The Law of Torts

Cases and Materials

David K. DeWolf
Professor
Gonzaga University School of Law
http://guweb2.gonzaga.edu/~dewolf

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Introduction:
An Overview of Tort Law

§ A. The Nature of Tort Law

Tort law is basically about collisions. Often the collision is literal, as where two cars collide in an intersection,[1] or a defective Coke bottle explodes in the hand of a waitress,[2] but even where the collision is less literal it is no less real. For example, in defamation (libel and slander) cases,[3] plaintiffs sue to recover for injury to their reputations. Tort law must resolve the conflict between competing claims of the individual's interest in his reputation and the public's interest in free expression. Just as cars on the highway usually pass one another without incident, so newspapers and individuals can - usually - carry on their respective activities in harmony. Occasionally, however, collisions occur and someone is hurt. When that happens we turn to tort law to decide who must pay for the injury: is the injured party entitled to have the party that caused his injury compensate him, or should the loss "lie where it falls"[4]?

What makes tort law so interesting (and at the same time so difficult) is that there are no absolute formulas by which such questions are resolved. The rules of tort law are rough approximations of the balance our society wants to strike between competing values, and the "correct" decision frequently depends upon the facts of the particular case. For example, we make automobile drivers liable for the injuries they cause, but only when they are "at fault," or negligent. Manufacturers, by contrast, are liable for the injuries caused by a defective product, even if they have exercised all reasonable care. Newspapers, to take another example, are not liable for injuries to the reputation of "public figures," even the newspaper acts negligently, so long as it does not exhibit "reckless disregard" for the probable falsity of what they are publishing.

The primary problem in striking the proper balance lies in determining the standard for imposing liability. Should the defendant be liable irrespective of negligence (strict liability); liable if negligent; or liable only his behavior is even more culpable than mere negligence (*e.g.*, intentional torts)? In addition to the thorny questions about when to impose liability, tort law must also address issues of how to determine whether a plaintiff's harm was *caused* by a defendant's conduct, how to calculate the proper amount of damages, the availability of special immunities or defenses to liability, etc.

§ B. The Structure of this Book

This book is divided into six parts, each of which covers a distinct set of issues that are raised in the administration of tort law.

■ **Part I, Personal Injury: The Prima Facie Case**, discusses what is usually thought of as the plaintiff's "prima facie" case in a typical tort suit: what must the plaintiff prove in order to recover? Just a moment ago I said that the question of whether to shift the burden to the defendant depends upon whether the injured party was "[1] *entitled* to have the party that [2] *caused* his injury [3] *compensate* him." These three elements make up the building blocks of what a plaintiff must prove in a typical tort case, and they are discussed in Chapters One, Two and Three respectively.[5]

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1 *Li v. Yellow Cab*, *infra* Chapter Five.

2 *Escola v. Coca Cola Bottling Co.*, *infra* Chapter Eight.

3 This subject is covered in Chapter Twelve.

4 "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." OLIVER WENDELL HOLMES, THE COMMON LAW 88 (1881).

5 A tort case is typically described as consisting of an analysis of four elements: duty, breach, cause, and damages. *Harbeson v. Parke-Davis*, *infra* Chapter Three. This text follows this general approach with one major exception: Duty and breach are classed together as essentially a single question. Part III discusses in greater detail the question of how to determine what kind of duty the defendant owes to the plaintiff. Although duty is the first element of a negligence case, it would be almost

- *Chapter 1, Establishing a Breach of Duty*, examines what the plaintiff must prove about the defendant's conduct to entitle him to be compensated. As noted above, the most common standard is that of *reasonable care*, or to put it in the negative mode, whether or not the defendant was *negligent*. However, in certain kinds of cases liability can be imposed on a "no-fault" or "strict liability" basis.

- *Chapter 2, Causation*, considers a separate problem: if we have decided that the defendant breached a duty he owed, and thus should in fairness pay for the injuries that his conduct causes the plaintiff, how do we know that the defendant's breach of duty (rather than some other force(s)) *caused* the injury? In the vast majority of cases causation is obvious, but where it is in doubt the analysis is complex indeed.

- *Chapter 3, Damages*, examines what kinds of damages can be recovered, who can recover them, and how a dollar value is assigned to the plaintiff's loss.

■ **Part II, Defenses to a Personal Injury Case**, looks at the tort case from the defendant's point of view. Even if the plaintiff has met each of the three elements of the prima facie case, other policy considerations may intervene to allow the defendant to avoid liability or reduce the amount of liability.

- *Chapter 4, Immunity*, looks at doctrines that exempt certain classes of defendants from liability. It also looks at the modification or abandonment of such doctrines through statutory waiver and/or development through case law.

- *Chapter 5, Contributory Fault*, addresses conduct on the part of the plaintiff that would make it fair to hold the plaintiff at least partially responsible for his own injury.

- *Chapter 6, Multiple Tortfeasors*, is concerned with cases where the plaintiff's injury was caused by more than one defendant. In such cases the court must decide how the responsibility for the injury is to be allocated, and in particular whether to make one defendant responsible for the fault of other defendants who may or may not be able to pay their fair share. In addition, courts must decide how to handle cases where one party settles for only part of the liability and the plaintiff pursues his claim against another defendant.

- *Chapter 7, Statutes of Limitation*, deals with a familiar problem: what happens when the plaintiff waits too long to file his claim? How does the court measure the amount of time that the plaintiff is given to file a claim, and what circumstances will allow an exception to the rule?

■ **Part III, Modification of Duty by Status and Relationships**, returns to examine the origin and limiting principles that accompany the duty to use reasonable care. In particular, it considers the numerous cases in which the defendant's duty of care to the plaintiff is affected by a contractual relationship that exists between them. Courts must decide the significance of the fact that in many cases the parties have the opportunity to shape the transaction - to shift the entitlements - before the risk of injury is created.

- *Chapter 8, Premises Liability*, addresses a common relationship: where the defendant has permitted the plaintiff, perhaps even invited the plaintiff, to come upon the defendant's land. Most courts

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impossible to start with an analysis of duty by itself, because duty is intertwined with complex policy issues about the scope of tort liability. As Dean Prosser put it, asking whether the defendant owed a duty to the 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.... But it should be recognized that `duty' 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, at 332-333. As one recent commentator put it, there is "a default duty of reasonable care with regard to causing physical harm." W. Jonathan Cardi & Michael D. Green , *Duty Wars*, 81 S. CAL. L. REV. 671, 673 (2008).

That is not to say that courts never talk about duty – they do, and frequently. However, it is typically in the context of an exception to this "default" position. For example, if an injury is so unexpected that it is "unforeseeable," courts will hold that there is no duty to avoid such injuries. This again is intertwined the question of what it means to "cause" an injury – the focus of Chapter 2. Similarly, there is a "public duty doctrine" that limits the liability of governmental defendants (this issue is addressed in Chapter 11).

make the defendant's duty (and subsequent tort liability) depend upon the nature of the relationship between them: whether it is business, social, or nonconsensual.

• *Chapter 9, Product Liability*, considers an analogous problem: where the defendant sells a product that winds up injuring the plaintiff, what significance should be placed upon the fact that both parties volunteered to enter into the relationship? Are there additional duties has the seller accepted with respect to the safety of the product? What obligations has the buyer accepted?

• *Chapter 10, Professional Negligence*, deals with yet another set of related parties: the provider and the consumer of professional services, such as health care, law, accounting, etc. While the standard of reasonable care works as a good baseline for predicting liability, there are peculiarities in the professional context that require special attention. While most of this chapter focuses on the medical context, since the injuries there are most spectacular, tort remedies are pursued in an increasing number of professional specialties.

• *Chapter 11, Rescuers, Justifiable Reliance, and the Extension of Duty to Remote Plaintiffs*, deals with one of the law's most difficult subjects: when should tort liability be imposed upon one who *fails to prevent* an injury as distinguished from one who *caused* it? The general rule is that there is no affirmative duty to prevent harm to another, but that duty may be assumed, or the law may impose it in special cases.

■ **Part IV, Intentional Torts**, considers those cases - relatively rare in terms of the everyday practice of law, but fundamental to an understanding of the history of tort law - where the defendant intentionally causes injury to the plaintiff.

• *Chapter 12, Intentional Torts: The Prima Facie Case*, analyzes the burden of proof for the plaintiff in much the same way that we did in the negligence cases. However, because the requirements are different, and more technical in nature, close attention is paid to the criteria established in the principal authority for such cases, the Restatement (2d) of Torts.

• *Chapter 13, Defenses to Intentional Torts*, looks at affirmative defenses that can shield a defendant from liability. Just as in Part 2 (concerning defenses to negligence cases), a plaintiff may be able to prove that the defendant committed an act constituting the prima facie case for recovery, but still lose the case because of the application of a principle denying recovery.

[The following chapters are omitted in a 4-credit Torts class.]

■ **Part V, Harm to Non-Physical Interests**, treats those cases where the plaintiff sustains an injury to an interest other than physical well-being. For example, the plaintiff may have suffered injury to reputation (defamation), or the defendant may have invaded the plaintiff's interest in privacy, or the defendant caused harm to the plaintiff's business interests or his right to be free from wrongful litigation.

• *Chapter 14, Defamation*, discusses the cases where the plaintiff's right to his reputation is injured by the defendant's use (or abuse) of the first amendment right to speak one's mind.

• *Chapter 15, Privacy*, is a topic related to defamation; but it involves an injury to a different interest - the right to be let alone, usually by some type of media exposure, but occasionally by other intrusions.

• *Chapter 16, Damage to Business Interests*, addresses situations where the defendant caused a business or property loss, for example, by misappropriating property, misrepresentation, interference with contractual relations, etc.

• *Chapter 17, Misuse of the Legal Process*, covers two distinct but related torts: abuse of process (where the defendant uses the legal process for some ulterior purpose), and malicious prosecution (where the defendant wrongfully causes the legal system to prosecute the plaintiff).

■ **Part VI, Tort Reform and the Future of the Tort System**, tries to put into perspective the larger theoretical questions about the function the tort system ought to perform in our

society, and whether it is performing that function satisfactorily.

§ C. The Selection of Case Materials

The cases and materials selected for this book reflect a variety of different teaching goals. This book is intended for use by a student who is just beginning the study of law, and therefore focuses on the skills of learning how to read a case. Sometimes an older case is presented in order to show the origin of a particular doctrine. Sometimes an older case is followed by a more modern case that modifies the rule announced in the first case. Sometimes a case from one jurisdiction is followed by a case from another jurisdiction that takes a different approach to the same issue. Part of your task is to fit the cases together yourself. When you read the cases in a particular section, be alert to the potential for subtle shifts in doctrine. Sometimes the notes following the cases will clarify the current rule, but sometimes you will need to extract the rule from the cases themselves. Along with trying to ascertain what the rule is, you should ask yourself whether the rule(s) of law announced in the case make sense; that is, in your judgment do they strike a sensible balance between competing interests of justice? Hopefully for the most part you will find yourself nodding in agreement as the court explains why a particular rule is being followed. But at other times you may find the court's reasoning unpersuasive. Paying attention to the justice of the rules you are studying will make them more memorable, and they will also help you mature as a lawyer.

The goal of this course is for you to learn how to analyze torts problems. While this text includes a variety of issues that arise in tort law, a single course cannot hope to cover everything that will be of use to you in practice, or even in your study for the bar exam. Moreover, torts is a rapidly changing body of law. Vast areas of law will rise and disappear depending upon societal and statutory changes. The author's goal is that through mastery of the materials covered in this course - and the skills that are required to analyze cases - you will be able to tackle the tort law of the future.

In order to get us started, I present the following problem for you to ponder:

Problem

Suppose you are a lawyer practicing in Spokane, Washington. Your neighbor Jean has asked you for some legal advice about a neighborhood association to which she belongs. The Walnut Creek Homeowner's Association ("WCHA") was formed when the Walnut Creek Subdivision was built. It owns a piece of property upon which, according to the development plan, a swimming pool is to be built. Now that it is time to build the swimming pool, WCHA's officers are concerned about potential tort liability. Jean wants to know the answers to the following questions:

> (1) What would be their legal liability if a child should get into the pool area when no one is there, and hurt himself?
>
> (2) What would you recommend to minimize the risk that the WCHA runs by building a pool?

Read the next two cases. They are very old, but they highlight some of the key issues. Even though they might not represent the current law in your jurisdiction, see if you can find helpful information in these cases to answer Jean's questions.

RAILROAD CO. v. STOUT

84 U.S. (17 Wall.) 657 (1873)

ERROR to the Circuit Court for the District of Nebraska.

Henry Stout, a child six years of age and living with his parents, sued, by his next friend, the Sioux City and Pacific Railroad Company, in the court below, to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space, about eighty rods from the company's depot, in a hamlet or settlement of one hundred to one hundred and fifty persons. Near the turntable was a travelled road passing through the depot grounds, and another travelled road near by. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine

and the other ten years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it, the foot of the child (he being at the time upon the railroad track) was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there, to any of the officers or servants of the company having the table in charge.

One of the boys, who was with the child when injured, had previously played upon the turntable when the railroad men were working on the track, in sight, and not far distant.

It appeared from the testimony that the child had not, before the day on which he was now injured, played at the turntable, or had, indeed, ever been there.

The table was constructed on the railroad company's own land, and, the testimony tended to show, in the ordinary way. It was a skeleton turntable, that is to say, it was not planked between the rails, though it had one or two loose boards upon the ties. There was an iron latch fastened to it which turned on a hinge, and, when in order, dropped into an iron socket on the track, and held the table in position while using. The catch of this latch was broken at the time of the accident. The latch, which weighed eight or ten pounds, could be easily lifted out of the catch and thrown back on the table, and the table was allowed to be moved about. This latch was not locked, or in any way fastened down before it was broken, and all the testimony on that subject tended to show that it was not usual for railroad companies to lock or guard turntables, but that it was usual to have a latch with a catch, or a draw-bolt, to keep them in position when used.

The record stated that "the counsel for the defendant disclaimed resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rested their defence on the ground that the company was not negligent, and asserted that the injury to the plaintiff was accidental or brought upon himself."

On the question whether there was negligence on the part of the railway company in the management or condition of its turntable, the judge charged the jury -

> That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence.

The jury found a verdict of $7500 for the plaintiff, from the judgment upon which this writ of error was brought.

Mr. Isaac Cook, for the plaintiff in error, insisted -

1st. That the party injured was himself in fault, that his own negligence produced the result, and that upon well-settled principles, a party thus situated is not entitled to recover.

2d. That there was no negligence proved on the part of the defendant in the condition or management of the table.

3d. That the facts being undisputed, the question of negligence was one of law, to be passed upon by the court, and should not have been submitted to the jury.

Mr. S.A. Strickland, *contra*.

1. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity

only, and this is to be determined in each case by the circumstances of that case.

2. While a railway company is not bound to the same degree of care in regard to mere strangers who are even unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

3. Though it is true, in many cases, that where the facts of a case are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury.

Mr. Justice HUNT delivered the opinion of the court.

1st. It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.

But it is not necessary to pursue this subject. The record expressly states that "the counsel for the defendant disclaim resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defence on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself."

This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form, or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and therefore cannot recover.

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of *Lynch v. Nurdin*, the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In *Birge v. Gardner*, the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In *Daly v. Norwich and Worcester Railroad Company*, it is said the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.

In *Bird v. Holbrook*, the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable.There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

2d. Was there negligence on the part of the railway company in the management or condition of its turntable?

The charge on this point was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table they were

justified in believing that there was a probability of the occurrence of such accidents.

So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employes of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.

3d. It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contract with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper

care was given, or whether they establish negligence.

In REDFIELD ON THE LAW OF RAILWAYS, it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.

In *Patterson v. Wallace*, there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the judgment was reversed.

In *Mangam v. Brooklyn Railroad*, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a nonsuit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the nonsuit.

In *Detroit and W.R.R. Co. v. Van Steinberg*, the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of the opinion that it was properly left to the jury to determine that point.

Upon the whole case, the judgment must be

AFFIRMED.

UNITED ZINC & CHEMICAL CO. v. BRITT

258 U.S. 268 (1921)

Mr. Justice HOLMES delivered the opinion of the Court

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. The petitioner saved the question whether it could be held liable. 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. 264 Fed. 785.

Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434, and kindred cases were relied upon as leading to the result, and perhaps there is language in that and in *Sioux City & Pacific Ry. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, that might seem to justify it; but the doctrine needs very careful statement not to make an unjust and impracticable requirement. 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. The liability for spring guns and mantraps arises from the fact that the defendant has not rested on that assumption, but on the contrary has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it. *Chenery v. Fitchburg R.R. Co.*, 160 Mass. 211, 213, 35 N.E. 554, 22 L.R.A. 575. Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. 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*, 17 Wall. 657, 21 L. Ed. 745, 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 without much discussion 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 and liability for a danger not manifest to a child was declared in the very similar case of *Cooke v. Midland Great Western Ry. of Ireland (1909)*, A.C. 229.

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. The difficulties in the way of implying a license are adverted to in *Chenery v. Fitchburg R.R. Co.*, 160 Mass. 211, 212, 35 N.E. 554, 22 L.R.A. 575, but need not be considered here. It does not appear that children were in the habit of going to the place; so that foundation also fails.

Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434, is less in point. There a boy was burned by falling into burning coal slack close by the side of a path on which he was running homeward from other boys who had frightened him. It hardly appears that he was a trespasser and the path suggests an invitation; at all events boys habitually resorted to the place where he was. Also the defendant was under a statutory duty to fence the place sufficiently to keep out cattle. The decision is very far from establishing that the petitioner is liable for poisoned water not bordering a road, not shown to have been the inducement that led the children to trespass, if in any event the law would deem it sufficient to excuse their going there, 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.

Mr. Justice CLARKE, dissenting

The courts of our country have sharply divided as to the principles of law applicable to "attractive nuisance" cases, of which this one is typical.

At the head of one group, from 1873 until the decision of to-day, has stood the Supreme Court of the United States, applying what has been designated as the "humane" doctrine. Quite distinctly the courts of Massachusetts have stood at the head of the other group, applying what has been designated as a "hard doctrine" - the "Draconian doctrine." THOMPSON ON NEGLIGENCE, vol. I, §§ 1027 to 1054, inclusive, especially sections 1027, 1047 and 1048. COOLEY ON TORTS (3d Ed.) p. 1269 *et seq.*

In 1873, in *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, this court, in a turntable case, in a unanimous decision, strongly approved the doctrine that he who places upon his land, where children of tender years are likely to go, a construction or agency, in its nature attractive, and therefore a temptation, to such children, is culpably negligent if he does not take reasonable care to keep them away, or to see that such dangerous thing is so guarded that they will not be injured by it when following the instincts and impulses of childhood, of which all mankind has notice. The court also held that where the facts are such that different minds may honestly draw different conclusions from them, the case should go to the jury.

Twenty years later the principle of this *Stout* Case was elaborately re-examined and unreservedly affirmed, again in a unanimous decision in *Union Pacific Railway Co. v. McDonald*, 152 U.S. 262, 14 S. Ct. 619, 38 L. Ed. 434. In each of these cases the contention that a child of tender years must be held to the same understanding of the law with respect to property rights as an adult and that therefore, under the circumstances of each, the child injured was a trespasser, was considered and emphatically rejected. The attractiveness of the unguarded construction or agency - the temptation of it to children - is an invitation to enter the premises that purges their technical trespass. These have been regarded as leading cases on the subject for now almost fifty years and have been widely followed by state and federal courts - by the latter so recently as *Heller v. New York, N.H.& H.R. Co.* (C.C.A.) 265 Fed. 192, and *American Ry. Express Co. v. Crabtree* (C.C.A.) 271 Fed. 287.

The dimensions of the pool of poisoned water were about 20x45 feet. It was 2 ½ to 3 feet deep in

part and in part 10 or more feet deep. A photograph in the record gives it the appearance of an attractive swimming pool, with brick sides and the water coming nearly to the top of the wall. The water is described by the witnesses as appearing to be clear and pure, and, on the hot summer day on which the children perished, attractively cool.

This pool is indefinitely located within a tract of land about 1,000 feet wide by 1,200 feet long, about which there had not been any fence whatever for many years, and there was no sign or warning of any kind indicating the dangerous character of the water in the pool. There were several paths across the lot, a highway ran within 100 to 120 feet of the pool, and a railway track was not far away. The land was immediately adjacent to a city of about 10,000 inhabitants, with dwelling houses not far distant from it. The testimony shows that not only the two boys who perished had been attracted to the pool at the time, but that there were two or three other children with them, whose cries attracted men who were passing near by, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that, after lingering for a day or a two, he died. The evidence shows that the water in the pool was highly impregnated with sulphuric acid and zinc sulphate, which certainly caused the death of the children, and that the men who rescued the boys suffered seriously, one of them for as much as two weeks, from the effects of the poisoned water.

The case was given to the jury in a clear and comprehensive charge, and the judgment of the District Court upon the verdict was affirmed by the Circuit Court of Appeals. The court charged the jury that if the water in the pool was not poisonous and if the boys were simply drowned there could be no recovery, but that if it was found, that the defendant knew or in the exercise of ordinary care should have known that the water was impregnated with poison, that children were likely to go to its vicinity, that it was in appearance clear and pure and attractive to young children as a place for bathing, and that the death of the children was caused by its alluring appearance and by its poisonous character, and because no protection or warning was given against it, the case came within the principle of the `attractive nuisance' or `turntable' cases and recovery would be allowed.

This was as favorable a view of the federal law, as it has been until to-day, as the petitioner deserved. The Supreme Court of Illinois, on the authority of the *Stout* Case, held a city liable for the death of a child drowned in a similar pool of water not poisoned. *City of Pekin v. McMahon*, 151 Ill. 141, 39 N.E. 484, 27 L.R.A. 206, 45 Am. St. Rep. 114.

The facts, as stated, make it very clear that in the view most unfavorable to the plaintiffs below there might be a difference of opinion between candid men as to whether the pool was so located that the owners of the land should have anticipated that children might frequent its vicinity, whether its appearance and character rendered it attractive to childish instincts so as to make it a temptation to children of tender years, and whether, therefore, it was culpable negligence to maintain it in that location, unprotected and without warning as to its poisonous condition. This being true, the case would seem to be one clearly for a jury, under the ruling in the *Stout* Case, *supra*.

Believing as I do that the doctrine of the *Stout* and *McDonald* Cases, giving weight to, and making allowance, as they do, for, the instincts and habitual conduct of children of tender years, is a sound doctrine, calculated to make men more reasonably considerate of the safety of the children and of their neighbors, than will the harsh rule which makes trespassers of little children which the court is now substituting for it, I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact and in thereby overruling two decisions which have been accepted as leading authorities for half a century, and I therefore dissent from the judgment and opinion of the court.

The CHIEF JUSTICE and Mr. Justice DAY concur in this opinion.

Questions and Notes

1. The specific issue raised in this case, usually referred to as the "attractive nuisance" doctrine, is treated in greater depth in Chapter Eight, § A(3).

PART I

PERSONAL INJURY: THE PRIMA FACIE CASE

Chapter 1
Establishing a Breach of Duty

Introduction

The word "tort" derives from a French word meaning "wrong" or "injustice." (It shares its etymological origin with the pastry known as a "torte," or a "tortuous road," because both involve the idea of being turned or "twisted.") It is on the basis of some kind of deviation from the expectations of the rest of society that a person can be made liable in tort. The first two steps in the traditional analysis of a negligence case are determining whether the defendant owed a duty of care to the plaintiff and whether that duty was breached. As noted in the introduction,[6] the approach taken in this text is to combine breach and duty into a single analytical question: did the defendant breach a duty to the plaintiff?

Typically the most important issue in a tort case is whether or not a breach of duty occurred. For example, if a friend tells you that she was hit in an intersection, one of the first questions will be, "Whose fault was it?" In car accidents there are definite rules of the road. However, in most tort cases determining whether a breach of duty occurred is not a mechanical process; instead, what a court must determine is whether the defendant's conduct merits the imposition of tort liability, the effect of which is to transfer the cost of a loss from the plaintiff to the defendant. Tort law also reflects social values, which change over time. As rules change, liability will be given, and liability will be taken away; new torts may be created, while others may be abolished.[7]

Although we often refer to the question of whether the defendant was "at fault," the concept of a tort is not synonymous with moral failing; there may be moral failing without tort liability, and there may be civil liability without moral failing. Rather than focusing entirely on the defendant's conduct, it is more useful to see the question in light of the *relationship* between the defendant and the plaintiff.[8] Law generally (not just tort law) can only enforce a right if it creates a corresponding duty on someone else to provide or honor that right. If I claim the right to free speech, that can only be meaningful if it imposes upon the government (and other people) the duty not to interfere with my exercise of that right. I can only have a right to medical care if someone else has a duty to provide it to me.[9]

The effect of most legal rules is to determine the respective entitlements - the correlative rights and duties - of the parties.[10] This illustrates the

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[6] See the discussion in the Introduction about the way in there is a default position that assumes that a duty of care is owed to avoid physical injury to another.

[7] For a description of this process, *see* Blomquist, *"New Torts": A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23 (1990); Nehal A. Patel, *The State's Perpetual Protection of Adultery: Examining Koestler V. Pollard and Wisconsin's Faded Adultery Torts*, 2003 WIS. L. REV. 1013.

[8] As noted in the Introduction, certain kinds of relationships between plaintiff and defendant (*e.g.*, manufacturer-consumer or doctor-patient) create specific rules redefining what obligation is owed to prevent injury. This question of how relationships change the nature of tort liability is the focus of Part III (Chapters 8 through 11).

[9] Obviously one of the major issues in the discussion of rights is whether they are "negative" rights (that is, where I am demanding that other people leave me alone) or "positive" rights (that can be fulfilled only if someone else provides me with a good or service). The right to a job, or to health care, or to education, would be classified as positive rights, while the rights to assemble or to bear arms are "negative" rights – that only require the government to refrain from hindering me in my pursuit. For a discussion of "positive" rights, see *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012) (enjoining state to provide adequate funding for constitutionally-mandated education).

[10] An excellent treatment of the entitlement concept is contained in Calabresi & Melamed, *Property Rules, LiabilityRules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1090 (1972). A thoughtful critique by a leading exponent of the critical legal studies movement is Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387

similarity between tort law and other branches of law, such as property law. [11] In a property case, for example, certain rules decide where the boundary lines are to be drawn between *A* and *B*. The decision of the court determines where *A*'s land (and rights) end and *B*'s land (and rights) begin. Or the court may be called upon to decide whether *A*'s transfer of title to *B* is effective despite prior mortgage of the property to *C*.

Tort law involves the same kinds of questions about "who is entitled to what," but they are usually posed in the context of some kind of injury to the plaintiff. Thus, if *A* is injured by a car driven by *B*, we want to know whether *A* has a right to be free from injury by *B* (and thus *B* has a duty to avoid injuring him) - or is it the other way around – does *B* have a right to drive on the highway, such that *A* has a duty not to interfere with that right? Our allocation of duties corresponds to the rights we are trying to protect. Requiring drivers to use reasonable care is designed to protect pedestrians and other drivers from unnecessary harm.

As mentioned in the Introduction, tort law is frequently divided into four issues: duty, breach, causation and damages. To repeat, the question of duty is often more difficult that it appears. For the beginning torts student, I recommend looking at the questions of duty and breach as a single question. It is easier for the student to determine whether a particular defendant has been negligent (breached the duty of reasonable care) or was engaged in an ultrahazardous activity than it is to answer the abstract question "What duty did the defendant owe the plaintiff?"

This chapter considers the two most common breaches of duty: (1) Negligence; and (2) Strict Liability.

(1981).

[11] Although Torts is taught as a stand-alone course, it is closely related to other bodies of law. This extended discussion of property law is only one example. For another, we have seen how Civil Procedure questions are frequently raised in the course of resolving the standard of liability (*e.g.*, the *Stout* case). Tort law is similar to Criminal Law to the extent that both are concerned with assigning blame to a person's conduct. Evidence questions are frequently implicated. In Part III we address issues that implicate Contract Law. Again, while we take up distinct topics in distinct areas, there are many points of overlap.

BIERMAN v. CITY OF NEW YORK

302 N.Y.S.2d 696 (1969)

Jean Bierman pro se.

J. Lee Rankin, corporation counsel, (Thomas J. Brabazon of counsel), for New York City.

J. Bruce Byrne, New York City, for Consolidated Edison.

Irving YOUNGER, Judge

Jean Bierman, a lady no longer young, owns a small house at 149 Rivington Street, New York City, where, assisted by Social Security payments, she makes her home.

On February 11, 1968, at about 6:30 a.m., water poured into Mrs. Bierman's basement. It damaged the boiler, floor, and walls. The source of the flood was a ruptured water main in front of her house.

She filed a claim for property damage against the City, which responded with a letter stating, in substance, that Consolidated Edison had been working on the main, and hence that Mrs. Bierman's grievance, if any, was against Consolidated Edison. Mrs. Bierman then commenced an action in the Small Claims Part of this Court, against both the City and Consolidated Edison, seeking damages in the amount of $300.00. Because of a crowded calendar in the Small Claims Part, the case was referred to Part 20, where, on May 20, 1969, it was tried.

Neither the City nor Consolidated Edison offered any evidence. Rather, at the close of Mrs. Bierman's case, each moved to dismiss the complaint on the ground that there was no proof of negligence. There was none. Although it has been held that without such proof a plaintiff may not recover for harm caused by a broken water main, *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941), I find that simple citation of authority will not suffice as a basis for decision here.

This is a Small Claims case, and in Small Claims cases we are adjured "to do substantial justice between the parties according to the rules of substantive law." N.Y.S. City Civ. Ct. Act, Sec. 1804. The rule of substantive law says that Mrs. Bierman may not recover because she cannot prove negligence on the part of the City or of Consolidated Edison. Is this substantial justice? Only a very backward lawyer could think so. Why should a lady little able to bear the loss nevertheless bear it? Because the metropolis and the great utility were not at fault, we are told. Yet the concept of fault is beside the point. When called upon to decide the rights of a farmer into whose cabbages the flock wandered while the shepherd dallied, a court can preach a sermon on culpability and still appear to reason its way to a just result. But when the task is the allocation of burdens between a plaintiff who is little more than a bystander in his own society and government itself, talk of negligence leaves the highroad to justice in darkness. Accidents happen. Injuries occur. People suffer. Frequently nobody is at fault. The problem is one of mechanics, not morals. The law should therefore turn from fault as a rule of decision. Rather, judges must find a rule to decide whose the cost and whose the compensation so as to satisfy the legislature's command in a case like this "to do substantial justice."

Modern legal scholarship provides at least three signposts pointing to such a rule.

(1) Cost-spreading. *See* Calabresi, "*Some Thoughts on Risk Distribution and the Law of Torts*," 70 Yale L.J. 499 (1961). The rule should operate to alleviate the expense of accidents. Can Mrs. Bierman recover only by proving negligence here where no one was negligent? Then she will bear the whole expense and defendants none. Can Mrs. Bierman recover without proving negligence? Then defendants will in the first instance bear the whole expense and Mrs. Bierman none. That whole expense defendants will thereupon spread among all who benefit from the water main: the City in taxes, Consolidated Edison in rates. Mrs. Bierman obviously can do no such thing. So the defendants should pay. If they must, they argue, they have become insurers. Precisely. Let them charge each person something so that no person pays everything.

(2) Injury-prevention. *See* Seavey, "*Speculations as to Respondeat Superior*," in HARVARD LEGAL ESSAYS 433 (1934); Calabresi, "*The Decision for Accidents: An Approach to Nonfault Allocation of Costs*," 78 Harv. L. Rev. 713 (1965). The rule should assign liability to the party who will thereby be moved to take all possible precautions against recurrence of the accident. That party is not Mrs. Bierman. It is the defendants.

(3) Fairness. *See Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968). The rule should impress an onlooker as fair. Here,

defendants maintained a water main in the street. It was their business to do it. They created a hazard. The hazard gave issue to the accident. I believe that fairness calls for a defendant to pay for accidents which occur because of his business activities. Thus the City and Consolidated Edison should pay Mrs. Bierman for her damages here.

I recognize that Mrs. Bierman was a beneficiary of defendants' water main. So were many others. There is nothing in Mrs. Bierman's use of her share of the water to require that she sustain the entire loss brought about by the accident. At most, she should sustain her share; and that is the result forecast under "cost-spreading," above.

I conclude that "substantial justice" in this case demands a rule of strict liability rather than a rule of fault. Accordingly, plaintiff shall have judgment against defendants, jointly and severally, in the sum of $300, together with interest from February 11, 1968.

Notes and Questions

1. Would Judge Younger be able to apply "substantial justice" if the case had involved $3,000,000 instead of $300? Why or why not? Should he have been?

2. Judge Younger relies upon "three signposts." What authority does he have for their use? What bearing should they have had upon his opinion?

3. How much do you think Mr. Rankin and Mr. Byrne billed their clients? How do you think the clients reacted to the outcome of this case?

4. In *Bierman v. Consolidated Edison Co. of New York*, 66 Misc.2d 237, 320 N.Y.S.2d 331 (N.Y.Sup.App.Term 1970), the court reversed Judge Younger in the following opinion:

> It being the mandate of the statute Civil Court Act, § 1804) that the rules of substantive law are applicable to the Small Claims Court, the court below erred in departing from the traditional rules of negligence and in adopting a rule of strict liability without fault. Stability and certainty in the law requires adherence to precedents by courts of original jurisdiction, and the decisions of the Court of Appeals must be followed by all lower courts (*Brooks v. Horning*, 27 A.D.2d 874, 875, 876, 278 N.Y.S.2d 629, 632-634). If a rule of strict liability is to be adopted, the pronouncement should come from the Legislature or the Court of Appeals, and not from a court of original jurisdiction.
>
> There being no proof of negligence on the part of the defendant Consolidated Edison Company, the judgment should be reversed as to it and the complaint against it dismissed.
>
> With respect to the claim against the defendant City of New York, we find, contrary to the decision below, that there was sufficient proof of its negligence to sustain a recovery against it. The proof of a burst water main permitted an inference that the damage was due to the negligence of the City (*George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 118, 38 N.E.2d 455, 461). While it is true that the court was not compelled to draw that inference, there appears no reason for declining to do so. Therefore, in the absence of any evidence on the part of the City, judgment should have been rendered against it. While the court below found otherwise on this issue, it is within our province to review the facts (CPLR 5501(d)), and, in a non-jury case, to render the judgment which the court below should have granted (CPLR 5522; *Bruno v. Koshac*, 13 A.D.2d 650, 213 N.Y.S.2d 784; *Society of New York Hospitals v. Burstein*, 22 A.D.2d 768, 253 N.Y.S.2d 753). We conclude that the judgment against the City should be affirmed, although in affirming, we are not approving the reasons reached below (*Ward v. Hasbrouck*, 169 N.Y. 407, 420, 62 N.E. 434, 438).
>
> Judgment modified to the extent of reversing so much thereof as is against the defendant Consolidated Edison Company, without costs, and dismissing the complaint against it; otherwise affirmed, with $25 costs.

Was Judge Younger correct? Or was the reviewing court correct? Now how much had the City and Con Ed paid their lawyers? Did they get their money's worth?

5. One commentator characterizes the tort law of New York state as having "evolved" from a focus on fairness to an emphasis on efficiency.

See William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 Buff. L. Rev. 117 (1999).

6. Compensation and tort liability are distinguished in John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 Rutgers L. Rev. 1027 (2003) (regarding the Compensation fund for victims of Sept. 11, 2001); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort law* 91 Geo. L.J. 585 (2003).

HAMMONTREE v. JENNER

20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971)

LILLIE, Associate Justice

Plaintiff Maxine Hammontree and her husband sued defendant for personal injuries and property damage arising out of an automobile accident. The cause was tried to a jury. Plaintiffs appeal from judgment entered on a jury verdict returned against them and in favor of the defendant.

The evidence shows that on the afternoon of April 25, 1967, defendant was driving his 1959 Chevrolet home from work; at the same time plaintiff Maxine Hammontree was working in a bicycle shop owned and operated by her and her husband; without warning defendant's car crashed through the wall of the shop, struck Maxine and caused personal injuries and damages to the shop.

Defendant claimed he became unconscious during an epileptic seizure losing control of his car. He did not recall the accident but his last recollection before it, was leaving a stop light after his last stop, and his first recollection after the accident was being taken out of his car in plaintiffs' shop. Defendant testified he has a medical history of epilepsy and knows of no other reason for his loss of consciousness except an epileptic seizure; prior to 1952 he had been examined by several neurologists whose conclusion was that the condition could be controlled and who placed him on medication; in 1952 he suffered a seizure while fishing; several days later he went to Dr. Benson Hyatt who diagnosed his condition as petit mal seizure and kept him on the same medication; thereafter he saw Dr. Hyatt every six months and then on a yearly basis several years prior to 1967; in 1953 he had another seizure, was told he was an epileptic and continued his medication; in 1954 Dr. Kershner prescribed dilantin and in 1955 Dr. Hyatt prescribed phelantin; from 1955 until the accident occurred (1967) defendant had used phelantin on a regular basis which controlled his condition; defendant has continued to take medication as prescribed by his physician and has done everything his doctors told him to do to avoid a seizure; he had no inkling or warning that he was about to have a seizure prior to the occurrence of the accident.

In 1955 or 1956 the department of motor vehicles was advised that defendant was an epileptic and placed him on probation under which every six months he had to report to the doctor who was required to advise it in writing of defendant's condition. In 1960 his probation was changed to a once-a-year report.

Dr. Hyatt testified that during the times he saw defendant, and according to his history, defendant "was doing normally" and that he continued to take phelantin; that "[t]he purpose of the (phelantin) would be to react on the nervous system in such a way that where, without the medication, I would say to raise the threshold so that he would not be as subject to these episodes without the medication, so as not to have the seizures. He would not be having the seizures with the medication as he would without the medication compared to taking medication"; in a seizure it would be impossible for a person to drive and control an automobile; he believed it was safe for defendant to drive.

Appellants' contentions that the trial court erred in refusing to grant their motion for summary judgment on the issue of liability and their motion for directed verdict on the pleadings and counsel's opening argument are answered by the disposition of their third claim that the trial court committed prejudicial error in refusing to give their jury instruction on absolute liability.[1]

[1] "When the evidence shows that a driver of a motor vehicle on a public street or highway loses his ability to safely operate and control such vehicle because of some seizure or health failure, that driver is nevertheless legally liable for all injuries and property damage which an innocent person may suffer as a proximate result of the defendant's inability to so control or operate his motor vehicle.

"This is true even if you find the defendant driver had no warning of any such impending seizure or health failure."

Under the present state of the law found in appellate authorities beginning with *Waters v. Pacific Coast Dairy, Inc.*, 55 Cal. App. 2d 789, 791-793, 131 P.2d 588 (driver rendered unconscious from sharp pain in left arm and shoulder) through *Ford v. Carew & English*, 89 Cal. App. 2d 199, 203-204, 200 P.2d 828 (fainting spells from strained heart muscles), *Zabunoff v. Walker*, 192 Cal. App. 2d 8, 11, 13 Cal. Rptr. 463 (sudden sneeze), and *Tannyhill v. Pacific Motor Trans. Co.*, 227 Cal. App. 2d 512, 520, 38 Cal. Rptr. 774 (heart attack), the trial judge properly refused the instruction. The foregoing cases generally hold that liability of a driver, suddenly stricken by an illness rendering him unconscious, for injury resulting from an accident occurring during that time rests on principles of negligence. However, herein during the trial plaintiffs withdrew their claim of negligence and, after both parties rested and before jury argument, objected to the giving of any instructions on negligence electing to stand solely on the theory of absolute liability. The objection was overruled and the court refused plaintiffs' requested instruction after which plaintiffs waived both opening and closing jury arguments. Defendant argued the cause to the jury after which the judge read a series of negligence instructions and, on his own motion, BAJI 4.02 (res ipsa loquitur).

Appellants seek to have this court override the established law of this state which is dispositive of the issue before us as outmoded in today's social and economic structure, particularly in the light of the now recognized principles imposing liability upon the manufacturer, retailer and all distributive and vending elements and activities which bring a product to the consumer to his injury, on the basis of strict liability in tort expressed first in Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-468, 150 P.2d 436, and then in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897; *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168, and *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84. These authorities hold that "A manufacturer (or retailer) is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900; *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168.) Drawing a parallel with these products liability cases, appellants argue, with some degree of logic, that only the driver affected by a physical condition which could suddenly render him unconscious and who is aware of that condition can anticipate the hazards and foresee the dangers involved in his operation of a motor vehicle, and that the liability of those who by reason of seizure or heart failure or some other physical condition lose the ability to safely operate and control a motor vehicle resulting in injury to an innocent person should be predicated on strict liability.

We decline to superimpose the absolute liability of products liability cases upon drivers under the circumstances here. The theory on which those cases are predicated is that manufacturers, retailers and distributors of products are engaged in the business of distributing goods to the public and are an integral part of the over-all producing and marketing enterprise that should bear the cost of injuries from defective parts. (*Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 37 Cal. Rptr. 896, 391 P.2d 168; *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897.) This policy hardly applies here and it is not enough to simply say, as do appellants, that the insurance carriers should be the ones to bear the cost of injuries to innocent victims on a strict liability basis. In *Maloney v. Rath*, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513, followed by *Clark v. Dziabas*, 69 Cal. 2d 449, 71 Cal. Rptr. 901, 445 P.2d 517, appellant urged that defendant's violation of a safety provision (defective brakes) of the Vehicle Code makes the violator strictly liable for damages caused by the violation. While reversing the judgment for defendant upon another ground, the California Supreme Court refused to apply the doctrine of strict liability to automobile drivers. The situation involved two users of the highway but the problems of fixing responsibility under a system of strict liability are as complicated in the instant case as those in *Maloney v. Rath* at 447, 71 Cal. Rptr. 897, 445 P.2d 513, and could only create uncertainty in the area of its concern. As stated in *Maloney*, at page 446, 71 Cal. Rptr. at page 899, 445 P.2d at page 515: "To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile

accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence."

The instruction tendered by appellants was properly refused for still another reason. Even assuming the merit of appellants' position under the facts of this case in which defendant knew he had a history of epilepsy, previously had suffered seizures and at the time of the accident was attempting to control the condition by medication, the instruction does not except from its ambit the driver who suddenly is stricken by an illness or physical condition which he had no reason whatever to anticipate and of which he had no prior knowledge.

The judgment is affirmed.

WOOD, P.J., and THOMPSON, J., concur.

§ A. Negligence

Introductory Note. By far the most common kind of tort case is one based upon *negligence*. In most (but not all) areas of social interaction, we are expected to exercise "reasonable care." If *A* fails to use reasonable care, and that failure results in *B*'s injury, *A* is usually responsible for the damages suffered by *B*. Because negligence is the bedrock, so to speak, of tort liability, a thorough mastery of it is crucial to understanding tort law.

1. The Standard of Reasonable Care - In General

LUSSAN v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

280 F.2d 491 (5th Cir. 1960)

John R. BROWN, Circuit Judge

This case presents the question whether an action which a human being would normally take may be considered by a jury to be that which the law's ordinary prudent person would have taken under such circumstances.

What brings this all about was a wasp - or a bee - it really doesn't matter for bees and wasps are both of the order hymenoptera, and while a wasp, unlike the bee, is predacious in habit, both sting human beings, or humans fear they will. The wasp did not intrude upon a pastoral scene or disturb the tranquillity of nature's order. What this wasp did - perhaps innocently while wafted by convection or the force of unnatural currents generated by the ceaseless motion of man's nearby machines - was to find itself an unwelcome passenger in an automobile then moving toward, of all places, Elysian Fields - not on the banks of Oceanus, but a major thoroughfare in the City of New Orleans on the Mississippi.

With the wasp was the defendant - owner and driver of the vehicle. Two others were with him in the front seat as his mobile guests. The wasp flew in - or his presence was suddenly discovered. Like thousands of others confronted with the imminent fear of a sting by such air-borne agents, the defendant driver swatted at the wasp. Whether he hit the wasp, no one knows. But momentarily the defendant driver apparently thought this menace had flown his coupe. The wasp, however, was not yet through. One of the passengers suddenly looked down and hollered out "watch out, it's still alive." Instinctively the defendant driver looked down at the floorboard and simultaneously made a sweeping swat at the wasp or where the wasp was thought to be. The wasp with all his capacity for harm scarcely could have thought itself so powerful. For without ever matter even being there at all, this anonymous bug brought substantial damage to one of the guests. Unconscious probably that it had set in motion the law's but-for chain reaction of causation, the wasp was the blame in fact. For when the driver by involuntary reflex took the swat, he lurched just enough to pull the steering wheel over to crash the moving car into a vehicle parked at the curb.

The traditional twelve good men performing their function in the jury system by which men drawn from all walks of life pass upon behavior of their fellow men, heard these uncontradicted facts. Instructed by the judge in a clear fashion on the law of due care in a charge to which no exception was taken, the jury in nine minutes returned a verdict for the driver. The plaintiff, appellant here,

injured substantially by this combination of natural, human and mechanical forces has a single aim, and hope and necessity: convincing us that the trial court erred in not granting the plaintiff's motions for instructed verdict and j.n.o.v.

His surprise or even disappointment in this adverse verdict actually returned in favor of a direct-action insurer-defendant is not sufficient to give to this incident the quality essential to a directed verdict. Variously stated, restated, repeated and reiterated, the legal standard to be met is that no reasonable man could infer that the prudent man would have acted this way. *Marsh v. Illinois Central R.*, 5 Cir., 1949, 175 F.2d 498; *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F.2d 941. In the determination of this, little instruction comes from prior cases involving a Connecticut bee in *Rindge v. Holbrook*, 111 Conn. 72, 149 A. 231, of a diversity Eighth Circuit Iowa wasp, *Heerman v. Burke*, 8 Cir., 1959, 266 F.2d 935.

Asserting this negative imperative - no reasonable man could hold as the jury did - inescapably puts the reviewing judge, trial or appellate, in the position of a silent witness in behalf of mankind. In assaying the scope of the specific record, we inevitably measure it in terms of the general experience of mankind including our own. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). We draw on what we and what all others constituting that composite reasonable man have come to know. The sources of this knowledge are as variable as are the subjects of inquiry.

In this simple case in the search for the negative limits of the inferences open to the so-called reasonable man, we deal with a situation known and experienced by all - the involuntary reflex responses by which nature protects life from harm or apprehended harm. In a philosophical way it may be that nature has here elevated the instinct of self-preservation to a plane above the duty to refrain from harming others. It is here where man through law and ordered society steps in. But in stepping in, man, through law, has erected as the standard of performance, not what had to be done to avoid damage, but that which prudent human beings would have done or not done.

At times the judgment of the common man - voiced through the jury or other trier of fact - on what the prudent man should have done will be to deny to the individual concerned a legal justification for his perfectly human instinctive response. At other times what is actually usual may be equated with that which is legally prudent.

That is what occurred here. A wasp became the object of apprehended harm. Protective responses were instinctive and natural and swift. True, this diverted driver and his attention from other harm and other duties. But the jury in these circumstances under unchallenged instruction on legal standards concluded that this was normal and prudent human conduct. What better way is there to judge of this?

Affirmed.

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a. The "Reasonable Person"

VAUGHN v. MENLOVE

3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837)

At the trial it appeared that the rick [haystack] 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 a 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 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 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.

R.V. RICHARDS, in support of the rule....

... The measure of prudence varies so with the 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]t is well known that hay will ferment and take fire if it be not carefully stacked.... It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and 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 intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment,...

Instead, therefore, of saying that the liability for negligence should be co-extensive 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. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

Questions and Notes

1. Should a mentally disabled person be held to the standard of a "reasonable person" or to the standard of the average person with that disability? *See* Note, *Tort Liability of the Mentally Ill. in Negligence Actions*, 93 Yale L.J. 153 (1983).

2. Is the standard for determining negligence objective or subjective? Which should it be? For an argument that tort law should use a standard based less on luck, see Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. Rev. 439 (1990).

3. For an economic analysis, see Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 Geo. L.J. 241 (1989). For a good historical treatment of the development of negligence, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977), chapter 3.

4. *The Emergency Doctrine*. One important feature of the standard of reasonable care is that it is phrased in terms of what the reasonable person would do *in the same or similar circumstances*. Thus, if the defendant is confronted with an emergency, we do not hold the defendant to the standard of what might be expected of a person who has plenty of time to think about the best course of action. Thus, a typical jury instruction on emergency reads like this: "A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice." (Washington Pattern Instruction 12.02) Note, however, the qualification that the emergency must not be a result of the defendant's own prior negligence.

ADAMS v. BULLOCK

227 N.Y. 208, 125 N.E. 93 (1919)

CARDOZO, J.

The defendant runs a trolley line in the city of Dunkirk, employing the overhead wire system. At one point, the road is crossed by a bridge or culvert which carries the tracks of the Nickle Plate and Pennsylvania Railroads. Pedestrians often use the bridge as a short cut between streets, and children play on it. On April 21, 1916, the plaintiff, a boy of 12 years, came across the bridge, swinging a wire about 8 feet long. In swinging it, he brought it in contact with the

defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet 18 inches wide. Four feet 7: inches below the top of the parapet, the trolley wire was strung. The plaintiff was shocked and burned when the wires came together. He had a verdict at Trial Term, which has been affirmed at the Appellate Division by a divided court.

We think the verdict cannot stand. The defendant in using an overhead trolley was in the lawful exercise of its franchise. Negligence, therefore, cannot be imputed to it because is used that system and not another. *Dumphy v. Montreal, etc.*, Co., 1907 A.C. 454. There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance. *Nelson v. Branford L.& W. Co.*, 75 Conn. 548, 551, 54 Atl. 303; *Braun v. Buffalo Gen. El. Co.*, 200 N.Y. 484, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370. But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it. *Green v. W.P. Co.*, 246 Pa. 340, 92 Atl. 341, L.R.A. 1915C, 151. If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril. It has been so ruled in like circumstances by courts in other jurisdictions. *Green v. W.P. Co., supra*; *Vannatta v. Lancaster Co.*, 164 Wis. 344, 159 N.W. 940; *Parker v. Charlotte R.R. Co.*, 169 N.C. 68, 85 S.E. 33; *Kempf v. S.R. Co.*, 82 Wash. 263, 144 Pac. 77, L.R.A. 1915C, 405; *Sheffield Co. v. Morton*, 161 Ala. 153, 49 South. 772. Nothing to the contrary was held in *Braun v. Buffalo Gen. El. Co.*, 200 N.Y. 484, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, or *Wittleder v. Citizens Electric Ill. Co.*, 47 App. Div. 410, 62 N.Y. Supp. 297. In those cases, the accidents were well within the range of prudent foresight. *Braun v. Buffalo Gen. El. Co., supra*, 200 N.Y. at page 494, 94 N.E. 206, 35 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370. That was also the basis of the ruling in *Nelson v. Branford Lighting & Water Co.*, 75 Conn. 548, 551, 54 Atl. 303. There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown. To hold it liable upon the facts exhibited in this record would be to charge it as an insurer.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, C.J., and CHASE, COLLIN, HOGAN, CRANE, and ANDREWS, JJ., concur.

Judgments reversed, etc.

Questions and Notes

1. What does the court mean by suggesting that compensating the plaintiff in this case would amount to making the trolley company into an "insurer"?

2. What would be the advantages of making the trolley company an insurer? The disadvantages? Which would you prefer?

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b. "Customizing" the Standard of the Reasonable Person

ROBINSON v. LINDSAY

92 Wash. 2d 410, 598 P.2d 392 (1979)

UTTER, Chief Justice

An action seeking damages for personal

injuries was brought on behalf of Kelly Robinson who lost full use of a thumb in a snowmobile accident when she was 11 years of age. The petitioner, Billy Anderson, 13 years of age at the time of the accident, was the driver of the snowmobile. After a jury verdict in favor of Anderson, the trial court ordered a new trial.

The single issue on appeal is whether a minor operating a snowmobile is to be held to an adult standard of care. The trial court failed to instruct the jury as to that standard and ordered a new trial because it believed the jury should have been so instructed. We agree and affirm the order granting a new trial.

The trial court instructed the jury under WPI 10.05 that:

> In considering the claimed negligence of a child, you are instructed that it is the duty of a child to exercise the same care that a reasonably careful child of the same age, intelligence, maturity, training and experience would exercise under the same or similar circumstances.

Respondent properly excepted to the giving of this instruction and to the court's failure to give an adult standard of care.

The question of what standard of care should apply to acts of children has a long historical background. Traditionally, a flexible standard of care has been used to determine if children's actions were negligent. Under some circumstances, however, courts have developed a rationale for applying an adult standard.

In the courts' search for a uniform standard of behavior to use in determining whether or not a person's conduct has fallen below minimal acceptable standards, the law has developed a fictitious person, the "reasonable man of ordinary prudence." That term was first used in *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

Exceptions to the reasonable person standard developed when the individual whose conduct was alleged to have been negligent suffered from some physical impairment, such as blindness, deafness, or lameness. Courts also found it necessary, as a practical matter, to depart considerably from the objective standard when dealing with children's behavior. Children are traditionally encouraged to pursue childhood activities without the same burdens and responsibilities with which adults must contend. *See* Bahr, *Tort Law and the Games Kids Play*, 23 S.D. L. REV. 275 (1978). As a result, courts evolved a special standard of care to measure a child's negligence in a particular situation.

In *Roth v. Union Depot Co.*, 13 Wash. 525, 43 P. 641 (1896), Washington joined "the overwhelming weight of authority" in distinguishing between the capacity of a child and that of an adult. As the court then stated, at page 544, 43 P. at page 647:

> [I]t would be a monstrous doctrine to hold that a child of inexperience and experience can come only with years should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience.

The court went on to hold, at page 545, 43 P. at page 647:

> The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child.
>
> * * *
>
> [A] child is held ... only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age."

The current law in this state is fairly reflected in WPI 10.05, given in this case. In the past we have always compared a child's conduct to that expected of a reasonably careful child of the same age, intelligence, maturity, training and experience. This case is the first to consider the question of a child's liability for injuries sustained as a result of his or her operation of a motorized vehicle or participation in an inherently dangerous activity.

Courts in other jurisdictions have created an exception to the special child standard because of the apparent injustice that would occur if a child who caused injury while engaged in certain dangerous activities were permitted to defend himself by saying that other children similarly situated would not have exercised a degree of care higher than his, and he is, therefore, not liable for his tort. Some courts have couched the exception in terms of children engaging in an activity which is normally one for adults only. *See, e.g.*, *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961) (operation of a motorboat). We believe a better rationale is that when the activity a child engages in is inherently dangerous, as is the operation of powerful mechanized vehicles, the child should be held to an adult standard of care.

Such a rule protects the need of children to be children but at the same time discourages immature individuals from engaging in inherently dangerous activities. Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care. Although accidents sometimes occur as the result of such activities, they are not activities generally considered capable of resulting in "grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use...." *Daniels v. Evans*, 107 N.H. 407, 408, 224 A.2d 63, 64 (1966).

Other courts adopting the adult standard of care for children engaged in adult activities have emphasized the hazards to the public if the rule is otherwise. We agree with the Minnesota Supreme Court's language in its decision in *Dellwo v. Pearson, supra*, 259 Minn. at 457-58, 107 N.W.2d at 863:

> 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.

Dellwo applied the adult standard to a 12-year-old defendant operating a motor boat. Other jurisdictions have applied the adult standard to minors engaged in analogous activities. *Goodfellow v. Coggburn*, 98 Idaho 202, 203-04, 560 P.2d 873 (1977) (minor operating tractor); *Williams v. Esaw*, 214 Kan. 658, 668, 522 P.2d 950 (1974) (minor operating motorcycle); *Perricone v. DiBartolo*, 14 Ill. App. 3d 514, 520, 302 N.E.2d 637 (1973) (minor operating gasoline-powered minibike); *Krahn v. LaMeres*, 483 P.2d 522, 525-26 (Wyo. 1971) (minor operating automobile). The holding of minors to an adult standard of care when they operate motorized vehicles is gaining approval from an increasing number of courts and commentators. *See generally* Comment, *Capacity of Minors to be Chargeable with Negligence and Their Standard of Care*, 57 NEB. L. REV. 763, 770-71 (1978); Comment, *Recommended: An Objective Stand-ard of Care for Minors in Nebraska*, 46 NEB. L. REV. 699, 703-05 (1967).

The operation of a snowmobile likewise requires adult care and competence. Currently 2.2 million snowmobiles are in operation in the United States. 9 ENVIR. RPTR. (BNA) 876 (1978 Current Developments). Studies show that collisions and other snowmobile accidents claim hundreds of casualties each year and that the incidence of accidents is particularly high among inexperienced operators. *See* Note, *Snowmobiles A Legislative Program*, 1972 WIS. L. REV. 477, 489 n.58.

At the time of the accident, the 13-year-old petitioner had operated snowmobiles for about 2 years. When the injury occurred, petitioner was operating a 30-horsepower snowmobile at speeds of 10-20 miles per hour. The record indicates that the machine itself was capable of 65 miles per hour. Because petitioner was operating a powerful motorized vehicle, he should be held to the standard of care and conduct expected of an adult.

The order granting a new trial is affirmed.

ROSELLINI, STAFFORD, WRIGHT, BRACHTENBACH, HOROWITZ, DOLLIVER and HICKS, JJ., and RYAN, J. Pro Tem., concur.

Questions and Notes

1. Many jurisdictions hold that a child younger than 7 years of age is legally incapable of negligence. *See generally*, Donald J. Gee & Charlotte Peoples Hodges, *The Liability of Children: At What Age is a Child Deemed to Have the Capacity Required for Negligence, Contributory Negligence, or Comparative Negligence?*, 35 Trial 52 (May 1999).

2. Students with a taste for British humour may enjoy *Fardell v. Potts*, or "The Reasonable Man," found in A.P. HERBERT, UNCOMMON LAW 1-6.

c. Efficiency

UNITED STATES v. CARROLL TOWING

159 F.2d 169 (2d Cir. 1947)

L. HAND, Circuit Judge

These appeals concern the sinking of the barge, "Anna C," on January 4, 1944, off Pier 51, North River.

[*The barge **Anna C**, owned by the Conners Marine Co., sank after colliding with a tanker in New York's North River, losing a cargo of flour owned by the United States. The tug **Carroll**, owned by Carroll Towing Co. and chartered to Grace Line, Inc., was in the process of moving a nearby barge when the **Anna C** came unmoored. To get to the barge it wished to move, the **Carroll** had to throw off a line connecting one string of barges - of which the **Anna C** was innermost or closest to the pier - with barges across the inlet at another pier. When the other barges were tied to the **Anna C** her fasts to the pier apparently had not been strengthened.*

*The **Carroll** and another tug went to help the flotilla of barges after it broke loose and could have possibly helped pump water from the **Anna C** had anyone known it was taking on water after colliding with the tanker. However, the bargee (the person responsible for watching the barge while it is in the harbor) for the **Anna C** had left her the evening before. At trial, the district court did not assign any responsibility for the loss to the Conners Marine Co. The other defendants appealed, claiming that the owners of the **Anna C** were either negligent themselves or liable for their bargee's negligence. - ed.*]

* * *

For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in *Clapp v. Young*, held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in *Fenno v. The Mary E. Cuff*, treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in *The On-the-Level*, held liable for damage to a stake-boat, a barge moored to the stake-boat "south of Liberty Light, off the Jersey shore," because she had been left without a bargee; indeed he declared that the bargee's absence was "gross negligence." In the *Kathryn B. Guinan*, Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In *The Beeko*, Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In *United States Trucking Corporation v. City of New York*, the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree, but for another reason. In *The Sadie*, we affirmed Judge Coleman's holding that it was actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the inside barge. In *The P.R.R. No. 216*, we charged with liability a lighter which broke loose from, or was cast off, by a tanker to which she was moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in *The East Indian*, as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. *The Conway No. 23* went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In *The Trenton*, we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our

exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In *Bouker Contracting Co. v. Williamsburgh Power Plant Corporation*, we charged a scow with half damages because her bargee left her without adequate precautions. In *O'Donnell Transportation Co. v. M.& J. Tracy*, we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having "left the vessel to go ashore for a time on his own business."

