defect. . . .

[P]laintiffs’ theory was that the wiring in the upper right quadrant of the refrigerator

was faulty, causing an electrical fire which then spread to other areas of the kitchen and residence. Because that part of the refrigerator had been consumed in the fire, plaintiffs noted that it was impossible to examine or test the wiring to determine the precise nature of the defect. Thus, plaintiffs sought to prove their claim circumstantially by establishing that the refrigerator caused the house fire and therefore did not perform as intended.

New York has long recognized the viability of this circumstantial approach in products liability cases. . . . In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants. . .

. . . Here, in their motion for summary judgment, defendants . . . [offered] evidence that the injuries were not caused by their product but by an entirely different instrumentality—a grease fire that began on top of the stove. This was the conclusion of the Fire Marshal who stated during deposition testimony that his opinion was based on his interpretation of the burn patterns in the kitchen, his observation that one of the burner knobs on the stove was in the “on” position, and his conversation with a resident of the home who apparently advised him that the oven was on when the resident placed some food on the stovetop a few hours before the fire.

In order to withstand summary judgment, plaintiffs were required to come forward with competent evidence excluding the stove as the origin of the fire. To meet that burden, plaintiffs offered three expert opinions: the depositions of an electrical engineer and a fire investigator, and the affidavit of a former Deputy Chief of the New York City Fire Department. Each concluded that the fire originated in the refrigerator and not on the stove.

. . .

Upon review of these expert depositions and affidavit, we conclude that plaintiffs raised a triable question of fact by offering competent evidence which, if credited by the jury, was sufficient to rebut defendants' alternative cause evidence. In other words, based on plaintiffs' proof, a reasonable jury could conclude that plaintiffs excluded all other causes of the fire.

. . .

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion of defendants Sears, Roebuck and Co. and Whirlpool Corporation for summary judgment denied. . .

### **Notes**

1. *Causation or not?* Which side's story of causation in *Speller* do you think is more likely? Did the mistake happen in the tightly-controlled environs of the Whirlpool Corporation factory? Or in the plaintiff's kitchen, where the burner dial was found to have been set to “on” after the fire? Can we ever really know? Are the facts strong enough on either side to keep the case from a jury?

2. *Explaining the products transformation.* A modest literature aims to explain the transformation in products liability law in the decades after World War Two. George Priest contends that the explanation lies in the history of the ideas, and in particular in the rise of the kinds of regulatory ideas associated with the New Deal: one highly skeptical of markets and equally confident in the capacity of compulsory state regulation to accomplish public policy goals. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDS. 461 (1985).

Witt offers two complementary institutional explanations. The idea that enterprises ought to be liable for all the injuries arising out of their activities—the idea that Priest and others call enterprise liability—was coined not by New Dealers, but by the first generation of corporate managers in the new mega-firms of the early twentieth century. Human resource engineers and scientific management experts aimed to bring the firm completely under the control of management. And to complete this control, they urged that firms be deemed responsible for all the injuries with which they were connected. This idea soon became the basic principle of workmen’s compensation programs. And the same idea of managerial domination was soon associated with the relationship between firms and their consumers. (Just think of Traynor’s language of consumer helplessness in *Escola* and *Greenman*.) See John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003).

Ideas from the domain of work did not simply migrate as if magically to the domain of consumption. The labor of bringing ideas from one space to the other was carried out by a group that coalesced in the years immediately following World War Two. The National Association of Compensation Claimants’ Attorneys, or NACCA, brought work accident claimants’ representatives together starting in the early 1940s. The group initially aimed to work collectively to combat employers’ groups, which lobbied state legislatures to reduce workers’ compensation benefits. But when it became clear that common law of torts offered claimants’ lawyers better prospects than workers’ compensation claims (which had sharply limited lawyers’ fees), the claimants’ lawyers began to advocate for broader common law liability as well as higher workers’ compensation benefits. Within a few years, the group renamed itself the Association of Trial Lawyers of America, or ATLA.

NACCA and ATLA lawyers litigated many of the most important products liability cases, including *Escola*. They also began to turn their attention to helping friendly judges get elected in the state supreme courts. And their project seems to have worked, at least through the 1970s. For an account, see John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common Law Nation*, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).

3. *Compulsory insurance.* *Speller* makes apparent one important feature of products liability after *Greenman* and *Henningsen*. Modern products liability is a form of compulsory insurance for all product purchasers and users. When a consumer buys a product, they are also buying an insurance policy from the seller, one that the consumer may not waive or decline, even if they would like to do so. That insurance policy covers their injuries, or the injuries of other users or third parties, in the event of injury arising out of the use of the product.



But note that this is not like the insurance our consumer would purchase from her friendly neighborhood insurance broker. For example, unlike health or accident insurance, this insurance does not set the premium on the basis of the consumer's own risk profile. Sellers rarely possess information about the purchaser's risk when they sell a product. They cannot price discriminate on that basis. And even if they could, their exposure to non-purchaser users and third parties would make such knowledge inadequate.

Moreover, unlike a life insurer, a seller of products (and thus of products liability insurance) cannot price the product according to the value of damages to be paid out should the insured-against event come to pass. Life insurance premiums vary depending on the amount of insurance purchased. But once again product sellers cannot know the damages to which they will be exposed by any one purchaser or subsequent user.

The result is that sellers of products have to charge all purchasers the same premium in the purchase price—even though certain consumers will find the implicit insurance policy far more valuable (because they are risky users or may have high damages) than other consumers for whom the same implicit insurance policy is worth far less (because they are safe users or because they are likely to have lower damages). Products liability and its compulsory insurance, in other words, creates cross-subsidies among classes of consumers.

Cross-subsidies alone might not be bad. They can be useful policy devices, as in health insurance regimes, for example, where absent compulsory insurance mandates and cross-subsidies, adverse selection problems will make insurance unavailable for certain classes of unfortunate would-be buyers. But the products liability cross-subsidy is potentially perverse. Why should low-risk users be required to subsidize high-risk users? Shouldn't public policy aim to reward low-risk users over high-risk users? Most of all, why should low-expected-damage purchasers subsidize high-expected-damage purchasers? This second cross-subsidy is especially galling given that those who can expect low damages are those with relatively modest wages. Their damages from lost income, for example, will be lower. Those who can expect high damages, by contrast, are those with high wages whose lost income will be higher. The result of this cross-subsidy, in other words, is that the low incomes are subsidizing purchases of the same product by those with high incomes. *See generally* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

Of course, any such problem is lessened to the extent that the product in question has a relatively homogenous class of purchasers: homogenous with respect to risk and income. And there is good reason to think that many consumer product markets sort themselves along these axes. High-income car purchasers buy BMWs, while low-income car purchasers buy Kias. High-risk car purchasers buy sports cars, while low-risk car purchasers buy station wagons. But there are lots of product markets that have highly heterogeneous consumers. Who buys Ford sport utility vehicles? Well-heeled hunters and middle-class soccer moms. Working class landscapers and the owners of mansions with sweeping lawns buy riding lawn mowers. Both pay the same for the non-waivable product liability insurance that comes—by law—with their product.

4. *Manufacturing versus design.* So long as the product liability revolution transpired in the domain of manufacturing defects—areas where a product was defective because it departed from the manufacturer or seller's design—it met with widespread acceptance. There were

controversial cases, to be sure: cases like *Speller* where some believed the outcomes flawed. But such controversies were over generic features of tort law like causation and juries, not over anything specific to the modern products liability transformation. Not so in the law of design defects.

### 3. Design Defects

#### ***Barker v. Lull Engineering Company, Inc.*, 573 P.2d 443 (Cal. 1978)**

TOBRINER, Acting C.J.

In August 1970, plaintiff Ray Barker was injured at a construction site at the University of California at Santa Cruz while operating a high-lift loader manufactured by defendant Lull Engineering Co. and leased to plaintiff's employer by defendant George M. Philpott Co., Inc. [The high-lift loader was a large construction vehicle akin to an oversized fork-lift resting on four giant, five-foot tires. The loader in question was designed for use on moderate slopes. Plaintiff (who was substituting for the regular loader operator) was using it to lift lumber on behalf of his employer one day when the loader seemed to tip. Plaintiff leapt from the loader to try to reach safety but was struck by falling lumber. In his suit, plaintiff claimed that the loader ought to have been outfitted with outriggers, seat-belts, and roll-bars. Defendant contended that plaintiff had been operating the loader on the kind of steep slope for which the loader was not designed, that a seat belt would have added to the operator's risk by trapping him in his seat, and that roll bars were unnecessary because the machine was too bulky to roll.]  
...

The jury returned a verdict in favor of defendants, and plaintiff appeals from the judgment entered upon that verdict, contending primarily that in view of this court's decision in *Cronin v. J. B. R. Olson Corp.*, 501 P.2d 1153 (Cal. 1972), the trial court erred in instructing the jury "that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use . . . ."

As we explain, we agree with plaintiff's objection to the challenged instruction and conclude that the judgment must be reversed. In *Cronin*, we reviewed the development of the strict product liability doctrine in California at some length, and concluded that, for a variety of reasons, the "unreasonably dangerous" element which section 402A of the *Restatement (Second) of Torts* had introduced into the definition of a defective product should not be incorporated into a plaintiff's burden of proof in a product liability action in this state. . . .

As *Cronin* acknowledged, in the past decade and a half California courts have frequently recognized that the defectiveness concept defies a simple, uniform definition applicable to all sectors of the diverse product liability domain. Although in many instances as when one machine in a million contains a cracked or broken part the meaning of the term "defect" will require little or no elaboration, in other instances, as when a product is claimed to be defective because of an unsafe design or an inadequate warning, the contours of the defect concept may not be self-evident. In such a case a trial judge may find it necessary to explain

more fully to the jury the legal meaning of “defect” or “defective.” We shall explain that Cronin in no way precluded such elucidation of the defect concept, but rather contemplated that, in typical common law fashion, the accumulating body of product liability authorities would give guidance for the formulation of a definition. . . .

As we explain in more detail below, we have concluded . . . that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design. . . .

This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs. Finally, this test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the product, not on the manufacturer’s conduct, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action. . . .

*2. The trial court erred in instructing the jurors that “strict liability for a defect in design . . . is based on a finding that the product was unreasonably dangerous for its intended use.”*

Plaintiff principally contends that the trial court committed prejudicial error in instructing the jury “that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use. . . .”<sup>4</sup> Plaintiff maintains that this instruction conflicts directly with this court’s decision in *Cronin*, decided subsequently to the instant trial, and mandates a reversal of the judgment. Defendants argue, in response, that our *Cronin* decision should not be applied to product liability actions which involve “design defects” as distinguished from “manufacturing defects.”

The plaintiff in *Cronin*, a driver of a bread delivery truck, was seriously injured when, during an accident, a metal hasp which held the truck’s bread trays in place broke, permitting the trays to slide forward and propel plaintiff through the truck’s windshield. Plaintiff brought a strict liability action against the seller, contending that his injuries were proximately caused by the defective condition of the truck. Evidence at trial established that the metal hasp broke during the accident “because it was extremely porous and had a significantly lower tolerance to force than a non-flawed aluminum hasp would have had,” and, on the basis of this evidence, the jury returned a verdict in favor of plaintiff.

On appeal, defendant in *Cronin* argued that the trial court had erred “by submitting a definition of strict liability which failed to include, as defendant requested, the element that the defect found in the product be ‘unreasonably dangerous.’” Relying upon section 402A of the Restatement Second of Torts and a number of California decisions which had utilized the “unreasonably dangerous” terminology in the product liability context, the defendant in *Cronin* maintained that a product’s “unreasonable dangerousness” was an essential element that a plaintiff must establish in any product liability action.

After undertaking a thorough review of the origins and development of both California product liability doctrine and the Restatement's "unreasonably dangerous" criterion, we rejected the defendant's contention, concluding "that to require an injured plaintiff to prove not only that the product contained a defect but also that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in *Greenman v. Yuba Power Products*, California's seminal product liability decision . . . .

As we noted in *Cronin*, the Restatement draftsmen adopted the "unreasonably dangerous" language primarily as a means of confining the application of strict tort liability to an article which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) TORTS, § 402A, com. i. In *Cronin*, however, we flatly rejected the suggestion that recovery in a products liability action should be permitted only if a product is more dangerous than contemplated by the average consumer, refusing to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by that product. . . .

As this court has recognized on numerous occasions, the term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts. . . .

[T]he defect or defectiveness concept has embraced a great variety of injury-producing deficiencies, ranging from products that cause injury because they deviate from the manufacturer's intended result (e.g., the one soda bottle in ten thousand that explodes without explanation), to products which, though "perfectly" manufactured, are unsafe because of the absence of a safety device (e.g., a paydozer without rear view mirrors), and including products that are dangerous because they lack adequate warnings or instructions (e.g., a telescope that contains inadequate instructions for assembling a "sun filter" attachment).

. . .

In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. For example, when a product comes off the assembly line in a substandard condition it has incurred a manufacturing defect.

A design defect, by contrast, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all such units will reflect the same design. Rather than applying any sort of deviation-from-the-norm test in determining whether a product is defective in design for strict liability purposes, our cases have employed two alternative criteria

. . . .

First, our cases establish that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This initial standard, somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability, reflects the warranty heritage upon which California product liability doctrine in part rests. . . .

As Professor Wade has pointed out, however, the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defectiveness because “(i)n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.” [John] Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 829. . . .

A review of past cases indicates that in evaluating the adequacy of a product’s design . . . a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design. . . . [A] product may alternatively be found defective in design if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. . . .

[P]ast design defect decisions demonstrate that, as a practical matter, in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not. . . .

[But] an instruction which advises the jury that it may evaluate the adequacy of a product’s design by weighing the benefits of the challenged design against the risk of danger inherent in such design is not simply the equivalent of an instruction which requires the jury to determine whether the manufacturer was negligent in designing the product. It is true, of course, that in many cases proof that a product is defective in design may also demonstrate that the manufacturer was negligent in choosing such a design. As we have indicated, however, in a strict liability case, as contrasted with a negligent design action, the jury’s focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer’s conduct.

Thus, the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product’s design is unsafe to consumers, users, or bystanders.

### *Conclusion*

The technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. The radical change from a comparatively safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of a tortfeasor but now are more concerned with the safety of the individual who suffers the loss. . . .

Because the jury may have interpreted the erroneous instruction given in the instant case as requiring plaintiff to prove that the high-lift loader was ultrahazardous or more dangerous than the average consumer contemplated, and because the instruction additionally misinformed the jury that the defectiveness of the product must be evaluated in light of the product's "intended use" rather than its "reasonably foreseeable use," . . . we cannot find that the error was harmless on the facts of this case. In light of this conclusion, we need not address plaintiff's additional claims of error, for such issues may not arise on retrial.

The judgment in favor of defendants is reversed.

### Notes

1. *Burdens of persuasion?* The *Barker* court went even further than the final substantive paragraph of this excerpt indicates: it held that the burden of persuasion as to whether a product satisfies the risk-utility balancing test lies with the defendant, who is better positioned to offer evidence about the product's design virtues and vices than the plaintiff. *Barker*, 573 P.2d at 452. Few courts, if any, followed *Barker* in this. See, e.g., *Ray v. BIC Corp.*, 925 S.W.2d 527, 532-33 (Tenn. 1996).

2. *Risk-utility and consumer expectations.* Other features of *Barker* have produced controversy, too. *Barker* offers the two answers we discussed above (in the notes after *Temple v. Ween*) to the puzzle of how to understand when a product is defective for purposes of strict liability determinations under the Second Restatement's section 402A. The first is the risk-utility balancing test that compares the costs and benefits of the challenged design feature. On first glance, this approach might seem to reproduce the basic cost-benefit reasoning of Learned Hand's approach to the negligence standard. But look closely at the end of the *Barker* opinion: the question, as the *Barker* court puts it, is whether in "hindsight" the product's costs outweigh its benefits. This, as we noted, is an ex post Learned Hand test, one that asks about the risks and utility of the product in question not knowing what a reasonable manufacturer would have known at the time of the product's design, but knowing what we know now. In this sense, it is not a negligence approach at all, or at least not a fault-based approach at all, because one can hardly fault a manufacturer for failing to act on the basis of information that was not reasonably available to it at the time of design and manufacture. The insight of *Barker*'s ex post cost-benefit analysis is that the absence of information at the time of product design may not be sufficient reason to relieve manufacturers of the costs of their product design decisions. If the manufacturer or designer of the product is in a better position to generate the kinds of information required to make products safe for consumer use, perhaps we should adopt the ex post rather than the ex ante view. See, for example, *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986), where the Louisiana Supreme Court deemed a product design defective because "the danger-in-fact of the product, whether foreseeable or not, outweigh[ed] the utility of the product." *Id.* at 114.

The second approach in *Barker* to determining defectiveness is the consumer expectations approach that we noted above. If a reasonable consumer would have expected the product to be safer than it is, then the product is defective for purposes of the strict liability of 402A. This approach has the virtue of not reproducing the cost-benefit test of the negligence standard (even as modified in *Barker*). But its difficulty is that using consumer expectations as

the touchstone of an analysis designed around the premise of consumers' relative ignorance in the marketplace seems perverse. If there are product designs that could have made a product safer, why should we expect consumers to know about them rather than a manufacturers' expert engineers and designers?

What have the courts done? Some courts have refused to take up the cost-benefit test's invitation to "open-ended balancing" of risk and utility. The Montana Supreme Court, for instance, rejected the cost-benefit analysis and held that if a design fails the consumer expectation test, then "strict liability may be imposed even if the seller has 'exercised all possible care,' and even though the product was faultlessly manufactured." *Malcolm v. Evenflo Co.*, 217 P.3d 514, 520 (Mont. 2009).

A number of courts have stuck with a test "centered on the reasonable expectations of the ordinary consumer." *Connor v. Skagit Corp.*, 638 P.2d 115 (Wash. 1981); *Massey v. Conagra Foods, Inc.*, 328 P.3d 456 (Idaho 2014). But even here, some courts insist that we have not completely left costs and benefits behind. These courts insist that consumer expectations are the critical question, but regard risk and utility as "a guide in determining the expectations of consumers in complex cases." *Delaney v. Deere & Co.*, 999 P.2d 930, 944 (Kan. 2000). How else, after all, ought a consumer to expect a product to perform other than in a way that the benefits outweigh the costs? See *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997); *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 883 (Kan. 1994).

Setting the controversy to one side, however, *Barker* has been highly influential. For in addition to setting out two central tests for defectiveness, it identified three different classes of products cases: manufacturing defect cases, design defect cases, and warning defect cases. That trichotomy has gone on to be highly influential, as we will see shortly.

3. *Compulsory product features?* Does *Barker* offer a sensible approach to regulating the market in lift-loaders? Note that after *Barker*, a seller of lift-loaders may no longer be willing to sell loaders without outriggers, since to do so is to expose the seller to liability in the event the user deploys the loader on steep slopes. But what does this mean for would-be buyers of lift loaders who plan to use their loaders on even or flat surfaces? It means that they will have to buy loaders with outriggers—which are doubtlessly more expensive—regardless of their planned uses. Has the *Barker* court just made a valuable product unavailable, or at least added considerably to its cost? Should all lift loaders have outriggers, even when designed for use on sites where the outriggers are unnecessary?

4. *Compulsory insurance, adverse selection, and unraveling products markets?* Recall from note 3 after *Speller* the problem of compulsory insurance and potentially perverse cross-subsidies. The problem is potentially even greater than it seemed. For in some circumstances, the compulsory insurance will not only produce unfairness between high- and low-risk or high- and low-income purchasers. Sometimes compulsory insurance will cause the product market to break down completely.

As described in George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1553-60 (1987), the problem goes like this: for certain products, like general aviation airplanes, for example, the implicit insurance premium is quite high. But for

low-risk would-be purchasers, a substantial part of that implicit premium will reflect the risks posed by high-risk fliers. (The seller cannot effectively distinguish between the two when it sells a plane, and moreover will be liable to subsequent high-risk users of the plane even if it initially sells to a low-risk flier.) As a result, some marginal low-risk would-be purchasers will drop out of the relevant market, because the products and the compulsory insurance are too expensive. But when they do that, the insurance pool changes. The first consumers to drop out are likely to be among the lowest risk consumers, since they are the ones bearing the highest costs from the cross-subsidy to high-risk users. The pool of product users is therefore now made up of consumers who are, on balance, a little bit riskier than they were before the lowest risk consumers dropped out. And if the pool is riskier than it would have been before the low-risk consumers dropped out, the insurance seller (here the product seller) will have to increase the price of the implicit insurance policy by increasing the price of the product.

It is here that the potential perversity of compulsory insurance risks becomes truly pernicious. For now at the higher price point, a new round of low-risk consumers may reconsider their willingness to purchase. If they drop out of the market, the insurance pool will again become riskier, requiring a second new price point for the implicit insurance. But that new price will lead yet another set of consumers to reconsider their willingness to buy. Once again, the consumers dropping out of the market will tend to be the lowest risk would-be users remaining in the pool. And once again the riskiness of the pool and the price of the product will have to go up.

In theory, this dynamic of adverse selection in the product market—of consumer drop-outs and price hikes—may continue until there are no consumers remaining in the market. If this were to happen, products liability threatens to eliminate entire classes of products from the market altogether. These may be very useful products we would very much like to have around! Sometimes they may be safer than the existing alternatives.

Priest contends that the problem is not only a theoretical problem. The insurance crisis of the late 1980s, he argues, was a real-world example of the adverse selection unraveling theory he developed. Liability insurance became difficult or impossible to purchase for a wide variety of product sellers, ranging from vaccine manufacturers to sports equipment makers, and service providers ranging from obstetrics care providers to commercial truckers. In markets like general aviation airplanes, the unraveling of the market in new planes even made flying less safe than it had been by leaving old, less safe planes up in the air longer. See George L. Priest, *Can Absolute Manufacturer Liability be Defended*, 9 YALE J. REG. 237 (1992).

Others argue that the liability insurance price cycles were the result of interest rate swings, which affect insurers' bottom lines by eroding the returns the insurers can get by investing the premiums in the interim period between when insureds make premium payments, on the one hand, and policy obligations come due, on the other. See, e.g., Robert T. McGee, *The Cycle in Property / Casualty Insurance*, FED. RES. BANK OF N.Y. Q. REV., Autumn 1986, at 22-30.

Either way, the problem of adverse selection is potentially a serious obstacle to achieving systemic policy goals in products liability cases.



5. *A Third Restatement Rollback?* After three decades of experience with Prosser's Second Restatement, the American Law Institute reissued a Third Restatement dedicated exclusively to products liability in 1998. The *Restatement of the Law Third, Torts: Products Liability* almost completely overturned 402A. In its place, it adopted the three-part structure drawn from cases like *Barker* for liability arising out of defective products sold by someone "engaged in the business of selling or otherwise distributing products" when the defect causes harm to persons or property. RESTATEMENT (THIRD): PRODS. LIAB. § 1 (1998). Consider the next case, which illustrates the Third Restatement approach in action:

***Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159 (Iowa 2002)**

TERNUS, J.

The United States District Court for the Northern District of Iowa has certified [a question] to this court arising out of a personal injury action filed by a smoker against several cigarette manufacturers. The certified question. . . address[es] the nature and extent of the manufacturers' liability under products liability, warranty and tort law. . . .

*I. Factual and Procedural Background.*

The plaintiffs, Robert and DeAnn Wright, filed a petition against the defendants, all cigarette manufacturers, alleging they had been damaged as a result of Robert's cigarette smoking. . . .

Thereafter, the defendants asked the federal court to certify questions of law to the Iowa Supreme Court . . . . Concluding the case presented several questions of state law that are potentially determinative and as to which there is either no controlling precedent or the precedent is ambiguous, the district court certified eight questions to this court.

The [relevant question] certified is:

1. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?

. . .

*II. In a Design Defect Products Liability Case, What Test Applies Under Iowa Law to Determine Whether Cigarettes Are Unreasonably Dangerous? What Requirements Must Be Met Under the Applicable Test?*

The Iowa Supreme Court first applied strict liability in tort for a product defect in 1970, adopting Restatement (Second) of Torts section 402A. . . . Our purpose in adopting this provision was to relieve injured plaintiffs of the burden of proving the elements of warranty or negligence theories, thereby insuring "that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market."

Consistent with this purpose we held that a plaintiff seeking to recover under a strict liability theory need not prove the manufacturer's negligence. Moreover, we concluded that application of strict liability in tort was not exclusive and did not "preclude liability based on the alternative ground of negligence, when negligence could be proved."

In *Aller v. Rodgers Machinery Manufacturing Co.*, [1978], a design defect case, our court discussed in more detail the test to be applied in strict liability cases. In that case, the plaintiff asked the court to eliminate the "unreasonably dangerous" element of strict products liability, arguing that to require proof that the product was *unreasonably* dangerous injected considerations of negligence into strict liability, thwarting the purpose of adopting a strict liability theory. We rejected the plaintiff's request to eliminate the "unreasonably dangerous" element, concluding the theories of strict liability and negligence were distinguishable . . . .

Relying on comment *i* to section 402A, we held that a plaintiff seeking to prove a product was in a "defective condition unreasonably dangerous" must show that the product was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* at 834 (quoting Restatement (Second) of Torts 402A cmt. *i*). We went on, however, to discuss *how* the plaintiff is to prove the defective condition was unreasonably dangerous:

In order to prove that a product is unreasonably dangerous, the injured plaintiff must prove the product is dangerous and that it was unreasonable for such a danger to exist. Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.

Whether the doctrine of negligence or strict liability is being used to impose liability *the same process is going on in each instance*, i.e., weighing the utility of the article against the risk of its use.

*Id.* at 835 (emphasis added). Two conclusions can be drawn from our discussion in *Aller*: (1) the legal principles applied in a strict liability case include both a consumer expectation or consumer contemplation test and a risk/benefit or risk/utility analysis; and (2) the risk/benefit analysis employed in a strict liability design defect case is the same weighing process as that used in a negligence case.

Since *Aller*, this court has varied in its application of the tests set forth in that decision, sometimes applying both tests and sometimes applying only the consumer expectation test. On the other hand, we have continued to equate the strict liability risk/benefit analysis used in a design defect case with that applied in a design negligence case.

. . .

In determining what test should be applied in assessing whether cigarettes are unreasonably dangerous, we are confronted with the anomaly of using a risk/benefit analysis for purposes of strict liability based on defective design that is identical to the test employed in proving negligence in product design. This incongruity has drawn our attention once again to the "debate over whether the distinction between strict liability and negligence theories

should be maintained when applied to a design defect case.” [citation omitted] We are convinced such a distinction is illusory . . . .

[A]ny attempts to distinguish the two theories in the context of a defective design are in vain. That brings us to the Products Restatement, which reflects a similar conclusion by its drafters.

The Products Restatement demonstrates a recognition that strict liability is appropriate in manufacturing defect cases, but negligence principles are more suitable for other defective product cases. *See* 2 DAN B. DOBBS, *THE LAW OF TORTS* § 353, at 977 (2001) (“The effect . . . of the Products Restatement is that strict liability is retained when it comes to product flaws, but negligence or something very much like it is the test of liability when it comes to design and warning defects.”). Accordingly, it “establish[es] separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings.” Products Restatement § 2 cmt. *a*, at 14. . . .

The “unreasonably dangerous” element of section 402A has been eliminated and has been replaced with a multi-faceted definition of defective product. This definition is set out in section 2:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warning. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Products Restatement § 2, at 14.

The commentators give the following explanation for the analytical framework adopted in the Products Restatement:

In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer’s own design or marketing standards because those

standards are the very ones that the plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label “risk-utility balancing,” is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by the courts on product sellers.

Products Restatement § 2 cmt. *a*, at 15-16. [T]he Products Restatement has essentially “dropped the consumer expectation test traditionally used in the strict liability analysis and adopted a risk-utility analysis traditionally found in the negligence standard.” [citation omitted]

...

In summary, we now adopt *Restatement (Third) of Torts: Product Liability* sections 1 and 2 for product defect cases. Under these sections, a plaintiff seeking to recover damages on the basis of a design defect must prove “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.” . . .

### Notes

1. *The Third Restatement.* The Third Restatement approach preserves the strict liability of 402A for manufacturing defects: liability exists “even though all possible care” was exerted to make the manufacturing process safe.

But for design defects—for situations like the one in *Barker and Wright*—the American Law Institute recommends a different approach, one that determines defectiveness not on the basis of ex post risk-utility or consumer expectations, but on the basis of an ex ante cost-benefit test. The view of section 2(b) of the Third Restatement is that a product is defective in its design if the “foreseeable” risks could have been reduced or avoided by a “reasonable alternative design,” which by hypothesis must have been available at the time of production. The current view of the American Law Institute is thus that liability for design defects effectively ought to be liability for negligence in design.

As for what courts actually do, a fifty state survey published in 2015 found “no consensus with respect to application of either the consumer expectations test or the risk-utility test,” and among the jurisdictions that employ a risk-utility test, no consensus as to whether the plaintiff must prove that the harm could have been avoided by a “reasonable alternative design.” Mike McWilliams & Margaret Smith, *An Overview of the Legal Standard Regarding Product Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction*, 82 DEF. COUNSEL J. 80 (2015). In the early 2000s, some scholars predicted that the Third Restatement would eventually prevail. See, e.g., Cami Perkins, *The Increasing*

*Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609 (2004). The trendline is no longer clear. The Wisconsin Supreme Court observed in 2007 that “[s]ome jurisdictions that have adopted the *Restatement (Third)* are now back-tracking. The current judicial trend appears to be a return to the pro-consumer policies of origin and reinstating strict products liability under § 402A.” *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 690 (2007).

2. *General Motors fuel tank saga*. In 1999, a California jury awarded \$4.9 billion to six plaintiffs injured in Chevrolet Malibu cars who alleged that the fuel tank of the vehicle was placed unreasonably and dangerously close to the bumper. The plaintiffs’ injuries were severe. Plaintiff Patricia Anderson and her children, for example, were struck from the rear by a drunk driver; the collision caused the fuel tank to explode, causing severe injuries to all the occupants of the car. Ms. Anderson’s daughter Alisha was “horribly disfigured on her face and lost her right hand.” Still, the size of the damages award stunned observers. The General Motors Corporation as a whole reported only \$3 billion in earnings from its operations the previous year. The jury awarded \$107.6 million in compensatory damages and \$4.8 billion in punitive damages.

For our purposes, there are two striking features of the GM fuel tank case. The first has to do with cost-benefit calculations and the jury. A key piece of evidence for the plaintiffs was an internal General Motors memorandum revealing that the costs of moving the fuel tank further from the bumper would have been \$8.59 per vehicle, while the costs of fuel tank fires arising out of the existing bumper would amount only to \$2.40 per vehicle. The jury seems to have viewed the defendant’s cost-benefit calculation as a kind of reckless disregard for the safety of its customers and their passengers. But versions of this kind of cost-benefit calculation seem to be precisely what the risk-utility analysis of the Second Restatement and the reasonable alternative design analysis of the Third Restatement are designed to encourage. Perhaps the jury’s outrage arose out of the fact that General Motors seems to have been comparing its private benefits and costs, rather than the social benefits and costs. What the jury thought precisely we will never really know.

The second striking piece of the GM fuel tank case was the way it played in the media and the culture. On July 10, 1999, the *New York Times* covered the huge jury verdict prominently in its national page coverage. *\$4.9 Billion Jury Verdict in G.M. Fuel Tank Case*, N.Y. TIMES, Jul. 10, 1999, at A8. A month and a half later the trial judge slashed the damages by over \$3 billion, reducing the punitive damages award from \$4.8 billion to \$1.09 billion. This time, the story was covered in a small notice near the back of the *Times*’s front page. See *G. M. Damages Cut by Over \$3 Billion in Gas Tank Case*, N.Y. TIMES, Aug. 27, 1999, at A18.

Most readers presumably only saw the first story. Some readers may have noticed the second. Both groups would have come away with a massively inflated sense of the dollars that products liability cases transfer from defendants to plaintiffs. Because of course the case did not end with the trial judge’s reduction of the damages. Four years later, after continuing appellate litigation, General Motors and the plaintiffs settled.

The details of the settlement were private. But a GM spokesman said the company was “pleased with the settlement.” This time, the story did not appear at all in the *New York Times*. The *Los Angeles Times* covered the story in a short unsigned notice along with assorted A.P.

wire reports in its local coverage. *See GM to Settle Case over Gas Tank Explosion*, L.A. TIMES, Jul. 25, 2003, at 4.

What's the lesson? First, settlement is pervasive, even after entry of an ostensible judgment by a jury and trial judge, and these settlements are almost invariably private and confidential. Second, news coverage of tort law systematically distorts the way tort law works. It's hard to blame any one newspaper. Newspapers barely survive these days anyway, and the first story in the sequence is as interesting as the last one is boring. Nevertheless, the picture in the press of how tort works badly misrepresents the actual system, and usually in the direction of exaggerating the size and frequency of plaintiff-friendly verdicts. On this theme, see WILLIAM HARTORN & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

#### **4. Warning Defects**

As the Third Restatement indicates, there is a third category of product defect cases—one that is beyond manufacturing and design defects, though some say it resembles design defect cases. This third category involves cases of allegedly defective warnings. In recent years, warnings cases have become hotly controversial. The basic problem is that viewed either *ex post* (with the Second Restatement) or *ex ante* (with the Third), warnings are exceedingly inexpensive to adopt. Failure to adopt a warning can therefore often seem to have been negligent if the warning would have prevented even a modest number of injuries. On the other hand, warning proliferation threatens to desensitize product users or perhaps risks overwhelming their cognitive capacities.

Consider the following sequence of cases involving a meat grinder and a warning defect claim:

#### ***Liriano v. Hobart Corp. ("Liriano I"), 132 F.2d 124 (2d Cir. 1998)***

CALABRESI, J.

##### **I. BACKGROUND**

Luis Liriano, a seventeen-year-old employee in the meat department at Super Associated grocery store ("Super"), was injured on the job in September 1993 when he was feeding meat into a commercial meat grinder whose safety guard had been removed. His hand was caught in the "worm" that grinds the meat; as a result, his right hand and lower forearm were amputated.

The meat grinder was manufactured and sold in 1961 by Hobart Corporation ("Hobart"). At the time of the sale, it had an affixed safety guard that prevented the user's hands from coming into contact with the feeding tube and the grinding "worm." No warnings were placed on the machine or otherwise given to indicate that it was dangerous to operate

the machine without the safety guard in place. Subsequently, Hobart became aware that a significant number of purchasers of its meat grinders had removed the safety guards. And in 1962, Hobart began issuing warnings on its meat grinders concerning removal of the safety guard.

There is no dispute that, when Super acquired the grinder, the safety guard was intact. It is also not contested that, at the time of Liriano's accident, the safety guard had been removed. There is likewise no doubt that Hobart actually knew, before the accident, that removals of this sort were occurring and that use of the machine without the safety guard was highly dangerous. And Super does not question that the removal of the guard took place while the grinder was in its possession.

Liriano sued Hobart under theories of negligence and strict products liability for, inter alia, defective product design and failure to warn. He brought his claims in the Supreme Court, Bronx County, New York. Hobart removed the case to the United States District Court for the Southern District of New York, and also impleaded Super as a third-party defendant, seeking indemnification and/or contribution. The District Court (Shira A. Scheindlin, Judge) dismissed all of Liriano's claims except those based on failure to warn.

Following trial, the jury concluded that the manufacturer's failure to warn was the proximate cause of Liriano's injuries and apportioned liability 5% to Hobart and 95% to Super. . . . [The jury awarded Liriano \$1.3 million in damages.] On appeal, Hobart and Super argue, inter alia, that the question of whether Hobart had a duty to warn Liriano should have been decided in their favor by the court, as a matter of law. It is this question that gives rise to the current certification.

## II. DISCUSSION

### A. Applicable New York Law

It is well-settled under New York law that a manufacturer is under a duty to use reasonable care in designing its product so that it will be safe when "used in the manner for which the product was intended, as well as unintended yet reasonably foreseeable use." *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976) (citations omitted). It is equally well-settled in New York that manufacturers have a duty to warn users of foreseeable dangers inherent in their products. In *Robinson v. Reed-Prentice Division*, 403 N.E.2d 440 (N.Y. 1980), the New York Court of Appeals in effect removed a set of product liability cases from the *Micallef* analysis of "intended" and "reasonably foreseeable use." The *Robinson* case itself involved a machine designed with a safety shield that could not be kept in an open (unprotecting) position due to a sophisticated interlock system. This interlock was designed to prevent the machine from operating unless its safety shield was in a closed (protecting) position. The plaintiff's employer, however, cut holes in the safety shield so that the machine would still operate (without the protections of the safety shield). In other words, the employer bypassed the safety devices of the shield and the interlocking safety system.

The New York Court of Appeals held that a manufacturer of a product may not be held liable "either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which

substantially alters the product and is the proximate cause of plaintiff's" injuries. "Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility."<sup>1</sup>

*Robinson*, though never overruled, has not been left undisturbed. Thus in *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. 1984), decided four years after *Robinson*, the Court of Appeals not only reaffirmed a manufacturer's duty to warn purchasers of dangers in the product, but clearly held that this duty on the part of the manufacturer to warn can continue even after the original sale. . . .

Six years after *Robinson*, moreover, the Court of Appeals qualified *Robinson* in another way and declined to hold that all disablements of safety devices constitute subsequent modifications precluding a manufacturer's liability. In *Lopez v. Precision Papers, Inc.*, 492 N.E.2d 1214 (N.Y. 1986), the court held that a disablement does not necessarily foreclose liability where safeguards can be easily removed and where such removal thereby increases the efficacy of the product.

. . .

#### B. Unsettled Issues of Law

The further articulation of *Cover* and *Lopez* has, we think, left the law uncertain in various respects. Of particular moment to the case before us, the law appears to be unclear on whether a manufacturer may be liable for failure to warn of dangers associated with foreseeable and/or known misuses of a product, where the product has been substantially modified by a third party's removal of the product's safety devices (i.e., in situations in which no liability for design defect would exist).

The Court of Appeals has not addressed the circumstances under which a manufacturer may be liable for not warning against known or reasonably foreseeable misuse resulting in a dangerous product alteration. While *Robinson* squarely holds that a manufacturer may not be liable—in strict products liability or negligence—on a design defect claim for injuries caused in part by alteration or modification of a safety device, the question remains whether a manufacturer who knew of or should have foreseen the removal or modification is liable under either negligence or strict products liability for failure to warn of the dangers of misusing the product following such modification.<sup>6</sup>

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<sup>1</sup> Indeed, in *Robinson*, the evidence established that the manufacturer "knew, or should have known, that the particular safety gate designed for the machine made it impossible" for the purchaser-employer to use the machine to produce its product. In rejecting the foreseeability standard, however, the Court of Appeals stated that to hold otherwise "would expand the scope of a manufacturer's duty beyond all reasonable bounds and would be tantamount to imposing absolute liability on manufacturers for all product-related injuries."

<sup>6</sup> When addressing negligence, the *Robinson* majority cabined its analysis to the design defect claim. See *Robinson*, 403 N.E.2d at 444 ("Nor does the record disclose any basis for a finding of negligence on the part of [the manufacturer] in the design of the machine.").



The dissent in *Robinson* implied that the substantial modification defense created by the majority barred not only a manufacturer's liability for defective design, but also, sub silentio, its liability for negligent failure to warn. . . .

[A]t least four possible views of New York law present themselves: Whenever a substantial modification has occurred, *Robinson*: (1) bars claims both for design defect and failure to warn, regardless of whether negligence and/or strict products liability is alleged; (2) bars all actions for design defect, whether based on strict liability or negligence, but does not foreclose suits for failure to warn, whether based on strict liability or negligence; (3) bars all actions for design defect, and also bars strict liability actions for failure to warn, but does not preclude claims based on negligent failure to warn; (4) bars only strict liability claims (whether for design defect or failure to warn) and forecloses neither category of suit when negligence is alleged and proved.

There is a logic to each of these possibilities under *Robinson*, and all but the last find support in New York cases subsequent to *Robinson*. The last, which distinguishes between liability for negligence and strict products liability, seems negated by *Robinson*, and yet is perhaps the most consistent of all with *Robinson's* peroration which stated that its holding was crucial since any other decision "would be tantamount to imposing absolute liability on manufacturers for all product-related injuries."<sup>12</sup>

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<sup>12</sup> The same peroration would also support the third possibility (barring strict liability actions for failure to warn but permitting such actions when based on negligence). Unlike the fourth possibility, however, the third would require no further restriction on *Robinson*, since, as discussed *supra* note 6, the negligence analysis in *Robinson* was limited to its discussion of design defect.

Moreover, a reason does appear to exist in tort theory for treating negligence and strict liability similarly when dealing with design defects, but differently in failure to warn cases. One definition of a defective product is based on the so-called risk-utility test. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. B. § 2 cmt. a (Proposed Final Draft Apr. 1, 1997). (This ground for design defect liability applies in New York. See *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995). The other definition—which also applies in New York—is the implied warranty/consumer expectations basis.)

The risk-utility test involves the making of a cost-benefit analysis to gauge the benefits of a product in relation to its dangers. In this respect, it is very similar to the Learned Hand cost-benefit analysis undertaken to determine whether negligence exists, see *United States v. Carroll Towing Co.* The difference—and it is a significant one—is that under negligence analysis, the cost-benefit test is made on the basis of what the defendant knew or ought to have known at the time he acted, while on the no-fault, risk-utility test, the analysis relies on the knowledge that is available at the time of trial (i.e., it includes data that has become available even after the accident). Despite this difference, both tests involve a similar weighing of advantages and disadvantages associated with the product. Cf. *Denny*, 662 N.E.2d at 735 ("The adoption of th[e] risk/utility balance as a component of the 'defectiveness' element has brought the inquiry in [strict products liability] design defect cases closer to that used in traditional negligence cases, where the reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors.").

While strict liability is also available for failure to warn, substantial authority exists for not basing such strict liability on the risk-utility test, see *Freund v. Cellofilm Properties, Inc.*, 432 A.2d 925, 929 & 930 n.1 (N.J. 1981) (citing "[a] growing trend of cases and authority . . . [that] has perceived a difference between the utilization of strict liability [based on the risk-utility test], as opposed to negligence, in the inadequate warning area"). The argument is that ex post, it would almost always have been worthwhile to have warned a particular user of the danger that in fact came about, and hence, there would almost always be an actionable failure to warn under the risk-utility test. Yet such ex post analysis usually gives no indication of what warnings would be appropriate in the future. And unless it does so, failure to warn strict liability must be based on other grounds. But these other grounds—essentially implied warranty or consumer

We welcome enlightenment on which of these, or other possibilities, is the law of New York today.

### III. CERTIFICATION

Certification is particularly appropriate when the state's highest court has cast doubt on the scope or continued validity of one of its earlier holdings, or when there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal.<sup>14</sup> Absent certification, the danger in both situations—as Professors Corbin and Shulman foresaw—is that a party favored by the lower court decisions or by the weakened high court holding will seek federal jurisdiction with the knowledge that the federal courts, unlike the state's highest court, will feel virtually bound to follow these decisions. . . .

Accordingly, we certify the following question to the New York Court of Appeals:

Can manufacturer liability exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory, and if so, is such manufacturer liability barred as a matter of law on the facts of this case, viewed in the light most favorable to the plaintiff?

. . . This panel retains jurisdiction so that after we receive a response from the New York Court of Appeals we may dispose of various additional questions that may remain on appeal.

#### ***Liriano v. Hobart Corp. ("Liriano II"), 700 N.E.2d 303 (1998)***

COPARICK, J.

[In response to the first half of the question certified by the Second Circuit, the New York Court of Appeals issued the following decision:]

. . .

This Court's rationale in *Robinson* stemmed from the recognition that a manufacturer is responsible for a "purposeful design choice" that presents an unreasonable danger to the user. . . .

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expectations—amount to another way of saying that the product was defective in design because no warning was given.

While it doesn't follow necessarily, the applicability of the negligence-related risk-utility test to define design defect may well have led a court like that in *Robinson* to deny all liability, whether strict or based on negligence, as to design defects. Its underlying reasoning might then apply to bar strict liability for failure to warn, since this is akin to liability for design defect, but not to preclude liability for negligent failure to warn, since that is a totally separate basis for relief.

<sup>14</sup> Certification might also be appropriate in circumstances where doubt on the continued validity of an earlier decision of a state's highest court has been cast: (a) by significant questioning of that decision in the opinions of the state's intermediate appellate courts; (b) by abandonment of the rule in neighboring, or otherwise cognate, states; or (c) perhaps even by substantial criticism from respected commentators.