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*<*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*," *supra*; 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 3d, 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.

* * *

Decrees reversed and cause remanded for further proceedings in accordance with the foregoing.

Questions and Notes

1. "Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that *B*, *P*, and *L* all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors." *U.S. Fidelity & Guar. Co. v. Jadranska Slobodna*, 683 F.2d 1022, 1026 (7th Cir. 1982) (POSNER, J.).

2. Is the negligence standard superior to a standard that makes the defendant liable as an insurer? Why or why not?

3. Law review articles discussing the development of the negligence standard include: Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 La. L. Rev. 1 (1970); Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925 (1981); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985).

Questions and Notes

1. *Pre-emption*. Sometimes the United States Congress decides to substitute its own regulatory scheme for the ordinary duties of reasonable care and resultant "regulation" by state tort law. This has been done in the case of tobacco companies; *see* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); and for certain farm products under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); *see* *Didier v. Drexel Chemical Co.*, 86 Wash.App. 795, 938 P.2d 364 (1997) (farmer's claim against chemical manufacturer for damage caused by liquid growth retardant were preempted, including failure to warn, express and implied warranty, consumer protection, and negligence claims, as well as claims against wholesaler and retailer).

2. What Evidence Establishes Negligence?

Introductory Note. It is one thing to agree upon the definition of the *standard* by which the defendant's conduct should be judged; it is another thing to determine what kinds of evidence can be used to *prove* what would have been reasonable care under the circumstances, and whether or not the defendant's conduct met that standard. Although such questions shade into the substantive area of evidence law, tort law contains its own determinations of how a plaintiff can prove negligence. Remember[1] that the job of the jury is to determine what the facts are; the job of the judge is to decide what the law is. The law is communicated to the jury through the form of jury instructions, and by the judge's determination of whether or not there is enough question about the facts to require the jury's deliberation. Thus, an understanding of the operation of the negligence principle requires that we examine the kinds of cases in which courts decide how negligence can be proved.

[1] It may be helpful for you to review Appendix A, The History of a Simple Torts Case, for clarification of these points.

a. Juror Experience

Sometimes jurors have enough experience with the defendant's activity that they can use their own standard of what would be reasonable under the circumstances. For example, when the injury is caused by an everyday behavior such as driving, shoveling a sidewalk, using household tools, etc., the plaintiff can ask the jury to decide that the defendant was negligent based upon their own judgment as to what a reasonable person would do in the same or similar circumstances. We saw that in the *Lussan* case. However, in many cases the litigants may find it useful to supplement the jurors' experience with additional evidence regarding what constitutes reasonable care.

b. The Use of Industry Custom

BENNETT v. LONG ISLAND R. CO.

163 N.Y. 1, 57 N.E. 79 (1900)

PARKER, C.J.

The defendant, while building an extension to its railroad of about 10 miles in length, put in for temporary use a switch without either lock or target, and by means of that switch, while open, a caboose propelled by an engine was run at considerable speed into a flat car loaded with rails standing on the side track. The plaintiff, an employe of the defendant, was, with a number of other employes, in the caboose, en route to the point where they were to begin the labors of the day; and, discovering that a collision was imminent, he jumped, receiving injuries to the right arm, for which damages have been awarded to him by the judgment now under review. The switch had been in use for a number of months, was perfect of its kind, and when the engine and caboose passed by it the night before the accident the switch was closed; and, had it not been opened by human agency between that time and the return of the engine and caboose the next morning, the accident could not have happened. Neither passenger nor freight trains had been run over this track down to this time, nor were they so run for several months thereafter; and no engine was run over this road in the time intervening the passing of this engine and caboose at night, and their return in the morning. There was some evidence of threats of mischief by one or more Italians who had formerly been employed in the construction of the road, and of the close proximity of one of

them at the time of the accident; and, while there was not sufficient evidence to require a finding that the switch had been thrown open by one of them, the fact was conclusively established that there was no defect in the switch, and that it required a man to open it. Therefore it must have been opened either by a fellow servant or by an outsider, and in either event the defendant is not liable to respond to this plaintiff for the results of such an act, because in the former case it was the act of a co-employee; in the latter, the felonious act of a third party. The Penal Code makes an interference with a switch by a third party a felony. Section 636. The learned trial justice correctly charged the jury as to these propositions, and with his conception of the law the appellate division agreed. The question submitted to the jury were whether defendant should have provided a lock for the switch "for the purpose of securing it against trespassers who might inadvertently throw it out of place, or prevent temptation to persons maliciously minded, who might find it so easy to turn the switch, by having it secured, to make it more difficult," and also "whether or not it was its duty to have provided a signal, called a "target," so that an approaching construction train could have seen it at a distance so far that they could have stopped the train in time to prevent the accident," and, in effect, that an affirmative finding would establish the liability of the defendant to respond to the plaintiff in damages. The prevailing opinion at the appellate division agreed with this view of the law, and justified the trial court, upon those grounds only, in refusing to dismiss the complaint, ad submitting the case to the jury.

When the plaintiff rested, he had proved the character of the switch, that it was closed the night before and open at the moment of the accident, and that it was without lock or target, but had not offered any evidence tending to show that it was customary to either lock or place targets on switches made use of during the construction of railroads. The motion for nonsuit having been denied, the defendant proceeded to introduce evidence tending to show that the switch actually used was such as is ordinarily used during the construction of railroads, and that, during constructions, switches are never locked and never targeted. William A. Cattell, formerly assistant chief engineer on defendant's railroad, testified that the siding in question was put in for temporary use during the construction of the railroad, and, further, that during his 12 years' experience on various railroads, in which he had much familiarity with construction work, he did not think he had ever seen a locked switch on a construction track, and targets very seldom, if ever. The assistant engineer on the New York division of the Pennsylvania Railroad testified that he had had 18 years of experience on various railroads, was familiar with construction work on new railroads, and had never seen a switch locked on tracks in process of construction, nor had he ever seen targets on such switches; and, of this particular switch, he said it was of the regular standard variety of switch found on construction work, and that it was not customary to lock or target such switches during the process of construction. No witness was called who attempted to contradict the testimony given by these witnesses. At the close of the trial, therefore, the uncontradicted testimony showed that the switch in use had not only performed its work perfectly during the months that it had been in operation, and was a perfect switch of its kid, but, further, that the switch was of the standard variety found on construction work, and that it was not customary either to lock or target such switches. The question, therefore, was presented to the court, on a motion for a nonsuit, whether the jury could be permitted to say, notwithstanding this evidence, that the defendant failed in the duty which it owed to its employes, in not providing the switch with a lock or target, or both.The rule of law is that the master's duty to his servants does not require him to furnish the best known appliances, but such only as are reasonably safe; and the test by which to determine whether he has performed that duty is not satisfied by an answer to the inquiry whether better appliances might have been obtained, but whether the selection made was reasonably prudent and careful. *Stringham v. Hilton*, 111 N.Y. 195, 18 N.E. 870, 1 L.R.A. 483; *Kern v. Refining Co.*, 125 N.Y. 50, 25 N.E. 1071; *De Vau v. Railroad Co.*, 130 N.Y. 632, 28 N.E. 532; *Harley v. Manufacturing Co.*, 142 N.Y. 31, 36 N.E. 813. Applying the test prescribed by the cases above cited to the evidence presented by this record, for the purpose of determining whether this defendant, as master, discharged its full duty, the result is necessarily reached that this defendant fully performed its obligation to its employes engaged in the construction of its road when it made selection of this particular switch, without putting on it either a lock or target. True, it might have made use of one or both of these appliances; but, according to the record, the switch selected was such as is generally and efficiently used on construction work by other railroads, and hence in making selection of it the defendant acted with reasonable care and

prudence. The best known appliance for completed railroads that are in actual operation is a switch with a lock and a target, but the defendant was not called upon during the construction of this road to do more than to furnish a switch that was reasonably safe. In *Brick v. Railroad Co.*, 98 N.Y. 211, this court had before it a case where the plaintiff's intestate lost his life while riding upon a construction train over a dilapidated railroad, which the defendant was engaged in reconstructing; and in denying the plaintiff's right to recover the court asserted the general principle that it is the duty of the master to provide and maintain for the use of his employes suitable machinery and other instrumentalities for the performance of the duties enjoined upon them, and within that principle is generally included the duty of a railroad to provide a track sufficient for the purpose in view, and to maintain it in good order. But the court further said that, while this principle is generally applicable to railroads which are in a state of completion, it must be considered with some qualification in reference to a road which has become dilapidated and out of repair, and is in the process of being reconstructed. "It may be assumed, we think, that the deceased, in performing the services in which he was engaged, and in traveling on the construction train, understood that he was not working upon a road that was finished and in good repair, but upon one which, having been long neglected, and little traveled, - latterly only by construction trains, - subjected him to greater risks and perils than would be incurred under ordinary circumstances, and in entering defendant's service he assumed hazards incident to the same." The reasoning in that case is as applicable generally to the construction of a railroad as to its reconstruction. The master who, while constructing a railroad, makes use of such appliances as the experience of others engaged in similar work has shown to be sufficient and reasonably safe, performs his duty. Therefore this defendant performed its duty in selecting and using the switch in question; for, according to the evidence contained in this record, it selected the kind of switch that had been in use on other railroads during construction, - a switch that had stood the practical test of user for so long a time that it had become the custom to use it without either lock or target during the period of construction by railroads generally, and particularly by all those with which the witnesses had become familiar during their long and varied experience in railroad building. The record, therefore, was barren of any evidence authorizing a jury to find that in selecting this switch for use during construction, without either lock or target, the defendant acted unreasonably or imprudently, and therefore the motion to dismiss the complaint should have been granted. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. CULLEN, J., not sitting.

Judgment reversed, etc.

T.J. HOOPER

60 F.2d 737 (2d Cir. 1932)

[*The defendant, owner of tugboats, had been found liable for the loss of ship and cargo when a severe storm sank two barges that the defendant was towing. Defendant appealed; one of the issues was whether or not the defendant should have anticipated the severe weather. - ed.*]

L. HAND, Circuit Judge

* * *

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 would have been amply vindicated by what followed. To be sure the barges would, as we have said, probably have

withstood the gale, had they been well found; but a master is not justified in putting his tow to every test which she will survive, if she be fit. There is a zone in which proper caution will avoid putting her capacity to the proof; a coefficient of prudence that he should not disregard. Taking the situation as a whole, it seems to us that these masters would have taken undue chances, had they got the broadcasts.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 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 manoeuvre, 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, 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. *Ketterer v. Armour & Co.* (C.C.A.) 247 F. 921, 931, L.R.A. 1918D, 798; *Spang Chalfant & Co. v. Dimon, etc., Corp.* (C.C.A.) 57 F.(2d) 965, 967. 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 never may 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. *Wabash R. Co. v. McDaniels*, 107 U.S. 454, 459-461, 2 S. Ct. 932, 27 L. Ed. 605; *Texas & P.R. Co. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905; *Shandrew v. Chicago, etc., R. Co.*, 142 F. 320, 324, 325 (C.C.A. 8); *Maynard v. Buck*, 100 Mass. 40. 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 [liable] 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.

Questions and Notes

1. What is the relationship between the existence of a custom and a finding on the issue of negligence?

2. One torts expert has commented that "this case [*T.J. Hooper*] has had an enormous influence in the product liability context, especially after the SECOND RESTATEMENT. The single sentence that `a whole calling may have unduly lagged in the adoption of new and available devices,' 60 F.2d at 740, has itself been worth billions of dollars in transfer payments." Epstein, *The Unintended Revolution in Product Liability Law*, 10 Cardozo L. Rev. 2193 (1989).

c. Statutory Violations

Introductory Note. Sometimes the defendant's conduct will violate a statutory duty. For example, suppose that there is an automobile accident in which *A* is injured by a car driven by *B*. What is the relevance of the fact that *B* was exceeding the speed limit at the time of the accident?

MARTIN v. HERZOG

228 N.Y. 164, 126 N.E. 814 (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. The case was tried on the assumption that the hour had arrived when lights were due. It was argued on the same assumption in this court. In such circumstances, it is not important whether the hour might have been made a question for the jury. *Todd v. Nelson*, 109 N.Y. 316, 325, 16 N.E. 360. A controversy put out of the case by the parties is not to be put into it by us. We say this by way of preface to our review of the contested rulings. 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. POLLOCK, TORTS (10th Ed.) p. 458; CLARK & LINSEIL, TORTS (6th Ed.) p. 493; SALMOND, JURISPRUDENCE (5th Ed.) pp. 351, 363; *Texas & Pac. Ry. Co. v. Right, supra*, 241 U.S. 43, 36 Sup. Ct. 482, 60 L. Ed. 874; *Chicago, B.& Q. Ry. Co. v. U.S.*, 220 U.S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

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. *Amberg v. Kinley, supra*; *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; *Kelley v. N.Y. State Rys.*, 207 N.Y. 342, 100 N.E. 1115; *Ward v. Hobbs*, 4 App. Cas. 13.... [T]he omission of a safeguard prescribed by statute is ... held not merely some evidence of negligence, but negligence in itself. *Massoth v. D.& H. Canal Co., supra. Cf. Cordell v. N.Y.C.& H.R.R.R. Co., supra.*

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 were allowed to "consider the default as lightly or gravely" as they would (THOMAS, J., in the court below). 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. *Scott v. International Paper Co.*, 204 N.Y. 49, 97 N.E. 413; *Fitzwater v. Warren*, 206 N.Y. 49, 97 N. 99 N.E. 1042, 42 L.R.A.(N.S.) 1229; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. 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 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. A plaintiff who travels without them is not to forfeit the right to damages, unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. "Proof of negligence in the air, so to speak, will not do." POLLOCK TORTS (10th Ed.) p. 472.

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. *Lambert v. Staten Island R. R. Co.*, 70 N.Y. 104, 109, 110; *Walsh v. Boston R.R. Co.*, 171 Mass. 52, 58, 50 N.E. 453. *The Pennsylvania*, 19 Wall. 125, 136, 137, 22 L. Ed. 148; *Fisher v. Village of Cambridge*, 133 N.Y. 527, 532, 30 N.E. 663. 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 viation of the statute. They should have been told, not only that the omission of the light was negligence, but that it was "prima facie evidence of contributory negligence"; *i.e.*, that it was sufficient in itself unless its probative force was overcome (THOMAS, J., in court below) to sustain a verdict that the decedent was at fault. *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523.

Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road; but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for and refused.

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.

[*The dissenting opinion is omitted. - ed.*]

TEDLA v. ELLMAN

280 N.Y. 124, 19 N.E.2d 987 (1939)
LEHMAN, Judge

While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant [Ellman]. 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" 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 in December. 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." Section 85, subd. 6. 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 defendants moved to dismiss the complaint on the ground, among others, that violation of the statutory rule constitutes contributory negligence as matter of law. They did not, in the courts below, urge that any negligence in other respect of Mrs. Tedla or her brother bars a recovery. The trial judge left to the jury the question whether failure to observe the statutory rule was a proximate cause of the accident; he left to the jury no question of other fault or negligence on the part of Mrs. Tedla or her brother, and the defendants did not request that any other question be submitted. 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.

... Until by chapter 114 of the Laws of 1933, it adopted subdivision 6 of section 85, quoted above, 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. In 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. Disregard of the statutory rule of the road and observance of a rule based on immemorial custom, it is said, is negligence which as matter of law is a proximate cause of the accident, though observance of the statutory rule might, under the circumstances of the particular case, expose a pedestrian to serious danger from which he would be free if he followed the rule that had been established by custom. 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. It is unreasonable to ascribe to the Legislature an intention that the statute should have so extraordinary a result, and the courts may not give to a statute an effect not intended by the Legislature.

* * *

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 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.

* * *

I have so far discussed the problem of the plaintiffs' right to compensation for the damages caused by defendants' negligence as if it depended solely upon the question of whether the pedestrians were at fault, and I have ignored the question whether their alleged fault was a proximate cause of the accident. In truth, the two questions cannot be separated completely. If the pedestrians had observed the statutory rule of the road they would have proceeded easterly along the roadway on the left of the center grass plot, and then, it must be conceded, they would not have been struck by the automobile in which the defendants were riding, proceeding in the same direction along the roadway on the right. Their presence on the roadway where they were struck was an essential condition of their injury. Was it also as matter of law a proximate cause of the accident? "The position of a vehicle which has been struck by another may or many not have been one of the causes of the striking. Of course, it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly or proximately produces or helps to produce, a result as an efficient cause and that which is a necessary condition or attendant cause of it.... That is, a contributing cause of an accident, is usually a question for a jury, to be determined by the facts of the particular case." *Newcomb v. Boston Protective Department*, 146 Mass. 596, 604, 16 N.E. 555, 559, 4 Am. St. Rep. 354. Here the jury might find that the pedestrians avoided a greater, indeed an almost suicidal, risk by proceeding along the east bound roadway; that the operator of the automobile was entirely heedless of the possibility of the presence of pedestrians on the highway; and that a pedestrian could not have avoided the accident even if he had faced oncoming traffic. Under those circumstances the question of proximate cause, as well as the question of negligence, was one of fact.

In each action, the judgment should be affirmed, with costs.

CRANE, C.J., and HUBBS, LOUGHRAN, and RIPPEY, JJ., concur.

O'BRIEN and FINCH, JJ., dissent on the authority of *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814.

Judgments affirmed.

Questions and Notes

1. Can you square the holding in *Tedla* with *Martin v. Herzog*? If so, how; if not, which case was wrongly decided?

2. In *Rumpelheimer v. Haddock*, or "Port to Port" (A.P. HERBERT, UNCOMMON LAW, 237-242) the defendant's boat collided with the plaintiff's

motor-car; the court decided that admiralty law prescribed the method by which the two should pass.

3. The RESTATEMENT (2D), TORTS, provides the following definitions of negligence per se and excuse:

§ 286. When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

§ 288A. Excused Violations

> (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
>
> (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
>
> (a) the violation is reasonable because of the actor's incapacity;
>
> (b) he neither knows nor should know of the occasion for compliance;
>
> (c) he is unable after reasonable diligence or care to comply;
>
> (d) he is confronted by an emergency not due to his own misconduct;
>
> (e) the compliance would involve a greater risk of harm to the actor or to others.

§ 288B. Effect of Violation

> (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.
>
> (2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

4. How does a finder of fact conclude that there is negligence per se?

5. What happens if negligence per se is found?

6. What happens if negligence per se is not found?

7. A famous case in the history of negligence per se is *Gorris v. Scott*, [1874] 9 L.R. (Exch.) 125, in which a sheepowner sued the owner of a ship that lost the sheep during transport. The sheepowner based his negligence claim on a statute that required sheep to be kept in pens during the voyage. Instead, the sheep were left on the deck of the ship and washed overboard. The defendant replied that the purpose of the statute was to protect other animals from contamination, not to avoid loss from storms. Who should have prevailed?

8. Some states (*e.g.*, Washington) do not impose negligence per se but rather permit the jury to use a statutory violation as evidence of negligence. (*See* R.C.W. 5.40.050, barring negligence per se except in cases involving certain building code violations or driving while intoxicated.) What difference would it make to the plaintiff (or to the defendant) if an unexcused statutory violation were treated merely as evidence, rather than as a conclusive presumption, of negligence?

9. A special problem arises with the application of the negligence per se doctrine to children. Should children be held to a standard that takes into account their age (*see Robinson v. Lindsay, supra*), or should they be expected to abide by the standard set by the statute? Most jurisdictions use the statute as a guideline as to what a reasonable jury would do, but allow the

jury to take into account the child's age in evaluating whether the child was negligent. DIAMOND, LEVINE & MADDEN, UNDERSTANDING TORTS § 6.05.

d. Res Ipsa Loquitur

Introductory Note. As noted earlier, the plaintiff bears the burden of producing evidence upon which the jury can conclude that the defendant should be held liable. In many cases the defendant's conduct is known, and it is up to the jury to decide whether the defendant's conduct measured up to the standard of reasonable care. However, in some cases the evidence of *what the defendant did* is missing for some reason: it may have been destroyed in an explosion, or may have happened so long ago that witnesses are unavailable. Does the plaintiff then lose because he cannot carry his burden of proof? Not always. Tort law employs a doctrine called "res ipsa loquitur," which is discussed in the following cases.

(The term "res ipsa loquitur" is usually pronounced "race ipsuh loh-kwitur." For amusing advice on how to pronounce Latin terms, please consult *Rex v. Venables and Others*, or "The Dead Pronunciation," found in A.P. HERBERT, UNCOMMON LAW 360-364.)

MURPHY v. MONTGOMERY ELEVATOR CO.

65 Wash. App. 112, 828 P.2d 584 (1992)

PETRICH, Chief Judge

Margaret Murphy sued Montgomery Elevator Company for injuries she claims resulted when she fell while stepping out of an elevator at Humana Hospital, her place of employment. After a jury verdict for Montgomery Elevator (Montgomery), Murphy appeals, claiming instructional errors. She argues that the trial court erred in not giving the jury her proposed instruction on res ipsa loquitur and in not giving her proposed instruction that Montgomery be held to the highest standard of care, *i.e.*, that of a common carrier, to discover and correct a dangerous condition on an elevator it inspected, maintained, and repaired under contract with Humana Hospital. We affirm.

Murphy contended at trial that while she was stepping out of the elevator on March 30, 1987, the elevator dropped two to four inches after opening and that this caused her fall. Humana Hospital had a limited service contract with Montgomery to maintain the elevator. Humana did not service the elevators; Montgomery maintenanced and repaired them.

During the trial, Murphy presented the expert testimony of Joseph Cunningham, a former city elevator inspector. He testified that elevators do not suddenly drop if they have been properly maintained and that the likely cause of the misleveling was a failure in the "suicide switch." Ken Durin, a Montgomery employee, and Carl Burkland, Montgomery's expert witness, testified that a properly functioning elevator should not mislevel by more than one-half inch.

I. Res Ipsa Loquitur

Contending that the exact cause of the malfunction was indeterminable but was the result of improper service and maintenance, Murphy proposed a res ipsa loquitur instruction.[1] Res ipsa loquitur applies if the following conditions are met:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. Horner v. Northern Pac. Beneficial Ass'n. Hosps., Inc., 62 Wash. 2d 351, 359, 382 P.2d 518 (1963).[2]

[1] Murphy's proposed instruction no. 12 provided: "When an agency or instrumentality which produces injury or damage is under the control of the defendant at the time of injury or damage to plaintiff and the injury or damage which occurred would ordinarily have not resulted if the defendant had used ordinary care, then, in the absence of satisfactory explanation, you may infer that the defendant was negligent and that such negligence produced the injury or damage complained of by the plaintiff."

[2] We need not address the issue of what effect the adoption of comparative negligence has on the third element of res ipsa loquitur. *See* W.P.I. 3D at 206.

Whether the doctrine applies in a given case is a question of law. *Zukowsky v. Brown*, 79 Wash. 2d 586, 592, 488 P.2d 269 (1971). *See also Brown v. Dahl*, 41 Wash. App. 565, 580-83, 705 P.2d 781 (1985) (court should give res ipsa loquitur instruction when plaintiff presents substantial evidence of each of its elements, even though defendant presented weighty, competent exculpatory evidence). Once the trial court determines that the doctrine applies, the defendant has the duty to come forward with exculpatory evidence to overcome the inference of negligence. *Metropolitan Mortgage & Securities Co. v. Washington Water Power*, 37 Wash. App. 241, 243, 679 P.2d 943 (1984).

The trial court did not err in refusing Murphy's proposed instruction. Murphy failed to satisfy the second condition of this doctrine, which requires the plaintiff to present evidence connecting the defendant with the negligence. When the plaintiff fails to show that a defendant had exclusive control of the object causing the injury, res ipsa loquitur does not apply. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wash. 2d 42, 58, 785 P.2d 815 (1990) (John Doe donated blood, defendant collected it, and hospital transfused it). *See also Jackson v. Criminal Justice Training Commission*, 43 Wash. App. 827, 830-31, 720 P.2d 457 (1986) (not only must defendant have exclusive control, but plaintiff must have corresponding lack of control to avoid the injury); *Hughes v. King Cy.*, 42 Wash. App. 776, 784, 714 P.2d 316, *review denied*, 106 Wash. 2d 1006 (1986) (plaintiff failed to present evidence that county had any control over private drainage system); *Cusick v. Phillippi*, 42 Wash. App. 147, 155-56, 709 P.2d 1226 (1985) (absence of exclusive control when investors could have directed earlier sale of apples, and evidence established multiple possible causes of browning).

Murphy contends that Montgomery had exclusive control of the elevator because it was solely responsible for its maintenance and repair and because it had sole access to the elevators. Montgomery, on the other hand, contends that because Humana owned, operated, and supervised Montgomery's work, Montgomery did not have exclusive control. Under their contract, Montgomery was to service the elevators twice a month, and Humana was to notify Montgomery if other service work or repair needed to be made.

Franklin Simmons, the director of engineering for Humana Hospital at the time of Murphy's accident, testified that Montgomery had a service contract with Humana, that none of Humana's employees did any type of preventative maintenance on the elevators, that Humana did no repair work on the elevators, and that Humana did not help Montgomery in making any repairs. He also testified that he would periodically inspect Montgomery's work, look at the elevator and elevator rooms to insure they were in proper order, and occasionally watch Montgomery service the elevators.

Ken Durin, Montgomery's service man who worked on Humana's elevators, testified that he went to Humana twice a month for two hours at a time, that he inspected, lubricated, and cleaned the parts, and that he would check the controller, which included the "suicide switch." He also testified that if a part needed replacement he would go to Humana's maintenance department for authorization, that Humana had to authorize any additional time or labor that needed to be done and that Montgomery billed Humana for that time and those parts.

Because Humana retained some control over the elevators, and because its contract with Montgomery was only a limited service contract, Montgomery did not have exclusive control of the elevators. Murphy's argument that Montgomery was the only entity which did any work on the elevators is insufficient under the reasoning of *Cusick v. Phillippi, supra*, which held that the failure of the investors to exercise their discretion did not give Phillippi exclusive control of the apple harvest. Similarly here, the failure of Humana to exercise its discretion did not give Montgomery exclusive control of the elevators.

* * *

Judgment affirmed.

MORGAN and SEINFELD, JJ., concur.

Questions and Notes

1. The RESTATEMENT (2D), TORTS, provides the following:

§ 328 D. Res Ipsa Loquitur

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope

of the defendant's duty to the plaintiff.

Note that although the three elements do not specifically mention it, many commentators have suggested that the primary rationale for using res ipsa loquitur is in situations where the defendant has superior access to the information that would explain the cause of the accident. The Restatement does not make this a requirement (§ 328D, cmt. k), but it is a useful guideline to distinguish those cases where res ipsa makes the most sense.

2. If there were no doctrine of res ipsa loquitur, would the plaintiff be able to prove negligence in *Judson*? If so, how? If he could not, should the plaintiff lose?

3. In *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1945), a plaintiff sustained nerve damage in his shoulder and arm while under anesthetic for an appendectomy. The damage was apparently caused by two hard objects left on the table upon which the plaintiff was placed during surgery. Plaintiff could not identify who had left them there. The court held that the doctrine of res ipsa loquitur was appropriate in this case since the injury was of the sort unlikely to occur without negligence, was caused by instruments exclusively controlled by the defendants, and was not contributed to by the plaintiff. The court concluded it would be unreasonable to force the plaintiff to prove who had caused his injury when such knowledge was known only by the defendants. Is *Ybarra* an appropriate case for the application of the res ipsa doctrine? Why or why not?

4. Courts differ on the procedural effect of the res ipsa inference. Some hold that where the facts of the case permit the inference of negligence the plaintiff is relieved only of the burden of producing evidence, but he still bears the risk of nonpersuasion if the jury is undecided. Thus, even if the defendant produces no additional evidence to prove that he did use reasonable care, the jury may still find for the defendant. Other courts hold that the burden of production and the risk of nonpersuasion shift to the defendant; thus, unless the defendant's evidence of reasonable care (or of some other explanation of how the accident occurred) persuades the jury that it was more probable than not that the defendant was not negligent, the plaintiff is entitled to a judgment. Do you think this is a significant difference?

e. Evidence of Defendant's Safety Policies

HYJEK V. ANTHONY INDUSTRIES

133 Wash.2d 414, 944 P.2d 1036 (1997)

MADSEN, Justice.

Plaintiff Gary Hyjek brought an action claiming design defect against Anthony Industries' subsidiary, K2 Corporation (K2), as a result of an injury he sustained while using a K2 snowboard. Plaintiff contends the trial court's decision excluding evidence of subsequent remedial measures relating to the binding retention system of K2's snowboards was error. We affirm.

STATEMENT OF THE CASE

K2 Corporation (K2), a subsidiary of Anthony Industries, designs, manufactures, and markets snowboards and other winter sports equipment. In 1990, K2 marketed a snowboard model called the "Dan Donnelly XTC." Ex. 6. The Dan Donnelly XTC was sold without bindings, allowing customers to affix their bindings of choice. K2 did not pre-drill the snowboard for bindings. Without a pre-set hole pattern, the purchaser could install his choice of any bindings on the market by simply screwing them into the snowboard. Coarse threaded screws were screwed directly into a fiberglass retention plate in the snowboard's core to affix the bindings ultimately chosen by the customer.

Plaintiff purchased a Dan Donnelly XTC and was injured on March 24, 1991, while using the snowboard. He testified that the binding came loose from the snowboard, which then struck his inside left ankle. In 1993, Plaintiff sued Anthony Industries, claiming the snowboard as designed was not reasonably safe in that it provided for the affixing of bindings to the snowboard by means of threaded screws which foreseeably could and did prove to be an inadequate and unsafe binding retention method.

In 1992, K2 began to design a new binding system involving "through-core inserts" molded

into the snowboard. Fine threaded screws were then screwed into the inserts to hold the bindings in place. Clerk's Papers (CP) at 34-35. Plaintiff sought to enter into evidence K2's subsequent change in design to support his claim for design defect.

K2 brought a motion in limine to exclude evidence of subsequent remedial measures pursuant to Evidence Rules (ER) 402, 403, and 407 and the motion was granted. A jury returned a special verdict in favor of K2. Plaintiff appealed to Division One of the Court of Appeals, arguing that ER 407 does not apply to strict product liability cases, and the evidence of subsequent measures should have been admitted. We accepted certification from the Court of Appeals.

DISCUSSION

The issue in this case is whether ER 407, which provides that a party may not introduce evidence of subsequent remedial measures to establish culpable conduct or negligence, applies in products liability cases where strict liability is alleged. ER 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Washington's Evidence Rule is identical to former Federal Evidence Rule 407[13] and codifies the common law doctrine which excludes evidence of subsequent remedial measures as a proof of an admission of fault.[14] Wash. Evid. R. 407 advisory committee note; *see also* *Cochran v. Harrison Mem'l Hosp.*, 42 Wash.2d 264, 254 P.2d 752.

Courts justify the exclusion of such evidence because it is not relevant and it may discourage development of safety measures. Regarding relevancy, courts have found that evidence of a subsequent repair is of little probative value, since the repair may not be an admission of fault. *See* *Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 207-08, 12 S.Ct. 591 (the Supreme Court reasoned that evidence of subsequent remedial measures could not be used to prove negligence because such evidence is irrelevant, confusing to the jury, and prejudicial to the defendant). Rule 407 is a rejection of the notion that ****1038** " 'because the world gets wiser as it gets older, therefore it was foolish before.' " Fed.R.Evid. 407 advisory committee note (quoting *Hart v. Lancashire & Yorkshire Rya. Co.*, 21 L.T.R.N.S. 261, 263 (1869)). A manufacturer may change a product's design for many other reasons besides the existence of a defect. Washington courts have excluded such evidence on the basis of relevancy. *See* *Bartlett v. Hantover*, 84 Wash.2d 426, 526 P.2d 1217; *Aldread v. Northern Pac. Ry. Co.*, 93 Wash. 209, 160 P. 429; Wash. Evid. R. 407 advisory committee note.

While the historical use of relevancy as the basis for excluding evidence of subsequent remedial measures as evidence of negligence is well established, the more widely accepted basis for exclusion appears to be the social policy rationale of encouraging safety precautions. Karl B. Tegland, 5 Wash. Prac. *Evidence* § 131, at 471 (3d ed.1989); *see also* *Codd v. Stevens Pass, Inc.*, 45 Wash.App. 393, 725 P.2d 1008. The Federal Advisory Committee Note to Rule 407 specifically indicates a distinct preference for this rationale. Fed.R.Evid. 407 advisory committee note. The expressed concern is that the introduction of such evidence may provide a

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[13] While this case was pending Federal Evidence Rule 407 was amended.

[14] Washington cases follow the rule, allowing the introduction of subsequent remedial measures for purposes other than proving liability such as proving ownership, control, or feasibility of precautionary measures, or impeachment. *See* *Brown v. Quick Mix Co.*, 75 Wash.2d 833, 454 P.2d 205 (feasibility); *Peterson v. King County*, 41 Wash.2d 907, 252 P.2d 797 (on nature of conditions existing at the time of the incident); *Cochran v. Harrison Mem'l Hosp.*, 42 Wash.2d 264, 254 P.2d 752 (dictum on issue on control of an instrumentality); *Hatcher v. Globe Union Mfg. Co.*, 170 Wash. 494, 16 P.2d 824 (feasibility). These "other purposes" for which subsequent remedial measures may be admitted must be controverted in order to avoid the introduction of evidence under false pretenses. Wash. Evid. R. 407 advisory committee note. Although evidence of subsequent remedial measures may be admissible under one of the exceptions to Wash. Evid. R. 407, the evidence will not be admitted unless it is relevant as proof upon the actual issues in the case. Wash. Evid. R. 407 advisory committee note.

disincentive for people to take safety precautions. Rule 407 seeks to advance the public policy of encouraging people to take steps in furtherance of added safety by freeing them from the fear that such steps will be used against them in a future lawsuit. *Carter v. City of Seattle*, 21 Wash. 585, 59 P. 500; *see also* Wash. Evid. R. 407 advisory committee note.

Although the rule clearly applies in products liability actions based in negligence, where the claim seeks recovery under theories of strict liability, the applicability of Rule 407 varies from state to state and across the federal circuits. Neither the text of Washington's rule nor the Advisory Committee's Note addresses the issue of whether Rule 407 should apply to strict product liability actions. *See* Wash. Evid. R. 407 advisory committee note. Additionally, Washington courts have not squarely addressed this question. *See Haysom v. Coleman Lantern Co.*, 89 Wash.2d 474, 573 P.2d 785.

In the federal circuits, a solid majority apply Rule 407 in products cases where strict liability is alleged and exclude evidence of subsequent remedial measures only where an exception applies. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits each has applied Rule 407 in strict products liability cases. Only the Eighth and Tenth Circuits allow evidence of subsequent remedial measures to be admitted in strict product liability actions.

The debate in the federal courts, however, has recently been answered. Federal Evidence Rule 407 has been amended, adopting the view of the majority of the federal courts, providing that "evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, *a defect in a product, a defect in a product's design, or a need for a warning or instruction.*" (emphasis added). Amend. Fed.R.Evid. 407. (Westlaw 1997).

Plaintiff asks this court to adopt the reasoning of those courts finding that ER 407 does not apply to strict products liability actions and find that the trial court erred in excluding evidence of subsequent remedial measures. Finding the majority of federal courts holding that ER 407 applies to actions based in strict liability persuasive and considering the recent amendment to the Federal Rule, we decline to reverse the trial court's decision.

Plaintiff relies primarily on the California Supreme Court's decision in *Ault v. International Harvester Co.*, 13 Cal.3d 113, 528 P.2d 1148, which was one of the first to admit evidence of subsequent remedial measures in a strict liability action. The *Ault* court reasoned that the public policy considerations underling the rule were not valid in strict products liability cases, and held that a plaintiff may use evidence of a subsequent remedial measure to prove a defect. The court found inapplicable the goal of encouraging repairs in the case of mass produced products. *Id.*, 528 P.2d at 1152 A mass producer, the court reasoned, would not "risk innumerable additional lawsuits and the attendant adverse effect upon its public image" merely to avoid admission of the evidence in the first lawsuit. *Id.* The threat of future increased liability for failure to remedy a product defect is a sufficient impetus to encourage the mass producer to take remedial actions. *Id.* Therefore, the court concluded, exclusion of subsequent remedial actions only provides "a shield against potential liability." *Id.*

The *Ault* court also considered whether the phrase "culpable conduct" included the actions of manufacturers who were sued under strict liability. *Id.* at 1151, 117 Cal.Rptr. at 815 If the Legislature had intended to apply the rule to strict liability, the court asserted, a phrase without the connotation of "affirmative fault" would have been used. *Id.*

The *Ault* court's dual rationale, that the additional impetus of exclusion is unnecessary to encourage remedial action in a products liability case and that culpable conduct does not apply to strict liability actions, has been followed by numerous state courts and in early federal court decisions concerning ER 407. *See e.g.*, *Robbins v. Farmers Union Grain Terminal Ass'n*, 552 F.2d 788, 793 (8th Cir.1977; *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir.1983); *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 125 (Ky.1991; *Sanderson v. Steve Snyder Enter., Inc.*, 196 Conn. 134, 491 A.2d 389; *McFarland v. Bruno Mach. Corp.*, 68 Ohio St.3d 305, 626 N.E.2d 659.

Expanding on the courts' reasoning in *Ault*, the Nevada Supreme Court held that the rule "comes into play only where negligence or other 'culpable' conduct is alleged." *Jeep Corp. v. Murray*, 101 Nev. 640, 708 P.2d 297. Strict liability, the court stated, does not include either of those issues. *Id.* In a products liability case the focus is on the defect in the product, not on any culpable acts of the manufacturer. *Id.* Because there is no negligent conduct to influence in strict products liability cases the rule does not apply. *Id; see also Caldwell v. Yamaha Motor Co.*, 648 P.2d 519, 524 (Wyo.1982 (since due care or culpability is not at issue in a strict liability action, the

exclusionary rule was not applicable).

We, however, agree with the majority of the federal circuits rejecting these arguments and applying the exclusionary rule to actions brought under a theory of strict products liability. The reasoning employed by the Fourth Circuit in *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir.1980), exemplifies the rationale followed by the majority. In *Werner*, the court found that, regardless of the theory used to require a manufacturer to pay damages, the deterrent to taking remedial measures is the same, namely, the fear that the evidence may ultimately be used against the defendant. *Id.* at 856-57.

* * *

The differences between theories of negligence and strict liability are not significant enough to require different approaches when viewed against the goal of encouraging manufacturers to implement safety measures. Instead, the focus must be on the realistic implications of applying the exclusionary rule in strict products liability cases. From a defendant's point of view, it does not matter what kind of action the plaintiff brings. Rather, the manufacturer's focus will be on the fact that if it makes any repairs or safety improvements to its product, evidence of those repairs may be used at trial to show the product was defectively designed. Thus, failing to apply the exclusionary rule in strict liability actions will have the same deterrent effect on subsequent remedial measures as in a negligence case.

* * *

In this case, none of the exceptions listed in the Rule was offered to support admission of K-2's later modifications. Therefore, evidence of subsequent remedial measures was correctly excluded in this case.

STEVENS v. BOSTON ELEVATED RY. CO.

184 Mass. 476, 69 N.E. 338 (1904)

[*Plaintiff sued for personal injuries sustained in an accident involving defendant's streetcar. Defendant had issued a rule to its motormen (streetcar operators) requiring them to sound a gong when approaching an intersection. Plaintiff obtained a jury verdict in part based upon evidence that the motorman in question had not followed this rule, and that if he had done so, the accident would have been prevented. - ed.*]

KNOWLTON, C.J.

The only exception now relied on by the defendant is to the admission in evidence of the defendant's rule in regard to sounding the gong, in connection with testimony that the defendant's motorman disobeyed the rule, and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the method used at the time of the accident. *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N.E. 214; *Shinners v. Proprietors, etc.*, 154 Mass. 168, 28 N.E. 10, 12 L.R.A. 554, 26 Am. St. Rep. 226; *Downey v. Sawyer*, 157 Mass. 418, 32 N.E. 654; *Hewitt v. Taunton Street Railway Company*, 167 Mass. 483, 485, 486, 46 N.E. 106; *Dacey v. New York, New Haven & Hartford Railroad Company*, 168 Mass. 479-481, 47 N.E. 418. This is the general rule in other jurisdictions. *Morse v. Minneapolis Railroad*, 30 Minn. 465, 16 N. W. 358; *Columbia Railroad Company v. Hawthorne*, 144 U.S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, and cases there cited.

On the other hand, the violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137-140; *Connolly v. New York & New England Railroad Company*, 158 Mass. 8, 10, 11, 32 N.E. 937; *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152, 39 N.E. 797; *Sweetland v. Lynn & Boston Railroad Company*, 177 Mass. 574, 578, 579, 59 N.E. 443, 51 L.R.A. 783. *See, also*, in other courts, Chicago, etc., *Railroad Company v. Lowell*, 151 U.S. 209-217, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Baltimore & Ohio Railroad Company*, 168 U.S. 339-346, 18 Sup. Ct. 68, 42 L. Ed. 491. In *Floytrup v. Boston & Maine Railroad, ubi supra*, Mr. Justice Barker said in the opinion, "The evidence of the usage of the road

that one train should not enter a station while another train was engaged in delivering passengers there was competent upon the question whether the defendant's servants managed the train in a proper manner." Similar statements of the law may be found in numerous cases. *Dublin, Wickford & Wexford Railway Company v. Slattery*, 3 App. Cas. 1155-1163; *Delaware, etc., Railroad Company v. Ashley*, 67 Fed. 209-212, 14 C.C.A. 368; *Cincinnati Street Railway Company v. Altemeier*, 60 Ohio St. 10, 53 N.E. 300; *L.S.& M.S. Railway Company v. Ward*, 135 Ill. 511-518, 26 N.E. 520; *Georgia Railway Company v. Williams*, 74 Ga. 723-773; *Atlanta Cons. Railway Company v. Bates*, 103 Ga. 333, 30 S.E. 41. The only decision to the contrary of which we are aware is in the case of *Fonda v. Railway Company*, 71 Minn. 438-449, 74 N.W. 166, 70 Am. St. Rep. 341.

It is contended by the defendant that there is no sound principle under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant which is always received as evidence, although not conclusive, of the defendant's negligence. *Wright v. Malden & Melrose Railway Company*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136; *Hall v. Ripley*, 119 Mass. 135; *Hanlon v. South Boston, etc., Railway Company*, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes prima facie upon everybody a duty of obedience. Disobedience is therefore a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So, a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to he held an implication that there was a breach of duty towards him, as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in *Columbia Railroad Company v. Hawthorne*, 144 U.S. 202-207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405. Mr. Justice Gray, referring to changes made by a defendant after an accident, says in the opinion, "It is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." In *Morse v. Minneapolis & St. Louis Railway*, 30 Minn. 465, 16 N.E. 358, it is said, referring to the same subject, that "a person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." *See, also, Illinois Central Railroad Company v. Swisher*, 61 Ill. App. 611. In *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N.E. 214, and in some of the earlier cases, there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

Questions and Notes

1. What is the basis for the rule against using evidence of post-accident repairs?

2. Is it distinguishable from using a defendant's company rulebooks as evidence that the defendant was negligent?

3. Establishing Vicarious Liability (Respondeat Superior)

HAYES v. FAR WEST SERVICES, INC.

50 Wash. App. 505, 749 P.2d 178 (1988)

WILLIAMS, J.

Frederick Hayes and Judy Frounfelter brought suit for damages against Thomas McGrath and his former law firm, Torbenson, Thatcher, McGrath, Treadwell & Schoonmaker, Inc., P.S., for injuries arising out of McGrath's shooting of Hayes. On motion for summary judgment, the trial court dismissed the firm as a defendant. Hayes appeals.

The facts are these: at approximately 4:30 p.m. on February 11, 1980, McGrath went to a restaurant/cocktail establishment in Kirkland. From then until about 11 o'clock, he imbibed considerable alcohol while socializing and discussing personal and firm-related business. After 11 o'clock, McGrath continued to socialize until approximately 1:45 a.m., when he and Hayes, another bar patron, exchanged words. Shortly thereafter, the two encountered each other outside, and after another exchange, McGrath shot Hayes in what he claims was self-defense. Frounfelter, who was in the company of Hayes, is alleged to have sustained emotional trauma.

The basic question is whether the law firm is liable on the theory of respondeat superior for damages arising out of McGrath's shooting of Hayes. The basic rule is stated in *Kuehn v. White*, 24 Wash. App. 274, 277, 600 P.2d 679 (1979):

> A master is responsible for the servant's acts under the doctrine of respondeat superior when the servant acts within the scope of his or her employment and in furtherance of the master's business. Where a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable.

See also Kyreacos v. Smith, 89 Wash. 2d 425, 429, 572 P.2d 723 (1977); *Westerland v. Argonaut Grill*, 185 Wash. 411, 55 P.2d 819 (1936).

Under the traditional interpretation of respondeat superior, there is not sufficient evidence to establish liability on the part of the law firm. Viewing the evidence in a light most favorable to the nonmoving parties, Hayes and Frounfelter, as we must, there is nothing to indicate either directly or by inference that McGrath was acting in the scope of his employment when he shot Hayes. There is no evidence McGrath transacted firm business or engaged in any promotional activities any time after 11 p.m.

But in *Dickinson v. Edwards*, 105 Wash. 2d 457, 716 P.2d 814 (1986), the Supreme Court extended the doctrine of respondeat superior, allowing a plaintiff to recover from a banquet-hosting employer if the following prima facie case is proven:

> 1. The employee consumed alcohol at a party hosted by the employer which was held to further the employer's interest in some way and at which the employee's presence was requested or impliedly or expressly required by the employer.
>
> 2. The employee negligently consumed alcohol to the point of intoxication when he knew or should have known he would need to operate a vehicle on some public highway upon leaving the banquet.
>
> 3. The employee caused the accident while driving from the banquet.
>
> 4. The proximate cause of the accident, the intoxication, occurred at the time the employee negligently consumed the alcohol.
>
> 5. Since this banquet was beneficial to the employer who impliedly or expressly required the employee's attendance, the employee negligently consumed this alcohol during the scope of his employment. *Dickinson*, at 468, 716 P.2d 814.

Appellants, citing *Dickinson v. Edwards, supra*, argue that McGrath's firm is liable under respondeat superior because McGrath negligently became intoxicated while acting within the scope of his employment, and his intoxication was the proximate cause of the shooting.

The decision in *Dickinson v. Edwards, supra*, is based on *Chastain v. Litton Systems, Inc.*, 694 F.2d 957 (4th Cir. 1982). That case employed essentially a three prong analysis: (1) was the employee's consumption of alcohol within the

scope of employment, (2) did the employee's consumption of alcohol while within the scope of employment constitute negligence, and (3) did the negligent intoxication continue until the time of the incident and constitute a proximate cause of the injuries. *Chastain*, at 962; *see also* *Childers v. Shasta Livestock Auction Yard, Inc.*, 190 Cal. App. 3d 792, 235 Cal. Rptr. 641 (3d Dist. 1987).

Under this formulation of the rule, there is sufficient evidence to present a jury question as to whether McGrath was acting within the scope of his employment when he consumed alcohol. Prior to 8:30 p.m., McGrath met with several acquaintances, including a friend from an insurance company he had been trying to secure as a client for the firm for some time; McGrath later submitted a charge slip marked "Entertainment" to his firm for bar purchases while with the friend. From about 8:30 p.m. to 11 p.m., McGrath discussed settlement possibilities with opposing counsel on a bankruptcy case he was handling for his firm; McGrath's firm subsequently billed their client in the bankruptcy for 2.7 hours for that settlement conference. Moreover, McGrath's activities appear consistent with his firm's policies; members were encouraged to engage in promotional activities, and the firm gave partners such as McGrath considerable discretion in billing for expenses, as evidenced by the numerous reimbursements made to McGrath for his business and entertainment expenditures.

There is also sufficient evidence to present a jury question as to whether McGrath consumed alcohol to the point of intoxication while within the scope of his employment. McGrath admitted to having several drinks prior to 11 p.m., and Hayes and several others said McGrath appeared intoxicated before the shooting.

But there is nothing in the record to show that McGrath's consumption of alcohol was negligent. Negligence necessarily involves a foreseeable risk; if an actor could not reasonably foresee any injury as the result of his act, there is no negligence and no liability. *Hunsley v. Giard*, 87 Wash. 2d 424, 435, 553 P.2d 1096 (1976). In *Dickinson v. Edwards*, *supra*, negligence was defined in terms of whether the employee knew or should have known he would be operating a motor vehicle on a public highway upon leaving the banquet. Because the employee had driven to the banquet, it was foreseeable that he would have to drive away, and the risks of driving while intoxicated are well-recognized. Such a situation is far removed from the particulars of this case. There is no evidence to suggest McGrath knew or should have known that his drinking would lead to his becoming involved in an altercation that would result in his firing a gun at another bar patron; nothing in the record shows that the cocktail lounge was a frequent scene of such incidents or that its patrons were known to be confrontational, or that when intoxicated, McGrath became violent or had ever drawn a gun. Accordingly, there is not sufficient evidence to establish liability on the part of the law firm under the application of respondeat superior set forth in *Dickinson v. Edwards, supra.*

The remaining arguments are insubstantial. The notion of "enterprise liability" was specifically rejected by the court in *Kuehn v. White*, 24 Wash. App. at 279-80, 600 P.2d 679, and no subsequent cases have indicated otherwise. Nothing in the record supports a finding of liability based on either a theory of negligent retention and supervision or a duty to control because of a "special relation" between McGrath and his firm. And finally, the court did not err in striking certain materials submitted by the appellants, nor was its denial of their motion for continuance an abuse of discretion.

Affirmed.

Questions and Notes

1. Obviously the plaintiff is often very interested in whether or not the defendant's employer will be liable for the defendant's negligence, since employers usually carry insurance and usually have much greater resources with which to pay a judgment. Since most people have employers, it is important to look at the possibility of *respondeat superior* whenever you are analyzing an injury. *Hayes* discusses the requirement that, to impose liability upon the employer, the evidence must establish that the negligent act was committed during the course and scope of employment. Prior to that determination, there must be a finding that the person who caused the injury was an *employee* (as distinguished from an independent contractor). The test used by most courts is whether or not the alleged employer had a *right to control* the behavior of the alleged employee. If I hire a plumber to hook up my washing machine, for example, I don't control how he does his work, and he is therefore not my employee; any negligence he commits is his responsibility, not mine. On the other hand, if I am a plumbing contractor and I hire a person to do plumbing installation for me, I do have the right to control

the way the work is done and therefore that person will be considered my employee.

2. The issues of respondeat superior are addressed more fully in RESTATEMENT (2D), TORTS § 317, and in the RESTATEMENT (2D) OF AGENCY §§ 219-49.

3. Sometimes an employer can be liable for the wrongs done by an employee where the employer was negligent in the hiring or supervision of the employee. For example, in *Carlsen v. Wackenhut Corp.*, 73 Wash.App. 247, 868 P.2d 882, *review denied*, 124 Wash.2d 1022, 881 P.2d 255 (1994), the employer hired ushers (who doubled as "security") for a rock concert without adequate determination of whether they were suitable. When an employee lured a concertgoer under the stage and sexually assaulted her, the victim sued the employer for negligence. Although the trial court dismissed on summary judgment, the appellate court held that a jury could find that there had been inadequate screening of the employees and therefore reinstated the complaint.

4. Even if there is agreement on the wisdom of holding "deep pockets" liable where negligence leads to the infliction of intentional harm, there is no consensus on whether to divide the liability between the deep pocket and the malefactor, or to make the deep pocket liable for the whole: William D. Underwood and Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 Baylor L. Rev. 617 (2003).

5. A related principle is that of *negligent entrustment*. If the possessor of a dangerous instrument, such as a gun or a motor vehicle, negligently entrusts it to someone who is incompetent to handle it safely, the owner can be held liable to a victim who is injured thereby. For example, in *Splawnik v. DiCaprio*, 146 A.D.2d 333, 540 N.Y.S.2d 615 (1989), a gun dealer sold a loaded gun to a woman who allegedly knew that the purchaser was depressed. When she committed suicide, her estate sued the gun dealer for negligent entrustment.

6. Employers are often caught in a dilemma. If they don't pass along information that would warn others about the dangers of an employee they have fired, they face liability for failure to warn. On the other hand, if they pass along information that later turns out to have insufficient basis in fact, they may face liability for defamation. *See* J. Bradley Buckhalter, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (or, How Employers Can Have Their Cake and Eat It Too)*, 22 Seattle U. L. Rev. 265 (1998); *see also* Markita D. Cooper, *Beyond Name, Rank and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 Va. J. Soc. Pol'y & L. 287 (1998).

7. One of the difficulties faced by courts in cases of sexual harassment is whether or not to make the employer vicariously liable for torts committed by employees. In a recent case, the U.S. Supreme Court tried to strike a reasonable balance. In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), the court decided that the plaintiff need not present evidence that the employer knew that the harassment was taking place, but the employer can present an affirmative defense of having used reasonable care to prevent the harassment. The case is analyzed in William R. Corbett, *Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801 (1999)

§ B. Strict Liability

Introductory Note. Although negligence is the most common basis for the plaintiff's claim that he is entitled to recover damages from the defendant, it is not the exclusive basis for a tort claim. "Strict liability" is the term used to describe cases in which the plaintiff is able to recover even though the defendant has exercised reasonable care. In Chapter Six we will consider cases that impose strict liability for a defective product. Here, however, we are concerned with cases where strict liability is imposed because of the nature of the defendant's activity.[1]

[1] Some other systems, like the worker's compensation system in most states, provide compensation without proof of fault. However, they typically provide significantly smaller benefits than those available for a tort recovery. In this chapter we consider cases where the liability is similar

1. The Distinction Between Strict Liability and Negligence

HELLING v. CAREY

83 Wash. 2d 514, 519 P.2d 981 (1974)

HUNTER, Associate Justice

This case arises from a malpractice action instituted by the plaintiff (petitioner), Barbara Helling.

The plaintiff suffers from primary open angle glaucoma. Primary open angle glaucoma is essentially a condition of the eye in which there is an interference in the ease with which the nourishing fluids can flow out of the eye. Such a condition results in pressure gradually rising above the normal level to such an extent that damage is produced to the optic nerve and its fibers with resultant loss in vision. The first loss usually occurs in the periphery of the field of vision. The disease usually has few symptoms and, in the absence of a pressure test, is often undetected until the damage has become extensive and irreversible.

The defendants (respondents), Dr. Thomas F. Carey and Dr. Robert C. Laughlin, are partners who practice the medical specialty of ophthalmology. Ophthalmology involves the diagnosis and treatment of defects and diseases of the eye.

The plaintiff first consulted the defendants for myopia, nearsightedness, in 1959. At that time she was fitted with contact lenses. She next consulted the defendants in September, 1963, concerning irritation caused by the contact lenses. Additional consultations occurred in October, 1963; February, 1967; September, 1967; October, 1967; May, 1968; July, 1968; August, 1968; September, 1968; and October, 1968. Until the October 1968 consultation, the defendants considered the plaintiff's visual problems to be related solely to complications associated with her contact lenses. On that occasion, the defendant, Dr. Carey, tested the plaintiff's eye pressure and field of vision for the first time. This test indicated that the plaintiff had glaucoma. The plaintiff, who was then 32 years of age, had essentially lost her peripheral vision and her central vision was reduced to approximately 5 degrees vertical by 10 degrees horizontal.

Thereafter, in August of 1969, after consulting other physicians, the plaintiff filed a complaint against the defendants alleging, among other things, that she sustained severe and permanent damage to her eyes as a proximate result of the defendants' negligence. During trial, the testimony of the medical experts for both the plaintiff and the defendants established that the standards of the profession for that specialty in the same or similar circumstances do not require routine pressure tests for glaucoma upon patients under 40 years of age. The reason the pressure test for glaucoma is not given as a regular practice to patients under the age of 40 is that the disease rarely occurs in this age group. Testimony indicated, however, that the standards of the profession do require pressure tests if the patient's complaints and symptoms reveal to the physician that glaucoma should be suspected.

The trial court entered judgment for the defendants following a defense verdict. The plaintiff thereupon appealed to the Court of Appeals, which affirmed the judgment of the trial court. *Helling v. Carey*, No. 1185-41918-1 (Wn. App., filed Feb. 5, 1973). The plaintiff then petitioned this Court for review, which we granted.

In her petition for review, the plaintiff's primary contention is that under the facts of this case the trial judge erred in giving certain instructions to the jury and refusing her proposed instructions defining the standard of care which the law imposes upon an ophthalmologist. As a result, the plaintiff contends, in effect, that she was unable to argue her theory of the case to the jury that the standard of care for the specialty of ophthalmology was inadequate to protect the plaintiff from the incidence of glaucoma, and that the defendants, by reason of their special ability, knowledge and information, were negligent in failing to give the pressure test to the plaintiff at an earlier point in time which, if given, would have detected her condition and enabled the defendants to have averted the resulting substantial loss in her vision.

We find this to be a unique case. The testimony of the medical experts is undisputed concerning the standards of the profession for the specialty of ophthalmology. It is not a question in this case of the defendants having any greater special ability, knowledge and information than other ophthalmologists which would require the defendants to comply with a higher duty of care than that "degree of care and skill which is

in its structure to a negligence recovery, but eliminates the need for proving negligence.

expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances." *Pederson v. Dumouchel*, 72 Wash. 2d 73, 79, 431 P.2d 973 (1967). The issue is whether the defendants' compliance with the standard of the profession of ophthalmology, which does not require the giving of a routine pressure test to persons under 40 years of age, should insulate them from liability under the facts in this case where the plaintiff has lost a substantial amount of her vision due to the failure of the defendants to timely give the pressure test to the plaintiff.

The defendants argue that the standard of the profession, which does not require the giving of a routine pressure test to persons under the age of 40, is adequate to insulate the defendants from liability for negligence because the risk of glaucoma is so rare in this age group. The testimony of the defendant, Dr. Carey, however, is revealing as follows:

> **Q.** Now, when was it, actually, the first time any complaint was made to you by her of any field or visual field problem? **A.** Really, the first time that she really complained of a visual field problem was the August 30th date. [1968] **Q.** And how soon before the diagnosis was that? **A.** That was 30 days. We made it on October 1st. **Q.** And in your opinion, how long, as you now have the whole history and analysis and the diagnosis, how long had she had this glaucoma? **A.** I would think she probably had it ten years or longer. **Q.** Now, Doctor, there's been some reference to the matter of taking pressure checks of persons over 40. What is the incidence of glaucoma, the statistics, with persons under 40? **A.** In the instance of glaucoma under the age of 40, is less than 100 to one per cent. The younger you get, the less the incidence. It is thought to be in the neighborhood of one in 25,000 people or less. **Q.** How about the incidence of glaucoma in people over 40? **A.** Incidence of glaucoma over 40 gets into the two to three per cent category, and hence, that's where there is this great big difference and that's why the standards around the world has been to check pressures from 40 on.

The incidence of glaucoma in one out of 25,000 persons under the age of 40 may appear quite minimal. However, that one person, the plaintiff in this instance, is entitled to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease. The test is a simple pressure test, relatively inexpensive. There is no judgment factor involved, and there is no doubt that by giving the test the evidence of glaucoma can be detected. The giving of the test is harmless if the physical condition of the eye permits. The testimony indicates that although the condition of the plaintiff's eyes might have at times prevented the defendants from administering the pressure test, there is an absence of evidence in the record that the test could not have been timely given.

Justice Holmes stated in *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 623, 47 L. Ed. 905 (1903):

> What 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.

In *The T.J. Hooper*, 60 F.2d 737, on page 740 (2d Cir. 1932), Justice Hand stated:

> [I]n 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 never may 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*. (Italics ours.)

Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which

proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.

There are no disputed facts to submit to the jury on the issue of the defendants' liability. Hence, a discussion of the plaintiff's proposed instructions would be inconsequential in view of our disposition of the case.

The judgment of the trial court and the decision of the Court of Appeals is reversed, and the case is remanded for a new trial on the issue of damages only.

HALE, C.J., and ROSELLINI, STAFFORD, WRIGHT and BRACHTENBACH, JJ., concur.

UTTER, Associate Justice (concurring)

I concur in the result reached by the majority. I believe a greater duty of care could be imposed on the defendants than was established by their profession. The duty could be imposed when a disease, such as glaucoma, can be detected by a simple, well-known harmless test whose results are definitive and the disease can be successfully arrested by early detection, but where the effects of the disease are irreversible if undetected over a substantial period of time.

The difficulty with this approach is that we as judges, by using a negligence analysis, seem to be imposing a stigma of moral blame upon the doctors who, in this case, used all the precautions commonly prescribed by their profession in diagnosis and treatment. Lacking their training in this highly sophisticated profession, it seems illogical for this court to say they failed to exercise a reasonable standard of care. It seems to me we are, in reality, imposing liability, because, in choosing between an innocent plaintiff and a doctor, who acted reasonably according to his specialty but who could have prevented the full effects of this disease by administering a simple, harmless test and treatment, the plaintiff should not have to bear the risk of loss. As such, imposition of liability approaches that of strict liability.

Strict liability or liability without fault is not new to the law. Historically, it predates our concepts of fault or moral responsibility as a basis of the remedy. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HAR. L. REV. 315, 383, 441 (1894). As noted in W. PROSSER, THE LAW OF TORTS § 74 (3d ed. 1964) at pages 507, 508:

> There are many situations in which a careful person is held liable for an entirely reasonable mistake.... [I]n some cases the defendant may be held liable, although he is not only charged with no moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care.... There is "a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault." (Footnote omitted.)

Tort law has continually been in a state of flux. It is "not always neat and orderly. But this is not to say it is illogical. Its central logic is the logic that moves from premises - its objectives - that are only partly consistent, to conclusions - its rules - that serve each objective as well as may be while serving others too. It is the logic of maximizing service and minimizing disservice to multiple objectives." Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886, 897 (1967).

When types of problems rather than numbers of cases are examined, strict liability is applied more often than negligence as a principle which determines liability. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 239 (1971). There are many similarities in this case to other cases of strict liability. Problems of proof have been a common feature in situations where strict liability is applied. Where events are not matters of common experience, a juror's ability to comprehend whether reasonable care has been followed diminishes. There are few areas as difficult for jurors to intelligently comprehend as the intricate questions of proof and standards in medical malpractice cases.

In applying strict liability there are many situations where it is imposed for conduct which can be defined with sufficient precision to insure that application of a strict liability principle will not produce miscarriages of justice in a substantial number of cases. If the activity involved is one which can be defined with sufficient precision, that definition can serve as an accounting unit to which the costs of the activity may be allocated with some certainty and precision. With this possible, strict liability serves a compensatory function in situations where the defendant is, through the use of insurance, the financially more responsible person. Peck, *Negligence and Liability Without Fault in* *Tort Law, supra* at 240, 241.

If the standard of a reasonably prudent specialist is, in fact, inadequate to offer reasonable protection to the plaintiff, then liability can be

imposed without fault. To do so under the narrow facts of this case does not offend my sense of justice. The pressure test to measure intraocular pressure with the Schiotz tonometer and the Goldman applanometer takes a short time, involves no damage to the patient, and consists of placing the instrument against the eyeball. An abnormally high pressure requires other tests which would either confirm or deny the existence of glaucoma. It is generally believed that from 5 to 10 years of detectable increased pressure must exist before there is permanent damage to the optic nerves.

Although the incidence of glaucoma in the age range of the plaintiff is approximately one in 25,000, this alone should not be enough to deny her a claim. Where its presence can be detected by a simple, well known harmless test, where the results of the test are definitive, where the disease can be successfully arrested by early detection and where its effects are irreversible if undetected over a substantial period of time, liability should be imposed upon defendants even though they did not violate the standard existing within the profession of ophthalmology.

The failure of plaintiff to raise this theory at the trial and to propose instructions consistent with it should not deprive her of the right to resolve the case on this theory on appeal. Where this court has authoritatively stated the law, the parties are bound by those principles until they have been overruled. Acceptance of those principles at trial does not constitute a waiver or estop appellants from adapting their cause on appeal to such a rule as might be declared if the earlier precedent is overruled. *Samuelson v. Freeman*, 75 Wash. 2d 894, 900, 454 P.2d 406 (1969).

FINLEY and HAMILTON, JJ., concur.

Questions and Notes

1. Was the majority opinion based upon an application of strict liability or negligence? What about the concurring opinion?

2. The Washington Legislature enacted a statute in 1975 that provided that a plaintiff in a medical malpractice action would have to "prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages . . .." Nonetheless, in *Gates v. Jensen*, 92 Wash.2d 246 (1979), the Washington Supreme Court again held a physician negligent for failing to give a pressure test to a glaucoma patient.

3. In *Spano v. Perini*, 25 N.Y.2d 11, 302 N.Y.S.2d 527, 250 N.E.2d 31 (1969), the New York Court of Appeals considered a case in which a garage owner's property was damaged by blasting conducted nearby in tunnel construction. The leading New York case, *Booth v. Rome, W.& O.T.R. Co.*, 140 N.Y. 267, 35 N.E. 592 (1893) had permitted the imposition of strict liability in blasting cases only where there was a physical invasion of the property (*e.g.*, by flying debris), reasoning that (1) construction was a valuable activity, and (2) to declare a landowner's right to be free from the results of blasting would in effect declare blasting unlawful. "This sacrifice, we think, the law does not exact. Public policy is sustained 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." *Booth*, 35 N.E. at 596. However, in *Spano* the court overruled this precedent, stating:

> 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. (250 N.E.2d at 34).

Is this the right question to ask in deciding whether to impose strict liability?

4. There is a continuing fascination with "no-fault" schemes for medical malpractice. For a recent review, *see* Bovbjerg, Randall R. and Frank A. Sloan, *No-fault for Medical Injury: Theory and Evidence*. 67 U. Cin. L. Rev. 53 (1998). *See*

also infra, Chapter Ten, Professional Negligence.

2. When Is Strict Liability Imposed?

Introductory Note. Just as we had to distinguish between identifying the standard for negligence (reasonable care) and the means by which it can be identified (negligence per se, res ipsa, etc.), so we now must shift from an understanding of what strict liability is to a consideration of the circumstances in which strict liability will be imposed upon the defendant. Remember that unless the plaintiff establishes the existence of facts that bring the case into one of the categories qualifying for strict liability, the plaintiff will be required to prove negligence in order to recover. We have already seen the imposition of strict liability in *Bierman*, although that case is unique because of its use of the small claims court standard ("substantial justice") instead of tort doctrine as such. In general, it can be said that strict liability cases represent small islands within the larger sea of cases governed by the negligence standard. As you read the subsequent cases, see if you can find a common thread connecting the cases in which strict liability is imposed.

a. Abnormally Dangerous Activities

SIEGLER v. KUHLMAN

81 Wash. 2d 448, 502 P.2d 1181 (1973

HALE, Associate Justice

Seventeen-year-old Carol J. House died in the flames of a gasoline explosion when her car encountered a pool of thousands of gallons of spilled gasoline. She was driving home from her after-school job in the early evening of November 22, 1967, along Capitol Lake Drive in Olympia; it was dark but dry; her car's headlamps were burning. There was a slight impact with some object, a muffled explosion, and then searing flames from gasoline pouring out of an overturned trailer tank engulfed her car. The result of the explosion is clear, but the real causes of what happened will remain something of an eternal mystery.

* * *

The jury apparently found that defendants had met and overcome the charges of negligence. Defendants presented proof that both the truck, manufactured by Peterbilt, a division of Pacific Car and Foundry Company, and the tank and trailer, built by Fruehauf Company, had been constructed by experienced companies, and that the fifth wheel, connecting the two units and built by Silver Eagle Company, was the type of connecting unit used by 95 percent of the truck-trailer units. Defendants presented evidence that a most careful inspection would not have revealed the defects or fatigue in the metal connections between truck and trailer; that the trailer would not collapse unless both main springs failed; there was evidence that, when fully loaded, the tank could not touch the wheels of the tank trailer without breaking the springs because the maximum flexion of the springs was less than 1 inch. Defendants presented evidence that the drawbar was secure and firmly attached; that the tanks were built of aluminum to prevent sparks; and that, when fully loaded with 4,800 gallons of cargo, there would be 2 or 3 inches of space between the cargo and top of the tank; that two safety cables connected the two units; that the truck and trailer were regularly serviced and repaired, and records of this preserved and put in evidence; that the unit had been subject to Interstate Commerce Commission spot checks and conformed to ICC standards; and that, at the time of the accident, the unit had traveled less than one- third of the average service life of that kind of unit. There was evidence obtained at the site of the fire that both of the mainsprings above the tank trailer's front wheels had broken as a result of stress, not fatigue - from a kind of stress that could not be predicated by inspection - and finally that there was no negligence on the driver's part.

Defendants also presented some evidence of contributory negligence on the basis that Carol House, driving on a 35-mile-per-hour road, passed another vehicle at about 45 miles per hour and although she slacked speed somewhat before the explosion, she was traveling at the time of the impact in excess of the 35-mile-per-hour limit. The trial court submitted both contributory negligence and negligence to the jury, declared the maximum speed limit on Capitol Lake Drive to be 35 miles per hour, and told the jury that, although

violation of a positive statute is negligence as a matter of law, it would not engender liability unless the violation proximately contributed to the injury. From a judgment entered upon a verdict for defendants, plaintiff appealed to the Court of Appeals which affirmed. 3 Wash. App. 231, 473 P.2d 445 (1970). We granted review (78 Wash. 2d 991 (1970)), and reverse.

* * *

Strict liability is not a novel concept; it is at least as old as *Fletcher v. Rylands*, L.R. 1 Ex. 265, 278 (1866), *affirmed*, House of Lords, 3 H.L. 330 (1868). In that famous case, where water impounded in a reservoir on defendant's property escaped and damaged neighboring coal mines, the landowner who had impounded the water was held liable without proof of fault or negligence. Acknowledging a distinction between the natural and nonnatural use of land, and holding the maintenance of a reservoir to be a nonnatural use, the Court of Exchequer Chamber imposed a rule of strict liability on the landowner. The ratio decidendi included adoption of what is now called *strict liability*, and at page 278 announced, we think, principles which should be applied in the instant case:

> [T]he 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.

All of the Justices in *Fletcher v. Rylands, supra*, did not draw a distinction between the natural and nonnatural use of land, but such a distinction would, we think, be irrelevant to the transportation of gasoline. The basic principles supporting the Fletcher doctrine, we think, control the transportation of gasoline as freight along the public highways the same as it does the impounding of waters and for largely the same reasons. *See* PROSSER, TORTS, § 78 (4th ed. 1971).

In many respects, hauling gasoline as freight is no more unusual, but more dangerous, than collecting water. When gasoline is carried as cargo - as distinguished from fuel for the carrier vehicle - it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight - extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties. And the very hazards inhering from the size of the load, its bulk or quantity and its movement along the highways presents another reason for application of the *Fletcher v. Rylands, supra*, rule not present in the impounding of large quantities of water - the likely destruction of cogent evidence from which negligence or want of it may be proved or disproved. It is quite probable that the most important ingredients of proof will be lost in a gasoline explosion and fire. Gasoline is always dangerous whether kept in large or small quantities because of its volatility, inflammability and explosiveness. But when several thousand gallons of it are allowed to spill across a public highway - that is, if, while in transit as freight, it is not kept impounded - the hazards to third persons are so great as to be almost beyond calculation. As a consequence of its escape from impoundment and subsequent explosion and ignition, the evidence in a very high percentage of instances will be destroyed, and the reasons for and causes contributing to its escape will quite likely be lost in the searing flames and explosions.

That this is a sound case for the imposition of a rule of strict liability finds strong support in Professor Cornelius J. Peck's analysis in *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971). Pointing out that strict liability was imposed at common law prior to *Fletcher v. Rylands, supra*, that study shows the application of a rule of strict liability in a number of instances, *i.e.*, for harm done by trespassing animals; on a bona fide purchaser of stolen goods to their true owner; on a bailee for the misdelivery of bailed property regardless of his good faith or negligence; and on innkeepers and hotels at common law. But there are other examples of strict liability: The Supreme Court of Minnesota, for example, imposed liability without fault for damage to a dock inflicted by a ship moored there during a storm. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

The rule of strict liability rests not only upon the ultimate idea of rectifying a wrong and putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible, but it also rests on problems of proof:

> One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied.

> For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.
>
> Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard. (Footnote omitted.) C. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971).

See, also, G.P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972), for an analysis of the judicial philosophy relating to tort liability as affecting or affected by concepts of fault and negligence; and Comment, *Liability Without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201.

Thus, the reasons for applying a rule of strict liability obtain in this case. We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all of the hazards of high-speed traffic, multiplied by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied again by the quantity and size of the load. Then we have the added dangers of ignition and explosion generated when a load of this size, that is, about 5,000 gallons of gasoline, breaks its container and, cascading from it, spreads over the highway so as to release an invisible but highly volatile and explosive vapor above it.

Danger from great quantities of gasoline spilled upon the public highway is extreme and extraordinary, for any spark, flame or appreciable heat is likely to ignite it. The incandescent filaments from a broken automobile headlight, a spark from the heat of a tailpipe, a lighted cigarette in the hands of a driver or passenger, the hot coals from a smoker's pipe or cigar, and the many hot and sparking spots and units of an automobile motor from exhaust to generator could readily ignite the vapor cloud gathered above a highway from 5,000 gallons of spilled gasoline. Any automobile passing through the vapors could readily have produced the flames and explosions which killed the young woman in this case and without the provable intervening negligence of those who loaded and serviced the carrier and the driver who operated it. Even the most prudent and careful motorist, coming unexpectedly and without warning upon this gasoline pool and vapor, could have driven into it and ignited a holocaust without knowledge of the danger and without leaving a trace of what happened to set off the explosion and light the searing flames.

Stored in commercial quantities, gasoline has been recognized to be a substance of such dangerous characteristics that it invites a rule of strict liability - even where the hazard is contamination to underground water supply and not its more dangerous properties such as its explosiveness and flammability. *See* *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969). It is even more appropriate, therefore, to apply this principle to the more highly hazardous act of transporting it as freight upon the freeways and public thoroughfares.

Recently this court, while declining to apply strict liability in a particular case, did acknowledge the suitability of the rule in a proper case. In *Pacific Northwest Bell Tel. Co. v. Port of Seattle*, 80 Wash. 2d 59, 491 P.2d 1037 (1971), we observed that strict liability had its beginning in *Fletcher v. Rylands, supra*, but said that it ought not be applied in a situation where a bursting water main, installed and maintained by the defendant Port of Seattle, damaged plaintiff telephone company's underground wires. There the court divided - not on the basic justice of a rule of strict liability in some cases - but in its

application in a particular case to what on its face was a situation of comparatively minor hazards. Both majority and dissenting justices held, however, that the strict liability principles of *Fletcher v. Rylands, supra*, should be given effect in some cases; but the court divided on the question of whether underground water mains there constituted such a case.

The rule of strict liability, when applied to an abnormally dangerous activity, as stated in the RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964), was adopted as the rule of decision in this state in *Pacific Northwest Bell Tel. Co. v. Port of Seattle, supra*, at 64, 491 P.2d, at 1039, 1040, as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
>
> (2) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

As to what constitutes an abnormal activity, § 520 states:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) Whether the gravity of the harm which may result from it is likely to be great;
>
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
>
> (d) Whether the activity is not a matter of common usage;
>
> (e) Whether the activity is inappropriate to the place where it is carried on; and
>
> (f) The value of the activity to the community.

[*The **Siegler** court continued its quotation from **Pacific Northwest Bell**:*]

> Applying these factors to this system, we do not find the activity to be abnormally dangerous. There has never been a break in the system before, absent an earthquake, and the pipe could have been expected to last many more years. It is a system commonly used for fire protection, and its placement under ground is, of course, appropriate. We do not find § 519 of the RESTATEMENT, (Tent. Draft No. 10, 1964), or *Rylands v. Fletcher, supra*, applicable.

It should be noted from the above language that we rejected the application of strict liability in *Pacific Northwest Bell Tel. Co. v. Port of Seattle, supra*, solely because the installation of underground water mains by a municipality was not, under the circumstances shown, an abnormally dangerous activity. Had the activity been found abnormally dangerous, this court would have applied in that case the rule of strict liability.

Contrast, however, the quiet, relatively safe, routine procedure of installing and maintaining and using underground water mains as described in *Pacific Northwest Bell v. Port of Seattle, supra*, with the activity of carrying gasoline as freight in quantities of thousands of gallons at freeway speeds along the public highway and even at lawful lesser speeds through cities and towns and on secondary roads in rural districts. In comparing the quiescence and passive job of maintaining underground water mains with the extremely heightened activity of carrying nearly 5,000 gallons of gasoline by truck, one cannot escape the conclusion that hauling gasoline as cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the RESTATEMENT (SECOND) OF TORTS § 519 (Tent. Draft No. 10, 1964), above.

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care. That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation. Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all

of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight. Hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability.

The case is therefore reversed and remanded to the trial court for trial to the jury on the sole issue of damages.

HAMILTON, C.J., FINLEY, ROSELLINI, and HUNTER, JJ., and RYAN, J., pro tem., concur.

ROSELLINI, Associate Justice (concurring)

I agree with the majority that the transporting of highly volatile and flammable substances upon the public highways in commercial quantities and for commercial purposes is an activity which carries with it such a great risk of harm to defenseless users of the highway, if it is not kept contained, that the common-law principles of strict liability should apply. In my opinion, a good reason to apply these principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers - who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.

I think the opinion should make clear, however, that the owner of the vehicle will be held strictly liable only for damages caused when the flammable or explosive substance is allowed to escape without the apparent intervention of any outside force beyond the control of the manufacturer, the owner, or the operator of the vehicle hauling it. I do not think the majority means to suggest that if another vehicle, negligently driven, collided with the truck in question, the truck owner would be held liable for the damage. But where, as here, there was no outside force which caused the trailer to become detached from the truck, the rule of strict liability should apply.

It also is my opinion that the legislature has expressed an intent that owners and operators of vehicles carrying trailers should be required to keep them under control, and that intent can be found in the statutes cited in the majority opinion. Thus the application of the common-law principles of strict liability is in accord with the manifest legislative view of the matter.

It also should be remarked, I think, that there was in this case no evidence that the alleged negligence of the deceased, in driving faster than the posted speed, was in any sense a proximate cause of the tragedy which befell her. There was no showing that, had she been proceeding at the legal rate of speed, she could have stopped her vehicle in time to avoid being enveloped in the flames or that the gasoline would not have ignited. Thus we are not confronted in this case with a question whether contributory negligence might under some circumstances be a defense to an action of this kind. It should be understood that the court does not pass upon that question at this time.

HAMILTON, C.J., FINLEY, J., and RYAN, J., pro tem., concur.

NEILL, Associate Justice (dissenting)

The application of the doctrine of strict liability to the facts of this case is warranted, at least as the applicability is qualified by the concurring opinion of Justice Rosellini. However, to decide this case on that theory violates our established rules of appellate review. *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wash. 2d 124, 309 P.2d 742 (1957); *State v. McDonald*, 74 Wash. 2d 474, 445 P.2d 345 (1968).

Plaintiff seeks money redress for the death of an exemplary young woman whose life was horribly terminated in a tragic accident. A jury absolved the defendants from culpability. Irrespective of our sympathy, that jury verdict must stand unless error was committed at the trial. On appeal, the Court of Appeals affirmed the verdict and judgment. *Siegler v. Kuhlman*, 3 Wash. App. 231, 473 P.2d 445 (1970). We granted review. 78 Wn. 2d 991 (1970). The only issue brought to this court by the appeal is the procedural effect of res ipsa loquitur....

I would affirm the trial court and the Court of Appeals.

STAFFORD, J., concurs.

Questions and Notes

1. In *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 687 P.2d 212 (1984), natural gas leaked from a pipeline, allegedly as the result of negligence by a telephone company employee. The ground above the pipeline was frozen, and so the gas found its way into the plaintiff's house, where it exploded. When the plaintiff sued, should the court have imposed strict liability upon the gas company for damage caused by the explosion?

2. In *Crosby v. Cox Aircraft Co. of Washington*, 109 Wash. 2d 581, 746 P.2d 1198 (1987), the defendant's airplane crashed into the plaintiff's house. Based upon *Siegler*, would the plaintiff be required to establish negligence, or does strict liability apply? *See also* RESTATEMENT (SECOND) OF TORTS (1977) § 520A.

3. Apparently the theory of strict liability was not argued on appeal by the plaintiff; the plaintiff relied upon the doctrine of res ipsa loquitur. Do you think that doctrine would have provided a recovery in this case?

4. In an article cited in the case, Professor George Fletcher suggested that strict liability is appropriate where the defendant's activity imposes a "non-reciprocal risk" upon the plaintiff. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972). Do you agree? Is the concept of "non-reciprocal risk" a useful one for distinguishing cases that should be governed by the negligence standard from those in which strict liability can be imposed?

5. Suppose *D* is driving his car at a lawful speed through a residential area. *P*, a three-year-old child, runs out into the street to chase a ball; *D* is unable to stop in time and *P* is struck by the car, suffering serious injuries. Must *P* prove that *D* was negligent in order to recover? Or should *D* be subject to strict liability? Explain your reasoning.

6. The treatment of contributory negligence on the part of the plaintiff is in a state of flux. The RESTATEMENT (2D) OF TORTS originally provided that contributory negligence is not a defense to a claim based on strict liability for abnormally dangerous activities. § 524(1). This may have been a result of the contributory negligence rule, which in many jurisdictions barred the plaintiff's claim if he was in any way at fault. Now that the comparative negligence principle has replaced the absolute bar with a percentage reduction in proportion to fault, the rationale for § 524(1) no longer applies. Most jurisdictions now use comparative fault to allow a percentage reduction if the plaintiff is found to be at fault. This issue is taken up in more detail in Chapter Five, *infra*.

7. Recent statutes have imposed what amounts to strict liability on the generators of hazardous wastes, and the owners of property where those wastes are disposed. One estimate puts the cost of cleaning up existing hazardous waste sites at $100 billion. *Pollution and Contamination Losses: Insurance Claims Under Property and Liability Policies*, DEFENSE RESEARCH INSTITUTE (Goldstein, ed., 1988). In *Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 497 A.2d 1310 (1985), it was held that both the operator of the waste dump and those responsible for generating the wastes would be strictly liable under New Jersey law for any damages such wastes caused when loosed on the environment: "A company which creates the Frankenstein monster of abnormally dangerous waste should not expect to be relieved of accountability ... merely because the company entrusts the monster's care to another...." 497 A.2d at 1320-21. In *Kenney*, some 625 defendants were alleged to have generated toxic materials which found their way to the dump. Because of the enormous amount of money at stake, there is an abundance of literature on this subject. *See* Note, *Developments in the Law: Toxic Waste Legislation*, 99 Harv. L. Rev. 1458 (1986).

8. The determination of what is an abnormally dangerous activity is made by the judge, not the jury, since the ruling applies to that activity as a whole, not just the facts of a particular case. *See Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 810 P.2d 917 (1991).

b. Invasion of Property Rights - Nuisance

FLETCHER v. RYLANDS

Court of Exchequer, 1865, 34 L.J. Rep., N.S. 177

MARTIN, B.

The circumstances of this case raise two questions. First, assuming the plaintiff and defendants to be the owners of two adjoining closes [parcels] of land, and at some time or other beyond living memory coal had been worked under both closes and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but of the existence of such workings both plaintiff and defendants were ignorant, and that the defendants, without any negligence or default whatever, made a reservoir upon their own land for the purpose of

collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir into the old workings below the defendants' close, and thence into the plaintiff's close, and did damage there, are the defendants responsible?

The second question is, assuming the defendants not to be responsible upon the above state of facts, does it make any difference that the defendants employed a competent engineer and competent contractors who were ignorant of the existence of the old workings, and who selected the site of the reservoir and planned and constructed it, and on the part of defendants themselves there was no personal negligence or default whatever, but in point of fact reasonable and proper care and skill were not exercised by and on behalf of the persons so employed with reference to the old shafts found at the bottom of the reservoir, to provide for the sufficiency of the reservoir to bear the pressure of the water, which, when filled to the height proposed, it would have to bear.

* * *

First, I think there was no trespass. In the judgment of my brother Bramwell, to which I shall hereafter refer, he seems to think 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, *viz.*, *Leame v. Bray* (3 East, 593) and *Gregory v. Piper* (9 B.& C. 591) prove the contrary. I think the true criterion of trespass is laid down in the judgments in the former case, that to 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. Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. 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.

[*The second question was also answered in the negative; Baron Martin found that there was no reason to suspect any danger, and therefore found no negligence. - ed.*]

BRAMWELL, B.

* * *

I agree with Mr. Mellish, that the case is singularly wanting in authority, and, therefore, while it is always desirable to ascertain the principle on which a case depends, it is especially so here.

Now, what 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. * * *

I proceed to deal with the arguments the other way. It is said, there must be a trespass or nuisance with negligence. I do not agree with that, and I think *Bonomi v. Blackhouse*, 9 H.L. Cas. 903; s.c. 27 LAW J. REP., N.S., Q.B. 378, and *ante*, Q.B. 181, shows the contrary. But why is not this a trespass? - *see Gregory v. Piper*, 9 B.& C. 591. Wilfulness is not material - *see Leame v. Bray*, 3 East, 593. Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping. As in *Bonomi v. Blackhouse*, 9 H.L. Cas. 903; s.c. 27 LAW J. REP., N.S., Q.B. 378, and *ante*, Q.B. 181, the act was lawful, the mischievous consequence was a wrong. Where two carriages come in collision, if there is no negligence in either, it is as much the act of the one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and, though exceptional, furnish no evidence that the general law, in cases wholly independent of contract, is not what I have stated. The old common law liability for fire created a liability beyond what I contend for here.

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which, but for the defendants' act, would not have gone there, 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. But I may as well add, that if the defendants did not know what would happen, their agents knew that there were old shafts on their land; knew, therefore, that

they must lead to old workings; knew that those old workings might extend in any direction, and, consequently, knew damage might happen. The defendants surely are as liable as their agents would be. Why should not both be held to act at their peril? But I own, this seems to me, rather to enforce the rule, that knowledge and wilfulness are not necessary to make the defendant liable, than to give the plaintiff a separate ground of action. My judgment is for the plaintiff.

[*POLLOCK, C.B., voted with MARTIN, B.*]

FLETCHER v. RYLANDS

L.R. 1 Ex. 265 (1866)

May 14, 1866. BLACKBURN, J., read the following judgment of the court

This was a Special Case stated by an arbitrator under an order of nisi prius, in which the question for the court is stated to be whether the plaintiff is entitled to recover any, and, if any, what, damages from the defendants by reason of the matters thereinbefore stated. In the Court of Exchequer, POLLOCK, C.B., and MARTIN, B., were of opinion that the plaintiff was not entitled to recover at all, BRAMWELL, B., being of a different opinion. The judgment in the Court of Exchequer was, consequently, given for the defendants in conformity with the opinion of the majority of the court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover.

We have come to the conclusion that the opinion of BRAMWELL, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the Case, and consequently that the judgment below should be reversed; but we cannot, at present, say to what damages the plaintiff is entitled. It appears from the statement in the Case, that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders and maintained by the defendants. It appears from the statement in the Case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. It further appears from the Case that the defendants selected competent engineers and contractors and make the reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil, but that the persons employed by them, in the course of the work, became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that in fact, proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir, when filled with water, burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. 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 liability which the law casts upon a person who like the defendants, lawfully brings on his land something which, though harmless while 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 keep it there in order that it may not escape and damage his neighbour's, 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. Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, namely,

whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who, for his own purposes, brings on his land, 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, he is prima facie answerable for all the damages which is the natural consequence of its escape. He can excuse himself by showing 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 escaped 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 will 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. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stenches.

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, although nor 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 has a vicious propensity to attack man he will be answerable for that too. As early as [1480] BRIAN, C.J., lays down the doctrine in terms very much resembling those used by LORD HOLT in *Tenant v. Goldwin*, which will be referred to afterwards. It was trespass with cattle. Plea: that the plaintiff's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. BRIAN, C.J., says:

> It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common, and out of the land of any other.

He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs,

> that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went.

In *Cox v. Burbidge*, WILLIAMS, J., says (13 C.B.N.S. at p. 438):

> I apprehend the law to be perfectly plain. If I am the owner of an animal in which, by law, the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.

So in *May v. Burdett*, the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that a person keeping a mischievous animal is bound to keep it secure at his peril. And in 1 HALE'S PLEAS OF THE CROWN, p. 430, Lord Hale states that where one keeps a beast knowing that its nature or habits were such that the natural consequences of his being loose is that he will harm men, the owner

> must at his peril keep him up safe from doing hurt, for though he uses his diligence to keep him up, if he escapes and does harm, the owner is liable to

answer damages;

though, as he proceeds to show, he will not be liable criminally without proof of want of care.

No case has been found in which the question of the liability of noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works of Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they had, at great expense, erected a contrivance by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the juries that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood. The juries, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown, yet if the law be as laid down by the majority of the Court of Exchequer it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions for such nuisances is to say that the defendant caused the noisome vapours to arise on his premises and suffered them to come on the plaintiff's without stating that there was any want of care or skill on the defendant's part; and that *Tenant v. Goldwin* showed that this was founded on the general rule of law he whose stuff it is must keep it so that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them on his land must at his peril see that they do not escape and do that mischief.

* * *

But it was further said by MARTIN, B., that when damage is done to personal property, or even to the person by collision, neither upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible. This is no doubt true, and this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack v. White*, or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott v. London Dock Co.* Many other similar cases may be found. But we think these cases distinguishable from the present. 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 owners, 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, namely, that the circumstances were such as to show that the plaintiff had taken the risk upon himself. 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 there 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.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them. We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

[*The defendants appealed to the House of Lords. - ed.*]

RYLANDS v. FLETCHER

L.R. 3 H.L. 330 (1868)

LORD CAIRNS

* * *

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 on 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.

* * *

LORD CRANWORTH

Applying the principles of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) 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. Even if all the old workings had been made by the defendants they would have done no more than they were entitled to do, for, according to the principle acted on in *Smith v. Kenrick*, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. 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, skilfully 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.

Questions and Notes

1. The defendant's actions in this case were held to be a *trespass*, a direct invasion of the plaintiff's person or property. Trespass is one of the ancient forms of action recognized at common law, distinguished from trespass *on the case*, or an action *in case*, which is an injury to the person or property of the plaintiff, but caused indirectly. For example, if the defendant negligently drove his cart so that a log fell out and struck another cart driver, breaking his arm, the plaintiff could sue for trespass *vis et armis* (literally, "with force of arms"), and proof of negligence was not required. However, if the defendant negligently allowed a log to fall out of his cart, and the plaintiff later hit the log and broke his arm in the collision, the plaintiff could only sue for trespass on the case, and negligence usually had to be shown. *See* Appendix C. Nonetheless, in *Fletcher v. Rylands* the court clearly considered this action to be based on trespass, rather than case.

The RESTATEMENT (2D), TORTS, provides:

> **§ 165. Liability for Intrusions Resulting from Reckless or Negligent Conduct and Abnormally Dangerous Activities**
>
> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest.

Is this more or less protective of a property owner's rights than the court's description of liability in *Fletcher*?

2. One of the court's arguments in favor of

strict liability was the long history of strict liability for trespasses by animals, both domesticated and "wild." When a defendant's cattle escape and eat a neighbor's crops, liability will be imposed regardless of fault. If a wild animal escapes and mauls someone, strict liability will be imposed. This is the modern rule. *See* RESTATEMENT (2D), TORTS, §§ 504-518. Note that in both cases the liability is restricted to that which makes the animal dangerous. On the other hand, animals not known to be dangerous impose only the duty to use reasonable care. *Id.*, § 518. Thus, the origin of the misunderstood "every dog gets one bite" rule: So long as the animal is not known to be ferocious, the owner is required only to use reasonable care. However, after the dog's first bite, the owner is on notice of its ferocity, and is then subject to strict liability for subsequent bites. Is this a sensible rule?

3. Students who enjoy A.P. Herbert will be amused by *Haddock v. Thwale*, or "What is a Motor-Car," found in UNCOMMON LAW 124-132.

4. Not everyone is impressed with the wisdom of *Fletcher v. Rylands:* Frank C. Woodside, III et al., *Why Absolute Liability under Rylands V. Fletcher Is Absolutely Wrong*, 29 U. Dayton L. Rev. 1 (2003).

BOHAN v. PORT JERVIS GAS LIGHT CO.

25 N.E. 246 (N.Y. 1890)
[*See dissenting opinion for facts. - ed.*]

BROWN, J.

* * *

It was claimed by the defendant, and the court refused a request to charge, "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at those works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus, and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case. While every person has exclusive dominion over his own property, and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights. The maxim, "sic utere tuo ut alienum non laedas," limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood. The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion. In *Campbell v. Seaman, supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery. In *Heeg v. Licht*, 80 N.Y. 579, an action for injuries arising from the explosion of fire-works, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge upon the plaintiff's request "that the powder-magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous.

* * *

The principle that one cannot recover for injuries sustained from lawful acts done on one's own property, without negligence and without malice, is well founded in the law. Everyone has the right to the reasonable enjoyment of his own property, and, so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him. The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidable sustains. Such losses

the law regards as damnum absque injuria; and under this principle, if the steam-boiler on the defendant's property, or the gas-retort, or the naphtha tanks, had exploded, and injured the plaintiff's property, it would have been necessary for her to prove negligence on the defendant's part to entitle her to recover. *Losee v. Buchanan*, 51 N.Y. 476. But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies. *Hay v. Cohoes Co.*, 2 N.Y. 159; *McKeon v. See*, 51 N.Y. 300. The exception to the refusal to charge the first proposition above quoted was not therefore well taken.

* * *

HAIGHT, J. (dissenting)

This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emission of such odors. The complaint alleges negligent and unskillful construction of the works, and also negligence in the use and maintenance thereof. The trial resulted in a verdict for damages, upon which the court awarded a judgment for an injunction.

... A nuisance, as it is ordinarily understood, is that which is offensive, and annoys and disturbs. A common or public nuisance is that which affects the people, and is a violation of a public right, either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do.

Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable, or unlawful use of property, or from improper, indecent, or unlawful conduct, working an obstruction of injury to the public, and producing material annoyance, inconvenience, and discomfort. Founded upon a wrong, it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public, and to refrain from doing of that which materially injures and annoys or inconveniences the people; and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort, or morals is of paramount importance; and that which affects or impairs it must give way for the general; good. In such cases, the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offense. It is founded upon injuries that result from the violation of private rights, and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist, and still the act or thing producing them not be a nuisance. Every person has a right to the reasonable enjoyment of his own property; and so long as the use to which he devotes it violates no rights of another, however much damage other may sustain therefrom, his use is lawful, and it is damnum absque injuria. *Thurston v. Hancock*, 12 Mass. 222. So that a person may suffer inconvenience and be annoyed, and if the act or thing is lawful, and no rights are violated, it is not such a nuisance as the law will afford a redress; but if his rights are violated, as, for instance, if a trespass has been committed upon his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow, over and upon his premises, or if a brick-kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises, killing and destroying his trees and vegetation, it will be a nuisance of which he may be awarded damages. *Campbell v. Seaman*, 63 N.Y. 568. Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage, and thus become liable as for a nuisance. It therefore becomes important that the courts should proceed with caution, and carefully consider the rights of the parties, and not declare a lawful business a nuisance except in cases where rights have been invaded, resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance, and discomforts. They must yield some of their rights to the necessity of business which from the nature of things must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom.

... In the case of *Heeg v. Licht*, 80 N.Y. 579, the defendant had constructed upon his premises a

powder-magazine, in which he kept stored a quantity of powder, which, without apparent cause, exploded, damaging the plaintiff's building. It was held that the plaintiff could recover, without showing carelessness or negligence. MILLER, J., in delivering the opinion of the court, says: "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, and might in some localities render it a private nuisance. In such a care the rule which exonerates a party engaged in a lawful business when free from negligence has no application." The rule we have contended for is thus recognized and conceded. There is a distinction between an action for a nuisance in respect to an act producing a material injury to property and one in respect to an act producing personal discomfort.

BOOMER v. ATLANTIC CEMENT CO.

26 N.Y.2d 219, 257 N.E.2d 870 (1970)

BERGAN, Judge

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 public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. 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 of 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.

* * *

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. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period - *e.g.*, 18 months - the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to 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 power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. (*See*, *e.g.*, the alternatives considered in *McCarty v. Natural Carbonic Gas Co., supra*, as well as *Strobel v. Kerr Salt Co., supra.*)

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that

a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S. *Nuisances* § 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance (*Kentucky-Ohio Gas Co. v. Bowling*, 264 Ky. 470, 477, 95 S.W.2d 1).

* * *

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (*See United States v. Causby*, 328 U.S. 256, 261, 262, 267, 66 S. Ct. 1062, 90 L. Ed. 1206, where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees (*see Northern Indiana Public Serv. Co. v. W.J.& M.S. Vesey, supra*, p. 351, 200 N.E. 620).

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings. 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.

JASEN, Judge (dissenting)

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

* * *

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation (*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801) may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. (*Matter of New York City Housing Auth. v. Muller*, 270 N.Y. 333, 343, 1 N.E.2d 153, 156; *Pocantico Water Works Co. v. Bird*, 130 N.Y. 249, 258, 29 N.E. 246, 248.) The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (*See Fifth Ave. Coach Lines v. City of New York*, 11 N.Y.2d 342, 347, 229 N.Y.S.2d 400, 403, 183 N.E.2d 684, 686; *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178.) This is made clear by the State Constitution (art. I, § 7, subd. (a)) which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private use*.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of

clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

* * *

Questions and Notes

1. This case raises questions about what *remedies* to use in nuisance cases. The court must not only decide whether the defendant has invaded some protected right of the plaintiff, but must also decide what to do about it. Most of the time, the plaintiff in a tort case is interested in money damages. In this case the plaintiff also sought a form of *equitable* relief, an injunction. The difference between remedies in *equity* and remedies *at law* is quite complex, and will be covered in greater depth in your Civil Procedure class. In a nutshell, the two forms of relief reflect a historical development in the British courts in which some courts were permitted to award damages, while other courts (more closely controlled by the Crown) were able to award "equitable" relief - to order the defendant to do the fair thing. The standards in courts of law and in courts of equity were different, and having the two systems compete for the same legal business made for fascinating (although quite confusing) legal developments. Virtually all jurisdictions now use the same court system to dispense whichever remedies seem appropriate. For a discussion of the history of law and equity, consult a civil procedure text such as JAMES & HAZARD, CIVIL PROCEDURE §§ 1.3-1.5.

SPUR INDUSTRIES v. DEL E. WEBB DEVELOPMENT CO.

108 Ariz. 178, 494 P.2d 700 (1972)

CAMERON, Vice Chief Justice

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?

* * *

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. *Engle v. Clark*, 53 Ariz. 472, 90 P.2d 994 (1939); *City of Phoenix v. Johnson*, *supra*. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

Must Del Webb Indemnify Spur?

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:

> **§ 104. Where public interest is involved.**
>
> Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accor-dingly, the granting or withholding of relief may properly be dependent upon considerations of public interest.... 27 AM. JUR. 2D, *Equity*, page 626.

In addition to protecting the public interest, however, 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*, and opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.
>
> 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. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. 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*, 183 Kan. 513, 525, 526, 331 P.2d 539, 548, 549 (1958). *See also East St. Johns Shingle Co. v. City of Portland*, 195 Or. 505, 246 P.2d 554, 560-562 (1952).

And:

> 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*, 23 Mich. 448, 455, 2 Brown 158 (1871).

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:

> The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population.... *City of Ft. Smith v. Western Hide & Fur Co.*, 153 Ark. 99, 103, 239 S.W. 724, 726 (1922).

We agree, however, with the Massachusetts court that:

> The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, 'extreme rights' cannot be enforced.... *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 488, 104 N.E. 371, 373 (1914).

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 equitable 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.

Questions and Notes

1. Feedlot operators received more sympathetic treatment in a recent Idaho case. *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985).

2. Is there a difference between the treatment of damage caused by "nuisance" and damage caused by "negligence"? If so, what is it?

3. Should such a distinction be made? Why or why not?

4. In *Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 8, 712 P.2d 914, 921 (1985), the plaintiffs' association brought an action to enjoin the defendant from providing free meals to indigent persons because, before and after mealtime, center clients frequently trespassed, urinated, defecated, drank and littered on the plaintiffs' property. Should the court have granted the injunction? Why or why not?

5. Prosser comments, "So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." PROSSER & KEETON, § 2, at 6. In this quotation, is "unreasonable" synonymous with "negligent"?

c. Animals

WILLIAMS v. JOHNSON

781 P.2d 922 (Wy. 1989)

CARDINE, Chief Justice

Appellant, Thomas Williams, was delivering mail in a Cheyenne neighborhood when he was attacked by two dogs owned by appellees, Daniel and Jennifer Johnson. The dogs attacked appellant while he was standing on the porch of a house next door to appellees' house. Although the dogs inflicted no direct injury on appellant, they frightened him and he injured his knee in an attempt to avoid the attack. Williams sued to recover compensation for his injury. The trial court entered summary judgment in favor of the Johnsons. Williams now appeals, asserting that the district court erred in its determination that, in order to defeat the summary judgment motion, he must raise an issue of fact concerning Johnsons' knowledge of the dangerous propensities of their dogs.

We affirm.

The only issue raised by appellant is this:

> The court below erred in ruling that as a matter of law, appellants must have had notice of the dangerous propensities of their dogs.

Appellant's complaint, filed in June 19, 1987, generally alleged appellees' liability based on the facts outlined above, but omitted reference to any particular theory of recovery. His "Pre-trial Memorandum," however, limited the factual and legal issues which he considered material to appellees' liability to the following:

1. Was appellant attacked by dogs owned by appellee?

2. Was such an attack the proximate cause of his injury?

3. Could appellees be held liable for that injury if they had no notice of the vicious nature of their dogs?

4. Could appellant obtain compensation for injury sustained as a result of a dog attack, during which there was no physical contact by the attacking dogs?

In opposition to the summary judgment motion, appellant argued that he need not prove appellees' knowledge of the vicious propensities of their dogs. That contention was consistent with the position he advanced at the pretrial conference, at which time appellant considered himself entitled to recover upon proof of: (1) injury, (2) proximately caused, (3) by attacking dogs owned by appellees. Appellees' summary judgment motion asserts that because of absence of any knowledge of dangerous propensities, appellees are entitled to judgment as a matter of law. We agree.

This court has recognized three distinct theories of recovery under which appellant could have argued the particular facts of this case. The first is the common law theory of strict liability of an owner who keeps an animal knowing of its dangerous propensities as articulated in RESTATEMENT, SECOND, TORTS § 509 (1977); *Abelseth v. City of Gillette*, 752 P.2d 430, 433-34 (Wyo. 1988). The second is also a common law cause of action, for negligence in the care and control of domestic animals. *Endresen v. Allen*, 574 P.2d 1219, 1221-22 (Wyo. 1978). Finally, we have recognized a theory of negligence premised on duties created by state statutes or municipal ordinances which alter the duties imposed by common law by making it unlawful for owners of domestic animals to permit them to run at large. *Id.* at 1222-25; *see also Nylen v. Dayton*, 770 P.2d 1112, 1116 (Wyo. 1989).

Under the common law, the owner of a vicious dog, if he had knowledge of a dangerous propensity, was held strictly liable for any harm proximately caused by the animal's vicious behavior. Such liability attached despite the owner's exercise of utmost care to control the animal. RESTATEMENT, SECOND, TORTS § 509 (1977); *Abelseth*, 752 P.2d at 433-34; *Larsen v. City of Cheyenne*, 626 P.2d 558, 560 (Wyo. 1981). The common law also provided that the owner of an animal which was not vicious or not known to be vicious, but which was prone to some other potentially harmful behavior, could be held liable under a theory of negligence for any injury proximately caused by such behavior. In such cases the owner was only liable if, having knowledge of the particular propensities which created a foreseeable risk of harm, he failed to exercise reasonable care in his control of the animal. Thus, if the owner of a dog knew of its proclivity for leaping fences and chasing cars, he could be held liable for failure to take reasonable measures to confine the animal should it escape from his property and cause an accident. RESTATEMENT, SECOND, TORTS § 518 (1977); *Endresen*, 574 P.2d at 1221-22.

Common to both of these causes of action are certain facts which must be put in issue to defeat defendant's summary judgment motion, *i.e.*, (1) the owner, (2) of an animal with a propensity for potentially harmful behavior, (3) must know of that propensity, and (4) such behavior must be the proximate cause of injury to the plaintiff. In this case, appellees denied knowledge of harmful propensities. Appellant claimed knowledge of dangerous propensities was unnecessary to a common law cause of action. Appellant therefore failed to assert facts, by affidavit or otherwise, which would place in issue appellees' knowledge of the vicious nature of their dogs. This was fatal to his maintaining a cause of action under these common law theories. His suit was premised on these theories, and the district court, therefore, correctly granted appellees' summary judgment motion.

Appellant's argument on appeal, however, characterizes his suit as one based on appellees' duties under Cheyenne's municipal ordinances. He asserts that these ordinances alter the elements necessary to the common law actions and render appellees liable, despite their lack of knowledge concerning the dangerous propensities of their animals. Appellant bases that argument on our discussion in *Endresen v. Allen*, in which we explained that a dog owner's common law duty may be altered by a municipal ordinance that prohibits owners from permitting animals to run at large. We noted that, while the unconditional prohibition of such an ordinance creates a duty to restrain animals from running at large without reference to the owner's knowledge of their propensities to escape or cause harm, the ordinance does not relieve a plaintiff from the obligation of establishing that a failure to restrain was a result of the owner's negligence. Thus, we

rejected the notion that a prima facie case of negligence could result from the mere fact that an animal was at large. *Endresen*, 574 P.2d at 1222-25. *See also Nylen*, 770 P.2d at 1116; *Hinkle v. Siltamaki*, 361 P.2d 37, 40-41 (Wyo. 1961).

Appellant presented his claim of a cause of action under the ordinances for the first time on appeal. Parties seeking reversal of a summary judgment may not, on appeal, assert issues or theories of recovery which were not presented to the trial court. This court will not consider such issues or theories unless it is apparent or reasonably discernable from the pleadings, affidavits and exhibits that they were raised below. *Teton Plumbing and Heating, Inc. v. Board of Trustees, Laramie County School District No. One*, 763 P.2d 843, 848 (Wyo. 1988); *Minnehoma Financial Company v. Pauli*, 565 P.2d 835, 838-39 (Wyo. 1977).

We conclude from our examination of the record that appellant never presented the trial court with a theory of recovery grounded in the duty which may have been created by the "running at large" ordinance. Instead, he proceeded solely upon a common law cause of action, arguing merely that the animal control ordinances taken as a whole created a presumption that the Johnsons' dogs were vicious.

Nowhere in his pleadings, affidavits, exhibits, or in his pretrial memorandum does appellant so much as mention any of these city ordinances. Appellees called this fact to the attention of the trial court in a brief supporting their summary judgment motion, which noted:

> The Plaintiff has not alleged that a state statute or city ordinance posed a duty upon the Defendants and the complaint basically alleges a negligence cause of action.
>
> Clearly, the Plaintiff is required to show that the Defendants had knowledge of the dangerous propensities of the animals or they are barred from recovery.

Appellant first mentioned the ordinances in his memorandum in opposition to the summary judgment motion, where he briefly quotes from a number of definitional provisions and the section prohibiting owners from permitting animals to run at large, and then relied upon the provisions to establish that the Johnsons' dogs, running at large, were presumed vicious because of the attack. Appellant summarizes his position with respect to the ordinances by stating, "It is clear, however, that the Cheyenne Municipal Ordinance has by definition abrogated the Common Law Rule and has created a presumption that an animal is vicious if it engages in an unprovoked attack."

The district court correctly concluded that Cheyenne's animal control ordinances did not provide appellant with presumptive proof that the Johnson's knew of the vicious nature of their dogs. The district court correctly determined that, under the common law theory of recovery advanced, appellant was required to present as an issue the fact appellees had knowledge of the dangerous propensities of their dogs. Accordingly, the summary judgment is affirmed.

URBIGKIT, J., files a dissenting opinion. [*omitted*]

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d. Statutory Strict Liability

COOK v. WHITSELL-SHERMAN

796 N.E.2d 271 (Ind. 2003)

BOEHM, Justice.

Tamara Cook's dog bit Kenneth Whitsell-Sherman while Whitsell-Sherman was discharging his duties as a letter carrier. The liability of owners whose dogs bite mail carriers and certain other public servants is governed in Indiana by statute. We hold the effect of this statute is to render dog owners strictly liable if their dogs bite the described public servants without provocation. We also hold Indiana Rule of Evidence 413 allows the admission into evidence of bills for actual charges for past medical treatment but does not authorize admission of written statements purporting to estimate future medical costs.

Factual and Procedural Background

On the afternoon of July 31, 1998, Kenneth Whitsell-Sherman was delivering mail as a letter carrier for the United States Postal Service. When he arrived at the home of Marva and Joseph Hart, the Harts were on the sidewalk outside their fenced yard and their eight-year-old daughter was several feet away on the sidewalk, holding Maggie, a 100-pound Rottweiler, on a leash. Maggie was owned by appellant Tamara Cook, and the Harts were taking care of her while Cook

was out of town. When Whitsell-Sherman finished delivering the Hart's mail and attempted to walk around Mrs. Hart, Maggie broke free and bit Whitsell-Sherman on the left hand. Before this incident, Maggie had never demonstrated any aggressive or violent tendencies.

Whitsell-Sherman sued Cook and the Harts. The Harts did not appear and a default judgment was entered against them on both the complaint and Cook's cross claim for indemnity. After a bench trial, the trial court found that Cook was the owner of the dog and the Harts had custody and control at the time of the incident. The court concluded that Cook was liable for negligence per se and violation of a statutory duty.

* * * The trial court entered judgment for Whitsell-Sherman against Cook and the Harts in the amount of $87,000. Cook appealed and the Harts remained in default.

Indiana Code section 15-5-12-1 provides:

> If a dog, without provocation, bites any person who is peaceably conducting himself in any place where he may be required to go for the purpose of discharging any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, the owner of such dog may be held liable for any damages suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

On appeal, the Court of Appeals agreed that Cook was the "owner" of the dog for purposes of this statute, but reversed the trial court's determination that the statute rendered the owner liable under the doctrine of negligence per se. The Court of Appeals reasoned that the statute imposed no duty upon Cook and did not alter the common law standard of reasonable care required of dog owners except to eliminate the common law presumption that a dog is harmless. The court concluded that under general rules of negligence a public servant who has been bitten by a dog must still show that the dog's owner failed to act reasonably to prevent the dog from causing harm. * * * This Court granted transfer.

I. Liability of "Owners" and Keepers to Public Servants Bitten by Dogs

At the time Maggie bit Whitsell-Sherman, Cook was Maggie's owner but not her custodian. Whether Indiana Code chapter 15-5-12 renders Cook liable under these facts is a question of law and we review it de novo.

Cook argues initially that the statute does not apply to her in this situation because at the time of the incident she was not in possession of the dog. Section 15-5-12-2 provides that "owner" as the term is used in 15-5-12-1 "includes a possessor, keeper, or harborer of a dog." Cook reasons that under this definitional section, an "owner" of a dog is the person who has control of the dog at the time of the bite. As in this case, the "keeper" may not be the person to whom the dog belongs. The Court of Appeals held that the statute applies to Cook by its terms. The statute explicitly provides that " 'owner' means the owner of a dog." Ind.Code § 15-5-12-2 (1998). The court reasoned that the fact that the statute goes on to say that "owner" also "includes" the "possessor, keeper, or harborer of a dog" does not restrict the term "owner" to those in immediate custody. Rather, it expands the definition of "owner" to include others in addition to the dog's owner. We agree that Cook's liability is governed by this statute. By providing that owner "includes" custodians, it does not substitute them for the owner if, like Cook, the owner is absent from the scene of the bite. This also seems fair because the owner is usually better able to know the dog's temperament than one to whom temporary custody is extended. The owner is ordinarily best positioned to give whatever special instructions are necessary to control the dog.

Cook argues that even if she is an owner, the trial court misapplied Section 15-5-12-1 when it held her negligent per se by reason of the statute. The common law presumes that all dogs, regardless of breed or size, are harmless. *Poznanski v. Horvath*, 788 N.E.2d 1255, 1257 (Ind.2003); *Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind.1993). This presumption can be overcome by evidence of a known vicious or dangerous propensity of the particular dog. *Ross*, 619 N.E.2d at 914. The owner or keeper of a dog who knows of any vicious propensity is required to use reasonable care in those circumstances to prevent the animal from causing injury. *Id.* Furthermore, the owner of a dog is expected to use reasonable care to prevent injury that might result from the natural propensities of dogs. *Id.* "Thus, whether the owner or keeper of the animal is aware of any vicious propensity, the legal description of the duty owed is the same: that of reasonable care under the circumstances." *Id.* Cook argues that Indiana Code section 15-5-12-1 does nothing to alter this traditional framework other than to remove the common law presumption of harmlessness if a dog injures a public servant. Accordingly, she argues, the public servant injured by a dog still bears the burden of showing

that the owner of the dog failed to exercise reasonable care to prevent the dog from causing injury.

We agree with Cook's view of the common law of dog bites, but we think it clear that Section 15-5-12-1 was intended to alter that common law framework if the victim is a letter carrier. A statute in derogation of the common law is presumed to be enacted with awareness of the common law. *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 10 (Ind.1993). Here, the legislature clearly intended to change the common law and did so by explicitly removing the common law presumption that a dog is harmless unless it acts otherwise. Some states have chosen to impose strict liability for all dog bites. As the Restatement notes, "[s]tatutes frequently abolish the necessity of scienter and impose strict liability for all harm caused to human beings and livestock by dogs." *Restatement (Second) of Torts* § 509 cmt. f (1977). *See, e.g., Nicholes v. Lorenz*, 49 Mich.App. 86, 211 N.W.2d 550, 551 (1973) (a statute that provides "the owner of any dogs which shall ... bite any person ... shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness" places absolute liability on the owner of the dog).

The Indiana statute imposes a less sweeping revision of common law. It protects only public servants, and does not expressly set a standard of conduct or impose liability for a bite. The trial court concluded that the effect of the statute was to render the owner negligent per se. Negligence per se is ordinarily found where the actor has violated a duty imposed by law. *Elder v. Fisher*, 247 Ind. 598, 602, 217 N.E.2d 847, 850 (1966). For example, violation of a statute making it a misdemeanor to permit cattle to wander onto a highway is negligence per se. *Corey v. Smith*, 233 Ind. 452, 455, 120 N.E.2d 410, 412 (1954). Just as the Indiana statute does not explicitly create liability, it also does not expressly establish a standard of conduct. It thus does not suggest negligence per se under standard doctrine.

We nevertheless conclude the statute has the effect of rendering the owner liable for bites of public servants. Persons engaged in dangerous activities may be strictly liable to others who are injured. Specifically, owners of wild animals have been viewed as negligent per se for failure to control the animal. *See Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind.App. 566, 568, 73 N.E. 281, 282 (1905). More recently, liability for injuries inflicted by wild animals has been viewed as strict liability doctrine. *Irvine v. Rare Feline Breeding Ctr.*, 685 N.E.2d 120, 123 (Ind.Ct.App.1997) (injuries by a tiger). Thus, possession of a wild animal is, like blasting, an unreasonably dangerous activity subjecting the actor to strict liability. The common law treated dogs, unlike tigers, as presumptively not dangerous and not subject to that liability. Otherwise stated, although a dog with a previously spotless record may present some risk of a bite, canine ownership was not an abnormally dangerous activity at common law. However, the Indiana statute puts dog owners on the same legal footing as owners of less domestic animals as far as public servants are concerned. The result is strict liability for failure to prevent injuries that are the result of the perceived dangerous propensity. In this case, the dangerous propensity is a dog bite. Keeping a tiger in the backyard is a classic example of an "abnormally dangerous" activity subjecting the keeper to strict liability. *See* Dan B. Dobbs, *The Law of Torts* § 345, at 947-48 (2001). The Indiana statute gives the postal delivery worker the same protection from dog bites that the common law gives all citizens from tiger maulings. In this case, the statute reflects a policy choice that the dog's owner and keeper should bear the loss rather than the injured public employee. Accordingly, Cook is subject to strict liability for Maggie's biting Whitsell-Sherman.

Reading the statute to impose strict liability is similar but not identical to the negligence per se theory followed by the trial court. Under negligence per se, the law accepts the legislative judgment that acts in violation of the statute constitute unreasonable conduct. A person whose acts are negligent per se can still invoke the excuses available to any negligent actor such as emergency response or lack of capacity. *See generally Restatement (Second) of Torts* § 288A; *Gore v. People's Sav. Bank*, 235 Conn. 360, 665 A.2d 1341, 1345 n. 10 (1995). Strict liability, on the other hand, assumes no negligence of the actor, but chooses to impose liability anyway. David C. Sobelsohn, *Comparing Fault*, 60 Ind. L.J. 413, 427-28 (1985).