While this Court stated that principles of foreseeability are inapplicable where there has been a substantial modification of the product, that discussion was limited to the manufacturer's responsibility for defective design where there had been a substantial alteration of a product by a third party. Thus, this Court stated that a manufacturer's duty "does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented" and the manufacturer need not trace its "product through every link in the chain of distribution to insure that users will not adapt the product to suit their own unique purposes."<sup>1</sup>

Hobart and amici argue that the rationale of *Robinson* is equally applicable to failure-to-warn claims where a substantial modification of the product occurs and that application of the failure-to-warn doctrine in these circumstances would undermine *Robinson*'s policy justification and destroy its purpose. This Court is not persuaded that the existence of a substantial modification defense precludes, in all cases, a failure to warn claim.

The factors militating against imposing a duty to design against foreseeable post-sale product modifications are either not present or less cogent with respect to a duty to warn against making such modifications. The existence of a design defect involves a risk/utility analysis that requires an assessment of whether "if the design defect were known at the time of the manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Voss v. Black & Decker Mfg. Co.*; see also *Denny v. Ford Motor Co.*). Such an analysis would be unreasonably complicated, and may very well be impossible to measure, if a manufacturer has to factor into the design equation all foreseeable post-sale modifications. Imposition of a duty that is incapable of assessment would effectively result in the imposition of absolute liability on manufacturers for all product-related injuries. See, *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 286 F.2d 478 (9th Cir. 1961). This Court has drawn a policy line against that eventuality.

These concerns are not as strongly implicated in the context of a duty to warn. Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning. The burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product. Thus, although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.

Furthermore, this Court has held that a manufacturer may be liable for failing to warn against the dangers of foreseeable misuse of its product. No material distinction between foreseeable misuse and foreseeable alteration of a product is evident in this context.<sup>2</sup>

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<sup>1</sup> Although the plaintiff in *Robinson* also raised a claim for failure to warn (. . . [Fuchsberg, J., dissenting]), the dismissal of plaintiff's claim, not discussed in the majority opinion, was fact-specific. The manufacturer had even warned *Robinson*'s employer that the alteration compromised the safety features of the machine.

<sup>2</sup> True, issues of foreseeability, obviousness, proximate cause or the adequacy of warnings can be troublesome in failure-to-warn cases, as has been noted by various commentators (see, e.g., Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265 [1990]). Those difficulties do not, however, negate the duty to warn against foreseeable product misuse which is well established in this Court's precedents as well as contemporary products liability jurisprudence.

This Court has also recognized that, in certain circumstances, a manufacturer may have a duty to warn of dangers associated with the use of its product even after it has been sold. Such a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer; the existence and scope of such a duty are generally fact-specific (see, *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. Ct. App. 1984) [technical service bulletin issued by manufacturer and sent to vendor 13 months after delivery relevant and admissible]).<sup>3</sup>

The justification for the post-sale duty to warn arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use. A manufacturer's superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product. Indeed, as in this case, Hobart was the only party likely to learn about the removal of the safety guards and, as it ultimately did, pass along warnings to customers.

This Court therefore concludes that manufacturer liability can exist under a failure-to-warn theory in cases in which the substantial modification defense as articulated in *Robinson* might otherwise preclude a design defect claim.

We should emphasize, however, that a safety device built into the integrated final product is often the most effective way to communicate that operation of the product without the device is hazardous. Thus, where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or participated in the removal of the safety device whose purpose is obvious, lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger. Thus, in appropriate cases, courts could as a matter of law decide that a manufacturer's warning would have been superfluous given an injured party's actual knowledge of the specific hazard that caused the injury. Nevertheless, in cases where reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the question is one for the jury.

Similarly, a limited class of hazards need not be warned of as a matter of law because they are patently dangerous or pose open and obvious risks (cf., *Amatulli v. Delhi Constr. Corp.*, 571 N.E.2d 645 [had aboveground pool not been installed two feet below ground level, "its depth would have been readily apparent and would itself have served as an evident warning against diving"] ). Where a danger is readily apparent as a matter of common sense, "there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided" (Prosser and Keeton, at 686). Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning. On the other hand, the open and obvious defense generally should not apply when there are aspects of the hazard which are concealed or not reasonably apparent to the user.

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<sup>3</sup> As we noted in *Cover*, the post-sale duty of a manufacturer to warn involves the weighing of a number of factors including the degree of danger the problem involves, the number of reported incidents, the burden of providing the warning, as well as the burden and/or ability to track a product post-sale.

This is particularly important because requiring a manufacturer to warn against obvious dangers could greatly increase the number of warnings accompanying certain products. If a manufacturer must warn against even obvious dangers, “[t]he list of foolish practices warned against would be so long, it would fill a volume” (*Kerr v. Koemm*, 557 F. Supp. 283, 288 [S.D.N.Y. 1983] ). Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product’s inherent dangers.

While important to warning law, the open and obvious danger exception is difficult to administer. The fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult, and in close cases it is easy to disagree about whether a particular risk is obvious. It is hard to set a standard for obviousness that is neither under-nor over-inclusive.

Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question. Where only one conclusion can be drawn from the established facts, however, the issue of whether the risk was open and obvious may be decided by the court as a matter of law. . . .

#### **Note**

In *Liriano II*, the New York Court of Appeals declined to answer the second certified question—whether manufacturer liability for failure to warn was barred as a matter of law on the facts of this case, viewed in the light most favorable to the plaintiff—“in deference to the Second Circuit’s review and application of existing principles of law to the facts, as amplified by the full record before that Court.” On return from certification, the Court of Appeals for the Second Circuit issued the following decision in *Liriano III*:

#### ***Liriano v. Hobart Corp. (“Liriano III”), 170 F.3d 264 (2d Cir. 1999)***

CALABRESI, J.

Hobart makes two arguments challenging the sufficiency of the evidence. The first concerns the obviousness of the danger that Liriano faced, and the second impugns the causal relationship between Hobart’s negligence and Liriano’s injury. Each of these arguments implicates issues long debated in the law of torts. . . . The obviousness question was the subject of an important but now generally rejected opinion by Justice Holmes, then on the Massachusetts Supreme Judicial Court; the causation question is answered in a celebrated opinion of Judge Cardozo, then on the New York Court of Appeals. We examine each in turn.

(1) Obviousness

More than a hundred years ago, a Boston woman named Maria Wirth profited from an argument about obviousness as a matter of law that is very similar to the one Hobart urges today. *See Lorenzo v. Wirth*, 49 N.E. 1010 (Mass. 1898). Wirth was the owner of a house on whose property there was a coal hole. The hole abutted the street in front of the house, and casual observers would have no way of knowing that the area around the hole was not part of the public thoroughfare. A pedestrian called Lorenzo fell into the coal hole and sued for her injuries. *See id.* Writing for a majority of the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes, Jr., held for the defendant. He noted that, at the time of the accident, there had been a heap of coal on the street next to the coal hole, and he argued that such a pile provided sufficient warning to passers-by that they were in the presence of an open hole. . . .

It was true, Holmes acknowledged, that “blind men, and foreigners unused to our ways, have a right to walk in the streets,” and that such people might not benefit from the warning that piles of coal provided to sighted Bostonians. But Holmes wrote that coal-hole cases were simple, common, and likely to be oft repeated, and he believed it would be better to establish a clear rule than to invite fact-specific inquiries in every such case. . . .

Justice Knowlton disagreed. His opinion delved farther into the particular circumstances than did Holmes’s opinion for the majority. In so doing, he showed that Lorenzo’s failure to appreciate her peril might have been foreseen by Wirth and hence that Wirth’s failure to warn might constitute negligence. He noted, for example, that the accident occurred after nightfall, when Lorenzo perhaps could not see, or recognize, the heap of coal for what it was. There was “a throng of persons” on the street, such that it would have been difficult even in daylight to see very far ahead of where one was walking. And the plaintiff was, in fact, a foreigner unused to Boston’s ways. “[S]he had just come from Spain, and had never seen coal put into a cellar through a coal hole.” In sum, the case was not the “simple” one that Holmes had made it out to be. What is more, none of the facts he recited was either unusual or unforeseeable by Wirth. “What kind of conduct is required under complex conditions, to reach the usual standard of due care, namely, the ordinary care of persons of common prudence, is a question of fact . . . [and thus] a question for a jury.” Even cases involving “obvious” dangers like coal holes, Knowlton believed, might not be resolvable as matters of law when viewed in the fullness of circumstances that rendered the issue less clear than it would be when posed in the abstract. . . .

Knowlton’s position has prevailed in the court of legal history. “[T]he so-called Holmes view—that standards of conduct ought increasingly to be fixed by the court for the sake of certainty—has been largely rejected . . . . The tendency has been away from fixed standards and towards enlarging the sphere of the jury.” FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* § 15.3, at 358-59 n. 15 (2d ed. 1986). . . .

If the question before us were, therefore, simply whether meat grinders are sufficiently known to be dangerous so that manufacturers would be justified in believing that further warnings were not needed, we might be in doubt. On one hand, just as a coal hole was deemed a danger appreciated by most Bostonians in 1898, so most New Yorkers would probably appreciate the danger of meat grinders a century later. Any additional warning might seem superfluous. On the other hand, Liriano was only seventeen years old at the time of his

injury and had only recently immigrated to the United States. He had been on the job at Super for only one week. He had never been given instructions about how to use the meat grinder, and he had used the meat grinder only two or three times. And, as Judge Scheindlin noted, the mechanism that injured Liriano would not have been visible to someone who was operating the grinder. It could be argued that such a combination of facts was not so unlikely that a court should say, as a matter of law, that the defendant could not have foreseen them or, if aware of them, need not have guarded against them by issuing a warning. . . .

Nevertheless, it remains the fact that meat grinders are widely known to be dangerous. Given that the position of the New York courts on the specific question before us is anything but obvious, we might well be of two minds as to whether a failure to warn that meat grinders are dangerous would be enough to raise a jury issue.

But to state the issue that way would be to misunderstand the complex functions of warnings. . . . [A] warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in. And where the function of a warning is to assist the reader in making choices, the value of the warning can lie as much in making known the existence of alternatives as in communicating the fact that a particular choice is dangerous. It follows that the duty to warn is not necessarily obviated merely because a danger is clear.

To be more concrete, a warning can convey at least two types of messages. One states that a particular place, object, or activity is dangerous. Another explains that people need not risk the danger posed by such a place, object, or activity in order to achieve the purpose for which they might have taken that risk. Thus, a highway sign that says “Danger—Steep Grade” says less than a sign that says “Steep Grade Ahead—Follow Suggested Detour to Avoid Dangerous Areas.”

If the hills or mountains responsible for the steep grade are plainly visible, the first sign merely states what a reasonable person would know without having to be warned. The second sign tells drivers what they might not have otherwise known: that there is another road that is flatter and less hazardous. A driver who believes the road through the mountainous area to be the only way to reach her destination might well choose to drive on that road despite the steep grades, but a driver who knows herself to have an alternative might not . . . .

One who grinds meat, like one who drives on a steep road, can benefit not only from being told that his activity is dangerous but from being told of a safer way. As we have said, one can argue about whether the risk involved in grinding meat is sufficiently obvious that a responsible person would fail to warn of that risk, believing reasonably that it would convey no helpful information. But if it is also the case—as it is—that the risk posed by meat grinders can feasibly be reduced by attaching a safety guard, we have a different question. Given that attaching guards is feasible, does reasonable care require that meat workers be informed that they need not accept the risks of using unguarded grinders? Even if most ordinary users may—as a matter of law—know of the risk of using a guardless meat grinder, it does not follow that a sufficient number of them will—as a matter of law—also know that protective guards are available, that using them is a realistic possibility, and that they may ask that such guards be used. It is precisely these last pieces of information that a reasonable manufacturer may have a duty to convey even if the danger of using a grinder were itself deemed obvious.

Consequently, the instant case does not require us to decide the difficult question of whether New York would consider the risk posed by meat grinders to be obvious as a matter of law. A jury could reasonably find that there exist people who are employed as meat grinders and who do not know (a) that it is feasible to reduce the risk with safety guards, (b) that such guards are made available with the grinders, and (c) that the grinders should be used only with the guards. Moreover, a jury can also reasonably find that there are enough such people, and that warning them is sufficiently inexpensive, that a reasonable manufacturer would inform them that safety guards exist and that the grinder is meant to be used only with such guards. Thus, even if New York would consider the danger of meat grinders to be obvious as a matter of law, that obviousness does not substitute for the warning that a jury could, and indeed did, find that Hobart had a duty to provide. It follows that we cannot say, as a matter of law, that Hobart had no duty to warn Liriano in the present case. . . .

## (2) Causation

On rebriefing following the Court of Appeals decision, Hobart has made another argument as to why the jury should not have been allowed to find for the plaintiff. In this argument, Hobart raises the issue of causation. It maintains that Liriano “failed to present any evidence that Hobart’s failure to place a warning [on the machine] was causally related to his injury.” Whether or not there had been a warning, Hobart says, Liriano might well have operated the machine as he did and suffered the injuries that he suffered. Liriano introduced no evidence, Hobart notes, suggesting either that he would have refused to grind meat had the machine borne a warning or that a warning would have persuaded Super not to direct its employees to use the grinder without the safety attachment.

Hobart’s argument about causation follows logically from the notion that its duty to warn in this case merely required Hobart to inform Liriano that a guard was available and that he should not use an unguarded grinder. The contention is tightly reasoned, but it rests on a false premise. It assumes that the burden was on Liriano to introduce additional evidence showing that the failure to warn was a but-for cause of his injury, even after he had shown that Hobart’s wrong greatly increased the likelihood of the harm that occurred. But Liriano does not bear that burden. When a defendant’s negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of injury that ensued, that very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact. The burden then shifts to the defendant to come forward with evidence that its negligence was not such a but-for cause. . . .

This shifting of the onus procedendi has long been established in New York. Its classic statement was made more than seventy years ago, when the Court of Appeals decided a case in which a car collided with a buggy driving after sundown without lights. *See Martin v. Herzog*. The driver of the buggy argued that his negligence in driving without lights had not been shown to be the cause-in-fact of the accident. Writing for the Court, Judge Cardozo reasoned that the legislature deemed driving without lights after sundown to be negligent precisely because not using lights tended to cause accidents of the sort that had occurred in the case. The simple fact of an accident under those conditions, he said, was enough to support the inference of but-for causal connection between the negligence and the particular accident. The inference, he noted, could be rebutted. But it was up to the negligent party to produce the evidence supporting such a rebuttal.



. . . [T]he fact that Liriano did not introduce detailed evidence of but-for causal connection between Hobart's failure to warn and his injury cannot bar his claim. His prima facie case arose from the strong causal linkage between Hobart's negligence and the harm that occurred. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975) (describing the concept of "causal link"). And, since the prima facie case was not rebutted, it suffices.

. . .

The district court did not err. We affirm its decision in all respects.

NEWMAN, J., concurring.

. . . .

[I]f our decision correctly predicts New York law, manufacturers of meat-grinders equipped with safety guards can readily avoid liability for injuries resulting from use after the guard has been removed by the inexpensive furnishing of some reasonable form of notice of the hazard of using the machine without the guard. Hobart has already acted in this direction by placing on its machine a warning against use if the safety guard has been removed. Thus, the circumstances giving rise to Hobart's liability in this case are unlikely to arise again.

. . . I concur.

### Notes

1. *What dangers require a warning?* Liriano raises the question of whether a defendant manufacturer or seller may be liable for failure to warn of dangers associated with foreseeable or known misuses of a product. What about dangers arising from the product's foreseeable incorporation or integration into a larger product? The U.S. Supreme Court recently considered this issue in a maritime torts case involving metal pumps, blowers, and turbines, all of which required the addition of asbestos insulation in order to function as intended. The plaintiffs, who served in the Navy aboard ships outfitted with the defendants' parts and who both developed cancer, claimed that the defendants had a duty to warn them of the dangers of asbestos in the integrated product. In a decision limited to the maritime context (and that referenced maritime law's "special solicitude" for sailors), the Court adopted a relatively plaintiff-friendly standard, requiring a product manufacturer to warn "when its product requires incorporation of a part that makes the integrated product dangerous for its intended uses." *Air & Liquid Systems Corp. v. DeVries*, 586 U.S. \_\_\_ (2019). Justice Gorsuch, joined by Justices Thomas and Alito, dissented. The dissent notes, first, that the Restatement (Third) of Products Liability takes a different approach (recognizing the possibility of liability in this situation only if the component itself is defective or the seller or distributor of the component "substantially participates in the integration of the component into the design of the product," thereby causing defect). 586 U.S. \_\_\_ (2019) (Gorsuch, J., dissenting); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5 (1998). The dissent then supplies various rationales for this alternative approach, including ones grounded in efficiency (the component part manufacturer is not the "least-cost

avoider”) and fairness (consumers do not expect warnings that go beyond the product itself and are not well-served by “long, duplicative fine print”). But the dissent places the most emphasis on legal uncertainty and its cost to society:

Consider what might follow if the Court’s standard were widely adopted in tort law. Would a company that sells smartphone cases have to warn about the risk of exposure to cell phone radiation? Would a car maker have to warn about the risks of improperly stored antifreeze? Would a manufacturer of flashlights have to warn about the risks associated with leaking batteries? Would a seller of hot dog buns have to warn about the health risks of consuming processed meat? Just the threat of litigation and liability would force many manufacturers of safe products to spend time and money educating themselves and writing warnings about the dangers of other people’s more dangerous products. All this would, as well, threaten to leave consumers worse off. After all, when we effectively require manufacturers of safe products to subsidize those who make more dangerous items, we promise to raise the price and restrict the output of socially productive products. Tort law is supposed to be about aligning liability with responsibility, not mandating a social insurance policy in which everyone must pay for everyone else’s mistakes.

586 U.S. \_\_ (2019) (Gorsuch, J., dissenting). Do Justice Gorsuch’s critiques apply more generally to tort law’s approach to warning defects? Is it an adequate answer to observe that the duty to warn attaches only when a failure to warn would defeat consumer expectations or fail some kind of a cost-benefit analysis? How much legal certainty can a concept like “foreseeability” provide? Is products liability, in fact, best understood as a form of social insurance?

2. *The relationship between products liability and regulation.* Should there even be products liability in markets for heavily regulated products? Understanding how the information that leads to a product recall is generated sheds light on an answer. One view holds that litigation is merely a “follow-on” result of the investigations conducted by regulators. *See, e.g.,* Pamela R. Haunschild & Mooweon Rhee, *The Role of Volition in Organizational Learning: The Case of Automotive Product Recalls*, 50 *MANAG. SCI.* 1545-1560 (2004). This view is exemplified by the case of fen-phen, a weight-loss “miracle pill” taken by six million people before it was pulled from the market in 1997 at the request of the FDA. None of the thousands of lawsuits that followed the recall helped to discover the link between fen-phen and heart disease; in fact, the threat of litigation appears to have *delayed* the relaying of findings to the public. *See* Carrie E. Johnson, Timothy L. Sellnow, Matthew W. Seeger, M. Scott Barrett & Kathryn C. Hasbargen, *Blowing The Whistle On Fen-Phen: An Exploration of MeritCare’s Reporting of Linkages Between Fen-Phen and Valvular Heart Disease*, 41 *J. BUS. COMMUN.* 350-369 (2004).

An alternate view sees discovery as a tool that allows litigation to uncover threats to public safety either unknown to, or ignored by, regulators. *See, e.g.,* Jon S. Vernick, Jason W. Sapsin, Stephen P. Teret & Julie Samia Mair, *How Litigation Can Promote Product Safety*, 32 *J. LAW MED. ETHICS* 551-555 (2004). Take General Motors’s 2014 recall of 2.6 million vehicles with faulty ignition switches. The recall was prompted by information brought to light by a solo practitioner, Lance Cooper, on behalf of the family of a woman killed while

driving her 2005 Chevy Cobalt. Cooper hired experts, deposed G.M. engineers, and obtained over 32,000 pages of internal documents to reveal what the National Highway Transportation Safety Administration had failed to see: that an ignition switch defect present on millions of GM cars could cause them to unexpectedly shut off. See Patrick G. Lee & Jeff Plungis, *GM Plagued as George Lawyer Presses Regulators on Deaths*, BLOOMBERG, Mar. 17, 2014. The GM recall closely parallels that of Firestone tires in 2000, which was the result of a publicity campaign mounted by Arkansas lawyer Tab Turner to spur action by NHSTA. Turner's campaign not only led to the recall, but "stunned the public into realizing how much federal auto-safety enforcement had deteriorated in the last 20 years." See Michael Winerip, *What's Tab Turner Got Against Ford?*, N.Y. TIMES, Dec. 17, 2000.

Keep this debate in mind as we move to the next section on the relationship between federal statutes and regulations and their state analogues.

Note that even when a warning appears there is still a further question whether the warning is adequate. Judge J. Harvie Wilkinson takes up the adequacy question in the next case:

***Hood v. Ryobi Am. Corp.*, 181 F.3d 608 (4th Cir. 1999)**

WILKINSON, C.J.

....

Hood purchased a Ryobi TS-254 miter saw in Westminster, Maryland on February 25, 1995, for the purpose of performing home repairs. . . .

A number of warnings in the operator's manual and affixed to the saw itself stated that the user should operate the saw only with the blade guards in place. For example, the owner's manual declared that the user should "KEEP GUARDS IN PLACE" and warned: "ALWAYS USE THE SAW BLADE GUARD. Never operate the machine with the guard removed"; "NEVER operate this saw without all guards in place and in good operating condition"; and "WARNING: TO PREVENT POSSIBLE SERIOUS PERSONAL INJURY, NEVER PERFORM ANY CUTTING OPERATION WITH THE UPPER OR LOWER BLADE GUARD REMOVED." The saw itself carried several decals stating "DANGER: DO NOT REMOVE ANY GUARD. USE OF SAW WITHOUT THIS GUARD WILL RESULT IN SERIOUS INJURY"; "OPERATE ONLY WITH GUARDS IN PLACE"; and "WARNING . . . DO NOT operate saw without the upper and lower guards in place."

The day after his purchase, Hood began working with the saw in his driveway. While attempting to cut a piece of wood approximately four inches in height Hood found that the blade guards prevented the saw blade from passing completely through the piece. Disregarding the manufacturer's warnings, Hood decided to remove the blade guards from the saw. Hood first detached the saw blade from its spindle. He then unscrewed the four screws that held the blade guard assembly to the frame of the saw. Finally, he replaced the blade onto the bare spindle and completed his cut.

Rather than replacing the blade guards, Hood continued to work with the saw blade exposed. He worked in this fashion for about twenty minutes longer when, in the middle of another cut, the spinning saw blade flew off the saw and back toward Hood. The blade partially amputated his left thumb and lacerated his right leg.

Hood admits that he read the owner's manual and most of the warning labels on the saw before he began his work. He claims, however, that he believed the blade guards were intended solely to prevent a user's clothing or fingers from coming into contact with the saw blade. He contends that he was unaware that removing the blade guards would permit the spinning blade to detach from the saw. But Ryobi, he claims, was aware of that possibility. In fact, another customer had sued Ryobi after suffering a similar accident in the mid-1980s.

On December 5, 1997, Hood sued several divisions of Ryobi in the United States District Court for the District of Maryland. Hood raised claims of failure to warn . . . . On cross-motions for summary judgment the district court entered judgment for the defendants on all claims, finding that in the face of adequate warnings Hood had altered the saw and caused his own injury. *Hood v. Ryobi N. Am., Inc.*, 17 F. Supp. 2d 448 (D. Md. 1998). Hood appeals.

## II.

A manufacturer may be liable for placing a product on the market that bears inadequate instructions and warnings or that is defective in design. *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975); *Simpson v. Standard Container Co.*, 527 A.2d 1337, 1339-40 (Md. Ct. Spec. App. 1987).

Hood asserts that Ryobi failed adequately to warn of the dangers of using the saw without the blade guards in place. . . .

### A.

Hood first complains that the warnings he received were insufficiently specific. Hood admits that Ryobi provided several clear and conspicuous warnings not to operate the saw without the blade guards. He contends, however, that the warnings affixed to the product and displayed in the operator's manual were inadequate to alert him to the dangers of doing so. In addition to Ryobi's directive "never" to operate a guardless saw, Hood would require the company to inform of the actual consequences of such conduct. Specifically, Hood contends that an adequate warning would have explained that removing the guards would lead to blade detachment.

We disagree. Maryland does not require an encyclopedic warning. Instead, "a warning need only be one that is reasonable under the circumstances." *Levin v. Walter Kidde & Co.*, 248 A.2d 151, 153 (Md. 1968). A clear and specific warning will normally be sufficient—"the manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product." *Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 861 (D. Md. 1991); see *Levin*, 248 A.2d at 154 (declining to require warning of the danger that a cracked syphon bottle might explode and holding "never use cracked bottle" to be adequate as a matter of law). In deciding whether a warning is adequate, Maryland law asks whether the benefits of a more detailed warning outweigh the costs of requiring the change. *Moran*, 332 A.2d at 15.

Hood assumes that the cost of a more detailed warning label is minimal in this case, and he claims that such a warning would have prevented his injury. But the price of more detailed warnings is greater than their additional printing fees alone. Some commentators have observed that the proliferation of label detail threatens to undermine the effectiveness of warnings altogether. See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296-97 (1990). As manufacturers append line after line onto product labels in the quest for the best possible warning, it is easy to lose sight of the label's communicative value as a whole. Well-meaning attempts to warn of every possible accident lead over time to voluminous yet impenetrable labels-too prolix to read and too technical to understand.

By contrast, Ryobi's warnings are clear and unequivocal. Three labels on the saw itself and at least four warnings in the owner's manual direct the user not to operate the saw with the blade guards removed. Two declare that "serious injury" could result from doing so. . . . Ryobi provided warnings sufficient to apprise the ordinary consumer that it is unsafe to operate a guardless saw-warnings which, if followed, would have prevented the injury in this case.

It is apparent, moreover, that the vast majority of consumers do not detach this critical safety feature before using this type of saw. Indeed, although Ryobi claims to have sold thousands of these saws, Hood has identified only one fifteen-year-old incident similar to his. Hood has thus not shown that these clear, unmistakable, and prominent warnings are insufficient to accomplish their purpose. Nor can he prove that increased label clutter would bring any net societal benefit. We hold that the warnings Ryobi provided are adequate as a matter of law.

....

*AFFIRMED.*

### *Notes*

1. *Who decides when a warning is adequate?* The *Hood* court mentions the law review article by James A. Henderson, Jr. and Aaron D. Twerski to support the assertion that there exists such a thing as too many warnings. The court does not, however, address the central question raised in the article, namely: who is best positioned to decide what constitutes an adequate warning? Is it primarily a question of fact for the jury or, as Henderson & Twerski urge, should the judge assume an active role? Which do you think the *Hood* court favors?

2. *Defective products with adequate warnings.* Since the 1970s, Maryland's courts have interpreted the Restatement (Second) of Torts § 402A cmt. j (1965) to mean that a plaintiff's failure to follow an adequate warning negates any claim of design defect. See Erin O'Dea, *B. Maintaining an Unrealistic Standard: Maryland Holds It Is Not Reasonably Foreseeable for Consumers to Fail to Follow Product Warnings*, 65 MD. L. REV. 1303 (2006). This suggests that Hood's failure to follow the warnings would have prevented him from recovering, even if Ryobi might have adopted a more reasonable, safer design. Maryland is one of only a couple

jurisdictions that maintain this interpretation. See *Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221 (D.C. Cir. 1996); *Dugan v. Sears, Roebuck & Co.*, 447 N.E.2d 1055 (Ill. App. 1983).

## 5. Plaintiff's Conduct

### *Daly v. Gen. Motors Corp.*, 575 P.2d 1162 (Cal. 1978)

RICHARDSON, J.

. . . . In the early hours of October 31, 1970, decedent Kirk Daly, a 36-year-old attorney, was driving his Opel southbound on the Harbor Freeway in Los Angeles. The vehicle, while travelling at a speed of 50-70 miles per hour, collided with and damaged 50 feet of metal divider fence. After the initial impact between the left side of the vehicle and the fence the Opel spun counterclockwise, the driver's door was thrown open, and Daly was forcibly ejected from the car and sustained fatal head injuries. . . .

Plaintiffs, who are decedent's widow and three surviving minor children, sued General Motors Corporation, Boulevard Buick, Underwriter's Auto Leasing, and Alco Leasing Company, the successive links in the Opel's manufacturing and distribution chain. The sole theory of plaintiffs' complaint was strict liability for damages allegedly caused by a defective product, namely, an improperly designed door latch claimed to have been activated by the impact. It was further asserted that, but for the faulty latch, decedent would have been restrained in the vehicle and, although perhaps injured, would not have been killed. Thus, the case involves a so-called "second collision" in which the "defect" did not contribute to the original impact, but only to the "enhancement" of injury.

. . . .

[D]efendants contend that the deceased's own conduct contributed to his death. Because plaintiffs' case rests upon strict products liability based on improper design of the door latch and because defendants assert a failure in decedent's conduct, namely, his alleged intoxication and nonuse of safety equipment, without which the accident and ensuing death would not have occurred, there is thereby posed the overriding issue in the case, should comparative principles apply in strict products liability actions?

. . . .

Those counseling against the recognition of comparative fault principles in strict products liability cases vigorously stress, perhaps equally, not only the conceptual, but also the semantic difficulties incident to such a course. The task of merging the two concepts is said to be impossible, that "apples and oranges" cannot be compared, that "oil and water" do not mix, and that strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles. The syllogism runs, contributory negligence was only a defense to negligence, comparative negligence only affects contributory negligence, therefore comparative negligence cannot be a defense to strict liability. . . .

The inherent difficulty in the “apples and oranges” argument is its insistence on fixed and precise definitional treatment of legal concepts. In the evolving areas of both products liability and tort defenses, however, there has developed much conceptual overlapping and interweaving in order to attain substantial justice. The concept of strict liability itself, as we have noted, arose from dissatisfaction with the wooden formalisms of traditional tort and contract principles in order to protect the consumer of manufactured goods. Similarly, increasing social awareness of its harsh “all or nothing” consequences led us in *Li* to moderate the impact of traditional contributory negligence in order to accomplish a fairer and more balanced result. . . .

...  
We think, accordingly, the conclusion may fairly be drawn that the terms “comparative negligence,” “contributory negligence” and “assumption of risk” do not, standing alone, lend themselves to the exact measurements of a micrometer-caliper, or to such precise definition as to divert us from otherwise strong and consistent countervailing policy considerations. Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire.

We pause at this point to observe that where, as here, a consumer or user sues the manufacturer or designer alone, technically, neither fault nor conduct is really compared functionally. The conduct of one party in combination with the product of another, or perhaps the placing of a defective article in the stream of projected and anticipated use, may produce the ultimate injury. In such a case, as in the situation before us, we think the term “equitable apportionment or allocation of loss” may be more descriptive than “comparative fault.”

Given all of the foregoing, we are, in the wake of *Li*, disinclined to resolve the important issue before us by the simple expedient of matching linguistic labels which have evolved either for convenience or by custom. Rather, we consider it more useful to examine the foundational reasons underlying the creation of strict products liability in California to ascertain whether the purposes of the doctrine would be defeated or diluted by adoption of comparative principles. We imposed strict liability against the manufacturer and in favor of the user or consumer in order to relieve injured consumers “from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, . . .” . . . [W]e sought to place the burden of loss on manufacturers rather than “. . . injured persons who are powerless to protect themselves . . . .”

The foregoing goals, we think, will not be frustrated by the adoption of comparative principles. Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant’s liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff’s recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will, through him, be “spread among society.” However, we do not permit plaintiff’s own conduct relative to the product to escape unexamined, and as to that share of plaintiff’s damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others. Such a result would directly contravene the principle

announced in *Li*, that loss should be assessed equitably in proportion to fault.

We conclude, accordingly, that the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles. . . .

A second objection to the application of comparative principles in strict products liability cases is that a manufacturer's incentive to produce safe products will thereby be reduced or removed. . . . [T]he problem is more shadow than substance. First, of course, the manufacturer cannot avoid its continuing liability for a defective product even when the plaintiff's own conduct has contributed to his injury. The manufacturer's liability, and therefore its incentive to avoid and correct product defects, remains; its exposure will be lessened only to the extent that the trier finds that the victim's conduct contributed to his injury. Second, as a practical matter a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy. Doubtless, many users are free of fault, and a defect is at least as likely as not to be exposed by an entirely innocent plaintiff who will obtain full recovery. In such cases the manufacturer's incentive toward safety both in design and production is wholly unaffected. Finally, we must observe that under the present law, which recognizes assumption of risk as a complete defense to products liability, the curious and cynical message is that it profits the manufacturer to make his product so defective that in the event of injury he can argue that the user had to be aware of its patent defects. To that extent the incentives are inverted. We conclude, accordingly, that no substantial or significant impairment of the safety incentives of defendants will occur by the adoption of comparative principles.

In passing, we note one important and felicitous result if we apply comparative principles to strict products liability. This arises from the fact that under present law when plaintiff sues in negligence his own contributory negligence, however denominated, may diminish but cannot wholly defeat his recovery. When he sues in strict products liability, however, his "assumption of risk" completely bars his recovery. Under *Li*, as we have noted, "assumption of risk" is merged into comparative principles. The consequence is that after *Li* in a negligence action, plaintiff's conduct which amounts to "negligent" assumption of risk no longer defeats plaintiff's recovery. Identical conduct, however, in a strict liability case acts as a complete bar under rules heretofore applicable. Thus, strict products liability, which was developed to free injured consumers from the constraints imposed by traditional negligence and warranty theories, places a consumer plaintiff in a worse position than would be the case were his claim founded on simple negligence. This, in turn, rewards adroit pleading and selection of theories. The application of comparative principles to strict liability obviates this bizarre anomaly by treating alike the defenses to both negligence and strict products liability actions. In each instance the defense, if established, will reduce but not bar plaintiff's claim.

A third objection to the merger of strict liability and comparative fault focuses on the claim that, as a practical matter, triers of fact, particularly jurors, cannot assess, measure, or compare plaintiff's negligence with defendant's strict liability. We are unpersuaded by the argument and are convinced that jurors are able to undertake a fair apportionment of liability.

We are strengthened in the foregoing conclusion by the federal experience under the maritime doctrine of "unseaworthiness." For decades, seamen have been permitted to recover from shipowners for injuries caused by defects rendering a vessel "unseaworthy." . . . As noted



by many courts, the concept of “unseaworthiness” is not limited to or affected by notions of the shipowner’s fault or due care, but applies to any deficiency of hull, equipment or crew, regardless of cause, which renders the ship less than reasonably fit for its intended purposes. . . . Nonetheless, comparative principles have been made applicable to suits brought under the “unseaworthiness” doctrine, a form of strict liability, and the degree to which plaintiff’s own negligence contributes to his injuries has been considered in determining the amount of his recovery. . . . No serious practical difficulties appear to have arisen even where jury trials are involved. . . .

We find equally unpersuasive [the] objection that the merger of the two principles somehow will abolish or adversely affect the liability of such intermediate entities in the chain of distribution as retailers . . . , and bailors . . . . We foresee no such consequence. Regardless of the identity of a particular defendant or of his position in the commercial chain the basis for his liability remains that he has marketed or distributed a defective product. If, as we believe, jurors are capable of assessing fully and fairly the legal responsibility of a manufacturer on a strict liability basis, no reason appears why they cannot do likewise with respect to subsequent distributors and vendors of the product.

....

Having examined the principal objections and finding them not insurmountable, and persuaded by logic, justice, and fundamental fairness, we conclude that a system of comparative fault should be and it is hereby extended to actions founded on strict products liability. In such cases the separate defense of “assumption of risk,” to the extent that it is a form of contributory negligence, is abolished. While . . . on the particular facts before us, the term “equitable apportionment of loss” is more accurately descriptive of the process, nonetheless, the term “comparative fault” has gained such wide acceptance by courts and in the literature that we adopt its use herein.

....

[U]nder the particular circumstances, comparative principles cannot be applied retroactively . . . . In the event of retrial, however, the principles herein announced will, of course, apply.

....

[N]otwithstanding that plaintiffs’ case was founded on strict products liability, evidence of decedent’s failure to use available seat belts and door locks, and of his intoxication at the time of the fatal collision, may have been improperly regarded by the jury as authorizing a defense verdict. It appears reasonably probable that, had such evidence been either excluded or its effect confined, a result more favorable to plaintiffs would have been reached. Reversal is therefore required. . . .

The judgment is reversed.

...

MOSK, J. dissenting.

I dissent.

This will be remembered as the dark day when this court, which heroically took the lead in originating the doctrine of products liability and steadfastly resisted efforts to inject concepts of negligence into the newly designed tort inexplicably turned 180 degrees and beat a hasty retreat almost back to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court for the past decade and a half is reduced to a shambles.

The majority inject a foreign object the tort of negligence into the tort of products liability by the simple expedient of calling negligence something else: on some pages their opinion speaks of “comparative fault,” on others reference is to “comparative principles,” and elsewhere the term “equitable apportionment” is employed, although this is clearly not a proceeding in equity. But a rose is a rose and negligence is negligence; thus the majority find that despite semantic camouflage they must rely on *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, even though *Li* is purely and simply a negligence case which merely rejects contributory negligence and substitutes therefor comparative negligence.

...

... In any event if the consumer used the product as intended or as foreseeable . . . it is inconsequential that he committed some extraneous act of negligence, since the injury occurs whether or not there was an act of omission or commission by the user; it results from the commercial exploitation of a defective product.

The defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminately, the righteous and the evil, the careful and the careless. Thus when a faulty design or otherwise defective product is involved, the litigation should not be diverted to consideration of the negligence of the plaintiff. The liability issues are simple: was the product or its design faulty, did the defendant inject the defective product into the stream of commerce, and did the defect cause the injury? The conduct of the ultimate consumer-victim who used the product in the contemplated or foreseeable manner is wholly irrelevant to those issues. . . .

### Notes

1. *Dissents and concurrences.* Who do you think has the better argument, Justice Richardson, writing for the majority, or Justice Mosk? In a separate opinion, concurring in part and dissenting in part from the majority’s opinion, Justice Jefferson raised practical concerns about juries’ ability to determine what percentage of fault is attributable to a negligent plaintiff in a case where the comparator is a defective product. Such an expectation would be akin to instructing a jury that a “quart of milk (representing plaintiff’s negligence) and a metal bar three feet in length (representing defendant’s strict liability for a defective product)” together “equal 100” and then asking the jury to assign a percentage to each. 575 P.2d at 1178 (Jefferson, J., concurring in part and dissenting in part). Most jurisdictions that have shifted from contributory negligence to comparative negligence have also now applied comparative fault principles to product defect cases. The Restatement (Third) of Products Liability also takes this view. DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBICK, *THE LAW OF TORTS*

(2d. ed) § 470 (2019 update). Note that this trend makes sense if products liability silently imports negligence principles in its regime of liability for defective products.

Justice Clark, who had dissented in *Li v. Yellow Cab Co.*, concurred in this case, recognizing the majority's decision as a logical extension of *Li*. But his concurring opinion sounded less than pleased ("Under the compulsion of *Li*, I have signed the majority opinion"). 575 P.2d at 1175 (Clark, J., concurring). Clark wrote separately to flag the fairness concerns inherent in any kind of comparative fault scheme, whether limited to negligence or extended to products liability, and to float the idea of a fixed percentage discount of the negligent plaintiff's total damages of perhaps "30, 50, or 70 percent." "A uniform discount . . . would eliminate the necessity of the often impossible task of comparing fault" and "bring about consistency and predictability where neither now exists, permitting evaluation and settlement of claims." 575 P.2d at 1176 (Clark, J., concurring). Does this proposal serve the goals of tort law? Do you think such a reform falls within the purview of a common law court?

2. *A multi-state view.* States are divided on whether comparative negligence may be raised as a defense in cases alleging strict liability for a defective product. The Supreme Court of South Carolina surveyed the landscape in 2017 and found that as to "crashworthiness" cases (that is, cases where the alleged defect became apparent as a result of a collision), twenty-two states had a clear position on the issue; most of those jurisdictions allowed for comparative fault analysis. *Donze v. Gen. Motors, LLC*, 800 S.E.2d 479, 481 (S.C. 2017). The South Carolina Supreme Court sided with the minority view, albeit in a case where the plaintiff was only seeking to recover for the "enhanced injuries" that the defendant's product allegedly caused, not collision-related injuries that were separable from the alleged defect. One of the Court's explanations for this decision was that in South Carolina, strict liability was a "statutory construct[]"; available defenses to that cause of action should therefore also come from the state legislature. *Id.* at 484-85.

3. *Whither assumption of risk?* What should happen in cases where the plaintiff knowingly, voluntarily makes use of a dangerous product and then claims defect? The case law is muddled: "[s]ome courts consider 'assumption of risk' as comparative fault while others consider it a distinct defense. Of these, some use assumed risk to bar the plaintiff entirely, while others treat it as grounds for reducing damages." DOBBS, ET AL., EDS., *LAW OF TORTS*, *supra*, § 470. What strikes you as the best approach? Recall that conduct that looks like assumption of risk may also be grounds for an argument that the product simply is not defective—because its dangers are so open and obvious to users that no warning or design modification is required to make the product reasonably safe.

## 6. The Preemption Question

Tort law is generally state law. We have spent a semester reading cases arising out of the state courts—or cases applying state law in the federal courts. However, federal law often regulates the same activity that is the subject of state tort law. In areas ranging from automobile safety to pharmaceuticals and beyond, the contemporary American legal system is a regime of

pervasive federal-state overlap. But state and federal law are not made equal. The Supremacy Clause of the U.S. Constitution makes federal law supreme: “The Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .” U.S. Const., art VI. Accordingly, in certain circumstances, federal law “preempts” state law. In the most common situations, defendants in state law tort suits argue as a defense that they should not be held liable under the state law because the state law is preempted by federal law.

Preemption generally happens in one of three different ways: “express preemption” occurs when Congress states in the text of a federal statute that certain state laws are preempted; “conflict preemption” occurs when the Court finds that state law poses an obstacle to the aims of federal law; and “field preemption” occurs when the federal law establishes such a comprehensive regulatory regime that all overlapping state regulation is preempted. This next case, *Geier v. American Honda Motor Co.*, raised preemption defense in the first two categories. It also set off a run of preemption cases that has turned out to be one of the most important developments in American tort law in the past two decades.

***Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)**

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O’CONNOR, SCALIA, and KENNEDY, JJ., joined.

This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966. The standard, FMVSS 208, required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car’s manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver’s side airbag.

We first ask whether the Safety Act’s express pre-emption provision pre-empts this tort action. The provision reads as follows:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard

applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

[T]he Act contains another provision . . . . That provision, a “saving” clause, says that “[c]ompliance with” a federal safety standard “does not exempt any person from any liability under common law.” The saving clause assumes that there are some significant number of common-law liability cases to save. . . .

The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of all state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. . . .

The basic question, then, is whether a common-law “no airbag” action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners’ and the dissent’s view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary’s view. The Department of Transportation’s (DOT’s) comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote FMVSS 208’s safety objectives. . . .

DOT gave manufacturers a further choice for new vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an “ignition interlock” device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing that such systems must include an interlock system and a continuous warning buzzer to encourage reattachment of the belt. But the interlock and buzzer devices were most unpopular

with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices.

That experience influenced DOT's subsequent passive restraint initiatives. . . . Andrew Lewis, a new DOT Secretary in a new administration, rescinded the [passive restraint] requirements, primarily because DOT learned that the industry planned to satisfy those requirements almost exclusively through the installation of detachable automatic seatbelts. This Court held the rescission unlawful. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. . . .

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. Sixth, airbags were expected to be significantly more expensive than other passive restraint devices . . . . Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices—a particular concern with respect to airbags.

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety—a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. DOT wrote that it had rejected a proposed FMVSS 208 “all airbag” standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a “backlash” more easily overcome “if airbags” were “not the only way of complying.” It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would thereby build public confidence necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a gradual phase-in of passive restraints. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and

other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. . . .

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 “embodies the Secretary’s policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.” Petitioners’ tort suit claims that the manufacturers of the 1987 Honda Accord “had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags.”

In effect, petitioners’ tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law—i.e., a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer’s nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood “as an obstacle to the accomplishment and execution of” the important means-related federal objectives that we have just discussed, it is pre-empted. . . .

The judgment of the Court of Appeals is affirmed.

STEVENS, J., with whom SOUTER, THOMAS, and GINSBURG, JJ., join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition “that, to be safe, a car must have an airbag.” Indeed, current federal law imposes that requirement on all automobile manufacturers. The question raised by petitioners’ common-law tort action is whether that proposition was sufficiently obvious when Honda’s 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation’s desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court’s unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

“This is a case about federalism,” that is, about respect for “the constitutional role of the States as sovereign entities.” It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court’s interpretation of the final commentary

accompanying an interim administrative regulation and the history of airbag regulation generally. . . .

Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as “ordinary experience-proved principles of conflict pre-emption.”

### Notes

1. *Startling coalitions.* A striking feature of the *Geier* case is the coalitions it created on the Court. In an age in which we are all too accustomed to party-line splits in the U.S. Supreme Court, the preemption issue in *Geier* split the Court along a different axis.

2. *Preemption clauses and savings clauses.* The National Traffic and Motor Vehicle Safety Act of 1966 is hardly alone in combining a preemption clause with a savings clause. For example, regulations under the National Bank Act empower national banks to “make real estate loans . . . , without regard to state law limitations” but simultaneously have a savings clause stating that state laws on torts, contracts, taxation and other areas are not preempted. 12 C.F.R. § 34.4(a)). What are courts to make of these conflicting instructions? Is a principled doctrinal answer possible, or are courts forced to decide a policy question of whether federal law should preempt?

3. *A presumption against preemption?* One doctrinal answer that has emerged is that courts should generally presume that federal law does *not* preempt state law. Professor Roderick Hills argues that this presumption is justified as a way to jump-start democratic deliberation in the national lawmaking process:

Because of the size and heterogeneity of the population that it governs, Congress has institutional tendencies to avoid politically sensitive issues, deferring them to bureaucratic resolution and instead concentrating on constituency service. Nonfederal politicians can disrupt this tendency to ignore or suppress political controversy by enacting state laws that regulate business interests, thus provoking those interests to seek federal legislation that will preempt the state legislation. In effect, state politicians place issues on Congress’s agenda by enacting state legislation. Because business groups tend to have more consistent incentives to seek preemption than anti-preemption interests have to oppose preemption, controversial regulatory issues are more likely to end up on Congress’s agenda if business groups bear the burden of seeking preemption. . . . Therefore, by adopting an anti-preemption rule of



construction, the courts would tend to promote a more highly visible, vigorous style of public debate in Congress. . . .

Hills contends that regulated industries favoring preemption have systematically “greater capacity” to obtain votes on preemption than do the opponents of preemption. Only the former, goes the argument, have “an interest in regulatory uniformity for its own sake” because only national business and industry groups benefit greatly from national uniformity. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

4. *What did Geier mean for future preemption cases?* The next case, in the prescription drug context, contains a lengthy debate about what exactly were the core principles of *Geier* and how far they should reach.

***Wyeth v. Levine*, 555 U.S. 555 (2009)**

STEVENS, J.

Directly injecting the drug Phenergan into a patient’s vein creates a significant risk of catastrophic consequences. A Vermont jury found that petitioner Wyeth, the manufacturer of the drug, had failed to provide an adequate warning of that risk and awarded damages to respondent Diana Levine to compensate her for the amputation of her arm. The warnings on Phenergan’s label had been deemed sufficient by the federal Food and Drug Administration (FDA) when it approved Wyeth’s new drug application in 1955 and when it later approved changes in the drug’s labeling. The question we must decide is whether the FDA’s approvals provide Wyeth with a complete defense to Levine’s tort claims. We conclude that they do not.

Phenergan is Wyeth’s brand name for promethazine hydrochloride, an antihistamine used to treat nausea. The injectable form of Phenergan can be administered intramuscularly or intravenously, and it can be administered intravenously through either the “IV-push” method, whereby the drug is injected directly into a patient’s vein, or the “IV-drip” method, whereby the drug is introduced into a saline solution in a hanging intravenous bag and slowly descends through a catheter inserted in a patient’s vein. The drug is corrosive and causes irreversible gangrene if it enters a patient’s artery. Levine’s injury resulted from an IV-push injection of Phenergan. . . . Levine developed gangrene, and doctors amputated first her right hand and then her entire forearm. In addition to her pain and suffering, Levine incurred substantial medical expenses and the loss of her livelihood as a professional musician. After settling claims against the health center and clinician, Levine brought an action for damages against Wyeth, relying on common-law negligence and strict-liability theories. Although Phenergan’s labeling warned of the danger of gangrene and amputation following inadvertent intra-arterial injection, Levine alleged that the labeling was defective because it failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method. More broadly, she alleged that Phenergan is not reasonably safe for intravenous administration because the foreseeable risks of gangrene and loss of limb are great in relation to the drug’s therapeutic benefits. Wyeth filed a motion for summary judgment, arguing that Levine’s failure-to-warn claims were pre-empted by federal law.

Wyeth first argues that Levine's state-law claims are pre-empted because it is impossible for it to comply with both the state-law duties underlying those claims and its federal labeling duties. The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label. Generally speaking, a manufacturer may only change a drug label after the FDA approves a supplemental application. There is, however, an FDA regulation that permits a manufacturer to make certain changes to its label before receiving the agency's approval. Among other things, this "changes being effected" (CBE) regulation provides that if a manufacturer is changing a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," it may make the labeling change upon filing its supplemental application with the FDA; it need not wait for FDA approval. . . .

Wyeth . . . argues that requiring it to comply with a state-law duty to provide a stronger warning about IV-push administration would obstruct the purposes and objectives of federal drug labeling regulation. Levine's tort claims, it maintains, are pre-empted because they interfere with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives." We find no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law. . . .

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. . . .

Despite . . . evidence that Congress did not regard state tort litigation as an obstacle to achieving its purposes, Wyeth nonetheless maintains that, because the FDCA requires the FDA to determine that a drug is safe and effective under the conditions set forth in its labeling, the agency must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different state-law judgments. In advancing this argument, Wyeth relies not on any statement by Congress, but instead on the preamble to a 2006 FDA regulation governing the content and format of prescription drug labels. In that preamble, the FDA declared that the FDCA establishes "both a 'floor' and a 'ceiling,'" so that "FDA approval of labeling . . . preempts conflicting or contrary State law." It further stated that certain state-law actions, such as those involving failure-to-warn claims, "threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs."

This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements. *See, e.g., Geier v. American Honda Motor Co . . . .* In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption. We are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives. Because Congress has not authorized the FDA to pre-empt state law directly, the question is what weight we should accord the FDA's opinion.

In prior cases, we have given “some weight” to an agency’s views about the impact of tort law on federal objectives when “the subject matter is technical and the relevant history and background are complex and extensive.” *Geier*, 529 U.S., at 883. Even in such cases, however, we have not deferred to an agency’s conclusion that state law is pre-empted. Rather, we have attended to an agency’s explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.

Under this standard, the FDA’s 2006 preamble does not merit deference. When the FDA issued its notice of proposed rulemaking in December 2000, it explained that the rule would “not contain policies that have federalism implications or that preempt State law.” In 2006, the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA’s pre-emptive effect in the regulatory preamble. The agency’s views on state law are inherently suspect in light of this procedural failure.

Further, the preamble is at odds with what evidence we have of Congress’ purposes, and it reverses the FDA’s own longstanding position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA’s regulation of drug labeling during decades of coexistence. The FDA’s 2006 position plainly does not reflect the agency’s own view at all times relevant to this litigation. Not once prior to Levine’s injury did the FDA suggest that state tort law stood as an obstacle to its statutory mission. To the contrary, it cast federal labeling standards as a floor upon which States could build and repeatedly disclaimed any attempt to pre-empt failure-to-warn claims. For instance, in 1998, the FDA stated that it did “not believe that the evolution of state tort law [would] cause the development of standards that would be at odds with the agency’s regulations.” It further noted that, in establishing “minimal standards” for drug labels, it did not intend “to preclude the states from imposing additional labeling requirements.”

In keeping with Congress’ decision not to pre-empt common-law tort suits, it appears that the FDA traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA’s premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times. Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation. The agency’s 2006 preamble represents a dramatic change in position.

Largely based on the FDA’s new position, Wyeth argues that this case presents a conflict between state and federal law analogous to the one at issue in *Geier*. There, we held that state tort claims premised on Honda’s failure to install airbags conflicted with a federal regulation that did not require airbags for all cars. The Department of Transportation had

promulgated a rule that provided car manufacturers with a range of choices among passive restraint devices. Rejecting an “all airbag” standard, the agency had called for a gradual phase-in of a mix of passive restraints in order to spur technological development and win consumer acceptance. Because the plaintiff’s claim was that car manufacturers had a duty to install airbags, it presented an obstacle to achieving “the variety and mix of devices that the federal regulation sought.”

Wyeth and the dissent contend that the regulatory scheme in this case is nearly identical, but, as we have described, it is quite different. In *Geier*, the DOT conducted a formal rulemaking and then adopted a plan to phase in a mix of passive restraint devices. Examining the rule itself and the DOT’s contemporaneous record, which revealed the factors the agency had weighed and the balance it had struck, we determined that state tort suits presented an obstacle to the federal scheme. After conducting our own pre-emption analysis, we considered the agency’s explanation of how state law interfered with its regulation, regarding it as further support for our independent conclusion that the plaintiff’s tort claim obstructed the federal regime.

By contrast, we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law. And the FDA’s newfound opinion, expressed in its 2006 preamble, that state law “frustrate[s] the agency’s implementation of its statutory mandate,” does not merit deference for the reasons we have explained. Indeed, the “complex and extensive” regulatory history and background relevant to this case undercut the FDA’s recent pronouncements of pre-emption, as they reveal the longstanding coexistence of state and federal law and the FDA’s traditional recognition of state-law remedies—a recognition in place each time the agency reviewed Wyeth’s Phenergan label.

In short, Wyeth has not persuaded us that failure-to-warn claims like Levine’s obstruct the federal regulation of drug labeling. Congress has repeatedly declined to pre-empt state law, and the FDA’s recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.

## V

We conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that Levine’s common-law claims do not stand as an obstacle to the accomplishment of Congress’ purposes in the FDCA. Accordingly, the judgment of the Vermont Supreme Court is affirmed.

It is so ordered.

ALITO, J., with whom ROBERTS, C.J., and SCALIA, J., join, dissenting.

This case illustrates that tragic facts make bad law. The Court holds that a state tort jury, rather than the Food and Drug Administration (FDA), is ultimately responsible for regulating warning labels for prescription drugs. That result cannot be reconciled with *Geier*

*v. American Honda Motor Co.*, or general principles of conflict pre-emption. I respectfully dissent.

. . . [T]he real issue is whether a state tort jury can countermand the FDA's considered judgment that Phenergan's FDA-mandated warning label renders its intravenous (IV) use "safe." Indeed, respondent's amended complaint alleged that Phenergan is "not reasonably safe for intravenous administration," respondent's attorney told the jury that Phenergan's label should say, "'Do not use this drug intravenously'"; respondent's expert told the jury, "I think the drug should be labeled 'Not for IV use'"; and during his closing argument, respondent's attorney told the jury, "Thank God we don't rely on the FDA to . . . make the safe[ty] decision. You will make the decision. . . . The FDA doesn't make the decision, you do."

Federal law, however, does rely on the FDA to make safety determinations like the one it made here. The FDA has long known about the risks associated with IV push in general and its use to administer Phenergan in particular. Whether wisely or not, the FDA has concluded—over the course of extensive, 54-year-long regulatory proceedings—that the drug is "safe" and "effective" when used in accordance with its FDA-mandated labeling. The unfortunate fact that respondent's healthcare providers ignored Phenergan's labeling may make this an ideal medical-malpractice case. But turning a common-law tort suit into a "frontal assault" on the FDA's regulatory regime for drug labeling upsets the well-settled meaning of the Supremacy Clause and our conflict pre-emption jurisprudence. . . .

Given the "balance" that the FDA struck between the costs and benefits of administering Phenergan via IV push, *Geier* compels the pre-emption of tort suits (like this one) that would upset that balance. The contrary conclusion requires turning yesterday's dissent into today's majority opinion.

First, the Court denies the existence of a federal-state conflict in this case because Vermont merely countermanded the FDA's determination that IV push is "safe" when performed in accordance with Phenergan's warning label; the Court concludes that there is no conflict because Vermont did not "mandate a particular" label as a "replacement" for the one that the jury nullified, and because the State stopped short of altogether "contraindicating IV-push administration." But as we emphasized in *Geier* (over the dissent's assertions to the contrary), the degree of a State's intrusion upon federal law is irrelevant—the Supremacy Clause applies with equal force to a state tort law that merely countermands a federal safety determination and to a state law that altogether prohibits car manufacturers from selling cars without airbags. . . .

Second, the Court today distinguishes *Geier* because the FDA articulated its pre-emptive intent "without offering States or other interested parties notice or opportunity for comment." But the *Geier* Court specifically rejected the argument (again made by the dissenters in that case) that conflict pre-emption is appropriate only where the agency expresses its pre-emptive intent through notice-and-comment rulemaking. Indeed, pre-emption is arguably more appropriate here than in *Geier* because the FDA (unlike the DOT) declared its pre-emptive intent in the Federal Register. Yet the majority dismisses the FDA's published preamble as "inherently suspect," and an afterthought that is entitled to "no weight" . . . .

Third, the Court distinguishes *Geier* because the DOT's regulation "bear[s] the force of law," whereas the FDA's preamble does not. But it is irrelevant that the FDA's preamble

does not “bear the force of law” because the FDA’s labeling decisions surely do. . . . Moreover, it cannot be said that *Geier*’s outcome hinged on the agency’s choice to promulgate a rule. The *Geier* Court relied—again over the dissenters’ protestations—on materials other than the Secretary’s regulation to explain the conflict between state and federal law.

Fourth, the Court sandwiches its discussion of *Geier* between the “presumption against pre-emption,” and heavy emphasis on “the longstanding coexistence of state and federal law and the FDA’s traditional recognition of state-law remedies.” But the *Geier* Court specifically rejected the argument (again made by the dissenters in that case) that the “presumption against pre-emption” is relevant to the conflict pre-emption analysis. Rather than invoking such a “presumption,” the Court emphasized that it was applying “ordinary,” “longstanding,” and “experience-proved principles of conflict pre-emption.” Under these principles, the sole question is whether there is an “actual conflict” between state and federal law; if so, then pre-emption follows automatically by operation of the Supremacy Clause. (. . . Accordingly—and in contrast to situations implicating ‘federalism concerns and the historic primacy of state regulation of matters of health and safety’—no presumption against pre-emption obtains in this case” (citation omitted)).

Finally, the *Geier* Court went out of its way to emphasize (yet again over the dissenters’ objections) that it placed “some weight” on the DOT’s amicus brief, which explained the agency’s regulatory objectives and the effects of state tort suits on the federal regulatory regime. Yet today, the FDA’s explanation of the conflict between state tort suits and the federal labeling regime, set forth in the agency’s amicus brief, is not even mentioned in the Court’s opinion. Instead of relying on the FDA’s explanation of its own regulatory purposes, the Court relies on a decade-old and now-repudiated statement, which the majority finds preferable. . . .

*Geier* does not countenance the use of state tort suits to second-guess the FDA’s labeling decisions. And the Court’s contrary conclusion has potentially far-reaching consequences.

By their very nature, juries are ill equipped to perform the FDA’s cost-benefit-balancing function. . . . [J]uries tend to focus on the risk of a particular product’s design or warning label that arguably contributed to a particular plaintiff’s injury, not on the overall benefits of that design or label; “the patients who reaped those benefits are not represented in court.” Indeed, patients like respondent are the only ones whom tort juries ever see, and for a patient like respondent—who has already suffered a tragic accident—Phenergan’s risks are no longer a matter of probabilities and potentialities.

In contrast, the FDA has the benefit of the long view. Its drug-approval determinations consider the interests of all potential users of a drug, including “those who would suffer without new medical [products]” if juries in all 50 States were free to contradict the FDA’s expert determinations. And the FDA conveys its warnings with one voice, rather than whipsawing the medical community with 50 (or more) potentially conflicting ones. After today’s ruling, however, parochialism may prevail.

The problem is well illustrated by the labels borne by “vesicant” drugs, many of which are used for chemotherapy. As a class, vesicants are much more dangerous than drugs like Phenergan, but the vast majority of vesicant labels—like Phenergan’s—either allow or do not disallow IV push. Because vesicant extravasation can have devastating consequences, and

because the potentially lifesaving benefits of these drugs offer hollow solace to the victim of such a tragedy, a jury's cost-benefit analysis in a particular case may well differ from the FDA's. . . .

To be sure, state tort suits can peacefully coexist with the FDA's labeling regime, and they have done so for decades. But this case is far from peaceful coexistence. The FDA told Wyeth that Phenergan's label renders its use "safe." But the State of Vermont, through its tort law, said: "Not so."

The state-law rule at issue here is squarely pre-empted. Therefore, I would reverse the judgment of the Supreme Court of Vermont.

### Notes

1. *Preemption by agencies.* In both *Geier* and *Wyeth v. Levine*, the view of the agency charged with implementing the federal statute was the subject of significant focus for the Court—even if the agency did not ultimately prevail in *Wyeth*. What should be the significance of such agency views? One author argues that "the ever-growing role of agencies gives scholars the coherent analytical framework for the Court's preemption jurisprudence . . . that they have long sought." Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012). Professor Sharkey points to a comment Justice Breyer made from the bench in a preemption case dealing with an administrative automobile safety regulation:

Justice Stephen Breyer . . . tipped his hand during oral argument [in *Williamson v. Mazda Motor of America*, 562 U.S. [323] (2011)], asking rhetorically: "Who is most likely to know what 40,000 pages of agency record actually mean and say? People in the agency. And the second most likely is the [Solicitor General's] office, because they will have to go tell them. . . . So if the government continuously says, this is what the agency means and the agency is telling them, yes, this is what it means, the chances are they will come to a better, correct conclusion than I will with my law clerks. . . ."

*Id.* As Professor Sharkey notes, the Court in *Levine* "looked with particular disdain" on the agency preemption provision in *Levine*—far more disdain than Breyer suggested here in his comments from the bench two years later. Why? Because, as Professor Sharkey puts it, "procedural irregularities" accompanied the "FDA's inclusion of its preemptive intent statement in the preamble to the drug labeling rule."

When the FDA issued its notice of proposed rulemaking in December 2000, it explained that the rule would "not contain policies that have federalism implications or that preempt State law." In 2006, the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure.

*Id.* The FDA's preemption provision, in other words, did not comply with the basic procedural requirements for rulemaking in the administrative state as set out in the Administrative Procedure Act.

2. *Preemption and administrative compensation schemes.* Federal agency regulation of conduct may effectively act as substitutes for state tort law causes of action in one sense, at least. Such regulations may ensure that manufacturers of devices make safe products. But agency regulation does not typically provide compensation to people injured by devices.

Recall, however, that in Chapter 1, we encountered one alternative scheme in the mixed compensation / regulation framework established for vaccines, which is here described by the Court in *Bruesewitz v. Wyeth*, 562 U.S. 223 (2011):

For the last 66 years, vaccines have been subject to the same federal premarket approval process as prescription drugs, and compensation for vaccine-related injuries has been left largely to the States. Under that regime, the elimination of communicable diseases through vaccination became “one of the greatest achievements” of public health in the 20th century. But in the 1970's and 1980's vaccines became, one might say, victims of their own success. They had been so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases, and much more concerned with the risk of injury from the vaccines themselves.

Much of the concern centered around vaccines against diphtheria, tetanus, and pertussis (DTP), which were blamed for children's disabilities and developmental delays. This led to a massive increase in vaccine-related tort litigation. Whereas between 1978 and 1981 only nine product-liability suits were filed against DTP manufacturers, by the mid-1980's the suits numbered more than 200 each year. This destabilized the DTP vaccine market, causing two of the three domestic manufacturers to withdraw; and the remaining manufacturer, Lederle Laboratories, estimated that its potential tort liability exceeded its annual sales by a factor of 200. Vaccine shortages arose when Lederle had production problems in 1984.

Despite the large number of suits, there were many complaints that obtaining compensation for legitimate vaccine-inflicted injuries was too costly and difficult. A significant number of parents were already declining vaccination for their children, and concerns about compensation threatened to depress vaccination rates even further. This was a source of concern to public health officials, since vaccines are effective in preventing outbreaks of disease only if a large percentage of the population is vaccinated.

To stabilize the vaccine market and facilitate compensation, Congress enacted the NCVIA [National Childhood Vaccine Injury Act] in 1986. The Act establishes a no-fault compensation program “designed to work faster and with greater ease than the civil tort system.” . . .



Fast, informal adjudication is made possible by the Act's Vaccine Injury Table, which lists the vaccines covered under the Act; describes each vaccine's compensable, adverse side effects; and indicates how soon after vaccination those side effects should first manifest themselves. Claimants who show that a listed injury first manifested itself at the appropriate time are *prima facie* entitled to compensation. No showing of causation is necessary; the Secretary bears the burden of disproving causation. . . . Unlike in tort suits, claimants under the Act are not required to show that the administered vaccine was defectively manufactured, labeled, or designed. . . . These awards are paid out of a fund created by an excise tax on each vaccine dose.

The *quid pro quo* for this, designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers. The Act requires claimants to seek relief through the compensation program before filing suit for more than \$1,000. Manufacturers are generally immunized from liability for failure to warn if they have complied with all regulatory requirements (including but not limited to warning requirements) and have given the warning either to the claimant or the claimant's physician. They are immunized from liability for punitive damages absent failure to comply with regulatory requirements, "fraud," "intentional and wrongful withholding of information," or other "criminal or illegal activity." And most relevant to the present case, the Act expressly eliminates liability for a vaccine's unavoidable, adverse side effects[.]

In *Bruesewitz*, you will remember, the Court held that the National Childhood Vaccine Injury Act preempted state tort claims alleging that a vaccine was defectively designed. This statutory scheme has a mechanism for deterrence (compliance with federal regulation) and a mechanism for compensation (a no-fault compensation scheme funding through an excise tax). But unlike state tort law, the Vaccine Injury Act does not link the two functions together.

3. *Medical device preemption.* Medical devices, despite being similar to prescription drugs in many ways, face a different preemption structure from the one at issue in *Wyeth v. Levine*. For devices, the text of the relevant statute provides that "no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C. § 360k(a). The U.S. Supreme Court has interpreted this statute broadly to preempt state tort claims concerning devices that have gone through the full FDA premarket approval process. See *Riegel v. Medtronic, Inc.*, 555 U.S. 312 (2008). However, devices that were already on the market before the creation of the medical devices regulatory regime were "grandfathered" and exempted from the premarket approval process, as were devices that were substantially similar to grandfathered devices. The Court ruled that such devices were not subject to "requirements" under the statute, and therefore that state tort claims were generally not preempted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

4. *Wyeth v. Levine* took up the question of brand-name manufacturers and their obligations under state tort law. But what about the manufacturers of generic drugs? That question came to the Supreme Court a short two years later:

***PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011)**

THOMAS, J.,

These consolidated lawsuits involve state tort-law claims based on certain drug manufacturers' alleged failure to provide adequate warning labels for generic metoclopramide. The question presented is whether federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, these state-law claims. We hold that they do.

. . . Gladys Mensing and Julie Demahy, the plaintiffs in these consolidated cases, were prescribed Reglan in 2001 and 2002, respectively. Both received generic metoclopramide from their pharmacists. After taking the drug as prescribed for several years, both women developed tardive dyskinesia [a serious and irreversible movement disorder].

In separate suits, Mensing and Demahy sued the generic drug manufacturers that produced the metoclopramide they took (Manufacturers). Each alleged, as relevant here, that long-term metoclopramide use caused her tardive dyskinesia and that the Manufacturers were liable under state tort law . . . for failing to provide adequate warning labels. . . .

In both suits, the Manufacturers urged that federal law pre-empted the state tort claims. According to the Manufacturers, federal statutes and FDA regulations required them to use the same safety and efficacy labeling as their brand-name counterparts. This means, they argued, that it was impossible to simultaneously comply with both federal law and any state tort-law duty that required them to use a different label. . . . [The U.S. Courts of Appeals for the Fifth Circuit and the Eighth Circuit each rejected manufacturers' legal arguments before trial. The Supreme Court granted certiorari in both cases and consolidated them.]

[B]rand-name and generic drug manufacturers have different federal drug labeling duties. A brand-name manufacturer seeking new drug approval is responsible for the accuracy and adequacy of its label. A manufacturer seeking generic drug approval, on the other hand, is responsible for ensuring that its warning label is the same as the brand name's.

First, Mensing and Demahy urge that the FDA's "changes-being-effected" (CBE) process allowed the Manufacturers to change their labels when necessary. The CBE process permits drug manufacturers to "add or strengthen a contraindication, warning, [or] precaution" . . . . When making labeling changes using the CBE process, drug manufacturers need not wait for preapproval by the FDA, which ordinarily is necessary to change a label. They need only simultaneously file a supplemental application with the FDA.

The FDA denies that the Manufacturers could have used the CBE process to unilaterally strengthen their warning labels. . . . The FDA argues that CBE changes unilaterally made to strengthen a generic drug's warning label would violate the statutes and regulations requiring a generic drug's label to match its brand-name counterpart's. We defer to the FDA's

interpretation of its CBE and generic labeling regulations. . . . We therefore conclude that the CBE process was not open to the Manufacturers for the sort of change required by state law. . . .

Though the FDA denies that the Manufacturers could have used the CBE process or Dear Doctor letters to strengthen their warning labels, the agency asserts that a different avenue existed for changing generic drug labels. According to the FDA, the Manufacturers could have proposed—indeed, were required to propose—stronger warning labels to the agency if they believed such warnings were needed. If the FDA had agreed that a label change was necessary, it would have worked with the brand-name manufacturer to create a new label for both the brand-name and generic drug.

According to the FDA . . . a “central premise of federal drug regulation is that the manufacturer bears responsibility for the content of its label at all times.” The FDA reconciles this duty to have adequate and accurate labeling with the duty of sameness in the following way: Generic drug manufacturers that become aware of safety problems must ask the agency to work toward strengthening the label that applies to both the generic and brand-name equivalent drug. . . .

To summarize, the relevant state and federal requirements are these: State tort law places a duty directly on all drug manufacturers to adequately and safely label their products. Taking *Mensing* and *Demahy*’s allegations as true, this duty required the Manufacturers to use a different, stronger label than the label they actually used. Federal drug regulations, as interpreted by the FDA, prevented the Manufacturers from independently changing their generic drugs’ safety labels. But, we assume, federal law also required the Manufacturers to ask for FDA assistance in convincing the brand-name manufacturer to adopt a stronger label, so that all corresponding generic drug manufacturers could do so as well. We turn now to the question of pre-emption. . . .

We find impossibility [preemption] here. It was not lawful under federal law for the Manufacturers to do what state law required of them. And even if they had fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law.

If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law. Taking *Mensing* and *Demahy*’s allegations as true, state law imposed on the Manufacturers a duty to attach a safer label to their generic metoclopramide. Federal law, however, demanded that generic drug labels be the same at all times as the corresponding brand-name drug labels. Thus, it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal law duty to keep the label the same.

The federal duty to ask the FDA for help in strengthening the corresponding brand-name label, assuming such a duty exists, does not change this analysis. Although requesting FDA assistance would have satisfied the Manufacturers’ federal duty, it would not have satisfied their state tort-law duty to provide adequate labeling. State law demanded a safer label; it did not instruct the Manufacturers to communicate with the FDA about the possibility of a safer label. . . . *Mensing* and *Demahy* argue that if the Manufacturers had asked the FDA for help in changing the corresponding brand-name label, they might eventually have been able to accomplish under federal law what state law requires. That is true enough. The

Manufacturers “freely concede” that they could have asked the FDA for help. If they had done so, and if the FDA decided there was sufficient supporting information, and if the FDA undertook negotiations with the brand-name manufacturer, and if adequate label changes were decided on and implemented, then the Manufacturers would have started a Mouse Trap game that eventually led to a better label on generic metoclopramide. . . .

The question for “impossibility” is whether the private party could independently do under federal law what state law requires of it. . . . We can often imagine that a third party or the Federal Government might do something that makes it lawful for a private party to accomplish under federal law what state law requires of it. In these cases, it is certainly possible that, had the Manufacturers asked the FDA for help, they might have eventually been able to strengthen their warning label. Of course, it is also possible that the Manufacturers could have convinced the FDA to reinterpret its regulations in a manner that would have opened the CBE process to them. Following Mensing and Demahy’s argument to its logical conclusion, it is also possible that, by asking, the Manufacturers could have persuaded the FDA to rewrite its generic drug regulations entirely or talked Congress into amending the Hatch–Waxman Amendments.

If these conjectures suffice to prevent federal and state law from conflicting for Supremacy Clause purposes, it is unclear when, outside of express pre-emption, the Supremacy Clause would have any force. We do not read the Supremacy Clause to permit an approach to pre-emption that renders conflict pre-emption all but meaningless.

*Wyeth* is not to the contrary. In that case, as here, the plaintiff contended that a drug manufacturer had breached a state tort-law duty to provide an adequate warning label. The Court held that the lawsuit was not pre-empted because it was possible for Wyeth, a brand-name drug manufacturer, to comply with both state and federal law. Specifically, the CBE regulation permitted a brand-name drug manufacturer like Wyeth “to unilaterally strengthen its warning” without prior FDA approval. Thus, the federal regulations applicable to Wyeth allowed the company, of its own volition, to strengthen its label in compliance with its state tort duty.

We recognize that from the perspective of Mensing and Demahy, finding pre-emption here but not in *Wyeth* makes little sense. Had Mensing and Demahy taken Reglan, the brand-name drug prescribed by their doctors, *Wyeth* would control and their lawsuits would not be pre-empted. But because pharmacists, acting in full accord with state law, substituted generic metoclopramide instead, federal law pre-empts these lawsuits. We acknowledge the unfortunate hand that federal drug regulation has dealt Mensing, Demahy, and others similarly situated. . . .

SOTOMAYOR, J., with whom GINSBURG, BREYER, and KAGAN, JJ., join, dissenting.

The Court today invokes the doctrine of impossibility pre-emption to hold that federal law immunizes generic-drug manufacturers from all state-law failure-to-warn claims because they cannot unilaterally change their labels. I cannot agree. We have traditionally held defendants claiming impossibility to a demanding standard: Until today, the mere possibility of impossibility had not been enough to establish pre-emption. . . .

[H]ad the Manufacturers invoked the available mechanism for initiating label changes, they may well have been able to change their labels in sufficient time to warn respondents. Having failed to do so, the Manufacturers cannot sustain their burden (at least not without further factual development) to demonstrate that it was impossible for them to comply with both federal and state law. At most, they have demonstrated only “a hypothetical or potential conflict.”

Like the majority, the Manufacturers focus on the fact that they cannot change their labels unilaterally—which distinguishes them from the brand-name-manufacturer defendant in *Wyeth*. They correctly point out that in *Wyeth* we concluded that the FDA’s CBE regulation authorized the defendant to strengthen its warnings before receiving agency approval of its supplemental application describing the label change. But the defendant’s label change was contingent on FDA acceptance, as the FDA retained “authority to reject labeling changes made pursuant to the CBE regulation.” Thus, in the long run, a brand-name manufacturer’s compliance with a state-law duty to warn required action by two actors: The brand-name manufacturer had to change the label and the FDA, upon reviewing the supplemental application, had to agree with the change. The need for FDA approval of the label change did not make compliance with federal and state law impossible in every case. Instead, because the defendant bore the burden to show impossibility, we required it to produce “clear evidence that the FDA would not have approved a change to [the] label.”

I would apply the same approach in these cases. State law, respondents allege, required the Manufacturers to provide a strengthened warning about the dangers of long-term metoclopramide use. Just like the brand-name manufacturer in *Wyeth*, the Manufacturers had available to them a mechanism for attempting to comply with their state-law duty to warn. Federal law thus “accommodated” the Manufacturers’ state-law duties. It was not necessarily impossible for the Manufacturers to comply with both federal and state law because, had they approached the FDA, the FDA may well have agreed that a label change was necessary. Accordingly, as in *Wyeth*, I would require the Manufacturers to show that the FDA would not have approved a proposed label change. They have not made such a showing: They do “not argue that [they] attempted to give the kind of warning required by [state law] but [were] prohibited from doing so by the FDA.” *Wyeth*, 555 U.S., at 572 . . . .

Given the longstanding existence of product liability actions, including for failure to warn, “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.” [*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)] In concluding that Congress silently immunized generic manufacturers from all failure-to-warn claims, the majority disregards our previous hesitance to infer congressional intent to effect such a sweeping change in traditional state-law remedies.

As the majority itself admits, a drug consumer’s right to compensation for inadequate warnings now turns on the happenstance of whether her pharmacist filled her prescription with a brand-name drug or a generic. If a consumer takes a brand-name drug, she can sue the manufacturer for inadequate warnings under our opinion in *Wyeth*. If, however, she takes a generic drug, as occurs 75 percent of the time, she now has no right to sue. The majority offers no reason to think—apart from its new articulation of the impossibility standard—that Congress would have intended such an arbitrary distinction. In some States, pharmacists must dispense generic drugs absent instruction to the contrary from a consumer’s physician. Even when consumers can request brand-name drugs, the price of the brand-name drug or the consumers’ insurance plans

may make it impossible to do so. As a result, in many cases, consumers will have no ability to preserve their state-law right to recover for injuries caused by inadequate warnings.

### Notes

1. *The FDA warning.* In 2009, after the underlying conduct in *PLIVA v. Mensing*, the FDA ordered metoclopramide manufacturers to add a so-called “black box” warning – the sternest warning in the FDA’s requirements – about the risk of tardive dyskinesia. The new FDA warning was essentially the warning that the plaintiffs in *PLIVA v. Mensing* alleged the manufacturer defendants ought to have used in the first place. A subsequent study showed a sharp drop in the use of metoclopramide after the black box warning. See Eli D. Ehrenpreis et al., *The Metoclopramide Black Box Warning for Tardive Dyskinesia*, 108 AM. J. GASTROENTEROLOGY 866 (2013).

2. *Familiar coalitions.* Observe that the familiar partisan split in the Court—broken in earlier preemption cases like *Geier*—reemerged in *PLIVA v. Mensing*.

3. *The role of agencies?* In both *Wyeth v. Levine* and *Mensing*, the Court ultimately rejected the position taken by the FDA through the Solicitor General. In *Wyeth v. Levine*, the FDA argued that suits against brand-name companies were preempted because of a statement in the regulatory preamble—a statement rejected by the Court as insufficient. In *Mensing*, the FDA argued that generic manufacturers’ duty to propose changes to the FDA meant that failure to warn claims were not preempted. But the Court rejected that interpretation as well. Generally, the Court accords a certain amount of deference to administrative agencies like the FDA in interpreting their own statutes. But despite the appeal of the approach articulated by Catherine Sharkey in the notes following *Wyeth v. Levine* above, there seems to be little evidence of that deference here. Should the Court defer to agencies, which might have better insight into the policy rationale for finding preemption? Or, should the Court be especially hesitant to give agencies broad authority to preempt state law?

4. *Preemption and design defects.* One question is whether design defect claims against generic manufacturers ought to fare any differently than failure to warn claims. In *Mutual Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013), the Court answered in the negative. The majority opinion held that the design defect claim was no different than the failure to warn claim in *Mensing*. Justice Sotomayor’s dissent argued that the state law design defect claim was really a state requirement to *either* have a different design *or* pay damages—and that paying damages was an obligation consistent with federal regulatory requirements.

5. *Unanticipated consequences.* The Court’s mixed decisions in *Wyeth v. Levine* and *Mensing* have created interesting and unexpected effects. Justice Sotomayor noted in dissent in *Mensing* that the majority seemed to have foreclosed consumers of generic drugs from seeking compensation for injuries caused by inadequate labels. If a patient “takes a generic drug, as occurs 75 percent of the time,” Justice Sotomayor wrote, “she now has no right to

sue.” But the Justice may have protested too much. As is so often the case in the development of American tort law, the creativity of the plaintiffs’ bar soon called the dissenting conclusion into question, and at least one court has gone along. In *Wyeth v. Weeks*, the Alabama Supreme Court ruled that consumers injured by generic drugs could sue the brand-name manufacturers for writing the adequate warnings that the generic manufacturers were then required to use. The Alabama court held as follows:

Under Alabama law, a brand-name-drug company may be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture of a brand-name prescription drug, by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company. Prescription drugs, unlike other consumer products, are highly regulated by the FDA. Before a prescription drug may be sold to a consumer, a physician or other qualified health-care provider must write a prescription. The United States Supreme Court in *Wyeth v. Levine* recognized that Congress did not preempt common-law tort suits, and it appears that the FDA traditionally regarded state law as a complementary form of drug regulation: The FDA has limited resources to monitor the approximately 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge; state-law tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly and serve a distinct compensatory function that may motivate injured persons to come forward with information.

FDA regulations require that a generic manufacturer’s labeling for a prescription drug be exactly the same as the brand-name manufacturer’s labeling. The Supreme Court in *PLIVA* held that it would have been impossible for the generic manufacturers to change their warning labels without violating the federal requirement that the warning on a generic drug must match the warning on the brand-name version, preempting failure-to-warn claims against generic manufacturers.

In the context of inadequate warnings by the brand-name manufacturer placed on a prescription drug manufactured by a generic manufacturer, it is not fundamentally unfair to hold the brand-name manufacturer liable for warnings on a product it did not produce because the manufacturing process is irrelevant to misrepresentation theories based, not on manufacturing defects in the product itself, but on information and warning deficiencies, when those alleged misrepresentations were drafted by the brand-name manufacturer and merely repeated, as allowed by the FDA, by the generic manufacturer.

*Wyeth, Inc. v. Weeks*, 159 So.3d 649 (Ala. 2014). Does it make sense to hold brand-name manufacturers liable for the injuries of consumers of the generic drug? From one perspective, it is a simple outgrowth of the requirement that the generic manufacturers adopt the brand-name manufacturer’s label. Perhaps the brand-name manufacturer’s liability in such instances is part of the responsibility that comes along with the privileges of its patent period and its FDA approval. From another view, however, the Alabama approach seems outrageous. As then-Chief Judge Roy Moore contended in his vigorous dissent, the *Wyeth v. Weeks* decision

required brand-name manufacturers to compensate consumers with whom they have no relationship at all: consumers who never purchased their product, let alone consumed it.

Which of these two views has the better argument? Note that shortly after the *Weeks* decision, the Alabama legislature intervened, enacting S.B. No. 80, An Act Relating to Products Liability, reversing the rule of *Wyeth v. Weeks* and requiring that products liability plaintiffs show that the particular product causing them injury was designed, manufactured, sold, or leased by the defendant. See Ala. Code 1975 s. 6-5-530.

6. *Judges, juries, and preemption.* The Supreme Court's most recent foray into the preemption cases (at least at the date of this writing) raised the question whether the preemption determination is properly for jury or judge. In the other preemption cases we have seen here, the Court has split. Here the Court's judgment was unanimous.

***Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019)**

Justice BREYER delivered the opinion of the Court.

When Congress enacted the Federal Food, Drug, and Cosmetic Act, it charged the Food and Drug Administration with ensuring that prescription drugs are “safe for use under the conditions prescribed, recommended, or suggested” in the drug’s “labeling.” When the FDA exercises this authority, it makes careful judgments about what warnings should appear on a drug’s label for the safety of consumers.

For that reason, we have previously held that “clear evidence” that the FDA would not have approved a change to the drug’s label pre-empts a claim, grounded in state law, that a drug manufacturer failed to warn consumers of the change-related risks associated with using the drug. We here determine that this question of pre-emption is one for a judge to decide, not a jury. We also hold that “clear evidence” is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug’s label to include that warning. . . .

Petitioner Merck Sharp & Dohme manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. Fosamax belongs to a class of drugs called “bisphosphonates.” Fosamax and other bisphosphonates work by affecting the “bone remodeling process,” that is, the process through which bones are continuously broken down and built back up again. . . . Fosamax (like other bisphosphonates) slows the breakdown of old bone cells and thereby helps postmenopausal women avoid osteoporotic fractures.

However, the mechanism through which Fosamax decreases the risk of osteoporotic fractures may increase the risk of a different type of fracture. That is because all bones—healthy and osteoporotic alike—sometimes develop microscopic cracks that are not due to any trauma, but are instead caused by the mechanical stress of everyday activity. Those so-called “stress fractures” ordinarily heal on their own through the bone remodeling process. But, by slowing the breakdown of old bone cells, Fosamax and other bisphosphonates may cause stress fractures to progress to complete breaks that cause great pain and require surgical intervention



to repair. When that rare type of complete, low-energy fracture affects the thigh bone, it is called an “atypical femoral fracture.”

The Fosamax label that the FDA approved in 1995 did not warn of the risk of atypical femoral fractures. . . .

Evidence connecting Fosamax to atypical femoral fractures developed after 1995. . . .

In 2008, Merck applied to the FDA for preapproval to change Fosamax’s label to add language to both the “Adverse Reaction[s]” and the “Precaution[s]” sections of the label. In particular, Merck proposed adding a reference to “ ‘low-energy femoral shaft fracture’ ” in the Adverse Reactions section, and cross-referencing a longer discussion in the Precautions section that focused on the risk of stress fractures associated with Fosamax. The FDA approved the addition to the Adverse Reactions section, but rejected Merck’s proposal to warn of a risk of “stress fractures.” The FDA explained that Merck’s “justification” for the proposed change to the Precautions section was “inadequate,” because “[i]dentification of ‘stress fractures’ may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature.” The FDA invited Merck to “resubmit” its application and to “fully address all the deficiencies listed.” But Merck instead withdrew its application and decided to make the changes to the Adverse Reactions section through the CBE process.

A warning about “atypical femoral fractures” did not appear on the Fosamax label until 2011, when the FDA ordered that change based on its own analyses. . . .

## C

The respondents here are more than 500 individuals who took Fosamax and who suffered atypical femoral fractures between 1999 and 2010. Respondents, invoking federal diversity jurisdiction, filed separate actions seeking tort damages on the ground that, during the relevant period, state law imposed upon Merck a legal duty to warn them and their doctors about the risk of atypical femoral fractures associated with using Fosamax. One respondent, for example, filed a complaint alleging that she took Fosamax for roughly 10 years and suffered an atypical femoral fracture. One day in 2009, when the respondent was 70 years old, she turned to unlock the front door of her house, heard a popping sound, and suddenly felt her left leg give out beneath her. She needed surgery, in which doctors repaired her leg with a rod and screws. She explained she would not have used Fosamax for so many years if she had known that she might suffer an atypical femoral fracture as a result.

Merck, in defense, argued that respondents’ state-law failure-to-warn claims should be dismissed as pre-empted by federal law. . . . Merck conceded that the FDA’s CBE regulation would have permitted Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt. In particular, Merck pointed to the FDA’s rejection of Merck’s 2008 attempt to amend the Fosamax label to warn of the risk of “stress fractures” associated with Fosamax. On that basis, Merck claimed that federal law prevented Merck from complying with any state-law duty to warn the respondents of the risk of atypical femoral fractures associated with Fosamax.

The District Court agreed with Merck’s pre-emption argument and granted summary judgment to Merck , but the Court of Appeals vacated and remanded. The Court of Appeals concluded that its pre-emption analysis was controlled by this Court’s decision in *Wyeth*. The Court of Appeals understood that case as making clear that a failure-to-warn claim grounded in state law is pre-empted where there is “clear evidence that the FDA would not have approved a change to the . . . label” (quoting *Wyeth*, 555 U.S. at 571). The Court of Appeals, however, suggested that this statement had led to varying lower court applications and that it would be helpful for this Court to “clarif[y] or buil[d] out the doctrine.” . . .

## II

We here decide that a judge, not the jury, must decide the pre-emption question. And we elaborate *Wyeth*’s requirements along the way.

### A

[In *Wyeth*, we] concluded that . . . . Wyeth’s evidence of pre-emption fell short . . . . First, the record did not show that Wyeth “supplied the FDA with an evaluation or analysis concerning the specific dangers” that would have merited the warning. . . . Second, the record did not show that Wyeth “attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA.” For those reasons, we could not “credit Wyeth’s contention that the FDA would have prevented it from adding a stronger warning about the IV-push method of intravenous administration.” And we could not conclude that “it was impossible for Wyeth to comply with both federal and state requirements.” We acknowledged that meeting the standard we set forth would be difficult, but, we said, “[i]mpossibility pre-emption is a demanding defense.”

### B

The underlying question for this type of impossibility pre-emption defense is whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law. And, of course, in order to succeed with that defense the manufacturer must show that the answer to this question is yes. . . . In a case like *Wyeth*, showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug’s label to include that warning. . . .

## III

We turn now to what is the determinative question before us: Is the question of agency disapproval primarily one of fact, normally for juries to decide, or is it a question of law, normally for a judge to decide without a jury?

The complexity of the preceding discussion of the law helps to illustrate why we answer this question by concluding that the question is a legal one for the judge, not a jury. The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination. Judges are experienced in "[t]he construction of written instruments," such as those normally produced by a federal agency to memorialize its considered judgments. And judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context. To understand the question as a legal question for judges makes sense given the fact that judges are normally familiar with principles of administrative law. Doing so should produce greater uniformity among courts; and greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of federal agency action.