By stating that an owner "may be held liable ... regardless of the former viciousness of such dog or the owner's knowledge of such viciousness," the statute directs that a court may hold a person liable whether or not the dog had a history of violence. Cook points to the statute's use of the word "may," and argues that the statute permits but does not require liability for the dog's first bite. She reasons that a successful plaintiff

must still establish lack of reasonable care. We think "may" simply emphasizes the change in the liability scheme from the common law rule that every dog gets one free bite. Because every canine is a dangerous instrumentality as far as postal employees are concerned, the rules applicable to wild animals apply to impose strict liability. The net result of eliminating the presumption of canine harmlessness is that the statute imposes strict liability on dog owners for bites of letter carriers and other public servants in the course of their duties. The result is that the statute's removal of the presumption in most cases leaves the bitten public servant with nothing more to prove to establish liability than who the owner is and that the dog sunk his teeth into the public servant without provocation. Failure to control the dog who bites under these circumstances renders the owner liable without more.

* * *

Conclusion

We hold that Indiana Code section 15-5-12-1 imposes strict liability on dog owners whose dogs bite public servants without provocation. We hold also that Rule 413 of the Indiana Rules of Evidence does not support the introduction into evidence of written estimates of future medical costs. Cook argues that the amount of damages assessed against her was excessive. Because there must be a new trial of damages, we need not address this issue. This case is remanded for retrial on the issue of damages.

SHEPARD, C.J., and DICKSON, and SULLIVAN, JJ. concur.

RUCKER, J., concurs in part and dissents in part with separate opinion.

RUCKER, Justice, concurring in part and dissenting in part.

I disagree with the majority's conclusion that Indiana Code section 15-5- 12-1 imposes strict liability on the owners of dogs that bite letter carriers and other public servants. Although the General Assembly abrogated the common law in this area, there is nothing in the statute to suggest that it did so by making dog owners strictly liable. Professor Prosser discussed the rationale for the imposition of strict liability against owners for injuries caused by dangerous animals. He explained that strict liability is appropriately placed:

> [U]pon those who, even with proper care, expose the community to the risk of a very dangerous thing.... The kind of "dangerous animal" that will subject the keeper to strict liability ... must pose some kind of an abnormal risk to the particular community where the animal is kept; hence, the keeper is engaged in an activity that subjects those in the vicinity, including those who come onto his property, to an abnormal risk. It is the exposing of others to an abnormal risk that is regarded as justifying strict liability.... Thus, strict liability has been imposed on keepers of lions and tigers, bears, elephants, wolves, monkeys, and other animals. No member of such a species, however domesticated, can ever be regarded as safe, and liability does not rest upon any experience with the particular animal.

Prosser and Keeton on the Law of Torts § 76, at 541-42 (5th ed.1984) (footnotes omitted). The underlying premise is that the animal itself is inherently dangerous and thus safety lies only in keeping the animal secure. *See, e.g.*, *Irvine v. Rare Feline Breeding Ctr., Inc.*, 685 N.E.2d 120, 125 (Ind.Ct.App.1997) (discussing the imposition of strict liability on owners of wild animals), *trans. denied.*

There is nothing inherently dangerous about a dog. Indeed, as the majority correctly points out, under our common law, all dogs regardless of breed or size, are presumed to be harmless domestic animals. *Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind.2003); *Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind.1993). Ordinarily this presumption is overcome by evidence of a known or dangerous propensity as shown by the specific acts of the particular animal. *Poznanski*, 788 N.E.2d at 1258. However, even where the owner of a dog knows of the animal's dangerous propensity "[the] rules of liability are based upon negligence and not strict liability." *Id.* at 1259 (quoting *Alfano v. Stutsman*, 471 N.E.2d 1143, 1144 (Ind.Ct.App.1984)).

In this case the majority reasons the statute's language that an owner "*may be held liable* ... regardless of the former viciousness of such dog or the owner's knowledge of such viciousness," has the "net result" of imposing strict liability on dog owners when their dogs bite letter carriers and other public servants in the course of their duties. Slip op. at 8-9 (emphasis added). In my view this is an overly expansive reading of the statute. Had the Legislature intended to impose strict liability, it would have done so by dictating that an owner "*shall be held liable* ... etc." Absent such language, I agree with my colleagues on the Court of Appeals that the statute removes the common law presumption that a dog is harmless in

situations where an unprovoked dog bites a letter carrier or other public servant. In essence, the statute simply relieves the plaintiff of the burden of establishing a dog owner's knowledge of the dog's dangerous propensities. The plaintiff still has the burden of establishing that the dog owner failed to exercise reasonable care to prevent the dog from causing injury. On this point I therefore dissent. I concur in the remainder of the majority opinion.

Notes and Questions

1. Students are often confused by the similarity between statutory strict liability and negligence per se. Everything depends upon the intent of the legislature in adopting the statute in question. Typically a statute will simply prohibit or require some activity (like a prohibition against dumping non-recylcable material into a recycling container, or a requirement that anyone riding a motorcycle must first obtain a license). Some statutes, however, go beyond merely commanding or prohibiting an activity and actually require the person engaging in a particular activity to compensate those injured by the activity. That's what is at stake in *Cook*. Note that it is not always easy to determine the legislature's intent, as the conflicting opinions in the case demonstrate. What is important for the student is to understand the different effect that the two types of statutes will have. If the statute is of the ordinary kind, at most it creates a presumption (sometimes conclusive) that the unexcused violation of a statute will be judged negligent as a matter of law. But the defendant can dispute the characterization of the conduct as negligent by offering an excuse, or challenging the scope of statutory purpose. On the other hand, if the intent of the statute is to shift the burden of loss to the defendant, without requiring proof that the defendant was negligent, then it imposes a form of strict liability that applies regardless of negligence.

Chapter 2
Proximate Cause

Introduction

Many law students find causation one of the most difficult concepts to master. This is perhaps because most of the causation concept is intuitively obvious. What is difficult is not the largely intuitive and obvious part, but the relatively rare case in which our intuitive faculties fail us. For example, when two cars collide in an intersection, and one of the cars was driven at excessive speed through a red light, it is not difficult for us to assign the cause of the accident to speeding and failure to yield. Although the issue of causation is technically part of the plaintiff's burden of proof, in practice that issue will occupy almost none of the jury's time in deliberation.

The difficulty arises where we are uncertain about what caused a particular accident, or where we are certain of one cause, but uncertain with respect to another. For example, if an asbestos worker/smoker dies of lung cancer, what must we know about the relationship between lung cancer and smoking or between lung cancer and asbestos before we can say that one or the other (or both) *caused* his lung cancer? Is it enough to note that smokers have a significantly higher rate of lung cancer than nonsmokers? What about the fact that asbestos workers have higher lung cancer rates than the population as a whole?

A typical jury instruction requires the jury to find that the defendant's conduct was "a proximate cause" of the plaintiff's injury. Tort law has generally divided the question of proximate cause into two separate inquiries, both of which must be affirmatively answered by the finder of fact:

> (a) *But-for causation* (also called *cause-in-fact*): Can it be said that the injury would not have occurred *but for* the defendant's conduct?
>
> - and -
>
> (b) *Legal cause*: was the defendant's conduct *closely enough* related to the plaintiff's injury to make it fair to hold him liable?

Each of these is taken up in turn, after we have looked at a California case that abandoned the traditional approach.

MITCHELL v. GONZALEZ

54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991)

LUCAS, Chief Justice

In this case we decide whether BAJI No. 3.75,[15] the so-called proximate cause instruction, which contains a "but for" test of cause in fact, should continue to be given in this state, or whether it should be disapproved in favor of BAJI No. 3.76, the so-called legal cause instruction, which employs the "substantial factor" test of cause in fact.[16]

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[15] All BAJI instructions referred to are from the bound volume of the seventh edition (1986) unless otherwise noted.

[16] BAJI No. 3.75, requested by defendants and given by the trial court, provides: "A proximate cause of [injury] [damage] [loss] [or] [harm] is a cause which, in natural and continuous sequence, produces the [injury] [damage] [loss] [or] [harm] and without which the [injury] [damage] [loss] [or] [harm] would not have occurred." Because of the "without which" language, courts often refer to this instruction as the "but for" instruction of causation. BAJI No. 3.76, requested by plaintiffs and refused by the trial court, provides: "A legal cause of [injury] [damage] [loss] [or] [harm] is a cause which is a substantial factor in bringing about the [injury] [damage] [loss] [or] [harm]."
We emphasize that despite the use of the terms proximate cause and legal cause, BAJI Nos. 3.75 and 3.76 are instructions on cause in fact. Issues that are properly referred to as questions of proximate or legal cause are contained in other instructions. (*See, e.g.*, BAJI No. 3.79

Plaintiffs James and Joyce Mitchell, the parents of 12-year-old Damechie Mitchell, who drowned in Lake Gregory on July 4, 1985, sued defendants Jose L. Gonzales, Matilde Gonzales, and Mrs. Gonzales's son Luis (hereafter defendants) for damages, claiming defendants' negligence caused Damechie's death. By special verdict, the jury found that defendants were negligent, *i.e.*, they had breached a duty, but that the negligence was not a proximate cause of the death.

The Court of Appeal concluded that, under the facts, the trial court erred when it denied plaintiffs' request to instruct the jury pursuant to BAJI No. 3.76 and instead instructed under BAJI No. 3.75. After reviewing both instructions, the Court of Appeal concluded that BAJI No. 3.75 is potentially misleading and should not have been given, and that the trial court committed prejudicial error when it refused to give BAJI No. 3.76.

We granted review in this case to determine whether courts should continue to instruct juries on cause in fact using BAJI No. 3.75 in light of the frequent criticism of that instruction. We conclude that the Court of Appeal was correct and that BAJI No. 3.75 should be disapproved.

I. Facts

Damechie, 12 years old, standing 4 feet 11 inches tall, and weighing 90 pounds, had a tag-along little-brother relationship with his friend Luis, who was 14 years old, 5 feet 4 inches tall, and weighed 190 pounds. The Gonzales invited Damechie to accompany them to Lake Gregory for the Fourth of July. According to Mrs. Mitchell's testimony, when Mrs. Gonzales called her to ask whether Damechie could accompany them, she informed Mrs. Gonzales that Damechie could not swim. After Mrs. Gonzales suggested that the boys would play in the shallow edge of the lake, the Mitchells agreed that Damechie could go, as long as he was restricted to the edge of the lake.

Mrs. Gonzales denied that she had told Mrs. Mitchell the children would be swimming or that Mrs. Mitchell had told her Damechie could not swim.

According to Mrs. Mitchell, while Damechie was packing, he, Luis, and Luis's sister, Yoshi, talked about swimming. Mrs. Mitchell told the children Damechie could not swim and should not go swimming. Luis and Yoshi said they would watch Damechie.

Luis testified that Mrs. Mitchell did not tell him that Damechie could not swim. He did remember telling her they were going swimming, but he did not remember what she said about it. He also remembered that Mrs. Mitchell told him to watch out for Damechie because Luis was bigger and older than Damechie.

At the lake, the Gonzales family was joined by Mr. and Mrs. Reyes and their young children. Luis asked his parents for money to rent a paddleboard. Mrs. Gonzales told him, as she always did, not to go into water over his head. Both Luis and Yoshi knew how to swim.

The three children rented two paddleboards, replying affirmatively when asked by the employee in charge of rentals whether they knew how to swim. During the morning, the children stayed within 30 feet of shore, in water that was not over their heads. Mr. and Mrs. Gonzales admittedly did not watch the children during some of the time the children were in the water.

Mrs. Gonzales testified that had she known the children were going into deep water, she probably would not have allowed it because she believed it would be dangerous. Apparently, because of her vantage point, it was difficult for her to watch the children in the water, and there was a long period when she did not have them in sight. She assumed Luis would obey her, although she acknowledged that he had disobeyed her on other occasions.

Mr. Gonzales testified that he relied on the lifeguards to watch the children and that he neither knew nor asked whether Damechie could swim.

After lunch, Mrs. Gonzales told the children not to leave the picnic area and went to the restroom. Nevertheless, the children left and rented another paddleboard. When she returned to the picnic site 15 minutes later, the children were gone and Mr. Gonzales was asleep. She did not know where they had gone, nor did she ask Mr. Reyes, who was awake and at the site, of their whereabouts.

The children had entered the water and, on their paddleboard, crossed the lake. When Luis started to push Damechi and Yoshi, who were on the paddleboard, back across the lake, Damechie told Luis he could not swim.

Luis, nevertheless, pushed them 100 feet out onto the lake, into water over their heads. He then

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[superseding causes].)

told Damechie to let him get on the paddleboard because he was tired. Damechie again told Luis he was unable to swim and asked him to be careful. Luis promised to be careful. After Luis got on board, Damechie asked Luis whether Luis would save him if he fell off. Luis said he would do so.

Shortly before the accident, the children were five to ten feet from three women, apparently on a nearby paddleboard, who testified that the children made a lot of noise and engaged in horseplay. They each testified that Luis was the rowdiest.

One of the women testified that the paddleboard tipped over and that the noise and roughhousing stopped for five to ten minutes. Immediately before the board tipped over, Luis was on the center of the board and Damechie and Yoshi were draped over it. During the quiet period, neither Luis nor Yoshi called or gestured for help, but they appeared to be whispering.

The second woman testified that the quiet period lasted from one to five minutes, during which time she glanced over and saw only Luis and Yoshi. She did not hear any cries for help.

The third woman thought three minutes of quiet elapsed before she notice only two children where there had previously been three. She never heard any call for help.

After the women noticed one of the children was missing, Luis said, "Lady, my friend's down there," indicating the lake. One of the women yelled for a lifeguard and asked Luis why he had not signalled for help sooner. He replied that neither he nor his sister could swim. He also said that Damechie had grabbed Luis in an effort to save himself and that he, Luis, had kicked Damechie to get him off and to avoid being pulled under.

Luis testified that the board tipped over when Damechie put his hands on Luis's shoulder. He admitted he rocked the board before it tipped over and that Damechie's movement had not caused the board to tip. The employee in charge of the paddleboard rentals testified that "You have to work at it" to get a board to tip. Yoshi testified that the board tipped when Luis attempted to climb on.

Luis testified that Damechie was very scared while the board was rocking and that he asked Luis not to rock the board because he did not want to fall off. Additionally, Luis admitted that at the time, he was being very rowdy and that when he tipped the board, he and Damechie fell off. Damechie panicked and grabbed Luis's shorts, pulling them down. Luis pulled them up, and Damechie grabbed Luis's ankles. Luis shook free of Damechie, got to the surface, and climbed onto the board. He looked into the water and could see Damechie's fingers, which he tried to grab. Yoshi remained on the board. Luis testified inconsistently, one time stating that he waited two or three minutes before calling a lifeguard and another time stating that he immediately called for a lifeguard.

Later that day, Luis told the lifeguards that Damechie had rocked the board, causing it to flip. He asked them whether he and his family would be sued. Mrs. Gonzales asked him, "Why didn't you stay where I told you to stay?"

Damechie's body was not recovered for several days because of the opacity of the water and bottom vegetation. The body was about 120 feet from shore in 8 feet of water.

The Mitchells sued the Gonzaleses, including Luis, and others not party to this appeal. The complaint alleged causes of action for negligence and wrongful death. Defendants asserted comparative negligence on the part of Damechie and his parents.

As noted above, the court refused plaintiffs' proffered instruction on causation in fact *(i.e.*, BAJI No. 3.76) and instead gave the causation in fact instruction requested by defendants, BAJI No. 3.75.

The jury, by special verdict, concluded that defendants were negligent but that the negligence was not a cause of the death. The jury therefore did not reach a special verdict on comparative negligence.

The trial court denied plaintiffs' motions for a new trial or a judgment notwithstanding the verdict. The Court of Appeal reversed.

II. Discussion

As explained below, we conclude the Court of Appeal correctly determined that the trial court prejudicially erred when it refused BAJI No. 3.76 and instead gave BAJI No. 3.75. Our discussion proceeds in two steps. We begin by determining whether instructional error occurred. Our analysis focuses on whether conceptual and grammatical flaws in BAJI No. 3.75 may confuse jurors and lead them to improperly limit their findings on causation, and whether BAJI No. 3.76 is a superior alternative instruction. Because we find error, we next analyze prejudice and conclude that there is a reasonable probability that BAJI No. 3.75 misled the jurors into finding that defendants' negligence was not a "proximate cause" of

Damechie's death and that a result more favorable to plaintiffs would have occurred if the jury had been instructed under BAJI No. 3.76. Accordingly, we affirm the Court of Appeal's decision reversing the judgment of the trial court.

A. Alleged Instructional Error

As Dean Prosser observed over 40 years ago, "Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze...." Cases "indicate that `proximate cause' covers a multitude of sins, that it is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried...." (Prosser, *Proximate Cause in California* (1950) 38 CAL. L. REV. 369, 375.)

One of the concepts included in the term proximate cause is cause in fact, also referred to as actual cause.[17] Indeed, for purposes of BAJI No. 3.75, "so far as a jury is concerned `proximate cause' only relates to causation in fact." (Com. to BAJI No. 3.75, italics added.)[18] "There are two widely recognized tests for establishing cause in fact. The `but for' or `sine qua non' rule, unfortunately labeled `proximate cause' in BAJI No. 3.75, asks whether the injury would not have occurred but for the defendant's conduct. The other test, labeled `legal cause' in BAJI No. 3.76, asks whether the defendant's conduct was a substantial factor in bringing about the injury." (*Maupin v. Widling* (1987) 192 Cal. App. 3d 568, 574, 237 Cal. Rptr. 521.)

BAJI Nos. 3.75 and 3.76 are alternative instructions that should not jointly be given in a single lawsuit. (*See Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 575-579, 237 Cal. Rptr. 521 [error to give both BAJI No. 3.79, which instructs on supervening causes in substantial factor terms, and BAJI No. 3.75].) Several Court of Appeal opinions have discussed the propriety of giving one or he other instruction in particular circumstances. It has generally been recognized that the "but for" test contained in BAJI No. 3.75 should not be used when two "causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result (*Thomsen v. Rexall Drug & Chemical Co.* [(1965)] 235 Cal. App. 2d 775 [45 Cal. Rptr. 642]). In those few situations, where there are concurrent [independent] causes, our law provides one cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it. The proper rule for such situations is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about." (*Vecchione v. Carlin* (1980) 111 Cal. App. 3d 351, 359, 168 Cal. Rptr. 571; *see also Hart v. Browne* (1980) 103 Cal. App. 3d 947, 960-962, 163 Cal. Rptr. 356; *Fraijo v. Hartland Hospital* (1979) 99 Cal. App. 3d 331, 346-347, 160 Cal. Rptr. 246; PROSSER & KEETON ON TORTS (5th ed. 1984) § 41, pp. 266-267; BAJI Nos. 3.75, 3.76 and respective comments.) The foregoing authorities conclude that in such a situation BAJI No. 3.76 should be given.

This case presents the issue of whether BAJI No. 3.75 should be given in any negligence action.

Criticism of the term "proximate cause" has been extensive. Justice Traynor once observed, "In all probability the general expectation is the reasonable one that in time courts will dispel the mists that have settled on the doctrine of proximate cause in the field of negligence." (*Mosley v. Arden Farms Co.* (1945) 26 Cal. 2d 213, 222, 157 P.2d 372 (conc. opn. of TRAYNOR, J.).) Similarly, while serving on the Court of Appeal, Justice Tobriner commented, "The concept of proximate causation has given courts and commentators consummate difficulty and has in truth defied precise definition." (*State Comp. Ins. Fund v. Ind. Acc. Com.* (1959) 176 Cal. App. 2d 10, 20, 1 Cal. Rptr. 73.)

Nor did Prosser and Keeton hide their dislike for the term: "The word `proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long

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[17] In addition to the issue of causation in fact, Prosser lists the following issues that have at various times been included in the proximate cause rubric: apportionment of damages among causes, liability for unforeseeable consequences, superseding causes, shifted responsibility, duty to the plaintiff, and plaintiff's fault. (Prosser, *Proximate Cause in California*, *supra*, 38 CAL. L. REV. 369, 374.)

[18] Although the dissent embarks upon a general discussion of proximate cause, the discussion is misplaced. We do not dispute the dissent's claim that there is more than one concept included in the term "proximate cause." (Dis. opn., *post*, at p. 923 of 1 Cal. Rptr. 2d, at p. 881 of 819 P.2d.) For purposes of this case, however, we focus on the jury's consideration of BAJI No. 3.75 as it relates to cause in fact.

since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness." (PROSSER & KEETON ON TORTS, *supra*, § 42, at p. 273, fn. omitted.)

It is reasonably likely that when jurors hear the term "proximate cause" they may misunderstand its meaning or improperly limit their discussion of what constitutes a cause in fact. Prosser and Keeton's concern that the word "proximate" improperly imputes a spatial or temporal connotation is well founded. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) page 1828, defines proximate as "very near," "next," "immediately preceding or following." Yet, "[p]roximity in point of time or space is no part of the definition [of proximate cause] ... except as it may afford evidence for or against proximity of causation. [Citation.]" (*Osborn v. City of Whittier* (1951) 103 Cal. App. 2d 609, 616, 230 P.2d 132.)

Given the foregoing criticism, it is not surprising that a jury instruction incorporating the term "proximate cause" would come under attack from courts, litigants, and commentators. In considering a predecessor to BAJI No. 3.75 that included language almost identical to the current instruction,[19] Prosser observed, "There are probably few judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury. The first sentence was lifted by a California opinion long since from SHEARMAN AND REDFIELD ON NEGLIGENCE, a text written for lawyers and not expected to be comprehensible to laymen, and none too good a text at that." (Prosser, *Proximate Cause in California, supra*, 38 CAL. L. REV. 369, 424, fn. omitted.)

The misunderstanding engendered by the term "proximate cause" has been documented.[20] In a scholarly study of 14 jury instructions, BAJI No. 3.75 produced proportionally the most misunderstanding among laypersons. (Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* (1979) 79 COLUM. L. REV. 1306, 1353 (hereafter *Psycholinguistic Study*).) The study noted two significant problems with BAJI No. 3.75. First, because the phrase "natural and continuous sequence" precedes "the verb it is intended to modify, the construction leaves the listener with the impression that the cause itself is in a natural and continuous sequence. Inasmuch as a single `cause' cannot be in a continuous sequence, the listener is befuddled." (*Psycholinguistic Study, supra*, 79 COLUM. L. REV. at p. 1323.) Second, in one experiment, "the term `proximate cause' was misunderstood by 23% of the subjects.... They interpreted it as `approximate cause,' `estimated cause,' or some fabrication." (*Id.*, at p. 1353.)

Our Courts of Appeal have recognized the serious problems with the language of BAJI No. 3.75. In *Fraijo v. Hartland Hospital, supra*, 99 Cal. App. 3d 331, 160 Cal. Rptr. 246, the court criticized the instruction because it appeared to place an undue emphasis on "nearness." Nonetheless, "despite the criticism of the `but for' language in BAJI No. 3.75, the most recent edition of California Jury Instructions (Civil) [citation] ... allow[s] the trial judge to exercise a discretion in selecting his preference between ... the `proximate cause' instruction found in BAJI No. 3.75, or the `legal cause' instruction found in BAJI No. 3.76." (*Id.*, at p. 346, 160 Cal. Rptr. 246.)

The *Fraijo* court said, "We agree that BAJI No. 3.75 - the proximate cause instruction - is far from constituting a model of clarity in informing a jury as to what is meant by proximate causation.... Nevertheless, in view of its long history of being considered a correct statement of the law by the

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[19] "*The proximate cause of an injury is that cause which, in natural and continuous sequence*, unbroken by any efficient intervening cause, *produces the injury, and without which the result would not have occurred*. It is the efficient cause - the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies." (BAJI No. 104 (4th ed. 1943 bound vol.), italics added.)

[20] Contrary to the dissenting opinion, we think it unwise to underestimate the problems associated with the term "proximate cause." (Dis. opn., *post*, at p. 924 of 1 Cal. Rptr. 2d, at p. 882 of 819 P.2d.) The preceding examples clearly establish the likelihood that jurors will be misled by the term. It is in the face of a flurry of criticism that the dissent recognizes the instruction is not a "model of clarity." (Dis. opn., *post*, at p. 923 of 1 Cal. Rptr. 2d, at p. 881 of 819 P.2d.) Yet, the dissent advocates retention of the flawed instruction without explaining what mysterious meritorious aspect of the instruction overcomes its readily apparent shortcomings. The dissent fails to articulate any compelling reason for this court to embrace an admittedly confusing instruction.

courts of this state, we are not inclined to hold that BAJI No. 3.75 is an erroneous instruction. Although we believe such a determination should be made, we consider that the determination ought to be made by our Supreme Court and not by an intermediate reviewing court." (*Fraijo v. Hartland Hospital, supra*, 99 Cal. App. 3d 331, 347, 160 Cal. Rptr. 246; *see also Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 574, 237 Cal. Rptr. 521 ["BAJI No. 3.75 is famous for causing juror confusion. It has been criticized for its inexact terminology and incorrect sentence structure."]; *John B. Gunn Law Corp. v. Maynard* (1987) 189 Cal. App. 3d 1565, 1571, 235 Cal. Rptr. 180 [instruction misleading, but "it has never been held error in California to instruct in terms of BAJI No. 3.75 due to lack of intelligibility."].)

We believe the foregoing authorities properly criticize BAJI No. 3.75 for being conceptually and grammatically deficient. The deficiencies may mislead jurors, causing them, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm.

In contrast, the "substantial factor" test, incorporated in BAJI No. 3.76 and developed by the RESTATEMENT SECOND OF TORTS, section 431 (com. to BAJI No. 3.76) has been comparatively free of criticism and has even received praise. "As an instruction submitting the question of causation in fact to the jury in intelligible form, it appears impossible to improve on the RESTATEMENT's `substantial factor [test.]'" (Prosser, *Proximate Cause in California, supra*, 38 CAL. L. REV. 369, 421.) It is "sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms." (*Id.*, at p. 379.)[21]

Moreover, the "substantial factor" test subsumes the "but for" test. "If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." (*Doupnik v. General Motors Corp.* (1990) 225 Cal. App. 3d 849, 861, 275 Cal. Rptr. 715.)

Not only does the substantial factor instruction assist in the resolution of the problem of independent causes, as noted above, but "[i]t aids in the disposition ... of two other types of situations which have proved troublesome. One is that where a similar, but not identical result would have followed without the defendant's act; the other where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. But in the great majority of cases, it produces the same legal conclusion as the but-for test. Except in the classes of cases indicated, no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed." (PROSSER & KEETON ON TORTS, *supra*, § 41, at pp. 267-268, fns. omitted, italics added.) Thus, "[t]he substantial factor language in BAJI No. 3.76 makes it the preferable instruction over BAJI No. 375. [Citation.]" (*Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 575, 237 Cal. Rptr. 521.)

We recognize that BAJI No. 3.76 is not perfectly phrased. The term "legal cause" may be confusing. As part of the psycholinguistic study referred to above, the experimenters rewrote BAJI No. 3.75 to include the term "legal cause."[22] The study found that "25% of the subjects who heard `legal cause' misinterpreted it as the opposite of an `illegal cause.' We would therefore recommend that the term `legal cause' not be used in jury

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[21] Although the dissent recognizes that BAJI No. 3.76 (embodying the "substantial factor" test) is "essentially a cause-in-fact instruction," it criticizes the test on grounds unrelated to its use with regard to cause-in-fact considerations. The dissent prefaces its discussion with the qualification, "When the `substantial factor' test is used as a means of setting limits on liability...." (Dis. opn., *post*, at p. 925 of 1 Cal. Rptr. 2d, at p. 884 of 819 P.2d.) Without articulating any reason to believe the test would be so applied, the dissent claims the test does not work well for the liability limiting considerations that are distinct from a finding of cause-in-fact. Although the dissent further details the shortcomings of the "substantial factor" test when the test is used for other purposes, it does not demonstrate any deficiencies of the "substantial factor" test when used for cause-in-fact determinations.

[22] The modified instruction read, "A legal cause of an injury is something that triggers a natural chain of events that ultimately produces the injury. [&] Without the legal cause, the injury would not occur." (*Psycholinguistic Study*, *supra*, 79 COLUM. L. REV. at p. 1352.)

instructions; instead, the simple term `cause' should be used, with the explanation that the law defines `cause' in its own particular way."[23] (*Psycholinguistic Study, supra*, 79 COLUM. L. REV. at p. 1353.)

Moreover, "advocates, judges, and scholars [have] capitalized upon the ambiguities and nuances of `substantial'" and have created new uses for the instruction. (PROSSER & KEETON ON TORTS (5th ed., 1988 supp.) § 41, p. 45.) One such use is "in cases in which a defendant's conduct is clearly a `but for' cause of plaintiff's harm, and defense counsel contends that defendant's conduct made such an insubstantial contribution to the outcome that liability should not be imposed. [&] ... Used in this way, the `substantial factor' test becomes an additional barrier to liability...." *Id.*, at pp. 43-44.) Such a use of the "substantial factor" test undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby. We are confident, however, that proper argument by counsel and instruction by the court will prevent any confusion from occurring.[24]

The continued use of BAJI No. 3.75 as an instruction on cause in fact is unwise. The foregoing amply demonstrates that BAJI No. 3.75 is grammatically confusing and conceptually misleading. Continued use of this instruction will likely cause needless appellate litigation regarding the propriety of the instructions in particular cases. Use of BAJI No. 3.76 will avoid much of the confusion inherent in BAJI No. 3.75. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called proximate cause instruction, should be disapproved and that the court erred when it refused to give BAJI No. 3.76 and instead gave BAJI No. 3.75. (*See ante*, p. 920 of 1 Cal. Rptr. 2d, at p. 879 of 819 P.2d, fn. 7.)

B. Prejudicial Effect of Erroneous Instruction

Having determined it was error to refuse to give BAJI No. 3.76 and instead give BAJI No. 3.75, we must decide whether the error was so prejudicial as to require reversal.

Under article VI, section 13 of the California Constitution, if there is error in instructing the jury, the judgment shall be reversed only when the reviewing court, "after an examination of the entire cause, including the evidence," concludes that the error "has resulted in a miscarriage of justice." Under the Constitution, we must determine whether it is reasonably probable that result more favorable to the appealing party would have been reached in the absence of error. (*People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243.) Although there is no precise formula for determining the prejudicial effect of instructional error, we are guided by the five factors enumerated in *LeMons v. Regents of University of California* (1978) 21 Cal. 3d 869, 876, 148 Cal. Rptr. 355, 582 P.2d 946.

The first factor we consider is the degree of conflict in the evidence on the critical issue, here cause in fact. The evidence shows that Damechie drowned, not only because he could not swim, but also because he was placed in a position in which his inability to swim resulted in death. The jury's verdict, amply supported by the evidence, indicates that Mr. and Mrs. Gonzales and their son Luis were at least partially responsible for Damechie's predicament. Mr. and Mrs. Gonzales failed to supervise him adequately. Luis, after assuring Damechie he would be careful and knowing that Damechie could not swim, climbed onto the paddleboard, rocked it, causing it to flip over, and failed to call for help despite the presence of adults who might have been able to save Damechie. The conflict in the evidence is not great. If properly instructed, it is reasonably probable that the jury would have found defendants' behavior to have been a substantial factor, and thus a cause in fact, in Damechie's death.

Second, we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence. The jury did not make such a request, but we note that jury received a copy of the instructions, making such a request unnecessary.

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[23] Although we need not decide whether BAJI No. 3.76 should be rewritten to eliminate the term "legal cause," we do suggest that the Committee on Standard Jury Instructions consider whether the instruction could be improved by adopting the suggestion of the Psycholinguistic Study or by otherwise modifying the instruction.

[24] Although we disapprove BAJI No. 3.75, nothing in this opinion should be read to discourage the Committee on Standard Jury Instructions from drafting a new and proper "but for" instruction.

Third, we analyze the closeness of the jury's verdict. The jury found on a vote of nine to three that Jose Gonzales and Luis were negligent (*i.e.*, they breached a duty of care to Damechie). Likewise, the jury concluded on a vote of 11 to 1 that Matilde Gonzales was negligent. Yet the jury unanimously concluded that neither the actions of Luis nor Jose Gonzales caused Damechie's death and, on a vote of 10 to 2, the jury found that the actions of Matilde Gonzales were not a cause of the death.

The verdict as to causation was not particularly close. It seems that the jury did follow BAJI No. 3.75 but was misled by the instruction's flaws: Having found the defendants negligent, it is illogical and inconsistent on this record to conclude that they were not a cause in fact of Damechie's death. Accordingly, we conclude it is reasonably probable that the jury was confused by BAJI No. 3.75 and overemphasized the "but for" nature of the instruction, improperly focusing on the factor operative at the closest temporal proximity to the time of death, Damechie's inability to swim.

Fourth, we consider whether defense counsel's closing argument contributed to the instruction's misleading effect. The closing argument was replete with references to Damechie's inability to swim, his own knowledge that he could not swim, and his decision nevertheless to venture out on the lake. Counsel also argued that Damechie's parents knew he could not swim, yet they permitted him to go with the Gonzaleses without determining whether the Gonzaleses intended to take the children swimming, and argued that but for these facts, Damechie would not have drowned.

The argument thus highlighted the condition temporally closest to the death, Damechie's inability to swim, and factors related to it. As discussed above, BAJI No. 3.75 improperly emphasizes temporal and spatial proximity. The argument thus contributed to the instruction's misleading effect. It is reasonably probable that if the jury had received the substantial factor instruction, counsel's argument would not have misled the jury.

Finally we consider the effect of other instructions in remedying the error BAJI No. 3.77 was requested by both parties and given by the court.[25] This instruction did not remedy the confusion caused by instructing the jury under BAJI No. 3.75. By frequently repeating the term "proximate cause" and by emphasizing that a cause must be operating at the moment of injury, the instruction buttressed rather counteracted the restrictions on time and place inherent in the word "proximate." Thus, giving BAJI No. 3.77 did not cure the deficiencies of BAJI No. 3.75. (*Hart v. Browne, supra*, 103 Cal. App. 3d 947, 961, 163 Cal. Rptr. 356.)

Based on the foregoing analysis, we conclude that it is reasonably probable a result more favorable to the plaintiffs would have resulted if BAJI No. 3.75 had not been given.

Conclusion

We conclude that BAJI No. 3.75 should be disapproved, that the trial court erred when it gave the instruction, and that such error was prejudicial. Accordingly, the decision of the Court of Appeal reversing the judgment in favor of defendants is affirmed.

MOSK, PANELLI, ARABIAN, BAXTER and GEORGE, JJ., concur.

KENNARD, Associate Justice, dissenting

I dissent.

The majority invalidates a jury instruction on proximate cause - an essential element of every tort case - that has been used in this state for some 50 years and embodies well-established law. And, by delegating responsibility for defining proximate cause to the Committee on Standard Jury Instructions, the majority neglects its duty to provide guidance to trial courts and litigants. This court should give guidance to the committee, not seek guidance from it.

The majority proscribes use of BAJI No. 3.75, a standard jury instruction that defines proximate

[25] BAJI No. 3.77 provides: "There may be more than one [proximate] [legal] cause of an injury. When negligent conduct of two or more persons contributes concurrently as [proximate] [legal] causes of an injury, the conduct of each of said persons is a [proximate] [legal] cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. [It is no defense that the negligent conduct of a person not joined as a party was also a [proximate] [legal] cause of the injury.]" As read, the instruction included the term "proximate" and the last sentence.

cause as "a cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred." As I shall explain, proximate cause includes two elements: an element of physical or logical causation, known as cause in fact, and a more normative or evaluative element, which the term "proximate" imperfectly conveys. The majority concedes that the concept of proximate cause includes these two distinct elements, yet it limits its discussion of BAJI No. 3.75 to that instruction "as it relates to cause in fact." (Maj. opn., *ante*, p. 917 of 1 Cal. Rptr. 2d, at p. 875 of 819 P.2d, fn. 4.) Having found BAJI No. 3.75 fatally deficient, the majority suggests that another instruction, BAJI No. 3.76, provides a satisfactory alternative instruction on cause in fact. Yet the majority does not embrace this other instruction as an adequate expression of the second, more elusive element of proximate cause. Because BAJI No. 3.75 addresses both elements of proximate cause, the majority's decision leaves a significant unanswered question: Is there now a standard jury instruction that trial courts can use to convey the second element?

Legal scholars have long struggled with the complexities and subtleties of proximate cause. (*See e.g.*, Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103; Prosser, *Proximate Cause in California* (1950) 38 CAL. L. REV. 369.) But the problem of proximate cause - when and how to limit liability when cause and effect relationships logically continue to infinity - has remained intractable and the riddle of proximate cause has remained unsolved. (PROSSER & KEETON ON TORTS (5th ed. 1984) § 43, p. 300.) Although BAJI No. 3.75 is not a model of clarity, and a better instruction would certainly be most welcome, this court should not proscribe the use of BAJI No. 3.75 unless and until it proposes a better instruction that includes both elements of proximate cause, or at least provides meaningful guidance on the subject. Because the majority has done neither, I would not hold in this case that the trial court erred in instructing the jury with BAJI No. 3.75.

I

To understand the issue presented in this case, it is necessary to examine the concept of proximate cause and the manner in which BAJI No. 3.75 explains it to the jury.

An essential element of any cause of action for negligence is that the defendant's act or omission was a cause of the plaintiff's injury. (*E.g.*, PROSSER & KEETON ON TORTS, *supra*, § 41, p. 263; 6 WITKIN, SUMMARY OF CAL. LAW (9th ed. 1988) *Torts*, § 965, p. 354.) To simply say, however, that the defendant's act or omission must be a necessary antecedent of the plaintiff's injury does not resolve the question of whether the defendant should be held liable. As Prosser and Keeton observed: "The consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would `set society on edge and fill the courts with endless litigation.'" (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 264, quoting *North v. Johnson* (1894) 58 Minn. 242, 59 N.W. 1012.)

Accordingly, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the act or omission and the injury, but also to "our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient." (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 264.) Thus, there are two basic elements of proximate cause: cause in fact and the limitations imposed by "our more or less inadequately expressed ideas of what justice demands." For the sake of clarity and convenience, I shall refer to the latter element as the social evaluative process.

BAJI No. 3.75, the instruction invalidated by the majority, addresses both elements of proximate cause. By stating that a proximate cause is one "without which the injury would not have occurred" (or, in other words, that the injury would not have occurred "but for" the defendant's conduct), the instruction addresses the element of cause in fact. The term "natural and continuous sequence" and the word "proximate," on the other hand, address the social evaluative process because they require the jury, after determining cause in fact, to reflect further on causation before finally deciding the issue of liability.

II

The majority disapproves BAJI No. 3.75 because it contains the word "proximate," which connotes proximity in space or time. (Maj. opn., *ante*, at pp. 918-919 of 1 Cal. Rptr. 2d, at pp. 876-77 of 819 P.2d.) The majority exaggerates the difficulties presented by the use of the word

"proximate" and adopts a wholly inadequate solution. Although proximity in time or space is not relevant to cause in fact, it is frequently an appropriate consideration in determining the second element of proximate cause, the social evaluative process. In the absence of an instruction that captures that element at least as well, use of BAJI No. 3.75 should not be forbidden.

The majority relies on a statement from Prosser and Keeton objecting to the term "proximate" as "an unfortunate word, which places an entirely wrong *emphasis* upon the factor of physical or mechanical closeness." (PROSSER & KEETON ON TORTS, *supra*, § 42, p. 273; italics added.) Yet by these words Prosser and Keeton do not assert that proximity in space and time is irrelevant to the ultimate determination of proximate cause, but only that it should not be unduly emphasized. This necessarily implies that temporal and spatial proximity does play some role in the determination of proximate cause.

Other authority supports the conclusion that temporal and spatial proximity is frequently an appropriate consideration in determining the social evaluative process element of proximate cause. As a Court of Appeal recently remarked, "The time span between any alleged misconduct and the harm is among the factors to be considered in determining the existence of proximate cause." (*Weissich v. County of Marin* (1990) 224 Cal. App. 3d 1069, 1083, 274 Cal. Rptr. 342; *see also Duffy v. City of Oceanside* (1986) 179 Cal. App. 3d 666, 674, 224 Cal. Rptr. 879; REST. 2D TORTS, § 433, com. f.) The same is true of proximity in space. Foreseeability of injury, which is a concept that includes spatial nearness or remoteness, may be relevant to the trier of fact's decision whether defendant's act "was a proximate or legal cause of the plaintiff's injury." (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 572-573, fn. 6, 224 Cal. Rptr. 664, 715 P.2d 624.) Indeed, a case the majority cites recognizes the potential relevance of temporal and spatial proximity. In *Osborn v. City of Whittier*, *supra*, 103 Cal. App. 2d 609, 616, 230 P.2d 132, the court said that "[p]roximity in point of time or space ... is of no importance *except as it may afford evidence for or against proximity of causation*." (Italics added.)

The majority directs its remaining criticism of BAJI No. 3.75 to the statement in the instruction that "a proximate cause is a cause which, *in natural and continuous sequence*, produces the injury...." (Italics added.) Quoting from a psycholinguistic study, the majority characterizes the instruction as befuddling because the term "natural and continuous sequence" precedes the verb it modifies, thus creating the impression that the cause itself is in a "natural and continuous sequence." (Maj. opn., *ante*, at p. 919 of 1 Cal. Rptr. 2d, at p. 878 of 819 P.2d.) But this perceived problem with the placement of the language could be readily corrected by simply rearranging the sentence to read: "a proximate cause of the injury is a cause without which the injury would not have occurred and which produces the injury in natural and continuous sequence."

There is no immediate need to proscribe use of BAJI No. 3.75. Trial courts have been instructing juries in its language since 1969 (BAJI No. 3.75 (6th ed. 1977); BAJI No. 3.75 (5th ed. 1969)), and, as the majority notes (maj. opn., *ante*, at p. 917 of 1 Cal. Rptr. 2d, at p. 876 of 819 P.2d, fn.4), it is almost identical to the standard instruction used since 1943. (BAJI No. 104 (4th ed. 1943).) The courts of this state have long considered it a correct statement of the law. (*Fraijo v. Hartland Hospital* (1979) 99 Cal. App. 3d 331, 347, 160 Cal. Rptr. 246.) Despite its flaws, BAJI No. 3.75 ought to be retained as an acceptable instruction in the absence of a proposed superior instruction.

The majority asserts that disapproval of BAJI No. 3.75 is justified because "issues that are properly referred to as questions of proximate or legal cause are contained in other instructions. (*See e.g.*, BAJI No. 3.79 [superseding causes].)" (Maj. opn., *ante*, at p. 914 of 1 Cal. Rptr. 2d, at pp. 873 of 819 P.2d, fn.2.) But a review of the relevant instructions (BAJI Nos. 3.77, 3.78, 3.79, and 3.80) shows that each addresses a specialized situation.[1] None attempts a general definition of

[1] BAJI No. 3.77 states that there may be concurrent causes. BAJI No. 3.78 says that a defendant is not relieved of liability when there are two independent causes. BAJI No. 3.79 explains that a defendant is not relieved of liability by the negligence of a third party if the defendant should have realized that the third party might act as it did, or a reasonable person would not have regarded the third party's acts as highly extraordinary, or the conduct of the third party was not extraordinarily negligent and was a normal consequence of the situation created by the defendant. BAJI No. 3.80 addresses the situation when all of the defendants were negligent but the plaintiff cannot prove causation.

the social evaluative process element of proximate cause, and thus none will fill the void resulting from the proscribing of BAJI No. 3.75.

III

The majority favors the "substantial factor" instruction, BAJI No. 3.76, over the "but for" instruction, BAJI No. 3.75, as a definition of cause in fact. But the majority makes no claim that BAJI No. 3.76 adequately addresses the social evaluative process element, the most critical and elusive aspect of proximate cause.

BAJI No. 3.76 states that "[a] legal cause of injury is a cause which is a substantial factor in bringing about the injury." The word "substantial" refers only to whether the defendant's act was more than a minimal element in the plaintiff's injury. (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 267; *see also* Prosser, *Proximate Cause in California*, *supra*, 38 CAL. L. REV. 369, 378-382.) Thus, BAJI No. 3.76 is essentially a cause-in-fact instruction. Because it requires only a single determination by the jury (whether the defendant's conduct was a "substantial factor" in producing the plaintiff's injury), BAJI No. 3.76 does not reflect as clearly as does BAJI No. 3.75 the two separate and distinct elements of proximate cause.

When the "substantial factor" test of BAJI No. 3.76 is used as a means of setting limits on liability, it is no better than the "but for" test of BAJI No. 3.75, the instruction invalidated by the majority, and it is just as problematic as the word "proximate" in BAJI No. 3.75. As Prosser and Keeton observed: "A number of courts have [used substantial factor as a test of proximate cause, not just cause in fact], apparently accepting the phrase as the answer to all prayers and some sort of universal solvent. As applied to the fact of causation alone, the test though not ideal, may be thought useful. But when the `substantial factor' is made to include all the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than `proximate cause,' and it becomes a hindrance rather than a help." (PROSSER & KEETON ON TORTS, *supra*, § 42, p. 278.)

Because its language is neither as clear nor as helpful as it superficially appears, the "substantial factor" (BAJI No. 3.76) instruction is no better than the "but for" instruction (BAJI No. 3.75). As Prosser and Keeton explained: "Even if `substantial factor' seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings for the term `substantial factor' has created risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without explicit indication of which of its conflicting meanings is intended." (PROSSER & KEETON ON TORTS, *supra*, 1988 supp. p. 43.) For instance, the term "substantial factor" may impose an additional barrier to liability when used to focus on the respective degrees of the contribution of different causes of any injury. It may also be used to focus the inquiry on an actors motive or purpose in the sense of attempting to provide a means of distinguishing permissible and impermissible motives. And it may be confused with the separate requirement that the plaintiff prove the elements of the case by a preponderance of the evidence. (*Id*. at pp. 43-45.)

Thus, the majority fails to recognize that BAJI No. 3.76 is no better than BAJI No. 3.75 as a comprehensive proximate cause instruction.

IV

By delegating to the Committee on Standard Jury Instructions[2] the responsibility for defining proximate cause, the court neglects its duty, as the highest court in this state, to provide guidance to the state's trial courts.

It is easy, as the majority has done, to find fault with existing formulations of proximate cause. It is quite another matter, however, to actually address and resolve the subtle and complex issues presented by the concept of proximate cause. The Committee on Standard Jury Instructions will necessarily be in the same situation as are trial judges: "The trial judge is in the dilemma that a failure to instruct at all on proximate cause is very likely to be error, while

[2] The committee's full name is The Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California. Formed in 1938, the committee includes among its members attorneys as well as superior court judges. The committee has performed invaluable service by drafting standard or pattern jury instructions, based primarily on published appellate decisions, for use in civil jury trials. Although no statute mandates the use of the instructions, the Judicial Council has recommended their use, when applicable, "unless [the trial judge] finds that a different instruction would more adequately, accurately or clearly state the law." (Cal. Standards Jud. Admin., § 5.) The Judicial Council has cautioned that trial judges should give jury instructions proposed by the parties' attorneys "no less consideration" than the committee's standard instructions. (*Ibid*.)

any instruction he [or she] gives runs the risk of being so complicated and vulnerable to attack in its ideas or language that it invites appeal." (Prosser, *Proximate Cause in California, supra*, 38 CAL. L. REV. at pp. 423-424.)

Unless and until this court is prepared to offer a better alternative or provide meaningful guidance on both elements of proximate cause, I would not invalidate BAJI No. 3.75. Accordingly, I would hold that the trial court did not err when it instructed the jury in the terms of BAJI No. 3.75.

Questions and Notes

1. Although she writes in the minority in this case, Justice Kennard articulates the approach that most jurisdictions take to the definition of proximate cause. As one court stated,

> The "substantial factor" test has not turned out to be the hoped for panacea for all causation in fact problems. Over the years, it has taken on several distinct and conflicting meanings. Harper, supra, § 20.6, at 180-82; Keeton, supra, § 41, at 43-45 (Supp.1988). While several jurisdictions have adopted the "substantial factor" test as their sole test for determining causation in fact, see, e.g., * * * *Knodle v. Waikiki Gateway Hotel*, 69 Haw. 376, 742 P.2d 377, 386-87 (1987); *Busko v. DeFilippo*, 162 Conn. 462, 294 A.2d 510, 512 (1972), others have declined to jettison the "but for" test. *See, e.g.*, *Culver v. Bennett*, 588 A.2d 1094, 1098-99 (Del.1991); *Fussell v. St. Clair*, 120 Idaho 591, 818 P.2d 295, 299 (1991).
>
> *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.*, 15 S.W.3d 425 (Tenn.Ct.App. 1997).

§ A. But-For Causation (Cause-in-Fact)

1. The Traditional Burden of Proof

HULL v. MERCK & CO.

758 F.2d 1474 (11th Cir. 1985)

PER CURIAM

In this diversity case applying Georgia law, Jim Dale Hull appeals from a jury verdict for the appellee, Merck & Company, Inc. (Merck), in the United States District Court for the Northern District of Georgia. Finding no error in the trial of the case, we affirm.

Merck operates three adjacent chemical plants in Albany, Georgia. Waste chemicals are expelled via three fiberglass sewer pipes which meet at a large junction before emptying into a one-million-gallon neutralizing pool. In 1980, Merck determined that the waste lines needed replacement. It solicited bids from four companies specializing in such work, including Augusta Fiberglass Coatings (AFC), the appellant's employer. Merck cautioned the bidders that Merck planned to operate the factories throughout the replacement activity, and that bypass pipes and various types of safety equipment would be necessary to the work. Before bidding, AFC also inspected the job site. AFC's bid was accepted and Hull commenced supervision of the job on September 4, 1980.

AFC relayed Merck's cautionary instructions to its employees and provided AFC workers, as required by Merck, with rubber boots, pants, coats and gloves, as well as goggles and masks. Hull, who had long experience working with chemicals, initially wore some of the equipment but after a few days ceased this practice. Many of Hull's coworkers used the safety equipment extensively. At an October 17, 1984 employee meeting, AFC noted a lack of full compliance and reminded the employees of the necessity of wearing the protective gear.

Although the evidence was conflicting, it appears that Hull spent about four hours each day in the trench which was dug to expose the pipelines. He regularly breathed gases and allowed liquid to spill on his clothing and body. Hull noted at the time that the chemical fumes in and around the pipes were a health hazard. His most severe exposure occurred on September 22, 1980. On that morning, Hull stuck his head inside the 20-inch pipe connecting lines 1 and 2 to line 3. The pipes were supposed to carry only a two

percent solution of waste, but because of an accidental spill in the factories, the pipe contained at that moment an 80 to 85 percent solution of toluene. Hull became dizzy and nauseous. As a result, he received oxygen at the plant infirmary.

Within a year after the completion of the Merck contract, Hull suffered bone marrow depression, followed by leukemia. He sued Merck for $2,500,000.00 plus punitive damages, alleging (1) that Merck had negligently failed to disclose the nature and health dangers of the waste chemicals carried by the pipelines; (2) that Merck had negligently failed to inform him adequately of the necessity for wearing the various types of protective gear during construction; (3) that the intermittent discharge without warning of high-concentration spills into the pipelines resulted from the negligent operation of the factories; and (4) that Merck's decision to continue plant operations and consequently the flow of waste chemicals during the pipelines replacement project amounted to negligence. The jury trial commenced on January 23, 1984 and resulted in a verdict for Merck.

* * *

Evidence of Exposure to Benzene

The waste pipelines contained trace amounts of benzene, a compound widely considered to pose risks of cancer. Before the trial, Hull deposed a medical expert, Dr. Cohen, who stated that Hull's disease was caused by benzene, toluene or both. On questioning by Merck's counsel, however, Dr. Cohen admitted that in reaching this conclusion he had made two assumptions: "one, that [Hull's] toxic exposure was significant.... And, two, that it caused his acute leukemia." Deposition of Dr. Cohen pp. 24-25.

The appellant now challenges the district court's exclusion of this deposition evidence at the trial. The district court was well within its discretion in excluding the evidence. *E.g.*, *United States v. Lopez*, 543 F.2d 1156 (5th Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1150, 51 L. Ed. 2d 566 (1977). Here, the assumptions made by Dr. Cohen rendered his seemingly firm opinion quite speculative, and the danger of irrelevance is clear. Such potentially confusing testimony is at odds with the purposes of expert testimony as envisioned in FED. R. EVID. 702. The district court's decision was not "manifestly erroneous," 543 F.2d at 1158, especially considering that only parts of the deposition were excluded, and that Dr. Cohen was not barred from testifying before the jury and thereby subjecting himself to cross-examination.

Hull also contends the court erred in failing to instruct the jury as to whether benzene exposure caused Hull's leukemia. But Hull's own expert admitted at the trial that the concentrations of benzene to which Hull claimed to be exposed could not have precipitated the disease. There was no evidence to support submission of such an instruction to the jury, and the district court did not err in refusing to give the instruction.

Questions and Notes

1. For a survey of the problem of establishing causation in toxic tort cases, *see* Matteo, *How Many Mice Must Die?*, 7 Temp. Envtl. L. & Tech. J. 103 (1988); Shirley K. Duffy, *"Risk Assessment": a Methodology for Deciding Claims for Increased Risk of Cancer*, 11 Penn St. Envtl. L. Rev. 213 (2003); Alani Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, 108 Penn St. L. Rev. 479 (2003); Robert W. Loewen, *Causation in Toxic Tort Cases: Has the Bar Been Lowered?* 17 Nat. Resources & Env't 228 (2003).

2. Critics of the tort system often point to what they call "junk science" as a culprit in imposing inappropriate liability; the poster child is a $4 billion settlement for the class action brought by women claiming injury from breast implants. *See* David E. Bernstein, *The Breast Implant Fiasco*, 87 Calif. L. Rev. 457 (1999).

3. For a general discussion of the causation issue as it applies to the burgeoning field of toxic tort litigation, *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); Jon R. Pierce and Terrence Sexton, *Toxicogenomics: Toward the Future of Toxic Tort Causation*, 5 N.C. J.L. & Tech. 33 (2003). An example of a toxic tort case close to home (and the problems the plaintiffs faced in establishing liability, *see* Eric DeJure Wilson, *Hope for Hanford Downwinders?: the Ninth Circuit's Ruling in ... (In re Hanford Nuclear Reservation Litig.)*, 82 Or. L. Rev. 581 (2003).

4. One of the complaints about modern tort

litigation is that it degenerates into a "battle of the experts." One proposal to alleviate the spectacle of partisan experts-for-hire is to encourage the judges to appoint neutral experts or panels of experts. *See* Karen Butler Reisinger, *Note. Court-Appointed Expert Panels: A Comparison of Two Models*, 32 Ind. L. Rev. 225 (1998).

REYNOLDS v. TEXAS & PACIFIC RAILWAY CO.

37 La. Ann. 694 (1885)

FENNER, J.

The plaintiff and his wife claim damages for the defendant company for injuries suffered by the wife and caused by the alleged negligence of the company.

Mr. Reynolds, with his wife, sister-in-law, three small children and two colored attendants, had purchased tickets as passengers on the defendant road, and were at the depot at Morrogh Station for the purpose of boarding the east-bound train, which was due at that station at about midnight, but, being behind time, did not reach there till about two o'clock in the morning.

* * *

Several witnesses testif[ied] that passengers were warned to "hurry up." Mrs. Reynolds, a corpulent woman, weighing two hundred and fifty pounds, emerging from the bright light of the sitting room, which naturally exaggerated the outside darkness, and hastening down these unlighted steps, made a misstep in some way and was precipitated beyond the narrow platform in front and down the slope beyond, incurring the serious injuries complained of.

Upon what grounds to the company claim exemption from liability?

1st. It denies the fact of negligence on its part, and contends that the way was safe and the lights sufficient.

We have already disposed of this contention, and have found that the light was insufficient and that this rendered the way insecure....

2d. It contends that, even conceding the negligence of the company in the above respect, it does not follow that the accident to plaintiff was necessarily caused thereby, but that she might well have made the misstep and fallen even had it been broad daylight. We concede that this is possible, and recognize the distinction between *post hoc* and *propter hoc*. But where 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 mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury. Courts, in such matters, consider the natural and ordinary course of events, and do not indulge in fanciful suppositions. The whole tendency of the evidence connects the accident with the negligence.

* * *

Judgment affirmed.

2. Modifying the But-For Causation Requirement

a. Excusable Inability to Identify the Defendant

SUMMERS v. TICE

33 Cal. 2d 80, 199 P.2d 1 (1948)

CARTER, Justice

Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of bring struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were

hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 ½ size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." 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 ten 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. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

* * *

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. Tice argues that there is evidence to show that the shot which struck plaintiff came from Simonson's gun because of admissions allegedly made by him to third persons and no evidence that they came from his gun. Further in connection with the latter contention, the court failed to find on plaintiff's allegation in his complaint that he did not know which one was at fault did not find which defendant was guilty of the negligence which caused the injuries to plaintiff.

Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and "That as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip." In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.

It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could have caused the injury. *Moore v. Foster*, Miss., 180 So. 73; *Oliver v. Miles*, Miss., 110 So. 666, 50 A.L.R. 357; *Reyher v. Mayne*, 90 Colo. 856, 10 P.2d 1109; *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120, 114 Am. St. Rep. 675. The same rule has been applied in criminal cases (*State v. Newberg*, 129 Or. 564, 278 P. 568, 63 A.L.R. 1225), and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person. *Saisa v. Lilja*, 1 Cir., 76 F.2d 380. These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept and the more reasonable basis appears in *Oliver v. Miles, supra*. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated (110 So. 668): "We think that ... each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence." (Emphasis added.) 110 So. p. 668. It is said in the RESTATEMENT: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he ... (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." (REST., TORTS, sec. 876(b)(c).) Under subsection (b) the example is given: "*A* and *B* are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal this being negligent as to persons on the road. *A* hits the animal. *B*'s bullet strikes *C*, a traveler on the road. *A* is liable to *C*." (REST., TORTS, Sec. 876(b), Com., Illus. 3.) An illustration given under subsection (c) is the same as above except the factor of both defendants shooting is missing and joint liability is not imposed. It is further said that: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." (REST., TORTS, sec. 432.) Dean Wigmore has this to say: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) ... The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert...." (WIGMORE, SELECT CASES ON THE LAW OF TORTS, sec. 153.) Similarly Professor Carpenter has said: "[Suppose] the case where *A* and *B* independently shoot at *C* and but one bullet touches *C*'s body. In such case, such proof as is ordinarily required that either *A* or *B* shot *C*, of course fails. It is suggested that there should be a relaxation of the proof required of the plaintiff ... where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause." (20 CAL. L. REV. 406.)

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*, 25 Cal. 2d 486, 154 P.2d 687, 162 A.L.R. 1258. 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. It was there said: "If the doctrine is to continue to serve a useful purpose, we should not forget that "the 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." 25 Cal. 2d at page 490, 154 P.2d at page 689, 162 A.L.R. 1258. Similarly in the instant case plaintiff is not able to establish which of defendants caused his injury.