We understand that sometimes contested brute facts will prove relevant to a court's legal determination about the meaning and effect of an agency decision. For example, if the FDA rejected a drug manufacturer's supplemental application to change a drug label on the ground that the information supporting the application was insufficient to warrant a labeling change, the meaning and scope of that decision might depend on what information the FDA had before it. Yet in litigation between a drug consumer and a drug manufacturer (which will ordinarily lack an official administrative record for an FDA decision), the litigants may dispute whether the drug manufacturer submitted all material information to the FDA.

But we consider these factual questions to be subsumed within an already tightly circumscribed legal analysis. And we do not believe that they warrant submission alone or together with the larger pre-emption question to a jury. Rather, in those contexts where we have determined that the question is "for the judge and not the jury," we have also held that "courts may have to resolve subsidiary factual disputes" that are part and parcel of the broader legal question. And, as in contexts as diverse as the proper construction of patent claims and the voluntariness of criminal confessions, they create a question that "falls somewhere between a pristine legal standard and a simple historical fact." In those circumstances, "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." In this context, that "better positioned" decisionmaker is the judge.

#### IV

Because the Court of Appeals treated the pre-emption question as one of fact, not law, and because it did not have an opportunity to consider fully the standards we have described in Part II of our opinion, we vacate its judgment and remand the case to that court for further proceedings consistent with this opinion. . . .

Justice THOMAS, concurring.

I join the Court’s opinion and write separately to explain my understanding of the relevant pre-emption principles and how they apply to this case. . . .

I remain skeptical that “physical impossibility” is a proper test for deciding whether a direct conflict exists between federal and state law. But even under our impossibility precedents, Merck’s pre-emption defense fails.

## I

As I have explained before, it is not obvious that the “ ‘physical impossibility’ standard is the best proxy for determining when state and federal laws ‘directly conflict’ for purposes of the Supremacy Clause.” Evidence from the founding suggests that, under the original meaning of the Supremacy Clause, federal law pre-empts state law only if the two are in logical contradiction. See Nelson, Preemption, 86 Va. L. Rev. 225, 260-61 (2000). Sometimes, federal law will logically contradict state law even if it is possible for a person to comply with both. For instance, “if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior.” *Wyeth*, 555 U.S. at 590 (opinion of THOMAS, J.).

Merck does not advance this logical-contradiction standard, and it is doubtful that a pre-emption defense along these lines would succeed here. “To say, as the statute does, that [Merck] may not market a drug without federal approval (*i.e.*, without [a Food and Drug Administration (FDA) ] approved label) is not to say that federal approval gives [Merck] the unfettered right, for all time, to market its drug with the specific label that was federally approved.” *Id.* at 592. . . .

## II

Applying the Court’s impossibility precedents leads to the same conclusion. . . . Respondents’ claim here is “that state law obligated Merck to add a warning about atypical femur fractures” to the Warnings and Precautions section of Fosamax’s label. . . .

Here, Merck’s impossibility pre-emption defense fails because it does not identify any federal law that “prohibited [it] from adding any and all warnings ... that would satisfy state law.” By its reference to “the Laws of the United States,” the Supremacy Clause “requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.” *Wyeth v. Levine*, 555 U.S. at 586 (opinion of THOMAS, J.). Merck’s primary argument, based on various agency communications, is that the FDA would have rejected a hypothetical labeling change submitted via the CBE process. But neither agency musings nor hypothetical future rejections constitute pre-emptive “Laws” under the Supremacy Clause. . . .

As Merck acknowledges, it could have resubmitted its PAS applications, sought a hearing, or changed its label at any time through the CBE process. See Reply Brief 13. Indeed, when Merck instead decided to withdraw its PAS applications, it added atypical femoral fractures to the Adverse Reactions section through the CBE process. That process also enabled Merck to add language to the Warnings and Precautions section, but Merck did not do so. If it had, it could have satisfied its federal and alleged state-law duties—meaning that it was possible for Merck to independently satisfy both sets of duties. Merck’s belief that the FDA would have eventually rejected a CBE application does not make an earlier CBE change impossible. As the Court correctly explains, “ ‘the possibility of impossibility [is] not enough.’ ” *Ante*, at 1678 – 1679. The very point of the CBE process is that a manufacturer can “unilaterally” make a labeling change that does not violate other federal law, *Wyeth*, 555 U.S. at 573, at least until the FDA rules on its application.

Because Merck points to no statute, regulation, or other agency action with the force of law that would have prohibited it from complying with its alleged state-law duties, its pre-emption defense should fail as a matter of law.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice KAVANAUGH join, concurring in the judgment.

I concur in the judgment because I agree with the Court’s decision on the only question that it actually decides, namely, that whether federal law allowed Merck to include in the Fosamax label the warning alleged to be required by state law is a question of law to be decided by the courts, not a question of fact. I do not, however, join the opinion of the Court because I am concerned that its discussion of the law and the facts may be misleading on remand. . . .

[F]or years the FDA was aware of [the fracture risk raised by the plaintiffs], communicating with drug manufacturers, studying all relevant information, and instructing healthcare professionals and patients alike to continue to use Fosamax as directed. For this reason, the FDA itself, speaking through the Solicitor General, takes the position that the FDA’s decision not to require a label change prior to October 2010 reflected the FDA’s “determin[ation]” that a new warning “should [not] be included in the labeling of the drug.” See Brief for United States as *Amicus Curiae* 30, 33–34.

For these reasons, I concur in the judgment only.

## **CHAPTER 15. ANTIDISCRIMINATION LAW MODULE #4 -- RESPONDEAT SUPERIOR IN HARASSMENT CASES UNDER TITLE VII**

Recall Judge Friendly's decision in *Ira Bushey* on employers' no-fault vicarious liability for the torts of their employees arising within the scope of their employment. Should employers be similarly vicariously liable under Title VII of the Civil Rights Act of 1964 for sexual harassment by one or more employees against other employees?

A series of Supreme Court cases in the 1980s and 1990s clarified a distinct standard for employers' vicarious liability in harassment cases alleging that a hostile work environment had altered the terms and conditions of the plaintiff's employment. In particular, two 1998 cases established both a standard for vicarious liability in hostile environment cases and an affirmative defense to such liability for employers. All agree that the Court produced a vast industry in sexual harassment training. Whether the 1998 cases produced an effective regime for accomplishing the goals of Title VII is less clear.

### **1. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)**

[In this landmark labor law case and 9-0 decision, the U.S. Supreme Court recognized sexual harassment as an illegal form of discrimination prohibited under Title VII of the Civil Rights Act of 1964. In 1974, at 19, plaintiff Mechelle Vinson began working as a teller-trainee at Capitol City Federal Savings and Loan Association in Washington D.C. (which would soon change its name to Meritor Savings Bank). Thereafter, she alleged, her supervisor Sidney L. Taylor began a three-year campaign of sexual harassment against her: touching her in public, exposing himself to her, raping her multiple times, and coercing her into sex forty or fifty times. Then he fired her, explaining that she had used an inordinate number of sick days. Seeking injunctive relief and compensatory and punitive damages, Ms. Vinson alleged that such harassment constituted a "hostile working environment" and was properly recognized as a form of unlawful discrimination under Title VII of the Civil Rights Act of 1964. The primary question in *Meritor* was whether a hostile work environment alone could constitute unlawful discrimination under Title VII. The District Court below had held that it could not. The Court of Appeals below had then reversed. The Court agreed with the appellate court and concluded that Title VII prohibited hostile work environments that discriminated on the basis of race or sex or any of Title VII's other protected classifications, at least when the harassment was so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment." As to the question of the employer's liability for such harassment, however, *Meritor* held only that employer liability should be limited by the traditional principles of the law of agency:]

REHNQUIST, Chief Justice:

....

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E.g., Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to:

a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure,

the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Brief for the United States and EEOC as Amici Curiae, 26. As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an “[examination of] the circumstances of the particular employment relationship and the job [functions] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.” *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were “so pervasive and so long continuing . . . that the employer must have become conscious of [them],” *Taylor v. Jones*, 653 F.2d 1193, 1197-1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties’ invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress’ decision to define “employer” to include any “agent” of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner’s view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent’s failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner’s general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer’s interest in correcting that form of discrimination. Moreover, the bank’s grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner’s contention that respondent’s failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.



**Note**

A new affirmative defense? In 1998, the U.S. Supreme Court established a definitive standard for *respondeat superior* in Title VII harassment cases in two decisions delivered the same day in 1998. Both cases concerned low-ranking female employees. *Ellerth v. Burlington Indus.*, 524 U.S. 742 (1998) involved a salesperson who complained that she had been harassed by a male vice president. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) involved a lifeguard who contended that she had been humiliatingly harassed by male lifeguards, including her supervisor.

**2. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)**

KENNEDY, Justice:

....

III

We must decide . . . whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate’s terms or conditions of employment, based on sex, but does not fulfill the threat. We turn to principles of agency law, for the term “employer” is defined under Title VII to include “agents.” 42 U. S. C. § 2000e(b); see *Meritor*, *supra*, at 72. In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely “on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” *Community for Creative Non-Violence v. Reid*, 490 U. S. 730, 740 (1989). The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction. . . .

As *Meritor* acknowledged, the Restatement (Second) of Agency (1957) (hereinafter Restatement) is a useful beginning point for a discussion of general agency principles. 477 U. S., at 72. Since our decision in *Meritor*, federal courts have explored agency principles, and we find useful instruction in their decisions, noting that “common-law principles may not be transferable in all their particulars to Title VII.” *Ibid.* The EEOC has issued Guidelines governing sexual harassment claims under Title VII, but they provide little guidance on the issue of employer liability for supervisor harassment. See 29 CFR § 1604.11(c) (1997) (vicarious liability for supervisor harassment turns on “the particular employment relationship and the job functions performed by the individual”).

A.

Section 219(1) of the Restatement sets out a central principle of agency law:

A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's "purpose, however misguided, is wholly or in part to further the master's business." ... For example, when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies. See Prosser and Keeton on Torts § 70, at 505-506.

As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. . . . The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer. . . . The concept of scope of employment has not always been construed to require a motive to serve the employer. E.g.,

*Ira S. Bushey & Sons, Inc. v. United States*. Federal courts have nonetheless found similar limitations on employer liability when applying the agency laws of the States under the Federal Tort Claims Act, which makes the Federal Government liable for torts committed by employees within the scope of employment. 28 U.S.C. § 1346(b); see, e.g., . . . *Wood v. United States*, 995 F.2d 1122, 1123 (C.A.1 1993) (Breyer, C.J.) (sexual harassment amounting to assault and battery "clearly outside the scope of employment") . . . .

The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.

B.

Scope of employment does not define the only basis for employer liability under agency principles. In limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. The principles are set forth in the much-cited § 219(2) of the Restatement:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

See also § 219, Comment *e* (Section 219(2) "enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment").

Subsections (b) and (d) are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered. Under subsection (b), an employer is liable when the tort is attributable to the employer's own negligence. § 219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Section 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard). *Ibid.* As other federal decisions have done in discussing vicarious liability for supervisor harassment, e. g., *Henson v. Dundee*, 682 F.2d 897, 909 (CA11 1982), we begin with § 219(2)(d). . . .

As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power. Compare Restatement § 6 (defining "power") with § 8 (defining "apparent authority"). In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context. If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one. Restatement § 8, Comment c ("Apparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized"). When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis. . . .

We turn to the aided in the agency relation standard. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. See *Gary v. Long*, 59 F.3d 1391, 1397 (CA11 1995). Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue. . . .

At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. . . .

In the context of this case, a tangible employment action would have taken the form of a denial of a raise or a promotion. The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those

decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. . . .

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . .

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . .

For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability, as *Meritor* itself appeared to acknowledge. See *supra*, at 760-761.

Whether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. . . . On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation. . . . On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference.

It is this tension which, we think, has caused so much confusion among the Courts of Appeals which have sought to apply the aided in the agency relation standard to Title VII cases. The aided in the agency relation standard, however, is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgment. In particular, we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment. . . . Congress has not altered *Meritor's* rule even though it has made significant amendments to Title VII in the interim. See *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736 (1977) (“[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation”).

Although *Meritor* suggested the limitation on employer liability stemmed from agency principles, the Court acknowledged other considerations might be relevant as well. See 477 U. S., at 72 (“common-law principles may not be transferable in all their particulars to Title VII”). For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. . . .

**Note**

In the companion case, the Court elaborated on the policy advantage of holding employers liable while allowing them an affirmative defense:

**3. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)**

Justice Souter delivered the opinion of the Court:

This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination. We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim. . . .

II.

A.

Under Title VII of the Civil Rights Act of 1964, “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition “is not limited to ‘economic’ or ‘tangible’ discrimination,” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, *supra*), and that it covers more than “‘terms’ and ‘conditions’ in the narrow contractual sense.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). Thus, in *Meritor* we held that sexual harassment so “severe or pervasive” as to “‘alter the conditions of [the victim’s] employment and create an abusive working environment” violates Title VII.

. . . .

[C]laims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown. . . .

A variety of reasons have been invoked for this apparently unanimous rule. Some courts explain, in a variation of the “proxy” theory discussed above, that when a supervisor makes such decisions, he “merges” with the employer, and his act becomes that of the employer. Other courts have suggested that vicarious liability is proper because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing, promotion,

and the like. Others have suggested that vicarious liability is appropriate because the supervisor who discriminates in this manner is aided by the agency relation. . . .

B.

The Court of Appeals identified, and rejected, three possible grounds drawn from agency law for holding the City vicariously liable for the hostile environment created by the supervisors. It considered whether the two supervisors were acting within the scope of their employment when they engaged in the harassing conduct. The court then inquired whether they were significantly aided by the agency relationship in committing the harassment, and also considered the possibility of imputing Gordon's knowledge of the harassment to the City. Finally, the Court of Appeals ruled out liability for negligence in failing to prevent the harassment. Faragher relies principally on the latter three theories of liability.

1

A “master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” Restatement § 219(1). This doctrine has traditionally defined the “scope of employment” as including conduct “of the kind [a servant] is employed to perform,” occurring “substantially within the authorized time and space limits,” and “actuated, at least in part, by a purpose to serve the master,” but as excluding an intentional use of force “unexpected by the master.” *Id.*, § 228(1).

Courts of Appeals have typically held, or assumed, that conduct similar to the subject of this complaint falls outside the scope of employment. See, *e.g.*, *Harrison*, 112 F.3d, at 1444 (sexual harassment “‘simply is not within the job description of any supervisor or any other worker in any reputable business’”) . . . . In so doing, the courts have emphasized that harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual harassment to the classic “frolic and detour” for which an employer has no vicarious liability.

These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer. [*E.g.*,] *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (C.A.2 1968) . . . .

Courts, in fact, have treated scope of employment generously enough to include sexual assaults. See, *e.g.*, *Primeaux v. United States*, 102 F.3d 1458, 1462-1463 (C.A.8 1996) (federal police officer on limited duty sexually assaulted stranded motorist) . . . . The rationales for these decisions have varied, with some courts echoing *Bushey* in explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business, and others finding that the employee's sexual misconduct arose from or was in some way related to the employee's essential duties.

An assignment to reconcile the run of the Title VII cases with those just cited would be a taxing one. Here it is enough to recognize that their disparate results do not necessarily reflect wildly varying terms of the particular employment contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward

behavior. In the instances in which there is a genuine question about the employer's responsibility for harmful conduct he did not in fact authorize, a holding that the conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law. As one eminent authority has observed, the "highly indefinite phrase" is "devoid of meaning in itself" and is "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keaton on Law of Torts* 502 (5th ed.1984) . . . . Older cases, for example, treated smoking by an employee during working hours as an act outside the scope of employment, but more recently courts have generally held smoking on the job to fall within the scope. . . . It is not that employers formerly did not authorize smoking but have now begun to do so, or that employees previously smoked for their own purposes but now do so to serve the employer. We simply understand smoking differently now and have revised the old judgments about what ought to be done about it.

The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, see, e.g., §§ 219, 228, 229, but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view.

The Restatement itself points to such an approach, as in the commentary that the "ultimate question" in determining the scope of employment is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." *Id.*, § 229, Comment *a*.

In the case before us, a justification for holding the offensive behavior within the scope of Terry's and Silverman's employment was well put in Judge Barkett's dissent: "[A] pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability." It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace. An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. . . .

Two things counsel us to draw the contrary conclusion. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment. Such a distinction can readily be applied to the spectrum of possible harassing conduct by supervisors, as the following examples show. First, a supervisor might discriminate racially in job assignments in order to placate the prejudice pervasive in the labor force. Instances of this variety of the heckler's veto would be consciously intended to further the employer's interests by preserving peace in the workplace. Next, supervisors might reprimand male employees for workplace failings with banter, but respond to women's shortcomings in harsh or vulgar terms. A third example might be the supervisor who, as here, expresses his sexual interests in ways having no apparent object whatever of serving an interest of the

employer. If a line is to be drawn between scope and frolic, it would lie between the first two examples and the third, and it thus makes sense in terms of traditional agency law to analyze the scope issue, in cases like the third example, just as most federal courts addressing that issue have done, classifying the harassment as beyond the scope of employment.

The second reason goes to an even broader unanimity of views among the holdings of District Courts and Courts of Appeals thus far. Those courts have held not only that the sort of harassment at issue here was outside the scope of supervisors' authority, but, by uniformly judging employer liability for co-worker harassment under a negligence standard, they have also implicitly treated such harassment as outside the scope of common employees' duties as well. . . .

The rationale for placing harassment within the scope of supervisory authority would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of coemployees. The employer generally benefits just as obviously from the work of common employees as from the work of supervisors; they simply have different jobs to do, all aimed at the success of the enterprise. As between an innocent employer and an innocent employee, if we use scope-of-employment reasoning to require the employer to bear the cost of an actionably hostile workplace created by one class of employees (*i.e.*, supervisors), it could appear just as appropriate to do the same when the environment was created by another class (*i.e.*, co-workers).

## 2

The Court of Appeals also rejected vicarious liability on the part of the City insofar as it might rest on the concluding principle set forth in § 219(2)(d) of the Restatement, that an employer “is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.” Faragher points to several ways in which the agency relationship aided Terry and Silverman in carrying out their harassment. She argues that in general offending supervisors can abuse their authority to keep subordinates in their presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint. Thus, she maintains that power conferred on Terry and Silverman by the City enabled them to act for so long without provoking defiance or complaint.

. . . . [T]here are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. We are not entitled to recognize this theory under Title VII unless we can square it with *Meritor's* holding that an employer is not “automatically” liable for harassment by a supervisor who creates the requisite degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the “aid” may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high. To counter it, we think there are two basic alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.



There is certainly some authority for requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority before liability may be imputed. That is the way some courts have viewed the familiar cases holding the employer liable for discriminatory employment action with tangible consequences, like firing and demotion. And we have already noted some examples of liability provided by the Restatement itself, which suggest that an affirmative misuse of power might be required. See *supra* (telegraph operator sends false messages, a store manager cheats customers, editor publishes libelous editorial).

But neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior. Supervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist; this is the reason that courts have consistently held that acts of supervisors have greater power to alter the environment than acts of coemployees generally. How far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not reasonably be seen as actively using authority? Judgment calls would often be close, the results would often seem disparate even if not demonstrably contradictory, and the temptation to litigate would be hard to resist. We think plaintiffs and defendants alike would be poorly served by an active-use rule.

The other basic alternative to automatic liability would avoid this particular temptation to litigate, but allow an employer to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided. This composite defense would, we think, implement the statute sensibly, for reasons that are not hard to fathom.

Although Title VII seeks “to make persons whole for injuries suffered on account of unlawful employment discrimination,” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975), its “primary objective,” like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. *Id.*, at 417. As long ago as 1980, the Equal Employment Opportunity Commission (EEOC), charged with the enforcement of Title VII, 42 U.S.C. § 2000e-4, adopted regulations advising employers to “take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment.” 29 CFR § 1604.11(f) (1997), and in 1990 the Commission issued a policy statement enjoining employers to establish a complaint procedure “designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.” EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990) (internal quotation marks omitted). It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty “to use such means as are reasonable under the circumstances to avoid or minimize the damages” that result from violations of the statute. . . .

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, *ante*, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington*, *ante*, at 17.

Applying these rules here, we believe that the judgment of the Court of Appeals must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry. It is undisputed that these supervisors “were granted virtually unchecked authority” over their subordinates, “directly controll[ing] and supervis[ing] all aspects of [Faragher’s] day-to-day activities.” . . . .

While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City’s policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. App. 274. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct. Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in anyone of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

## Notes

1. *Who is a supervisor?* Since the defendants in neither *Ellerth* nor *Faragher* contested that the harassers were supervisors, those cases left the definition of “supervisor” open. The U.S. Supreme Court clarified the issue in the 2013 decision, *Vance v. Ball State University*, holding that in the context of vicarious liability for unlawful harassment under Title VII, a supervisor is one empowered by the employer to take tangible employment actions against the victim. 570 U.S. 41 (2013).

2. *Do small work forces need official anti-harassment policies?* The majority in *Faragher* states that the city could not have been expected to protect against sexual harassment across many departments without an explicit policy, “[u]nlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally[.]” Do you agree?

3. *Who is HR for?* Journalist Caitlin Flanagan contends that *Ellerth* and *Farragher* helped produce a vast world of managers and human resources departments and harassment policies. Such officials, structures, and policies, she contends, actually do little to help employees – but they do help employers:

Anti-harassment training, and the centrality of HR in resolving women’s problems, has been an ever-growing part of employees’ lives since 1998, when a pair of Supreme Court decisions, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, changed the way courts look at harassment claims. If a company uses a Faragher-Ellerth defense, it is asserting that despite clear policy and regular training, the employee who was harassed failed to make a report to HR and so the employer was unable to resolve the problem. This is why all of that training—the videos and online courses and worksheets—seems so useless: because it’s designed to serve as a defense against an employment lawsuit. [An EEOC-commissioned] task force cited a study that found “no evidence that the training affected the frequency of sexual harassment experienced by the women in the workplace.” The task force also said that HR trainings and procedures are “too focused on protecting the employer from liability,” and not focused enough on ending the problem.

Caitlin Flanagan, *The Problem with HR*, THE ATLANTIC, July 2019; see also Lauren B. Edelman, *How HR and Judges Made it Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (August 2018).

## CHAPTER 16. DAMAGES

O reader, to what shifts is poor Society reduced, struggling to give still some account of herself, in epochs when Cash Payment has become the sole nexus of man to men!

THOMAS CARLYLE, CHARTISM 61 (1840)

- The ones showing up in court demanding justice, all they’ve got their eye on’s that million dollar price tag.
- It’s not simply the money no . . . because the money’s just a yardstick isn’t it. It’s the only common reference people have for making other people take them as seriously as they take themselves.

WILLIAM GADDIS, A FROLIC OF HIS OWN (1994)

“It was a shocking moment; it was a beautiful moment,” [Hope Cheston] said of hearing the jury’s decision to award her \$1 billion in damages in a lawsuit against the security company that hired her rapist. . . . When it was all over on Tuesday, Cheston said, jurors hugged her and told her: “You’re worth something.”

Lindsey Bever, *A Rape Victim Was Just Awarded \$1 Billion*, WASH. POST, May 24, 2018

So far in this book we have paid little attention to the endgame for torts claims. But of course that will not do at all. Plaintiffs in tort suits bring claims to accomplish something. Lawsuits are expensive and time consuming. Being in one can be a miserable experience. After a dozen years of watching litigation from the bench, the great torts jurist Learned Hand remarked that “as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 122 (2d ed. 2010).

Why, then, do plaintiffs assert claims? The reasons are many. But one thing we can say for certain is that in the United States, the remedy in a successful tort suit is virtually always the payment of damages, measured in dollars. Courts do not, for example, require public apologies, or acts of service to a decedent’s family, or jail time for a tortfeasor. Instead, the most oft-stated aim of damages in tort is to provide money damages sufficient to restore plaintiffs to the condition they were in before the injury.

Of course, this aspiration immediately begs more questions than it answers. What are the consequences of asking people to prove who they would have been, but for what someone else did to them? What are the consequences of asking people to prove how “broken” they have become? And even accepting that the goal of damages is to correct or repair (should we

accept this?), the question remains whether money can ever restore the status quo ante? The notion is especially challenging in cases involving the loss of life, limb, or mental capacity. What does it mean to treat money as a kind of equivalent to such losses? Thomas Carlyle, a forceful nineteenth century English critic of the market, objected that the “cash nexus” impoverished social relations. Like-minded critics today observe that the regime of money damages risks commodifying things like life and health that we would never allow to be sold in the marketplace. (Some go on to note, too, the inequalities that can result from making the market our measure of value.) And as the skeptics of money damages further note, tort law is a terribly expensive, cumbersome, and time-consuming way of delivering money to meet the basic needs of life. Social insurance systems seem vastly superior for these fundamental purposes.

Criticisms of money damages have great weight. And yet there is also something extraordinary about money damages. In a society in which we value diversity and encourage people to choose their own values, in which each person gets to decide what matters to them, money serves as a common currency of value. The oenophile may not share the same priorities as the NASCAR fan. The bridge player may not see the world in the same fashion as the BASE jumper. Many people value family and community; others value solitude. But dollars aim to translate these divergent interests into a common coin. Cash, one might say, is the *lingua franca*—the Esperanto—of liberal value pluralism. And, of course, at the most practical level, in a nation with relatively narrow systems of social provision, many plaintiffs will find that damages meet basic needs, such as food, shelter, and healthcare.

Or so might go the beginnings of a defense of money damages. The critics will likely remain unmollified. And yet there is no gainsaying the centrality of money damages in the law and social practice of damages in American tort law.

## A. Compensatory Damages

Given that money is the currency in which tort damages are paid, how do courts figure out how much money is required? The law typically treats compensatory damages as coming in two flavors: pecuniary damages, on the one hand, and nonpecuniary, on the other. Pecuniary damages aim to reproduce the amount of money lost by the plaintiff, typically because of lost income and increased expenditures. The calculation, however, is not always as easy as it might seem.

### 1. Pecuniary Damages

#### *O’Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982)

POSNER, J.

On the day of the accident, Margaret O’Shea was coming off duty as a cook on a towboat plying the Mississippi River. A harbor boat operated by the defendant, Riverway Towing Company, carried Mrs. O’Shea to shore and while getting off the boat she fell and

sustained the injury complained of. The district judge found Riverway negligent and Mrs. O'Shea free from contributory negligence, and assessed damages in excess of \$150,000. Riverway appeals only from the finding that there was no contributory negligence and from the part of the damage award that was intended to compensate Mrs. O'Shea for her lost future wages.

...

The . . . substantial issues in this appeal relate to the computation of lost wages. Mrs. O'Shea's job as a cook paid her \$40 a day, and since the custom was to work 30 days consecutively and then have the next 30 days off, this comes to \$7200 a year although, as we shall see, she never had earned that much in a single year. She testified that when the accident occurred she had been about to get another cook's job on a Mississippi towboat that would have paid her \$60 a day (\$10,800 a year). She also testified that she had been intending to work as a boat's cook until she was 70—longer if she was able. An economist who testified on Mrs. O'Shea's behalf used the foregoing testimony as the basis for estimating the wages that she lost because of the accident. He first subtracted federal income tax from yearly wage estimates based on alternative assumptions about her wage rate (that it would be either \$ 40 or \$ 60 a day); assumed that this wage would have grown by between six and eight percent a year; assumed that she would have worked either to age 65 or to age 70; and then discounted the resulting lost-wage estimates to present value, using a discount rate of 8.5 percent a year. These calculations, being based on alternative assumptions concerning starting wage rate, annual wage increases, and length of employment, yielded a range of values rather than a single value. The bottom of the range was \$50,000. This is the present value, computed at an 8.5 percent discount rate, of Mrs. O'Shea's lost future wages on the assumption that her starting wage was \$40 a day and that it would have grown by six percent a year until she retired at the age of 65. The top of the range was \$114,000, which is the present value (again discounted at 8.5 percent) of her lost future wages assuming she would have worked till she was 70 at a wage that would have started at \$60 a day and increased by eight percent a year. The judge awarded a figure—\$86,033—near the midpoint of this range. . . .

There is no doubt that the accident disabled Mrs. O'Shea from working as a cook on a boat. . . . But Riverway argues that Mrs. O'Shea (who has not worked at all since the accident, which occurred two years before the trial) could have gotten some sort of job and that the wages in that job should be deducted from the admittedly higher wages that she could have earned as a cook on a boat.

The question is not whether Mrs. O'Shea is totally disabled in the sense, relevant to social security disability cases but not tort cases, that there is no job in the American economy for which she is medically fit. . . . It is whether she can by reasonable diligence find gainful employment, given the physical condition in which the accident left her. . . . Here is a middle-aged woman, very overweight, badly scarred on one arm and one leg, unsteady on her feet, in constant and serious pain from the accident, with no education beyond high school and no work skills other than cooking, a job that happens to require standing for long periods which she is incapable of doing. It seems unlikely that someone in this condition could find gainful work at the minimum wage. True, the probability is not zero; and a better procedure, therefore, might have been to subtract from Mrs. O'Shea's lost future wages as a boat's cook the wages in some other job, discounted (i.e., multiplied) by the probability—very low—that she would in fact be able to get another job. But the district judge cannot be criticized for having failed to use a

procedure not suggested by either party. The question put to him was the dichotomous one, would she or would she not get another job if she made reasonable efforts to do so? This required him to decide whether there was a more than 50 percent probability that she would. We cannot say that the negative answer he gave to that question was clearly erroneous.

Riverway argues next that it was wrong for the judge to award damages on the basis of a wage not validated, as it were, by at least a year's employment at that wage. Mrs. O'Shea had never worked full time, had never in fact earned more than \$3600 in a full year, and in the year preceding the accident had earned only \$900. But previous wages do not put a cap on an award of lost future wages. If a man who had never worked in his life graduated from law school, began working at a law firm at an annual salary of \$35,000, and was killed the second day on the job, his lack of a past wage history would be irrelevant to computing his lost future wages. The present case is similar if less dramatic. Mrs. O'Shea did not work at all until 1974, when her husband died. She then lived on her inheritance and worked at a variety of part-time jobs till January 1979, when she started working as a cook on the towboat. According to her testimony, which the trial judge believed, she was then working full time. It is immaterial that this was her first full-time job and that the accident occurred before she had held it for a full year. Her job history was typical of women who return to the labor force after their children are grown or, as in Mrs. O'Shea's case, after their husband dies, and these women are, like any tort victims, entitled to damages based on what they would have earned in the future rather than on what they may or may not have earned in the past.

If we are correct so far, Mrs. O'Shea was entitled to have her lost wages determined on the assumption that she would have earned at least \$7200 in the first year after the accident and that the accident caused her to lose that entire amount by disabling her from any gainful employment. And since Riverway neither challenges the district judge's (apparent) finding that Mrs. O'Shea would have worked till she was 70 nor contends that the lost wages for each year until then should be discounted by the probability that she would in fact have been alive and working as a boat's cook throughout the damage period, we may also assume that her wages would have been at least \$7200 a year for the 12 years between the date of the accident and her seventieth birthday. . . .

We come at last to the most important issue in the case, which is the proper treatment of inflation in calculating lost future wages. Mrs. O'Shea's economist based the six to eight percent range which he used to estimate future increases in the wages of a boat's cook on the general pattern of wage increases in service occupations over the past 25 years. During the second half of this period the rate of inflation has been substantial and has accounted for much of the increase in nominal wages in this period; and to use that increase to project future wage increases is therefore to assume that inflation will continue, and continue to push up wages. Riverway argues that it is improper as a matter of law to take inflation into account in projecting lost future wages. Yet Riverway itself wants to take inflation into account—one-sidedly, to reduce the amount of the damages computed. For Riverway does not object to the economist's choice of an 8.5 percent discount rate for reducing Mrs. O'Shea's lost future wages to present value, although the rate includes an allowance—a very large allowance—for inflation.

To explain, the object of discounting lost future wages to present value is to give the plaintiff an amount of money which, invested safely, will grow to a sum equal to those wages. So if we thought that but for the accident Mrs. O'Shea would have earned \$7200 in 1990, and we were computing in 1980 (when this case was tried) her damages based on those lost

earnings, we would need to determine the sum of money that, invested safely for a period of 10 years, would grow to \$7200. Suppose that in 1980 the rate of interest on ultra-safe (i.e., federal government) bonds or notes maturing in 10 years was 12 percent. Then we would consult a table of present values to see what sum of money invested at 12 percent for 10 years would at the end of that time have grown to \$7200. The answer is \$ 2318. But a moment's reflection will show that to give Mrs. O'Shea \$2318 to compensate her for lost wages in 1990 would grossly under-compensate her. People demand 12 percent to lend money risklessly for 10 years because they expect their principal to have much less purchasing power when they get it back at the end of the time. In other words, when long-term interest rates are high, they are high in order to compensate lenders for the fact that they will be repaid in cheaper dollars. In periods when no inflation is anticipated, the risk-free interest rate is between one and three percent. See references in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 n.2 (2d Cir. 1980). Additional percentage points above that level reflect inflation anticipated over the life of the loan. But if there is inflation it will affect wages as well as prices. Therefore to give Mrs. O'Shea \$2318 today because that is the present value of \$7200 10 years hence, computed at a discount rate—12 percent—that consists mainly of an allowance for anticipated inflation, is in fact to give her less than she would have been earning then if she was earning \$7200 on the date of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation.

...

[I]t is illogical and indefensible to build inflation into the discount rate yet ignore it in calculating the lost future wages that are to be discounted. That results in systematic undercompensation, just as building inflation into the estimate of future lost earnings and then discounting using the real rate of interest would systematically overcompensate. The former error is committed, we respectfully suggest, by those circuits, notably the Fifth, that refuse to allow inflation to be used in projecting lost future earnings but then use a discount rate that has built into it a large allowance for inflation. See, e.g., *Culver v. Slater Boat Co.*, 644 F.2d 460, 464 (5th Cir. 1981) (using a 9.125 percent discount rate). We align ourselves instead with those circuits (a majority, see *Doca v. Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 35-36), notably the Second, that require that inflation be treated consistently in choosing a discount rate and in estimating the future lost wages to be discounted to present value using that rate. See *id.* at 36-39. . . .

[Plaintiff's economist] made no allowance for the fact that Mrs. O'Shea, whose health history quite apart from the accident is not outstanding, might very well not have survived—let alone survived and been working as a boat's cook or in an equivalent job—until the age of 70. The damage award is a sum certain, but the lost future wages to which that award is equated by means of the discount rate are mere probabilities. If the probability of her being employed as a boat's cook full time in 1990 was only 75 percent, for example, then her estimated wages in that year should have been multiplied by .75 to determine the value of the expectation that she lost as a result of the accident; and so with each of the other future years. Cf. *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 670 (2d Cir. 1960). The economist did not do this, and by failing to do this he overstated the loss due to the accident.

But Riverway does not make an issue of this aspect of the economist's analysis. . . .



Although we are not entirely satisfied with the economic analysis on which the judge, in the absence of any other evidence of the present value of Mrs. O'Shea's lost future wages, must have relied heavily, we recognize that the exactness which economic analysis rigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive. Therefore, we will not reverse an award of damages for lost wages because of questionable assumptions unless it yields an unreasonable result—especially when, as in the present case, the defendant does not offer any economic evidence himself and does not object to the questionable steps in the plaintiff's economic analysis. We cannot say the result here was unreasonable. . . .

Judgment affirmed.

### Notes

1. *Social insurance programs and torts.* Because of her injury, O'Shea may have been eligible for Social Security Disability Insurance (SSDI), a federal social insurance program that pays out monthly benefits to qualifying workers who meet the program's definition of disability. As Judge Posner noted, the standards for SSDI are significantly more demanding than those in a tort lawsuit ("The question is not whether Mrs. O'Shea is totally disabled in the sense, relevant to social security disability cases but not tort cases, that there is no job in the American economy for which she is medically fit." *O'Shea*, 677 F.2d at 1197.) Unlike tort damages, SSDI does not aim for full wage replacement; benefits are capped at a level significantly lower than median wages. There are a variety of other social insurance programs for which O'Shea might be eligible: she may be eligible for Medicaid health insurance based on her income and disability status; if she were a veteran, she could receive disability benefits even for injuries unrelated to her service; if she were sufficiently poor, she may qualify for Supplemental Security Income (SSI) or other need-based welfare programs. Should O'Shea's tort award be decreased if her injury allowed her to qualify for additional benefits?

As Kenneth Abraham and Lance Liebman noted, "[t]he United States does not have a system for compensating the victims of illness and injury; it has a set of different institutions that provide compensation. We rely on both tort law and giant programs of public and private insurance to compensate the victims of illness and injury. These institutions perform related functions, but the relationships among them are far from coherent. Indeed, the institutions sometimes work at cross-purposes, compensating some victims excessively and others not at all." Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 75 (1993).

2. *Workers' compensation and the displacement of tort.* If O'Shea had been injured on her employer's boat, her tort lawsuit would probably have been displaced by a worker's compensation statute. In almost every state, employees injured in the course of their employment are entitled to worker's compensation benefits, typically paid for by the employer, in return for which tort lawsuits by employees against their employers for workplace injuries are barred. (Texas's worker's compensation program is voluntary; employees of non-participating employers may bring tort lawsuits against their employer in the event of a workplace injury). Workers' compensation differs from tort damages in two primary ways.

First, workers' compensation is a *no fault* system—in order to collect, an employee only has to prove that the injury was workplace-related, not that the employer was negligent. Second, workers' compensation damages are not fully compensatory—rather, worker's compensation benefits typically only cover a fraction of lost income and do not allow nonpecuniary damages. In many states, benefits to cover lost income are typically capped at the median wage in the state; in some states, caps are even lower.

Does workers' compensation preserve the deterrent effect of the torts system? Most state tort systems have an experience-rating system for employers, so employers who have had more employees file claims pay higher premiums. In theory, this creates incentives for employers to lower their rating through improved safety programs. However, experience rating is also extremely expensive: it reproduces the adversarial litigation workers' compensation was meant to eliminate because it leads employers to resist claims in order to minimize their workers' compensation costs. See MICHAEL J. GRAETZ & JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 190-209 (1999). Some observers note that experience rating undermines the compensation goal because it “encourages motivated employers to attempt to prevent workers' compensation costs by reducing the filing of claims instead of the occurrence of injuries.” Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 *HOUS. L. REV.* 119, 127 (1994).

3. *The incidence of workers' compensation costs.* Before the rise of mandatory workers' compensation, evidence indicates that workers in jobs with a high likelihood of workplace injuries received a “risk premium” of higher wages. Those premiums levelled out with the introduction of mandatory workers' compensation. Workers' compensation essentially forces employers to pay their workers in not just wages, but also insurance. Do workers get paid less in wages because some of their compensation is in the form of insurance? Historical data indicates that workers bore the brunt of the incidence of workers' compensation costs through reduced wages. Price V. Fishback & Shawn Kantor, *Did Workers Gain from the Passage of Workers' Compensation Laws?* 110 *Q.J. ECON.* 713 (1995).

Workers' compensation laws do not preempt lawsuits against third parties, such as the tug-boat company that ferried O'Shea to work or the manufacturers of industrial equipment. If both the employer and the third party are at fault, they would have been held jointly and severally liable and thus shared the costs before the enactment of workers' compensation. Today, the third party often bears the entire cost because the claim against the employer is preempted. Is this a positive development? On the one hand, these third parties may be held liable out of proportion to their share of the fault; on the other hand, allowing third parties to bring employers into the litigation substantially undoes the quid pro quo of the workers' compensation deal in which the employer provides certain compensation regardless of fault in return for immunity from suit in tort.

4. *The collateral source rule.* If O'Shea had disability insurance, would that affect her tort award? Most likely not. The “collateral source rule” provides that the tort damages awarded to a plaintiff shall not be affected by payments from third parties, such as insurers, for those same injuries. *RESTATEMENT (SECOND) OF TORTS* § 920A(2). This rule means that, in theory, a plaintiff could receive compensation from their property insurance company for

damages to their house and receive compensation from the tortfeasor for those same damages. The collateral source rule makes sense from a deterrence perspective. But the rule is hard to understand if compensation is our goal. In a deterrence framework, the fact of a plaintiff's insurance is irrelevant to the proper incentives for the defendant's conduct. In a compensation framework, by contrast, a plaintiff who has already been made whole by an insurer will not need further compensation; at the very least, the high expenses of further compensation through tort are likely unjustified purely for compensation purposes.

Note that it is not always clear that the collateral source rule should be thought of as providing for double payment. On the one hand, the plaintiff may be recovering twice for the same damage, an apparent windfall. On the other hand, the plaintiff often has been paying insurance premiums for one payout; in such instances, the insurance payout is hardly a free windfall. Even if the collateral source rule allows double payment, is it necessary to preserve the deterrence effects of torts? Or, is it necessary to preserve incentives to purchase insurance? Many states have passed legislation restricting the collateral source rule in some form to restrict the potential double payment to plaintiffs, most often in the context of medical malpractice claims. David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, 28 CATO J. 83, 89 (2008). Why should defendants get the benefit a plaintiff's insurance arrangements? The case for the traditional collateral source rule is especially clear in the context of private insurance, where the plaintiff has paid premiums to be protected. But even with respect to public insurance mechanisms, why should a defendant be able to make a claim on the public tax resources that have gone towards paying for the plaintiff's insurance.

What pecuniary damages should be awarded to someone who has no history in the labor market by which to calculate lost wages? What assumptions should be made about her likely participation in the workforce? Keep in mind that the case below was decided in 1975, when different assumptions might have been made about the deceased's life plans.

5. *The taxation of tort awards.* The plaintiff's expert in *O'Shea* discounted her future earnings by reference to her expected federal income tax obligations. But as Judge Posner observed in a part of the *O'Shea* opinion not excerpted here, this was an error. There are a number of reasons courts decline to discount future earnings by income tax obligations. Judge Posner pointed out that because interest on the damages award is subject to taxation (even if the damage award is not), reducing the award by projected income taxes is a form of double taxation. In West Virginia, courts do not take into account income tax obligations because "income tax liability or saving is a matter not pertinent to the damages issue, being a matter between the plaintiff and the taxing authority." *Hicks ex rel. Saus v. Jones*, 217 W. Va. 107, 113, 617 S.E.2d 457, 463 (2005). The logic seems to be that defendants should pay the full cost of the damages they caused. How that payment is then divided between the state and the plaintiff is not the defendant's concern, but rather is up to the state. If states choose to adopt a tax regime friendly to tort plaintiffs, that policy decision should hardly benefit the defendants! Any other outcome is a tax break for tortfeasors.

Alaska holds that income taxes should not be deducted for a different reason—that "income tax laws and regulations are so subject to change in the future that we believe that a court cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for a defendant's tortious conduct." *Beaulieu v. Elliott*, 434 P.2d 665,

673 (Alaska 1967). This leads to the interesting consequence that the court should deduct “taxes on income earned prior to trial [which] can be easily calculated based on income tax laws and regulations as they existed at the time the wages would have been earned.” *Id.* Should defendants gain the benefit of a plaintiff’s likely future contributions to the public fisc?

***Feldman v. Allegheny Airlines*, 524 F.2d 384 (2d Cir. 1975)**

LASKER, J.

On June 7, 1971, an Allegheny Airlines flight crashed in fog while approaching New Haven Airport. Nancy Feldman, a passenger, died, in the crash. Allegheny conceded liability, and the parties submitted the issue of damages to Judge Blumenfeld of the United States District Court for the District of Connecticut. The airline appeals from Judge Blumenfeld’s judgment awarding \$444,056 to Reid Laurence Feldman, as administrator of the estate of his late wife.

Determination of damages in this diversity wrongful death action is governed by Connecticut law, specifically Conn. Gen. Stats. § 52-55, which measures recovery by the loss to the decedent of the value of her life rather than by the value of the estate she would have left had she lived a full life. . . . In accordance with Connecticut law, the judgment represented the sum of (1) the value of Mrs. Feldman’s lost earning capacity and (2) the destruction of her capacity to enjoy life’s non-remunerative activities, less (3) deductions for her necessary personal living expenses. No award was made for conscious pain and suffering before Mrs. Feldman’s death because the evidence on this point was too speculative, nor did the award include pre-judgment interest.

Damages in a wrongful death action must of necessity represent a crude monetary forecast of how the decedent’s life would have evolved. Prior to stating his specific findings, the district judge noted, and we agree, that “the whole problem of assessing damages for wrongful death . . . defies any precise mathematical computation,” citing *Floyd v. Fruit Industries, Inc.*, *supra*, 144 Conn. at 675, 136 A.2d at 927 (382 F. Supp. at 1282).

It is clear from Judge Blumenfeld’s remarkably detailed and precise analysis that he nevertheless made a prodigious effort to reduce the intangible elements of an award to measurable quantities. It is with reluctance, therefore, that we conclude that his determination of loss of earnings and personal living expenses must [be]remanded.

...

Nancy Feldman was 25 years old at the time of her death. From 1968 until shortly before the plane crash, she lived and worked in New Haven while her husband studied at Yale Law School. On Mr. Feldman’s graduation from law school in the spring of 1971 the Feldmans moved to Washington, D.C., where they intended to settle. At the time of her death, Mrs. Feldman had neither accepted nor formally applied for employment in Washington, although she had been accepted by George Washington Law School for admission in the Fall of 1971 and had made inquiries about the availability of employment.

...

In computing the value of Mrs. Feldman's lost earning capacity, the trial judge found that Mrs. Feldman's professional earnings in her first year of employment would have been \$15,040. and that with the exception of eight years during which she intended to raise a family and to work only part time, she would have continued in full employment for forty years until she retired at age 65. The judge further found that during the period in which she would be principally occupied in raising her family, Mrs. Feldman would have remained sufficiently in contact with her profession to maintain, but not increase, her earning ability. Pointing out that under Connecticut law damages are to be based on "the loss of earning capacity, not future earnings per se . . . ." (382 F. Supp. at 1282) (emphasis in original), the judge concluded that when a person such as Mrs. Feldman, who possesses significant earning capacity, chooses to forego remunerative employment in order to raise a family, she manifestly values child rearing as highly as work in her chosen profession and her loss of the opportunity to engage in child rearing "may thus fairly be measured by reference to the earning capacity possessed by the decedent" (382 F. Supp. at 1283). Applying this rationale, the trial judge made an award for the eight year period of \$17,044 per year, the salary which he computed Mrs. Feldman would have reached in the year preceding the first child-bearing year, but did not increase the amount during the period.

We believe the trial judge erred in automatically valuing Mrs. Feldman's loss for the child-bearing period at the level of her salary. As Judge Blumenfeld's opinion points out, the Connecticut cases distinguish clearly between loss of earning capacity and loss of capacity to carry on life's non-remunerative activities. As we read Connecticut law, where a decedent suffers both kinds of loss for the same period each must be valued independently in relation to the elements particular to it.

The court in *Floyd v. Fruit Industries, Inc.*, *supra*, equated "earning capacity" with "the capacity to carry on the particular activity of earning money." 144 Conn. at 671, 136 A.2d at 925. Here the evidence established, and the trial court found, that Mrs. Feldman would have worked only part-time while raising a family. In the circumstances, we believe that under the Connecticut rule the plaintiff is entitled to recover "loss of earnings" for the child raising years only to the extent that the court finds that Mrs. Feldman would actually have worked during those years. For example, if the court finds that she would have worked 25% of the time during that period, the plaintiff would properly be credited only with 25% of her salary for each of the eight years.

This conclusion is consistent with the other leading authority in Connecticut. In *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946), an award for "loss of future earnings" was denied in respect of a decedent who had been employed as a housekeeper, but who at the time of her death was a housewife with no intention of seeking outside employment. The court held that any award for wrongful death in such a case should be based not on the decedent's loss of earning capacity, but rather on her "loss of the enjoyment of life's activities." 132 Conn. at 470, 45 A.2d at 793. Consistently with the holding in *Chase*, we conclude that any award in relation to the portion of the child-raising period during which Mrs. Feldman would not have been working must be predicated on her "loss of the enjoyment of life's activities" rather than on loss of earnings, and on remand the district judge should reevaluate the elements accordingly.

We recognize that thus computed the total award for Mrs. Feldman's child-raising years may be similar to that already made, but conclude that the conceptual framework we have described is required by Connecticut's distinctive law of damages. . . .

The judgment is affirmed in part, reversed in part and remanded.

FRIENDLY, J., concurring.

. . .

I would . . . question the likelihood—indeed, the certainty as found by the court—that, despite her ability, determination and apparent good health, Mrs. Feldman would have worked full time for forty years until attaining age 65, except for the eight years she was expected to devote to the bearing and early rearing of two children. Apart from the danger of disabling illness, temporary or permanent, there would be many attractions to which the wife of a successful lawyer might yield: devoting herself to various types of community service, badly needed but unpaid, or to political activity; accompanying her husband on business trips—often these days to far-off foreign countries; making pleasure trips for periods and at times of the year inconsistent with the demands of her job; perhaps, as the years went on, simply taking time off for reflection and enjoyment. Granted that in an increasing number of professional households both spouses work full time until retirement age, in more they do not. Surely some discount can and should be applied to the recovery for these reasons. . . .

### *Note*

*Gender and tort damages.* Legal scholar Martha Chamallas offers a pointed critique of the logic of *Feldman*:

Gender and race have disappeared from the face of tort law. . . . But as in so many other areas of the law, formal equality on the face of the law of torts bears little connection to gender and race equity as measured by real-world standards. Most empirical studies indicate that women of all races and minority men continue to receive significantly lower damage awards than white men in personal injury and wrongful death suits.

Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998). Chamallas's calculations from a 1996 practitioners' guide to settlement and damages awards found that damages awards for male plaintiffs "were twenty-seven percent higher" than those for female plaintiffs. Similar studies in the 1980s by the Washington State Task Force on Gender and Justice in the Courts concluded that the average award in death cases involving a male decedent was \$332,166, as compared to \$214,923 in death cases with a female decedent. A *Washington Post* study estimated that damages for the future lost income of an average white 25-year-old man would exceed those of the average 25-year-old black woman by more than \$1 million. Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASH. POST, Oct. 25, 2016.

Chamallas also found that courts regularly rely on life expectancy tables that calculate so-called "work-life expectancy" (*i.e.*, expected work years remaining) on the basis of gender,

and sometimes also race—as we will see in the next case. “[L]oss of future earning capacity,” Chamallas writes, “is typically measured by estimating the number of years the plaintiff would have worked had she not been injured (work-life expectancy) and the amount the plaintiff would have earned each year, reduced to present value.” *Id.* In the U.S., white men typically have longer work-life expectancies than similarly aged men who are not white and also than similarly aged white and non-white women, in part because people in these latter categories are more likely to experience periods outside the paid labor market.

***McMillan v. City of New York***, 253 F.R.D. 247 (E.D.N.Y. 2008).

WEINSTEIN, J.

## I. Introduction

James McMillan, the claimant, was rendered a quadriplegic in the crash of a ferryboat operated negligently by the City of New York. He sued for pain, suffering and cost of necessary medical care.

A critical factor in determining claimant's damages is his estimated life expectancy. In a trial before the court and an advisory jury, statistical evidence was introduced suggesting that a spinal cord-injured “African–American” was likely to survive for fewer years than persons of other “races” with similar injuries. The parties characterized claimant as an “African–American.”

The question posed is whether such “racially” based statistics and other compilations may be relied upon to find a shorter life expectancy for a person characterized as an “African–American,” than for one in the general American population of mixed “ethnic” and “racial” backgrounds. The answer is “no.” “Racially” based life expectancy and related data may not be utilized to find a reduced life expectancy for a claimant in computing damages based on predictions of life expectancy. . . .

## II. Factual Unreliability of “Race”-Based Statistics

. . . Reliance on “race”-based statistics in estimating life expectancy of individuals for purposes of calculating damages is not scientifically acceptable in our current heterogeneous population. . . . “[R]ace” is largely a social construct inappropriate in assessing damages in a negligence suit.

### A. “Race” as Biological Fiction

Franz Boas, the great Columbia University Anthropologist, pointed out that “[e]very classification of mankind must be more or less artificial;” he exposed much of the false cant of “racial” homogeneity when he declared that “no racial group is genetically ‘pure.’” *Quoted in* Keay Davidson, *Franz Boas* in 3 American National Biography 83 (1999). . . .

An anthropologist who has written extensively on “race” and its evolution in American society notes:

Despite legal and social attempts to prohibit intermarriage or intermating, some genetic mixture still occurred. In response, the United States had to resort to a fiction to help preserve the distinctiveness of the White/Black racial (and social) dichotomy. North Americans define as Black anyone who has known African ancestors, a phenomenon known and introduced by historians over half a century ago as the “one drop rule”... There is mounting historical evidence that this modern ideology of race took on a life of its own in the latter half of the 19th century ... [a]s a paradigm for portraying the social reality of permanent inequality as something that was natural.

Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem is Real*, 60:1 Am. Psychologist 16, 20 (2005) (internal citations omitted). Professor Smedley finds that “[t]he ideology [of “race”] arose as a rationalization and justification for human slavery at a time when Western European societies were embracing philosophies promoting individual and human rights, liberty, democracy, justice, brotherhood, and equality.” Smedley, *supra*, at 22. . . .

Professor Smedley cautions against scientific investigations that focus on justifying the differences between “racial” groups:

Racialized science, with its emphasis on identifying immutable differences between racial groups, can be expected only to maintain and reinforce existing racial inequality, in that its adherents indirectly argue that no degree of government intervention or social change will alter the skills and abilities of different racial groups. The disproportionate representation of some “racial” groups (e.g., African Americans, American Indians) among lower socioeconomic tiers can therefore be explained as an unavoidable byproduct of human evolution. Yet reinforcing this widely held social stereotype of racial inferiority risks limiting individual human potential, in that individuals' abilities and opportunities would likely be assessed in relation to their racial group.

*Id.* at 24.

DNA technology finds little variation among “races” (humans are genetically 99.9% identical), and it is difficult to pinpoint any “racial identity” of an individual through his or her genes. *Id.* at 19. . . .

. . . [M]any policymakers and courts insist that [race] “remains a significant predictor of ... access to societal goods and resources.” *Id.* at 22. “Racial” and “ethnic” disparities in quality of health care, for example, remain substantial across a broad range of medical services. *Id.* at 23. But those “disparities are associated with socioeconomic differences and tend to diminish significantly and, in a few cases, to disappear altogether when socioeconomic factors are controlled.” *Id.* By allowing the use of “race”-based life expectancy tables, which are based on historical data, courts are essentially reinforcing the underlying social inequalities of our society rather than describing a significant biological difference.

## B. Unreliability of “Racial” Categories

In 1977, the Office of Management and Budget (OMB) issued Statistical Policy Directive Number 15, “Race and Ethnic Standards for Federal Statistics and Administrative Reporting.” The directive established four “racial” categories (“American Indian or Alaskan



Native,” “Asian or Pacific Islander,” “Black,” and “White”) for federal legislative, programmatic and administrative purposes. The OMB revised these standards in October of 1997, creating five groups instead of four by splitting “Asian” and “Native Hawaiian or Other Pacific Islander.” *Id.* The 2000 census also added a sixth “racial” set, “Some Other Race,” and allowed responders to choose more than one category. *Id.* . . . [D]emographic studies that use pre-2000 census data continue to define “race” by using the 1977 OMB directive.

Life expectancy tables are based on historical data and thus largely rely on the OMB's former archaic “racial” analysis. This means that the tables frequently employed by courts in determining tort damages fail to account for the nuanced reality of “racial” heritage in the United States today.

After hundreds of years of sexual mixings, there continues to be “no socially sanctioned in-between classification” of “race” in America. Smedley, *supra*, at 20. Even researchers investigating the differences between the life expectancies of “Black” and “White” Americans admit that the “presently available summary measures such as age-adjusted mortality and estimated life expectancy are crude” and “may mask special successes and/or problems for specific age categories/diseases or in specific local populations.” . . . Even if reliance on “race”-based statistical projections made factual sense in the United States, available statistics do not appear to account for what might be called “blood ratios,” in view of the American reality of long-term “racial” mixing.

### C. Socio-Economic Status and “Race”

. . .

The impact of socio-economic status (SES) on life expectancy has long been recognized. . . . More detailed investigations into the life expectancy gap between “White” and “Black” Americans have shown that life expectancy varies within “racial” groups by economic characteristics and geography. . . . In a national study of twenty-three local areas, researchers found that “African American residents of advantaged urban areas have substantially higher life expectancies than their poor urban counterparts; in some cases their life expectancies approach the white national average.” That study also found that “White residents of urban poor areas have mortality profiles comparable to those of black residents of poor rural areas and blacks nationwide,” and “somewhat worse than residents of relatively advantaged black urban areas.” In fact, “African-Americans” residing “in the advantaged population of New York City fare as well as whites nationwide.” . . .

. . .

[D]espite a documented gap in life expectancy between “Black” and “White” Americans, the simple characterization of individuals as “Black” or “White” is not only misleading, it risks masking the complex interactions between a host of genetic and socio-economic factors. While some researchers have suggested that higher socio-economic position may not impact “African-American” health as directly as other populations (due to stress-related diseases potentially linked to structural racism), this is not reason for courts to enforce the negative impacts of lower socio-economic status while ignoring the diversity within populations.

## D. Legal Decisions on “Race”

A 1905 decision by a federal court in New York relied on “race”-based statistics and “racial” categories in reducing damages in an admiralty case. *The Saginaw and The Hamilton*, 139 F. 906 (S.D.N.Y.1905); see Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 Rev. Litig. 37, 53–57 (2007) (discussing the case). Two steamships collided, resulting in the deaths of some passengers and crewmembers. Wrongful death actions were brought for six “Colored” and two “White” persons killed in the accident. Rejecting the use of standard mortality tables to predict the life expectancies of all the deceased, the court cited census data summarizing differences in “White” and “Colored” life expectancies in justifying its reduction of awards. At that time census respondents did not have the option of selecting more than one “race” to identify themselves. Professor Jennifer B. Wriggins found that “on average [the *Saginaw* court] lowered the awards for the deaths of blacks ten percent more than the awards for the deaths of whites and [the court] slashed three of the awards for blacks by forty percent or more.” Wriggins, *supra*, at 56.

It should be noted in assessing *The Saginaw* that the case was decided shortly after *Plessy [v. Ferguson, 163 U.S. 537 (1896)]*, approving “racial” segregation of “African–Americans.” *Plessy*’s “racial” basis was entirely rejected by *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *The Saginaw* has no precedential value.

### 1. Future Earnings

Courts are increasingly troubled by “race”- and gender-based figures for calculating loss of future income. The district court in *United States v. Bedonie* noted that “surprisingly the reported cases have almost completely neglected the question” of whether to use sex- and “race”-neutral statistics. 317 F.Supp.2d 1285, 1315 (D.Utah 2004), *aff’d sub nom, United States v. Serawop*, 505 F.3d 1112 (10th Cir.2007). After receiving an expert report (for restitution purposes) that reduced the estimate of lost income based on the fact that a victim was “Native American,” that court directed recalculation without regard to “race” or gender. . . .

One court refused to use “racial” statistics in calculating tort damages for loss of future income when the plaintiff was half “Black” and half “White.” *Wheeler Tarpeh–Doe v. United States*, 771 F.Supp. 427 (D.D.C.1991). . . . The court held it “inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages.” It used “the average earnings of all persons.” . . .

Canadian courts have refused to use gender-specific wage calculations in determining damages. See, e.g., *Walker v. Ritchie*, 119 A.C.W.S. (3d) (Ont.Sup.Ct. J. Jan. 3, 2003) (using statistical figures which reflected the entire population).

### 2. Work–Life Expectancy

In an action for damages by an injured seaman, the plaintiff presented statistics on work-life expectancy modified to exclude “race” as a factor; the defendant challenged the increased work-life expectancy that resulted. *Theodile v. Delmar Systems, Inc.*, 2007 WL 2491808 at \*8 (W.D.La.2007). The district court refused to upset the jury’s award in the “race”-

neutral amount suggested by plaintiff's expert. Another district court rejected an expert calculation that reduced a female tort victim's estimated working life by 40% based on a historical statistic about the number of years females average in the workforce. *Reilly v. United States*, 665 F.Supp. 976, 997 (D.R.I.1987), *aff'd*, 863 F.2d 149, 167 (1st Cir.1988).

In administering the September 11th Victim Compensation Fund, Special Master Kenneth R. Feinberg based estimations of remaining years of work-life on the victim's age, using statistics for the general population of active males in the United States for all claimants and ignoring "racial" differences.

### 3. Life Expectancy

In the context of Title VII, the Supreme Court noted that while "[a]ctuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex," Congress has outlawed classifications based on "race," national origin, and sex. *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 709, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). . . . "Racial" statistics present an especially strong argument for exclusion, since, as already noted, the question of "race" is ambiguous, whereas gender is generally conceded.

### III. Unconstitutionality of "Race" as a Criterion for Assessing Damages

[Judge Weinstein goes on to hold that "Equal protection in this context demands that the claimant not be subjected to a disadvantageous life expectancy estimate solely on the basis of a 'racial' classification" and that "[b]y allowing use of 'race'-based statistics at trial, a court would be creating arbitrary and irrational state action," in violation of the Due Process Clause.]

### IV. Application of Law to Facts

There is no factual basis for discriminating against this claimant by finding a reduced life expectancy based upon "race." That conclusion is particularly sound in the instant case where the damages awarded are designed to extend claimant's life by providing him with the best medical and other care . . . .

Constitutional normative doctrine also supports excluding "race"-based statistics. "[A]ny decision to use a group-based projection into the future as the basis for a damage remedy also involves normative judgments about the relevant frame of reference and the rate of future change." Wiggins, *supra*, at 56. The American reality reflects that "people do not fall naturally into discrete racial groupings" and "[l]egal classifications of race tend to be unrefined and often reflect ignorance of differences within a given category." Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, *supra*, at 113.

### V. Conclusion

Reliance on "race"-based statistics in estimating life expectancy for purposes of calculating damages in this case is rejected in computing life expectancy and damages.

## Notes

1. *Making Black Lives Matter in tort law.* As Judge Weinstein observes, America tort law relied on race- and gender-based actuarial tables for a century and more. Courts and legislatures have only recently begun to question their use. One of Judge Weinstein's most important arguments in *McMillan* is that race-based statistics are not reliable as a predictor of a person's future. *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008); *see also G.M.M. ex rel Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126 (E.D.N.Y. 2015) (Weinstein, J.) (holding that reliance on a child's Latinx ethnicity in calculating damages award violated both the 14th Amendment's due process clause, "because it creates arbitrary and irrational state action," and the Amendment's equal protection clause, "because it subjects the claimant to a 'disadvantageous estimate of damages 'solely on the basis' of ethnic classification"). If reliability is the main reason for rejecting the use of race, does that counsel in favor of leaving the resolution of the statistical dispute to the adversary process, allowing race to enter the picture when a party convinces the judge that it is reliable and foreclosing its use when a judge is not so convinced? Should courts insist that reproducing marketplace race discrimination in the courts through lower tort awards for lost income is wrong as a matter of law, even if it is predictive as a matter of statistical fact? Recall that although actuarial tables are in one sense only modeling tools and therefore only imperfectly capture the future for any particular plaintiff, they are constructed from social scientific data about the recent past and in that sense reflect actual inequalities in aggregate life chances. *Cf. G.M.M. ex rel Hernandez-Adams*, 116 F.Supp. 3d at 152 ("Race and ethnicity are not, *and* should not, be a determinant of individual achievement. . . . Using these statistics to calculate future economic loss reinforces the rigid racial and ethnic barriers that our society strives to abolish.").

The topic raises many practical questions. For starters, note that we could level up—or we could level down. Should, for example, white or male injury victims have their damages reduced by the arguably unjust increment over and above an average wage loss calculation that includes nonwhite or nonmale workers? Or should the awards to such individuals stay the same, but everyone else be given the benefit of the statistical tables used in their cases? Note that leveling up is not unprecedented: in administering the September 11th Victim Compensation Fund, discussed *infra*, Special Master Kenneth Feinberg, chose to use the work-life expectancy tables for men to measure damages for all claimants. Martha Chamallas, *The September 11<sup>th</sup> Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 71 (2003). If you support leveling up or leveling down, what do you find to be the most compelling rationale? Redistribution? Correcting past injustice? Achieving greater accuracy?

More fundamentally, why is the use of race-based and gender-based actuarial calculations still permitted anywhere, three quarters of a century after the civil rights era? In a Utah case striking down the use of race-based damages, "[the plaintiff's expert witness], who has performed thousands of lost income analyses, testified that no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases, although he has used sex-neutral calculations in pension cases." *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1314 (D. Utah 2004). Moreover, Professors Ronen Avraham and Kimberly Yuracko noted in 2017 that while most tort reform statutes, such as caps on non-economic damages, are challenged in state court for a variety of reasons, there appears not to be even a single attempt to strike down as unconstitutional state damages statutes or pattern jury instructions adopting statistical models that include race- and gender-based variables. Ronen Avraham & Kimberly Yuracko,

*Torts and Discrimination* 78 OHIO L. REV. 661 (2017); *see also* Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018). Note that other compensation programs incorporating race- and gender-based variables were struck down in the 1970s. *See, e.g., City of Los Angeles v. Marnhart*, 435 U.S. 702 (1978) (striking down employment policies requiring women to contribute more to pension plans because of their longer average life expectancy). Chamallas suggests that personal injury lawyers simply haven't thought about the question because, to them, it is a civil rights issue rather than a personal injury issue. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005). Is that a plausible explanation? What are other plausible explanations? Building on Chamallas's insights, Helen White suggests that one logical place to begin rethinking the role of race in damage calculations is in torts cases that *do* clearly implicate violations of civil rights, as when plaintiffs seek money damages against state actors for violating their constitutional rights. Helen E. White, Note, *Making Black Lives Matter: Properly Valuing the Rights of the Marginalized in Constitutional Torts*, 128 YALE L.J. 1742 (2019).

2. *Legislative reform.* California, often a leader in reforming tort law, has now formally addressed the use of race- and gender-based actuarial tables. Nora Freeman Engstrom & Robert L. Rabin, *California Bars the Calculation of Tort Damages Based on Race, Gender and Ethnicity*, SLS Blogs: Legal Aggregate (Nov. 13, 2019), <https://perma.cc/RR45-6Z2Z>. On July 31, 2019, Governor Gavin Newsom signed into law Senate Bill No. 41, which prohibits “the estimation, measure, or calculation of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender.” S.B. 41, 2019-2020 Leg., Reg. Sess. (Cal. 2019). The law states that, historically, such reductions have “perpetuate[d] systemic inequalities,” magnifying the significance of “gender pay gaps and workforce discrimination” and “disproportionately injur[ing] women and minority individuals.” *Id.* at Section 1(e)-(f). What effects do you expect this law to have on the landscape of tort law in California? To the extent that the law seeks to address structural inequality, does it go far enough? Note that the legislation's careful language states only that damages may not be *reduced* based on these characteristics. This feature of the legislation reflects the fact that in many instances – especially in cases involving women who have longer life expectancies than men – such characteristics work to the advantage of the plaintiff. *See* Nora Freeman Engstrom & Robert L. Rabin, *California Bars the Calculation of Tort Damages Based on Race, Gender and Ethnicity*, SLS Blogs: Legal Aggregate (Nov. 13, 2019), <https://perma.cc/RR45-6Z2Z>.

Are there other types of bias that might unfairly affect damage calculations and should be addressed legislatively? Note that in 2016, U.S. senators Cory Booker and Kirsten Gillibrand and representatives Joe Kennedy III and Mia Love proposed federal legislation that would prohibit any “court of the United States” from “award[ing] damages to a plaintiff in a civil action using a calculation for the projected future earning potential of that plaintiff that takes into account the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff.” Fair Calculations in Civil Damages Act of 2016, H. R. 6417, 114th Cong. (2016), *available at* <https://perma.cc/4H7QRWDX>. Congress did not enact the legislation during that session, but the bill was reintroduced in 2019. *See* Fair Calculations in Civil Damages Act of 2019, H.R. 4418, 116th Cong. (2019), *available at* <https://perma.cc/G9UN-WZ7Q>; Fair Calculations in Civil Damages Act of 2019, S. 2512, 116th Cong. (2019),

available at <https://perma.cc/W4LV-DG34>; Fair Calculations in Civil Damages Act of 2022, H.R. 6758, 117th Cong. (2022), available at <https://perma.cc/T33C-KVVD>. The bill had not been enacted into law as of the date of this writing.

3. *A slippery slope to average?* One possible outgrowth of the reforms discussed in Note 2 is simply less tailoring of damage awards. The less tailored a statistical analysis is to the particular circumstances of a particular plaintiff, the less damages determinations will be individualized, and the more they begin to reflect the outcome of an injury to a hypothetical average person. Which litigants are likely to favor this approach? Which litigants are likely to resist it? In the race area, should we expect to see litigants finding other ways to individualize, based on other predictive variables? Will we see factors like residential zip code assume a new role in damage calculations? See *Bedonie, supra* (disallowing the use of zip codes because of the strong correlation with race in that case). Such questions run into the uncomfortable truth that many factors outside a plaintiff's control—factors other than the ones listed in most proposed reform legislation—powerfully affect things such as life expectancy and therefore might powerfully shape tort damages awards. Where such factors have predictive power, is it wrong to take them into account? If one of the foundational ideals of tort law is to make the plaintiff “whole,” the damages inquiry *should* be specific to the plaintiff, including all the plaintiff's statistically relevant characteristics. But that obviously means reproducing all sorts of social unfairness. Can you imagine an approach to calculating damages that would honor tort law's commitment to corrective justice while also recognizing the injustice inherent in existing distributions of life chances? Professor Catherine Sharkey argues that in calculating damage awards in wrongful death cases, courts should follow the federal agency practice of basing calculations on a uniform VSL (value of a statistical life). Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages*, 96 NOTRE DAME L. REV. 1479 (2021).

4. *NFL Head Injury Settlement.* Beginning in 2011, players and former players sued the National Football League for failing to take reasonable steps to protect them from the risk of head injuries in football. In 2017, the NFL settled with some 5,000 players for approximately \$765 million in an arrangement that set up claims procedures to calculate the compensation owed to particular players. See *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 436-43 (3d Cir. 2016). The claims process employed standard neuropsychological examinations of claimants for measuring neuropsychological injury. But those standard examination methods turned out to include race-specific baselines that reduced the calculated loss of function for Black players as compared to players of other races. In 2021, the NFL agreed in a second settlement to stop employing the so-called “race-normed” examinations. See Andrew Beaton & Louise Radnofsky, *How the NFL's Concussion Settlement Changed the Debate About Race-Norming in Medicine*, WALL STREET J., Nov. 11, 2021.

5. *Market inequalities, tort inequalities.* Inequities in damages based on expected future earnings are not only gender- or race-based phenomena, of course. They are also a class phenomenon. This became painfully clear in the lawsuits following the terrorist attacks of September 11, 2001. One reporter recounted the claims that families contemplated:

[A] lawyer, Alan L. Fuchsberg, was estimating the value of a case involving another man who died on Sept. 11. He was 42 and earned \$54,000 as a clerk in a financial firm in the World Trade Center. Mr. Fuchsberg said the clerk's case might bring a substantial award for pain and suffering. The office he worked for was on the 90th floor of the second tower to be hit, where there were announcements encouraging people to return to their desks while the first tower burned.

The clerk, Mr. Fuchsberg said, would have had plenty of time to understand his circumstances. "Obviously," the lawyer said, "it got very smoky and hot and unbearable." But Mr. Fuchsberg said he told the clerk's father to expect a comparatively small award for economic damages, especially if it was difficult to prove that the clerk, who was single, provided substantial support to his aging parents. Mr. Fuchsberg said some claims for single people with no dependents could be worth as little as \$100,000.

The clerk's father, who asked not to be named, said he was stunned to learn the role a person's income played in lawyers' math. "The value of a life is certainly not determined based on earnings," he said, his voice breaking. "We're talking about my son."

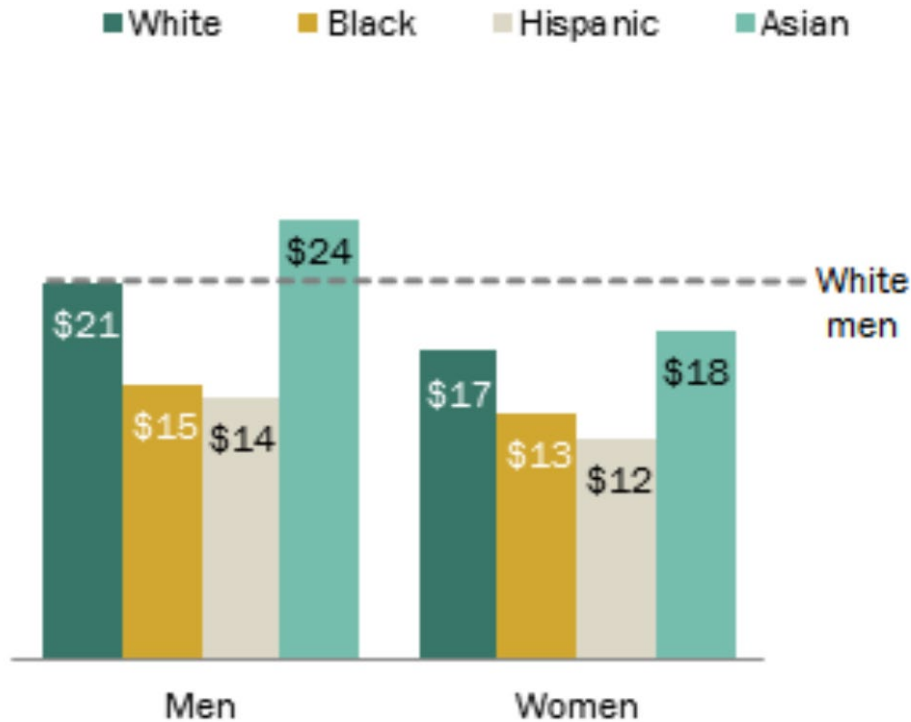
William Glaberson, *Lawyer Math in Sept. 11 Deaths Shows Varying Values for a Life*, N.Y. TIMES, Nov. 11, 2001.

6. *Wages versus wealth.* Of course the income-tracking effect of tort damages does not perfectly reflect *wealth* per se: it reflects *income*. Tort damages doctrine treats people with high income and low wealth, for example, very differently from people with low income and high wealth. A retired person with no wages but significant retirement savings will often receive little in pecuniary damages if she suffers no lost income. At the same time, a working person with high wages but no savings will receive a significantly higher award. The assets of the retiree would not be taken into account, because those assets would still be available to the plaintiff or the plaintiff's estate after the tort. In practice, wealth and income are extremely correlated. Low-income households are unlikely to have significant net worth and most low-wealth households do not have high incomes. See CONGRESSIONAL RESEARCH SERVICE, AN ANALYSIS OF THE DISTRIBUTION OF WEALTH ACROSS HOUSEHOLDS, 1989-2010 (2012).

7. *Wage differentials.* The Pew Foundation has produced the following chart depicting wage differentials by race and gender. What does it mean for tort damages?

## White men had higher hourly earnings than all except Asian men in 2015

*Median hourly earnings of men and women from each race/ethnicity*



Source: Pew Research Center, <https://perma.cc/8NFQ-LR3N>

### 2. *Nonpecuniary Damages*

Nonpecuniary damages, or what trial lawyers call “general damages,” consist of those damages that have no specific economic measure. The principal item of nonpecuniary damages consists of pain and suffering. The principal theoretical problem is to translate pain and suffering into dollars.

#### *The Rise of Pain and Suffering*

Nonpecuniary damages pose a great puzzle in American tort practice. Pain and suffering damages have been awarded in tort cases since the dawn of the modern common law. The doctrine has been remarkably stable. Yet the practice of nonpecuniary damages has changed radically. Where once they played a modest role in personal injury litigation, now they loom large and the dollar figures can be substantial. The result has been increased caution



from parts of the bar and bench about the advisability of unconstrained nonpecuniary damage awards.

One question is how nonpecuniary damages became such an important part of tort practice if the doctrine changed virtually not at all? One account looks to the influence of the plaintiffs' bar as a shaper of modern tort practice in the United States. As this author wrote in a book chapter on the subject, pain and suffering damages were a modest part of the law in the nineteenth century. A key factor in making pain and suffering damages a much bigger part of American tort law was the organization and mobilization of the trial lawyers into a lobbying and trade association to be reckoned with. No one played a bigger role in the creation of the modern trial bar than a flamboyant and energetic lawyer in post-war California named Melvin Belli:

The King of Torts, as *Life Magazine* dubbed him in 1954, was a man of scarlet silk-lined suits, of multi-colored Rolls Royces, of courtroom theatrics and Hollywood hijinks. . . . Belli's campaign began in 1951, when he published a long article in the law review of his alma mater, the law school at the University of California, Berkeley. The article, titled "The Adequate Award," aimed to raise the value of personal injury cases. Professional baseball players earned \$100,000 for a season's work. Racehorses fetched \$300,000 on the market. Art and fine violins sold for hundreds of thousands. And yet, Belli contended, the value of personal injury awards lagged behind the increasing cost of everything from haircuts to housing.

Front and center in Belli's efforts were pain and suffering damages. . . . Damages for intangible injuries such as pain and suffering, Belli observed, "depend upon counsel's imagination." Their value turned on the "vividness" of the trial lawyer's portrayal of the pain of his client. By using the courtroom for the theatrical reconstruction of the pain and suffering of the victim, the trial lawyer could push the value of pain ever upward. . . .

Belli . . . instruct[ed] his audiences in an elaborate taxonomy of kinds and types of pain their clients might be suffering. He distinguished "physical pain and suffering" from "mental pain and suffering," which in turn he distinguished from "embarrassment, ridicule, and humiliation," each of which he insisted could be an independent basis for intangible damages without an impermissible double counting. Belli became an ersatz expert in the budding science of pain measurement, and encouraged his peers at the bar to do the same. He painstakingly described "the pathways of pain," which he likened to an elaborate telephone system managed by a central operator's station in the thalamus.

In the decade after Belli and the Association of Trial Lawyers of America transformed the practice of personal injury law, the size of damages awards for pain and suffering injuries increased dramatically. Belli himself reported the new trends in . . . the massive, multi-volume *Modern Damages*, published with pocket part updates to keep plaintiffs' lawyers around the country informed on the latest damage verdicts and settlements.

John Fabian Witt, *The Political Economy of Pain*, in *MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON* 235 (Daniel J. Hulsebosch & R.B. Bernstein eds., 2013).

The performance of the trial bar in the courtroom cannot be the complete story of the rise of nonpecuniary damages for pain and suffering, of course. For we know that trials are a rare event in personal injury law. They are virtually endangered today, but they were rarities even a half century ago when the trial bar was coming into its own. Alongside a trial practice, as the next excerpt suggests, came a concerted effort to turn the pain and suffering component of tort damages into a more important part of torts settlements. Most of all, this required that the plaintiffs' side of the tort dispute process have access to the same kinds of economies of scale and information that the defense had been able to access:

Belli and the fledgling ATLA worked to replicate on the plaintiffs' side the defense-side systems of claims administration that had long minimized the costs of claims resolutions for insurers, railroads, and other repeat players. Increasingly sophisticated referral networks arose within the plaintiffs' bar, for example, that allowed nonspecialists to send cases along to specialists while retaining a share of the fee. At the same time, plaintiffs'-side law firms grew and chose to specialize rather than diversify their practices. The result was a sharply increased concentration of claims in the hands of a small number of specialist plaintiffs' firms. . . .

Specialist claims administrators on both sides developed an array of shortcuts and bargaining conventions for the streamlined, stereotyped resolution of the claims that entered the system. Where the common law entailed cumbersome and slow inquiries into the facts of a particular case, private administrative schemes operated by plaintiffs' lawyers and insurance company claims adjusters aimed to produce . . . "a collectively satisfactory return" on the run of the claims they resolved. . . .

Perhaps the most important shortcuts of all were the ones developed to arrive at claims values. In the American law of torts, the damages to be awarded in any given case were (as they remain in the early twenty-first century) enormously open ended. What, after all, was an arm, or a leg, or a bad back worth? Economic loss might be measured with relatively concrete measures such as wage loss and medical bills . . . . But with respect to open-ended injuries such as pain and suffering, the common law provided virtually no guidance to judges and juries or to the lawyers and claims adjusters who sought to settle such cases in the shadow of the law.

And so claims adjusters and plaintiffs' lawyers alike employed "yardsticks" or bargaining conventions of one sort or another to arrive at damages determinations. The "three times three" rule (in which pain and suffering damages equaled three times a plaintiff's economic damages) governed in some jurisdictions and among some adjusters and lawyers. Elsewhere, plaintiffs' lawyers followed the complex "Sindell Formula," created by NACCA lawyers at the Cleveland firm of Sindell & Sindell. Chicago lawyers who in the 1950s and 1960s created formal tables for the valuation of back and neck injuries, tables they continuously revised by reference to jury verdicts in

the relevant area. . . .

JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (2007). Belli's three-volume compilation, *Modern Damages*, collected damages awards and settlement values for every conceivable kind of injury. Plaintiffs' lawyers called it "a Golconda of information, comparable to Bowditch's Practical Navigator," a veritable "vade mecum" for the plaintiffs' bar. Belli provided the plaintiffs' bar with the same kinds of settlement value information that their insurance company counterparts had long enjoyed. In the process, the plaintiffs' bar grew to be able to compete with their defense counterparts like never before.

Of course, trial lawyers alone did not transform pain and suffering damages. A long history of institutional transformations and changes in public attitudes lay the groundwork for the trial lawyers' successes:

The history of accident law in the twentieth and twenty-first centuries is the story of dynamic interaction between systemic reformers, on the one hand, and interest groups, on the other. Beginning a century ago, we see a series of attempts to bring order and bureaucratic rationality to the tangled skein of the common law. Workmen's compensation was the first such systematic effort at reform. It was also far and away the most important effort, though it was followed by further reform proposals for automobile accidents as well as niche programs for childhood vaccines, black lung, and nuclear disasters.

Across the middle two-thirds of the twentieth century, however, interest groups from at least two sides eroded the value of the rationalizing reforms. On one side, employers' lobbies systematically destroyed the value of workmen's compensation benefits. Only in the 1970s would legislative readjustment of benefit rates and the indexing of benefit rates for inflation solve what by then had become an acute crisis.

From the other side—and often at precisely the same time—trial lawyers worked to rehabilitate the common law and the courts in the modern state and to increase tort liability by leaps and bounds.

Witt, *Political Economy of Pain*, *supra*. Reforms such as workers' compensation statutes and social security seem to have fostered a new way of thinking about harms and injuries that legal scholar Lawrence Friedman has memorably called "total justice": a social sentiment that the legal system ought to annul injuries. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1994). These social sentiments, in turn, allowed plaintiffs' lawyers to transform pain and suffering from a sleepy corner of the law into one of the most hotly controversial areas of American legal practice.

Significantly, the twentieth-century transformation in pain and suffering damages took place largely out of sight. There were few legislative debates, no landmark judicial decisions. And partly as a result, the growth of pain and suffering damages produced a backlash in the last quarter of the twentieth century, one that helped fuel the so-called tort reform movement, which has aimed for nearly forty years now to roll back the expansions of tort liability and damages that took place in the middle third of the twentieth century. We will return to the

efforts of the tort reform movement later on in this section. But for now, consider the following case, which came after the rise of modern pain and suffering damages was largely complete:

***McDougald v. Garber*, 73 N.Y.2d 246 (1989)**

WACHTLER, C.J.

This appeal raises fundamental questions about the nature and role of nonpecuniary damages in personal injury litigation. By nonpecuniary damages, we mean those damages awarded to compensate an injured person for the physical and emotional consequences of the injury, such as pain and suffering and the loss of the ability to engage in certain activities. Pecuniary damages, on the other hand, compensate the victim for the economic consequences of the injury, such as medical expenses, lost earnings and the cost of custodial care.

The specific questions raised here deal with the assessment of nonpecuniary damages and are (1) whether some degree of cognitive awareness is a prerequisite to recovery for loss of enjoyment of life and (2) whether a jury should be instructed to consider and award damages for loss of enjoyment of life separately from damages for pain and suffering. We answer the first question in the affirmative and the second question in the negative.

I.

On September 7, 1978, plaintiff Emma McDougald, then 31 years old, underwent a Caesarean section and tubal ligation at New York Infirmary. Defendant Garber performed the surgery; defendants Armengol and Kulkarni provided anesthesia. During the surgery, Mrs. McDougald suffered oxygen deprivation which resulted in severe brain damage and left her in a permanent comatose condition. This action was brought by Mrs. McDougald and her husband, suing derivatively, alleging that the injuries were caused by the defendants' acts of malpractice.

A jury found all defendants liable and awarded Emma McDougald a total of \$9,650,102 in damages, including \$1,000,000 for conscious pain and suffering and a separate award of \$3,500,000 for loss of the pleasures and pursuits of life. The balance of the damages awarded to her were for pecuniary damages—lost earnings and the cost of custodial and nursing care. . . . [T]he Appellate Division affirmed and later granted defendants leave to appeal to this court.

II.

We note at the outset that the defendants' liability for Emma McDougald's injuries is unchallenged here. . . . What remains in dispute, primarily, is the award to Emma McDougald for nonpecuniary damages. At trial, defendants sought to show that Mrs. McDougald's injuries were so severe that she was incapable of either experiencing pain or appreciating her condition. Plaintiffs, on the other hand, introduced proof that Mrs. McDougald responded to certain stimuli to a sufficient extent to indicate that she was aware of her circumstances. Thus, the extent of Mrs. McDougald's cognitive abilities, if any, was sharply disputed.

The parties and the trial court agreed that Mrs. McDougald could not recover for pain and suffering unless she were conscious of the pain. Defendants maintained that such

consciousness was also required to support an award for loss of enjoyment of life. The court, however, accepted plaintiffs' view that loss of enjoyment of life was compensable without regard to whether the plaintiff was aware of the loss. Accordingly, because the level of Mrs. McDougald's cognitive abilities was in dispute, the court instructed the jury to consider loss of enjoyment of life as an element of nonpecuniary damages separate from pain and suffering. The court's charge to the jury on these points was as follows:

If you conclude that Emma McDougald is so neurologically impaired that she is totally incapable of experiencing any unpleasant or painful sensation, then, obviously, she cannot be awarded damages for conscious pain . . . . [F]or an injured person to experience suffering, there, again, must be some level of awareness. . . .

Damages for the loss of the pleasures and pursuits of life, however, require no awareness of the loss on the part of the injured person. . . . It is possible . . . for an injured person to lose the enjoyment of life without experiencing any conscious pain and suffering. Damages for this item of injury relate not to what Emma McDougald is aware of, but rather to what she has lost. . . .

We conclude that the court erred, both in instructing the jury that Mrs. McDougald's awareness was irrelevant to their consideration of damages for loss of enjoyment of life and in directing the jury to consider that aspect of damages separately from pain and suffering.

### III.

We begin with the familiar proposition that an award of damages to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer. The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred. To be sure, placing the burden of compensation on the negligent party also serves as a deterrent, but purely punitive damages—that is, those which have no compensatory purpose—are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence.

Damages for nonpecuniary losses are, of course, among those that can be awarded as compensation to the victim. This aspect of damages, however, stands on less certain ground than does an award for pecuniary damages. An economic loss can be compensated in kind by an economic gain; but recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on “the legal fiction that money damages can compensate for a victim's injury.” . . . We accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace for the condition created.

Our willingness to indulge this fiction comes to an end, however, when it ceases to serve the compensatory goals of tort recovery. When that limit is met, further indulgence can only result in assessing damages that are punitive. The question posed by this case, then, is whether an award of damages for loss of enjoyment of life to a person whose injuries preclude any awareness of the loss serves a compensatory purpose. We conclude that it does not.

Simply put, an award of money damages in such circumstances has no meaning or utility to the injured person. An award for the loss of enjoyment of life “cannot provide [such a victim] with any consolation or ease any burden resting on him . . . . He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away” (*Flannery v. United States*, 4th Cir. 718 F.2d 108, 111).

We recognize that, as the trial court noted, requiring some cognitive awareness as a prerequisite to recovery for loss of enjoyment of life will result in some cases “in the paradoxical situation that the greater the degree of brain injury inflicted by a negligent defendant, the smaller the award the plaintiff can recover in general damages.” The force of this argument, however—the temptation to achieve a balance between injury and damages—has nothing to do with meaningful compensation for the victim. Instead, the temptation is rooted in a desire to punish the defendant in proportion to the harm inflicted. However relevant such retributive symmetry may be in the criminal law, it has no place in the law of civil damages, at least in the absence of culpability beyond mere negligence.

Accordingly, we conclude that cognitive awareness is a prerequisite to recovery for loss of enjoyment of life. We do not go so far, however, as to require the fact finder to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated. With respect to pain and suffering, the trial court charged simply that there must be “some level of awareness” in order for plaintiff to recover. We think that this is an appropriate standard for all aspects of nonpecuniary loss. No doubt the standard ignores analytically relevant levels of cognition, but we resist the desire for analytical purity in favor of simplicity. A more complex instruction might give the appearance of greater precision but, given the limits of our understanding of the human mind, it would in reality lead only to greater speculation.

We turn next to the question whether loss of enjoyment of life should be considered a category of damages separate from pain and suffering.