* * *

In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can relieving the wronged person of the duty of apportioning the injury to a

particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. *See*, *Colonial Ins. Co., v. Industrial Acc. Com.*, 29 Cal. 2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tortfeasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not a position to complain of uncertainty. *California Orange Co. v. Riverside P.C. Co., supra.*

* * *

The judgment is affirmed.

GIBSON, C.J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

SINDELL v. ABBOTT LABORATORIES

26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980)

MOSK, Justice

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?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

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 and the mothers of the class she represents,[1] for the purpose of preventing miscarriage. In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years.[2] It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

* * *

Plaintiff [Sindell] 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

[1] The plaintiff class alleged consists of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

[2] [Ed. note: The evidence showed that the rate of cancer among "DES daughters" was .1-.4%.]

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.

* * *

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.[3] 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).) Most of the cases are still pending. With two exceptions,[4] those that have been decided resulted in judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers.[5] The same result was reached in a recent California case. (*McCreery v. Eli Lilly & Co.* (1978) 87 Cal. App. 3d 77, 82-84, 150 Cal. Rptr. 730.) The present action is another attempt to overcome this obstacle to recovery.

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 (*e.g.*, *Shunk v. Bosworth* (6th Cir. 1964) 334 F.2d 309) or from the use of a defective product. (*E.g.*, *Wetzel v. Eaton Corporation* (D. Minn. 1973) 62 F.R.D. 22, 29-30; *Garcia v. Joseph Vince Co.* (1978) 84 Cal. App. 3d 868, 873-875, 148 Cal. Rptr. 843; and *see* annot. collection of cases in 51 A.L.R.3d 1344, 1351; 1 HURSH AND BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D (1974) p. 125.)

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by *Summers v. Tice* (1948) 33 Cal. 2d 80, 199 P.2d 1, places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which we prefer to designate by the more accurate term of "industry-wide" liability,[6] which might obviate the necessity for identifying the manufacturer of the injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

The celebrated case of *Summers v. Tice*,

[3] DES was marketed under many different trade names.

[4] In a recent New York case a jury found in the plaintiff's favor in spite of her inability to identify a specific manufacturer of DES. An appeal is pending. (*Bichler v. Eli Lilly and Co.* (Sup. Ct. N.Y. 1979).) A Michigan appellate court recently held that plaintiffs had stated a cause of action against several manufacturers of DES even though identification could not be made. (*Abel v. Eli Lilly and Co.* (decided Dec. 5, 1979) Docket No. 60497.) That decision is on appeal to the Supreme Court of Michigan.

[5] *E.g.*, *Gray v. United States* (S.D. Tex. 1978) 445 F.Supp. 337. In their briefs, defendants refer to a number of other cases in which trial courts have dismissed actions in DES cases on the ground stated above.

[6] The term "enterprise liability" is sometimes used broadly to mean that losses caused by an enterprise should be borne by it. Klemme, *Enterprise Liability* (1976) 47 COLO. L. REV. 153, 158.

supra, 33 Cal. 2d 80, 199 P.2d 1, a unanimous opinion of this court, best exemplifies the rule. In *Summers*, the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot which actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, "each to absolve himself if he can." (*Id.*, p. 86, 199 P.2d p. 4.) We stated that under these or similar circumstances a defendant is ordinarily in a "far better position" to offer evidence to determine whether he or another defendant caused the injury.

In *Summers*, we relied upon *Ybarra v. Spangard* (1944) 25 Cal. 2d 486, 154 P.2d 687. There, the plaintiff was injured while he was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of res ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct.[7]

The rule developed in *Summers* has been embodied in the RESTATEMENT OF TORTS. (REST. 2D TORTS, § 433B, subsec. (3))[8] Indeed, the *Summers* facts are used as an illustration (p. 447).

Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe plaintiff is correct.

In *Summers*, the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are "[o]rdinarily ... in a far better position to offer evidence to determine which one caused the injury" than a plaintiff (33 Cal. 2d 80, at p. 86, 199 P.2d 1 at p. 4), but the decision does not determine that this "ordinary" situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of

[7] Other cases cited by plaintiff for the proposition stated in Summers are only peripherally relevant. For example, in *Ray v. Alad Corporation* (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3, the plaintiff brought an action in strict liability for personal injuries sustained when he fell from a defective ladder manufactured by the defendant's predecessor corporation. We held that, although under the general rule governing corporate succession the defendant could not be held responsible, nevertheless a "special departure" from that rule was justified in the particular circumstances. The defendant had succeeded to the good will of the manufacturer of the ladder, and it could obtain insurance against the risk of liability, whereas the plaintiff would be left without redress if he could not hold the defendant liable. The question whether one corporation should, for policy reasons, be answerable for the products manufactured by its predecessor is a different issue than that we describe above.

[8] Section 433B, subsection (3) of the RESTATEMENT provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The reason underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (REST. 2D TORTS, § 433B, com. f, p. 446.)

one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers*, the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff or defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed between the time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification.[9] Certainly there can be no implication that plaintiff is at fault in failing to do so the event occurred while plaintiff was in utero, a generation ago.[10]

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produced a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warnings. Thus *Haft v. Lone Palm Hotel* (1970) 3 Cal. 3d 756, 91 Cal. Rptr. 745, 478 P.2d 465, upon which plaintiff relies, is distinguishable.[11] It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the precise drug taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example, one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude that the fact defendants do not have greater access to information which might establish the identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at least as those principles have previously been applied.[12] There is an important

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[9] The trial court was not required to determine whether plaintiff had made sufficient efforts to establish identification since it concluded that her failure to do so was fatal to her claim. The court accepted at face value plaintiff's assertion that she could not make the identification, and for purposes of this appeal we make the same assumption.

[10] Defendants maintain that plaintiff is in a better position than they are to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated, and might know the brand and strength of dosage, the appearance of the medication, or other details from which the manufacturer might be identified, whereas they possess none of this information. As we point out in footnote 12, we assume for purposes of this appeal that plaintiff cannot point to any particular manufacturer as the producer of the DES taken by her mother.

[11] In *Haft*, a father and his young son drowned in defendants' swimming pool. There were no witnesses to the accident. Defendants were negligent in failing to provide a lifeguard, as required by law. We held that the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, and that, therefore, the burden of proof on the issue of causation was upon defendants. Plaintiff attempts to bring herself within this holding. She asserts that defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her "since she was unaware of any reason to do so for a period of 10 to 20 years." There is no proper analogy to *Haft* here. While in *Haft* the presence of a lifeguard on the scene would have provided a witness to the accident and probably prevented it, plaintiff asks us to speculate that if the DES taken by her mother had been labelled as an experimental drug, she would have recalled or recorded the name of the manufacturer and passed this information on to her daughter. It cannot be said here that the absence of evidence of causation was a "direct and foreseeable result" of defendants' failure to provide a warning label.

[12] Plaintiff relies upon three older cases for the proposition that the burden of proof may be shifted to defendants to explain the cause of an accident even if less than all of them are before the court. (*Benson v. Ross*

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.[13]

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.[14]

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. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.[15]

II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. Preliminarily, we briefly describe the procedure a drug manufacturer must follow before placing a drug on the market. Under federal law as it read prior to 1962, a new drug was defined as one "not generally recognized as ... safe." (§ 102, 76 Stat. 781 (Oct. 10, 1962).) Such a substance could be marketed only if a new drug application had been filed with the Food and Drug Administration and had become "effective." [16]If the agency

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(1906) 143 Mich. 452, 106 N.W. 1120; *Moore v. Foster* (1938) 182 Miss. 15, 180 So. 73; *Oliver v. Miles* (1927) 144 Miss. 852, 110 So. 666.) These cases do not relate to the shifting of the burden of proof; rather, they imposed liability upon one of two or more joint tortfeasors on the ground that they acted in concert in committing a negligent act. This theory of concerted action as a basis for defendants' liability will be discussed infra. In *Summers*, we stated that these cases were "straining" the concept of concerted action and that the "more reasonable" basis for holding defendants jointly liable when more than one of them had committed a tort and plaintiff could not establish the identity of the party who had caused the damage was the danger that otherwise two negligent parties might be exonerated. (*Summers*, 33 Cal. 2d 80, at pp. 84-85, 199 P.2d 1.)

[13] According to the RESTATEMENT, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (REST. 2D TORTS, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p. 446.)

[14] Defendants claim further that the effect of shifting the burden of proof to them to demonstrate that they did not manufacture the DES which caused the injury would create a rebuttable presumption that one of them made the drug taken by plaintiff's mother, and that this presumption would deny them due process because there is no rational basis for the inference.

[15] *Garcia v. Joseph Vince Co., supra*, 84 Cal. App. 3d 868, 148 Cal. Rptr. 843, relied upon by defendants, presents a distinguishable factual situation. The plaintiff in *Garcia* was injured by a defective saber. He was unable to identify which of two manufacturers had produced the weapon because it was commingled with other sabers after the accident. In a suit against both manufacturers, the court refused to apply the *Summers* rationale on the ground that the plaintiff had not shown that either defendant had violated a duty to him. Thus in *Garcia*, only one of the two defendants was alleged to have manufactured a defective product, and the plaintiff's inability to identify which of the two was negligent resulted in a judgment for both defendants. (*See also Wetzel v. Eaton, supra*, 62 F.R.D. 22.) Here, by contrast, the DES manufactured by all defendants is alleged to be defective, but plaintiff is unable to demonstrate which of the defendants supplied the precise DES which caused her injuries.

[16] A new drug application became "effective" automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to

determined that a product was no longer a "new drug," *i.e.*, that it was "generally recognized as ... safe," (21 U.S.C.A. § 321, subd. (p) (1)) it could be manufactured by any drug company without submitting an application to the agency. According to defendants, 123 new drug applications for DES had been approved by 1952, and in that year DES was declared not to be a "new drug," thus allowing any manufacturer to produce it without prior testing and without submitting a new drug application to the Food and Drug Administration.

With this background we consider whether the complaint states a claim based upon "concert of action" among defendants. 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." With respect to this doctrine, Prosser states that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. (¶) Express agreement is not necessary, and all that is required is that there be a tacit understanding...." (PROSSER, LAW OF TORTS (4th ed. 1971), sec. 46, p. 292.)

Plaintiff contends that her complaint states a cause of action under these principles. She alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings ... and other acts or omissions...." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

In our view, this litany of charges is insufficient to allege a cause of action under the rules stated above. The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques. These allegations 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, and that they substantially aided and encouraged one another in these omissions. The complaint charges also that defendants produced DES from a "common and mutually agreed upon formula," allowing pharmacists to treat the drug as a "fungible commodity" and to fill prescriptions from whatever brand of DES they had on hand at the time. It is difficult to understand how these allegations can form the basis of a cause of action for wrongful conduct by defendants, acting in concert. The formula for DES is a scientific constant. It is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must, with exceptions not relevant here, utilize the formula set forth in that compendium. (21 U.S.C.A. § 351, subd. (b).)

What the complaint appears to charge is defendants' parallel or imitative conduct in that they relied upon each others' testing and promotion methods. But such conduct describes a common practice in industry: a producer avails himself of the experience and methods of others making the same or similar products. Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

None of the cases cited by plaintiff supports a conclusion that defendants may be held liable for concerted tortious acts. They involve conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually

disapprove the application. If the agency had insufficient information to decide whether the drug was safe or had information that it was unsafe, the application was denied. (§ 505, 52 Stat. 1052 (June 25, 1938).) Since 1962, affirmative approval of an application has been required before a new drug may be marketed. (21 U.S.C.A. § 355, subd. (c).)

over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage,[17] or encouraged and assisted the person who directly caused the injuries by participating in a joint activity.[18]

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. There were, however, a number of Canadian blasting cap manufacturers which could have supplied the caps. 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 court 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. The court noted that this theory of liability applied to industries composed of a small number of units, and that what would be fair and reasonable with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers.[19]

Plaintiff attempts to state a cause of action under the rationale of *Hall*. She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and "concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards" for the drug. We have concluded above that allegations that defendants relied upon one another's testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

In the Fordham Comment, the industry-wide theory of liability is discussed and refined in the context of its applicability to actions alleging injuries resulting from DES. The author explains causation under that theory as follows, "[T]he industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable

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[17] *Weinberg Co. v. Bixby* (1921) 185 Cal. 87, 103, 196 P. 25, involved a husband who was held liable with his wife for wrongful diversion of flood waters although he had given his wife title to the land upon which the outlet causing the diversion was constructed. He not only owned land affected by the flood waters, but he was his wife's agent for the purpose of reopening the outlet which caused the damage. In *Meyer v. Thomas* (1936) 18 Cal. App. 2d 299, 305-306, 63 P.2d 1176, both defendants participated in the conversion of a note and deed of trust.

[18] In *Agovino v. Kunze* (1960) 181 Cal. App. 2d 591, 599, 5 Cal. Rptr. 534, a participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer. In *Loeb v. Kimmerle* (1932) 215 Cal. 143, 151, 9 P.2d 199, a defendant who encouraged another defendant to commit an assault was held jointly liable for the plaintiff's injuries. *Also see Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36.

[19] In discussing strict liability, the *Hall* court mentioned the drug industry, stating, "In cases where manufacturers have more experience, more information, and more control over the risky properties of their products than do drug manufacturers, courts have applied a broader concept of foreseeability which approaches the enterprise liability rationale." (345 F. Supp. 353 at p. 370.)

injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." (Fordham Comment, *supra*, at p. 997.)

The Comment proposes seven requirements for a cause of action based upon industry-wide liability,[20] and suggests that if a plaintiff proves these elements, the burden of proof of causation should be shifted to the defendants, who may exonerate themselves only by showing that their product could not have caused the injury.[21]

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. (345 F. Supp. at p. 378.) 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.[22] To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal. 3d 51, 65, 107 Cal. Rptr. 45, 507 P.2d 653.) But since 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.[23]

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

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[20] The suggested requirements are as follows: 1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product. 2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct. 3. A generically similar defective product was manufactured by all the defendants. 4. Plaintiff's injury was caused by this defect. 5. Defendants owed a duty to the class of which plaintiff was a member. 6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury. 7. All defendants were tortfeasors.

[21] The Fordham Comment takes exception to one aspect of the theory of industry-wide liability as set forth in *Hall*, *i.e.*, the conclusion that a plaintiff is only required to show by a preponderance of the evidence that one of the defendants manufactured the product which caused her injury. The Comment suggests that a plaintiff be required to prove by clear and convincing evidence that one of the defendants before the court was responsible and that this standard of proof would require that the plaintiff join in the action the producers of 75 or 80 percent of the DES prescribed for prevention of miscarriage. It is also suggested that the damages be apportioned among the defendants according to their share of the market for DES. (Fordham Comment, *supra*, 999-1000.)

[22] Federal regulations may specify the type of tests a manufacturer must perform for certain drugs (21 C.F.R. § 436.206 *et seq.*), the type of packaging used (§ 429.10), the warnings which appear on labels (§ 369.20), and the standards to be followed in the manufacture of a drug (§ 211.22 *et seq.*).

[23] *Abel v. Eli Lilly and Company*, the Michigan case referred to above which held that the plaintiffs had stated a cause of action against several manufacturers of DES even though they could not identify a particular manufacturer as the source of a particular injury, relied upon the theories of concerted action and alternative liability.

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) 24 Cal. 2d 453, 467-468, 150 P.2d 436, 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 RESTATEMENT comments that modification of the *Summers* rule may be necessary in a situation like that before us. (*See* fn. 16, *ante*.)

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." (24 Cal. 2d p. 462, 150 P.2d p. 441; *see also* REST. 2D TORTS, § 402A, com. c, pp. 349-350.) 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. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 501 P.2d 1153; *Beech Aircraft Corp. v. Superior Court* (1976) 61 Cal. App. 3d 501, 522-523, 132 Cal. Rptr. 541.) 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. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability. But we approach the issue of causation from a different perspective: we 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.[24]

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

[24] 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." (Fordham Comment, *supra*, at p. 94.)

demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.

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. In the present case, as we have see, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complaint against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. 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 (*Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226) or partial indemnity (*American Motorcycle Ass'n v. Superior Court* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899), 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. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can." (33 Cal. 2d at p. 88, 199 P.2d at p. 5.)

We are not unmindful of the practical problems involved in defining the market and determining market share,[25] 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.[26]

The judgments are reversed.

BIRD, C.J., and NEWMAN and WHITE, JJ., concur.

RICHARDSON, Justice, dissenting

I respectfully dissent. In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.

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

[25] Defendants assert that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent miscarriage and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative, and that the establishment of a time frame and area for market share would pose problems.

[26] The dissent concludes by implying the problem will disappear of 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.

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, a fact which prompted one recent commentator, in criticizing a substantially identical theory, to conclude that "Elimination of the burden of proof as to identification (of the manufacturer whose drug injured plaintiff) would impose a liability which would exceed absolute liability." (Coggins, *Industry-Wide Liability* (1979) 13 SUFFOLK L. REV. 980, 998, fn. omitted; *see also* pp. 1000-1001.) In my view, the majority's departure from traditional tort doctrine is unwise.

The applicable principles of causation are very well established. A leading torts scholar, Dean Prosser, has authoritatively put it this way: "An *essential* element of the plaintiff's cause of action for negligence, *or for that matter for any other tort*, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." (PROSSER, TORTS (4th ed. 1971) § 41, p. 236, italics added.) With particular reference to the matter before us, and in the context of products liability, the requirement of a causation element has been recognized as equally fundamental. "It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. Thus, for example, if recovery is sought from a manufacturer, *it must be shown that he actually was the manufacturer of the product which caused the injury*;..." (1 HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY (2d ed. 1974) § 1:41, p. 125, italics added; *accord*, PROSSER, *supra*, § 103, at pp. 671-672; 2 DOOLEY, MODERN TORT LAW (1977) § 32.03, p. 243.) Indeed, an inability to prove this causal link between defendant's conduct and plaintiff's injury has proven fatal in prior cases brought against manufacturers of DES by persons who were situated in positions identical to those of plaintiffs herein. (*See* *McCreery v. Eli Lilly & Co.* (1978) 87 Cal. App. 3d 77, 82, 150 Cal. Rptr. 730; *Gray v. United States* (D. Tex. 1978) 445 F. Supp. 337, 338.)

The majority now expressly abandons the foregoing traditional requirement of some causal connection between defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship.

According to the majority, in the present case plaintiffs have openly conceded that they are unable to identify the particular entity which manufactured the drug consumed by their mothers. In fact, plaintiffs have joined only five of the approximately two hundred drug companies which manufactured DES. Thus, the case constitutes far more than a mere factual variant upon the theme composed in *Summers v. Tice* (1948) 33 Cal. 2d 80, 199 P.2d 1, wherein plaintiff joined as codefendants the only two persons who could have injured him. As the majority must acknowledge, our *Summers* rule applies only to cases in which "it is proved that harm has been caused to the plaintiff by ... one of [the named defendants], but there is uncertainty as to which one has caused it,..." (REST. 2D TORTS, § 433B, subd. (3).) In the present case, in stark contrast, it remains wholly speculative and conjectural whether any of the five named defendants actually caused plaintiffs' injuries.

The fact that plaintiffs cannot tie defendants to the injury-producing drug does not trouble the majority for it declares that the *Summers* requirement of proof of actual causation by a named defendant is satisfied by a joinder of those defendants who have together manufactured "a substantial percentage" of the DES which has been marketed. Notably lacking from the majority's expression of its new rule, unfortunately, is any definition or guidance as to what should constitute a "substantial" share of the relevant market. The issue is entirely open-ended and the answer, presumably, is anyone's guess.

Much more significant, however, is the consequence of this unprecedented extension of liability. Recovery is permitted from a handful of defendants each of whom individually may account for a comparatively small share of the relevant market, so long as the aggregate business of those who have been sued is deemed "substantial." In other words, a particular defendant may be held proportionately liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries. Plaintiffs have strikingly capsulated their reasoning by insisting "that while one manufacturer's product may not have injured

a particular plaintiff, we can assume that it injured a different plaintiff and all we are talking about is a mere matching of plaintiffs and defendants." (Counsel's letter (Oct. 16, 1979) p. 3.) In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential. Furthermore, in bestowing on plaintiffs this new largess the majority sprinkles the rain of liability upon all the joined defendants alike those who may be tortfeasors and those who may have had nothing at all to do with plaintiffs' injury and an added bonus is conferred. Plaintiffs are free to pick and choose their targets.

The "market share" thesis may be paraphrased. Plaintiffs have been hurt by someone who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

* * *

Finally, I am disturbed by the broad and ominous ramifications of the majority's holding. The law review comment, which is the wellspring of the majority's new theory, conceding the widespread consequences of industry-wide liability, openly acknowledges that "The DES cases are only the tip of an iceberg." (Comment, *DES and a Proposed Theory of Enterprise Liability (1978)* 46 FORDHAM L. REV. 963, 1007.) Although the pharmaceutical drug industry may be the first target of this new sanction, the majority's reasoning has equally threatening application to many other areas of business and commercial activities.

Given the grave and sweeping economic, social, and medical effects of "market share" liability, the policy decision to introduce and define it should rest not with us, but with the Legislature which is currently considering not only major statutory reform of California product liability law in general, but the DES problem in particular. (*See* Sen. Bill No. 1392 (1979-1980 Reg. Sess.), which would establish and appropriate funds for the education, identification, and screening of persons exposed to DES, and would prohibit health care and hospital service plans from excluding or limiting coverage to persons exposed to DES.) An alternative proposal for administrative compensation, described as "a limited version of no-fault products liability" has been suggested by one commentator. (Coggins, *supra*, 13 SUFFOLK L. REV. at pp. 1019-1021.) Compensation under such a plan would be awarded by an administrative tribunal from funds collected "via a tax paid by all manufacturers." (P. 1020, fn. omitted.) In any event, the problem invites a legislative rather than an attempted judicial solution.

I would affirm the judgments of dismissal.

CLARK and MANUEL, JJ., concur.

Questions and Notes

1. As you will learn in the course of your law school career, law reviews are for the most part edited by law students. "Notes" and "Comments" are articles written by students; notes are usually an analysis of some recent important case, whereas "comments" usually suggest a change in the law. The court in this case relies heavily upon a student-written comment appearing in the *Fordham Law Review*. Do you think it appropriate that the supreme court of the most populous state in the nation should make substantial changes in the law based upon an approach suggested by someone who hasn't even completed law school?

2. The challenges of managing a large class action based on claims of personal injury have led many courts to reject the class action vehicle, even where the alternative is thousands of individual cases. Moreover, there are important due process limitations on what courts may do. For example, in *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the Supreme Court rejected a settlement-only class action brought by victims of asbestos exposure. The case is analyzed (and criticized) in S. Charles Neill, *The Tower of Babel Revisited: The U.S. Supreme Court Decertifies One of the Largest Mass Tort Classes in History*, 37 Washburn L.J. 793 (1998).

BROWN v. SUPERIOR COURT

44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988)

[*This case is significant both for its impact on the "market share" theory, and also because of its holdings with respect to product liability. The parts of the case dealing with product liability are excerpted in Chapter Six, § B. - ed.*]

MOSK, Justice

* * *

II. Sindell Issues

A. Breach of Express and Implied Warranty and Fraud

* * *

B. Joint and Several or Several Liability

The last issue we determine is whether the defendants found liable in a market share action are to be held jointly and severally liable for the judgment or whether, as defendants here assert, each defendant should be liable only for the portion of a plaintiff's damages that corresponds to the percentage of its share of the relevant market for DES.

The consequences of these methods of determining liability are markedly different. If such defendants are jointly and severally liable, a plaintiff may recover the entire amount of the judgment from any of the defendants joined in the action. Since the plaintiff is required under Sindell to join the manufacturers of only a substantial share of the appropriate market for DES, it follows that if joint liability were the rule, a defendant could be held responsible for a portion of the judgment that may greatly exceed the percentage of its market share. Under several liability, in contrast, because each defendant's liability for the judgment would be confined to the percentage of its share of the market, a plaintiff would not recover the entire amount of the judgment (except in the unlikely event that all manufacturers were joined in the action) but only the percentage of the sum awarded that is equal to the market shares of the defendants joined in the action. In the one case, it would be the plaintiff who would bear the loss resulting from the fact that some producers of DES that might have been found liable under the market share theory were not joined in the action (or if a defendant became insolvent), whereas in the other such losses would fall on the defendants. Since, as we pointed out in Sindell, there is little likelihood that all manufacturers of DES in the appropriate market would be amenable to suit, the adoption of one or the other basis for liability could significantly affect the amount of a plaintiff's recovery and, concomitantly, a defendant's liability.

* * *

In creating the market share doctrine, this court attempted to fashion a remedy for persons injured by a drug taken by their mothers a generation ago, making identification of the manufacturer impossible in many cases. We realized that in order to provide relief to an injured DES daughter faced with this dilemma, we would have to allow recovery of damages against some defendants which may not have manufactured the drug that caused the damage. To protect such defendants against excessive liability, we considered and rejected three separate theories of liability suggested by the plaintiff, and formulated, instead, the market share concept.

We explained the basis of the doctrine as follows: In order to decrease the likelihood that a manufacturer of DES would be held liable for injuries caused by products not of its making, and to achieve a reasonable approximation of its responsibility for injuries caused by the DES it produced, the plaintiff should be required to join in the action the manufacturers of a substantial share of the relevant DES market. If this were done, the injustice of shifting the burden of proof to defendants to exonerate themselves of responsibility for the plaintiff's injuries would be diminished. Each defendant would be held liable for the proportion of the judgment represented by its market share, and its overall liability for injuries caused by DES would approximate the injuries caused by the DES it manufactured. A DES manufacturer found liable under this approach would not be held responsible for injuries caused by another producer of the drug. The opinion acknowledged that only an approximation of a manufacturer's liability could be achieved by this procedure, but underlying our holding was a recognition that such a result was

preferable to denying recovery altogether to plaintiffs injured by DES.

It is apparent that the imposition of joint liability on defendants in a market share action would be inconsistent with this rationale. Any defendant could be held responsible for the entire judgment even though its market share may have been comparatively insignificant. Liability would in the first instance be measured not by the likelihood of responsibility for the plaintiff's injuries but by the financial ability of a defendant to undertake payment of the entire judgment or a large portion of it. A defendant that paid a larger percentage of the judgment than warranted by its market share would have the burden of seeking indemnity from other defendants (Code Civ. Proc., § 875; *American Motorcycle Association v. Superior Court* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899), and it would bear the loss if producers of DES that might have been held liable in the action were not amenable to suit, or if a codefendant was bankrupt. In short, the imposition of joint liability among defendant manufacturers in a market share action would frustrate Sindell's goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug.

This holding is consistent with the views of commentators who, with a few exceptions, have concluded that Sindell in effect held or should have held that defendants are not jointly liable for damages in a market share action. (Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution* (1985) 73 CAL. L. REV. 941, 957; Note, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation* (1981) 69 CAL. L. REV. 1179, 1194; Comment, *The Market Share Theory: Sindell, Contribution to Industry-Wide Liability* (1981) 19 HOUSTON L. REV. 107, 131-132; Note, *Products liability* (1981) 34 OKLA. L. REV. 843, 853; Note, *Market Share Liability: An Answer to the DES Causation Problem* (1981) 94 HARV. L. REV. 668, 673; Note, *DES: Judicial Interest Balancing and Innovation* (1981) 22 B.C. L. REV. 747, 770, 774.)

Finally, plaintiff proposes an alternate means to apportion liability among defendants. She suggests that if we conclude that joint liability is not appropriate, each defendant's liability should be "inflated" in proportion to its market share in an amount sufficient to assure that plaintiff would recover the entire amount of the judgment. While this ingenious approach would not be as unjust to defendants as joint liability, we decline to adopt the proposal because it would nonetheless represent a retreat from Sindell's attempt to achieve as close an approximation as possible between a DES manufacturer's liability for damages and its individual responsibility for the injuries caused by the products it manufactured.

The judgment of the Court of Appeal is affirmed.

[All concur.]

Questions and Notes

1. One commentator has expressed skepticism concerning the court's ability to make meaningful (and fair) determinations of "market share." *See* Fischer, *Products Liability - An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981).

2. There is considerable debate about the best way to handle mass tort cases, of which the DES cases are but an example. Should the plaintiffs (and defendants) be given individual treatment, or is some sort of "assembly-line" approach best for all concerned? For a review, *see* Symposium, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation*, 1989 U. ILL. L. REV. 35.

3. There are even efforts to apply market share liability theories against illegal drug dealers. *See* Kevin G. Meeks, *From Sindell to Street Pushers: Imposing Market Share Tort Liability on Illegal Drug Dealers*, 33 Ga. L. Rev. 315 (1998).

b. Loss of a Chance

DILLON v. TWIN STATE GAS & ELECTRIC CO.

163 A. 111 (N.H. 1932)

Action for negligently causing the death of the plaintiff's intestate, a boy of 14. A jury trial resulted in a disagreement.

The defendant maintained wires to carry electric current over a public bridge in Berlin. In the construction of the bridge there were two spans of girders on each side between the roadway and footway. In each span the girders at each end sloped upwards towards each other from the floor of the bridge until connected by horizontal girders about nineteen feet above the floor.

The wires were carried above the framework of the bridge between the two rows of girders. To light the footway of the bridge at its center a lamp was hung from a bracket just outside of one of the horizontal girders and crossing over the end of the girder near its connection with a sloping girder. Wires ran from a post obliquely downward to the lamp and crossed the horizontal girder a foot or more above it. The construction of the wire lines over and upon the bridge is termed aerial. The wires were insulated for weather protection but not against contact.

The decedent and other boys had been accustomed for a number of years to play on the bridge in the daytime, habitually climbing the sloping girders to the horizontal ones, one which they walked and sat and from which they sometimes dived into the river. No current passed through the wires in the daytime except by chance.

The decedent, while sitting on a horizontal girder at a point where the wires from the post to the lamp were in front of him or at his side, and while facing outwards from the side of the bridge, leaned over, lost his balance, instinctively threw out his arm, and took hold of one of the wires with his right hand to save himself from falling. The wires happened to be charged with a high voltage current at the time and he was electrocuted. Further facts appear in the opinion.

* * *

ALLEN, J.

The bridge was in the compact part of the city. It was in evidence that at one time the defendant's construction foreman had complained to the city marshal about its use by boys as a playground, and in his complaint had referred to the defendant's wires. The only wires were those over the bridge superstructure. From this evidence and that relating to the extent of the practice for boys to climb up to and upon the horizontal girders an inference that the defendant had notice of the practice was reasonable. The occasion for the complaint might be found due to apprehension of danger from proximity to the wires. This only came about from climbing upon the upper framework of the bridge. There was no suggestion of danger in any use of the bridge confined to the floor level.

The use of the girders brought the wires leading to the lamp close to those making the use, and as to them it was in effect the same as though the wires were near the floor of the bridge. While the current in the wires over the bridge was mechanically shut off during the daytime, other wires carried a commercial current, and there was a risk from many causes of the energizing of the bridge wires at any time. It is claimed that these causes could not be overcome or prevented. If they could not, their consequences might be. Having notice of the use made of the girders, and knowing the chance of the wires becoming charged at any time, the defendant may not say that it was not called upon to take action until the chance happened. Due care demanded reasonable measures to forestall the consequences of a chance current if the chance was too likely to occur to be ignored.

* * *

When it is said that care is owing only towards those with whom there is a relationship, the problem of determining if a relationship exists remains. It is not solved by rigid and arbitrary classifications between those entitled, and those not entitled, to receive care. "The rule of reasonable conduct is applied in this jurisdiction ... to show the extent of an existing relation.... It is a reasonable rule because it only calls for reasonable conduct." *McCaffrey v. Company, supra,* page 51 of 80 N.H., 114 A. 395, 398. And the rule goes even farther and serves to show the existence of a relation as well as its extent. Reasonableness is as well a test of the requirement of conduct as a matter of law as of its character, as a matter of fact.

* * *

In passing upon the issue of reasonableness, relative and comparative considerations are made. In general, when the danger is great and the wrongful conduct of the injured person is not serious, it is reasonable for the law to find a relationship and to impose a duty of protection. A defendant in his own interest causing dangerous forces to operate or dangerous conditions to exist should reasonably protect those likely to be

exposed to them and not reasonably in fault for the exposure.

Standing of reasonableness may change in changing conditions and changing attitudes towards the conditions. But the principle of reasonable conduct remains unchanged as the test of civil liability, in the absence of special rules. It is because of such changes and because of the elements of reasonableness which resolve into opinion that differences and conflict of rules come about. But it is a difference of application and not a principle.

* * *

"The object of the law being to safeguard and protect the various rights in land, it is obviously going quite far enough to limit the immunity to the one whose rights have been invaded. Nor does logic or justice require more. A trespass is an injury to the possession; and, as it is only he whose possession is disturbed who can sue therefor, so it should be that he, alone, could assert the unlawful invasion when suit is brought by an injured trespasser. One should not be allowed `to defend an indefensible act' by showing that the party injured was engaged in doing something which, as to a third person, was unlawful." *Humphrey v. Company*, 100 Vt. 414, 139 A. 440, 442, 56 A.L.R. 1011.

Authority is understood to be nearly unanimous in support of this view.

* * *

The circumstances of the decedent's death give rise to an unusual issue of its cause. In leaning over from the girder and losing his balance he was entitled to no protection from the defendant to keep from falling. Its only liability was in exposing him to the danger of charged wires. If but for the current in the wires he would have fallen down on the floor of the bridge or into the river, he would without doubt have been either killed or seriously injured. Although he died from electrocution, yet, if by reason of his preceding loss of balance he was bound to fall except for the intervention of the current, he either did not have long to live or was to be maimed. In such an outcome of his loss of balance, the defendant deprived him, not of a life of normal expectancy, but of one too short to be given pecuniary allowance, in one alternative, and not of normal, but of limited, earning capacity, in the other.

If it were found that he would have thus fallen with death probably resulting, the defendant would not be liable, unless for conscious suffering found to have been sustained from the shock. In that situation his life or earning capacity had no value. To constitute actionable negligence there must be damage, and damage is limited to those elements the statute prescribes

If it should be found that but for the current he would have fallen with serious injury, then the loss of life or earning capacity resulting from the electrocution would be measured by its value in such injured condition. Evidence that he would be crippled would be taken into account in the same manner as though he had already been crippled.

His probable future but for the current thus bears on liability as well as damages. Whether the shock from the current threw him back on the girder or whether he would have recovered his balance, with or without the aid of the wire he took hold of, if it had not been charged, are issues of fact, as to which the evidence as it stands may lead to difference conclusions.

Exception overruled. All concurred.

Questions and Notes

Suppose the jury were convinced that there was a 30% chance that, but for the electrified wire, the plaintiff would have landed in the river and floated to safety; but a 70% chance that he would have landed on the rocks and been killed. What result?

MOHR V. GRANTHAM, 172 Wash. 2d 844, 262 P.3d 490 (2011)

OWENS, J.

Linda Mohr suffered a trauma-induced stroke and is now permanently disabled. She and her husband, Charles, claim that negligent treatment by her health care providers diminished her

chances of avoiding or greatly minimizing her disability. In other words, they claim that negligence caused Mrs. Mohr a loss of the chance of a better outcome. *In Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wash.2d 609, 611, 614, 664 P.2d 474 (1983) (Dore, J., lead opinion), this court recognized the lost chance doctrine in a survival action when the plaintiff died following the alleged failure of his doctor to timely diagnose his lung cancer. This case compels consideration of whether, in the medical malpractice context, there is a cause of action for a lost chance, even when the ultimate result is some serious harm short of death. We hold that there is such a cause of action and, accordingly, reverse the order of summary judgment.

FACTS

In Richland, Washington, on the afternoon of August 31, 2004, Mrs. Mohr suffered a hypoglycemic event that caused her to run her car into a utility pole at approximately 45 m.p.h. She was taken by ambulance to the emergency room at Kadlec Medical Center (KMC). Having visible lacerations on her face from the car accident, Mrs. Mohr was given a neurological assessment upon arrival, at around 4:00 p.m., and a computerized tomography (CT) scan of her brain about an hour later. These tests were overseen or authorized by Dr. Dale Grantham, who was charged with Mrs. Mohr's care at KMC on August 31. The results were normal.

Following those neurological tests, however, Mrs. Mohr reported and was observed to have neurological symptoms, including being wobbly on her feet and having severe pain after being administered pain medication.[26] Dr. Grantham informed one of Mrs. Mohr's physician sons, Dr. Brandt Mohr, by phone that he would carry out another neurological assessment before discharging her. He did not. Instead, he prescribed a narcotic, Darvocet, and sent Mrs. Mohr home with her husband. At that point, Mrs. Mohr could not walk herself to or from the car and had to be carried to bed by her husband when they arrived home. The Mohrs were not given discharge instructions that included specific information about head injuries.

Mrs. Mohr was again transported to KMC by ambulance just after 7:00 a.m. on September 1, 2004, because her husband was concerned that she remained very lethargic through the night. Dr. Brian Dawson was the attending emergency room physician that morning. By around 9:30 a.m., Mrs. Mohr was diagnosed as having a stroke. Specifically, she was first found to have an "evolving infarct ... in the right middle cerebral artery territory," Clerk's Papers (CP) at 119, which relates to a cause of a stroke.[27] A magnetic resonance imaging (MRI) examination, performed shortly after 9:30 a.m., confirmed that Mrs. Mohr was in fact having a stroke.[28] However, Dr. Dawson did not provide any anticoagulant or antithrombotic treatment or therapy. Around 11:30 a.m. Mrs. Mohr was transferred to the intermediate care unit, under the care of Dr. Brooks Watson.

Before the transfer, Mrs. Mohr's two physician sons had arrived at KMC to be by her side. They tried to get both Dr. Dawson and then, after her transfer, Dr. Watson to order a CT angiogram. A CT angiogram was not done until 2:30 p.m., after the Mohr sons had Dr. Watson repeatedly paged. Then, although the results were available at 3:27 p.m., Dr. Watson was not located or informed until 4:50 p.m. that the CT angiogram showed a dissected carotid artery. He still did not order anyone to administer anticoagulant therapy, antiplatelet agents, or any other treatment. Dr. Watson had prescribed aspirin around 2:00 p.m. but did not order its immediate administration.

Mrs. Mohr's sons finally arranged a transfer and transport to Harborview Medical Center. Dr. Watson signed the transfer form as a formality. Only shortly before her transport at 6:00 p.m. on September 1, 2004, was Mrs. Mohr finally given aspirin, though it had to be administered in suppository form because, by then, she could no longer swallow.

[26] The Mohrs also allege that Mrs. Mohr reported some numbness but that it was not recorded until the following day, when the hospital records indicate that "some numbness in her left hand ... has persisted." Clerk's Papers (CP) at 122.

[27] An "infarct" is "an area of coagulation necrosis in a tissue ... resulting from obstruction of the local circulation by a thrombus [(blood clot)] or embolus [(foreign particle circulating in the blood)]." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1157 (2002). A known cause of strokes is "formation of an embolus or thrombus that occludes an artery." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1847 (18th ed. 1997).

[28] Mrs. Mohr's medical records indicate that the "MRI ... revealed a right frontoparietal CVA." CP at 123. "CVA" is an abbreviation for a "cerebrovascular accident," also known as a stroke. Taber's, supra, at 350.

Mrs. Mohr is now permanently brain damaged; a quarter to a third of her brain tissue was destroyed. In particular, the portions of her brain that were damaged are involved with motor control, sensation, and spatial reasoning.

Mrs. Mohr and her husband filed suit, claiming that Mrs. Mohr received negligent treatment, far below the recognized standard of care. They argue that the doctors' negligence substantially diminished her chance of recovery and that, with nonnegligent care, her disability could have been lessened or altogether avoided. The Mohrs' claim relies, at least in part, on a medical malpractice cause of action for the loss of a chance. In support of their claim, the Mohrs presented the family's testimony, including her two sons who are doctors, and the testimony of two other doctors, Kyra Becker and A. Basil Harris. The testimony included expert opinions that the treatment Mrs. Mohr received violated standards of care and that, had Mrs. Mohr received nonnegligent treatment at various points between August 31 and September 1, 2004, she would have had a 50 to 60 percent chance of a better outcome. The better outcome would have been no disability or, at least, significantly less disability.

On April 16, 2009, the Benton County Superior Court granted summary judgment for the defendants on the basis that the Mohrs did not show "but for" causation and the hesitancy of the court to expand *Herskovits* to the facts of this case. The Mohrs appealed, and the Court of Appeals certified the case for our review.

ISSUES

1. In the medical malpractice context, is there a cause of action for a lost chance of a better outcome?

2. Did the trial court properly grant summary judgment for all defendants under CR 56(c)?

ANALYSIS

1. *Lost Chance of a Better Outcome*

The medical malpractice statute requires the same elements of proof as traditional tort elements of proof: duty, breach, injury, and proximate cause. RCW 7.70.040. Whether there is a cause of action for a lost chance of a better outcome in the medical malpractice context is a question of law, which we review de novo. *Berger v. Sonneland*, 144 Wash.2d 91, 103, 26 P.3d 257 (2001). The standard formulation for proving proximate causation[29] in tort cases requires, "first, a showing that the breach of duty was a cause in fact of the injury, and, second, a showing that as a matter of law liability should attach." *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 475-76, 656 P.2d 483 (1983). In a medical malpractice case, for example, a plaintiff would traditionally seek to prove "cause in fact" by showing "that he or she would not have been injured but for the health care provider's failure to use reasonable care." *Hill v. Sacred Heart Med. Ctr.*, 143 Wash.App. 438, 448, 177 P.3d 1152 (2008) (citing McLaughlin v. Cooke, 112 Wash.2d 829, 837, 774 P.2d 1171 (1989)). However, as the plurality noted in *Herskovits*, "[t]he word 'cause' has a notoriously elusive meaning (as the writings on legal causation all agree)." 99 Wash.2d at 635 n. 1, 664 P.2d 474 (Pearson, J., plurality opinion). For this reason, and in service of underlying tort principles, this court and others have recognized some limited exceptions to the strict tort formula, including recognition of lost chance claims. *See, e.g., Id.* at 619, 664 P.2d 474 (Dore, J., lead opinion), 634-35 (Pearson, J., plurality opinion).

Herskovits involved a survival action following an allegedly negligent failure to diagnose lung cancer. Over the course of a year, Leslie *Herskovits* repeatedly sought treatment for persistent chest pains and a cough, for which he was prescribed only cough medicine. *Id.* at 611, 664 P.2d 474 (Dore, J., lead opinion). When he finally sought another medical opinion, *Herskovits* was diagnosed with lung cancer within three weeks. *Id.* His diagnosing physician testified that the delay in diagnosis likely diminished *Herskovits*'s chance of long-term survival from 39 percent to 25 percent. *Id.* at 612, 664 P.2d 474. Less than two years after his diagnosis, then 60 years old, *Herskovits* died. *Id.* at 611, 664 P.2d 474. The trial court dismissed the case on summary judgment on the basis that *Herskovits*'s estate, which brought suit, failed to establish a prima facie case of proximate cause: it could not show that but for his doctor's negligence

[29] To answer the question of whether there is a cause of action for a loss of a chance of a better outcome, we focus on the injury and proximate cause elements. At the outset, however, we note that, in order to prevail in a medical malpractice claim, a plaintiff still also bears the exacting burden to prove that a health care provider breached the standard of care.

he would have survived because he "probably would have died from lung cancer even if the diagnosis had been made earlier." *Id.* Though divided by different reasoning, this court reversed the trial court, finding that *Herskovits*'s lost chance was actionable.

The lead opinion, signed by two justices, and the concurring opinion, which garnered a plurality, agreed on the fundamental bases for recognizing a cause of action for the loss of a chance. The lead opinion explained: "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." *Id.* at 614, 664 P.2d 474. The plurality similarly noted that traditional all-or-nothing causation in lost chance cases " 'subverts the deterrence objectives of tort law.' " *Id.* at 634, 664 P.2d 474 (Pearson, J., plurality opinion) (quoting Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1377 (1981)). Both opinions found that "the loss of a less than even chance is a loss worthy of redress." *Id.* With emphasis, the lead opinion agreed, stating that " '[n]o matter how small that chance may have been--and its magnitude cannot be ascertained--no one can say that the chance of prolonging one's life or decreasing suffering is valueless.' " *Id.* at 618, 664 P.2d 474 (Dore, J., lead opinion) (quoting *James v. United States*, 483 F.Supp. 581, 587 (N.D.Cal.1980)).

The lead and plurality opinions split over how, not whether, to recognize a cause of action. Drawing from other jurisdictions, especially the Pennsylvania Supreme Court's holding in *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978), the lead opinion held that the appropriate framework for considering a lost chance claim was with a "substantial factor" theory of causation. The court summarized that "once a plaintiff has demonstrated that the defendant's acts or omissions have increased the risk of harm to another, such evidence furnishes a basis for the jury to make a determination as to whether such increased risk was in turn a substantial factor in bringing about the resultant harm." *Herskovits*, 99 Wash.2d at 616, 664 P.2d 474 (additionally noting the *Hamil* court's reliance on the Restatement (Second) of Torts § 323 (1965), which provides that one who renders services to another, necessary for the protection of that person, is liable if "his failure to exercise [reasonable] care increases the risk of [physical] harm").[30] The "substantial factor test" is an exception to the general rule of proving but for causation and requires that a plaintiff prove that the defendant's alleged act or omission was a substantial factor in causing the plaintiff's injury, even if the injury could have occurred anyway. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wash.App. 675, 684, 183 P.3d 1118 (2008).

Rather than looking to the causation element, the plurality opinion in *Herskovits* focused instead on the nature of the injury. *Herskovits*, 99 Wash.2d at 634, 664 P.2d 474 (Pearson, J., plurality opinion) ("[T]he best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury."). The plurality noted among its concerns about the "all or nothing" traditional tort approach to recovery that it "creates pressure to manipulate and distort other rules affecting causation and damages in an attempt to mitigate perceived injustices." *Id.* In part, this characterizes what the *Herskovits* lead opinion does by prescribing that causation in all lost chance cases is to be examined under the substantial factor doctrine. The plurality found it more analytically sound to conceive of the injury as the lost chance. *Id.*

Though this court has not reconsidered or clarified the rule of *Herskovits* in the survival action context or, until now, considered whether the rule extends to medical malpractice cases where the ultimate harm is something short of death, the *Herskovits* majority's recognition of a cause of action in a survival action has remained intact since its adoption. "Washington recognizes loss of chance as a compensable interest." *Shellenbarger v. Brigman*, 101 Wash.App. 339, 348, 3 P.3d 211 (2000); see Zueger v. Pub. Hosp. Dist. No. 2, 57 Wash.App. 584, 591, 789 P.2d 326 (1990) (finding that the *Herskovits* "plurality represents the law on a loss of the chance of survival"); 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4. 10, at 155-56, § 15.32, at 488

[30] While recognizing the lost chance doctrine, the most recentRestatement asserts that the reliance by many courts on § 323 of theRestatement (Second) as support for the doctrine is misplaced. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n (2010). The reporter's note explains that § 323 addressed affirmative duties, not causation or the nature of injury.

(3d ed. 2006) ("Washington courts recognize the doctrine of 'loss of a chance' as an exception to a strict application of the but-for causation test in medical malpractice cases."). In Shellenbarger, the Court of Appeals reversed summary judgment of a medical malpractice claim of negligent failure to diagnose and treat lung disease from asbestos exposure in its early stages. 101 Wash.App. at 342, 3 P.3d 211. Expert witnesses testified that had Shellenbarger received nonnegligent testing and early diagnosis, which would have led to treatment, he would have "had a 20 percent chance that the disease's progress would have been slowed and, accordingly, he would have had a longer life expectancy." *Id.* at 348, 3 P.3d 211. The court concluded, "We find no meaningful difference between this and *Herskovits*' lost chance of survival." *Id.* at 349, 3 P.3d 211.

Washington courts have, however, generally declined to extend *Herskovits* to other negligence claims. See, e.g., *Daugert v. Pappas*, 104 Wash.2d 254, 260-62, 704 P.2d 600 (1985) (declining to apply *Herskovits* in a legal malpractice claim); *Fabrique*, 144 Wash.App. at 685, 183 P.3d 1118 (following *Daugert* and finding "no authority supporting the application of the 'substantial factor' definition of proximate cause to a negligence or strict liability action involving a contaminated food product"); *Sorenson v. Raymark Indus., Inc.*, 51 Wash.App. 954, 957, 756 P.2d 740 (1988) (distinguishing *Herskovits* from an asbestos exposure claim that the plaintiff's risk of cancer was increased). Such limitation is common: "[T]he courts that have accepted lost opportunity as cognizable harm have almost universally limited its recognition to medical-malpractice cases." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n at 356-57 (2010).

Herskovits has been widely cited as an authority by other state courts and in journal articles for recognizing a cause of action in lost chance cases. See, e.g., *Matsuyama v. Birnbaum*, 452 Mass. 1, 16, 890 N.E.2d 819 (2008); *McMackin v. Johnson County Healthcare Ctr.*, 2003 WY 91, ¶ ¶ 16-17, 73 P.3d 1094, 1100, adhered to on reh'g, 2004 WY 44, 88 P.3d 491; Tory A. Weigand, Loss *of Chance in Medical Malpractice*: *The Need for Caution*, 87 MASS. L.REV. 3, 9 (2002). Since *Herskovits*, the majority of states that have considered the lost chance doctrine have adopted it, although with varying rationales. Matsuyama, 452 Mass. at 10 n. 23, 890 N.E.2d 819 (listing 20 states and the District of Columbia that have recognized the lost chance doctrine); see Weigand, supra, at 7-10. Several states have rejected the doctrine. *Matsuyama*, 452 Mass. at 10 n. 23, 890 N.E.2d 819 (listing 10 states that have declined to adopt the doctrine). And others have not yet reviewed the issue or have declined to reach the question. *Id.*

The rationales underpinning the lost chance doctrine have generally been applied the same in wrongful death claims and medical malpractice claims where the ultimate harm is something short of death. See, e.g., *Shellenbarger*, 101 Wash.App. at 349, 3 P.3d 211. In *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994), the Kansas Supreme Court recognized a cause of action for loss of chance of a better outcome. The court observed that many jurisdictions are like Kansas, in that the issue has only come up in a loss of survival case or a loss of a better recovery case.... "We have found no authority or rational argument which would apply the loss of chance theory solely to survival actions or solely to loss of a better recovery actions and not to both." *Id.* at 209-10, 873 P.2d 175. *But cf. Weymers v. Khera*, 454 Mich. 639, 653, 563 N.W.2d 647 (1997) ("we reject scrapping causation (the bedrock of our tort law) in negligence cases where the injury alleged by the plaintiff is something less than death").[31] We find no persuasive rationale to distinguish *Herskovits* from a medical malpractice claim where the facts involve a loss of chance of avoiding or minimizing permanent disability rather than death. To limit *Herskovits* to cases that result in death is arbitrary; the same underlying principles of deterring negligence and compensating for injury apply when the ultimate harm is permanent disability.

We note that, significantly, nothing in the medical malpractice statute precludes a lost chance cause of action. In relevant part, chapter 7.70 RCW provides that, in order to prove "that injury resulted from the failure of the health care provider to follow the accepted standard of care," a plaintiff must establish:

[31] The Restatement characterizes the *Weymers* holding as "without any good explanation." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 Reporter's Note cmt. n at 375.

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040. The chapter does not define "proximate cause" or "injury." RCW 7.70.020.

The principal arguments against recognizing a cause of action for loss of a chance of a better outcome are broad arguments, similar to those raised when *Herskovits* was decided: concerns of an overwhelming number of lawsuits and their impact on the health care system; distaste for contravening traditional tort law, especially regarding causation; discomfort with the reliance on scientific probabilities and uncertainties to value lost opportunities. See Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. MEM. L.REV. 491, 506 (1998); *Matsuyama*, 452 Mass. at 15, 890 N.E.2d 819 (noting criticisms of the doctrine, namely that it "upends the long-standing preponderance of the evidence standard; alters the burden of proof in favor of the plaintiff; undermines the uniformity and predictability central to tort litigation; results in an expansion of liability; and is too complex to administer") However, none of these arguments effectively distinguish the Mohrs' claim from *Herskovits* and seem instead to agitate for its overruling. Now nearly 30 years since *Herskovits* was decided, history assures us that *Herskovits* did not upend the world of torts in Washington, as demonstrated by the few cases relying on *Herskovits* that have been heard by Washington appellate courts.

We hold that *Herskovits* applies to lost chance claims where the ultimate harm is some serious injury short of death. We also formally adopt the reasoning of the *Herskovits* plurality. Under this formulation, a plaintiff bears the burden to prove duty, breach, and that such breach of duty proximately caused a loss of chance of a better outcome. This reasoning of the *Herskovits* plurality has largely withstood many of the concerns about the doctrine, particularly because it does not prescribe the specific manner of proving causation in lost chance cases. Rather, it relies on established tort theories of causation, without applying a particular causation test to all lost chance cases. Instead, the loss of a chance is the compensable injury.

The significant remaining concern about considering the loss of chance as the compensable injury, applying established tort causation, is whether the harm is too speculative. We do not find this concern to be dissuasive because the nature of tort law involves complex considerations of many experiences that are difficult to calculate or reduce to specific sums; yet juries and courts manage to do so. We agree that "[s]uch difficulties are not confined to loss of chance claims. A wide range of medical malpractice cases, as well as numerous other tort actions, are complex and involve actuarial or other probabilistic estimates." *Matsuyama*, 452 Mass. at 18, 890 N.E.2d 819. Moreover, calculation of a loss of chance for a better outcome is based on expert testimony, which in turn is based on significant practical experience and "on data obtained and analyzed scientifically ... as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff's case." *Id.* at 17, 890 N.E.2d 819. Finally, discounting damages responds, to some degree, to this concern.

In *Herskovits*, both the lead and concurring opinions discussed limiting damages. 99 Wash.2d at 619, 664 P.2d 474 (Dore, J., lead opinion), 635 (Pearson, J., plurality opinion). This is a common approach in lost chance cases, responsive in part to the criticism of holding individuals or organizations liable on the basis of uncertain probabilities. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n at 356 ("Rather than full damages for the adverse outcome, the plaintiff is only compensated for the lost opportunity. The lost opportunity may be thought of as the adverse outcome discounted by the difference between the ex ante probability of the outcome in light of the defendant's negligence and the probability of the outcome absent the defendant's negligence."). Treating the loss of a chance as the cognizable injury "permits plaintiffs to recover for the loss of an opportunity for a better outcome, an interest that we agree should be compensable, while providing for the proper valuation of such an interest." *Lord v. Lovett*, 146 N.H. 232, 236, 770 A.2d 1103 (2001). In particular, the *Herskovits* plurality adopted a proportional damages

approach, holding that, if the loss was a 40 percent chance of survival, the plaintiff could recover only 40 percent of what would be compensable under the ultimate harm of death or disability (i.e., 40 percent of traditional tort recovery), such as lost earnings. *Herskovits*, 99 Wash.2d at 635, 664 P.2d 474 (Pearson, J., plurality opinion) (citing, King, supra, 90 YALE L.J. at 1382). This percentage of loss is a question of fact for the jury and will relate to the scientific measures available, likely as presented through experts. Where appropriate, it may otherwise be discounted for margins of error to further reflect the uncertainty of outcome even with a nonnegligent standard of care. See King, *supra*, 28 U. MEM. L.REV. at 554-57 ("conjunction principle").

We find that the *Herskovits* plurality has withstood the broad policy criticisms raised against it and comports with the medical malpractice statute. We find no meaningful basis to distinguish permanent disability from death for the purposes of raising a loss of chance claim. Accordingly, we hold that *Herskovits* applies to medical malpractice cases that result in harm short of death and formally adopt the rationale of the plurality opinion that the injury is the lost chance. For the reasons discussed next, as it relates to the facts of this case, we reverse the order of summary judgment.

2. *Summary Judgment*

An order granting summary judgment is reviewed de novo. Rivas v. Overlake Hosp. Med. Ctr., 164 Wash.2d 261, 266, 189 P.3d 753 (2008). Summary judgment "shall be rendered forthwith if ... there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). We review the evidence in the light most favorable to the nonmoving party. Miller v. Jacoby, 145 Wash.2d 65, 71, 33 P.3d 68 (2001).

Interpreting the facts in the light most favorable to the Mohrs, they have made a prima facie case under the lost chance doctrine that, on August 31 and September 1, 2004, the respondents breached the recognized standard of care for treating a head trauma victim with Mrs. Mohr's symptoms and that their breaches caused Mrs. Mohr a diminished chance of a better outcome. The Mohrs presented the expert testimony of doctors Becker and Harris. Their testimony included opinions regarding breaches of the standard of care: that once given a narcotic, Mrs. Mohr should not have been discharged but observed overnight; that, had Mrs. Mohr been held overnight, her neurological deficits would have been earlier discovered to be a stroke; and that anticoagulants, antiplatelet agents, and general brain protective care reduce the damage caused by strokes. The expert testimony also included information regarding causation, including Dr. Becker's opinion that had Mrs. Mohr "received anti-thrombotic therapy there's at least a 50 to 60 percent chance that things could have had a better outcome.... Less disability, less neglect, less ... of the symptoms of right hemispheric stroke." CP at 225-26. Dr. Harris testified that had Mrs. Mohr received nonnegligent treatment at various points between August 31 and September 1, 2004, she would have had a 50 to 60 percent chance of a better outcome. This included the possibility, according to Dr. Harris, that Mrs. Mohr may have had no disability if she had been properly treated. We find, on this evidence, a prima facie showing of duty, breach, injury in the form of a lost chance, and causation.

* * *

CONCLUSION

We hold that there is a cause of action in the medical malpractice context for the loss of a chance of a better outcome. A plaintiff making such a claim must prove duty, breach, and that there was an injury in the form of a loss of a chance caused by the breach of duty. To prove causation, a plaintiff would then rely on established tort causation doctrines permitted by law and the specific evidence of the case. Because the Mohrs made a prima facie case of the requisite elements of proof, we reverse the order of summary judgment and remand to the trial court for further proceedings.

WE CONCUR: CHARLES W. JOHNSON, TOM CHAMBERS, MARY E. FAIRHURST, DEBRA L. STEPHENS, and CHARLES K. WIGGINS, Justices.

MADSEN, C.J. (dissenting).

A central tenet of tort liability for medical malpractice is that a plaintiff must prove a physician's acts or omissions caused a patient's actual physical or mental injury before liability will attach. The lost chance doctrine adopted by the majority punishes physicians for negligent acts or omissions that cannot be shown to have caused any actual physical or mental harm.

Because traditional tort justifications for imposing liability are missing, we should not extend a cause of action for a lost chance of a better outcome as a form of medical malpractice claim beyond its current application.

Black letter negligence law requires proof on a more probable than not basis that the injury was caused by the negligence of another. The majority holding rests on the fiction that the "injury" is actually the loss of a chance of a better outcome. This is semantic pretense. No matter how the cause of action is described, at the end of the day liability is based on no more than the mere possibility that the physician's negligence has caused harm, a result that conflicts with black letter law that "negligence in the air" is not actionable.

The majority claims that the tort principles of deterrence and compensation are served by adopting the doctrine. It is incorrect. Deterrence of negligence that does not cause actual harm is a meaningless proposition, and there can be no compensation of injury because the actual injury that occurs may be the result of the preexisting condition. Compensating plaintiffs for preexisting harm is not a legitimate goal of the tort system.

The majority's holding is also contrary to RCW 7.70.040. If the lost chance doctrine is to be accepted in this state, it should be through action of the legislature, which can consider the numerous public policy questions implicated by the doctrine that the majority never considers and, indeed, is not suitably in a position to consider.

The lost chance doctrine is also uniquely unfair because only the health care profession is exposed to liability under it. This court, like others, has refused to apply the basic doctrine against members of any other profession. If a lawyer is sued for malpractice, the plaintiff must prove proximate causation of real harm, but this is not true under the lost chance doctrine when a plaintiff sues a physician for negligent treatment that cannot be shown to have proximately caused real harm. The inequity is obvious.

* * *

J.M. JOHNSON, J. (dissenting).

The majority improperly extends *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wash.2d 609, 664 P.2d 474 (1983) to create a cause of action for Mrs. Linda Mohr and her husband against the emergency professionals and hospital that provided for her care after she crashed her own car. These medical professionals did not proximately cause the ultimate, sad injury Mrs. Mohr suffered--namely, a distal dissection of her right internal carotid artery and loss of brain tissue. Proximate cause is a required element under Washington's liability law (RCW 7.70.040). Because the majority creates a speculative cause of action that is beyond the express legislative mandate of RCW 7.70.040, I dissent.

* * *

ANALYSIS

A. *Standard of Review*

This case boils down to statutory interpretation. Because RCW 7.70.040 does not provide the cause of action the majority creates, its analysis and result are incorrect. Our legislature has simply not required the impossible of medical caregivers: to guarantee the best possible outcome for patients they help.

* * *

B. *Respondents Are Entitled to Judgment as a Matter of Law: the Mohrs Have Not Established the Statutorily Required Element of Proximate Cause*

The language of RCW 7.70.040 is plain and unambiguous. With respect to the issue raised in this motion for summary judgment, the health care provider's alleged failure to exercise the acceptable standard of care must be a "proximate cause of the injury complained of" before that health care provider may be subject to liability under chapter 7.70 RCW. Proximate cause is a necessary element of proof. RCW 7.70.040.

A "proximate cause" of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Stoneman v. Wick Constr. Co.*, 55 Wash.2d 639, 643, 349 P.2d 215 (1960). To establish proximate cause, the plaintiff must show both "cause in fact" (that the injury would not have occurred but for the act in question) and "legal causation." *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 753, 818 P.2d 1337 (1991). "Legal causation" depends on considerations of " 'logic, common sense, justice, policy, and precedent.' " King v. City of Seattle, 84 Wash.2d 239, 250, 525 P.2d 228 (1974) (quoting 1 THOMAS ATKINS STREET, THE FOUNDATION OF LEGAL LIABILITY 110 (1906)). It involves the "determination of whether liability should attach as a matter of law given the

existence of cause in fact." *Hartley v. State*, 103 Wash.2d 768, 779, 698 P.2d 77 (1985).

The injury complained of in this case is the distal dissection of Mrs. Mohr's right internal carotid artery, which led to a loss of brain tissue. The appellants offer no evidence or testimony, however, that Drs. Grantham, Dawson or Watson caused this injury. They have not established cause in fact. Consequently, the appellants have not made a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial: proximate cause. See *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Thus, there can be no "genuine issue as to any material fact," and the respondents are entitled to a "judgment as a matter of law." CR 56(c); *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

* * *

I CONCUR: GERRY L. ALEXANDER, Justice.

Questions and Notes

1. What threshold would you adopt as the plaintiff's burden of proof on the issue of causation?

2. Go back to *Dillon*. Assume the jury would find the probability of landing in water and swimming to safety was 70% and the chance of landing on the rocks (and death) was 30%. What result? Is that result consistent with your answer to the preceding question?

3. For a general discussion of the theory of loss of chance, *see* Michelle L. Truckor, *The Loss of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. Dayton L. Rev. 349 (1999).

4. Loss of a chance has been a continuing source of interest and commentary. *See* Joseph H., King, Jr., *"Reduction of Likelihood" Reformulation and other Retrofitting of the Loss-of-a-Chance Doctrine*. 28 U. Mem. L. Rev. 491 (1998).

c. Multiple Redundant Causes: The "Substantial Factor" Test

PURCELL v. ASBESTOS CORPORATION, LTD

153 Or. App. 415, 959 P.2d 89 (1998)

DEITS, Chief Judge.

Defendants Owens-Corning Fiberglas Corporation (Owens) and E.J. Bartells Company (Bartells) appeal and plaintiff cross-appeals from the judgment for plaintiff in this negligence and products liability action arising from an asbestos-related disease that plaintiff suffered as a result of exposure to products manufactured by defendants.[4] We affirm on the appeal and on the cross-appeal.

Plaintiff developed mesothelioma, a cancer of the lining of the lungs, as a result of inhaling airborne asbestos fibers. He was exposed to the asbestos during his 35-year employment with several employers at numerous job sites. During many of plaintiff's working years, asbestos was used commonly in fire-resistant products such as insulation products and wall board. According to expert testimony, inhaled asbestos fibers may lie dormant in the lungs and pleura for 10 to 60 years before developing into cancer. One asbestos-related disease expert testified that even one exposure to airborne asbestos fibers can cause mesothelioma.

Plaintiff's occupational exposure to airborne

[4] In the balance of this opinion, we will refer to the defendants "Owens" and "Bartells" individually and refer to them as "defendants" collectively. Plaintiff, John Purcell, died during the course of this litigation, and his surviving spouse has been substituted as a party. We nevertheless will refer to John Purcell as "plaintiff."

asbestos fibers began in 1955 at Jantzen Knitting Mills, where he worked as an apprentice machinist. As an apprentice, plaintiff was exposed to airborne asbestos fibers as he observed other workers apply formed half-rounds of insulation and powder, mixed with water to create asbestos "mud" or cement, which sealed the insulation around steam lines. Plaintiff also worked as an electrician for Allied Electric for about two years beginning in 1959, and for Bohm Electric from 1961 to 1973. Plaintiff was employed as an electrician by the Portland School District (school district) in 1973-74 and 1984-93. While working as an electrician, plaintiff was exposed to airborne asbestos fibers from multiple sources, including asbestos-containing sheet cement boards and dust from deteriorating heat and hot water pipe insulation at more than 100 sites. Those sites included schools, paper mills, shopping centers, jails, hotels, and manufacturing plants. Plaintiff stopped working in 1993, when he was diagnosed with mesothelioma.

During his many years of employment, plaintiff was exposed to several types of asbestos products. Bartells distributed two asbestos-containing product lines, Eagle-Picher cement and Johns-Manville cements and insulation. The Johns- Manville products were distributed from 1955 to 1972 and included Thermobestos and 85 percent Magnesium, which was a cement of 85 percent magnesium and 15 percent asbestos. From 1958 to 1972, Owens and Owens-Illinois, a subsidiary, manufactured and sold Kaylo, which was a calcium-silicate based product that was combined with asbestos. Kaylo was sold in formed blocks as an insulating material to be placed around steam pipes and hot water heaters. Kaylo cement, a loose material containing up to 100 percent asbestos, was mixed with water and applied in the joints and between blocks to secure and seal the insulation.

Plaintiff brought this action in November 1993, against Owens, Bartells and 16 other defendants, alleging strict products liability and negligence and seeking compensatory and punitive damages for personal injuries resulting from exposure to asbestos-containing materials. Plaintiff alleged, in relevant part: "E. J. Bartells Company ... was engaged in the manufacture, distribution and sale of asbestos-containing refractory, building and insulation materials. " ... "Owens-Corning Fiberglas was ... engaged in the manufacture, sale and distribution of asbestos-containing insulation and building materials. " ... "Defendants' asbestos products were unreasonably dangerous and defective in that: "1. Defendants did not provide sufficient or adequate warnings and/or instructions of the harm that could be caused by exposure to defendants' asbestos-containing products; "2. The asbestos-containing products of the defendants caused pulmonary disease and/or cancer if inhaled by individuals in their work place. "3. Individual workmen were not advised to utilize proper respiratory protection and were exposed to airborne asbestos fibers within their working environment."

The case proceeded to trial against 12 defendants, nine of which settled and one of which received a directed verdict in its favor. Bartells and Owens remained as defendants. The jury awarded plaintiff $307,000 in economic damages and $1.5 million in noneconomic damages against both defendants. It also awarded plaintiff $3 million in punitive damages against Owens. Pursuant to ORS 18.455 (1993), the court reduced the amount of the verdict against those defendants by the amount of the settlements between plaintiff and the other defendants.

Defendants first assign error to the denial of their motions for a directed verdict.[5] Owens asserts that plaintiff's proof was insufficient to establish "medical causation" under the proper legal standard. Additionally, both defendants contend that, even assuming that plaintiff's evidence was sufficient in that regard, he nevertheless failed to offer adequate proof of his exposure to their asbestos-containing products, as distinct from products of other manufacturers, to permit the inference that their products caused his disease.

We review the denial of a motion for a directed verdict by considering the evidence, including the inferences, in the light most favorable to plaintiff, the nonmoving party. *Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984). The verdict cannot be set aside "unless we can affirmatively say that there is no

[5] Plaintiff contends, on various grounds, that defendants did not adequately preserve those assignments of error or their arguments under them. We have considered plaintiff's arguments and conclude without discussion that defendants have adequately preserved their assignments and arguments.

evidence from which the jury could have found the facts necessary to establish the elements of plaintiff's cause of action." *Id.*; OR. CONST., Art. VII (Amended), s 3.

We turn first to the medical causation issue. Plaintiff's expert, Dr. Andrew Churg, is a pathologist who specializes in the diagnosis of mesothelioma. He testified that plaintiff's exposure to airborne asbestos fibers caused the disease. According to Churg, inhaled asbestos fibers have a latency period of from 10 to 60 years, and at least 15 years generally will elapse between the victim's initial exposure and the onset of mesothelioma. Additionally, Churg testified that a single exposure to asbestos fibers can cause mesothelioma, with each subsequent exposure exponentially increasing the risk of the disease. Thus, Churg concluded that all of plaintiff's exposure to asbestos fibers over the years "contributed to some degree" to his mesothelioma.

As noted above, Owens contends that plaintiff's evidence was insufficient to establish causation. According to Owens, plaintiff was required and failed to show that exposure to its products, in itself, caused plaintiff's mesothelioma or that plaintiff would not have suffered the disease in the absence of exposure to Owens' products. Owens reasons that, because plaintiff did not prove that his mesothelioma was not caused by exposure to the products of other asbestos manufacturers, the fact that plaintiff may have been exposed to an Owens' product is legally insufficient to support a finding of causation or liability against it. For the same reason, Owens also argues that Churg's testimony did not establish that exposure to Owens' products could have been the medical cause of the disease: It asserts that plaintiff's evidence did not show that those exposures were a "substantial factor" in causing the disease.

The Oregon Supreme Court articulated the "substantial factor" test as the standard for proving causation and for assessing the "respective liability of multiple defendants" in *McEwen v. Ortho Pharmaceutical*, 270 Or. 375, 528 P.2d 522 (1974). The plaintiff there ingested birth control pills manufactured by two defendants, neither of which contained warnings about possible side effects that left her blind in one eye. The plaintiff brought a products liability action against both manufacturers for failing to provide adequate warnings. The court stated that the "respective liability of multiple defendants depends upon whether the negligence of each was a substantial factor in producing the complained of harm. If both [defendants] were negligent and their negligence combined to produce plaintiff's injuries, then the negligence of [one] was concurrent with that of [the other] and does not insulate [the other] from liability. This is true although the negligent omissions of each defendant occurred at different times and without concerted action. Nor is it essential to ... liability that its negligence be sufficient to bring about plaintiff's harm by itself; it is enough that the [defendant] substantially contributed to the injuries eventually suffered by [the plaintiff]." *Id.* at 418, 528 P.2d 522. (Citations omitted; emphasis supplied.)

The trial court properly applied that causation standard here. Owens, Bartells and possibly others manufactured or distributed the asbestos in this case. Plaintiff's expert testified that any minute exposure to airborne asbestos fibers could cause mesothelioma and that, once plaintiff had been exposed, any subsequent exposures exponentially increased the likelihood of contracting the disease. Examining the evidence in the light most favorable to plaintiff, he was exposed at different times over the course of many years to the asbestos products of various manufacturers. Those exposures combined to create an increased risk of mesothelioma. Thus, if plaintiff was exposed to defendants' products, the jury could find that defendants substantially contributed to plaintiff's disease, thereby meeting the causation requirement.

Defendants assert that we should apply a more stringent variation of the substantial factor test to establish causation in asbestos cases, such as the "frequency, regularity, and proximity" test used in some other jurisdictions. Under that test, a plaintiff must show that he or she worked in proximity, on a regular basis, to asbestos products manufactured by a particular defendant. *See, e.g.*, *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir.1992); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir.1986). However, even the jurisdictions that follow the "frequency, regularity, and proximity" test apply it less rigidly when dealing with mesothelioma, because it can be caused by very minor exposures. *Tragarz*, 980 F.2d at 421; *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343, 177 Ill. Dec. 379, 603 N.E.2d 449, 460 (1992). As the court said in *Wehmeier v. UNR Industries, Inc.*, 213 Ill.App.3d 6, 157 Ill. Dec. 251, 572 N.E.2d 320, 337 (1991): "Where there is

competent evidence that one or a de minimus number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury."

In *Ingram v. AC&S, Inc.*, 977 F.2d 1332, 1343-44 (9th Cir.1992), the Ninth Circuit rejected the "frequency, regularity, or proximity" test as the standard of causation under Oregon law. In that case, a former insulator and machinist who contracted asbestosis sued several asbestos manufacturers and received favorable verdicts. The defendants appealed, contending that there was insufficient evidence of causation to support the verdict because the insulator worked for only a short time with the defendants' products and evidence showing the machinist's exposure was described as "somewhat scant." The court concluded in Ingram: "The more stringent test suggested by [the defendant] has no place in a jurisdiction such as Oregon which looks only to cause-in-fact ... . Under Oregon law, once asbestos was present in the workplace, it is the jury's task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff's injuries." *Id.* We agree with that understanding of Oregon law.

Defendants also argue that the Oregon Supreme Court's causation analysis in *Senn v. Merrell-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988), is applicable here. In that case, the plaintiff could not establish which of two defendant drug manufacturers supplied the vaccine that caused her injuries. Answering certified questions, the court concluded that it would not apply a theory of alternative liability where "neither defendant is able to produce exculpatory evidence," because such a theory would impose liability when the "probability of causation is 50 percent or less" under the plaintiff's evidence. *Id.* at 269, 751 P.2d 215. Defendants argue here that holding them liable in this case would do exactly that--impose liability when it is "less probable than not" that either party was responsible for plaintiff's mesothelioma.

Defendants' reliance on *Senn* is misplaced. There, only one defendant could have caused the plaintiff's harm because she used only one product. In this case, as in *McEwen*, multiple exposures to the products of more than one defendant could have combined to cause plaintiff's injury. We conclude that, in these circumstances, the proper inquiry under *McEwen* is whether defendants substantially contributed to plaintiff's injuries. 270 Or. at 418, 528 P.2d 522. In view of the medical evidence that a single exposure could have caused plaintiff's disease and that all exposures contributed to the likelihood of his contracting mesothelioma, a reasonable jury could find that the exposure to either or both of defendants' products was a substantial factor in causing plaintiff's disease.

Defendants further contend, however, that plaintiff failed to provide sufficient evidence to link their products to the work sites at which he sought to show that he was exposed to airborne asbestos fibers. Plaintiff worked at many sites, and his evidence was directed at showing that one or both of the defendants' products were located at various sites at the times that plaintiff worked there. The trial court held that plaintiff's proof was sufficient to go to the jury with respect to the Portland International Airport, various locations operated by the Portland School District, the Clackamas County Jail, the Cosmopolitan Motor Hotel, Mt. Hood Community College and Lloyd Center. We agree with the trial court in each instance.[6] Although the parties make detailed site-by-site arguments about the proof of plaintiff's exposures to defendants' products, it is unnecessary for us to engage in similar detail in our discussion, given the legal standard that we have held applies to the question. Plaintiff's evidence sufficed to allow the jury to infer that he was exposed to asbestos-containing products of both defendants, singly or in combination, at each of the work locations that the trial court allowed the jury to consider and that the exposures began in 1959 and continued until at least the 1980s. The exposures at some of the sites were recurrent. The number of discrete sites at which plaintiff's evidence showed that he was exposed to defendants' products in his work for the school district alone exceeded 100.

Defendants make extensive and detailed arguments challenging the adequacy of plaintiff's evidence that he was exposed to the products of either or both of them at various places where he worked. However, defendants' arguments fail to demonstrate that the proof was insufficient but amount instead to attacks on the weight of the evidence. Those arguments should have been and probably were addressed to the jury. However,

[6] The trial court also concluded that the evidence was insufficient to go to the jury with respect to a number of other work sites.

our review is limited to whether the evidence was adequate to allow the jury to find what it did. We conclude that it was.

Owens also makes a specific contention that certain evidence regarding exposures at a particular work location--Benson High School--was improperly admitted and should have been stricken. This contention requires separate discussion because, if it is correct, the jury's finding could have been based on inadmissible evidence, even though there was ample other evidence to support the finding. William Barnes, a retired Owens asbestos worker, testified on direct examination that he did not apply insulation at Benson but had surveyed the school and identified Kaylo as the brand of asbestos previously installed. On cross-examination by Owens' attorney, Barnes stated that a friend who installed pipe covering at Benson told him that Kaylo was used. Owens objected and moved to strike Barnes' product identification as hearsay.

Plaintiff's counsel then inquired further about the basis for Barnes' product identification, to which Barnes responded that Kaylo "had a harder finish and is more brittle" than the magnesium product and thus, after examining the product himself, he believed that it was Kaylo. The court gave a curative instruction to the jury, directing it to disregard Barnes' testimony about what his colleague told him, but allowing the jury to consider Barnes' firsthand knowledge.

Owens frames its assignment of error as challenging the court's denial of his motion to strike the testimony. Plaintiff responds that, if there was error, it was invited, because Owens itself elicited the testimony. *See James v. General Motors of Canada, Ltd.*, 101 Or.App. 138, 146 n. 4, 790 P.2d 8, rev. den. 310 Or. 243, 796 P.2d 360 (1990). Be that as it may, and assuming that the motion in the trial court and the assignment here are sufficient to preserve and raise the issue, we conclude that the curative instruction that the court gave adequately diffused any likelihood that the jury improperly considered the hearsay testimony. Indeed, the instruction effectively gave Owens exactly what it now contends it should have received--the striking of the hearsay evidence. We hold that the trial court correctly denied defendants' motions for a directed verdict.

* * *

Affirmed on appeal and on cross-appeal.

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§ B. Legal Cause: Policy Considerations Precluding Liability

Introductory Note. As noted earlier, the concept of "proximate cause" is rooted in notions of fairness: even though the defendant's conduct may have been a "but-for" cause of the plaintiff's injuries, is it fair to hold the defendant liable for them? For example, in *Berry v. Sugar Notch*, *infra*, the court decided that even if it were true that the motorman's negligence (exceeding the speed limit) was a cause-in-fact of the injury, it would not be fair to hold him liable, since it was simply a chance occurrence. This section identifies three different areas where courts will refuse to impose liability even where but-for causation is present: (1) where the defendant's conduct did not tend to *increase the risk* of the plaintiff's injury; (2) where the negligence of *another tortfeasor* (often called a "superseding" tortfeasor) was so reprehensible as to make the initial defendant's negligence merely a "remote" cause; or (3) where the plaintiff was so far removed in time and/or space from the defendant's initial act of negligence that an injury to that plaintiff was *unforeseeable*, thus making it unfair to impose liability.

1. Increased Risk v. Mere Chance

BERRY v. SUGAR NOTCH

191 Pa. 345, 43 A. 240 (1899)
FELL, J.

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. The question of the negligence of the borough in

permitting it to remain must, however, be considered as set at rest by the verdict. 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. Even in that case the ground for denying him the right to recover would be that he had been guilty of contributory negligence, and not that he had violated a borough ordinance. 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 same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety. It was also argued by the appellant's counsel that, even if the speed was not the sole efficient cause of the accident, it at least contributed to its severity, and materially increased the damage. It may be that it did. But what basis could a jury have for finding such to be the case? and, should they so find, what guide could be given them for differentiating between the injury done this man and the injury which would have been done a man in a similar accident on a car running at a speed of eight miles an hour or less? The judgment is affirmed.

Questions and Notes

1. Suppose a 15-year-old without a license to drive gets into an accident. What must the victim prove - in terms of negligence - in order to recover?

2. Same facts as #2, except that the driver is a 23-year-old with an expired license. What result?

2. Superseding Tortfeasors: Breaking the Chain of Causation

CROWE V. GASTON

134 Wash. 2d 509, 951 P.2d 1118 (1998)

MADSEN, Justice.

Joel Crowe seeks review of a trial court order granting defendants Oscar's and Kevin Rettenmeier's motions for summary judgment. At issue is whether Oscar's can be liable for alcohol-related injuries to Crowe when Oscar's sold alcohol to a minor who shared it with another minor who then injured Crowe. We find that Oscar's can be held liable and reverse the trial court's order granting Oscar's motion for summary judgment.

Also at issue is whether Kevin Rettenmeier, the minor who bought the alcohol, can be found liable for Crowe's injuries for supplying alcohol to the minor who then injured Crowe. We conclude that he cannot and affirm the trial court's order granting Rettenmeier's motion for summary judgment.

Statement of the Case

On February 11, 1994, Kevin Rettenmeier,

age 17, met Joe Schweigert and two of Schweigert's friends, Brad Rosenquist and Adam Fitzpatrick, all of whom were under 21, and agreed to buy them beer. They all proceeded to Oscar's, Rettenmeier traveling in a separate car. When they arrived, Schweigert and his friends gave money to Rettenmeier, who then entered the store and purchased beer while the others stayed in their car out of sight. It is not clear from the record how much beer was purchased. Rettenmeier purchased either twenty-four twelve-ounce cans plus two 40 ounce bottles, twelve twelve-ounce cans, or four to possibly seven 40 ounce bottles of beer. Rettenmeier gave all the beer he purchased to Schweigert and his friends.

Afterward, the group decided to go over to the house of another acquaintance, Steve Dean. At Dean's house they were joined by Joel Crowe and others. The group drank beer and played pool; however, Crowe claims he did not drink any beer. Later that evening, Crowe accepted a ride home by an intoxicated Fitzpatrick. During the ride, Fitzpatrick drove off the road and hit a tree, causing injuries to Crowe.

Crowe sued Oscar's and Rettenmeier, among others, for damages. Crowe claimed that Oscar's and Rettenmeier were liable for his injuries because they had furnished the alcohol that caused Fitzpatrick's intoxication. The trial court granted Oscar's and Rettenmeier's motions for summary judgment. Crowe appealed the trial court's order to the Court of Appeals. This court granted the Appellant's motion to transfer the case from the Court of Appeals.

Standard of Review

An appellate court engages in the same review as the trial court when reviewing a summary judgment order. *Reynolds v. Hicks*, 134 Wash. 2d 491, 495, 951 P.2d 761, 763 (1998). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If, after considering the evidence in the light most favorable to the nonmoving party, reasonable minds could come to but one conclusion, then the motion for summary judgment will be granted. *Id.*

Vendor Liability

The issue presented in this case is whether Oscar's, a commercial vendor, can be liable for injuries to Crowe which resulted from Oscar's illegal sale of alcohol to Kevin Rettenmeier. Crowe bases his claim of negligence on Oscar's violation of RCW 66.44.320[1] and RCW 66.44.270,[2] which prohibit the sale of alcohol to anyone under the age of 21.

In order to prove an actionable claim for negligence, Crowe must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury. *See Reynolds*, 951 P.2d at 763. Oscar's argument in this case is two-fold. First Oscar's contends that it did not owe a duty of care to Crowe. Second, Oscar's asserts that, even if it owed a duty of care to Crowe, it was not the legal cause of Crowe's injuries.

A. Duty of Care

We turn first to whether Oscar's owed a duty of care to Crowe. The existence of a legal duty is a question of law. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 951 P.2d 749, 752 (1998). Washington courts have recognized that a legislative enactment may prescribe a standard of conduct required of a reasonable person that when breached may be introduced to the trier of fact as evidence of negligence. *Id.*, 951 P.2d at 751-52; *Purchase v. Meyer*, 108 Wash. 2d 220, 737 P.2d 661 (1987). To determine whether a defendant owes a duty of care to a complaining party based upon a statutory violation, this court has adopted the Restatement (Second) of Torts § 286[3] which,

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[1] RCW 66.44.320 provides: "[e]very person who shall sell any intoxicating liquor to any minor shall be guilty of a violation of Title 66 RCW."

[2] RCW 66.44.270(1) provides: "[i]t is unlawful for any person to sell ... liquor to any person under the age of twenty-one...."

[3] RESTATEMENT (SECOND) OF TORTS § 286 (1965) provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment ... whose purpose is found to be exclusively or in part

among other things, requires the injured person to be within the class of persons the statute was enacted to protect. *Schooley*, 951 P.2d at 752-53. Oscar's argues that this prong of the Restatement test is not satisfied.

Citing our decisions in *Young* and *Purchase*, Oscar's contends that Crowe is not a member of the protected class because only minor purchasers and third persons injured by the minor purchaser are protected by the statutes in question. *See Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, 672 P.2d 1267 (1983) (a minor purchaser's estate had an action in negligence for the minor's alcohol-related death against the tavern owner who sold alcohol to the minor); *Purchase*, 108 Wash. 2d 220, 737 P.2d 661 (a third person injured by an intoxicated minor purchaser had a cause of action against the tavern owner who sold alcohol to the minor). However, in our recent decision in *Schooley*, we found the protected class was not so limited.

In that case, Lori Schooley became intoxicated from alcohol obtained from another minor purchaser and injured herself. *Schooley*,951 P.2d at 751. The alcohol vendor in *Schooley* made a similar argument which we rejected, finding the protected class extends to injuries which result when a minor purchaser shares the alcohol with other minors. *Id.* at 753. We noted that this court in *Purchase* emphasized that vendors owed a duty not only to the minor purchaser but "`to members of the general public as well.'" *Id.* at 753 (quoting *Purchase*, 108 Wash. 2d at 228, 737 P.2d 661). In light of the purpose of the legislation, which is to prevent against the hazard of ",alcohol in the hands of minors,'" we found it was arbitrary to draw a distinction between third persons injured by the intoxicated minor purchaser and those injured as a result of the minor purchaser sharing the alcohol with other minors. *Id.* at 753 (quoting *Hansen v. Friend*, 118 Wash. 2d 476, 481-82, 824 P.2d 483 (1992)). We found this distinction especially illogical when faced with the fact that minors who drink commonly do so with other minors. *Id.* at 753. "[P]rotecting all those injured as a result of the illegal sale of alcohol to minors is the best way to serve the purpose for which the legislation was created, to prevent minors from drinking." *Id.*

In this case, similar to the situation in *Schooley*, Kevin Rettenmeier purchased alcohol which he gave to a number of other minors. One of those minors then drove while intoxicated causing injuries to Crowe. Thus, we find that Crowe is part of the protected class.

The alcohol vendor, of course, is only responsible for the foreseeable consequences of his actions. *Id.* at 754; *see also Burkhart v. Harrod*, 110 Wash. 2d 381, 395, 755 P.2d 759 (1988). In this way, foreseeability serves to limit the scope of the duty owed by the alcohol vendor to Crowe. *See Schooley*, 951 P.2d at 754. Whether or not it was foreseeable that the minor purchaser would share the alcohol with others resulting in the injury to Crowe is a question of fact for the jury. *See id.* at 754. The trier of fact may consider the amount and character of the alcohol purchased, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the purchaser to determine whether it was foreseeable the alcohol would be shared with others. *Id.*

Oscar's asks this court to find, as a matter of law, that the circumstances of the sale of beer to Rettenmeier could not put the seller on notice that the beer would be shared with others and that they would then drive while intoxicated. We will decide issues of foreseeability as a matter of law only where reasonable minds cannot differ. *Schooley*, 951 P.2d at 754. Based on the facts of this case, however, we decline to find that Crowe's injuries were not foreseeable.

First, in *Schooley* we determined that reasonable minds could conclude that a minor purchasing substantial quantities of alcohol would share it with other minors. *Id.* at 754. Second, and more important, there is a genuine issue of material fact in this case concerning how much beer was actually purchased. Thus, it is for the trier of fact to determine how much beer was actually purchased and if the amount purchased would indicate that it would be shared with others.

Additionally, we find that reasonable minds could conclude that minors who obtain alcohol

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(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

from another minor purchaser would then drive while intoxicated. The question is whether "`[t]he harm sustained [is] reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.'" (Quoting *Hansen*, 118 Wash. 2d at 484, 824 P.2d 483). *Id.* at 754. We have previously recognized that the general harm encompassed by this duty is that of alcohol-induced driver error. *Christen v. Lee*, 113 Wash. 2d 479, 495, 780 P.2d 1307 (1989). In fact, a minor is guilty of driving under the influence in Washington if the minor has a breath test reading of .02 grams of alcohol per 210 liters of breath. RCW 46.61.503, .506. This standard is one-fifth that of adults. *See* RCW 46.61.502. It follows that the Legislature was particularly concerned about the danger of minors driving while intoxicated. Thus, we leave the question of whether Crowe's injuries were foreseeable to the jury.

B. Legal Causation

Next, Oscar's argues that it was not the legal cause of Crowe's injuries. Legalcausation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley*, 951 P.2d at 754. A determination of legal liability will depend upon "`mixed considerations of logic, common sense, justice, policy, and precedent.'" *Id.* at 754 (quoting *King v. City of Seattle*, 84 Wash. 2d 239, 250, 525 P.2d 228 (1974)). Where the facts are not in dispute, legal causation is for the court to decide as a matter of law.

As the petitioner did in *Schooley*, Oscar's argues that Crowe's injuries are too remote from the initial sale and that legal consequences of the sale cannot extend that far. *See* *Schooley*, 951 P.2d at 755. Oscar's bases this argument solely on the policy concern of unlimited liability. In *Schooley*, however, we found this argument unpersuasive noting that other legal principles such as foreseeability, superseding causation, and contributory negligence serve to dispel these fears. *Id.* at 755-56. We found that the policies behind legislation prohibiting the sale of alcohol to minors outweighed Petitioner's concerns. *Id.* at 755-57.

This is especially so where the duty involved is not onerous. The alcohol vendor is simply required to check the buyer's identification. Additionally, if, after the purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser sign a certification card complying with RCW 66.20.190. If the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor. RCW 66.20.210; *see also* *Schooley*, 951 P.2d at 755-56.

In this case we find the injuries to Crowe are not so remote as to preclude liability. The policy consideration behind the legislation prohibiting vendors from selling alcohol to minors are best served by holding vendors liable for the foreseeable consequences of the illegal sale of alcohol to minors. Thus, we conclude that legal cause is satisfied in this case.

C. Superseding Causation

Finally, Oscar's argues that the intervening intentional misconduct of Rettenmeier, the minor purchaser, and Fitzpatrick, the driver, serve to break the chain of causation in this case. A finding of proximate causation is premised upon the proof of cause in fact, as well as the legal determination that liability should attach. *Maltman v. Sauer*, 84 Wash. 2d 975, 981, 530 P.2d 254 (1975). Cause in fact requires proof that "`there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.'" *Id.* (quoting *Rikstad v. Holmberg*, 76 Wash. 2d 265, 268, 456 P.2d 355 (1969)). A defendant's negligence is the cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. *Id.* at 982, 530 P.2d 254. Where an intervening act does break the chain of causation, it is referred to as a "superseding cause." *Id.*

"`Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.'" *Cramer v. Department of Highways*, 73 Wash. App. 516, 520, 870 P.2d 999 (1994) (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash. App. 432, 442, 739 P.2d 1177 (1987)). An intervening act is not foreseeable if it is "`so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *Christen*, 113 Wash. 2d at 492, 780 P.2d 1307

(quoting *McLeod v. Grant County Sch. Dist. 128*, 42 Wash. 2d 316, 323, 255 P.2d 360 (1953)). The foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury. *Cramer*, 73 Wash. App. at 521, 870 P.2d 999. Thus, in this case it is for the jury to decide whether the acts of Rettenmeier and Fitzpatrick break the chain of causation, thus, relieving Oscar's from liability.

Social Host Liability

Crowe also asserts that Rettenmeier is liable for his injuries because Rettenmeier breached a duty owed to Crowe when he supplied beer to Fitzpatrick. Crowe's claims concern the duties of a social host rather than a commercial vendor of alcohol. The issue presented in this case is whether a social host, Rettenmeier, who furnishes alcohol to a minor, Fitzpatrick, owes a duty of care to a third person, Crowe, injured by the intoxicated minor.

Plaintiff contends that RCW 66.44.270(1) creates a duty of care owed by Rettenmeier to Crowe. RCW 66.44.270(1) makes it unlawful for any person to "give, or otherwise supply liquor to any person under the age of twenty-one years...." This court has recognized that a minor who is injured as a result of alcohol intoxication has a cause of action against the social host who supplied the alcohol based on a violation of RCW 66.44.270(1). *See Hansen*, 118 Wash. 2d 476, 824 P.2d 483. However, in *Reynolds*, we recently held that social host liability based on RCW 66.44.270(1) does not extend to injuries to third persons. *See Reynolds*, 951 P.2d at 766.

In *Reynolds*, we emphasized our reluctance to hold social hosts liable to the same extent of commercial vendors. "`Social hosts are not as capable of handling the responsibilities of monitoring their guests' alcohol consumption as are their commercial and quasi-commercial counterparts.... [T]he commercial proprietor has a proprietary interest and profit motive, and should be expected to exercise greater supervision than in the (non-commercial) social setting.'" *Id.* at 764 (alteration in original) (quoting *Burkhart v. Harrod*, 110 Wash. 2d 381, 386-87, 755 P.2d 759 (1988)).

Additionally, we found that RCW 66.44.270 was enacted to protect minors from injuries resulting from their own abuse of alcohol, not to protect third parties injured by intoxicated minors. *Reynolds*, 951 P.2d at 765. We explained that RCW 66.44.270(1) does not make it unlawful for the minor's parent or guardian to give alcohol to the minor if consumed in the presence of the parent or guardian, indicating that the statute was not designed for the protection of third persons. *Reynolds*, 951 P.2d at 765; *see also Mills v. Estate of Schwartz*, 44 Wash. App. 578, 584, 722 P.2d 1363 (1986) (finding that the Legislature, by allowing minors to drink alcohol if furnished by the minor's parent, did not intend to protect third persons); *Hostetler v. Ward*, 41 Wash. App. 343, 354, 704 P.2d 1193 (1985) (based on the exception to the statute, the court found that RCW 66.44.270 was designed to protect minors, not third persons, from injury). We noted in *Reynolds* that expanding the protected class to include injured third persons would "lead to an illogical result whereby a person who did not violate RCW 66.44.270 would then be liable in negligence pursuant to the same statute." *Reynolds*, 951 P.2d at 765. We concluded that RCW 66.44.270(1) was not enacted to protect third persons injured by an intoxicated minor. *Id.* at 765.

We also noted that the Legislature provided alcohol vendors with a means by which they can immunize themselves from civil liability for alcohol-related injuries resulting from the sale of alcohol to a minor, but did not provide the same protection for social hosts. *Id.* at 765; RCW 66.20.210.[4] This distinction, we stated, evinced as intent by the Legislature that commercial vendors would be held liable to a greater extent than social hosts.

Thus, in the present case, Rettenmeier owed no duty of care to Crowe.

Conclusion

We reverse the trial court's order granting Oscar's motion for summary judgment and affirm the trial court's order granting Rettenmeier's motion for summary judgment.

GUY and ALEXANDER, JJ., concur.

[4] If, after a purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser sign a certification card complying with RCW 66.20.190. If the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor. RCW 66.20.210.

DURHAM, Chief Justice (concurring).

I agree with the majority that a commercial vendor's duty to refrain from selling alcohol to minors extends to all minors and third parties who are foreseeably injured as a result. I also agree that, as a gratuitous furnisher of alcohol, Rettenmeier should not be liable for injuries to third parties caused by the minor to whom he furnished alcohol. However, I would do so for the reasons expressed in my concurrence in *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998).

DOLLIVER, J., concurs.

JOHNSON, Justice (concurring in part, dissenting in part).

For the reasons articulated in my dissent in *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998) (Johnson, J., dissenting), I must reaffirm my position and concur in part and dissent in part. The facts of the present case involve a commercial alcohol vendor who sells alcohol to a minor, who transfers alcohol to another minor, who becomes intoxicated, and injures another person. In this single case we are confronted with commercial alcohol vendor liability, the issue in *Schooley v. Pinch's Deli Market*, 134 Wash. 2d 468, 951 P.2d 749 (1998), and social host liability, the issue in *Reynolds*.

The majority's position that commercial alcohol vendors are liable when they illegally sell alcohol to minors is consistent with our decision in *Schooley*, however, the majority continues to justify the illegal conduct of providing alcohol to minors when the person providing the alcohol is a social host. I have clearly stated my position on this issue in my dissent in *Reynolds* and in *Hansen v. Friend*, 118 Wash. 2d 476, 824 P.2d 483 (1992). Under RCW 66.44.270(1), social hosts have a duty of care and may be found liable in negligence when an injury is caused by breach of this duty.

SMITH and TALMADGE, JJ., concur.

SANDERS, Justice (concurring in part, dissenting in part).

I would affirm the trial court's dismissal of claims against Oscar's for the reasons set forth in my dissenting opinion in *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 951 P.2d 749 (1998). I concur with the majority that the claim against Rettenmeier must be dismissed based on *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998).

Questions and Notes

1. If you had been a member of the Washington Supreme Court at the time this case was decided, which opinion would you have signed?

2. Some jurisdictions have responded to the expansion of tavern-owners' liability with legislative restrictions. In California, for example, "the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." CAL. CIV. CODE ANN. § 1714 (West 1985). Would you have voted for this provision?

LINEY v. CHESTNUT MOTORS

421 Pa. 26, 218 A.2d 336 (1966)

EAGEN, Justice

In this action in trespass, the lower court sustained preliminary objections to the complaint in the nature of a demurrer and dismissed the action. This appeal challenges the correctness of that order.

The pertinent pleaded facts are as follows:

The defendant operates an automobile sales agency and garage. About ten o'clock a.m. on the day involved, a customer's automobile was delivered to the garage for repairs. The defendant's employees allowed the automobile to remain outside the building, double-parked in the street and with the key in the ignition. About three hours later, it was stolen by an adult stranger who then drove it around the block in such a careless manner that it mounted a sidewalk, struck the plaintiff, a pedestrian

thereon, causing her serious injury. Defendant's garage was located in a Philadelphia area experiencing a high and increasing number of automobile thefts in the immediate preceding months.

The lower court's order was correct and we affirm. The complaint failed to state a cause of action against the defendant.

Assuming that defendant's employees were negligent in permitting the automobile to remain outside in the street under the circumstances described, it is clear that the defendant could not have anticipated and foreseen that this carelessness of its employees would result in the harm the plaintiff suffered. *See*, *Rapczynski v. W.T. Cowan, Inc.*, 138 Pa. Super. 392, 10 A.2d 810 (1940), and *Roscovich v. Parkway Baking Co.*, 107 Pa. Super. 493, 163 A. 915 (1933). In other words, the defendant violated no duty owed to the plaintiff. This being so, the plaintiff was not harmed by the defendant's negligence. *See*, *Dahlstrom v. Shrum*, 368 Pa. 423, 84 A.2d 307 (1951), and *Zilka v. Sanctis Construction, Inc.*, 409 Pa. 396, 186 A.2d 897 (1962). Assuming also that the defendant should have foreseen the likelihood of the theft of the automobile, nothing existed in the present case to put it on notice that the thief would be an incompetent or careless driver. Under the circumstances, the thief's careless operation of the automobile was a superseding cause of the injury suffered, and defendant's negligence, if such existed, only a remote cause thereof upon which no action would lie. *See*, RESTATEMENT, TORTS, (SECOND) §§ 448, 449, and § 302 B, Illustration 2 (1965); PROSSER, LAW OF TORTS (2d ed. 1941), at 140-41-42; *DeLuca v. Manchester Ldry. & Dry Cl. Co.*, 380 Pa. 484, 112 A.2d 372 (1955); *Kite v. Jones*, 389 Pa. 339, 132 A.2d 683 (1957); and, *Green v. Independent Oil Co.*, 414 Pa. 477, 201 A.2d 207 (1964).

It is true that the question of proximate cause is generally for the jury. However, if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of law: *Klimczak v. 7-Up Bottling Co. of Phila.*, 385 Pa. 287, 122 A.2d 707 (1956), and *Green v. Independent Oil Co.*, *supra*.

Finally, it is strenuously argued that *Anderson v. Bushong Pontiac Co.*, 404 Pa. 382, 171 A.2d 771 (1961), is controlling. We do not agree. In *Anderson*, several salient facts were present which are absent here. Those facts clearly put the defendant in that case on notice, not only that the automobile was likely to be stolen, but also that it was likely to be stolen and operated by an incompetent driver. In *Anderson*, we cited *Murray v. Wright*, 166 Cal. App. 2d 589, 333 P.2d 111 (1958), as persuasive authority for sustaining liability under the facts therein presented. We note that the same court has denied liability in a situation similar to the one now before us. *See*, *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954). Other jurisdictions have reached the same result. *See*, *Midkiff v. Watkins*, 52 So. 2d 573 (La. App. 1951); *Wilson v. Harrington*, 295 N.Y. 667, 65 N.E.2d 101 (1946); and, *Teague v. Pritchard*, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).

Order affirmed.

MUSMANNO and ROBERTS, JJ., dissent.

Questions and Notes

1. One law review article found evidence that the accident rate for stolen vehicles is about 200 times that of the normal accident rate. *See An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909. Should the court have been expected to know (or intuit) such a fact? Is it relevant to the disposition of the case?

ROSS v. HARTMAN

139 F.2d 14 (D.C. Cir. 1943)

EDGERTON, Associate Justice

This is an appeal by the plaintiff from a judgment for the defendant in a personal injury action.

The facts were stipulated. Appellee's agent violated a traffic ordinance of the District of Columbia by leaving appellee's truck unattended in a public alley, with the ignition unlocked and the key in the switch. He left the truck outside a garage "so that it might be taken inside the garage by the garage attendant for night storage," but he does not appear to have notified anyone that he had left it. Within two hours and unknown person drove the truck away and negligently ran over the

appellant.

The trial court duly directed a verdict for the appellee on the authority of *Squires v. Brooks*. That case was decided in 1916. On facts essentially similar to these, and despite the presence of a similar ordinance, this court held that the defendant's act in leaving the car unlocked was not a "proximate " or legal cause of the plaintiff's injury because the wrongful act of a third person intervened. We cannot reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916, and we think it should be overruled.

Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or "proximate" cause of a resulting accident.

But the existence of an ordinance changes the situation. If a driver causes an accident by exceeding the speed limit, for example, we do not inquire whether his prohibited conduct was unreasonably dangerous. It is enough that it was prohibited. Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. This comes only to saying that in such circumstances the law has no reason to ignore and does not ignore the casual relation which obviously exists in fact. The law has excellent reason to recognize it, since it is the very relation which the makers of the ordinance anticipated. This court has applied these principles to speed limits and other regulations of the manner of driving.

The same principles govern this case. The particular ordinance involved here is one of a series which require, among other things, that motor vehicles be equipped with horns and lamps. Ordinary bicycles are required to have bells and lamps, but they are not required to be locked. The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the policy, but to promote the safety of the public in the streets. An unlocked motor vehicle creates little more risk of theft than an unlocked bicycle, or for that matter an unlocked house, but it creates much more risk that meddling by children, thieves, or others will result in injuries to the public. The ordinance is intended to prevent such consequences. Since it is a safety measure, its violation was negligence. This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or "proximate" cause of the harm.[1] Both negligence and causation are too clear in this case, we think, for submission to a jury

The fact that the intermeddler's conduct was itself a proximate cause of the harm, and was probably criminal, is immaterial. *Janof v. Newsom* involved a statute which forbade employment agencies to recommend servants without investigating their references. An agency recommended a servant to the plaintiff without investigation, the plaintiff employed the servant, and the servant robbed the plaintiff. This court held the agency responsible for the plaintiff's loss. In that case as in this, the conduct of the defendant or his agent was negligent precisely because it created a risk that a third person would act improperly. In such circumstances the fact that a third person does act improperly is not an intelligible reason for excusing the defendant.

There are practical as well as theoretical reasons for not excusing him. The rule we are

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[1] This does not mean that one who violates a safety ordinance is responsible for all harm that accompanies or follows his negligence. He is responsible for the consequences of his negligence but not for coincidences. If in the present case, for example, the intermeddler had simply released the brake of appellee's truck, without making use of the ignition key or the unlocked switch, and the truck had thereupon rolled downhill and injured appellant, appellee would not have been responsible for the injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them. In other words the fact that the ignition was unlocked, which alone gave the agent's conduct its negligent character, would have had nothing to do with bringing about the harm.

Neither do we suggest that the ordinance should be interpreted as intended to apply in all possible circumstances. In some emergencies, no doubt, the act of leaving a car unlocked and unattended in a public place would not be a violation of the ordinance, fairly interpreted, and would therefore entail no responsibility for consequences. A classic illustration of the same general principle is the Bologna ordinance against blood-letting in the streets, which did not make criminals of surgeons.

adopting tends to make the streets safer by discouraging the hazardous conduct which the ordinance forbids. It puts the burden of the risk, as far as may be, upon those who create it. Appellee's agent created a risk which was both obvious and prohibited. Since appellee was responsible for the risk, it is fairer to hold him responsible for the harm than to deny a remedy to the innocent victim.

Reversed.

Questions and Notes

1. Are *Liney* and *Ross* distinguishable? Or are they fundamentally the same case?

2. The RESTATEMENT (2D), TORTS, § 440 defines a "superseding cause" as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." By contrast, in § 441 an "intervening force" is defined as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." It does not prevent the actor's conduct from being found a proximate cause. Do these definitions help distinguish one kind of cause from another?

3. If a tavern negligently serves an intoxicated patron in violation of state law, is the tavern responsible for intentional torts committed by the patron? *Compare*, 753 S.W.2d 507 (Tex. App. 1988, *writ denied*), *with* *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989). The Texas case is reviewed in a casenote, 20 TEX. TECH. L. REV. 1323 (1989).

4. In *Kitchen v. K-Mart Corporation*, 697 So.2d 1200 (Fla. 1997), the ex-boyfriend of the plaintiff purchased a gun from K-Mart. He was intoxicated at the time. When the clerk at K-Mart discovered his writing was too illegible to be read on the required firearms form, the clerk filled it out for him and had him initial it and sign it. He then went to the plaintiff's home and shot her. The jury determined that her damages were $12 million. Should K-Mart be required to pay the damages caused by the shooting? Or was the ex-boyfriend a superseding cause of the injury?

3. Remote and Indirect Results of Negligent Conduct

PALSGRAF v. LONG ISLAND R. CO

248 N.Y. 339, 162 N.E. 99 (1928)

CARDOZO, C.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." POLLOCK, TORTS (11th Ed.) p. 455; *Martin v. Herzog*, 228 N.Y. 164, 170, 126 N.E. 814. *Cf.* SALMOND, TORTS (6th Ed.) p. 24. "Negligence is the absence of care, according to the circumstances." Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 H.& N. 679, 688; 1 BEVEN, NEGLIGENCE (4th Ed.) 7; *Paul v. Consol. Fireworks Co.*, 212 N.Y. 117, 105 N.E. 795; *Adams v. Bullock*, 227 N.Y. 208, 211, 125 N.E.

93; *Parrott v. Wells-Fargo Co.*, 15 Wall. (U.S.) 524, 21 L. Ed. 206. 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. *Sullivan v. Dunham*, 161 N.Y. 290, 55 N.E. 923, 47 L.R.A. 715, 76 Am. St. Rep. 274. 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."

* * *

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 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. It 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. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the 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. Seavey, *Negligence, Subjective or Objective*, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N.Y. 365, 160 N.E. 400. 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." *Munsey v. Webb*, 231 U.S.

150, 156, 34 S. Ct. 44, 45 (58 L. Ed. 162); *Condran v. Park & Tilford*, 213 N.Y. 341, 345, 107 N.E. 565; *Robert v. United States Shipping Board Emergency Fleet Corp.*, 240 N.Y. 474, 477, 148 N.E. 650. 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. *Jeremiah Smith, Tort and Absolute Liability*, 30 H. L. Rv. 328; STREET, FOUNDATIONS OF LEGAL LIABILITY, vol. 1, pp. 77, 78. 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. Talmage v. Smith*, 101 Mich. 370, 374, 59 N.W. 656, 45 Am. St. Rep. 414. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. *Parrot v. Wells-Fargo Co. (The Nitro-Glycerine Case)* 15 Wall. 524, 21 L. Ed. 206. 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. Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694. 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. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to medieval law. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, p. 449; STREET, FOUNDATIONS OF LEGAL LIABILITY, vol. 1, pp. 189, 190. For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal. HOLDSWORTH, *op. cit.* p. 453; STREET, *op. cit.* vol. 3, pp. 258, 260, vol. 1, pp. 71, 74. Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth. HOLDSWORTH, *op. cit.* 450, 457; Wigmore, *Responsibility for Tortious Acts*, vol. 3, ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 520, 523, 526, 533. When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case. HOLDSWORTH, *op. cit.* p. 449; *cf. Scott v. Shepard*, 2 WM. BLACK. 892; GREEN, RATIONALE OF PROXIMATE CAUSE, p. 19. 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. HOLLAND, JURISPRUDENCE (12th Ed.) p. 328. 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. *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 54, 120 N.E. 86, 13 A.L.R. 875; *Ehrgott v. Mayor, etc., of City of New York*, 96 N.Y. 264, 48 Am. Rep. 622; *Smith v. London & S. W. R. Co.*, (1870-1871) L.R. 6 C.P. 14; 1 BEVEN, NEGLIGENCE, 106; STREET, *op. cit.* vol. 1, p. 90; GREEN, RATIONALE OF PROXIMATE CAUSE, pp. 88, 118; *cf. Matter of Polemis*, L.R. 1921, 3 K.B. 560; 44 LAW QUARTERLY REVIEW, 142. 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)

Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling, they injured the plaintiff, an intending passenger.

Upon these facts, may she 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.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect one's self from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word "unreasonable." For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important. *Hover v. Barkhoof*, 44 N.Y. 113; *Mertz v. Connecticut Co.*, 217 N.Y. 475, 112 N.E. 166. In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice - not one merely reckless conduct. But here neither insanity nor infancy lessens responsibility. *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449, 26 L.R.A. 153, 42 Am. St. Rep. 743.

As has been said, except in cases of contributory negligence, there must be rights which are or may be affected. Often though injury has occurred, no rights of him who suffers have been touched. A licensee or trespasser upon my land has no claim to affirmative care on my part that the land be made safe. *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491, 13 A.L.R. 633. Where a railroad is required to fence its tracks against cattle, no man's rights are injured should he wander upon the road because such fence is absent. *Di Caprio v. New York Cent. R. Co.*, 231 N.Y. 94, 131 N.E. 746, 16 A.L.R. 940. An unborn child may not demand immunity from personal harm. *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503.

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 not which is owed to the plaintiff himself and not merely to others." SALMOND TORTS (6th Ed.) 24. 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. If 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 the language of the courts when speaking of contributory negligence. Such again and again their language in speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. *Perry v. Rochester Line Co.*, 219 N.Y. 60, 113 N.E. 529, L.R.A. 1917B, 1058. 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. *Spade v. Lynn & B.R. Co.*, 172 Mass. 488, 491, 52 N.E. 747, 748 (43 L.R.A. 832, 70 Am. St. Rep. 298).

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. POLLOCK, TORTS (12th Ed.) 463.

In the well-known *Polemis Case*, (1921) 3 K.B. 560, 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. *Smith v. London & S.W.R. Co. R.R.* (1870-71) L.R. 6 C.P. 14; *Anthony v. Staid*, 52 Mass. (11 Metc.) 290; *Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 A. 699, 35 L.R.A. 199, 55 Am. St. Rep. 728; *Trashansky v. Hershkovitz*, 239 N.Y. 452, 147 N.E. 63.

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. Indeed in the *Di Caprio* Case we said that a breach of a general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

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 out 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.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience

can say. You may speak of a chain, or, if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be though helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. 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. But somewhere they reach the point where they cannot say the stream comes from any one source.

Take the illustration given in an unpublished manuscript by a distinguished and helpful writer on the law of torts. A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. *A*, walking on the sidewalk nearby, is killed. *B*, sitting in a window of a building opposite, is cut by flying glass. *C*, likewise sitting in a window a block away, is similarly injured. And a further illustration: A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that *C* may not recover while *A* may. As to *B* it is a question for court or jury. We will all agree that the baby might not. Because, we are again told, the chauffeur had no reason to believe his conduct involved any risk of injuring either *C* or the baby. As to them he was not negligent.

But the chauffeur, being negligent in risking the collision, his belief that the scope of the harm he might do would be limited is immaterial. His act unreasonably jeopardized the safety of any one who might be affected by it. *C*'s injury and that of the baby were directly traceable to the collision. Without that, the injury would not have happened. *C* had the right to sit in his office, secure from such dangers. The baby was entitled to use the sidewalk with reasonable safety.

The true theory is, it seems to me, that the injury to *C*, if in truth he is to be denied recovery, and the injury to the baby, is that their several injuries were not the proximate result of the negligence. And here not what the chauffeur had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing - may have some bearing, for the problem of proximate cause is not to be solved by any one consideration. 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. We have in a somewhat different connection spoken of "the stream of events." We have asked whether that stream was deflected - whether it was forced into new and unexpected channels. *Donnelly v. H.C.& A.I. Piercy Contracting Co.*, 222 N.Y. 210, 118 N.E. 605. 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. *Bird v. St. Paul & M. Ins. Co.*, 224 N.Y. 47, 120 N.E. 86, 13 A.L.R. 875, where we passed upon the construction of a contract - but something was also said on this subject. 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.

Here another question must be answered. In the case supposed, it is said, and said correctly, that the chauffeur is liable for the direct effect of the explosion, although he had no reason to suppose it would follow a collision. "The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur's negligence from being in law the cause of the injury." But the natural results of a negligent act - the results which a prudent man would or should foresee - do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.

If may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. We trace the consequences, not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him; if it exploded and injured one in the immediate vicinity, to him also as to A in the illustration. Mrs. Palsgraf was standing some distance away. How far cannot be told from the record - apparently 25 or 30 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.

POUND, LEHMAN, and KELLOGG, JJ., concur with CARDOZO, C.J.

ANDREWS, J., dissents in opinion in which CRANE and O'BRIEN, JJ., concur.

Judgment reversed, etc.

Questions and Notes

1. What is the difference between Cardozo's and Andrews' opinions? Which do you find more persuasive?

2. There is some question about whether the issue of foreseeability is for the judge or for the jury. Although Cardozo views the issue of foreseeability as a component of the question of whether or not the defendant owes a duty to the plaintiff (which is usually considered a question of law rather than fact, and thus reserved for the judge), the specific facts of a case must often be determined by the jury. Thus in many cases it will be the jury who determines whether or not the plaintiff was foreseeable.

3. A trilogy of British cases have struggled with the application of the foreseeability doctrine. The *Polemis* case (3 K.B. 560 [1921], All E.R. 40) was referenced in Judge Andrews dissenting opinion, *supra*. A plank was dropped by the defendant's employees into the hold of a ship carrying cans of gasoline. The falling plank somehow created a spark that ignited the vapor in the hold, destroying the ship and its cargo. Arbitrators found that the explosion was not a foreseeable result of the negligence. However, the judge concluded that "once the act is negligent, the fact that its exact operation was not foreseen is immaterial." Is this consistent with the foreseeability doctrine? Some judges thought not. In *Overseas Tankship v. Morts Dock & Engineering*, P.C. [1961], 1 All E.R. 404 ("*Wagon Mound 1*"), the Privy Council considered another harbor fire. The tanker *Wagon Mound* spilled a large amount of furnace oil into Sydney Harbour. Experts consulted at the time assured the dock and ship owners that the oil slick could not catch fire. However, it was ignited by a freakish accident in which molten metal, dropped from a welder, landed on floating rags; the rags acted as a wick, and started a fire that engulfed a dock and associated boats. The court rejected the broad notion of causation represented by *Polemis* and instead limited liability to that which is foreseeable, denying any recovery beyond the nuisance damage caused by the spilled oil.

However, in *The Wagon Mound* ("*Wagon Mound 2*"), P.C. [1966] 2 All E.R. 709, the Privy Council backed away from the stricter rule in *Wagon Mound 1* and held that although the risk of ignition was very slight, the owners of the tanker should have taken some action to prevent the calamity in light of the serious risk the oil presented. A reasonable person, Lord Reid stated, "would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense." Analyzed in terms of Learned Hand's formula, there is no additional burden to prevent the oil spill (since ordinary care would require it anyway), and thus the slightest chance of additional damage would make the actor negligent for failing to prevent such an injury.

The leading American case on the foreseeability question is *Kinsman Transit*, which follows:

KINSMAN TRANSIT CO

338 F.2d 708 (2d Cir. 1964)

FRIENDLY, Circuit Judge

We have here six appeals, 28 U.S.C. 1292(A)(3), from an interlocutory decree in admiralty adjudicating liability. 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. The owners of two vessels petitioned for exoneration from or limitation of liability; numerous claimants appeared in these proceedings and also filed libels against the Continental Grain Company and the City of Buffalo, which filed cross-claims. The proceedings were consolidated for trial before Judge Burke. We shall summarize the facts as found by him:

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 berth, east of the main portion of the dock, was exposed in the sense that about 150' of the Shiras' forward end, pointing upstream, and 70' of her stern - a total of over half her length - projected beyond the dock. This left between her stem and the bank a space of water seventy-five feet wide where the ice and other debris could float in and accumulate. The position was the more hazardous in that the berth was just below a bend in the river, and the Shiras was on the inner bank. None of her anchors had been put out. From about 10 P.M. large chunks of ice and debris began to pile up between the Shiras' starboard bow and the bank; the pressure exerted by this mass on her starboard bow was augmented by the force of the current and of floating ice against her port quarter. The mooring lines began to part, and a "deadman," to which the No. 1 mooring cable had been attached, pulled out of the ground - the judge finding that it had not been properly constructed or inspected. About 10:40 P.M. the stern lines parted, and the Shiras drifted into the current. During the previous forty minutes, the shipkeeper took no action to ready the anchors by releasing the devil's claws; when he sought to drop them after the Shiras broke loose, he released the compressors with the claws still hooked in the chain so that the anchors jammed and could no longer be dropped. The trial judge reasonably found that if the anchors had dropped at that time, the Shiras would probably have fetched up at the hairpin bend just below the Concrete Elevator, and that in any case they would considerably have slowed her progress, the significance of which will shortly appear.