#### IV.

There is no dispute here that the fact finder may, in assessing nonpecuniary damages, consider the effect of the injuries on the plaintiff’s capacity to lead a normal life. Traditionally, in this State and elsewhere, this aspect of suffering has not been treated as a separate category of damages; instead, the plaintiff’s inability to enjoy life to its fullest has been considered one type of suffering to be factored into a general award for nonpecuniary damages, commonly known as pain and suffering.

Recently, however, there has been an attempt to segregate the suffering associated with physical pain from the mental anguish that stems from the inability to engage in certain activities, and to have juries provide a separate award for each (see generally, Annotation, Damages Element—Loss of Enjoyment of Life, 34 ALR4th 293; Comment, Loss of Enjoyment of Life as a Separate Element of Damages, 12 Pac LJ 965 [1981]; Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 North Dakota L Rev 561 [1987]).

Some courts have resisted the effort, primarily on the ground that duplicative and therefore excessive awards would result. Other courts have allowed separate awards, noting

that the types of suffering involved are analytically distinguishable. Still other courts have questioned the propriety of the practice but held that, in the particular case, separate awards did not constitute reversible error.

In this State, the only appellate decisions to address the question are the decision of the Appellate Division, First Department, now under review (135 AD2d 80, *supra*), and the decision of the Second Department in *Nussbaum v Gibstein* (138 AD2d 193, *revd* 73 NY2d 912 [decided today]). Those courts were persuaded that the distinctions between the two types of mental anguish justified separate awards and that the potential for duplicative awards could be mitigated by carefully drafted jury instructions. In addition, the courts opined that separate awards would facilitate appellate review concerning the excessiveness of the total damage award.

We do not dispute that distinctions can be found or created between the concepts of pain and suffering and loss of enjoyment of life. If the term “suffering” is limited to the emotional response to the sensation of pain, then the emotional response caused by the limitation of life’s activities may be considered qualitatively different (see, Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac LJ 965, 969-973). But suffering need not be so limited—it can easily encompass the frustration and anguish caused by the inability to participate in activities that once brought pleasure. Traditionally, by treating loss of enjoyment of life as a permissible factor in assessing pain and suffering, courts have given the term this broad meaning.

If we are to depart from this traditional approach and approve a separate award for loss of enjoyment of life, it must be on the basis that such an approach will yield a more accurate evaluation of the compensation due to the plaintiff. We have no doubt that, in general, the total award for nonpecuniary damages would increase if we adopted the rule. That separate awards are advocated by plaintiffs and resisted by defendants is sufficient evidence that larger awards are at stake here. But a larger award does not by itself indicate that the goal of compensation has been better served.

The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application. Translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction. The figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, the distortion will be amplified by repetition.

Thus, we are not persuaded that any salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life. We are confident, furthermore, that the trial advocate’s art is a sufficient guarantee that none of the plaintiff’s losses will be ignored by the jury.

The errors in the instructions given to the jury require a new trial on the issue of nonpecuniary damages to be awarded to plaintiff Emma McDougald. Defendants' remaining contentions are either without merit, beyond the scope of our review or are rendered academic by our disposition of the case.\*

Accordingly, the order of the Appellate Division, insofar as appealed from, should be modified, with costs to defendants, by granting a new trial on the issue of nonpecuniary damages of plaintiff Emma McDougald, and as so modified, affirmed.

TITONE, J., dissenting

... I can find no fault with the trial court's instruction authorizing separate awards and permitting an award for "loss of enjoyment of life" even in the absence of any awareness of that loss on the part of the injured plaintiff. Accordingly, I dissent.

It is elementary that the purpose of awarding tort damages is to compensate the wronged party for the actual loss he or she has sustained. Personal injury damages are awarded "to restore the injured person to the state of health he had prior to his injuries because that is the only way the law knows how to recompense one for personal injuries suffered." Thus, this court has held that "[t]he person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act."

The capacity to enjoy life—by watching one's children grow, participating in recreational activities, and drinking in the many other pleasures that life has to offer—is unquestionably an attribute of an ordinary healthy individual. [T]he destruction of an individual's capacity to enjoy life as a result of a crippling injury is an objective fact that does not differ in principle from the permanent loss of an eye or limb. As in the case of a lost limb, an essential characteristic of a healthy human life has been wrongfully taken, and, consequently, the injured party is entitled to a monetary award as a substitute, if, as the majority asserts, the goal of tort compensation is "to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred."

Significantly, this equation does not suggest a need to establish the injured's awareness of the loss. The victim's ability to comprehend the degree to which his or her life has been impaired is irrelevant, since, unlike "conscious pain and suffering," the impairment exists independent of the victim's ability to apprehend it.

### Notes

1. *Hedonic Adaptation*. Some argue that damages for loss of enjoyment of life should reflect the scientific literature on what is called "hedonic adaptation." In a classic 1978 article, psychologists Philip Brickman, Dan Coates, and Ronnie Janoff-Bulman examined whether

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\* We note especially the argument raised by several defendants that plaintiffs' attorney was precluded by CPLR 3017(c) from mentioning, in his summation, specific dollar amounts that could be awarded for nonpecuniary damages. We do not resolve this issue, which has divided the lower courts, inasmuch as the matter was neither presented to nor addressed by the Appellate Division.



life-changing events (either for good or for ill) altered people's happiness by studying lottery winners and persons with paraplegia (paralysis of the legs and lower body). Philip Brickman, Dan Coates & Ronnie Janoff-Bulmann, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978). The lottery winners, although experiencing elation upon winning, appeared afterward to have returned to a level of happiness not substantially different from that of a control group of non-lottery winners. Likewise, the persons with paraplegia, although unhappy upon becoming partially paralyzed, appeared to have adapted to a much greater extent than might be expected by outside observers since they were, on the whole, not substantially less happy than a control group of persons without paraplegia. For decades, psychologists accepted the Brickman study to mean, generally, that a person can bounce back to full levels of happiness and well-being even after extreme events, including accidents causing serious, disabling injury. These findings gradually developed into a concept known as "hedonic adaptation," which refers to processes that "attenuate the long-term emotional or hedonic impact of favorable and unfavorable circumstances." Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302, 302 (Daniel Kahneman, Ed Diener & Norbert Schwartz eds., 1999). With this concept in mind, and drawing on insights from the disability rights movement, Professors Samuel Bagenstos and Margo Schlanger propose that tort damages for the loss of enjoyment of life based on disability be eliminated. Their concern is less about over-compensation and more about message-sending: "When courts award damages based on the (non-disabled person's) view that disability is tragic, they distract attention from the societal choices and stigmas that attach disadvantage to disability; they also make it harder for people with disabilities to make hedonic adjustments to their conditions." Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 750 (2007); see also Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 731-37 (2011) (describing tort law's influence on perceptions of disability). Might the damages phase of tort litigation present an opportunity to re-"frame" disability, to borrow Professor Elizabeth Emens's phrase, encouraging more respectful treatment of disabled people and a more realistic and positive understanding of what it means to be disabled? Elizabeth A. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1381 (2012). Does it matter that this particular re-framing seems to involve taking money away from people with disabilities?

Doubts have surfaced in the psychology literature, however, about the extent to which Brickman's study serves as evidence of hedonic adaptation. A 2006 article pointed out that the Brickman study actually reveals modest but significant differences between the happiness levels of persons with paraplegia and persons without. See Ed Diener, Richard E. Lucas & Christie N. Scollon, *Beyond the Hedonic Treadmill: Revising the Adaptation Theory of Well-Being*, 61 AM. PSYCHOL. 305 (2006). Similarly, newer studies of persons with paraplegia and other groups with disabilities suggest that, although these groups are not as unhappy as typical observers seem to expect, disability does have a significant negative impact on their happiness levels. See Richard E. Lucas, *Adaptation and the Set-Point Model of Subjective Well-Being: Does Happiness Change after Major Life Events?*, 16 CURRENT DIRECTIONS IN PSYCH. SCI. 75 (2007); see also Andrew J. Oswald & Nattavudh Powdthavee, *Does Happiness Adapt?: A Longitudinal Study with Implications for Economists and Judges*, 92 J. PUB. ECON. 1061 (2008) (finding that hedonic adaptation to disability, while significant, is partial: 30 to 50 percent rather than 100 percent).

Moreover, just because many people *can* adapt to disability and live a happy, meaningful life does not mean that any one particular plaintiff will, or that any one plaintiff has not experienced a kind of loss that extends beyond medical bills and lost income. If tort law were to disallow damages for loss of enjoyment of life, would it both under-compensate injured plaintiffs and under-deter actors in the defendant's position? As writer s. e. smith puts it, in a piece on the connection between environmental toxins and disability (including her own), "There's nothing wrong with being disabled. But there can be something wrong with the way you *become* disabled, and to pretend otherwise is to perpetuate injustice." How might tort law insist, as smith does, that "[d]isability is not wrong or tragic or bad," while also, recognizing that sometimes it is a symptom of a grave injustice"? s. e. smith, *When Disability Is a Toxic Legacy*, CATAPULT, Apr. 23, 2019, available at <https://perma.cc/4QWP-XAD8>. One idea, advanced by legal scholar Anne Bloom, is for tort law to focus less on restoring the plaintiff to a pre-tort level of well-being, which requires constantly looking back to an idealized iteration of the plaintiff's body, and more on holding the defendant *accountable*, both for the losses and suffering the defendant's actions have caused and the difficulties that the plaintiff is likely to encounter going forward in the pursuit of a meaningful life. Bloom also raises the possibility of damages for "unjust enrichment"—forcing a defendant to acknowledge and disgorge any benefit gained from the act of disabling others. Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011); see also Sagit Mor, *The Meaning of Injury: A Disability Perspective*, in INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 27 (Anne Bloom, David M. Engel, & Michael McCann, eds., 2018) (discussing ways to compensate plaintiffs for disabling harms and promote human resilience without reinforcing a tragic view of disability).

2. *Damages reform legislation.* The same kind of skepticism of pain and suffering awards apparent in Judge Wachtler's decision has produced a tidal wave of tort reform legislation aimed at reducing damages awards. Beginning with the Medical Injury Compensation Reform Act, known as MICRA, enacted in California in 1976, damages reform has become a popular legislative priority in state legislatures around the country, especially in those dominated by the Republican Party. In all, more than thirty states have enacted statutes placing caps on noneconomic damages, with caps generally set in the range of \$250,000 – \$500,000, but occasionally running as high as \$1 million.

As hoped by their supporters, caps on non-economic damages seem to have reduced the number of lawsuits, the average size of awards in lawsuits, and insurance costs. CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004). There are confounding selection effects, to be sure: the cases that move forward after the enactment of damages caps on pain and suffering are more likely to be cases with higher ratios of pecuniary to nonpecuniary damages. One study found that damages awarded at trial remain roughly constant across the enactment of reform caps. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005). But studies that look beyond the courtroom find that damages caps decrease average settlement amounts. Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL. STUD. 183 (2007). Such effects seem to be driven both by the reduced expectations of plaintiffs and by the decreased willingness of the plaintiffs' bar to take on certain types of cases. See Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damages Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635 (2006).

It is worth observing, however, that the caps only affect those plaintiffs whose pain and suffering has been found, or is likely to be found, by a jury to have been very high. Plaintiffs whose pain and suffering is deemed by a jury as minimal are affected not at all. The legislation therefore takes only from the most seriously injured.

And what kinds of injuries are most likely to be affected? To what kind of people? Injuries causing relatively little pecuniary damage are especially notable here, since the caps on damages may mean that the expense of bringing claims in such cases may be too high to warrant filing suit, especially in costly kinds of litigation such as medical malpractice and products liability. Injuries to people out of the paid workforce are especially likely to produce higher ratios of nonpecuniary to pecuniary losses. This disproportionately includes women, whose work is to this day disproportionately outside the paid labor market. Injuries to reproductive or sexual capacities are another example. In some sense, these injuries may actually save their victims money in the long run because of the great expense entailed in raising a child. But such injuries may be devastating to the life plans of victims and therefore produce vast non-pecuniary injuries. For an argument that nonpecuniary damages caps disproportionately affect women, children, and the elderly, because the types of harm these plaintiffs suffer may be likely to be nonpecuniary and because the pecuniary damages they can get may be relatively lower, see Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004). Do damage caps send a message about the value society places on these lives and these harms?

Is it sensible to think of pain and suffering damages as a way in which the inequities of the market—inequities that are reproduced by measures of pecuniary damages—may be rectified? Note that one difficulty with this strategy is that it may reproduce its own kind of distributive injustice. The kinds of charisma and attractiveness that may produce higher nonpecuniary awards are also not distributed fairly in society.

3. *Constitutionality of damages caps.* In many states, plaintiffs have argued that damages caps violate provisions of the state constitutions. Challenges have attacked the damages caps on a kitchen sink of state constitutional grounds: state equal protection requirements, the right to a jury trial, separation of powers, bans on so-called “special legislation” granting illegitimate privileges, the right to substantive or procedural due process, the right of access to courts, and state privileges or immunities clauses—or sometimes even provisions in state constitutions specifically prohibiting the legislature from limiting the amount of damages.

Courts have struck down damages caps in a number of cases. See *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012) (holding that the statute capping noneconomic damages for medical negligence violates the right to a jury trial set forth in the Missouri Constitution); *Estate of McCall v. U.S.*, 134 So.3d 894 (Fla. 2014) (holding that Florida’s statutory cap on wrongful death noneconomic damages violates the right to equal protection under State Constitution); *N. Broward Hospital District v. Kalitan*, No. SC15-1858, 2017 WL 2481225 (Fla. June 8, 2017) (holding that Florida’s statutory cap on medical malpractice noneconomic damages violates the right to equal protection under State Constitution).

However, damages caps have been upheld (and the challenges rejected) more often than not. See, e.g., *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012) (holding that the statutory

cap of \$250,000 on noneconomic damages in medical malpractice actions did not violate the right to a jury trial, the right to remedy, or the equal protection clause under State Constitution); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991) (holding that the statutory cap on noneconomic damages in medical malpractice claims did not violate plaintiffs' equal protection or substantive due process rights or the right to remedy guaranteed by State Constitution).

A recent damages cap constitutional challenge arose in *Mayo v. Wisconsin Injured Patients & Families Comp. Fund.*, 914 N.W.2d 678 (Wis. 2018). In May 2011, Ascaris Mayo, a 50-year-old African-American mother of four, went to the emergency room at Columbia St. Mary's Hospital with an infection. She subsequently developed sepsis, which caused organ failure and dry gangrene, leading a second medical care provider to amputate all Mayo's limbs. Mayo sued both providers on the theory that the physician and physician's assistant who at Columbia St. Mary's had neglected to give her an antibiotic that would have treated her infection. At trial, a jury awarded her over \$25 million in damages, including \$16.5 million in noneconomic damages. In Wisconsin, the Injured Patients & Families Compensation Fund provides medical malpractice insurance for all tort awards against health care providers in excess of the limit of \$1,000,000 per occurrence or \$3,000,000 per year, as of this writing. The Compensation Fund moved to reduce the noneconomic damages to \$750,000 on the basis of a cap established by the Wisconsin state legislature in 2008. *See* WIS. STAT. ANN., § 893.55 (West 2008). The Wisconsin Supreme Court upheld the statute as rationally related to a legitimate government purpose. *Mayo*, 914 N.W.2d at 692. Is \$750,000 in noneconomic damages an adequate award for the loss of four limbs?

4. *Schedules for pain and suffering damages?* One alternative to damages caps would be schedules for pain and suffering damages. One influential account in the scholarly literature by Randall Bovbjerg and his co-authors proposes that pain and suffering damages be dealt with by schedules or matrices that would provide fixed pain and suffering awards for particular classes of injury:

[We propose] three alternative ways to “schedule” amounts allowable for pain and suffering and other non-economic damages. Scheduling can provide rational standards—heretofore unavailable—for valuation, thus improving the tort system's current approach, rather than abolishing or arbitrarily limiting nonpecuniary damages. We propose that these models be legislatively implemented, although some change might be accomplished by the judiciary alone, perhaps through a state's judicial conference. Dollar values for the schedules could be based on past jury awards, or possibly on findings of the “value of life” research, with legislative or judicial adjustments to either.

The three scheduling models discussed here are designed for ordinary cases of bodily harm and mental distress. The first reform model creates a matrix of values that would award fixed damage amounts according to the severity of injury and age of the injured party. However constructed, the matrix's values would be binding of jury findings of nonpecuniary damages, although the possibility of unusually severe or minor cases may call for ranges of values within the matrix, or some other provision permitting special attention to “outliers.” The second proposal also gives juries systematic information on

appropriate awards based on past experience. However, rather than a binding matrix of awards, it provides a small set of paradigmatic injury “scenarios,” with associated dollar values. These values would serve as nonbinding benchmarks for assessing the case at trial. A jury would be free to award any amount, but the benchmarks would serve to guide their award and review by trial and appellate judges. The third approach mandates fixed limits on awards of non-economic damages, as many state legislatures have already done. But we suggest replacing today’s dominant approach of placing a single arbitrary cap on all non-pecuniary awards with a system of flexible floors and ceilings that vary with injury severity and victim age. . . .

We prefer matrices or scenarios to a system of floors and caps, primarily because they more comprehensively address the problems of variability and predictability in damage awards. Floors and caps, alternatively, deal only with the problem of extreme outliers, thus preventing excessive over- and under-valuation, but maintaining broad jury discretion (and variability in outcomes) for awards within the range. Whether matrices or scenarios are preferred depends primarily on how much one thinks non-economic damages should be individualized, how much one trusts juries to exercise discretion, and the importance one attaches to achieving similar results in similar cases.

Regardless of the scheduling model adopted, the relative levels and absolute sizes of allowances should be based on past award history, as modified and promulgated by state legislatures and, possibly, judiciaries. (We also suggest a substantive change to provide for non-economic loss in wrongful death.) The increase in values over time should be controlled, so that longer-term predictability is maintained. Our proposals are all fairer and more consistent with past results than the arbitrary flat caps now frequently enacted by legislatures—but not infrequently invalidated by the courts. Scheduling-oriented reforms promise to increase the consistency of awards across cases, as similar cases would achieve more similar results. These are important goals in their own right. Moreover, the enhanced predictability of awards would promote settlement and make tort liability a more readily insurable event.

Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Public Policy: Valuing Life and Limb in Tort: Scheduling “Pain and Suffering”*, 83 NW. U. L. REV. 908 (1989).

What are the relative merits of the caps and Bovbjerg et al.’s schedules? Note that no state has enacted schedules for pain and suffering, though many have enacted caps. How do we explain the lack of interest in schedules at the legislative level?

5. *Taxation of pain and suffering damages.* As we saw in our consideration of pecuniary damages, compensatory damages received “on account of physical injuries or physical sickness” are not included in gross income and thus not subject to federal income taxes. 26 U.S.C. § 104(a)(2). However, emotional distress—even emotional distress that results in physical injury—is not considered “on account of” a physical injury and therefore still taxable income. In *Murphy v. I.R.S.*, 493 F.3d 170, 175 (D.C. Cir. 2007), the D.C. Circuit held that “on account of” is a phrase implying a “stronger causal connection” than but-for causation between the

injury and physical damages; rather, the injury for which the plaintiff is being compensated must be primarily a physical injury in order to be excluded from gross income. What might be the public policy rationale for a difference in tax treatment between compensation for “physical injuries” and other injuries?

### 3. *Environmental Damages*

Calculating intangible environmental damages in torts has proved to be hotly controversial. How is one to measure the value of wilderness? Consider a decision from 2012 in which the Ninth Circuit affirmed a district court decision allowing a nearly \$30 million verdict for intangible environmental damages associated with a forest fire.

#### *United States v. CB & I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012)

FLETCHER, J.

Defendant CB&I Constructors, Inc., (“CB&I”) negligently caused a June 2002 wildfire that burned roughly 18,000 acres of the Angeles National Forest in Southern California. The United States brought a civil action against CB&I to recover damages for harm caused by the fire. CB&I does not contest its liability or the jury’s award of roughly \$7.6 million in fire suppression, emergency mitigation, and resource protection costs. It challenges only the jury’s additional award of \$28.8 million in intangible environmental damages.

The Angeles National Forest covers roughly 650,000 acres in the San Gabriel Mountains, just north of metropolitan Los Angeles. It was set aside for watershed protection and public use in 1892 as the first federal forest reserve in California. The U.S. Forest Service administers the forest “for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” It is part of a National Forest System “dedicated to the long-term benefit for present and future generations.”

The Angeles National Forest is an important environmental and recreational resource for Southern Californians, representing about 70 percent of all open space in Los Angeles County. It is also a refuge for native plants and animals, including several threatened and endangered species. San Francisquito Canyon, a chaparral and sage scrub ecosystem surrounded by high ridges in the northwestern part of the National Forest, contains known populations of several species protected under the Endangered Species Act, including the Bald Eagle, California Condor, Southwest Willow Flycatcher, and California Red-Legged Frog. The Red-Legged Frog was once widespread throughout the region, but now has only three known populations in Southern California. The largest of the three populations is in San Francisquito Canyon, where the frog remains “extremely vulnerable” to local extinction. . . .

[Due to defendant’s negligent operations in building a water shed, a fire started]. As the fire spread, it burned about 2,000 acres of private and county-owned property. It quickly reached the National Forest where it burned another 18,000 acres, or more than 28 square miles. Federal, state, and county firefighters fought the fire for nearly a week before they contained it on June 11. The government incurred roughly \$6.6 million in fire suppression costs. The fire became known as the Copper Fire. . . . Within the National Forest, some of the greatest fire

damage occurred in San Francisquito Canyon. The fire burned “pretty much all” of the native chaparral and sage scrub vegetation in the Canyon, opening the door to invasive, nonnative plants that increase the risk of future fires. . . .

The jury . . . awarded roughly \$7.6 million for fire suppression, [burned area rehabilitation], and resource protection costs in the amounts requested by the government. The jury also awarded the government an additional \$28.8 million for intangible environmental damages, or \$1,600 per acre of burned National Forest land. . . .

Landowners in California may recover damages for all the harm, including environmental injuries, caused by negligently set fires. . . . Federal courts have allowed the government to recover environmental damages for negligently set forest fires on protected public land in California. In *Feather River Lumber Co. v. United States*, we affirmed a damages award against a negligent lumber company for harm caused to merchantable timber in the National Forest as well as to young growth, which “while it had no market value, had a value to its owner.” We explained that the measure of damages for the merchantable timber was the market value of the trees, but that the measure of damages for young growth in the National Forest, which could not be sold, was “the damage actually sustained, that is to say, what was required to make the government whole.” We held that this amount “might properly include the cost of restoring the land to the condition in which it was before the fire.”

In sum, we see nothing in California law that prevents the federal government from recovering intangible, noneconomic environmental damages for a negligently set fire. California embraces broad theories of tort liability that enable plaintiffs to recover full compensation for all the harms that they suffer. Under California law, the government may recover intangible environmental damages because anything less would not compensate the public for all of the harm caused by the fire. Accordingly, we agree with the district court in this case that the government “should be able to recover damages for all of the damages caused by the fire, including the intangible environmental damages.”

CB&I next argues that the government did not produce sufficient evidence for the jury to determine the amount of environmental damages. . . . The district court acknowledged that the government in this case did not “elicit any testimony that put a dollar amount on the intangible environmental damages.” However, the court noted that the government “produced evidence regarding the extent of damage to the Angeles National Forest, including testimony regarding the 18,000 acres of burned federal land that was not usable by the public as a result of the fire. . . . The jury also heard testimony concerning the extensive destruction and harm to animal habitats, soils, and plant life. This testimony included the harm caused by the fire to the endangered California red-legged frog and the destruction of the historic Hazel Dell mining camp.”

We agree with the district court that the “trial provided sufficient evidence for the jurors to quantify the [intangible environmental] harm.” Evidence about the “nature and character” of the damaged National Forest environment provided a rational way for the jury to calculate the award. Such evidence having been shown, the jury could determine the intangible environmental damages award in the exercise of a sound discretion. That the government’s environmental damages are “largely intangible” and “not readily subject to precise calculation” does not make them any less real. . . .

CB&I negligently sparked a forest fire that burned roughly 18,000 acres of the Angeles National Forest. Under California law, the government was entitled to full compensation for all the harms caused by the fire, including intangible environment harm. The government produced substantial evidence for the jury to determine the amount of environmental damages, and the resulting award of \$1,600 per acre was not grossly excessive.

Affirmed.

### **Note**

*Environmental damages legislation.* The *C.B. & I. Instructors* case inspired legislative backlash from states in the region. The governor of California introduced legislation to alter California state law to eliminate intangible environmental damages for forest fires, supported by the timber industry and the insurance industry. Chris Megerian & Anthony York, *Gov. Jerry Brown Seeks to Cap Wildfire Liability in California*, L.A. TIMES, May 25, 2012. As passed, the bill included a tax on lumber products and an additional \$30 million for regulation of the timber industry, presumably as a compromise with environmentalists. Kevin Yamamura, *Gov. Jerry Brown Signs Lumber Tax, Wildfire Liability Limits*, SACRAMENTO BEE, Sept. 11, 2012. The bill was heavily opposed by the federal government, both in the Department of Justice and the Secretary of the Interior. Bob Egelko, *Brown Moves to Limit Timber Firms' Fire Liability*, S.F. GATE, Jul. 5, 2012. The legislation essentially shifted that stream of resources to the state by exchanging tort liability for a tax on lumber products.

Other states appear to be following California's lead (though not with the lumber tax provision). See, for example, Washington State, RCWA 76.04.760 (Wash. 2014), and Idaho (H.B. 132, 62nd Legislature, 2013 Regular Session (Idaho)). Note that after an amendment proposed by Representative Drew Hansen, a partner at the trial lawyer firm Susman Godfrey, the Washington legislation expressly authorizes damages for the full cost of forest restoration. Do restoration damages make up for the lost intangibles?

## **4. Death Cases**

### ***Wrongful Death Actions***

Tort actions arising out of a person's death are the most extreme example of the impossibility of restoring a plaintiff to her original condition. Not only is life different in kind than a sum of money, the victim cannot even use the funds to improve his or her state, as living victims might be able to.

Perhaps for this reason, the traditional common law rule was that causes of action in tort died with the victim: at common law, there were no death actions. Death, like pure economic loss or pure emotional distress, was an injury as to which no tort duty existed.

One reason for this was that the medieval and early modern law of homicide typically entailed the forfeiture of the perpetrator's estate; there were thus no assets a decedent's family



might hope to claim, since they had all been forfeit to the sovereign. Still, the rule seemed anomalous at best.

A number of American jurisdictions abandoned the English rule barring death actions in the early years of the nineteenth century. And in the middle of the nineteenth century, legislation specifically authorized so-called “wrongful death” actions, first in England and then in states across the U.S. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 L. & SOC’L INQ. 717 (2000).

Wrongful death actions under the statutes are typically brought by the decedent’s dependents to recover lost support. Generally, a wrongful death statute lays out who may bring a claim and what damages they may be entitled to receive. The quintessential plaintiffs are close family members dependent on the decedent for financial support. A number of states have broadened the categories of plaintiffs with standing to bring wrongful death suits. In California, for example, a dependent minor has standing to bring a wrongful death suit arising out of the death of an adult on whom the minor was financially dependent and with whom the minor lived for at least 180 days, regardless whether the minor plaintiff was related to the adult decedent. CAL. CODE CIV. PRO. 377.60.

Their damages in wrongful death actions are typically pecuniary damages for the loss of support. In California, for example,

A plaintiff in a wrongful death action is entitled to recover damages for his own pecuniary loss, which may include (1) the loss of the decedent’s financial support, services, training and advice, and (2) the pecuniary value of the decedent’s society and companionship—but he may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.

*Quiroz v. Seventh Ave. Center*, 45 Cal. Rptr. 3d 222, 226-27 (Cal. App. 2006).

In a case not involving death, a close relative of a victim of the non-fatal personal injuries would have a loss of consortium claim to recover for the intangible value of the lost relationship. Does it make sense that such an action is unavailable in death cases?

Consider also injuries causing death to children. If children do not have dependents, will there be any wrongful death action at all? This problem, among others, led to a wave of twentieth-century statutes authorizing so-called “survival actions” in death cases:

### ***Survival Actions***

Unlike wrongful death actions, which are brought by the decedent’s relatives in their own capacity, survival actions are brought on behalf of the decedent’s estate.

Survival actions allow the recovery of the lost income of the decedent even if there were no people dependent on the decedent for support. They also allow pain and suffering damages for any pain the decedent may have experienced prior to death. See David W.

Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989).

In some states, like California, the wrongful death action and the survival action are typically joined into one case. In other states, such as Massachusetts, all cases must be brought by the estate of the decedent, but the estate may collect and distribute damages for losses suffered by relatives of the decedent.

### ***Death Cases and Family Structure***

If a system is to recognize tort actions in death cases, a question that must be answered is: Who gets to sue? The answers a given society offers are revealing. Early American wrongful death statutes, for example, typically limited damages to dependent “widows and next of kin.” One effect was to exclude individuals who lay outside the usual family structure. Another effect was to exclude a *widower*: the male surviving spouse. For more than one hundred years, many states’ wrongful death law denied recovery to dependent widowers seeking lost support in the wake of a wife’s death. (The English statute, interestingly, authorized death actions by either spouse.) Both of these features meant that the wrongful death statutes both reflected and reinscribed very particular ideas about what proper families looked like. Proper families were ones with wage earning husbands and fathers who supported dependent wives and children. Indeed, given the way in which most statutes limited damages to lost wages, the death of non-wage earners such as women (who worked in the home) or children (who increasingly did not work for wages) often gave rise to no cause of action at all. See VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985)

The gender assumptions underlying the wrongful death model of the family lasted right into the late twentieth century. The widow / widower asymmetry lasted until the U.S. Supreme Court struck it down as an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment in *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (striking down the different treatment of widows and widowers under the Social Security Act as a violation of the Equal Protection Clause of the Fourteenth Amendment). For more on this theme, see Witt, *From Loss of Services to Loss of Support*, *supra*.

### ***The Death Case Paradox***

Bizarrely, in tort cases, killing a plaintiff can be far cheaper for the defendant than injuring the plaintiff severely. In *McDougald v. Garber*, 73 N.Y.2d 246 (1989) above, the initial damages awarded by the jury were \$9.7 million, of which \$1 million was for conscious pain and suffering and over \$2 million was for ongoing custodial and nursing care. If Mrs. McDougald had died during the operation, neither of those elements of the damages would have been awarded—and there are no additional categories of damages that would have been added instead.

Given the incredibly high cost of a lifetime of intensive medical care and nursing services, the pecuniary damages associated with severe injury can dwarf the wrongful death claims. Is this structure justified because it takes into account the societal costs of caring for

people with severe impairments, or absurd because it creates perverse incentives for tortfeasors? If you wanted to “solve” the death case paradox, how would you fix it?

## B. Damages in Practice

So far, our discussion of torts has largely focused on only a few actors: a plaintiff, a defendant, a judge. In practice, actually hammering out a settlement of damages involves many more players with unique interests and perspectives: the plaintiff’s lawyer, the insurance carriers for the defendant and the plaintiff, the jury, and others. The dynamics among this larger cast of characters shape the reality of the torts system in interesting and surprising ways.

### 1. *Plaintiffs’ Lawyers and the Contingency Fee*

In practice, tort damages are mediated heavily by the contingency fee: a fee for legal services paid as a percentage (usually around one-third) of total damages the plaintiff receives. On the one hand, some argue that the contingency fee is an essential way to provide legal services to clients who do not have the cash on hand to pay a lawyer—especially after suffering an injury that may have caused high medical expenses and unemployment. On the other hand, the contingency fee has been blamed for spiraling tort costs and concentrating excessive power in the hands of plaintiffs’ lawyers.

Richard Posner lays out the argument for the contingency fee as follows:

Suppose a person has a claim of \$100,000 and a 50 percent probability of vindicating it if he has a good lawyer. The expected value of the claim is \$50,000 and would justify him expending up to that amount in lawyer’s fees to protect the asset. . . . But suppose the claim is his only asset. Ordinarily this would be no problem; one can borrow a substantial sum against an asset as collateral. But it is not always possible to borrow against a legal claim. Banks and other lending institutions may be risk averse because of government regulation of financial institutions or may find it costly to estimate the likelihood that the claim can be established in court. These factors may make the interest rate prohibitively high. And many legal claims (notably most tort claims) are by law not assignable—in order, it is said, to prevent the fomenting of litigation—and so are worthless as collateral.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 782-84 (2011). The contingency fee contract is a solution to the problem of otherwise unmarketable claims. The contingent fee allows lawyers effectively to offer legal services in return for a stake in the otherwise unmarketable claim. By pooling many claims, the lawyer is able to achieve a diversification of her investment that no one plaintiff is able to achieve. Moreover, the plaintiffs’ lawyer is a specialist, which gives them the capacity to make better judgments about the value of particular claims than a traditional lender or investor would be able to make.

Posner observes that contingent fees of a third or more of the claim often seem exorbitant. Sometimes they are. But Posner observes that “the contingent fee compensates the lawyers not only for the legal services he renders but for the loan of those services.” The risk

of losing the case and the long time delays between the labor performed in the pretrial phase of a case and the ultimate payment of damages, if any, create what are essentially high implicit interest rates on the loans that plaintiffs' lawyers are effectively extending their clients. *See id.* at 283.

If the problem is unmarketable claims, and if plaintiffs' lawyers are superior bearers of the risks in question, why not go further? Indeed, the contingent fee introduces a problem of its own, which is that as joint owners the lawyer and the plaintiff each lack the incentives to act that exclusive ownership would produce. Why, then, not allow plaintiffs or prospective plaintiffs simply to sell all or nearly all of their unmatured claims to third parties such as lawyers? The booming litigation finance industry is experimenting with precisely this. A number of states have loosened their regulations on the sale of litigation claims to allow litigation finance, and a new class of hedge funds have leapt into the breach, often led by joint teams of investment experts and lawyers with expertise in litigation. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010). Critics object that such finance arrangements might produce too much litigation. Posner is not certain:

It might seem that the contingent fee contract and even more clearly outright sale must result in more litigation. Not necessarily, even though they certainly make it easier for an illiquid or risk-averse person to bring a suit. The likelier a suit is to be brought if there is a violation of law that causes injury, the greater the deterrent effect of whatever legal principle the suit would enforce, and hence the less likely are potential defendants to engage in the forbidden conduct. What is more, a contingent-fee contract gives the lawyer a greater incentive to decline a weak case than if he is paid on an hourly basis, because the cost of losing is shifted from the client to the lawyer. It is a filtering device.

POSNER, *ECONOMIC ANALYSIS*, *supra*, at 284; *see also* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195 (2014).

Critics of the contingent fee see the matter very differently. Many object to the use of litigation finance strategies. But many still object even to the investments that the contingency fee allows the plaintiffs' bar to make in lawsuits. Lester Brickman, an especially outspoken critic of contingency fees, argues that contingency fees have produced in the United States a massive, foolish, and unaccountable system of ad hoc regulation that lines the pockets of one group (the plaintiffs' lawyers) while impoverishing virtually everyone else.

American tort lawyers' profits have risen prodigiously to levels far beyond what is necessary to create sufficient incentives for lawyers to provide access to the civil justice system. Lawyers justify their fees by saying that they bear the risks of losing the cases. And indeed, by chasing down business through advertising and aggressive outreach, some lawyers appear to be among American society's quintessential entrepreneurs. They invest and put at risk time and capital, sometimes amounting to millions of dollars in exchange for a percentage of an uncertain recovery. Professional athletes, rock stars, hedge fund managers, and CEOs enjoy huge earnings. Why not lawyers? How can we say that their returns are excessive, so long as the field of play is level and they play an honest game?

In actual fact, the field of play is tilted, the deck is stacked, the game is fixed. Many lawyers charge for entrepreneurial risks they don't actually bear. By careful case selection, they prevail in the substantial majority of the cases they accept. Despite the limited risk, their share of damage awards routinely amounts to one third or more. Lawyers can charge for these phantom risks because they use positional advantages to shield themselves from market forces. They charge standard contingency fees which are intended to compensate lawyers for the risks they are assuming, but do so even in cases where there is no meaningful liability risk and a high probability of a substantial recovery. They benefit from enormous economies of scale in class actions and other large scale litigations but do not share these benefits with their clients. . . .

The quest for contingency super profits has led lawyers, in collaborative efforts with courts, to use the courts to secure outcomes which are indistinguishable from legislative acts and administrative rule-making. This "regulation through litigation" dilutes the democratic form of American government by exempting large areas of policy from legislative control. In effect, lawyers are using their positional advantages to convert policy making into a highly profitable enterprise. When public policy making is thus removed from legislatures, so too is political accountability and public participation in the process.

Lester Brickman, *Unmasking the Powerful Force that has Mis-Shaped the American Civil Justice System*, 4 GLOBAL COMPETITION LITIGATION REV. 169 (2010). Brickman exaggerates the problem; not all lawyers, of course, will be able to screen for low-risk cases, and lawyers near the bottom of the pecking order may take on cases with considerable risk. But Brickman makes an interesting observation: the very best lawyers are often able to select their cases carefully. They can screen for only the highest value claims, which are often the claims most certain to produce damages awards. And if that is so, then the market in legal services may systematically assign to the best lawyers not the hardest cases that warrant the greatest skills, but rather the easiest cases (in the sense of being most certain and thus often of highest value).

Brickman's proposed solution is what he calls the "early offer" proposal:

[T]he proposal prohibits plaintiff lawyers in personal injury cases from charging standard contingency fees where allegedly responsible parties make early settlement offers before the lawyer has added any significant value to the claim. Instead, the lawyer is restricted to charging an hourly rate fee for the effort required to assemble the relevant details of the claim and to notify the allegedly responsible party of the claim. If an early settlement offer is rejected and a larger subsequent settlement or judgment is obtained, the lawyer then applies the contingent percentage to the amount in excess of the early offer, that is, to the value he added to the claim. He would thus be paid what he would have received had the offer been accepted plus the contingent percentage of the value he added.

LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 451 (2011). Does this proposal make sense? Note that some lawyers add vast value

to a case simply by being appointed as counsel. The threat of having lawyers like Sheila Birnbaum or Elizabeth Cabraser (two prominent mass tort lawyers) involved in a case is often considerable enough to change the case's value. Should such super lawyers not be compensated for their reputations?

In some ways, critics of the contingent fee like Brickman and defenders like Posner are talking past each other—Brickman does not contest Posner's point that plaintiffs' lawyers have a strong incentive to maximize the settlement value of the cases they take on, and Posner does not contest Brickman's point that plaintiffs' lawyers may extract a higher than optimal cut of the total claim.

Is there a way we might reform the current contingency fee system to retain its advantages but mitigate the high costs of the system?

In a number of respects, the contingent fee functions nicely to align the interests of repeat-play lawyers and one-shot clients. . . . [But] the contingency fee does not completely close the gap between the interests of the lawyer and the interests of the client. The client's interests are in maximizing the total value of the claim. The lawyer's interests are in maximizing the implicit hourly wage. It follows that plaintiffs' representatives have powerful incentives to settle cases early in the process, before they have invested many hours in the claim, even if this means settling at a lower claim value.

John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Torts System*, 56 DEPAUL L. REV. 261 (2007). Your author identifies two developments in the market for plaintiffs' legal services that have mitigated this difficulty. The first is the use of escalating sliding scale fees, in which the lawyer's share of the damages increases at each successive stage of the case (summary judgment, trial, post-trial, appeal). An upwardly sliding fee scale helps (albeit only roughly) to align the client's and the lawyer's interests with respect to the duration of litigation.

The second development is the rise of referral markets among lawyers in the market for personal injury legal services, and in particular the role of reputation in that referral market. In high-stakes personal injury cases, a robust lawyer-to-lawyer referral market has arisen, such that lawyers who initially get high-value cases tend more and more to refer them to specialists in return for a cut of the contingent fee. The lawyer-to-lawyer referral networks offer a market solution to the lawyer's skewed incentive to settle low rather than go to trial because any lawyer who hopes for future referrals has a reputational interest in maximizing the value of the claim. (Note, too, that the referring lawyer typically has no implicit hourly wage calculation because the work is typically finished after the referral itself.)

Note that it is an interesting feature of American prohibitions on the unauthorized practice of law that non-lawyers are not allowed to create for-pay referral systems. The result is that lawyers have a monopoly on for-profit referral networks in the market for legal services. A century ago, some labor unions (especially in dangerous railroad work) aimed to create referral systems. They provided their members with expertise in selecting a lawyer in return for a small cut of any winnings, which in turn allowed the unions to monitor lawyer performance. In 1964, however, the U.S. Supreme Court ruled that while such organizations could offer referrals for free, and that such offers were protected speech under the First Amendment of the Constitution, there was no right to engage in referrals for a fee. *See*

*Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964). State bar associations have effectively prohibited such referral systems ever since.

## 2. *The Role of Defendants' Insurance*

The plaintiff, the plaintiff's lawyer, and the defendant are not the only three parties involved in the actual practice of settling and paying damages. Insurance companies also play critical roles in this process. As we've discussed since the outset of this book, defendants typically have insurance, for the simple reason that defendants without insurance are often judgment-proof and not worth suing. But if insurance is often a prerequisite for litigation, the policy limits set in the insurance contract often seem to set the outer limits of damages because plaintiffs don't typically push beyond the upper limit of the liability insurance policy. Torts and insurance scholar Tom Baker has observed that plaintiffs' lawyers have a special term for damages above the policy limit, which would have to be paid by the defendant herself or himself: they call such damages "blood money." Baker interviewed one defense lawyer, who explained the problem this way:

Q: "Do you ever have cases where your defendants are not insured?"

A: "Those are terrible. Yes I have. Those are the worst. I did two of those in a row for an attorney, who is now a judge, who had people who for some reason or other forgot to renew their insurance, and was driving the car without insurance. I think they were both like that. Those are terrible. Those are absolutely the worst. Without that umbrella behind you, you don't even want to try. You're petrified. Normally, when you try these cases, even if somebody's only got a twenty policy or fifty policy, if it goes over, the insurance company just pays. But, when there is nothing there, you walk in and they [the plaintiff's lawyers on the other side] just automatically assume because you're there that there is insurance. I almost want to wear a badge saying 'There is no insurance here.' This is what we call blood money, instead of insurance company money. We call it blood money because it is coming out of their pockets."

Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

Baker found in his interviews that most plaintiffs' lawyers denied being willing to pursue blood money, except in exceptional cases. "We don't do it often," one plaintiffs' lawyer told him. "And if you talk to every responsible plaintiffs' lawyer in the state, I'll bet it's rare." Baker's interlocutors described their reasons as ethical: "It's hard to take somebody's house away. I mean, you know, people with kids and mothers and fathers, and they worked their whole lives, probably, to acquire that home. I mean, it's not easy." And so plaintiffs' lawyers asserted that they followed "an unwritten union rule that you take the coverage and you go home." What about the lawyer's obligation to pursue his client's interests? Baker's interview subjects insisted that they would not represent clients who demanded damages over the policy limits.

An exception to the rule arose when "the defendant failed to purchase adequate insurance." In such instances, plaintiffs' lawyers cited the defendant's wrongful failure to

insure adequately as grounds for the collection of blood money. In addition, certain intentional torts, including rape and drunk driving, warranted the collection of blood money as well.

Empirical studies have confirmed Baker's qualitative analysis that "blood money" payments are relatively rare and may serve largely to punish defendants for being underinsured. A group of researchers studied settlement data from Texas medical malpractice suits and found that about 15% of cases settled exactly the upper limit of the insurance policy. This was more common with cases involving infants, which tend to have even higher damages awards. Less than 2% of cases involved payments above the upper limit of the insurance policy—and even in many of those cases, insurance companies paid the difference (presumably to avoid failure to settle claims). However, the rate of cases that involved payments beyond the insurance policy were several times higher for defendants that had purchased insurance policies with relatively low (under \$250,000) limits. See Charles Silver, Kathryn Zeiler, Bernard S. Black, David A. Hyman & William M. Sage, *Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003*, 33 THE GENEVA PAPERS ON RISK AND INSURANCE: ISSUES AND PRACTICE 177 (2008).

What best explains the reluctance to seek blood money? Is it a moral economy of the plaintiffs' bar? Or is it the acute difficulty and great expense of seizing personal assets? Note that one possibility is that seeking blood money is a specialist's game, and that while most cases do not require the pursuit of blood money, those that do go to the specialists.

### ***3. Subrogation; or, The Role of Plaintiffs' Insurance***

How does the plaintiff's insurer (for example, a health insurer or workers' compensation provider) enter into the picture? Many insurance companies include subrogation clauses in their insurance contracts. A subrogation clause allows the insurer to pursue claims against a tortfeasor on the policyholder's behalf and entitles the insurer to recover any damages paid that were covered by the insurer.

Some states, by statute or common law, have limited the reach of subrogation clauses. Arizona has held that subrogation of personal injury claims amounts to an "assignment" of personal injury claims, which cannot be assigned. *State Farm Fire & Casualty Co. v. Knapp*, 484 P.2d 180, 180 (Ariz. 1971). Virginia's legislature prohibiting contracts subrogating personal injury claims. VA. CODE § 38.1-342.2 (1980). Note that the prohibition on subrogation claims surely raises the price of insurance for all insureds. Is there a reason to prevent an insured from purchasing a policy that exchanges a subrogation claim in return for a lower price?

In any event, subrogation claims are often quite difficult to win. Tom Baker's qualitative study of plaintiffs' lawyers revealed some surprising results about the actual role of parties insuring the plaintiff who have subrogated claims of some kind. In Connecticut, where Baker did his study, state law provides that workers' compensation insurers have a lien on all tort damages recovered by a plaintiff who has also received workers' compensation benefits for the injury in question. Such a plaintiff, by the terms of the Connecticut statute, will only be able to capture tort damages over and above whatever amount the compensation insurer's claim. Nonetheless, in practice, workers' compensation insurers share the damages with plaintiffs according to what lawyers in the field call "the rule of thirds." Baker explains through the voice of one of his interview subjects:



That means that whatever money that the defendant was going to put up is split three ways. The plaintiff's attorney gets a third, which statutorily he gets fees and costs firsts. The comp carrier gets a third of whatever that money off their lien, and then the plaintiff puts a third in his pocket.

Baker, *Blood Money, New Money, supra*. But if the compensation insurers could by law take a plaintiff's recovery up to the full amount of the benefits they have paid out to the plaintiff in compensation benefits, why do they compromise their subrogation claims? The answer lies in the institutional structure and pervasive weakness of subrogation claims. In a workers' compensation setting or in any other subrogation setting, the insurer usually needs the plaintiff for the claim to be successful. The insurer needs the plaintiff to attend depositions and to go through the hassle of the litigation. It needs the plaintiff to serve as a witness at trial. And it needs the plaintiff to serve more generally as a charismatic and sympathetic claimant before the jury. If the insurer will take the entirety of the damages awarded (or, more typically, the entirety of the settlement value), then the insurer will have an awfully hard time getting the plaintiff to go through with the litigation in a manner that maximizes the insurer's recovery.

And so insurers share the proceeds with their insureds, even when the insurer is legally entitled to it. The effects of insurance benefits running to the plaintiff in advance of the resolution of a tort claim may be even more significant. Here is Tom Baker again, now describing the way in which an insurer or some other collateral benefits source of support for the plaintiff transforms "the dynamics of the tort settlement process." The term "new money" in the following passage refers to settlement amounts or damages awards allocated to the plaintiff over and above any collateral benefits the plaintiff has already received, as opposed to settlement amounts or damages allocated as reimbursement to the insurer or other provider of the collateral benefits in question:

[I]f the plaintiff has little or nothing to lose by going to trial, the plaintiff will go to trial; and trial poses substantial risks for the defendant, the defendant's liability insurance carrier, and the [workers' compensation carrier]. The defendant and the liability insurance company face the risk of a generous jury verdict, and the comp carrier faces the risk of a defense verdict. To get the certainty that settlement provides, both are willing to pay additional new money to the plaintiff. The result is, at least according to these respondents, that cases with workers compensation liens settle for a larger amount than cases without them.

Baker, *Blood Money, New Money, supra*. Note that the "blood money" norm seems to hold even in this more complex subrogation litigation. Baker finds that most subrogation claims holders also typically avoid seeking "blood money" and settle for insurance policy caps.

It is worth noting that traditionally, many insurers simply abandoned their subrogation claims. Subrogation litigation was expensive and rarely seemed to be worth the expense. But beginning in the 1970s, a lawyer in Philadelphia named Steve Cozen began approaching insurers and offering to handle their portfolio of subrogation claims on a contingency fee basis. Cozen won his first subrogation case in the 1970s. Since then, the practice has developed into a large one, employing many lawyers and forming the core of the increasingly large law firm, Cozen O'Connor. See Jason Fagone, *Steve Cozen Profile: The Inside Man*, PHILA. MAG. (Feb.

26, 2010). Chris Mondics, *How Cozen Took on a Kingdom for 9/11 Liability*, PHILA. INQUIRER (June 2, 2008).

Today, Cozen O'Connor claims to handle more "first-party subrogation claims than any other law firm in the United States." *Subrogation & Recovery*, COZEN O'CONNOR (2012). On a yearly basis, Cozen O'Connor receives seven thousand subrogation claims of at least \$100,000 in value each. What explains the success of Cozen in making the sleepy domain of subrogation into such a success story? The scope of Cozen O'Connor's subrogation practice has allowed the firm to achieve economies of scale available to no one insurer. Through examining various losses, Cozen attorneys "identify repetitive failure scenarios, product liability design flaws, and other important subrogation opportunities." Scale allows Cozen to amortize the costs of learning across multiple cases.

#### 4. The "Bronx Jury" Effect

Do the demographic characteristics of the jury pool affect the likely outcome of the case? This has been a subject of ongoing debate in the legal academy. A conventional view is that poor juries, and in particular juries made of people of color, are more likely to be friendly to plaintiffs than middle-class and white juries.

One of the earliest empirical studies countered the conventional wisdom:

We find little robust evidence that a trial locale's population demographics help explain jury trial outcomes. In tort cases, jury trial awards and plaintiff success rates do not consistently increase significantly with black population percentage. The mixed racial effects in tort cases are telling because the number of observations—over 30,000 federal and state tort trials—is surely large enough to detect a socially meaningful effect. The demographic effects that do emerge are not present in both federal and state courts. If there is a national Bronx effect in tort cases, it is likely tied more to poverty than to race. We do find evidence in state courts of increased plaintiff success rates and award size in tort trials held in more impoverished urban areas. But this effect does not emerge in federal tort trials in urban areas. So poverty is likely not the only factor at work, and federal-state juror pool differences may be the explanation.

Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839 (2002). Eisenberg and Wells conclude that "the evidence in a case is by far the most powerful influence on its outcome" and that "juror characteristics are most often of minor, secondary importance."

Another study that examined the effect of the poverty rate and race found some significant results:

[A]wards fall (or increase only moderately in the federal data) with white poverty rates but increase dramatically with black poverty rates. Awards also appear to increase with Hispanic poverty rates, although the results are more variable. An increase in the black poverty rate of 1 percentage point tends to raise the average personal injury tort award by 3-10 percent (\$20,000-\$60,000),

and our best estimate is that an increase in the Hispanic poverty rate of 1 percentage point tends to raise awards by 7 percent. Yet awards tend to fall by 2-3 percent for every 1-percentage-point increase in white poverty rates. A fall in awards is to be expected if compensatory awards fall with a fall in wages; thus, the increase in awards with black and Hispanic poverty is especially surprising.

Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 51-53 (2003). Helland and Tabarrok found that awards increased with Black and Hispanic county poverty rates “even after controlling for a wide variety of other potential causes including injuries, population densities, case types, any factors associated with states (such as legal differences), and any factor correlated with white poverty rates.” *Id.* They also found that “settlement amounts also increase with increases in black and Hispanic county poverty rates.” *Id.*

Still another study found significant effects associated with income inequality and poverty, which may relate to the effect of jury composition or to the effect of different attitudes and beliefs in poor communities. Professor Issa Kohler-Hausmann found that

both county poverty rate and the level of low-end income inequality in a county were positively correlated with damages in plaintiff win cases. This evidence raises the possibility that what has heretofore been assumed to be an artifact of jury composition might be an artifact of more diffuse social processes. The [standard] explanatory story behind interpreting an association between aggregate county demographic composition and case outcomes . . . is that jurors with certain demographic traits tend toward certain case outcomes (i.e., pro-plaintiff or generous with damages). . . .

Yet . . . county income and racial and ethnic composition could also be associated with an overall change in juror attitudes in that community. That is, income inequality in a jurisdiction might be associated with some community effect that changes all (or many) individuals’ attitudes in such communities regarding standards of tort liability or damages. This community effect would still operate through juries, but its influence is not limited to jurors who are low-income or minority . . . .

Issa Kohler-Hausmann, *Community Characteristics and Tort Law: The Importance of County Demographic Composition and Inequality to Tort Trial Outcomes*, 8 J. EMPIRICAL LEGAL STUD. 413 (2011). Kohler-Hausmann’s finding is that “the social environment of highly unequal counties may alter overall attitudes and standards related to the questions adjudicated in tort disputes.”

## 5. *Beyond Dollars*

What beyond dollars might we seek to get from the resolution of a tort suit? Linda Radzik suggests that the goal of torts might be conceived of as repairing the relationships damaged by the wrong.

A reconciliation theory of corrective justice insists a proper response to wrongdoing or harming requires the correction of the damage that the wrong or harm does to the relationships of the parties involved. This relational damage must be repaired for two reasons. First, insofar as damaged relations are allowed to continue, the wrong continues. Consider again the case of the bullied child. His money is returned to him. The bully is punished. But these steps do not guarantee his future safety. They probably do not remove the social stigma of having been bullied, or restore his self-esteem. He continues to suffer from the bully's misdeeds. Second, leaving damaged relations unrepaired is dangerous. Resentment, fear, humiliation, and distrust threaten to lead to new wrongs and harms. For this point, the example of bullying is sadly apt. Not infrequently, bullied children become bullies themselves. . . .

Apologies, explanations, promises of better behavior, and gestures of respect can all be properly demanded of wrongdoers. Without these sorts of interactions, victims may find it very difficult to put the past behind them and re-establish morally appropriate relationships with their former abusers, their communities, and themselves. . . .

[I]f we look at the tort process as a whole and not just tort judgments, we see that they provide victims with less tangible forms of corrective remedies as well. Through the proceedings, Janie [a hypothetical tort plaintiff bitten by a vicious dog] and her family may finally receive an explanation of how this wrong came about—what the dog's history was, why it was aggressive to children, and what Andy [the defendant] was thinking in letting the dog roam among children. This sort of information might help Janie work through her fear of dogs. It might help her parents manage their feelings of anger so that, even if they do not forgive Andy, they can move on.

Linda Radzik, *Tort Processes and Relational Repair*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 231 (John Oberdiek ed., 2014). Are the goals Radzik identifies compatible with a system of adversarial litigation that delegates decision-making authority over the litigation to private parties? If relational repair is important, can it be achieved where the parties settle in more than nine out of ten cases?

Settlement raises questions about another goal of torts as well: holding defendants publicly accountable. For a devastating example, consider legal historian Barbara Welke's finding that between 1942 and 1954, "an untold number of children were horribly burned" when the highly flammable fabric on the chaps of their Gene Autry cowboy suits came into contact with a flame or spark. Settlements with confidentiality clauses helped ensure that the cowboy suits continued to sell and circulate—and continued to kill and maim children—years after the danger had been discovered. Not knowing about the prior episodes, many families simply accepted moral and financial responsibility for their own children's terrible injuries. Barbara Young Welke, *The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy*, 101 J. AM. HIST. 97 (2014). Note that injured families entering into such settlements appear to have benefited from the confidentiality terms, in the sense that had they not agreed to these terms, they perhaps would have received less compensation, or no compensation at all, or would have received it only after greater outlays of time, effort, and expense. Does that make a difference in the analysis?

More recently, in 2014, General Motors came under harsh criticism for failing to recall cars that had faulty ignition switches—a safety defect associated with several deaths. Investigations revealed that General Motors was well aware of the defect. It had settled several tort lawsuits arising out of the defect, but had included confidentiality provisions in each settlement agreement that prevented the government or other users of the car from learning of the defect. The confidentiality provisions allowed General Motors to avoid recalling cars for over a year—although it ultimately did once the defect became public. Bill Vlasic, *Inquiry by General Motors Said to Focus on Its Lawyers*, N.Y. TIMES, May 17, 2014. The use of non-disclosure agreements in sexual harassment settlements has raised similar concerns. See, e.g., Matthew Garahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES, Oct. 23, 2017; Michelle Dean, *Contracts of Silence: How the Non-Disclosure Agreement became a Tool for Powerful People to Stymie Journalists from Informing the Public*, COLUM. J. REV., Winter 2018.

Should settlement agreements that include confidentiality provisions be enforceable? On the one hand, confidentiality agreements inflict external costs on unrepresented third parties (that is to say: on all of us!) by keeping some risk secret and making it harder for societies to protect themselves. On the other hand, confidentiality agreements allow plaintiffs to gain higher value settlements than they otherwise would be able to obtain because confidentiality is an additional thing of value such plaintiffs may exchange with a defendant. Is there any justification for allowing plaintiffs to sell the right to share information about a tort risk?

Some scholars argue for enforcing what they call “semi-confidential” settlements that disclose the subject matter, but not the magnitude of settlements. Such an approach would “liberate some information that is useful to third parties or the state, while still encouraging the defendant to settle—at a price that packs some deterrence punch.” Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311 (2018).

## 6. *The Death of Liability?*

As you will likely learn when you take business organizations, a standard feature of corporations is that their shareholders are generally not personally liable for the liabilities of the corporation. In other words, corporations typically have *limited liability*. Shareholders stand to lose the entire value of their shares. But their other assets are typically protected from damages awards against the firms whose shares they own. A practical example is that if BP incurs massive liabilities by spilling oil in Gulf of Mexico, its shareholders are only liable up to the value of the stock they hold—their personal assets cannot be seized by plaintiffs injured by the corporation.

There are some good reasons for this rule of limited liability. If shareholders were personally liable for the liabilities of the firms they owned, then the value of each share would depend on the personal wealth of the share’s owner. Shares owned by people with available assets would be less valuable than shares owned by people without available assets. The results would be bizarre. On the other hand, the argument for limited liability is much stronger with respect to contract creditors than it is with respect to tort creditors. Contract creditors enter into business with a particular firm with their eyes open. If they are worried about the

creditworthiness of the firm, they should demand their payment up front, or demand a guarantee of some kind, perhaps even a guarantee from one of the shareholders. Lenders to new businesses often demand such a personal guarantee, even if they are technically lending to a business entity. But what about tort creditors? The victim of a highway accident who is hit by a truck driven by Acme, Inc., has not had the opportunity to select a different firm. Why should the firm be able to use limited liability to shift the risks of its insolvency from its shareholders to third-party injury victims? An influential article by Hansmann and Kraakman contends that firms should not be able to insist on limited liability to tort claimants against the firm. Hansmann and Kraakman argue that by adopting pro rata personal liability for shareholders, the perverse effects of shareholder wealth on share price could be avoided. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

One new difficulty is that firms may be able to manage their own assets as to minimize their exposure to tort liability. While laypeople often think of corporations as entities with deep pockets that would never be judgment proof, corporations are creatures of their founders' design, with few or many assets. Sometimes firms may be able to structure themselves to become judgment proof, at least in certain situations. A classic example is the case *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966):

The complaint alleges that the plaintiff was severely injured four years ago in New York City when he was run down by a taxicab owned by the defendant Seon Cab Corporation and negligently operated at the time by the defendant Marchese. The individual defendant, Carlton, is claimed to be a stockholder of 10 corporations, including Seon, each of which has but two cabs registered in its name, and it is implied that only the minimum automobile liability insurance required by law (in the amount of \$10,000) is carried on any one cab. Although seemingly independent of one another, these corporations are alleged to be 'operated \* \* \* as a single entity, unit and enterprise' with regard to financing, supplies, repairs, employees and garaging, and all are named as defendants. The plaintiff asserts that he is also entitled to hold their stockholders personally liable for the damages sought because the multiple corporate structure constitutes an unlawful attempt 'to defraud members of the general public' who might be injured by the cabs. . . .

The individual defendant is charged with having 'organized, managed, dominated and controlled' a fragmented corporate entity but there are no allegations that he was conducting business in his individual capacity. Had the taxicab fleet been owned by a single corporation, it would be readily apparent that the plaintiff would face formidable barriers in attempting to establish personal liability on the part of the corporation's stockholders. The fact that the fleet ownership has been deliberately split up among many corporations does not ease the plaintiff's burden in that respect. The corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance coverage of the vehicle which struck the plaintiff, are insufficient to assure him the recovery sought. If Carlton were to be held individually liable on those facts alone, the decision would apply equally to the thousands of cabs which are owned by their individual drivers who conduct their businesses through corporations organized pursuant to section 401 of the

Business Corporation Law. These taxi owner-operators are entitled to form such corporations, and we agree with the court at Special Term that, if the insurance coverage required by statute ‘is inadequate for the protection of the public, the remedy lies not with the courts but with the Legislature.’ It may very well be sound policy to require that certain corporations must take out liability insurance which will afford adequate compensation to their potential tort victims. However, the responsibility for imposing conditions on the privilege of incorporation has been committed by the Constitution to the Legislature and it may not be fairly implied, from any statute, that the Legislature intended, without the slightest discussion or debate, to require of taxi corporations that they carry automobile liability insurance over and above that mandated by the Vehicle and Traffic Law. . . . In sum, then, the complaint falls short of adequately stating a cause of action against the defendant Carlton in his individual capacity.

Why don’t all corporations follow defendant Carlton’s lead, and organize themselves into smaller units to avoid any large judgments? One author thinks that this is, in fact, where things are heading. Lynn M. Lopucki suggests that changing the substantive law of torts may amount to nothing more than rearranging “the deck chairs on the Titanic”:

The system by which money judgments are enforced is beginning to fail. The immediate cause is the deployment of legal structures that render potential defendants judgment proof. The liability system has long accepted that those who do not have the financial ability to pay judgments do not pay them. The system employs a complex web of social, economic, and legal constructs to determine who can or cannot pay. Those constructs can be, and are, manipulated by potential defendants to create judgment-proof structures. . . . Included among them are secured credit, shareholder limited liability, national sovereignty, and the ownership of property. . . .

For a large, publicly held company, the most effective strategy would be a combination of secured debt and ownership strategies. The debtor would first reduce its assets through asset securitization, then compartmentalize by incorporating subsidiaries and dividing its assets among them. Finally, it would encumber the assets in those subsidiaries beyond their remaining value.

Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 4-5 (1996).

Of course, reorganizing one’s firm strictly to avoid liability is not free. It can be expensive indeed, and in complex organizations it may be preclusively cumbersome, since corporate form serves many purposes, not just managing liability. Firms seem to do huge amounts more creative lawyering to avoid tax liability than to avoid tort liability. (Sometimes they even sell themselves to smaller, offshore firms to manage their tax exposure.) Yet that is not at all to say that firms do not seize opportunities to shelter themselves against tort liability. On the contrary, Ringleb and Wiggins claim to have found evidence of large corporations outsourcing their risky activities into separate units with limited financial assets in order to shield themselves from tort liability. Al H. Ringleb & Steven N. Wiggins, *Liability and Large-Scale, Long-Term Hazard*, 98 J. POL. ECON. 574 (1990). They attributed a 20% increase in the number of small firms between 1967 and 1980 to the spinning off of hazardous activities by

large corporations to small firms. *Id.* Large companies may also protect themselves from tort liability by issuing secured debt based on physical assets and then using the earned cash to buy back equity or to pay dividends to shareholders. Indeed, Warren and Westbrook found in their sample of business bankruptcies that 61.2% of the debt was secured. Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1222 (2005). Some even think that the General Motors bankruptcy and reorganization of 2009 may have sheltered the firm from liability for the now-infamous ignition switch failures that killed at least thirteen people in the early 2000s. *See* Stephen J. Lubben, *G.M.'s Bankruptcy Will Probably Shield it from Most New Claims*, N.Y. TIMES, Apr. 23, 2014. For a general overview of judgment proofing strategies, see Yeon-Koo Che & Kathryn E. Spier, *Strategic Judgment Proofing*, 39 RAND J. ECON. 926, 927 (2008).

### **7. Strategic Bankruptcy: The New Death of Liability?**

In the mid-1990s, Lynn Lopucki's warnings appeared alarmist to some. In at least one way, however, Lopucki proved prescient. For decades, Johnson & Johnson (J&J) has faced accusations that its baby powder made from talc contained asbestos, which is sometimes found alongside talc in nature. Plaintiffs allege that J&J's talc contained asbestos that caused injuries including cancer, mostly in mothers and babies across the country. Now confronted with over 34,000 lawsuits, J&J is trying to shield its assets from liability by deploying a remarkable gambit known as the "Texas Two-Step." Will Maddox, *The Texas Two-Step and How Corporations May Use it to Avoid Bankruptcy*, DALLAS MAGAZINE (Sept. 13, 2021), <https://www.dmagazine.com/healthcare-business/2021/09/the-texas-two-step-and-how-corporations-may-use-it-to-avoid-bankruptcy/>.

Here's what J&J did: J&J Consumer Incorporated (a subsidiary of J&J that held sizeable consumer health product assets and all asbestos-related liabilities) was a New Jersey corporation, but reincorporated as a Texas corporation. Under Texas's unusual corporate law, J&J Consumer Inc. could then undergo what Texas law calls a "divisive merger," which splits a company into two new separate pieces. In a Texas "divisive merger," the parent company may allocate assets to one of the successor entities and liabilities to the other, after which the parent company dissolves. J&J Consumer Inc.'s divisive merger created LTL Management, which absorbed all of J&J's talc suit liabilities, and created a "new" J&J Consumer Inc. holding all of "old" J&J Consumer Inc.'s assets. *In re LTL Mgmt. LLC*, No. 21-30589, 2021 WL 5343945, at \*1 (Bankr. W.D.N.C. Nov. 16, 2021); *J&J's "Texas Two-Step" Moves Forward*, AM. BAR ASS'N (Oct. 21, 2021), [https://www.americanbar.org/groups/health\\_law/section-news/2021/10/tex-two/](https://www.americanbar.org/groups/health_law/section-news/2021/10/tex-two/). LTL Management (the debtor entity) then filed for chapter 11 federal bankruptcy protection, under which only the limited pool of assets allocated by J&J to LTL would be available to the talc suit claimants. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re LTL Mgmt. LLC* (Bankr. W.D.N.C. Nov. 16, 2021) (No. 21-30589), 2021 WL 5343945, at \*4. Those assets apparently amount to \$2 billion, plus a stream of J&J future income with a present value of \$350 million, according to LTL's website. J&J's gambit could thus radically limit a potential payout that has been predicted to reach as high as \$24 billion.

Ordinarily, a transfer of all liabilities into one entity would be considered a fraudulent transfer and therefore be recapturable by the creditors of the bankrupt entity. But a "divisive merger" under Texas law operates "without . . . any transfer or assignment having occurred" as a matter of state law. TEX. BUS. ORGS. CODE ANN. § 10.008(a)(2)(c). Note that the assets



that a federal bankruptcy court allocates are, like virtually all property in the U.S., assets defined by state law. Without a “transfer” as a matter of state law, there can arguably be no fraudulent transfer as a matter of federal law, at least if the federal law follows its usual practice of resting on underlying state law definitions of what belongs to whom. The Texas Two-Step could allow corporations to legally avoid paying damages for mass torts, and could vindicate Lopucki’s warning about the “death of liability.”<sup>6</sup>

J&J is not the first firm to experiment with the “two-step,” though the gambit is very new. (Several other firms with asbestos liability exposure have tried out the move in the past few years.) But the strategy has hit speedbumps. LTL filed for bankruptcy in the Western District of North Carolina, the court with the most experience addressing the Texas Two-Step strategy. *See In re LTL Mgmt. LLC*, No. 21-30589, 2021 WL 5343945, at \*6 (Bankr. W.D.N.C. Nov. 16, 2021) (“every debtor using the Texas Two Step [has] filed for bankruptcy in this district.”). But in November 2021, the bankruptcy court transferred the case to the District of New Jersey, noting that the debtor’s connections to North Carolina appeared to be manufactured as part of the corporate restructuring. Steven Church, *J&J’s Texas Two-Step leads to baby powder bankruptcy being sent to New Jersey*, DALLAS MORNING NEWS (Nov. 10, 2021), <https://www.dallasnews.com/business/health-care/2021/11/10/jjs-texas-two-step-leads-to-baby-powder-bankruptcy-being-sent-to-new-jersey/>. The talc claimants have already moved to dismiss the case as a bad-faith bankruptcy filing. Jason Cohen, Mark Dendinger, and Robert Grattan, *LTL Management Texas Two Steps into New Jersey Bankruptcy Court*, 11 NAT’L L. REV. 365 (Dec. 31, 2021), <https://www.natlawreview.com/article/ltl-management-texas-two-steps-new-jersey-bankruptcy-court>.

## C. Mass Settlements

### 1. The September 11th Victim Compensation Fund

#### *Background*

In the wake of the September 11, 2001 attacks, Congress moved quickly to create a fund to compensate the families of those killed in the attacks.

Attorney General John Ashcroft appointed respected New York lawyer Kenneth Feinberg as the special master of the settlement fund to determine how much each victim would get. Families could choose to opt into the settlement, surrendering their right to sue the airlines for negligently failing to maintain proper security procedures. Families submitted claims detailing information about the victim, including their income, age, household status, and the nature and extent of their injuries. The legislation precluded the fund from awarding punitive damages and obligated the fund to reduce awards by the amount of insurance that was paid out (for example, by the life insurance or health insurance of the deceased).

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<sup>6</sup> The conversion of a New Jersey entity into a Texas entity might itself be a transfer, but this is unsettled, in part because it raises choice of law questions. *See, e.g.,* Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (July 19, 2021), [creditslips.org/creditslips/2021/07/the-texas-two-step.html](https://creditslips.org/creditslips/2021/07/the-texas-two-step.html).

Feinberg set up a detailed methodology for calculating awards to families. Pecuniary damages were based on the victim's historical earnings projected forward—except for those individuals making more than the 98th percentile of national income, or \$231,000. For those individuals, the methodology “presumed” lifetime earnings at the \$231,000 level, with potential increases for those who could demonstrate special circumstances. Nonpecuniary damages were a uniform \$250,000 for each decedent and \$100,000 for each dependent of the decedent, with a few cases of higher nonpecuniary damages for victims who suffered for days or weeks before passing away. Under the Act, the fund set off collateral source benefits such as life insurance proceeds received by a decedent's family against the damages awarded. While there was still significant variation between the payouts given to higher and lower earning victims, the capped income figure and the life insurance set off meant that variation within the class of fund beneficiaries was significantly smaller than it would have been if these cases had gone through a tort law's traditional methodology of calculating damages. See Kenneth Feinberg, *Final Report of the Special Master of the September 11th Victim Compensation Fund*, U.S. Dept. of Justice, <https://perma.cc/ZCK7-DL33>.

In the end, the fund distributed over \$7 billion to over 5,000 individuals within three years. 97% of the decedents' families participated in the settlement. The median award was slightly over \$1.5 million; the highest award in a death case was \$7 million and the lowest was \$250,000.

Ninety-four families of those who died on 9/11 declined to opt into the fund and sued the airlines. Litigation stretched out over the subsequent years. By 2011, ten years after the events of 9/11, all but one of the 94 families had settled their claims. Susanna Kim, *9/11 Families, Except One, Receive \$7 Billion*, ABC NEWS, Sept. 12, 2011, <https://perma.cc/MCH4-SXBW>. Ninety-two of those claims were settled for a total of \$500 million under the aegis of mediator Sheila Birnbaum, a partner at Quinn Emanuel, who helped negotiate settlements between the families of the decedents and the airlines. The average settlement award in the courts seems to have been considerably higher than the \$2 million average for families who received awards from the fund. This may be due to selection effects, to the procedural effects of the fund (which discounted the income of the highest earners and reduced awards for insured decedents)—or simply to the value to be gained by being one of the hold-outs in a negotiation setting.

One vital question is why more families didn't opt out. The reasons are likely varied. The settlement fund gave out funds more quickly than the lawsuits did and required less documentation and investment on the part of families. In theory, wealthy families like many of those killed in the Towers would have had the most to gain from opting out of the fund—and many of those presumably would have had the financial resources necessary to wait out a protracted litigation. Yet there may have been other factors that led people to join the fund: solidarity with other victims, patriotic support for the government program, or simply a desire for closure. Families opting out of the fund also cited non-financial motives. Many families who refused the fund stated that they were motivated by the desire to bring the case to trial to showcase the misdeeds of the airlines. Does the fact that virtually all of them settled their claims tell us something about the capacity of the tort system to air matters of public import?

### *Other Funds*

Kenneth Feinberg goes where disaster calls. In 2013, in the wake of the Boston Marathon bombings, Feinberg volunteered to administer a \$60 million fund created by donations of private individuals to support people injured or killed. He also worked pro bono for Virginia Tech in the aftermath of a mass shooting in 2007. He also was employed by BP to manage a settlement fund to compensate people injured by the oil spill in the Gulf of Mexico in 2010, to be discussed further below. More recently, he has been hired by Penn State University to manage settlements related to sexual abuse perpetrated by a coach of the Penn State football team.

These funds all have different sources and effects. The 9/11 fund was created by the government; the Boston Marathon fund by private individuals; the Virginia Tech, BP Oil Spill and Penn State funds by private companies. The 9/11 fund was intentionally created to protect parties that could have been liable under tort law—the airlines. Victims of the Boston Marathon bombings did not have an obvious tort remedy for their injuries. The efforts by Virginia Tech, BP, and Penn State more closely resemble standard settlement proceedings in that a liable party pays potential plaintiffs for releasing claims.

### *Other Disasters*

Not all disasters result in a compensation fund. In fact, the vast majority of deaths do not have any associated compensation fund. What makes some deaths special? Peter Schuck questions the rationale for singling out the victims of 9/11.

Perhaps the most basic is the question of what policy analysts call horizontal equity, constitutional theorists call equal protection, and common lawyers call analogical reasoning: whether the system treats like cases alike. On this important criterion, I would give Congress a failing grade. It is not simply that the fund compensates the victims of one set of terrorist attacks [9/11] but not victims of other terrorist attacks on American and foreign soil [Oklahoma City, Khobar Towers, and others]. It is also that the fund compensates the 9/11 victims while most other innocent victims of crime, intentional wrongdoing, or negligence must suffer without remedy unless they are “lucky” enough to have been injured by someone who can be held liable under the tort system’s peculiar, often arbitrary rules and who is also sufficiently insured or secure financially to pay the judgment.

Peter Schuck, *Special Dispensation*, AM. LAWYER (June 2004). Schuck went on to note that the inconsistency in 9/11 compensation is symptomatic of a far broader collective failure to articulate a common set of standards for who should be compensated for injury and when. Stated this way, the problem is immense and overwhelming. What counts as an injury warranting compensation? How about those who are simply unlucky? Are those with poor genetic endowments victims of an injury? If a person contributes in some way to her injury is she disqualified from compensation for it? What counts as the right (or wrong) kind of contribution? And if some sort of compensation is appropriate, how much and what kind? Back to Schuck:

Small wonder, then, that American society has deployed such a messy, ostensibly incoherent, if not unprincipled, mixture of institutions and approaches—tort, social insurance, private insurance, contract, charity, private savings, categorical programs—for remedying misfortunes of one kind or another. The 9/11 fund well reflects this characteristically American eclecticism and the extraordinary circumstances of its sudden birth.

*Id.*

## **2. Aggregation: Class Actions and their Limits**

Most deaths, even in large-scale accidents, are not compensated for by centralized funds. If there is someone to sue, plaintiffs are compensated through private litigation and settlement. Plaintiffs in mass torts may try to aggregate their claims to sue in a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure. Under Rule 23, a court may certify a class of plaintiffs, represented by a named plaintiff and appoint counsel for the class. The settlement or judgment reached in the class action has the power to bind class members that did not actively consent to the suit or participate in it. Sometimes, class counsel may be required to provide notice of the ongoing litigation to class members and give them the opportunity to opt out of the litigation.

Because class actions have the power to bind parties not immediately before the court, courts take a much more active role in managing the litigation and settlement process. For example, district courts must find that class counsel will fairly and adequately represent the interests of all the plaintiffs in the class and must approve any final settlement as fair. While mass torts were not originally envisioned as being well suited to class actions, use of the class actions for mass tort actions grew substantially in the 1970s and 1980s. Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991). The class action vehicle held appeal to both plaintiffs and defendants. Plaintiffs’ counsel gets the ability to bring together a much larger number of plaintiffs than they could ever individually enlist, giving them access to higher damages and attorney’s fees. Defendants get the opportunity to achieve a certain, speedy, and relatively quick resolution to an outstanding liability that might otherwise drag on for decades.

However, the Supreme Court in the late 1990s decided a pair of asbestos cases, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), that made it exceedingly difficult for plaintiffs to bring class action suits for personal injury damages in mass tort cases. Both cases involved a global settlement of claims for a class that included many different plaintiffs—plaintiffs who had died, plaintiffs who were experiencing ongoing illness, plaintiffs who knew they were exposed to the asbestos and who had not yet suffered injury, and plaintiffs who may not have been aware of their exposure. The Supreme Court held that there was a conflict of interest between these different types of plaintiffs, who might prefer different settlement arrangements, and ruled that each subgroup was not adequately independently represented in the settlement process.

Underlying the Court’s decisions was a concern that the class action vehicle itself might be used as a type of collusion between the plaintiffs’ attorney and the defendants to limit the defendant’s exposure and increase the plaintiffs’ attorneys’ fees at the expense of absent class

members. For example, in *Ortiz*, the parties claimed that the class action should not have an opt-out procedure for plaintiffs because the defendants did not have sufficient resources to cover all the claims—which required all the plaintiffs to come together to divide the limited resources. This fact was simply stipulated to by the parties, which led some to suspect that the plaintiffs’ lawyers had agreed to so stipulate in order to provide the defendants with the closure they required as a term of the class settlement deal. Both the plaintiffs’ attorney and the defendants seemed to benefit from alleging that there was a limited pot of money. The plaintiffs’ attorney won the ability to represent the entire class, without opt-outs, and the defendants won the ability to cap their liability at the amount they said they were able to pay.

As many critics quickly pointed out, however, the difficulty with the Court’s approach was that the alternatives were no better—and probably far worse. The idea that asbestos litigation without class actions would provide individual asbestos victims with a day in court was exceedingly implausible. To the contrary, the promise of peace for defendants was all that had seemed to offer the hope that plaintiffs would be able to recover some amount in a relatively prompt fashion. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement*, 57 VAND. L. REV. 1571 (2004).

*Amchem* and *Ortiz* dramatically changed the landscape for mass torts. As one author stated:

The *Amchem* and *Ortiz* decisions effectively brought an end to attempts to use class actions to craft broad global settlements of asbestos cases and to resolve future asbestos claims where no injury was manifested or suit filed. Meanwhile, the multidistrict litigation (MDL) mechanism has come to the fore as a possible way to consolidate asbestos cases for pretrial resolution, whether by settlement or by remand for trial. The 1968 Multidistrict Litigation Act created the Panel on Multidistrict Litigation (Panel) with the power to transfer cases with “common questions of fact” to a single federal judge “for coordinated or consolidated pretrial proceedings.” “In contrast to the stringent rules that govern class actions, MDL is a looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations.” Also, unlike class actions where the named plaintiffs are the only formal party and are in a fiduciary capacity to represent the absent class members, every plaintiff in an MDL has taken the action to file suit. Thus the issue of adequate representation of absent persons—including those who may not have even known of the class action until notice is given upon settlement—is lessened in MDLs.

Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021, 1031-33 (2014). However, multi-district litigation (unlike a class action) cannot bind all parties in the relevant class and thus does not prevent multiple trials arising out of the same mass tort. In an MDL, only pre-trial proceedings are consolidated. The MDL is thus a far less efficient vehicle for quickly settling a large number of cases, even if it may offer greater due process protections.

So what was the result? Aggregation has continued. But the aggregation we see after *Amchem* and *Ortiz* is aggregation that happens, as Professor Howard Erichson has described it, informally rather than formally. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000). Mass tort litigation no longer happens through Rule 23 class actions. But the

economies of scale, and the imperatives of coordination, mean that it still happens. Only now it happens through the practices of lawyers who develop portfolios of thousands of claims. It happens through networks of plaintiffs' representatives who coordinate the actions of their claimants. And where the Rule 23 aggregation happened under judicial supervision, informal aggregation after *Amchem* and *Ortiz* happens entirely in private. See also Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017).

### 3. *The Vioxx Settlement*

A settlement involving the painkiller Vioxx highlights some of the challenges of litigating mass torts without class actions. The drug was approved in 2000 and quickly became one of pharmaceutical giant Merck's popular products. Four years later, however, Merck pulled Vioxx off the market when a study concluded that users had an increased chance of stroke or heart attack. Plaintiffs' lawyers quickly began gathering plaintiffs. Merck defended its conduct and committed publicly to trying every case filed against it. According to Merck, Vioxx was not the cause of many of the plaintiffs' injuries.

In 2007, however, a New Jersey jury awarded \$20 million dollars in damages and \$27.5 million dollars in additional punitive damages. Merck won cases, too. It won nine of the fourteen cases that went to trial against it. But by that point, plaintiffs' lawyers accumulated portfolios of thousands of plaintiffs. In late 2007, there were more than 27,000 cases pending against Merck.

Ultimately, Merck aimed to enter into a settlement with the principal plaintiffs' lawyers. Frank McClellan analyzes the settlement dynamics as follows:

On November 9, 2007, Merck & Co., the executive committee of the Plaintiffs' Steering Committee of the federal multidistrict, and plaintiffs' counsel representatives agreed to settle the Vioxx litigation. The plaintiffs' lawyers were charged with obtaining the acceptance of at least 85% of Vioxx plaintiffs before the settlement goes into effect. If the required number of plaintiffs accept the settlement, it is estimated that each plaintiff who qualifies—by presenting adequate proof that Vioxx caused a heart attack, stroke, or death—will receive an average payment of between \$100,000 and \$200,000, less attorneys' fees ranging from 33% to 40%.

Merck's settlement announcement highlighted a number of key provisions. To qualify for compensation, claimants must offer objective medical proof that they suffered a heart attack or stroke after taking at least thirty Vioxx pills and show that the injury took place within fourteen days of taking Vioxx. Administrators will be appointed to determine whether individual cases qualify. In addition, the agreement provides that Merck does not admit causation or fault. Finally, the settlement agreement provides that law firms on the federal and state Plaintiffs' Steering Committees and firms that have tried cases in the coordinated proceedings are required to recommend enrollment in the program to 100% of their clients who allege either myocardial infarction (MI) or ischemic stroke. These lawyers and law firms are also prohibited from continuing to represent nonparticipating plaintiffs.

The settlement followed the trial of fourteen cases that resulted in nine wins for Merck and five wins for plaintiffs. Throughout the course of the litigation, Merck vowed to “try every case” and backed its public litigation posture by paying millions of dollars in legal fees and other trial expenses, while running an extensive advertising campaign touting Merck’s contributions to public health. The settlement reflects a tremendous victory for Merck, because the company’s potential liability exposure was projected to be substantially higher. Wall Street rewarded Merck with a rise in its stock prices the day after the settlement was announced. Merck and the plaintiffs’ lawyers explained to the public that the settlement made pragmatic sense in light of the uncertainty of the outcomes that would follow trying over 27,000 cases one at time.

Merck’s successful employment of a try-every-case strategy to produce a settlement much lower than expected reveals a glaring deficiency in the legal system’s ability to achieve the fundamental goals of tort law in prescription drug cases where large numbers of consumers suffer adverse reactions to the same drug. If other corporations with vast financial resources follow Merck’s lead, the disparate economic interests among the rich corporation, plaintiffs’ lawyers, and injured consumers is likely to result in pragmatic decision making on the part of the business stakeholders that minimizes the importance of individual justice. The strategy of trying every case and making plaintiffs’ lawyers accept the reality of costly litigation over an extended period of time transforms plaintiffs’ lawyers from zealous advocates to pragmatic entrepreneurs. From a pragmatic business perspective, achieving individual justice seems much less important than garnering a settlement tailored toward global considerations and a return on an investment.

Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509 (2008).

As in the BP litigation, settlement is not necessarily where the story ends. Three and a half years after the settlement, the plaintiffs’ lawyers were in court suing each other over the division of the \$315 million attorney’s fee award from the settlement. Dionne Searcey, *The Vioxx Endgame: It’s All About the Fees*, WALL ST. J. L. BLOG, Mar. 3, 2011, available at <https://perma.cc/T9BZ-DAGU>. This highlights another distinction between class actions and multi-district litigation. In a class action lawsuit, the class counsel, appointed by the judge, has authority to divide up work and fees. In an MDL, a “Plaintiff’s Committee” composed of multiple firms, sometimes with competing interests, represents the interests of the plaintiffs’ lawyers and is responsible for managing contentious issues like the division of fees.

Howard Erichson explores the dynamics among the plaintiffs’ lawyers engaged in similar cases and argues that in mass tort cases, some kind of aggregation is inevitable. Erichson invites his readers to imagine a mass tort situation involving a hypothetical widget maker known as Widgium:

Picture one thousand such lawsuits. Each is brought by a plaintiff, or perhaps several plaintiffs, asserting claims against various defendants based on exposure to widgium. Each looks like a free-standing individual lawsuit. But in fact, all thousand lawsuits are part of a single litigation, linked together much

more closely than it appears at first glance. The plaintiffs' lawyers are working together to coordinate their efforts. Many of them belong to the Widgium Litigation Group sponsored by the Association of Trial Lawyers of America, and receive the Widgium Newsletter, which keeps them abreast of litigation developments. The leading plaintiffs' lawyers—each of whom represents dozens or even hundreds of individual widgium plaintiffs—have presented training sessions to teach other lawyers how to try a widgium case. The plaintiffs' lawyers have pooled resources to hire experts and have shared the costs of discovery. . . .

Informal aggregation practices have filled the void left by formal procedures that do not achieve full aggregation of related claims. . . .

In informally aggregated litigation, settlement negotiations may occur with little control by the individual client, and trial preparation often is handled “by a committee of plaintiffs' lawyers” who lack regular contact with most of the plaintiffs who rely on those lawyers' work. . . .

If the legal system cannot devise mechanisms for addressing a coherent dispute as a unified whole, the litigation will aggregate itself anyway. The end result may be the worst of both worlds. Neither does the client have individual litigant autonomy, nor does the legal system obtain real finality and consistency by precluding the relitigation of decided issues. Neither can the client rely on full control by the client's individually retained lawyer, nor can the client rely on explicit ethical duties to the client by those who control the case.

Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

Other authors have taken a more favorable view of the informal aggregation that resulted in the Vioxx settlement:

The Vioxx settlement took the form not of a class action settlement but of a contract between the defendant-manufacturer Merck & Company, Inc. and the small number of law firms within the plaintiffs' bar with large inventories of Vioxx clients. The contract described a grid-like compensation framework for the ultimate cashing out of Vioxx claims, but Vioxx claimants themselves literally were nonparties to that contract. The enforcement mechanism for the deal consisted not of preclusion but of contractual terms whereby each signatory law firm obligated itself to do two things: to recommend the deal to each of its Vioxx clients and—“to the extent permitted by” applicable ethical strictures—to disengage from the representation of any client who might decline the firm's advice to take the deal. Absent a signatory law firm's commitment of its entire Vioxx client inventory to the deal, Merck would have the discretion to reject the firm's enrollment such that none of the firm's clients would be eligible to participate.

The Vioxx settlement worked, at least in the practical sense that it garnered, by



a comfortable margin, the overall rate of participation from Vioxx claimants that Merck had specified as a precondition for its funding obligations. . . .

[T]he deal consisted of . . . allocation of the fixed overall sum of \$4.85 billion from Merck according to a point system designed to assess the relative strength of individual Vioxx users' cases as to specific causation. . . .

Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010).

#### **4. The BP Oil Spill**

On April 20, 2010, an explosion in an offshore oil rig operated by BP created an outpouring of oil into the Gulf of Mexico. Approximately 4.9 million barrels of oil spilled into the Gulf before the well was ultimately sealed. Oil eventually reached the shores of Texas, Louisiana, Mississippi, Alabama, and Florida. Businesses and individuals, from beach resorts to fishermen, felt the economic impact of the spill. The spill also caused significant ecological damage to the region. The government brought civil and criminal cases on its own behalf to recover its cost in cleaning up and mitigating the impact of the spill. In parallel, individual plaintiffs began to reach for compensation.

##### *The Compensation Fund*

In the aftermath of the spill, BP committed to taking “full responsibility” for the disaster and promised to compensate injured parties. BP hired Kenneth Feinberg, the same lawyer who ran the 9/11 Compensation Fund, to administer claims through the Gulf Coast Claims Facility (GCCF). Businesses and individuals filed claims with the fund, which had broad authority to set criteria for determining eligibility and awards. The GCCF came under heavy criticism by state governments, the Department of Justice, and plaintiffs for taking too long and for improperly rejecting claims. The GCCF paid out nearly \$7 billion before it was subsumed into the broader class action settlement.