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 Tewksbury was moored in a relatively protected area flush against the face of a dock on the outer bank just below a hairpin bend so that no opportunity was afforded for ice to build up between her port bow and the dock. Her shipkeeper had left around 5 P.M. and spent the evening watching television with a girl friend and her family. 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 Druckenmiller which was moored opposite the Tewksbury. Thus far there was no substantial conflict in the testimony; as to what followed there was. Judge Burke found, and we accept his findings as soundly based, that at 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 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.

[*The trial court concluded that the damages*

caused by the Shiras were without the knowledge of the owner, thus allowing Kinsman to limit its liability to the value of the Shiras and its cargo; that the Tewksbury and its owner deserved exoneration; that the City of Buffalo was at fault for failing to raise the Michigan Avenue Bridge; that the city was not at fault for the state of the flood improvements or for failing to dynamite the ice jams; and that the Tewksbury and the Druckenmiller could recover from Continental and Kinsman for damages suffered at the Standard Elevator dock. - ed.]

* * *

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 inculpate 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*, 248 N.Y. at 354-355, 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 "uncertain and wavering line," 248 N.Y. at 354, 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, Circuit Judge (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." Under any such principle, negligence suits would become further simplified by requiring a claimant to establish only his own innocence and then offer, in addition to his financial statement, proof of the financial condition of the respective defendants. Judgment would be entered against the defendant which

court or jury decided was best able to pay. Nor am I convinced that it should be the responsibility of the Buffalo taxpayers to reimburse the "innocent victims" in their community for damages sustained. In my opinion, before financial liability is imposed, there should be some showing of legal liability.

Unfortunate though it was for Buffalo to have had its fine vehicular bridge demolished in a most unexpected manner, I accept the finding of liability for normal consequences because the City had plenty of time to raise the bridge after notice was given. Bridges, however, serve two purposes. They permit vehicles to cross the river when they are down; they permit vessels to travel on the river when they are up. But no bridge builder or bridge operator would envision a bridge as a dam or as a dam potential.

By an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost-beyond-all-imagination sequences depicted by the famous cartoonist, Rube Goldberg, the Shiras with its companions which it picked up en route did combine with the bridge demolition to create a very effective dam across the Buffalo River. Without specification of the nature of the damages, claims in favor of some twenty persons and companies were allowed (Finding of Fact #33, Interlocutory Decree, par. 11) resulting from the various collisions and from "the damming of the river at the bridge, the backing up of the water and ice upstream, and the overflowing of the banks of the river and flooding of industrial installations along the river banks." (Sup. Finding of Fact #26a.) 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.

In final analysis the answers to the questions when the link is "too tenuous" and when "consequence is only fortuity" are dependent solely on the particular point of view of the particular judge under the particular circumstances. In differing with my colleagues, I must be giving "unconscious recognition of the harshness of holding a man for what he could not conceivably have guarded against, because human foresight could not go so far." (L. HAND, C.J., in *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767, 770, 2 Cir., 1932.) If "foreseeability" be the test, I can foresee the likelihood that a vessel negligently allowed to break its moorings and to drift uncontrolled in a rapidly flowing river may well strike other ships, piers and bridges. Liability would also result on the "direct consequence" theory. However, to me the fortuitous circumstance of the vessels so arranging themselves as to create a dam is much "too tenuous."

The decisions bearing on the foreseeability question have been so completely collected in three English cases that no repetition of the reasoning pro and con of this principle need be made here. To these cases may be added the many American cases cited in the majority opinion which to me push the doctrine of foreseeability to ridiculous lengths - ridiculous, I suppose, only to the judge whose "human foresight" is restricted to finite limits but not to the judge who can say: It happened; ergo, it must have been foreseeable. The line of demarcation will always be "uncertain and wavering," *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 354, 162 N.E. 99, 59 A.L.R. 1253 (1928), but if,

concededly, a line exists, there must be areas on each side. The flood claimants are much too far on the non-liability side of the line. As to them, I would not award any recovery even if the taxpayers of Buffalo are better able to bear the loss.

Questions and Notes

1. Although an *unforeseeable plaintiff* is unable to recover, a foreseeable plaintiff is not limited to those types of damage that were foreseeable; the plaintiff is entitled to a full recovery. The case often cited for this proposition is *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891). There a 12-year-old schoolboy kicked a classmate in the shin; because of a prior injury the kick precipitated serious injury to the boy's leg. The defendant was required to pay for the entire cost of the injury, despite the fact that a reasonable person could not have foreseen the seriousness of the injury inflicted. This rule is sometimes referred to as the "thin-skulled plaintiff" or "eggshell plaintiff" doctrine: If I am liable for a slight injury to the plaintiff's skull, I am fully liable for whatever injury follows from the wrongful contact. This is essentially the same rule as the court observed in *Polemis*; but the rule changes dramatically when no injury at all is foreseeable with respect to the plaintiff. Is this a sensible distinction?

2. Note that in *Kinsman* the court contrasted the foreseeable consequences of a negligent act with those consequences that are "only fortuity." Does this suggest a connection between the concept of "increased risk" as discussed in *Berry* and the requirement that the injured victim be foreseeable?

3. As a related point, it is important to note that the plaintiff need not establish that the exact mechanism by which the injury occurred was foreseeable; even a rather bizarre chain of events will support liability if the general result is foreseeable from the defendant's conduct. For example, in *United Novelty Co. v. Daniels*, the plaintiff was injured when he was using gasoline to clean the defendant's machine. In the course of the cleaning process, a rat hidden in the machine decided he would move to new quarters, and scurried away. Unfortunately for the rat (as well as the plaintiff), the rat's escape route took him through a furnace with an open flame, causing the rat's fur to catch fire. Out of the fire (into the frying pan, so to speak), the rat ran back to the machine, which then exploded from the gasoline fumes. Since the defendant had reason to anticipate the risk of explosion from supplying gasoline to clean his machine, the injury was foreseeable, even though the immediate precipitating event was not.

Chapter 3
Damages

Introduction

This chapter is difficult (and long) in large part because it incorporates a number of different concepts within it. As the first selection in this chapter notes, most of the class time in Torts is spent in learning the rules that govern the assignment of liability. When the time comes to determine damages, it is difficult to formulate general rules. There are questions not only about how to calculate damages, but also whether certain kinds of damages qualify for any compensation at all. At times it appears that within the damages analysis we are reopening the question of liability.

(1) **What kinds of damages are recoverable?** For example, in *Spade v. Lynn* (*infra*, § A.2.), the plaintiff was badly frightened when some men on her train car were negligently allowed to bump into her. Had she been knocked over and bruised, the court would have allowed her to recover not only for the bruising but for the "pain and suffering" (the emotional damages, including her fright) as well. However, because she suffered "only" emotional shock, without physical injury, the court did not let her recover anything. Is this a redetermination of the liability question? Not really, since we have decided that this kind of behavior (negligently knocking someone over) qualifies for an assignment of liability. However, the courts are setting a threshold requirement for what quantum of damage justifies the invocation of the judicial machinery.

(2) **Who is Entitled to Compensation?** Similarly, in *Dillon v. Legg* (*infra*, § B.3.), the defendant ran over and killed a little girl in a crosswalk. Clearly the defendant must pay compensation for the death of the girl. But what about her sister, who was also in the intersection but wasn't hit? Should she be compensated for *her* injuries? What about her mother, who witnessed the accident but wasn't in any physical danger? Similarly, in *First National Bank of Meadville* (*infra*, § B.1.), the defendant's negligence killed a lawyer. His widow and children sought recovery not only on behalf of his estate, but also in their own right. Death is the most obvious case where an injury to one person may require compensation for injury suffered by a related party. Should this extend to severe injury as well as to death cases? What about "wrongful birth" or even "wrongful life" cases?

(3) **How is the Actual Amount Determined?** A final set of questions revolves around *how much* the defendant must pay for the kinds of injuries society decides to compensate. Although the actual calculation of awards may seem incapable of analysis, the tort student must have some idea of whether the award will be large or small; it makes no sense to spend hours and hours worrying about the prospect of liability without some conception of the size of the award if liability is found. The student must also be aware of limits that courts (or legislatures) place on the overall size of the award.

Jaffe, Damages for Personal Injury: The Impact of Insurance

18 LAW & CONTEMP. PROBS. 219, 221-222 (1953)

I suggest that the critical controversy in personal injury torts today is not in the area of liability but of damages. Questions of liability have great doctrinal fascination. Questions of damage - and particularly their magnitude - do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration. Judges consign them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases. There is analogy for this situation in Jerome Frank's complaint that fact finding, though of paramount importance is neglected by teachers who devote themselves too exclusively to appellate law. This may reflect not so much their judgment of relative importance (as Judge Frank supposes) as the relative adaptability of the subjects to conceptualization. And so it probably is with the subject of damages.

§ A. Types of Recoverable Damages

1. Property Damage

McCURDY v. UNION PAC. R.R.

68 Wash.2d 457, 413 P.2d 617 (1966)

* * *

The primary principles to be applied in awarding damages for negligent injuries to property is that the owner shall have actual monetary compensation for the loss sustained. If the property is a total loss the measure of damages is the value of the property destroyed or damaged. This is its market value, if it has a market value. If the property is damaged but not destroyed, the measure of damages is the difference between the market value of the property before the injury and its market value after the injury. (Again, if it has a market value.) If the property does not have a market value, then if a total loss, the measure of damages is the cost to replace or reproduce the article. If it cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages.

The term "market value" as that term is used, means that reasonable sum of money which the property would bring on a fair sale, by a man willing to sell, but not obliged to sell, to a man willing to buy, but not obliged to buy.

2. "Economic" Losses

Introductory Note. The term "pure economic loss" is used to describe losses in which there has been no property damage, but only a loss of profits that would have been enjoyed by the plaintiff but for the defendant's negligence. For example, suppose the defendant negligently fails to deliver a critical item needed at the plaintiff's factory, and as a result the plaintiff suffers significant financial loss. May those damages be recovered? Most jurisdictions treat this as a question to be governed by the Uniform Commercial Code rather than by tort law. *See* Gary Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37 (1986).

What we consider here are economic losses that flow from a *personal injury* to the plaintiff.

a. Lost Wages

O'SHEA v. RIVERWAY TOWING

677 F.2d 1194 (CA 7, 1982)

POSNER, Circuit Judge

This is a tort case under the federal admiralty jurisdiction. We are called upon to decide questions of contributory negligence and damage assessment, in particular the question - one of first impression in this circuit - whether, and if so how, to account for inflation in computing lost future wages.

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 more 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. He did not explain in his written opinion how he had arrived at this figure, but in a preceding oral opinion he stated that he was "not certain that she would work until age 70 at this type of work," although "she certainly was entitled to" do so and "could have earned something"; and that he had not "felt bound by (the economist's) figure of eight per cent increase in wages" and had "not found the wages based on necessarily a 60 dollar a day job." If this can be taken to mean that he thought Mrs. O'Shea would probably have worked till she was 70, starting at $40 a day but moving up from there at six rather than eight percent a year, the economist's estimate of the present value of her lost future wages would be $75,000.

There is no doubt that the accident disabled Mrs. O'Shea from working as a cook on a boat. The break in her leg was very serious: it reduced the stability of the leg and caused her to fall frequently. It is impossible to see how she could have continued working as a cook, a job performed mostly while standing up, and especially on a boat, with its unsteady motion. 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. Compare *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1982), with *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037-38 (5th Cir. 1981). It is whether she can by reasonable diligence find gainful employment, given the physical condition in which the accident left her. *See*, *e.g.*, *Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 644 (6th Cir. 1974). 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. But Riverway does argue that we cannot assume she might have earned $10,800 a year rather than $7200, despite her testimony that at the time of the accident she was about to take another job as a boat's cook where she would have been paid at the rate of $60 rather than $40 a day. The point is not terribly important since the trial judge gave little weight to this testimony, but we shall discuss it briefly. Mrs. O'Shea was asked on direct examination what "pay you would have worked" for in the new job. Riverway's counsel objected on the ground of hearsay, the judge overruled his objection, and she answered $60 a day. The objection was not well taken. Riverway argues that only her prospective employer knew what her wage was, and hence when she said it was $60 she was testifying to what he had told her. But an employee's wage is as much in the personal knowledge of the employee as of the employer. If Mrs. O'Shea's prospective employer had testified that he would have paid her $60, Riverway's counsel could have made the converse hearsay objection that the employer was really testifying to what Mrs. O'Shea had told him she was willing to work for. Riverway's counsel could on cross-examination have probed the basis for Mrs. O'Shea's belief that she was going to get $60 a day in a new job, but he did not do so and cannot complain now that the judge may have given her testimony some (though little) weight.

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 undercompensate 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. There are (at least) two ways to deal with inflation in computing the present value of lost future wages. One is to take it out of both the wages and the discount rate - to say to Mrs. O'Shea, "we are going to calculate your probable wage in 1990 on the assumption, unrealistic as it is, that there will be zero inflation between now and then; and, to be consistent, we are going to discount the amount thus calculated by the interest rate that would be charged under the same assumption of zero inflation." Thus, if we thought Mrs. O'Shea's real *(i.e.*, inflation-free) wage rate would not rise in the future, we would fix her lost earnings in 1990 as $7200 and, to be consistent, we would discount that to present (1980) value using an estimate of the real interest rate. At two percent, this procedure would yield a present value of $5906. Of course, she would not invest this money at a mere two percent. She would invest it at the much higher prevailing interest rate. But that would not give her a windfall; it would just enable her to replace her lost 1990 earnings with an amount equal to what she would in fact have earned in that year if inflation continues, as most people expect it to do. (If people did not expect continued inflation, long-term interest rates would be much lower; those rates impound investors' inflationary expectations.)

An alternative approach, which yields the same result, is to use a (higher) discount rate based on the current risk-free 10-year interest rate, but apply that rate to an estimate of lost future wages that includes expected inflation. Contrary to Riverway's argument, this projection would not require gazing into a crystal ball. The expected rate of inflation can, as just suggested, be read off from the current long-term interest rate. If that rate is 12 percent, and if as suggested earlier the real or inflation-free interest rate is only one to three percent, this implies that the market is anticipating 9-11 percent inflation over the next 10 years, for a long-term interest rate is simply the sum of the real interest rate and the anticipated rate of inflation during the term.

Either approach to dealing with inflation is acceptable (they are, in fact, equivalent) and we by no means rule out others; but it 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. We note that in *Byrd v. Reederei*, 638 F.2d 1300, 1307-08 (5th Cir. 1981), a panel of the Fifth Circuit indicated misgivings over that circuit's position and that rehearing *en banc* has been granted. 650 F.2d 1324 (1981).

Applying our analysis to the present case, we cannot pronounce the approach taken by the plaintiff's economist unreasonable. He chose a discount rate - 8.5 percent - well above the real rate of interest, and therefore containing an allowance for inflation. Consistency required him to inflate Mrs. O'Shea's starting wage as a boat's

cook in calculating her lost future wages, and he did so at a rate of six to eight percent a year. If this rate had been intended as a forecast of purely inflationary wage changes, his approach would be open to question, especially at the upper end of his range. For if the estimated rate of inflation were eight percent, the use of a discount rate of 8.5 percent would imply that the real rate of interest was only .5 percent, which is lower than most economists believe it to be for any substantial period of time. But wages do not rise just because of inflation. Mrs. O'Shea could expect her real wages as a boat's cook to rise as she became more experienced and as average real wage rates throughout the economy rose, as they usually do over a decade or more. It would not be outlandish to assume that even if there were no inflation, Mrs. O'Shea's wages would have risen by three percent a year. If we subtract that from the economist's six to eight percent range, the inflation allowance built into his estimated future wage increases is only three to five percent; and when we subtract these figures from 8.5 percent we see that his implicit estimate of the real rate of interest was very high (3.5-5.5 percent). This means he was conservative, because the higher the discount rate used the lower the damages calculated.

If conservative in one sense, the economist was most liberal in another. He 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. Nor of another: the economist selected the 8.5 percent figure for the discount rate because that was the current interest rate on Triple A 10-year state and municipal bonds, but it would not make sense in Mrs. O'Shea's federal income tax bracket to invest in tax-free bonds. If he wanted to use nominal rather than real interest rates and wage increases (as we said was proper), the economist should have used a higher discount rate and a higher expected rate of inflation. But as these adjustments would have been largely or entirely offsetting, the failure to make them was not a critical error.

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. If the economist's method of estimating damages was too generous to Mrs. O'Shea in one important respect it was, as we have seen, niggardly in another. Another error against Mrs. O'Shea should be noted: the economist should not have deducted her entire income tax liability in estimating her future lost wages. *Cf. Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 495, 100 S. Ct. 755, 758, 62 L. Ed. 2d 689 (1980). While it is true that the damage award is not taxable, the interest she earns on it will be (a point the economist may have ignored because of his erroneous assumption that she would invest the award in tax-exempt bonds), so that his method involved an element of double taxation.

If we assume that Mrs. O'Shea could have expected a three percent annual increase in her real wages from a base of $7200, that the real risk-free rate of interest (and therefore the appropriate discount rate if we are considering only real wage increases) is two percent, and that she would have worked till she was 70, the present value of her lost future wages would be $91,310. This figure ignores the fact that she did not have a 100 percent probability of actually working till age 70 as a boat's cook, and fails to make the appropriate (though probably, in her bracket, very small) net income tax adjustment; but it also ignores the possibility, small but not totally negligible, that the proper base is really

$10,800 rather than $7200.

So we cannot say that the figure arrived at by the judge, $86,033, was unreasonably high. But we are distressed that he made no attempt to explain how he had arrived at that figure, since it was not one contained in the economist's testimony though it must in some way have been derived from that testimony. Unlike many other damage items in a personal injury case, notably pain and suffering, the calculation of damages for lost earnings can and should be an analytical rather than an intuitive undertaking. Therefore, compliance with Rule 52(a) of the Federal Rules of Civil Procedure requires that in a bench trial the district judge set out the steps by which he arrived at his award for lost future earnings, in order to assist the appellate court in reviewing the award. *Cf.* *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1183-84 (7th Cir. 1982). The district judge failed to do that here. We do not consider this reversible error, because our own analysis convinces us that the award of damages for lost future wages was reasonable. But for the future we ask the district judges in this circuit to indicate the steps by which they arrive at damage awards for lost future earnings.

Judgment affirmed.

Questions and Notes

1. Awards for lost income due to personal injuries have traditionally not been subject to income taxes, stretching back to a federal law passed in 1919. However, as the bite taken out for taxes has increased to a larger and larger percentage, pressure has mounted to allow juries to take this into account when figuring lost income. A majority of jurisdictions still recognize a gross income rule in which evidence of the amount of income tax the plaintiff would pay is excluded - lost earnings are based on gross, not net income. Of the minority jurisdictions, most allow or require evidence of what income tax would have been owed on the salary when figuring lost earnings. However, there is a movement toward allowing judges to use their discretion in giving such information to the jury. *See generally* Burke, *Tax Treatment of Employment - Related Personal Injury Awards: The Need for Limits*, 50 Mont. L. Rev. 13 (Winter 1989).

b. Medical Expenses

Medical expenses are often a substantial part of the "special damages" claimed in a personal injury case. In a case involving brain injury or spinal damage, the cost of care may dwarf even the loss of lifetime earning capacity. For example, in *Fortman v. Hemco*, *infra*, the plaintiff's medical care was estimated to cost $180,000 per year. Or consider *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), in which the plaintiff suffered brain injury because of a hospital's negligent treatment. His overall award was $4 million, of which $500,000 was income loss, future medical and attendant care/education were $1.8 million, and pain and suffering $1.6 million. Like lost income, damages for future medical expenses must be discounted to present value.

3. "Non-economic" Damages - Pain and Suffering

MORSE v. AUBURN AND SYRACUSE RAILROAD CO.

10 Barb. 621 (N.Y. S. Ct. 1851)

By the Court, JOHNSON, J.

The defendants excepted to that part of the charge to the jury, in which they were instructed, that in cases of this kind it was competent for them to go beyond the actual pecuniary damages sustained, and take into consideration, not only the loss of time and pecuniary expenses, but the bodily pain and suffering also, which the plaintiff had undergone, and compensate him in damages therefor. I confess I am yet to learn that this is contrary to law. I am confident the rule has been generally understood, and uniformly administered by our courts, as laid down by the learned justice to the jury, in all cases of this kind, where one person has received personal injury and mutilation, by the careless or negligent act of another. The bodily pain and suffering is part and parcel of

the actual injury, for which the injured party is as much entitled to compensation in damages, as for loss of time or the outlay of money. It is true the footing for a precise and accurate estimate of damages may not be quite as sure and fixed in regard to it, as where a loss has been sustained in time or money; and yet the actual damage is no less substantial and real.

... If persons or corporations engaged in the business of the defendants, intrusted daily with the lives and personal safety of hundreds of individuals, and using such an untamable power, may negligently cause serious injuries to the person, and occasion intolerable bodily pain and suffering, and only be chargeable with the loss of time, at what it may be proved to be worth, and the surgeon's and nurse's bill, it is quite time it should be understood, that persons trusting themselves to such protection may provide for more ample indemnity by special contract. Such a rule would, in my judgment, be a serious general evil and be productive of the most deplorable consequences.

... The defendants' counsel insists that all damages recovered beyond the actual loss of time and pecuniary expense, are strictly exemplary damages, and that to authorize a plaintiff to recover damages of that character, he must show the injury to have been willful and malicious on the part of the defend-ants. But I think that damages for bodily pain and suffering arising from physical injury, and connected with actual loss of time and money, are not exemplary, or punitory in their character, in any strict or proper sense of these terms. Exemplary or punitory damages, or smart money, as they are often called, are given by way of punishment, for intentional wrong, and to operate as an example to others.... Here the damages are strictly compensatory for the actual injury, of which the bodily pain and suffering were an essential part....

Questions and Notes

1. Many proposals for tort reform (some of which have been successful; *see* the case of *Fein v. Permanente*, *infra* § C) provide for a reduction or "cap" on pain and suffering damages, but allow a full recovery of "economic" losses. Is this an improvement to the tort system?

2. In a recent article, Bovbjerg, Sloan and Blumstein proposed an alternative to essentially unfettered jury determination of pain and suffering damages. In their view, "[d]etermination of awards on an ad hoc and unpredictable basis, especially for `non-economic' losses, ... tends to subvert the credibility of awards and hinder the efficient operation of the tort law's deterrence function." As an alternative, they suggest one of using one or more methods for calculating awards:

> (1) a matrix of dollar values based on victim age and injury severity; (2) a scenario-based system that employs descriptions of prototypical injuries with corresponding award values to be given to juries as guides to valuation; or (3) a system of flexible ranges of award floors and caps that reflect various categories of injury severity. Bovbjerg, Sloan and Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. Rev. 908 (1989). If you were a member of the legislature, would you support a measure to include one or more of these methods in jury calculation of awards? Why or why not?

3. A recent symposium addressed the topic, *Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?*: Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 San Diego L. Rev. 1097 (2003); Adi Ayal, *Can We Compensate for Incompensable Harms?* 40 San Diego L. Rev. 1123 (2003); Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 San Diego L. Rev. 1135 (2003); Michael Moore, *For What must We Pay? Causation and Counterfactual Baselines*, 40 San Diego L. Rev. 1181 (2003); Richard Fumerton, *Moore, Causation, Counterfactuals, and Responsibility*, 40 San Diego L. Rev. 1273 (2003); Stephen Perry, *Harm, History, and Counterfactuals*, 40 San Diego L. Rev. 1283 (2003); John Goldberg, C.P., *Rethinking Injury and Proximate Cause*, 40 San Diego L. Rev. 1315 (2003); Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 San Diego L. Rev. 1345 (2003); F.M. Kamm, *Baselines and Compensation*, 40 San Diego L. Rev. 1367 (2003); Emily Sherwin, *Compensation and Revenge*, 40 San Diego L. Rev. 1387 (2003); Kenneth W. Simons, *Compensation: Justice or Revenge*, 40 San Diego L. Rev. 1415 (2003);

Richard W. Wright, *the Grounds and Extent of Legal Responsibility*, 40 San Diego L. Rev. 1425 (2003); C.J. Martin, *Judicial Redistribution of Punitive Damage Awards*, 40 San Diego L. Rev. 1649 (2003).

SPADE v. LYNN & B.R. CO.

168 Mass. 285, 47 N.E. 88 (1897)

[*Plaintiff was riding in defendant's train, late at night, when two intoxicated passengers entered her car. They were jostling one another, and plaintiff moved to avoid them. Then one of them quarreled with the conductor over the payment of the fare, and additional pushing and shoving resulted in one of the men colliding with the plaintiff. She testified that as the man "lurched over on me; then it seemed as though I turned to solid ice. My breath was cut right off. I could not have spoken; I tried to speak, but I chilled so I kept growing stiffer and stiffer, until I did not know, I do not know when they got me off the car." She admitted at trial that she suffered neither pain nor physical injury. The jury awarded a verdict, and the defendant appealed.*]

ALLEN, J.

This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: Whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned by the negligence of another, which does not result in bodily injury, but that, when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge that he could not recover if he sustained no injury in his person, buy merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Railroad Co.*, 163 Mass. 484, 40 N.E. 895, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground; and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright and resulting nervous shock. The case calls for a consideration of the real ground upon which the liability of nonliability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety, does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of the enjoyment and of comfort, cause real suffering, and to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion, may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a

practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fall to meet what would be desirable if the single case were alone to be considered. Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties, - not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And, in determining the rules of law by which the right to recover compensation for unintended injury from other is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or inform, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for traveling in general, notice should be given so that if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 Hurl & N. 534, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennow*, 155 Mass. 70, 28 N.E. 1125; *White v. Dresser*, 135 Mass. 150; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Railroad Co. v. Kellogg*, 94 U.S. 469. 475; *Wyman v. Leavitt*, 71 Me. 227; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11; *Jones v. Fields*, 57 Iowa, 317, 10 N.W. 747; *Renner v. Canfield*, 36 Minn. 90, 30 N.W. 435; *Lynch v. Knight*, 9 H.L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 Prob. Div. 105; *Hobbs v. Railway Co.*, L.R. 10 Q.B. 11, 122. The law of negligence, in its special application to cases of accidents, has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Commissioners v. Coultas*, 13 App. Cas. 222; *Mitchell v. Railway Co.* (N.Y. App; Dec. 1, 1896) 45 N.E. 354; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340; *Haile's Curator v. Railroad Co.*, 9 C.C.A. 1345, 60 Fed. 557. In the following cases a different view was taken; *Bell v. Railroad Co.*, L.R. Ir. 26 Exch. 428; *Purchell v. Railroad Co.*, 48 Minn. 134, 50 N.W. 1034; *Fitzpatrick v. Railway Co.*, 12 U.C. Q.B. 645. *See, also*, BEVAN, NEG. 77 *et seq*. It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some other. Nor do we include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennow* and *Fillebrown v. Hoar*, already cited; *Meagher v. Driscoll*, 99 Mass. 281. In the present case no such considerations entered into the rulings or were presented by the facts. The entry therefore must be: Exceptions sustained.

JOHNSON v. STATE OF NEW YORK

37 N.Y.2d 378, 334 N.E.2d 590 (1975)

BREITEL, Chief Judge

* * *

Claimant's mother, Emma Johnson, had been a patient in the Hudson River State Hospital since 1960. On August 6, 1970, another patient, also named Emma Johnson, died. Later that day, the hospital sent a telegram addressed to Nellie Johnson of Albany, claimant's aunt and the sister of the living Emma Johnson. The telegram read:

> REGRET TO INFORM YOU OF DEATH OF EMMA JOHNSON PLEASE NOTIFY RELATIVES MAKE BURIAL ARRANGEMENTS HAVE UNDERTAKER CONTACT HOSPITAL BEFORE COMING FOR BODY HOSPITAL WISHES TO STUDY ALL DEATHS FOR SCIENTIFIC REASONS PLEASE WIRE POST MORTEM CONSENT.
>
> - HUDSON RIVER STATE HOSPITAL

In accordance with the instructions in the telegram, claimant was notified of her mother's death by her aunt. An undertaker was engaged; the body of the deceased Emma Johnson was released by the hospital and taken to Albany that night. A wake was set for August 11, with burial the next day. In the interim claimant incurred expenses in preparing the body for the funeral, and in notifying other relatives of her mother's death. On the afternoon of the wake, claimant and her aunt went to the funeral home to view the body. After examining the body, both claimant and her aunt remarked that the mother's appearance had changed. Nellie Johnson also expressed doubt that the corpse was that of her sister Emma. Thereafter the doubts built up, and upon returning that evening for the wake, claimant, in a state of extreme distress, examined the corpse more closely and verified that it was not that of her mother. At this point, claimant became "very, very hysterical", and had to be helped from the funeral chapel.

The hospital was called, and the mistake confirmed. Claimant's mother was alive and well in another wing of the hospital. Later that evening at the hospital, the deputy director, with the authorization of the director, admitted the mistake to claimant and her aunt. Upon the trial it appeared that the hospital had violated its own procedures and with gross carelessness had "pulled" the wrong patient record.

After this incident, claimant did not work in her employment for more than 11 days. She complained of "[r]ecurrent nightmares, terrifying dreams of death, seeing the coffin ... difficulty in concentrating, irritability, inability to function at work properly, general tenseness and anxiety." Her psychiatrist testified that "[s]he appeared to be somewhat depressed, tremulous. She seemed to be under a considerable amount of pressure. She cried easily when relating events that occurred. I though that she spoke rather rapidly and obviously perspiring." Both her psychiatrist and that of the State agreed that, as a result of the incident, claimant suffered "excessive anxiety", that is, anxiety neurosis. Her expert, as indicated, testified that she showed objective manifestations of that condition.

One to whom a duty of care is owed, it has been held, may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations (*Battalla v. State of New York*, 10 N.Y.2d 237, 238-239, 219 N.Y.S.2d 34, 35, 176 N.E.2d 729; *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21-22, 176 N.Y.S.2d 996, 999-1000, 152 N.E.2d 249, 252; *cf.* RESTATEMENT, TORTS 2D, § 313, subd. (1); *see, generally*, *Tobin v. Grossman*, 24 N.Y.2d 609, 613, 301 N.Y.S.2d 554, 556, 249 N.E.2d 419, 420; PROSSER, TORTS (4th ed.), § 54, pp. 330-333; 2 HARPER AND JAMES, LAW OF TORTS, § 18.4, pp. 1032-1034; *Torts - Emotional Disturbances, Ann.*, 64 A.L.R.2d 100, 143, § 11 *Et seq.*). In the absence of contemporaneous or consequential physical injury, courts have been reluctant to permit recovery for negligently caused psychological trauma, with ensuing emotional harm alone (*see* RESTATEMENT, TORTS 2D, § 436A; PROSSER, TORTS (4th ed.), *Op. cit.*, pp. 328-330, and cases collected; 2 HARPER AND JAMES, LAW OF TORTS, *Op. cit.*, pp. 1031-1032, and cases collected; *Torts - Emotional Disturbances, Ann.*, 64 A.L.R.2d 100, 115, § 7; *cf. Weicker v. Weicker*, 22 N.Y.2d 8, 11, 290 N.Y.S.2d

732, 733, 237 N.E.2d 876). The reasons for the more restrictive rule were best summarized by PROSSER (*Op. cit.*, p. 329): "The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort are lacking". Contemporaneous or consequential physical harm, coupled with the initial psychological trauma, was, however, thought to provide an index of reliability otherwise absent in a claim for psychological trauma with only psychological consequences.

There have developed, however, two exceptions. The first is the minority rule permitting recovery for emotional harm resulting from negligent transmission by a telegraph company of a message announcing death (*see* cases collected in RESTATEMENT, TORTS 2D, *App.*, § 436A; PROSSER, *Op. cit.*, p. 329; *but see Western Union Tel. Co. v. Speight*, 254 U.S. 17, 18, 41 S. Ct. 11, 65 L. Ed. 104; *Curtin v. Western Union Tel. Co.*, 13 App. Div. 253, 255-256, 42 N.Y.S. 1109, 1110-1111 (majority rule denying recovery). The Federal rule does, however, permit recovery where the psychological trauma results in physical illness, *see Kaufman v. Western Union Tel. Co.*, 5 Cir., 224 F.2d 723, 731, *cert. den.* 350 U.S. 947, 76 S. Ct. 321, 100 L. Ed. 825).

The second exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse (*see* PROSSER, *Op. cit.* pp. 329-330, and cases collected). Recovery in these cases has ostensibly been grounded on a violation of the relative's quasi-property right in the body (*see Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 262, 95 N.E. 695, 696; but *cf. Owens v. Liverpool Corp.* (1939), 1 KB 394, 400 (CA) (applying negligence principles), disapproved in *Hay or Bourhill v. Young* (1943), AC 92, 110 (HL) (per Lord WRIGHT), but applied in *Behrens v. Bertram Mills Circus* (1957), 2 QB 1, 28 (DEVLIN, J.)). It has been noted, however, that in this context such a "property right" is little more than a fiction; in reality the personal feelings of the survivors are being protected (PROSSER, *Op. cit.*, p. 59).

In both the telegraph cases and the corpse mishandling cases, there exists "an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious" (p. 330). PROSSER notes that "[t]here may perhaps be other such cases" (p. 330; *see Nieman v. Upper Queens Med. Group, City Ct.*, 220 N.Y.S.2d 129, 130, in which plaintiff alleged emotional harm due to negligent misinformation by a laboratory that his sperm count indicated sterility; and defendant's motion for judgment on the pleadings was denied). The instant claim provides an example of such a case.

As the Appellate Division correctly found and the State in truth concedes, the hospital was negligent in failing to ascertain the proper next of kin when it mistakenly transmitted the death notice to claimant's aunt and through her, at its behest, to claimant. While for one to be held liable in negligence he need not foresee novel or extraordinary consequences, it is enough that he be aware of the risk of danger. The consequential funeral expenditures and the serious psychological impact on claimant of a false message informing her of the death of her mother, were all within the "orbit of the danger" and therefore within the "orbit of the duty" for the breach of which a wrongdoer may be held liable (*Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339, 343, 162 N.E. 99, 100). Thus, the hospital owed claimant a duty to refrain from such conduct, a duty breached when it negligently sent the false message. The false message and the events flowing from its receipt were the proximate cause of claimant's emotional harm. Hence, claimant is entitled to recover for that harm, especially if supported by objective manifestations of that harm.

Tobin v. Grossman (24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419, *supra*) is not relevant. In the *Tobin* case, the court held that no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries (p. 611, 301 N.Y.S.2d pp. 554-555, 249 N.E.2d pp. 419-420). In this case, however, the injury was inflicted by the hospital directly on claimant by its negligent sending of a false message announcing her mother's death. Claimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the

real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case. (Nor is *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, relevant to the tort rationale or holding in this case. There recovery was allowed solely on the elastic basis permitted by the Workmen's Compensation Law as applied in the courts.)

Moreover, not only justice but logic compels the further conclusion that if claimant was entitled to recover her pecuniary losses she was also entitled to recover for the emotional harm caused by the same tortious act. The recovery of the funeral expenses stands only because a duty to claimant was breached. Such a duty existing and such a breach of that duty occurring, she is entitled to recover the proven harmful consequences proximately caused by the breach. In the light of the *Battalla* and *Ferrara* cases (*supra*), and the reasoning upon which they were based, recovery for emotional harm to one subjected directly to the tortious act may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a "guarantee of genuineness" to which the court referred in the *Ferrara* case (5 N.Y.2d 16, 21, 176 N.Y.S.2d 996, 999, 152 N.E.2d 249, 252, *supra*; *see, also, Battalla v. State of New York*, 10 N.Y.2d 237, 242, 219 N.Y.S.2d 34, 38, 176 N.E.2d 729, 731, *supra*).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to that court for a determination of the facts in accordance with CPLR 5613.

JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

Order reversed, with costs, and case remitted to Appellate Division, Third Department, for further proceedings in accordance with the opinion herein.

Questions and Notes

1. In *Lafferty v. Manhasset Medical Center Hospital*, 54 N.Y.2d 277, 445 N.Y.S.2d 11, 429 N.E.2d 789 (1981), the plaintiff brought suit against the hospital to recover for emotional distress and aggravation of a preexisting heart problem. She suffered these upon witnessing a negligent transfusion of mismatched blood into her mother-in-law and upon participating in the events that occurred during the period immediately following the start of the transfusion. Would the court impose liability based upon *Johnson v. State of New York*?

2. In *Bylsma v. Burger King Corp.*, 176 Wash. 2d 555, 293 P.3d 1168 (2012), a deputy sheriff purchased a Whopper with cheese at the drive-thru window. Before eating it he inspected it, and discovered a large glob of spit, which was later DNA tested and matched to a Burger King employee. The deputy sued Burger King for his emotional distress. Based upon what you have learned, is he likely to recover?

STEINHAUSER v. HERTZ CORPORATION

421 F.2d 1169 (2d Cir. 1970)

FRIENDLY, Circuit Judge

On September 4, 1964, plaintiff Cynthia Steinhauser, a New Jersey citizen then 14 years old, her mother and father were driving south through Essex County, N.Y. A northbound car, owned by defendant Hertz Corporation, a Delaware corporation authorized to do business in New York, and operated by defendant Ponzini, a citizen of New York, crossed over a double yellow line in the highway into the southbound lane and struck the Steinhauser car heavily on the left side. The occupants did not suffer any bodily injuries.

The plaintiffs' evidence was that within a few minutes after the accident Cynthia began to behave in an unusual way. Her parents observed her to be "glassy-eyed," "upset," "highly agitated," "nervous" and "disturbed." When Ponzini came toward the Steinhauser car, she jumped up and down and made menacing gestures until restrained by her father. On the way home she complained of a headache and became uncommunicative. In the following days things went steadily worse. Cynthia thought that she was being attacked and that knives, guns and bullets were coming through the windows. She was hostile toward her parents and assaulted them; becoming depressed, she attempted suicide. The

family physician recommended hospitalization. After observation and treatment in three hospitals, with a final diagnosis of "schizophrenic reaction - acute - undifferentiated," she was released in December 1964 under the care of a psychiatrist, Dr. Royce, which continued until September 1966. His diagnosis, both at the beginning and at the end, was of a chronic schizophrenic reaction; he explained that by "chronic" he meant that Cynthia was not brought to him because of a sudden onset of symptoms. She then entered the Hospital of the University of Pennsylvania and, one month later, transferred to the Institute of Pennsylvania Hospital for long-term therapy. Discharged in January 1968, she has required the care of a psychiatrist. The evidence was that the need for this will continue, that reinstitutionalization is likely, and that her prognosis is bad.

As the recital makes evident, the important issue was the existence of a causal relationship between the rather slight accident and Cynthia's undoubtedly serious ailment.[1] The testimony was uncontradicted that prior to the accident she had never displayed such exaggerated symptoms as thereafter. However, she had fallen from a horse about two years earlier and suffered what was diagnosed as a minor concussion; she was not hospitalized but missed a month of school. The other evidence relied on by the defendants to show prior psychiatric abnormality was derived largely from the history furnished, apparently in large part by Cynthia, at her admission to the first of the three hospitals on September 20, 1964, which we set out in the margin.

* * *

We add a further word that may be of importance on a new trial. Although the fact that Cynthia had latent psychotic tendencies would not defeat recovery if the accident was a precipitating cause of schizophrenia, this may have a significant bearing on the amount of damages. The defendants are entitled to explore the probability that the child might have developed schizophrenia in any event. While the evidence does not demonstrate that Cynthia already had the disease, it does suggest that she was a good prospect. Judge Hiscock said in *McCall*, "it is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense." 201 N.Y. at 224, 94 N.E. at 617. In *Evans v. S.J. Groves & Sons Company, supra*, we noted that 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." 315 F.2d at 347-348. *See also* the famous case of *Dillon v. Twin State Gas & Electric Co.*, 85 N.H. 449, 163 A. 111 (1932), and 2 HARPER & JAMES, *supra*, at 1128-1131. It is no answer that exact prediction of Cynthia's future apart from the accident is difficult or even impossible. However taxing such a problem may be for men who have devoted their lives to psychiatry, it is one for which a jury is ideally suited.

Reversed for a new trial.

Questions and Notes

1. Should it make any difference whether the emotional injury is one that is classified as a "mental illness"? Why or why not?

2. Does it make sense to draw the line between compensable and noncompensable emotional injuries based on whether they are accompanied by physical injury? If not, where should the line - if any - be drawn?

3. Note that in the *Spade* case the judge distinguished negligently caused emotional injury from other types of compensable harm, such as

[1] The fact that no physical harm was suffered as a result of the accident does not affect plaintiff's right to recover. New York has abandoned the rule disallowing recovery for mental disturbance in the absence of a physical impact, see *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), and although some courts deny recovery for mental disturbance unaccompanied by physical injuries, see PROSSER, TORTS 348-49 (3d ed. 1964); A.L.I. RESTATEMENT 2D TORTS 436A, New York allows such recovery if the "mental injury [is] marked by definite physical symptoms, which are capable of clear medical proof," *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958), quoting PROSSER, TORTS 212 (1st ed. 1941); *see also Battalla v. State*, *supra*, and *"A.A." v. State*, 43 Misc. 2d 1004, 252 N.Y.S. 2d 800 (Ct. Cl. 1964) (awarding damages where slight physical impact "aggravated and exacerbated that pre-existing condition" to produce schizophrenia).

libel or slander (see Chapter Fourteen for a discussion of these torts). If a newspaper had printed a story in which it incorrectly identified Nellie Smith as the daughter of a mental patient, Nellie Smith might sue the newspaper for libel. Does it make a difference if the negligence is on the part of a New York hospital, that sends a telegram to the daughter of the wrong Mrs. Johnson? Why does tort law generally permit one kind of emotional injury to be compensated without proof of physical harm, but not another?

4. The *Johnson* case is significant because the defendants did no physical harm to anyone. In many of the so-called "negligent infliction of emotional distress" cases (such as *Dillon v. Legg*, considered *infra*, § B.3.), the defendant has inflicted physical injury upon Party *X*, and some person related to Party *X* is seeking recovery of emotional damages. One could call those damages "parasitic" because they depend upon the existence of an otherwise valid tort claim. In this case, however, there is no physical injury. Does that make the case for recovery stronger or weaker?

5. A well-known case recognizing a claim for negligently inflicted emotional distress, even where no physical injury was caused (to anyone, not just to plaintiff), is *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In *Molien* an employee of the defendant hospital negligently examined the plaintiff and erroneously told her that she had contracted syphilis. If the hospital should be forced to compensate the plaintiff for her emotional distress, what theory provides the best justification?

4. Punitive Damages

MORAN v. JOHNS-MANVILLE SALES CORPORATION

691 F.2d 811 (6th Cir. 1982)

John W. PECK, Senior Circuit Judge

In this diversity action, Johns-Manville Sales Corp. ("JM") appeals from a judgment for the plaintiff, and from the trial court's denial of JM's motions for judgment notwithstanding the verdict ("JNOV"), for a new trial, and for a remittitur. On appeal, JM attacks the sufficiency of the evidence at trial to support the jury's award of $350,000 in compensatory and $500,000 in punitive damages. JM also offers policy arguments against any award of punitive damages in this case.

Edward Moran, the plaintiff's deceased, worked for over thirty years installing insulation. During that time he worked with asbestos insulation products made by JM's corporate predecessors. Moran died of lung cancer at age sixty-one. His executrix prosecuted this action against various manufacturers of asbestos products under a theory of strict liability in tort.

* * *

JM next argues that the evidence at trial did not support an award of punitive damages. JM states that Ohio law requires that "actual malice" - which JM apparently equates with ill-will - be established before punitive damages may be awarded. This is not the law of Ohio as stated by the Ohio Supreme Court or as construed by this Court. The Ohio Supreme Court recently summarized the "malice" justifying punitive damages thus:

> Evidence of actual malice ... must be present before a jury question of punitive damages is raised; actual malice may take either the form of the defendant's express ill will, hatred or spirit of revenge, or the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances. *Detling v. Chockley*, 70 Ohio St.2d 134, 137-38 (436 N.E.2d 208) (1982) *(per curiam)*. *Accord*, *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 365-66 (6th Cir. 1978); *Gillham v. Admiral Corp.*, 523 F.2d 102, 108 (6th Cir. 1975) (applying Ohio law).

In the product liability action of *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 456 at syllabus 2, 424 N.E.2d 568 (1981), the Ohio Supreme Court held that "[p]unitive damages may be awarded where a manufacturer's testing and examination procedures are so inadequate as to manifest a flagrant indifference to the probability

that the product might expose consumers to unreasonable risks of harm." By analogy to *Leichtamer* we hold that a jury question of punitive damages was established if a reasonable juror could have concluded that JM's failure to place warning labels on insulation products before 1964 manifested such a "flagrant indifference" to users' risks of harm.

To rebut Moran's evidence of flagrant indifference to risks to insulation workers, JM argues that the record discloses that the Selikoff study of 1964[1] was the first to document health risks to users, rather than producers, of asbestos products. This assertion is belied by the summary of prior knowledge given in the Selikoff study itself:

> Ellman in 1934 mentioned a case of asbestosis in an insulation worker. Other cases were subsequently reported, and in the annual report of the Chief Inspector of Factories for the year 1956, "lagging," or insulation work, was recognized as hazardous. Similarly, Hervieux in France drew attention in 1962 to the dangers of such end product use as insulation work. The only large scale survey of asbestos insulation workers was undertaken in the U.S. by Fleischer *et al*. in 1945. They found only three cases of asbestosis and concluded that "asbestos pipe covering of naval vessels is a relatively safe operation." Unfortunately, 95 per cent of those examined by them had worked for less than 10 years at the trade and, as we shall see, evaluation of the risk of insulation workers limited to study of men with relatively short durations of exposure may be misleading. Selikoff at 140 (footnotes omitted).

In judging whether a manufacturer's indifference to consumers' risks is "flagrant" we believe a jury may weigh the gravity of the harms threatened against the onerousness of the manufacturer's correctives. Here the harms threatened were chronic debilitating diseases; the corrective was the placement of warning labels on insulation products so that insulation workers might try to protect themselves if they so chose. Under the limited standard of review we may employ, we cannot disturb the jury's award of punitive damages in this case.

* * *

II. Policy Arguments Against Punitive Damages Award

JM offers numerous reasons why an award of punitive damages would be inappropriate in this case. The first is that the goals of punishment and deterrence would not be served by awarding "punitive" damages. JM argues that "there is no conduct to deter because Johns-Manville modified its products in the 1960's." In Ohio, however, the deterrence sought by punitive damages is general, not specific: the offending party is set up "as an example *to others* that they might be deterred from *similar* conduct." *Detling, supra*, 70 Ohio St. 2d at 136, 436 N.E.2d 208 (emphasis added); *see also* 30 OJUR 3D, *Damages*, § 148 (citing cases). Whether a defendant's particular course of conduct has ceased is irrelevant to the accomplishment of this broader purpose.

In *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 365-66 (6th Cir. 1978), we affirmed a district court's refusal to award punitive damages in a product liability case. The trial court had noted both improving industry practices, and a change in corporate ownership, as weighing against such an award. *See* 395 F. Supp. 1081, 1097-98 (N.D. Ohio 1975). The trial court's action may be questioned in light of later Ohio precedent; moreover, our own affirmance, by a divided court, was lukewarm. *See* 591 F.2d at 365-66, 371-74. *Drayton* was a case tried to the bench, and it was key to this Court's affirmance that "the trial judge's decision not to award punitive damages was based upon considerations of both law and fact." *Id.* at 365. We also noted the trial judge's factual characterization of the plaintiffs' arguments for punitive damages as "more shrill than persuasive." *Id.* at 366. Finally, we invoked Rule 52(a), FED. R. CIV. PRO., a pellucid indication that a factual determination was being left undisturbed. *See* 591 F.2d at 366. Nothing we said in *Drayton* requires us to disallow punitive damages in this case.

JM contends that no culpable party would be punished by an award of "punitive" damages here. It points out that the persons responsible for the business decisions giving rise to JM's liability have long ago left JM's employ. We noted in

[1] Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANN. N.Y. ACAD. SCI. 139 (1965).

Gillham that, under Ohio law, a corporation may be "subjected to punitive damages for the tortious acts of its agents within the scope of their employment in any case where a natural person acting for himself would be liable for punitive damages." 523 F.2d at 108. JM would have us overlook the liability of the legal person. We decline to adopt the boundless principle that legal entities may escape liability for punitive damages if the "culpable" persons are no longer agents of the corporation. It is agency at the time of the tortious act, not at the time of litigation, that determines the corporation's liability. JM's rule would make the corporate veil an impenetrable shield against punitive damages; JM points to nothing in Ohio law from which such a shield could be fashioned.

We are not dissuaded from allowing punitive damages because this cost will ultimately be borne by "innocent" shareholders. Punitive damage awards are a risk that accompanies investment. *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) did not establish a contrary rule. In that case we reduced, but did not eliminate, an award of punitive damages against a union; we noted that "the ones who will end up paying for the punitive damages award are the union members. For this reason, courts should be slow to award huge punitive damages awards against unions." *Id.* at 103 (fn. omitted). The case of a union member and shareholder are, however, not wholly analogous. Individual workers only seldom can choose which union to belong to; a group of workers cannot change bargaining agents overnight. Investors may typically place their money where they choose and withdraw it when they wish. The prospect of ultimate liability for punitive damages may encourage investors to entrust their capital to the most responsible concerns.

JM urges with particular force that punitive damages should not be awarded against a company that faces a multitude of product liability actions. If punitive damages are awarded in many of these actions, JM argues that it will not be punished, but destroyed. We have read Judge Friendly's interesting essay on such a prospect, and its implications for the law, in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-41 (2d Cir. 1967). However eloquent the essay, it is confessed dictum. Judge Friendly noted that "the New York cases afford no basis for our predicting that the [New York] Court of Appeals would adopt a rule disallowing punitive damages in a case such as this, and the *Erie* doctrine wisely prevents our engaging in such extensive law-making on local tort liability, a subject which the people of New York have entrusted to their legislature and, within limits, to their own courts, not to us." *Id.* at 841. So it is here. The relief sought by JM may be more properly granted by the state or federal legislature than by this Court. Such legislative relief is even now being sought by asbestos-product manufacturers. *See* 68 A.B.A.J. 398 (April 1982); NEW YORK TIMES, Aug. 10, 1982, at 34.

* * *

Questions and Notes

1. The asbestos cases generated huge litigation costs on both sides. Unfortunately, of the entire amount spent on the asbestos litigation, only 17¢ of every dollar actually went to the victims. The balance was chewed up in litigation, insurance and administrative expenses. Asbestos has been replaced by tobacco as the new object of scrutiny. *See* Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 Miss. L.J. 847 (1998).

2. Commentators have noted the unique characteristics of asbestos and the difficulties of applying traditional tort principles: George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 Pepp. L. Rev. 261 (2003); Katie Nester, *Asbestosis-inflicted Plaintiffs and Fear of Cancer Claims*, 23 St. Louis U. Pub. L. Rev. 367 (2004); Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 Vand. L. Rev. 1949 (2003).

GRIMSHAW v. FORD MOTOR CO.

119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)

TAMURA, Acting Presiding Justice

A 1972 Ford Pinto hatchback automobile unexpectedly stalled on a freeway, erupting into flames when it was rear ended by a car proceeding in the same direction. Mrs. Lilly Gray, the driver of the Pinto, suffered fatal burns and 13-year-old Richard Grimshaw, a passenger in the Pinto, suffered severe and permanently disfiguring burns on his face and entire body. Grimshaw and the heirs of Mrs. Gray (Grays) sued Ford Motor Company and others. Following a six-month jury trial, verdicts were returned in favor of plaintiffs against Ford Motor Company. Grimshaw was awarded $2,516,000 compensatory damages and $125 million punitive damages; the Grays were awarded $559,680 in compensatory damages. On Ford's motion for a new trial, Grimshaw was required to remit all but $32 million of the punitive award as a condition of denial of the motion.

Ford appeals from the judgment and from an order denying its motion for a judgment notwithstanding the verdict as to punitive damages. Grimshaw appeals from the order granting the conditional new trial and from the amended judgment entered pursuant to the order. The Grays have cross-appealed from the judgment and from an order denying leave to amend their complaint to seek punitive damages.

Ford assails the judgment as a whole, assigning a multitude of errors and irregularities, including misconduct of counsel, but the primary thrust of its appeal is directed against the punitive damage award. Ford contends that the punitive award was statutorily unauthorized and constitutionally invalid. In addition, it maintains that the evidence was insufficient to support a finding of malice or corporate responsibility for malice. Grimshaw's cross-appeal challenges the validity of the new trial order and the conditional reduction of the punitive damage award. The Grays' cross-appeal goes to the validity of an order denying them leave to amend their wrongful death complaint to seek punitive damages.

Facts

Since sufficiency of the evidence is in issue only regarding the punitive damage award, we make no attempt to review the evidence bearing on all of the litigated issues. Subject to amplification when we deal with specific issues, we shall set out the basic facts pertinent to these appeals in accordance with established principles of appellate review: We will view the evidence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor, and indulging all reasonable inferences favorable to them. (*Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 507, 156 Cal. Rptr. 41, 595 P.2d 619; *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 925, 101 Cal. Rptr. 568, 496 P.2d 480.)

The Accident:

In November 1971, the Grays purchased a new 1972 Pinto hatchback manufactured by Ford in October 1971. The Grays had trouble with the car from the outset. During the first few months of ownership, they had to return the car to the dealer for repairs a number of times. Their car problems included excessive gas and oil consumption, down shifting of the automatic transmission, lack of power, and occasional stalling. It was later learned that the stalling and excessive fuel consumption were caused by a heavy carburetor float.

On May 28, 1972, Mrs. Gray, accompanied by 13-year-old Richard Grimshaw, set out in the Pinto from Anaheim for Barstow to meet Mr. Gray. The Pinto was then six months old and had been driven approximately 3,000 miles. Mrs. Gray stopped in San Bernardino for gasoline, got back onto the freeway (Interstate 15) and proceeded toward her destination at 60-65 miles per hour. As she approached the Route 30 off-ramp where traffic was congested, she moved from the outer fast lane to the middle lane of the freeway. Shortly after this lane change, the Pinto suddenly stalled and coasted to a halt in the middle lane. It was later established that the carburetor float had become so saturated with gasoline that it suddenly sank, opening the float chamber and causing the engine to flood and stall. A car traveling immediately behind the Pinto was able to swerve and pass it but the driver of a 1962 Ford Galaxie was unable to avoid colliding with the Pinto. The Galaxie had been traveling from 50 to 55 miles per hour but before the impact had been braked to a speed of from 28 to 37 miles per hour.

At the moment of impact, the Pinto caught fire and its interior was engulfed in flames. According to plaintiffs' expert, the impact of the Galaxie had driven the Pinto's gas tank forward and caused it to be punctured by the flange or one of the bolts on the differential housing so that fuel sprayed from the punctured tank and entered the passenger compartment through gaps resulting from the separation of the rear wheel well sections from the floor pan. By the time the Pinto came to rest after the collision, both occupants had

sustained serious burns. When they emerged from the vehicle, their clothing was almost completely burned off. Mrs. Gray died a few days later of congestive heart failure as a result of the burns. Grimshaw managed to survive but only through heroic medical measures. He has undergone numerous and extensive surgeries and skin grafts and must undergo additional surgeries over the next 10 years. He lost portions of several fingers on his left hand and portions of his left ear, while his face required many skin grafts from various portions of his body. Because Ford does not contest the amount of compensatory damages awarded to Grimshaw and the Grays, no purpose would be served by further description of the injuries suffered by Grimshaw or the damages sustained by the Grays.

Design of the Pinto Fuel System:

In 1968, Ford began designing a new subcompact automobile which ultimately became the Pinto. Mr. Iacocco [sic], then a Ford Vice President, conceived the project and was its moving force. Ford's objective was to build a car at or below 2,000 pounds to sell for no more than $2,000.

Ordinarily marketing surveys and preliminary engineering studies precede the styling of a new automobile line. Pinto, however, was a rush project, so that styling preceded engineering and dictated engineering design to a greater degree than usual. Among the engineering decisions dictated by styling was the placement of the fuel tank. It was then the preferred practice in Europe and Japan to locate the gas tank over the rear axle in subcompacts because a small vehicle has less "crush space" between the rear axle and the bumper than larger cars. The Pinto's styling, however, required the tank to be placed behind the rear axle leaving only 9 or 10 inches of "crush space" far less than in any other American automobile or Ford overseas subcompact. In addition, the Pinto was designed so that its bumper was little more than a chrome strip, less substantial than the bumper of any other American car produced then or later. The Pinto's rear structure also lacked reinforcing members known as "hat sections" (2 longitudinal side members) and horizontal cross-members running between them such as were found in cars of larger unitized construction and in all automobiles produced by Ford's overseas operations. The absence of the reinforcing members rendered the Pinto less crush resistant than other vehicles. Finally, the differential housing selected for the Pinto had an exposed flange and a line of exposed bolt heads. These protrusions were sufficient to puncture a gas tank driven forward against the differential upon rear impact.

Crash Tests:

During the development of the Pinto, prototypes were built and tested. Some were "mechanical prototypes" which duplicated mechanical features of the design but not its appearance while others, referred to as "engineering prototypes," were true duplicates of the design car. These prototypes as well as two production Pintos were crash tested by Ford to determine, among other things, the integrity of the fuel system in rear-end accidents. Ford also conducted the tests to see if the Pinto as designed would meet a proposed federal regulation requiring all automobiles manufactured in 1972 to be able to withstand a 20-mile-per-hour fixed barrier impact without significant fuel spillage and all automobiles manufactured after January 1, 1973, to withstand a 30-mile-per-hour fixed barrier impact without significant fuel spillage.

The crash tests revealed that the Pinto's fuel system as designed could not meet the 20-mile-per-hour proposed standard. Mechanical prototypes struck from the rear with a moving barrier at 21-miles-per-hour caused the fuel tank to be driven forward and to be punctured, causing fuel leakage in excess of the standard prescribed by the proposed regulation. A production Pinto crash tested at 21-miles-per-hour into a fixed barrier caused the fuel neck to be torn from the gas tank and the tank to be punctured by a bolt head on the differential housing. In at least one test, spilled fuel entered the driver's compartment through gaps resulting from the separation of the seams joining the real wheel wells to the floor pan. The seam separation was occasioned by the lack of reinforcement in the rear structure and insufficient welds of the wheel wells to the floor pan.

Tests conducted by Ford on other vehicles, including modified or reinforced mechanical Pinto prototypes, proved safe at speeds at which the Pinto failed. Where rubber bladders had been installed in the tank, crash tests into fixed barriers at 21-miles-per-hour withstood leakage from punctures in the gas tank. Vehicles with fuel tanks installed above rather than behind the rear axle passed the fuel system integrity test at 31-miles-per-hour fixed barrier. A Pinto with two

longitudinal hat sections added to firm up the rear structure passed a 20-mile-per-hour rear impact fixed barrier test with no fuel leakage.