##### *The Class Action Settlement*

While the GCCF was paying out claims, BP was negotiating with a class of plaintiffs in district court. BP actually supported the plaintiffs' motion for class certification. In March 2012, it reached a settlement agreement with the plaintiffs that was approved by the court. Under the settlement agreement, BP agreed to pay out claims to parties who could demonstrate an economic impact during the time period of the oil spill—without demonstrating that the oil spill actually caused that downturn in revenue. The broad terms of the settlement led to subsequent lawsuits over the claims administration process. BP challenged the claims administrator's decision to give awards to plaintiffs who could not demonstrate a causal connection between the oil spill and their injuries, but the district court upheld the process, stating that BP was bound by the terms of the settlement that it agreed to. BP appealed to the Fifth Circuit, and lost. *In re Deepwater Horizon*, 744 F.3d 370 (5th Cir. 2014). BP also challenged the accounting process that the claims administrator of the fund was using, and the district court agreed with BP—but refused BP its request to recoup funds paid out under the

old methodology. So far, about \$4 billion has been paid out under the class action settlement. Many plaintiffs opted out of the class action process, and those cases are still settling.

Why did BP agree to such a bad deal? At the time, BP was taking heat about the GCCF from federal and state governments, who were both suing BP themselves and debating regulations restricting exploitation of offshore assets. It may have believed that getting a fast, generous settlement would have a public relations benefit that would spill over into other areas. BP ultimately paid out approximately \$2 billion to federal and state governments. After a brief “moratorium” on approving new offshore assets, regulation has not actually significantly increased in the Gulf, and BP has opened up new wells there in the past several years.

It remains to be seen what lessons will be learned from this debacle. Future companies may be more cautious about agreeing to broad, ill-defined settlement agreements—but perhaps they will take comfort from the fact that they may be able to buy their way out of regulation by accepting tort liability.

### 5. *State Attorneys General*

Given the procedural challenges to class actions as a way of resolving mass torts, state attorneys general have attempted to fill the void by bringing actions on behalf of their citizens. Courts have generally been more friendly to this vehicle for resolving mass torts, as state attorneys general have a claim to democratic legitimacy that lead counsel for a class does not. However, Margaret Lemos observes that we ought to have some concern about whether state attorneys general will provide an adequate substitute for either private litigants or class action attorneys adequately motivated by incentives of the contingency fee. We ought especially to be concerned given that state attorney general litigation may in some settings have the same claim preclusive effects of class actions on third parties. Consider Professor Margaret Lemos’s observations:

Class action scholars have produced mountains of commentary detailing the agency costs of aggregate litigation, including substantial conflicts between the interests of class counsel and the members of the plaintiff class. I show that the same risks are present in state suits. Attorneys general may not be driven by the pursuit of attorney’s fees, but their status as political representatives means that they must balance the interests of the public at large with those of the individuals they purport to represent in an adjudicative capacity. The potential for conflicted representation would not be troubling if citizens could easily monitor and control the work of the attorney general, but, as in the class context, they cannot. . . . Thus, far from solving the problems that scholars have emphasized in the class action context, the fact that the attorney general may be an elected official should provide cause for heightened concern. That concern assumes a constitutional character when state litigation bars subsequent private claims for damages or other monetary relief. . . . Case law on *parens patriae* preclusion is remarkably thin, but the consensus view seems to be that public suits preclude all private actions raising the same claims.

Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 487 (2012). Professor Lemos goes on to argue that preclusion

by state attorney general *parens patriae* litigation ought to be viewed as unconstitutional. Whether she is right about that or not, it is worth remembering in this context our earlier observations about the recent politicization of the state attorneys general. A world in which plaintiffs' lawyers and defense interests are vying with campaign dollars to influence state attorneys general is precisely the kind of world in which we ought to worry about the capacity of those officials to foreclose claims by their citizens. In a very real sense, state attorney general suits could reproduce and indeed exacerbate all of the fears of the Supreme Court in *Amchem* and *Ortiz*.

## D. Punitive Damages

Up to this point, we have been discussing compensatory damages—damages that are intended to restore the plaintiff to where she was prior to the tort. Punitive damages play a different role. Instead of compensating the plaintiff, they are meant to punish the defendant. Why might we want to punish a defendant above and beyond the cost of reparations to the plaintiff? Judge Posner rehearsed a series of rationales in *Kemezy v. Peters*:

### *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996)

POSNER, C.J.

Jeffrey Kemezy sued a Muncie, Indiana policeman named James Peters under 42 U.S.C. § 1983, claiming that Peters had wantonly beaten him with the officer's nightstick in an altercation in a bowling alley where Peters was moonlighting as a security guard. The jury awarded Kemezy \$10,000 in compensatory damages and \$20,000 in punitive damages. Peters' appeal challenges only the award of punitive damages, and that on the narrowest of grounds: that it was the plaintiff's burden to introduce evidence concerning the defendant's net worth for purposes of equipping the jury with information essential to a just measurement of punitive damages. . . . [W]e think the majority rule, which places no burden of production on the plaintiff, is sound, and we take this opportunity to make clear that it is indeed the law of this circuit. The standard judicial formulation of the purpose of punitive damages is that it is to punish the defendant for reprehensible conduct and to deter him and others from engaging in similar conduct. This formulation is cryptic, since deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages. An extensive academic literature, however, elaborates on the cryptic judicial formula, offering a number of reasons for awards of punitive damages. . . . A review of the reasons will point us toward a sound choice between the majority and minority views.

1. Compensatory damages do not always compensate fully. Because courts insist that an award of compensatory damages have an objective basis in evidence, such awards are likely to fall short in some cases, especially when the injury is of an elusive or intangible character. If you spit upon another person in anger, you inflict a real injury but one exceedingly difficult to quantify. If the court is confident that the injurious conduct had no redeeming social value, so that "overdetering" such conduct by an "excessive" award of damages is not a concern, a

generous award of punitive damages will assure full compensation without impeding socially valuable conduct.

2. By the same token, punitive damages are necessary in such cases in order to make sure that tortious conduct is not underdeterred, as it might be if compensatory damages fell short of the actual injury inflicted by the tort. These two points bring out the close relation between the compensatory and deterrent objectives of tort law, or, more precisely perhaps, its rectificatory and regulatory purposes. Knowing that he will have to pay compensation for harm inflicted, the potential injurer will be deterred from inflicting that harm unless the benefits to him are greater. If we do not want him to balance costs and benefits in this fashion, we can add a dollop of punitive damages to make the costs greater.

3. Punitive damages are necessary in some cases to make sure that people channel transactions through the market when the costs of voluntary transactions are low. We do not want a person to be able to take his neighbor's car and when the neighbor complains tell him to go sue for its value. We want to make such expropriations valueless to the expropriator and we can do this by adding a punitive exaction to the judgment for the market value of what is taken. This function of punitive damages is particularly important in areas such as defamation and sexual assault, where the tortfeasor may, if the only price of the tort is having to compensate his victim, commit the tort because he derives greater pleasure from the act than the victim incurs pain.

4. When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.

5. An award of punitive damages expresses the community's abhorrence at the defendant's act. We understand that otherwise upright, decent, law-abiding people are sometimes careless and that their carelessness can result in unintentional injury for which compensation should be required. We react far more strongly to the deliberate or reckless wrongdoer, and an award of punitive damages commutes our indignation into a kind of civil fine, civil punishment. Some of these functions are also performed by the criminal justice system. Many legal systems do not permit awards of punitive damages at all, believing that such awards anomalously intrude the principles of criminal justice into civil cases. Even our cousins the English allow punitive damages only in an excruciatingly narrow category of cases. But whether because the American legal and political cultures are unique, or because the criminal justice system in this country is overloaded and some of its functions have devolved upon the tort system, punitive damages are a regular feature of American tort cases, though reserved generally for intentional torts, including the deliberate use of excess force as here. This suggests additional functions of punitive damages:

6. Punitive damages relieve the pressures on the criminal justice system. They do this not so much by creating an additional sanction, which could be done by increasing the fines imposed in criminal cases, as by giving private individuals—the tort victims themselves—a monetary incentive to shoulder the costs of enforcement.

7. If we assume realistically that the criminal justice system could not or would not take up the slack if punitive damages were abolished, then they have the additional function of heading off breaches of the peace by giving individuals injured by relatively minor outrages a judicial remedy in lieu of the violent self-help to which they might resort if their complaints to the criminal justice authorities were certain to be ignored and they had no other legal remedy.

What is striking about the purposes that are served by the awarding of punitive damages is that none of them depends critically on proof that the defendant's income or wealth exceeds some specified level. The more wealth the defendant has, the smaller is the relative bite that an award of punitive damages not actually geared to that wealth will take out of his pocketbook, while if he has very little wealth the award of punitive damages may exceed his ability to pay and perhaps drive him into bankruptcy. To a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing. . . . But rich people are not famous for being indifferent to money, and if they are forced to pay not merely the cost of the harm to the victims of their torts but also some multiple of that cost they are likely to think twice before engaging in such expensive behavior again. Juries, rightly or wrongly, think differently, so plaintiffs who are seeking punitive damages often present evidence of the defendant's wealth. The question is whether they must present such evidence—whether it is somehow unjust to allow a jury to award punitive damages without knowing that the defendant really is a wealthy person. The answer, obviously, is no. A plaintiff is not required to seek punitive damages in the first place, so he should not be denied an award of punitive damages merely because he does not present evidence that if believed would persuade the jury to award him even more than he is asking.

Take the question from the other side: if the defendant is not as wealthy as the jury might in the absence of any evidence suppose, should the plaintiff be required to show this? That seems an odd suggestion too. The reprehensibility of a person's conduct is not mitigated by his not being a rich person, and plaintiffs are never required to apologize for seeking damages that if awarded will precipitate the defendant into bankruptcy. A plea of poverty is a classic appeal to the mercy of the judge or jury, and why the plaintiff should be required to make the plea on behalf of his opponent eludes us.

The usual practice with respect to fines is not to proportion the fine to the defendant's wealth, but to allow him to argue that the fine should be waived or lowered because he cannot possibly pay it. . . . Given the close relation between fines and punitive damages, this is the proper approach to punitive damages as well. The defendant who cannot pay a large award of punitive damages can point this out to the jury so that they will not waste their time and that of the bankruptcy courts by awarding an amount that exceeds his ability to pay.

It ill becomes defendants to argue that plaintiffs must introduce evidence of the defendant's wealth. Since most tort defendants against whom punitive damages are sought are enterprises rather than individuals, the effect of such a rule would be to encourage plaintiffs to seek punitive damages whether or not justified, in order to be able to put before the jury evidence that the defendant has a deep pocket and therefore should be made to pay a large judgment regardless of any nice calculation of actual culpability. . . . Individual defendants, as in the present case, are reluctant to disclose their net worth in any circumstances, so that compelling plaintiffs to seek discovery of that information would invite a particularly intrusive and resented form of pretrial discovery and disable the defendant from objecting. Since, moreover,

information about net worth is in the possession of the person whose net wealth is in issue, the normal principles of pleading would put the burden of production on the defendant—which, as we have been at pains to stress, is just where defendants as a whole would want it. . . .

Affirmed.

### Notes

1. *The relevance of wealth.* A central controversy in punitive damages cases is whether evidence of the defendant's wealth is admissible. The Seventh Circuit adopts the view that wealth may be admissible for the purposes of awarding punitive damages against individuals, but not against corporations:

Courts take account of a defendant's wealth when "[a]n amount sufficient to punish or to deter one individual may be trivial to another." . . . For natural persons the marginal utility of money decreases as wealth increases, so that higher fines may be needed to deter those possessing great wealth. ("May be" is an important qualifier; the entire penalty includes extra-judicial consequences, such as loss of business and other future income, that is likely to be greater for wealthier defendants.) Corporations, however, are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings? Absolute size, like net worth, also is a questionable reason to extract more per case. If L'Oréal introduces 10,000 products, perhaps 10 of these infringe someone else's trademark. Awards of ordinary damages in all 10 cases deter wrongful conduct. The net judgment bill of the firm will increase with its wrongs, without the need for punitive damages. If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none.

*Zazu Designs v. L'Oreal*, 979 F.2d 499 (7th Cir. 1992) (citations omitted). Does this give corporate actors a special advantage over natural persons in punitive damages litigation? Should the rule be the same for publicly held firms and close corporations?

2. *A concealment model.* Judge Posner's fourth consideration is the risk of concealment. Professors Polinsky and Shavell formalized this rationale in a leading article that articulated a so-called multiplier basis for punitive damages:

When an injurer has a chance of escaping liability, the proper level of total damages to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable. Thus, for example, if the harm is \$100,000 and there is a twenty-five percent chance that the injurer will be found liable for the harm for which he is legally responsible, the harm should be multiplied by  $1/.25$ , or 4, so total damages should be \$400,000. Because the injurer will pay this amount every fourth time he generates harm, his average payment will be \$100,000 ( $= \$400,000/4$ ).

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998). Polinsky and Shavell make punitive damage safe for the world of Learned Hand's cost-benefit test. On this theory, punitive damages are a way of prompting actors to take the social costs of their activities seriously even where the probability that those costs will be detected is less than 100%.

3. *The prevalence of punitives.* How much do punitive damages actually change the landscape of tort damages? One study suggests that punitive damages may not be as widespread as we might think.

The rate [at which plaintiffs seek punitive damages], about 10 percent [of filed claims], is much lower than many have believed. In tried cases in which punitive damages were sought, and in which plaintiffs established liability at trial, punitive damages . . . were awarded in 35.5 percent . . . of cases . . . . We find that the award of punitive damages is significantly associated with the level of the compensatory award. For compensatory award cases exceeding \$1 million, won by plaintiffs with punitive damages requested, the punitive damages award rate exceeded 50 percent.

Theodore Eisenberg, Michael Heise, Nicole L. Waters & Martin T. Wells, *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577 (2010). Critics of the Eisenberg methodology contend that the threat of punitive damages pushes defendants to settle and that punitives play a larger role in American torts practice than this study suggests. Eisenberg and his co-authors, however, found that there did not seem to be a settlement effect: cases in which punitives were sought in the pleadings were neither more nor less likely to come to settlement.

4. *Arbitrariness in punitives?* Judge Posner's rationales for punitive damages in *Kemezy* encompass a broad set of values—some of which are very difficult to put a price on. How, after

all, does one price outrage? Empirical research has shown that the amount of punitive damages awarded can be incredibly unpredictable. When Cass Sunstein and his collaborators explored this phenomenon, they found that “people have a remarkably high degree of moral consensus on the degrees of outrage and punishment that are appropriate for punitive damage cases,” and that this “moral consensus” cuts across “differences in gender, race, income, age, and education.” But the consensus, they concluded, “fractures when the legal system uses dollars as the vehicle to measure moral outrage.” The most important “source of arbitrariness within the existing system of punitive damages” is the “use of an unbounded dollar scale.” Further arbitrariness was produced by the fact that juries lacked any consistent points of reference or comparison. The study concluded that

[i]f juries cannot consistently or sensibly “map” their judgments onto an unbounded dollar scale, perhaps the civil justice system should be brought more closely in line with the criminal justice system, in which juries decide questions of liability and judges decide questions of punishment subject to guidelines and constraints.

Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

5. *The Supreme Court intervenes.* In a dramatic series of cases beginning in the mid-1990s, the Supreme Court has taken the view that some punitive damages can be so excessive as to violate the Due Process clause of the Fourteenth Amendment. The first case finding constitutionally excessive punitive damages was *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In *Gore*, plaintiff complained that defendant had failed to disclose that the plaintiff’s new car had been repainted before its sale. In a trial in Alabama state court, defendant BMW admitted that it followed a nationwide policy of making small undisclosed repairs to new cars when the cost of such repairs was less than 3% of the total value of the car. The policy seemed to have affected nearly 1,000 automobiles altogether. After trial, the jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages, which was later reduced to \$2 million by the Alabama Supreme Court, in part on the ground that the jury had erroneously arrived at the punitives award by multiplying the compensatory damages by the number of nondisclosed repaired automobiles sold nationwide. The United States Supreme Court struck down the \$2 million award as a violation of the Due Process Clause of the Fourteenth Amendment and indicated that courts should look to three factors to determine whether punitive damages ran afoul of the Constitution: first, the degree of reprehensibility of the defendant’s conduct; second, the ratio of compensatory damages to punitive damages; and third, the comparison between punitive damages and civil or criminal penalties that might be imposed for comparable misconduct.

Seven years later, the Court revisited the *Gore* factors in *State Farm*:



***State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)**

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of \$145 million in punitive damages, where full compensatory damages are \$1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but “a consensus was reached early on by the investigators and witnesses that Mr. Campbell’s unsafe pass had indeed caused the crash.” Campbell’s insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital’s estate (Ospital) to settle the claims for the policy limit of \$50,000 (\$25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.” To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for \$185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the \$135,849 in excess liability. Its counsel made this clear to the Campbells: “You may want to put for sale signs on your property to get things moving.” Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher’s and Ospital’s attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad-faith action. No settlement could be concluded without Slusher’s and Ospital’s approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell’s appeal in the wrongful-death and tort actions. *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989). State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. . . . In the first phase [of the trial] the jury determined that State Farm’s

decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559, and refused to sustain a \$2 million punitive damages award which accompanied a verdict of only \$4,000 in compensatory damages. Based on that decision, State Farm . . . moved for the exclusion of evidence of dissimilar out-of-state conduct. The trial court denied State Farm's motion.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. . . . State Farm argued during phase II that its decision to take the case to trial was an "honest mistake" that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. . . . In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages."

Evidence pertaining to the PP & R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively. Both parties appealed.

The Utah Supreme Court . . . reinstated the \$145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP & R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," and concluded that the ratio between punitive and compensatory damages was not unwarranted. We granted certiorari.

## II

. . . While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." . . .

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. . . . Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid “passion or prejudice,” do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

In light of these concerns, in *Gore, supra*, we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

### III

Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult. It was error to reinstate the jury’s \$145 million punitive damages award. . . .

While we do not suggest there was error in awarding punitive damages based upon State Farm’s conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country. The Utah Supreme Court’s opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. This was, as well, an explicit rationale of the trial court’s decision in approving the award, though reduced from \$145 million to \$25 million. . . .

A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

. . . Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. . . . A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is

permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains . . . .

## B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.

. . . Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

## C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases."

. . .

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, an amount dwarfed by the \$145 million punitive damages award. . . .

The judgment of the Utah Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SCALIA, J., dissenting.

I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore* that the Due Process Clause provides no substantive protections against “excessive” or “unreasonable” awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect. I would affirm the judgment of the Utah Supreme Court.

THOMAS, J., dissenting.

I would affirm the judgment below because I continue to believe that the Constitution does not constrain the size of punitive damages awards.

GINSBURG, J., dissenting.

In *Gore*, I stated why I resisted the Court’s foray into punitive damages “territory traditionally within the States’ domain.” I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions . . . , the Court “work[s] at this business [of reviewing state court judgments] alone,” unaided by the participation of federal district courts and courts of appeals. . . .

### Notes

1. *Room left for the multiplier theory?* The Court’s decision in *State Farm* seems to have dealt a powerful blow to the economists’ multiplier theory of punitive damages. If conduct to nonparties is inadmissible, then the undetected cases are essentially excluded from consideration—at least if to consider them means to increase the punishment to the defendant on the basis of the defendant’s additional wrongs to nonparties.

2. *Whither conduct toward nonparties?* But did this mean that evidence of conduct toward nonparties was irrelevant altogether? What about the relevance of conduct to nonparties as evidence of the defendant’s culpability with respect to the plaintiff himself or herself? Isn’t evidence of the defendant’s behavior toward others a quintessential way of showing the culpability of the defendant’s mental state in its conduct toward any given plaintiff? Shortly after *State Farm*, the Supreme Court was drawn back into the quagmire, this time in a punitive damages award arising out of a tobacco case. Events would reveal just how difficult the Court’s new line would be to follow.

***Philip Morris USA v. Williams*, 549 U.S. 346 (2007)**

BREYER, J.

The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

## I

This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker. Respondent, Williams' widow, represents his estate in this state lawsuit for negligence and deceit against Philip Morris, the manufacturer of Marlboro, the brand that Williams favored. A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury ultimately found that Philip Morris was negligent (as was Williams) and that Philip Morris had engaged in deceit. In respect to deceit, the claim at issue here, it awarded compensatory damages of about \$821,000 (about \$21,000 economic and \$800,000 noneconomic) along with \$79.5 million in punitive damages.

The trial judge subsequently found the \$79.5 million punitive damages award "excessive," see, e.g., *BMW of North America, Inc. v. Gore*, . . . (1995), and reduced it to \$32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the \$79.5 million jury award. Subsequently, Philip Morris sought review in the Oregon Supreme Court (which denied review) and then here. We remanded the case in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, . . . (2003). The Oregon Court of Appeals adhered to its original views. And Philip Morris sought, and this time obtained, review in the Oregon Supreme Court.

Philip Morris then made two arguments relevant here. First, it said that the trial court should have accepted, but did not accept, a proposed "punitive damages" instruction that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court. In particular, Philip Morris pointed out that the plaintiff's attorney had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed]." . . . In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims". . . . The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." . . .

Second, Philip Morris pointed to the roughly 100-to-1 ratio the \$79.5 million punitive damages award bears to \$821,000 in compensatory damages. Philip Morris noted that this Court in *BMW* emphasized the constitutional need for punitive damages awards to reflect (1) the “reprehensibility” of the defendant’s conduct, (2) a “reasonable relationship” to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of “sanctions,” e.g., criminal penalties, that state law provided for comparable conduct . . . And in *State Farm*, this Court said that the longstanding historical practice of setting punitive damages at two, three, or four times the size of compensatory damages, while “not binding,” is “instructive,” and that “[s]ingle-digit multipliers are more likely to comport with due process.” . . . Philip Morris claimed that, in light of this case law, the punitive award was “grossly excessive.” . . .

The Oregon Supreme Court rejected these and other Philip Morris arguments. In particular, it rejected Philip Morris’ claim that the Constitution prohibits a state jury “from using punitive damages to punish a defendant for harm to nonparties.” . . . And in light of Philip Morris’ reprehensible conduct, it found that the \$79.5 million award was not “grossly excessive.” . . .

Philip Morris then sought certiorari. It asked us to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded “the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.” . . . We granted certiorari limited to these two questions.

For reasons we shall set forth, we consider only the first of these questions. We vacate the Oregon Supreme Court’s judgment, and we remand the case for further proceedings.

## II

This Court has long made clear that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” . . . At the same time, we have emphasized the need to avoid an arbitrary determination of an award’s amount. Unless a State insists upon proper standards that will cabin the jury’s discretionary authority, its punitive damages system may deprive a defendant of “fair notice . . . of the severity of the penalty that a State may impose,” . . . ; it may threaten “arbitrary punishments,” i.e., punishments that reflect not an “application of law” but “a decisionmaker’s caprice” . . . ; and, where the amounts are sufficiently large, it may impose one State’s (or one jury’s) “policy choice,” say as to the conditions under which (or even whether) certain products can be sold, upon “neighboring States” with different public policies . . . .

For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as “grossly excessive.” See *Honda Motor Co. v. Oberg*, (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, (2001) (review must be de novo); *BMW, supra*, (excessiveness decision depends upon the reprehensibility of the defendant’s conduct . . .); *State Farm, supra* (excessiveness more likely where ratio exceeds single digits). Because we shall not decide whether the award here at issue is “grossly excessive,” we need now only consider the Constitution’s procedural limitations.

## III

In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." . . . Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. . . .

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the plaintiff. . . .

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries . . . —it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.



## IV

Respondent suggests as well that the Oregon Supreme Court, in essence, agreed with us, that it did not authorize punitive damages awards based upon punishment for harm caused to nonparties. We concede that one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility. See, e.g., 340 Ore., at 51 . . . (“[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large”). But the Oregon court's opinion elsewhere makes clear that that court held more than these few phrases might suggest.

The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the “reasonable relationship” equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that “you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is” between Philip Morris’ punishable misconduct and harm caused to Jesse Williams, “[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims” . . . . And as the Oregon Supreme Court explicitly recognized, Philip Morris argued that the Constitution “prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties.” . . .

The court rejected that claim. In doing so, it pointed out (1) that this Court in *State Farm* had held only that a jury could not base its award upon “dissimilar” acts of a defendant. . . . It added (2) that “[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.” . . . And it stated (3) that “[i]t is unclear to us how a jury could ‘consider’ harm to others, yet withhold that consideration from the punishment calculus.” . . .

The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now. We do not agree with the Oregon court's second statement. We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility. . . .

The Oregon court's third statement raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases.

V

As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth. . . .

STEVENS, J. dissenting.

. . .

Unlike the Court, I see no reason why an interest in punishing a wrongdoer “for harming persons who are not before the court” . . . should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. . . . In our early history either type of sanction might have been imposed in litigation prosecuted by a private citizen. . . . And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

In the case before us, evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. No evidence was offered to establish an appropriate measure of damages to compensate such third parties for their injuries, and no one argued that the punitive damages award would serve any such purpose. To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process . . . . But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction. . . . This justification for punitive damages has even greater salience when, as in this case, see Ore. Rev. Stat. § 31.735(1) (2003), the award is payable in whole or in part to the State rather than to the private litigant.<sup>1</sup>

While apparently recognizing the novelty of its holding . . . , the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant “directly”—which is forbidden. . . . This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm. A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. . . .

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<sup>1</sup> . . . The fact that part of the award in this case is payable to the State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction. . . .

[T]he Court should be “reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” . . . Judicial restraint counsels us to “exercise the utmost care whenever we are asked to break new ground in this field.” . . . Today the majority ignores that sound advice when it announces its new rule of substantive law.

Essentially for the reasons stated in the opinion of the Supreme Court of Oregon, I would affirm its judgment.

THOMAS, J., dissenting.

. . . I write . . . to reiterate my view that “the Constitution does not constrain the size of punitive damages awards.” *State Farm Mut. Automobile Ins. Co. v. Campbell*, (2003) (Thomas, J., dissenting). . . . Today’s opinion proves once again that this Court’s punitive damages jurisprudence is “insusceptible of principled application.” *BMW of North America, Inc. v. Gore*, (1996) (Scalia, J., joined by Thomas, J., dissenting).

Justice GINSBURG, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. Punish for what? Not for harm actually caused “strangers to the litigation,” the Court states, but for the reprehensibility of defendant’s conduct. “[C]onduct that risks harm to many,” the Court observes, “is likely more reprehensible than conduct that risks harm to only a few.” The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. The Oregon courts did not rule otherwise. . . .

The right question regarding reprehensibility, the Court acknowledges, would train on “the harm that Philip Morris was prepared to inflict on the smoking public at large.” . . . The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry. . . .

## Notes

1. *The aftermath of Williams*. The Oregon courts were widely expected to bow to the U.S. Supreme Court’s decision and to reverse the trial court’s punitive damages determination in the *Williams* case. But in a surprise decision handed down in January 2008, the Oregon Supreme Court affirmed its earlier decision, citing independent grounds in Oregon state law sufficient to sustain the state court punitive damages award:

[W]e are called upon to reconsider and reassess our earlier holding, which arose in the context of the trial court’s refusal to give a particular proposed jury instruction that defendant had requested. Having reconsidered and reassessed the issue, we now conclude that the proposed jury instruction at issue here also

was flawed for other reasons that we did not identify in our former opinion. We therefore reaffirm this court's prior conclusion that the trial court did not err in refusing to give the instruction. We otherwise reaffirm our prior opinion in all respects.

The United States Supreme Court granted Philip Morris's petition for writ of certiorari to review the Oregon courts' decision yet again. Observers of the Court expected the Court to enforce its judgment on the Oregon courts. Petitioner Philip Morris described the Oregon courts as flouting the authority of the United States Supreme Court. But on March 31, 2009, after briefing and after oral arguments, the Court (without comment) dismissed the writ of certiorari as improvidently granted. The \$32 million Oregon punitive damages judgment was left in place.

2. *The Exxon Valdez litigation.* As Justice Ginsburg noted in her *State Farm* dissent, curtailing punitive fines in state cases raises particular federalism concerns. However, in the *Exxon Valdez* case, the Supreme Court was unimpeded by such concerns because it was ruling on the case based on its maritime jurisdiction. Instead of applying a due process analysis, the Court was building federal maritime common law.

The *Exxon Valdez* litigation arose out of a massive, 11-million-gallon oil spill in Prince William Sound, Alaska, in 1989. A 900-foot-long supertanker ran aground on Bligh Reef during a turning maneuver in the Valdez Narrows. The vessel's captain, Joseph Hazelwood, was an alcoholic who had recently dropped out of AA. Hazelwood had inexplicably left the helm shortly before the vessel ran aground. Subsequent blood tests by the Coast Guard found that at the time of the accident, he had a blood alcohol level three times the legal driving limit in most states.

Numerous civil claims and criminal charges followed against Hazelwood and Exxon. Exxon expended \$2.1 billion in cleanup efforts. Civil claims settlements amounted to more than \$1 billion. When certain claims went to trial in the federal district court for the District of Alaska, Exxon conceded liability and contested only its damages. A jury awarded commercial fisherman—the only group that had not settled its compensatory damages claims—\$287 million in compensatory damages. The same jury then concluded that Hazelwood's actions had been reckless and awarded plaintiff commercial fishermen, Native Alaskans, and landowners \$5,000 in punitive damages from Hazelwood and \$5 billion in punitive damages from Exxon, an amount that was later reduced to \$2.5 billion by the Ninth Circuit, citing the Supreme Court's due process cases on excessive punitive damages awards.

At the Supreme Court, Justice Samuel Alito recused himself because he owned stock in Exxon. The remaining eight justices split evenly on the question whether under federal maritime law, a corporation can be held vicariously liable in punitive damages for the reckless acts of its employees. The split left undisturbed the Ninth Circuit's conclusion that such punitive damages awards were appropriate under federal maritime law. But on the question of what the relationship between punitive and compensatory damages is in federal maritime law, the Court reduced the lower court's punitive damages award by a factor of five. Writing for a majority of the Court, Justice David Souter conceded that the law of punitive damages had not "mass-produced runaway awards." But that did not, he continued, resolve the problem of "the stark unpredictability of punitive awards":

Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not. A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81. Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories.

*Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Noting that the median ratio of compensatories to punitives was less than 1:1, Souter ruled that “given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary . . . we consider that a 1:1 ratio . . . is a fair upper limit in such maritime cases.”

3. *Ratio ceilings?* The *Exxon Valdez* case indicates the extent of the Supreme Court’s reliance on a jurisprudence of ratios. But does that reliance on ratios make sense in light of the rationales for punitive damages discussed by Judge Posner at the beginning of the chapter?

Consider that question in the context of *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997), where the defendant ignored plaintiff landowner’s express refusal to allow him to cross the land in question and crossed over the land to deliver a mobile home. At trial, the defendant contended that the crossing had done no damage to the plaintiff’s land and that therefore neither compensatory nor punitive damages could properly be awarded. The Wisconsin Supreme Court would have none of it:

If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting [\$30 fine for a] Class B forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques’ land and dragged the mobile home across that path, in the face of the Jacques’ adamant refusal. A \$30 forfeiture and a \$1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will. . .

In conclusion, we hold that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded.

*Jacque*, 563 N.W.2d at 161. The Court thus upheld an award of \$100,000 in punitive damages. Does the infinite ratio of punitive damages to compensatory damages in *Jacque* violate the *BMW v. Gore* rule as refined in *State Farm*? Ought cases of nominal compensatory damages be governed by the Court’s ratios? And if not, should the fact of some positive compensatory damages (however modest) move a case back into a domain governed by the Court’s stern

ratios? If the plaintiff in *Jacques* had suffered \$10 in actual damages instead of zero actual damages would his punitive damages have suddenly been constrained by the ratio limits? Would that make any sense?

4. *Societal damages?* As Justice Stevens notes, the punitive damages in *Williams* were in part allocated to the state. As Professor Catherine Sharkey points out, it is a striking feature of punitive damages that they have often, at least historically, been motivated by harm to non-parties in the case. Sharkey suggests an interesting idea for managing this facet of punitive damages by splitting off the “societal” component of the award and funneling it toward the state:

[P]unitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case. The class action mechanism is, of course, often posited as the preferred solution to aggregate cases where the collective harm is widespread, such as in certain products liability, fraud, civil rights, and employment discrimination cases. But an increasingly common phenomenon is a jury’s award of significant punitive damages in single-plaintiff (i.e., non-class action or consolidated multiparty) cases. . . .

Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003). Do you find the proposal compelling?

One objection is that plaintiffs will simply settle with defendants to exclude the state from receiving its share. (There is no mechanism to prevent such settlements.)

A further objection is that the theory of punitives as societal damages has no mechanism for claim preclusion. The theory of “societal damages” aims to accomplish what class actions might otherwise have accomplished, namely, damages for society-wide injuries. In this sense, it is a mechanism for aggregating claims (recall the discussion of aggregation earlier in this chapter). But where the class action offers closure for defendants, punitive damages awards lack a coordination mechanism. Nothing in the law of punitive damages precludes a second award of damages in the same state or jurisdiction. Nothing in the law of punitive damages has the capacity to coordinate between or among states or jurisdictions. Even a rule that prohibited any subsequent award of punitive damages would be difficult, because such a rule would sometimes produce unseemly pressure by defendants to get a punitive award entered against them—especially a low first award—as protection against future awards.

## **Appendix: New Zealand's Accident Compensation Scheme: 50 Years Later**

So far we have discussed two different regimes to redress injuries in the United States – torts and regulation. In American law, for the most part, these two rival strategies co-exist and overlap. The rest of this book is about the resulting rivalries. But there is a more radical model.

In 1974, New Zealand abolished its common-law tort system and replaced it with the Accident Compensation Scheme (ACS), under which all New Zealanders and visitors are entitled to no-fault insurance coverage for injuries. In this section, we explore the rationale behind the New Zealand government's decision to abolish the tort system, the guiding principles and features of the ACS, and the outcomes over time. Does the New Zealand model hold out the hope of a better way?

### **A. History and Rationales in New Zealand's Accident Compensation System**

In 1967, the New Zealand government established a royal commission to explore reforms to the workers' compensation system, chaired by Justice Arthur Woodhouse. The resulting Woodhouse Report harshly criticized New Zealand's fault-based tort system for its arbitrary and erratic damage awards, high transaction costs, and crippling inefficiency. Peter Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 188 (2008).

Prior to the abolition of the tort system, three methods of compensation existed in New Zealand in parallel. Injury victims could sue under the common law of tort for damages. Those injured at work had access to a no-fault workers' compensation scheme, enshrined in the 1900 Workers' Compensation Act, which replaced tort law for industrial accidents. Simon Morrison, *The New Zealand No-Fault Accident Compensation Scheme*, 114 PRECEDENT 39, 39 (2013). Finally, some suffering disabling injury could fall back on the Social Security System established in 1938, which provided flat-rate benefits and free public hospitals for sickness and disability. Grant Duncan, *New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility*, in SUCCESSFUL PUBLIC POLICY: LESSONS FROM AUSTRALIA AND NEW ZEALAND 333 (Joannah Luetjens, Michael Mintrom, Paul Hart eds.) (2019).

These three regimes operated in parallel, presenting a multitude of problems. People with essentially the same injuries, disabilities, and needs often receive very different financial awards, depending on the system from which victims were entitled to draw compensation. *Id.* at 333. A person injured at work could receive significantly better entitlements than a person injured immediately after stepping outside of the factory. Some injury victims found that for no apparently good reason they were able to double- or triple-dip and receive entitlements from multiple systems. *Id.*

The Woodhouse Report proposed to replace the common-law tort system by extending no-fault compensation from workplace accidents to personal injuries at large. The goal was to provide affordable no-fault personal injury insurance and rehabilitation in return for the relinquishment of the right to sue.

## **B. Core Principles of the Accident Compensation System**

The Woodhouse Report adopted a principle of community responsibility. The Commission reasoned that risks of injury and incapacity – both in and out of the workplace – hurt the productivity of the workforce. Since all of society benefits from productive work, society should accept responsibility for compensating and rehabilitating those who fall victim to injury. Woodhouse Report 40.

The Woodhouse Report further favored comprehensive entitlement in place of the inconsistencies that arose across the three pre-existing systems of accident compensation. Equal losses, on its view, were best treated equally, regardless of the vagaries such as place, time, social situation, or individual fault. Woodhouse Report 40.

The Commission also supported complete rehabilitation and compensation of workers, to allow people to recover maximally in minimal time, and to compensate people for *actual* losses experienced, both physical and economic (as compared to the social security system, which only covered basic needs). Woodhouse Report 40-41.

Finally, the Woodhouse Report sought to promote administrative efficiency by replacing the adversarial system with an administrative appeals system based on nonadversarial, centralized inquiry and investigation. Woodhouse Report 41.

## **C. Key Features of the Accident Compensation System**

To breathe life into the Woodhouse Principles, the Labor Party supported and the Parliament enacted the Accident Compensation Act of 1972, which was extended by legislative amendments the next year. When the Accident Compensation Commission (ACC, later called the Accident Compensation Corporation) became operational in April 1974, the new law barred most common law tort actions with the exception of certain intentional torts. *See* Peter Shuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 191 (2008). In return, the Commission compensated injuries regardless of fault, including the fault of the injured. Peter Foley, *New Zealand's World-Leading No-Fault Accident Compensation Scheme*, 51 JAPAN MED. ASS'N J. 58, 58 (2008).

The ACC provides comprehensive, no-fault personal injury coverage for all New Zealand residents and visitors. The ACC covers hospital bills and medical costs, rehabilitation and transportation costs, and provides lump sum payments for permanent loss and impairment, entitlements for surviving family members, and weekly compensation of up to 80% of average weekly income when victims cannot work. Injuries covered by the 2001 Act include death, physical injury, mental injury suffered by a person because of physical injuries sustained, or mental injury suffered because of criminal acts. NEW ZEALAND TREASURY, ACCIDENT COMP.



CORP., <https://www.treasury.govt.nz/information-and-services/commercial-portfolio-and-advice/commercial-portfolio/accident-compensation-corporation>.

When one is injured, one simply needs to submit a claim form on the ACC website. When an accident lands someone in a hospital or clinic, health professionals automatically submit claims for the injured to the ACC. A person who disagrees with the ACC's determination can appeal the administrative decision in court. *See* ACCIDENT COMP. CORP., acc.co.nz.; *see also* Grant Duncan, *New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility*, in SUCCESSFUL PUBLIC POLICY 329-30 (2019).

Each year, the ACC allocates NZ\$1.4 billion to rehabilitation, treatment, and weekly compensation for personal injury. ACCIDENT COMP. CORP., ABOUT ACC, <https://www.acc.co.nz/about-us/>; *see also* Matthew Hitzhusen, *Crisis and Reform*, 22 ARIZ. J. INT'L & COMPAR. L. 649, 665 (2005). The ACC is principally funded by levies on employers and all taxpayers.

## D. Outcomes of the Accident Compensation Scheme

According to the ACC, the scheme:

- provides cover for injuries, no matter who is at fault
- eliminates the slow, costly and wasteful process of using the courts for each injury
- reduces personal, physical and emotional suffering by providing timely care and rehabilitation that gets people back to work or independence as soon as possible
- minimizes personal financial loss by paying weekly earnings compensation to injured people who are off work

Peter Foley, *New Zealand's World-Leading No-Fault Accident Compensation Scheme*, 51 JAPAN MED. ASS'N J 58, 60 (2008). The compensation regime is by some measures extremely efficient. Between 2018 and 2019, the ACC accepted over two million new claims, resolving 97 percent of non-complicated new claims within nine months. 41 percent of these new claims were accepted within a minute, while 74 percent were accepted within 24 hours. Complicated claims which needed more thorough investigation – constituting 2.3 percent of all new claims – on average took 57 days to resolve. ACCIDENT COMPENSATION CORPORATION, INJURY CLAIM STATISTICS, <https://www.acc.co.nz/newsroom/media-resources/injury-claim-statistics/>; STATISTICS NEW ZEALAND, INJURY STATISTICS – WORK-RELATED CLAIMS: 2019, <https://www.stats.govt.nz/information-releases/injury-statistics-work-related-claims-2019>. Administrative costs are notably low, constituting a mere 10 percent of the ACC's expenditures. Peter Foley, *New Zealand's World-leading No-Fault Accident Compensation Scheme*, 51 JAPAN MED. ASS'N J. 58, 58 (2008).

One advantage of the ACS seems to be that medical injuries may be treated more effectively. Since doctors cannot be sued for medical malpractice, some have suggested that health professionals are more likely to provide detailed and honest notes about people's procedures, making it easier to identify where a doctor may have gone wrong and thereby

making it easier to correct. Others have worried that removing medical malpractice suits might reduce the level of care exercised by medical professionals, but there is no evidence to suggest doctors have acted on these changed incentives, perhaps because doctors have professional ethics codes and face possible disciplinary actions for misconduct. Katharine Wallis, *No-Fault, No Difference: No-Fault Compensation for Medical Injury and Healthcare Ethics and Practice*, 67 BRIT. J. OF GEN. PRAC. 38, 38-39 (2017).

Politically, the ACS has endured. The ACC is one of the more popular government institutions in New Zealand. Grant Duncan, *New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility*, in SUCCESSFUL PUBLIC POLICY 348-51 (2019).

Nonetheless, the ACS is a costly operation. In 2010, the ACC found that its net funding position was negative NZ\$10.3 billion. Since then, the ACC has improved its financial position but is still not quite financially sustainable. The ACC recorded a NZ\$4.8 billion deficit in the fiscal year 2019-2020 and forecasted a deficit for the following four years. This year, the funding ratio for the entirety of the ACC was 84 percent (where a 100 percent funding ratio signifies complete financial self-sufficiency). ACCIDENT COMP. CORP., FINANCIAL CONDITION REPORT 2020, at 27.

## E. Kiwi-Style No-Fault Compensation for the U.S.?

New Zealand's system of compensation presents clear benefits and drawbacks. Injured people seem more likely to pursue and receive compensation for personal injury, and their claims are adjudicated more quickly and reliably than is typical under a common law system, where the time to resolution can vary wildly from claim to claim. But this comes at significant cost.

First, the system of accident compensation is narrower on important dimensions than a tort system. For example, the ACC compensates for emotional harm only if caused by one of a set of specifically enumerated covered physical injuries. Victims of emotional harm can attempt to bring common law suits for such damages, but the success of such suits has been poor, probably because of the shadow cast by the ACS. Peter Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 196-97 (2008); *see also* Colloquy, *Beyond Compensation: Comments: The New Zealand Experience*, 15 U. HAW. L. REV. 621, 633 (1993).

Second, the ACS largely set aside principles of deterrence. Tort is often thought to produce incentives to act safely and prevent accidents. Absent tort, some other mechanism for ensuring appropriate levels of care may be necessary. The numbers are not great for New Zealand: New Zealand saw 80 work-related fatalities in 2014-2015 while New South Wales, which is 1.6 times bigger, and which has retained the more traditional tort and workers' compensation systems, saw only 42 in the same period. Grant Duncan, *New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility*, in SUCCESSFUL PUBLIC POLICY 349 (2019). New Zealand also compares poorly in road accident fatalities to neighboring Australia, though it does better in comparison to the United States. *Id.* at 349 (69.9 per million in New Zealand, 53.7 per million in Australia, 109.4 per million in the U.S.). To remedy this deterrence problem, New Zealand has developed a more robust system

of regulatory requirements for safety; ex ante safety mandates do some of the work previously accomplished by ex post tort costs. Moreover, the ACC spends more than \$102.5 million a year on injury prevention. See ACCIDENT COMP. CORP., FINANCIAL CONDITION REPORT 2020, at 5, 34. Note, too, that in certain domains like product liability, New Zealand may be free-riding on foreign tort systems like the one in the U.S., which induce heightened safety standards in the design and manufacture of products. Incentives produced by one tort system, for example, produce greater crash-resistance in automobiles *everywhere*. Grant Duncan, *New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility*, in SUCCESSFUL PUBLIC POLICY 350 (2019).

Ultimately, political and institutional factors raise obstacles to the adoption of New Zealand's model elsewhere. The ACS acquired bipartisan support and support from the civil service. Interest groups that opposed reform in New Zealand were nowhere near as vehement as those in Australia or the U.S. Moreover, New Zealand is a unitary, non-federal, parliamentary system with no upper house and no written constitution. Australia's and the U.S.'s political institutions, by contrast, create formidable barriers to structural reform legislation.

One last thought: this book has emphasized the prevalence and importance of settlement in the U.S. tort system. The extent of settlement means that many tort claimants are being compensated considerably more quickly than tort adjudication would otherwise allow. Such settlements often mean that claimants receive far less than they might at trial, though it also means that many are compensated who would not receive anything at trial. Recall that some scholars attribute the decline of no-fault compensation reforms in the automobile accident context to the rise of speedy private settlements. Does the prevalence of such settlement in the U.S. mean that the American system more generally resembles a kind of privately-run, decentralized ACS?

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