The Cost To Remedy Design Deficiencies:

When a prototype failed the fuel system integrity test, the standard of care for engineers in the industry was to redesign and retest it. The vulnerability of the production Pinto's fuel tank at speeds of 20 and 30-miles-per-hour fixed barrier tests could have been remedied by inexpensive "fixes," but Ford produced and sold the Pinto to the public without doing anything to remedy the defects. Design changes that would have enhanced the integrity of the fuel tank system at relatively little cost per car included the following: Longitudinal side members and cross members at $2.40 and $1.80, respectively; a single shock absorbent "flak suit" to protect the tank at $4; a tank within a tank and placement of the tank over the axle at $5.08 to $5.79; a nylon bladder within the tank at $5.25 to $8; placement of the tank over the axle surrounded with a protective barrier at a cost of $9.95 per car; substitution of a rear axle with a smooth differential housing at a cost of $2.10; imposition of a protective shield between the differential housing and the tank at $2.35; improvement and reenforcement of the bumper at $2.60; addition of eight inches of crush space a cost of $6.40. Equipping the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space at a total cost of $15.30 would have made the fuel tank safe in a 34 to 38-mile-per-hour rear end collision by a vehicle the size of the Ford Galaxie. If, in addition to the foregoing, a bladder or tank within a tank were used or if the tank were protected with a shield, it would have been safe in a 40 to 45-mile-per-hour rear impact. If the tank had been located over the rear axle, it would have been safe in a rear impact at 50 miles per hour or more.

Management's Decision To Go Forward With Knowledge Of Defects:

The idea for the Pinto, as has been noted, was conceived by Mr. Iacocco, then Executive Vice President of Ford. The feasibility study was conducted under the supervision of Mr. Robert Alexander, Vice President of Car Engineering. Ford's Product Planning Committee, whose members included Mr. Iacocca, Mr. Robert Alexander, and Mr. Harold MacDonald, Ford's Group Vice President of Car Engineering, approved the Pinto's concept and made the decision to go forward with the project. During the course of the project, regular product review meetings were held which were chaired by Mr. MacDonald and attended by Mr. Alexander. As the project approached actual production, the engineers responsible for the components of the project "signed off" to their immediate supervisors who in turn "signed off" to their superiors and so on up the chain of command until the entire project was approved for public release by Vice Presidents Alexander and MacDonald and ultimately by Mr. Iacocco. The Pinto crash tests results had been forwarded up the chain of command to the ultimate decision-makers and were known to the Ford officials who decided to go forward with production.

Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford's management made the decision to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that "fixes" were feasible at nominal cost. He testified that management's decision was based on the cost savings which would inure from omitting or delaying the "fixes."

Mr. Copp's testimony concerning management's awareness of the crash tests results and the vulnerability of the Pinto fuel system was corroborated by other evidence. At an April 1971 product review meeting chaired by Mr. MacDonald, those present received and discussed a report (Exhibit 125) prepared by Ford engineers pertaining to the financial impact of a proposed federal standard on fuel system integrity and the cost savings which would accrue from deferring even minimal "fixes."[1] The report refers to crash

[1]The *"Fuel System Integrity Program Financial Review"* report included the following:

Product Assumptions

To meet 20 mph movable barrier requirements in 1973, fuel filler neck modifications to provide breakaway capability and minor upgrading of structure are required.

To meet 30 mph movable barrier requirements, original fuel system integrity programs assumptions provided for relocation of the fuel tanks to over the axle on all car lines beginning in 1974. Major tearup of rear and center floor pans, added rear end structure, and new fuel tanks were believed necessary for all car lines. These engineering assumptions were

tests of the integrity of the fuel system of Ford vehicles and design changes needed to meet anticipated federal standards. Also in evidence was a September 23, 1970, report (Exhibit 124) by Ford's "Chassis Design Office" concerning a program "to establish a corporate [Ford] position and reply to the government" on the proposed federal fuel system integrity standard which included zero fuel spillage at 20 miles per hour fixed barrier crash by January 1, 1972, and 30 miles per hour by January 1, 1973. The report states in part: "The 20 and 30 mph rear fixed barrier crashes will probably require repackaging the fuel tanks in a protected area such as above the rear axle. This is based on moving barrier crash tests of a Chevelle and a Ford at 30 mph and other Ford products at 20 mph. (¶) Currently there are no plans for forward models to repackage the fuel tanks. Tests must be conducted to prove that repackaged tanks will live without significantly strengthening rear structure for added protection." The report also notes that the Pinto was the "[s]mallest car line with most difficulty in achieving compliance." It is reasonable to infer that the report was prepared for and known to Ford officials in policy-making positions.

The fact that two of the crash tests were run at the request of the Ford Chassis and Vehicle Engineering Department for the specific purpose of demonstrating the advisability of moving the fuel tank over the axle as a possible "fix" further corroborated Mr. Copp's testimony that management knew the results of the crash tests. Mr. Kennedy, who succeeded Mr. Copp as the engineer in charge of Ford's crash testing program, admitted that the test results had been forwarded up the chain of command to his superiors.

Finally, Mr. Copp testified to conversations in late 1968 or early 1969 with the chief assistant research engineer in charge of cost-weight evaluation of the Pinto, and to a later conversation with the chief chassis engineer who was then in charge of crash testing the early prototype. In these conversations, both men expressed concern about the integrity of the Pinto's fuel system and complained about management's unwillingness to deviate from the design if the change would cost money.

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VI

Punitive Damages

Ford contends that it was entitled to a judgment notwithstanding the verdict on the issue of punitive damages on two grounds: First, punitive damages are statutorily and constitutionally impermissible in a design defect case; second, there was no evidentiary support for a finding of malice or of corporate responsibility for malice. In any event, Ford maintains that the punitive damage award must be reversed because of erroneous instructions and excessiveness of the award.

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developed from limited vehicle crash test data and design and development work.

Since these original assumptions, seven vehicle crash tests have been run which now indicate fuel tank relocation is probably not required. Although still based heavily on judgement, Chassis Engineering currently estimates that the 30 mph movable barrier requirement is achievable with a reduced level of rear end tearup.

In addition to added rear-end structure, Chassis Engineering believes that either rubber “flak” suits (similar to a tire carcass), or alternatively, a bladder lining within the fuel tank may be required on all cars with flat fuel tanks located under the luggage compartment floor (all cars, except Ford/Mercury/Lincoln and Torino/Montego station wagons). Although further crash tests may show that added structure alone is adequate to meet the 30 mph movable barrier requirement, provisions for flak suits or bladders must be provided. The design cost of a single flak suit, located between the fuel tank and the axle, is currently estimated at $(4) per vehicle. If two flak suits (second located at the rear of the fuel tank), or a bladder are required, the design cost is estimated at $(8) per vehicle. Based on these estimates, it is recommended that the addition of the flak suit/bladder be delayed on all affected cars until 1976. However, package provision for both the flak suits and the bladder should be included when other changes are made to incorporate 30 mph movable barrier capability. A design cost savings of $10.9 million (1974-1975) can be realized by this delay. Although a design cost provision of $(8) per affected vehicle has been made in 1976 program levels to cover contingencies, it is hoped that cost reductions can be achieved, or the need for any flak suit or bladder eliminated after further engineering development.

Current assumptions indicate that fuel system integrity modifications and 1973 bumper improvement requirements are nearly independent. However, bumper requirements for 1974 and beyond may require additional rear end structure which could benefit fuel system integrity programs.

(1) "Malice" Under Civil Code Section 3294:

The concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this country. (Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1262-1263 (hereafter Owen); Mallor & Roberts, *Punitive Damages, Towards A Principled Approach*, 31 HASTINGS L.J. 639, 642-643 (hereafter *Mallor & Roberts*); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-520.) The doctrine was a part of the common law of this state long before the Civil Code was adopted. (*Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657, 661; *Nightingale v. Scannell*, 18 Cal. 315, 325-326; *Dorsey v. Manlove*, 14 Cal. 553, 555-556; *Wilson v. Middleton*, 2 Cal. 54.) When our laws were codified in 1872, the doctrine was incorporated in Civil Code section 3294, which at the time of trial read: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."[2]

Ford argues that "malice" as used in section 3294 and as interpreted by our Supreme Court in *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, requires animus malus or evil motive an intention to injure the person harmed and that the term is therefore conceptually incompatible with an unintentional tort such as the manufacture and marketing of a defectively designed product. This contention runs counter to our decisional law. As this court recently noted, numerous California cases after *Davis v. Hearst, supra*, have interpreted the term "malice" as used in section 3294 to include, not only a malicious intention to injure the specific person harmed, but conduct evincing "a conscious disregard of the probability that the actor's conduct will result in injury to others." (*Dawes v. Superior Court*, 111 Cal. App. 3d 82, 88, 168 Cal. Rptr. 319, *hg. den.* (Dec. 17, 1980); *e.g.*, *Taylor v. Superior Court*, 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854; *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 922, 148 Cal. Rptr. 389, 582 P.2d 980; *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 922-923, 114 Cal. Rptr. 622, 523 P.2d 662; *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 521 P.2d 1103; *Donnelly v. Southern Pacific Co.*, 18 Cal. 2d 863, 869-870, 118 P.2d 465; *Nolin v. National Convenience Stores, Inc.*, 95 Cal. App. 3d 279, 285-286, 157 Cal. Rptr. 32; *Seimon v. Southern Pac. Transportation Co.*, 67 Cal. App. 3d 600, 607, 136 Cal. Rptr. 787; *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 30-32, 122 Cal. Rptr. 218; *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 465, 113 Cal. Rptr. 416; *Barth v. B.F. Goodrich*, 265 Cal. App. 2d 228, 240-241, 71 Cal. Rptr. 306; *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 713-714, 60 Cal. Rptr. 398.) *Pease*, *Barth* and *Toole* were strict products liability cases.

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[2] Section 3294 was amended in 1980 (Stats. 1980, ch. 1242, § 1, p. ---, eff. Jan. 1, 1981) to read:

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.

(2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

In *Taylor v. Superior Court, supra*, 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854, our high court's most recent pronouncement on the subject of punitive damages, the court observed that the availability of punitive damages has not been limited to cases in which there is an actual intent to harm plaintiff or others. (*Id.*, at p. 895, 157 Cal. Rptr. 693, 598 P.2d 854.) The court concurred with the Searle (*G.D. Searle & Co. v. Superior Court, supra*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218) court's suggestion that conscious disregard of the safety of others is an appropriate description of the animus malus required by Civil Code section 3294, adding: "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (*Id.*, 24 Cal. 3d at pp. 895-896, 157 Cal. Rptr. 693, 598 P.2d 854.)

Ford attempts to minimize the precedential force of the foregoing decisions on the ground they failed to address the position now advanced by Ford that intent to harm a particular person or persons is required because that was what the lawmakers had in mind in 1872 when they adopted Civil Code section 3294. Ford argues that the Legislature was thinking in terms of traditional intentional torts, such as, libel, slander, assault and battery, malicious prosecution, trespass, etc., and could not have intended the statute to be applied to a products liability case arising out of a design defect in a mass produced automobile because neither strict products liability nor mass produced automobiles were known in 1872.

A like argument was rejected in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, where the court held that in enacting section 1714 as part of the 1872 Civil Code, the Legislature did not intend to prevent judicial development of the common law concepts of negligence and contributory negligence. As the court noted, the code itself provides that insofar as its provisions are substantially the same as the common law, they should be construed as continuations thereof and not as new enactments (Civ. Code §§ 4, 5), and thus the code has been imbued "with admirable flexibility from the standpoint of adaptation to changing circumstances and conditions." (*Id.*, at p. 816, 119 Cal. Rptr. 858, 532 P.2d 1226.) In light of the common law heritage of the principle embodied in Civil Code section 3294,[3] it must be construed as a "continuation" of the common law and liberally applied "with a view to effect its objects and to promote justice." (Civ. Code §§ 4, 5.) To paraphrase *Li v. Yellow Cab Co., supra*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, the applicable rules of construction "permit if not require that section (3294) be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes." (*Id.*, at p. 822, 119 Cal. Rptr. 858, 532 P.2d 1226.)

(3) Sufficiency of the Evidence to Support the Finding of Malice and Corporate Responsibility:

Ford contends that its motion for judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support a finding of malice or corporate responsibility for such malice. The record fails to support the contention.

"The rules circumscribing the power of a trial judge to grant a motion for judgment notwithstanding the verdict are well established. The power to grant such a motion is identical to the power to grant a directed verdict; the judge cannot weigh the evidence or assess the credibility of witnesses; if the evidence is conflicting or if several reasonable inferences may be drawn, the motion should be denied; the motion may be granted `only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict.'" (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 877-878, 151 Cal. Rptr. 285, 587 P.2d 1098; *Brandenburg v. Pac. Gas & Elec. Co.* (1946) 28 Cal. 2d 282, 284, 169 P.2d 909, quoting *Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 110-111, 120 Cal. Rptr. 681, 534 P.2d 377, 74 A.L.R.3d 1282.)" (*Castro v. State of California*, 114 Cal. App. 3d 503, 512, 170 Cal. Rptr. 734.) There was ample

[3] The doctrine was expressed in *Dorsey v. Manlove, supra*, 14 Cal. 553, as follows: "But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone. In these cases the jury are not confined to the loss or injury sustained, but may go further and award punitive or exemplary damages, as a punishment for the act, or as a warning to others." (*Id.*, at p. 556.)

evidence to support a finding of malice and Ford's responsibility for malice.

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.

Ford's argument that there can be no liability for punitive damages because there was no evidence of corporate ratification of malicious misconduct is equally without merit. California follows the RESTATEMENT rule that punitive damages can be awarded against a principal because of an action of an agent if, but only if, "`(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.' (REST. 2D TORTS (Tent. Draft No. 19, 1973) § 909.)" (*Egan v. Mutual of Omaha Ins. Co., supra*, 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452; *Merlo v. Standard Life & Acc. Ins. Co*, 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416.) The present case comes within one or both of the categories described in subdivisions (c) and (d).

There is substantial evidence that management was aware of the crash tests showing the vulnerability of the Pinto's fuel tank to rupture at low speed rear impacts with consequent significant risk of injury or death of the occupants by fire. There was testimony from several sources that the test results were forwarded up the chain of command; Vice President Robert Alexander admitted to Mr. Copp that he was aware of the test results; Vice President Harold MacDonald, who chaired the product review meetings, was present at one of those meetings at which a report on the crash tests was considered and a decision was made to defer corrective action; and it may be inferred that Mr. Alexander, a regular attender of the product review meetings, was also present at that meeting. MacDonald and Alexander were manifestly managerial employees possessing the discretion to make "decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Ins. Co., supra*, 24 Cal. 3d 809, 823, 157 Cal. Rptr. 482, 598 P.2d 452.) There was also evidence that Harold Johnson, an Assistant Chief Engineer of Research, and Mr. Max Jurosek, Chief Chassis Engineer, were aware of the results of the crash tests and the defects in the Pinto's fuel tank system. Ford contends those two individuals did not occupy managerial positions because Mr. Copp testified that they admitted awareness of the defects but told him they were powerless to change the rear-end design of the Pinto. It may be inferred from the testimony, however, that the two engineers had approached management about redesigning the Pinto or that, being aware of management's attitude, they decided to do nothing. In either case the decision not to take corrective action was made by persons exercising managerial authority. Whether an employee acts in a "managerial capacity" does not necessarily depend on his "level" in the corporate hierarchy. (*Id.*, at p. 822, 157 Cal. Rptr. 482, 598 P.2d 452.) As the Egan court said: "Defendant should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions." (*Id.*, at p. 823, 157 Cal. Rptr. 482, 598 P.2d 452, quoting concurring and dissenting opinion in *Merlo v. Standard Life & Acc. Ins. Co., supra*, 59 Cal. App. 3d at p. 25, 130 Cal. Rptr. 416.)

While much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice. (*See Toole v. Richardson-Merrell, Inc., supra*, 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398.)

* * *

Nor was the reduced award excessive taking into account defendant's wealth and the size of the compensatory award. Ford's net worth was 7.7 billion dollars and its income after taxes for 1976 was over 983 million dollars. The punitive award was approximately .005% of Ford's net worth and approximately .03% of its 1976 net income. The

ratio of the punitive damages to compensatory damages was approximately 1.4 to one. Significantly, Ford does not quarrel with the amount of the compensatory award to Grimshaw.

Nor was the size of the award excessive in light of its deterrent purpose. An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. (*See* *Neal v. Farmers Ins. Exchange, supra*, 21 Cal. 3d 910, 929, fn. 14, 148 Cal. Rptr. 389, 582 P.2d 980.) The award in question was far from excessive as a deterrent against future wrongful conduct by Ford and others.

Disposition

In *Richard Grimshaw v. Ford Motor Company*, the judgment, the conditional new trial order, and the order denying Ford's motion for judgment notwithstanding the verdict on the issue of punitive damages are affirmed.

Questions and Notes

1. In an internal Ford memorandum, Ford engineers estimated the benefits and costs of installing rubber bladders into the gas tanks as follows: *Benefits*: 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles avoided. Valued at $200,000, $67,000, and $700 respectively, the total came to $49.5 million. *Costs*: 11 million cars and 1.5 million light trucks, @ $11 per installation, totalling $137 million. On the basis of this calculation, Ford decided not to install the rubber bladders. Were they wrong?

2. Some states, like Washington, do not allow the award of punitive damages except where some special statute (like an antitrust statute allowing treble damages) authorizes it. *Maki v. Aluminum Building Products*, 73 Wash. 2d 23, 436 P.2d 186 (1968).

3. Note that in footnote 2 the court sets out the statutory requirements to establish a corporation's liability for punitive damages for acts of its employees. These are tests to determine whether it can fairly be said that it was the corporation rather than the individual alone who committed the acts leading to the imposition of punitive damages.

4. One problem in the award of punitive damages, raised in cases like this one, is how courts can award consistent punitive damage awards where the same act (manufacturing the Ford Pinto or the Dalkon Shield) gives rise to multiple separate claims. *See* Owen, *Problems on Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982).

5. The United States Supreme Court has limited the ability of states to impose punitive damages where the 14th amendment guarantee of due process is not observed. For example, in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008) the Supreme Court struck down an award of $2.5 billion in punitive damages arising from the grounding of the *Valdez* in Prince William Sound in Alaska.

5. Attorneys Fees

Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?

49 IOWA L. REV. 75, 80-81 (1963)

* * *

The proposal of awarding attorney's fees as costs is not new. It is usually referred to as the "English rule" as it has existed there at least since 1275. Why it was not incorporated into our own system of costs is subject to speculation. As previously stated, we generally recognize that costs are recoverable and follow the judgment, and yet, in most instances attorney's fees, generally the main expense of litigation, are not recoverable.

Several ideas seem inherent in the historical explanation of why the "English rule" failed to develop in the United States. One initial problem facing a new government must be the creation of a willingness in its citizenry to submit to the system designed and established for the resolution of their disputes. At this stage of development, concern

over points of justice (such as seeing a party made whole through complete compensation) is less important than encouraging persons into the established system. At this stage deterrents to submission are not appropriate.

It also seems that at the time our judicial system was established there was a wish to maintain a system of laws and procedures in which every man would be able to represent himself adequately before the courts....

The naïveté that accompanies advocating retention of the present cost structure on the basis of these reasons would seem to merit little comment. The idea that one must encourage litigation seems to have been discarded long ago in light of the constantly repeated pronouncement of the courts that the present public policy is to encourage settlement and compromise rather than litigation. While the wish that law and its procedures remain sufficiently uncomplicated so that every man can represent himself may be devoutly desired, it would seem to overlook not only "an obvious truth" but also the demands of contemporary society.

Questions and Notes

1. Should the "English rule" be adopted for torts litigation? Why or why not?

2. For a review of the latest proposals to shift from the American rule to some form of "loser pays," as proposed by the 1994 Republican "Contract with America," *see* Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 Tex. L. Rev. 1863 (1998).

§ B. Related Parties: Who Else Is Entitled to Compensation?

1. Wrongful Death

MORAGNE v. STATES MARINE LINES

398 U.S. 375 (1970)

Mr. Justice HARLAN delivered the opinion of the Court

We brought this case here to consider whether *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, in which this Court held in 1886 that maritime law does not afford a cause of action for wrongful death, should any longer be regarded as acceptable law.

The complaint sets forth that Edward Moragne, a longshoreman, was killed while working aboard the vessel Palmetto State in navigable waters within the State of Florida. Petitioner, as his widow and representative of his estate, brought this suit in a state court against respondent States Marine Lines, Inc., the owner of the Vessel, to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were predicated upon both negligence and the unseaworthiness of the vessel.

* * *

Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all. Further, regardless of the viability of the rule in 1886 as applied to American land-based affairs, it is difficult to discern an adequate reason for its extension to admiralty, a system of law then already differentiated in many respects from the common law.

One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been

criticized ever since its inception, and described in such terms as "barbarous." *E.g.*, *Osborn v. Gilliett*, L.R. 8 Ex. 88, 94 (1873) (LORD BRAMWELL, dissenting); F. POLLOCK, LAW OF TORTS 55 (Landon ed. 1951); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 676-677 (3d ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical in the two cases: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him - usually spouse and children - seek to recover for their total loss of one on whom they depended. This difference, however, even when coupled with the practical difficulties of defining the class of beneficiaries who may recover for death, does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort. One expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly.

Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century - the felony-merger doctrine. *See* POLLOCK, *supra*, at 52-57; Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916). According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. *Smith v. Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (K.B. 1677); *Higgins v. Butcher*, Yel. 89, 80 Eng. Rep. 61 (K.B. 1606). The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion of Lord Ellenborough, sitting at nisi prius, in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine in announcing that "[i]n a Civil court, the death of a human being could not be complained of as an injury." *Ibid.* Nor had the felony-merger doctrine seemingly been cited as the basis for the denial of recovery in any of the other reported wrongful-death cases since the earliest ones, in the 17th century. *E.g.*, *Smith v. Sykes*, *supra*; *Higgins v. Butcher*, *supra*. However, it seems clear from those first cases that the rule of *Baker v. Bolton* did derive from the felony-merger doctrine, and that there was no other ground on which it might be supported even at the time of its inception. The House of Lords in 1916 confirmed this historical derivation, and held that although the felony-merger doctrine was no longer part of the law, the rule against recovery for wrongful death should continue except as modified by statute. *Admiralty Commissioners v. S.S. Amerika*, (1917) A.C. 38. Lord Parker's opinion acknowledged that the rule was "anomalous ... to the scientific jurist," but concluded that because it had once found justification in the doctrine that "the trespass was drowned in the felony," it should continue as a rule "explicable on historical grounds" even after the disappearance of that justification. *Id.*, at 44, 50; *see* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 676-677 (3d ed. 1927). Lord Sumner agreed, relying in part on the fact that this Court had adopted the English rule in *Brame* [*Insurance Co. v. Brame*, 95 U.S. 754 (1878)]. Although conceding the force of Lord Bramwell's dissent in *Osborn v. Gillett*, L.R. 8 Ex. 88, 93 (1873), against the rule, Lord Parker stated that it was not "any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence," and thus that he was bound simply to follow the past decisions. (1917) A.C., at 42-43.[1]

[1] The decision in *S.S. Amerika* was placed also on an alternative ground, which is independently sufficient. In that case, which arose from a collision between a Royal Navy submarine and a private vessel, the Crown sought to recover from the owners of the private vessel the pensions payable to the families of navy sailors who died in the collision. The first ground given for rejecting the claim was that the damages sought were too remote to be protected by tort law, because the pensions were voluntary payments and because they were not a measure of "the future services of which the Admiralty had been deprived." *Id.*, at 42, 50-51. Similar alternative reasoning was given in Brame, which involved a similar situation. 95 U.S., at 758-759, 24 L. Ed. 580. Thus, in neither case was the enunciation of the rule against recovery for wrongful

The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit. *E.g.*, *Grosso v. Delaware, Lackawanna & West. R. Co.*, 50 N.J.L. 317, 319-320, 13 A. 233, 234 (1888); *Hyatt v. Adams*, 16 Mich. 180, 185-188 (1867); *see* W. PROSSER, LAW OF TORTS 8, 920-924 (3d ed. 1964). Nevertheless, despite some early cases in which the rule was rejected as "incapable of vindication," *e.g.*, *Sullivan v. Union Pac. R. Co.*, 23 Fed. Cas. pp. 368, 371 (No. 13,599) (C.C. Neb. 1874); *Shields v. Yonge*, 15 Ga. 349 (1854); *cf. Cross v. Guthery*, 2 Root 90, 92 (Conn. 1794), American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption, culminating in this Court's decision in *Brame*, the courts failed to produce any satisfactory justification for applying the rule in this country.

Some courts explained that their holdings were prompted by an asserted difficulty in computation of damages for wrongful death or by a "repugnance ... to setting a price upon human life," *E.g.*, *Connecticut Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 265, 272-273 (1856); *Hyatt v. Adams*, *supra*, 16 Mich. at 191. However, other courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes, *see* Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 405, 406, nn.17, 18 (1966), does not present difficulties more insurmountable than assessment of damages for many nonfatal personal injuries. *See Hollyday v. The David Reeves*, 12 Fed. Cas. pp. 386, 388 (No. 6,625) (D.C. Md. 1879); *Green v. Hudson River R. Co.*, 28 Barb. 9, 17-18 (N.Y. 1858).

It was suggested by some courts and commentators that the prohibition of nonstatutory wrongful-death actions derived support from the ancient common-law rule that a personal cause of action in tort did not survive the death of its possessor, *e.g.*, *Eden v. Lexington & Frankfort R. Co.*, 53 Ky. 204, 206 (1853); and the decision in *Baker v. Bolton* itself may have been influenced by this principle. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916). However, it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death. *See ibid*; POLLOCK *supra*, at 53; Winfield, *Death as Affecting Liability in Tort*, 29 COL. L. REV. 239-250, 253 (1929).

The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in *Brame*, as well as many of the lower court opinions. *E.g.*, *Grosso v. Delaware, Lackawanna & West. R. Co.*, *supra*. Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while "[o]ur ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; ... they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 2 Pet. 137, 144, 7 L. Ed. 374 (1829) (STORY, J.); *The Lottawanna*, 21 Wall. 558, 571-574, 22 L. Ed. 654 (1875); *see* R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 93-97 (1938); H. HART & A. SACKS, THE LEGAL PROCESS 450 (tent. ed. 1958). The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, "was applicable to their situation," and it is difficult to imagine on what basis they might have concluded that it was.

Further, even after the decision in *Brame*, it is not apparent why the Court in *The Harrisburg* concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law;[2] and, from its focus on a particular subject

death necessary to the result.

[2] The Court in *The Harrisburg* acknowledged that, at least according to the courts of France, the civil law did allow recovery for the injury suffered by dependents of a person killed. It noted, however, that the Louisiana courts

matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 1-11, 253 (1957); P. EDELMAN, MARITIME INJURY AND DEATH 1 (1960). These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea. This was the conclusion reached by Chief Justice Chase, prior to *The Harrisburg*, sitting on circuit in *The Sea Gull*, 21 Fed. Cas. p. 909 (No. 12,578) (C.C. Md. 1865). He there remarked that

> There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures ... and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Id.*, at 910.

Numerous other federal maritime cases, on similar reasoning, had reached the same result. *E.g.*, *The Columbia*, 27 F. 704 (D.C.S.D.N.Y. 1886); *The Manhasset*, 18 F. 918 (D.C.E.D. Va. 1884); *The E.B. Ward, Jr.*, 17 F. 456 (C.C.E.D. La. 1883); *The Garland*, 5 F. 924 (D.C.E.D. Mich. 1881); *Holmes v. O.& C.R. Co.*, 5 F. 75 (D.C. Or. 1880); *The Towanda*, 24 Fed. Cas. p. 74 (No. 14,109) (C.C.E.D. Pa. 1877); *Plummer v. Webb*, 19 Fed. Cas. p. 894 (No. 11,234) (D.C. Maine 1825); *Hollyday v. The David Reeves*, 12 Fed. Cas. p. 386 (No. 6,625) (D.C. Md. 1879). Despite the tenor of these cases, some decided after *Brame*, the Court in *The Harrisburg* concluded that "the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but (only) on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisprudence of this country." 119 U.S., at 208, 7 S. Ct. at 144. Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical in this respect to the common law.

II

We need not, however, pronounce a verdict on whether *The Harrisburg*, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the area where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation.

To some extent this rejection has been judicial. The English House of Lords in 1937 emasculated the rule without expressly overruling it. *Rose v. Ford*, (1937) A.C. 826. Lord Atkin remarked about the decision in *S.S. Amerika* that "[t]he reasons given, whether historical or otherwise, may seem unsatisfactory," and that "if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum." At any rate, he saw "no reason for extending the illogical doctrine ... to any case where it does not clearly apply." *Id.*, A.C., at 833, 834. Lord Atkin concluded that, while the doctrine barred recognition of a claim in the dependents for the wrongful death of a person, it did not bar recognition of a common-law claim in the decedent himself for "loss of expectation of life" - a claim that vested in the person in the interval between the injury and death, and thereupon passed, with the aid of a survival statute, to the representative of his estate. He expressed no doubt that the claim was "capable of

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took a different view of the civil law, and that English maritime law did not seem to differ in this regard from English common law. 119 U.S., at 205, 212-213, 7 S. Ct., at 142, 146. *See generally Grigsby v. Coast Marine Service*, 412 F.2d 1011, 1023-1029 (C.A. 5th Cir. 1969); 1 E. BENEDICT, LAW OF AMERICAN ADMIRALTY 2 (6th ed. Knauth 1940); 4 *id.*, at 358.

being estimated in terms of money: and that the calculation should be made." *Id.*, at 834.[3] Thus, except that the measure of damages might differ, the representative was allowed to recover on behalf of the heirs what they could not recover in their own names.

Much earlier, however, the legislatures both here and in England began to evidence unanimous disapproval of the rule against recovery for wrongful death. The first statute partially abrogating the rule was Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which granted recovery to the families of persons killed by tortious conduct, "although the Death shall have been caused under such Circumstances as amount in Law to Felony."[4]

In the United States, every State today has enacted a wrongful-death statute. *See* Smith, *supra*, 44 N.C. L. REV. 402. The Congress has created actions for wrongful deaths of railroad employees, Federal Employers' Liability Act, 45 U.S.C. §§ 51-59; of merchant seamen, Jones Act, 46 U.S.C. § 688; and of persons on the high seas, Death on the High Seas Act, 46 U.S.C. § 761, 762.[5] Congress has also, in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), made the United States subject to liability in certain circumstances for negligently caused wrongful death to the same extent as a private person. *See, e.g.*, *Richards v. United States*, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

* * *

In sum, in contrast to the torrent of difficult litigation that has swirled about *The Harrisburg*, *The Tungus*, which followed upon it, and the problems of federal-state accommodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters. That prospect indeed makes for, and not against, the discarding of *The Harrisburg*.

We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties. The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

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[3] Lord Wright, concurring, stated: "In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate." (1937) A.C., at 848.

[4] It has been suggested that one reason the common-law rule was tolerated in England as long as it was may have been that the relatives of persons killed by wrongful acts often were able to exact compensation from the wrongdoer by threatening to bring a "criminal appeal." The criminal appeal was a criminal proceeding brought by a private person, and was for many years more common than indictment as a means of punishing homicide. Though a successful appeal would not produce a monetary recovery, the threat of one served as an informal substitute for a civil suit for damages. Over the years, indictment became more common, and the criminal appeal was abolished by statute in 1819. 59 Geo. 3, c. 46. *See* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916); *Admiralty Commissioners v. S. S. Amerika*, (1917) A.C., at 58-59.

[5] *See also* National Parks Act, 16 U.S.C. § 457; Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (making state wrongful-death statutes applicable to particular areas within federal jurisdiction). *Cf.* n.16, *infra*.

FIRST NATIONAL BANK OF MEADVILLE v. NIAGARA THERAPY MANUFAC-TURING CORPORATION

229 F. Supp. 460 (W.D. Pa. 1964)

WILLSON, District Judge

The plaintiff in this case is the First National Bank of Meadville, Pennsylvania, Executor under the will of Kenneth W. Rice, deceased. Mr. Rice was killed in an airplane accident at the Port Erie Airport on January 22, 1962....

* * *

Liability

* * *

Applying the ruling of ordinary negligence, this Court does not hesitate to find that the pilot Counselman failed in his duty to exercise reasonable care in making his plans for his flight, and thereafter during the course of his flight in failing to return to Buffalo when he had the opportunity to do so. But the first point is sufficient to hold the defendant responsible for the crash....

Damages

Plaintiff brought suit under both the "Wrongful Death Statutes" (12 P.S. 1602-1604) and the "Survival Statute" (20 P.S. 320.603) of Pennsylvania for the benefit of the surviving widow and the two daughters of the decedent.

* * *

This Court will apply the principle announced in *Ferne v. Chadderton*, 363 Pa. at 197, 69 A.2d at 107, with respect to the amounts which the plaintiff is to recover for the benefit of the wife and daughters. That opinion says the rule is:

> Under the Death Statutes the administratrix was entitled to recover for the benefit of the daughter and herself as widow the amount of the pecuniary loss they suffered by reason of decedent's death, that it to say, the present worth of the amount they probably would have received from his earnings for their support during the period of his life expectancy and while the family relationship continued between them, but without any allowance for mental suffering, grief, or loss of companionship; in other words, the measure of damages is the value of the decedent's life to the parties specified in the statute: *Minkin v. Minkin*, 336 Pa. 49, 55, 7 A.2d 461, 464. Recovery is also allowed for the expense incurred for medical and surgical care, for nursing of the deceased, and for the reasonable funeral expenses. Act of May 13, 1927, P.L. 992, 12 P.S. 1604. Under the Survival Statute, 20 P.S. 771, 772, the administratrix was entitled to recover for the loss of decedent's earnings from the time of the accident until the date of his death, and compensation for his pain and suffering during that period. Recovery may also be had for the present worth of his likely earnings during the period of his life expectancy, but diminished by the amount of the provision he would have made for his wife and children as above stated (thus avoiding duplication: *Pezzulli, Administrator v. D'Ambrosia*, 344 Pa. 643, 650, 26 A.2d 659, 662) and diminished also by the probable cost of his own maintenance during the time he would likely have lived but for the accident: *Murray, Administrator, v. Philadelphia Transportation Co.*, 359 Pa. 69, 73, 74, 58 A.2d 323, 325.

As indicated Mr. Rice was survived by his widow, Mary T. Rice, and two daughters, Cynthia and Barbara....

Under the evidence it is believed fair and just to award to the plaintiff the sum of $7,500.00 for the loss of the contributions which the two children would have received had it not been for their father's death.

The widow, Mary T. Rice, had the benefit of the generosity of a husband who provided her with the good things in life commensurate with his $25,000.00 a year income. It seems conservative of this Court to say that she had the benefit of at least $10,000.00 a year of that income. She enjoyed the use of a new automobile every two years. She had an unlimited checking

account. She bought clothes of up to $2,500.00 in price annually. They lived among friends commensurate with a house and furnishings of the value of $65,000.00. Again but only as indicating the manner in which Mr. Rice spent his money, the records showed that he would borrow $20,000.00 from the bank, invest it in stock, and pay off the debt over a period of about three years. It is apparent that the rest of his money was spent in good living, as he had no cash savings at the time he died. He had been some twenty-five years in the practice of law, and it is believed his income had leveled off. But under the testimony he had a life expectancy of approximately twenty-four years on January 22, 1962. Counsel for plaintiff argues that decedent's earnings would increase during his remaining working life. This is so, says counsel, because a lawyer's earnings will increase as he advances in wisdom and maturity. On the other hand, counsel for the defendant contended that it is more likely that decedent's earnings would fall off during the remainder of his life. Balancing the two theories together, it seems to the Court that $25,000.00 a year averaged out for his life expectancy is reasonable. In this Court's opinion, Mrs. Rice had the benefit of $10,000.00 per year contributions from her husband. She received the benefit of this sum by way of her general maintenance in the home on a rather luxurious standard of living, her expenses for her clothing, medical, and incidental bills, and in the expenditure of funds for her own and her husband's pleasure. There was a two year interval between the date of death, which occurred January 22, 1962, and the trial. Mrs. Rice's pecuniary loss during that period is not reduced, so for her benefit the Executor in this instance recovers $20,000. Under the various life expectancy tables, it appears that twenty-two years is the proper number of years to be used in computing the present worth of likely earnings and contributions. Thus in Mrs. Rice's case $10,000.00 a year for twenty-two years amounts to a gross of $220,000.00. Under the tables, AM. JUR. 2D DESK BOOK, Doc. No. 133, the present value of $1.00 per year, computed at 6 per cent as required by state law, for twenty-two years is 12.042 dollars. $10,000.00 is $120,420.00. Thus, under the Wrongful Death Acts, the Executor is entitled to recover for the benefit of Mrs. Rice, $120,420.00. Also, the Executor is claiming the sum of $2,000.00, covering reasonable funeral and administration expenses, and this sum is awarded the Executor. Under the Wrongful Death Act then the damages are computed as follows:

Loss of contributions by the two daughters	$ 7,500
Loss of contributions by the widow to date of trial	$ 20,000
Loss of future contributions to widow (reduced to present worth by 6%method)	120,420
Funeral and administration expense	2,000
TOTAL DAMAGES UNDER WRONGFUL DEATH ACT	$149,920

The damages awarded in the foregoing amount under the Wrongful Death Acts are amply supported by the evidence. In the computation of damages under the Survival Act, however, the problem is not as clearly defined.

It is this Court's experience that under the Survival Act damages to be awarded a decedent's estate are generally based on evidence which must be estimated with some degree of elasticity. There has lately been considerable discussion as to what the rule is with respect to this type of award. See a discussion in the PENNSYLVANIA BAR JOURNAL, Vol. 32, p. 47 (Oct. 1960), "*Has The Measure Of Damages Under The Survival Act In Pennsylvania Been Modified?*" In the instant case, the problem is made somewhat difficult because the record is bare of any specific testimony as to the money spent by Mr. Rice for his own maintenance during his lifetime. The last decision of the Supreme Court of Pennsylvania, *Skoda v. West Penn Power Co.*, 411 Pa. 323, 191 A.2d 822, 829 (1963), states the rule as follows:

> Recovery may also be had for the present worth of his likely earnings during the period of his life expectancy, but diminished by the amount of the provision he would have made for his wife and children as above stated, thus avoiding duplication. *Pezzulli, Administrator, v. D'Ambrosia*, 344 Pa. 643, 650, 26 A.2d 659, 662, and diminished also by the probable cost of his own maintenance during the time he would likely have lived but for the accident. *Murray, Administrator v. Philadelphia Transportation Co.*, 359 Pa. 69, 73, 74, 58 A.2d 323, 325.

Counsel for plaintiff strongly urge that under the rule in the various decisions, including *Skoda*, the award to the Executor in this case should run over $127,000.00. Although the award to be made under the Survival Statute is not to be based on savings and not to be based on accumulations, nevertheless, the history of Mr. Rice's financial status indicates that he shows not only the ability to save but also to accumulate. Following the rule, however, in *Ferne v. Chadderton*, and other cases, the present worth of decedent's likely earnings during the remaining period of the decedent's life expectancy is to be computed. This sum is to be diminished by the amount of the awards to the family under the Wrongful Death Acts and also diminished by the probable cost of his own maintenance during the time he would likely have lived but for the accident.

Therefore, in accordance with the rule and the tables, the present worth of $25,000.00 a year for twenty-two years is $301,050.00. From this sum the amount awarded to the family under the Wrongful Death Acts is to be deducted. This sum is $147,920.00. Deducting this figure from the $301,050.00 leaves $153,130.00 as the present worth of the pecuniary earnings lost to the state. To arrive at an award from this sum, it is necessary to deduct decedent's own maintenance expenses which he would have incurred had he lived. Under the cases and decisions these items, of course, include his cost of living, medical expenses, reasonable amounts for recreation, and general expenses of living. This is the area in the evidence in which there is very little proof, but it seems to this Court safe to conclude that his maintenance expenses are certainly equal to the amount he provided for his wife, that is, $10,000.00 a year. They both lived on the same scale. On this basis then, $120,420.00 is to be deducted from $153,130.00, leaving $32,710.00. This sum represents the loss of future earnings to the estate reduced to present worth. This sum also represents the difference between the likely gross earnings during decedent's lifetime diminished by the family contributions and less also the amount of his own maintenance during his life expectancy. To this sum is added the two years' gross earnings which are not to be reduced to present worth.

> In applying the doctrine of "present worth," it should be borne in mind that compensation, both for loss of earning power under the Survival Act and for loss of contributions under the Death Act, accruing from the date of the accident until the date of trial, is not reduced to present worth." *See* PENNSYLVANIA BAR ASSOCIATION QUARTERLY, Vol. XXIII, No. 1, October 1951, p. 19.

The two years' gross earnings between the decedent's death and the trial amount to $50,000.00. But, however, during the two years preceding the trial decedent would have expended $20,000.00 on his own maintenance. Therefore, from his gross earnings that amount is to be deducted leaving the sum of $30,000.00 to be added to the $32,710.00, leaving a net recovery under the Survival Act of $62,710.00.

In summary then, the damages to be awarded the Executor are as follows:

Under the Wrongful Death Acts	$149,920
Under the Survival Act	62,710
TOTAL DAMAGES:	$212,630

FELDMAN v. ALLEGHENY AIRLINES

524 F.2d 384 (CA 2, 1975)

LASKER, District Judge

On June 7, 1971, an Allegheny Airlines flight crashed in fog which 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.[1] The airline appeals[2] from Judge Blumenfeld's judgment

[1] Judge Blumenfeld's detailed opinion is reported at 382 F. Supp. 1271.

[2] Mr. Feldman filed a cross-appeal to enable him to argue that, if this court were inclined to adopt some of Allegheny's contentions, "there are other damage

awarding $444,056 to Reid Laurence Feldman, as administrator of the estate of his late wife.

Determination of damages in the diversity wrongful death of action is governed by Connecticut law, specifically CONN. GEN. STATS. § 52-555, which measures recovery by the loss to the decedent of her life rather than buy the value of the value of the estate she would have left had she lived a full life. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1351 (2d Cir. 1974); *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 669-671, 136 A.2d 918, 924 (1957). 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 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 remanded.

I

Damages for Destruction of Earning Capacity.

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 rational, 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

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elements, not recognized by the District Court which would offset any reduction in the award and thus justify a judgment of $444,056." We disagree that Judge Blumenfeld failed to recognize any appropriate element of damages.

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 of relation to the portion of the child-raising period during which Mrs. Feldman would not have been working must be predicted 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.

II

Deductions for Decedent's Necessary Personal Living Expenses

Where the decedent had been subject to the expense of self-maintenance, Connecticut case law provides for the deduction of "personal living expenses" from damages otherwise recoverable for the loss of earning capacity. *Floyd v. Fruit Industries, Inc., supra*, 144 Conn. at 674, 136 A.2d at 926. Judge Blumenfeld properly held that although a husband under Connecticut law has a duty to support his spouse, (*see e.g.*, CONN. GEN. STATS. §§ 46-10; 53-304), that duty does not exempt an income-earning wife from an obligation to apportion a part of her income for her own support. The Floyd court defined the term "personal living expenses" as:

> those personal expenses which, under the standard of living followed by a given decedent, it would have been reasonably necessary for him to incur in order to keep himself in such a condition of health and well-being that he could maintain his capacity to enjoy life's activities, including the capacity to earn money." 144 Conn. at 675, 136 A.2d at 926-927.

The trial judge concluded that, under Connecticut law, deductions for Mrs. Feldman's personal living expenses should include the cost, at a level commensurate with her standard of living, of food, shelter, and clothing and health care. The judge fixed such costs in Washington, D.C. for the year following her death at $2,750., increasing that figure by 3% per year to the age of retirement. After retirement, living expenses were deducted at the rate of $5,000. annually. These figures were discounted annually by 1.5% to reduce the deduction to present value. Although the process by which the trial judge determined the level of Mrs. Feldman's living expenses was proper, we believe that he substantially underestimated the actual costs of food, shelter, clothing and health care.

On direct examination, Mr. Feldman testified that his wife's personal living expenses in New Haven had been approximately $2,210. per year. On cross-examination, this figure was shown to have been unduly conservative with regard to clothing and food, and the trial judge rounded the amount to $2,200. He found that the Feldmans' cost of living would have increased after they moved to Washington, where living expenses were higher and their social and economic status would have changed from that of students to that of young professionals. Accordingly, the judge adjusted the $2,200. figure upward by 25% for the first year Mrs. Feldman would have resided in Washington, and by 3% annually until she would have reached the age of sixty-five and retired. Personal living expenses for that year were

calculated to be $6,675, but during the years of retirement deductions were lowered to $5,000., a level which the trial judge felt was consistent with a high standard of living but also reflected the fact that the cessation of work often produces a reduction in personal expenditures.

We recognize the perils involved in an appellate court dealing de novo with factual matters. We would not venture to do so in this case if we did not feel we have the right to take judicial notice of the facts of life, including the cost of living for those in the position of the Feldmans in such metropolitan areas as Washington, D.C. We reluctantly conclude that the trial judge was in error in computing living expenses at $2,750. for the year after Mrs. Feldman's death, and building on that base for later years.

Without attempting to specify what the results of such a computation should be, we believe that it would fall more nearly in the area of $4,000., including approximately $25. per week for food, $125. per month for rent, $1,000. annually for clothing and $400. annually for health care. For one year the difference between the trial judge's figure of $2,750. and the suggested figure of $4,000. may be considered de minimis in relation to the total award. However, projected over the 52 years of Mrs. Feldman's life expectancy, and at an annual increase of 3%, the difference is sufficiently large to require us to remand the matter for further determination by the trial judge.

We have considered the other points raised by Allegheny and find them to be without merit.

The judgment is affirmed in part, reversed in part and remanded.

FRIENDLY, Circuit Judge (concurring dubitante)

This case is another example of a federal court's being compelled by the Congressional grant of diversity jurisdiction to determine a novel and important question of state law on which state decisions do not shed even a glimmer of light....

I doubt whether judges, or anyone else, can peer so far into the future; the district court's computations suffer from what Mr. Justice Holmes, in another context, called "the dangers of a delusive exactness," *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (dissenting opinion).... The estate of a young woman without dependents is hardly an outstanding candidate for a forty-year protection against inflation not enjoyed at all by millions of Americans who depend on pensions or investment income and not fully enjoyed by millions more whose salaries have in no wise kept pace with inflation.

* * *

I would also 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 the eight years she was expected to devote to the bearing and early rearing of two children. Apart from 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.

My guess is also that, even if inflation should be taken into account, neither a Connecticut nor a federal jury would have made an award as large as was made here. I say this despite the $369,400 jury verdict for another death arising out of the same crash which we sustained in *Perry v. Allegheny Airlines, Inc., supra*, 489 F.2d 1349, where we did not expressly discuss the inflation question. Even though the existence of dependents is legally irrelevant under the Connecticut survival statute, a jury would hardly have ignored that, whereas Perry was survived by a dependent wife and five children ranging from 6 to 14 years in age, Mrs. Feldman had no dependents. More significant to me is that in Perry's case the jury awarded only $369,400 as against the $535,000 estimate of Mrs. Perry's expert for economic loss alone; here the judge was more generous in important respects than plaintiff's expert.

However, I am loathe to require a busy federal judge to spend still more time on this diversity case, especially when I do not know what instructions to give him about Connecticut law.

* * *

Judgments like Mr. Feldman's and Mrs. Perry's also inevitably raise serious policy questions with respect to damages in airline accident cases beyond those here considered, but these are for Congress and not for courts.

Questions and Notes

1. Obviously one of the most important issues in wrongful death cases is whether a recovery will be permitted for the "noneconomic" damages, sometimes called "hedonic damages." For an argument that recovery is necessarily incomplete unless some recovery is given for such damages, see McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L. Rev. 57 (1990).

2. Should there be a flat amount of damages set by statute for airlines for wrongful death? What advantages would such a plan have? What disadvantages?

3. If a hospital's negligence results in the death of a child still in the womb, is there an action for wrongful death? For recovery under the survival statute, if there is one? *See Wartelle v. Women's & Children's Hospital*, 704 So. 2d 778 (La. 1997); Eleni M. Roumel, *Recent Development; Denial of Survival and Bystander Actions for Death of a Stillborn Child*, 73 Tul. L. Rev. 399 (1998); Jonathan Dyer Stanley, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn: an Argument for a Social Standard*, 56 Vand. L. Rev. 1523 (2003); Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 Akron L. Rev. 41 (2004). .

4. Of recent interest is the status of "domestic partners" in wrongful death schemes. In California the domestic partner of a woman killed by her neighbor's dogs challenged the constitutionality of a California statute that limited wrongful death recoveries to spouses, children, and other designated beneficiaries. A superior court judge agreed with the plaintiff that the statute did not comply with the equal protection clause, but before the case could be resolved on appeal, the California legislature amended the wrongful death statute to state that the eligible beneficiaries included "the decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession." Some commentators approved. *See* Christopher D. Sawyer, *Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union*, 54 Hastings L.J. 727 (2003). Others were critical: Megan E. Callan, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 San Diego L. Rev.427 (2003).

2. "Wrongful Birth" and "Wrongful Life"

Introductory Note. "Wrongful birth" and "wrongful life" claims present a special problem. These cases must be distinguished from an ordinary tort claim based upon someone's negligence (typically a health care provider) in causing injury to a child. For example, suppose a pharmacist is given a prescription for iron supplements for a pregnant woman, and he negligently fills the prescription with a drug that causes harm to the fetus. The child (and perhaps his parents) can sue the pharmacist for his negligence, using as a measure of damage the typical comparison of life as it is with life *but for* the defendant's negligence. Such a case would not differ from the analysis in the cases discussed in § A, *supra*.[*] The difficult cases arise not where the

[*] To be fair, there are some additional wrinkles caused by injury to a fetus. Some early cases questioned whether a tortious act could be committed against a person not even in existence. However, it is obvious that a two-year-old would have a claim against a negligent carpenter if the house falls down on him at age 2, even if the negligent act was committed four years earlier, when the child was not even conceived. More difficult is the issue of wrongful death claims if the fetus dies *in utero*; when does

negligent act harms an already existing person, but instead where the negligent act *causes a person to exist* in the first place.

UNIVERSITY OF ARIZONA HEALTH SCIENCES CENTER v. SUPERIOR COURT

136 Ariz. 579, 667 P.2d 1294 (1983)

FELDMAN, Justice

Petitioner, a health care provider which operates a teaching hospital, brings this special action, claiming that the respondent judge erred in a legal ruling on petitioner's motion for summary judgment in the underlying tort action. Petitioner seeks this court's intervention by way of an order requiring respondent judge to apply the correct rule of law and to grant the motion for partial summary judgment. We have jurisdiction to entertain the action by virtue of Ariz. Const. art. 6, § 5(1), and Ariz. R. Sp. Act. 4, 17A A.R.S.

The real parties in interest are Patrick Heimann and Jeanne Heimann, husband and wife (Heimanns). The Heimanns originally brought a medical malpractice action against petitioner, a health care provider. The Heimanns claimed that one of the hospital's employees, a doctor, had negligently performed a vasectomy operation upon Patrick Heimann, that as a result Jeanne Heimann became pregnant and on October 4, 1981 gave birth to a baby girl. The Heimanns alleged in the underlying tort action that the vasectomy had been obtained because "already having three children, [they] decided ... that they desired to have no more children. As a result of this decision they further decided that a vasectomy was the best means of contraception for them." The baby girl is normal and healthy, but the Heimanns argue that they are financially unable to provide for themselves, their other three children and the newest child whose birth was neither planned nor desired. Accordingly, they seek damages from the doctor and his employer.

The question of negligence is not before us. The issue which brings these parties to our court pertains, rather, to the nature and extent of the damages which can be recovered, assuming that negligence is subsequently proved. The hospital filed a motion for partial summary judgment (Ariz. R. Civ. P. 56(b), 16 A.R.S.), contending that while damages were recoverable for "wrongful pregnancy," "as a matter of law [the Heimanns] could not recover damages for the future cost of raising and educating their normal, healthy child born as the result of petitioner's negligence." The trial judge denied the motion for partial summary judgment. Petitioner then brought this special action, claiming that the ruling of the trial judge was improper and should be vacated by this court.

* * *

Therefore, we shall proceed to consider the legal questions pertaining to the nature and extent of damages which may be recovered in an action for "wrongful pregnancy."[1] The first question is whether parents of a child who was neither desired nor planned for but who was, fortunately, normal and healthy, have been damaged at all by the birth of that child. An overview of the authorities indicates rather clearly that the law will recognize at least some types of damage which result from unwanted procreation caused by the negligence of another. *See* annot., *Tort Liability for Wrongfully Causing One to Be Born,*

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the fetus become a "person" allowed to bring such a claim? *See Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), (no wrongful death recovery, only a negligence action by the parents) (commented upon in Note, 21 RUTGERS L.J. 227 (1989)). The problem is further compounded by the possibility the mother's claim might amount to a double recovery.

A final twist exists in that as traditional family tort immunities erode (*see* Chapter 5 §A), the possibility rises that children might be able to sue their mothers for prenatal injuries. *See "Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries for Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984).

Nonetheless, it must be clearly borne in mind that a claim based upon *negligently causing a birth* raises a set of problems distinct from those associated with *negligently harming a person who would have been born anyway.*

[1] Although this action is brought under common law negligence principles, the term "wrongful pregnancy" is generally used to describe an action brought by the parents of a healthy, but unplanned, child against a physician who negligently performed a sterilization or abortion. *See Phillips v. United States*, 508 F. Supp. 544, 545 n.1 (D.S.C. 1980). This action is distinguished from a "wrongful birth" claim brought by the parents of a child born with birth defects, or a "wrongful life" claim brought by the child suffering from such birth defects. *See Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

83 A.L.R.3d 15, 29 (1978); *Phillips v. United States*, 508 F. Supp. 544, 549 (D.S.C. 1980). The real controversy centers around the nature of the damages which may be recovered. On this issue there are three distinct views.

The first line of authority limits damages by holding that the parents may recover only those damages which occur as the result of pregnancy and birth, and may not recover the cost of rearing the child. *Boone v. Mullendore*, 416 So. 2d 718, 721 (Ala. 1982); *Wilbur v. Kerr*, 275 Ark. 239, 243-44, 628 S.W.2d 568, 571 (1982); *Coleman v. Garrison*, 327 A.2d 757, 761-62 (Del. Super. Ct. 1974), *aff'd* 349 A.2d 8, 13-14 (Del. 1975); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 203-04, 69 Ill. Dec. 168, 173-74, 447 N.E.2d 385, 390-91 (1983) (reversing 99 Ill. App. 3d 271, 54 Ill. Dec. 751, 425 N.E.2d 968 (1981)); *Schork v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983); *Sala v. Tomlinson*, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979); *Mason v. Western Pennsylvania Hospital*, 499 Pa. 484, 453 A.2d 974, 975-76 (1982).

A second view could be characterized as the "full damage" rule and allows the parents to recover all damages and expenses, including the cost of the unsuccessful sterilization procedure, the economic loss from pregnancy, and the economic, physical and emotional cost attendant to birth and rearing the child. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967); *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 273-74, 54 Ill. Dec. 751, 753, 425 N.E.2d 968, 970 (1981), *rev'd* 95 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E.2d 385 (1983). These cases appear to be a distinct minority.

A substantial number of cases have adopted a third rule which allows the recovery of all damages which flow from the wrongful act but requires consideration of the offset of benefits. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977).[2] Under this view, the trier of fact is permitted to determine and award all past and future expenses and damages incurred by the parent, including the cost of rearing the child, but is also instructed that it should make a deduction for the benefits that the parents will receive by virtue of having a normal, healthy child. *Stills v. Gratton*, 55 Cal. App. 3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976); *Ochs v. Borelli*, 187 Conn. 253, 259-60, 445 A.2d 883, 886 (1982); *Troppi v. Scarf*, 31 Mich. App. 240, 255, 187 N.W.2d 511, 519 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175-76 (Minn. 1977).

The hospital claims that the trial court was bound by law to adopt the first view, that the cost of rearing and educating the child are not compensable elements of damage. The Heimanns claim, on the other hand, that the proper rule is the second view, which permits the recovery of all damage and does not permit the jury to consider and offset benefits. We disagree with both positions.

We consider first the strict rule urged by the hospital. Various reasons are given by the courts which adopt the view that damages for rearing and educating the child cannot be recovered. Some cases base their decision on the speculative nature of the necessity to assess "such matters as the emotional affect of a birth on siblings as well as parents, and the emotional as well as pecuniary costs of raising an unplanned and, perhaps, an unwanted child in varying family environments." *Coleman v. Garrison*, 327 A.2d at 761. We think, however, that juries in tort cases are often required to assess just such intangible factors, both emotional and pecuniary, and see no reason why a new rule should be adopted for wrongful pregnancy cases. Another reason given for the strict view is the argument that the benefits which the parents will receive from having a normal, healthy child outweigh any loss which the parents might incur in rearing and educating that child. *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973). No doubt this is true in many cases, but we think it unrealistic to assume that it is true in all cases. We can envision many situations in which for either financial or emotional reasons, or both, the parents are simply unable to handle another child and where it would be obvious that from either an economic or emotional perspective - or both - substantial damage has occurred.

A third basis for the strict rule is the argument that the "injury is out of proportion to the culpability of the [wrongdoer]; and that the allowance of recovery would place too unreasonable a burden upon the [wrongdoer], since it would likely open the way for fraudulent claims...." *Beardsley v. Wierdsma*, 650 P.2d 288,

[2] RESTATEMENT (SECOND) OF TORTS § 920 states: When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

292 (Wyo. 1982). This, of course, is the hue and cry in many tort cases and in essence is no more than the fear that some cases will be decided badly. Undoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, we think it better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice in many. *Brannigan v. Raybuck*, 136 Ariz. 513, 519, 667 P.2d 213, 219 (1983).

The final basis for the strict rule is the one which gives this court greater pause than any of the others. It is well put by the Illinois Supreme Court in *Cockrum v. Baumgartner, supra*. The court used the following words to justify the denial of recovery of damages for the rearing and educating of the unplanned child: "There is no purpose to restating here the panoply of reasons which have been assigned by the courts which follow the majority rule.... In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.... [I]t is a matter of universally-shared emotion and sentiment that the intangible but all important, incalculable but invaluable `benefits' of parenthood far outweigh any of the mere monetary burdens involved. Speaking legally, this may be deemed conclusively presumed by the fact that a prospective parent does not abort or subsequently place the "unwanted" child for adoption. On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law."... We consider that on the grounds described, the holding of a majority of jurisdictions that the costs of rearing a normal and healthy child cannot be recovered as damages to the parents is to be preferred. One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are the heart of our legal system and, broader still, our civilization. *Id.* 95 Ill. 2d at 198-201, 69 Ill. Dec. at 171-72, 447 N.E.2d at 388-89 (quoting *Public Health Trust v. Brown*, 388 So. 2d 1084, 1085-86 (Fla. App. 1980)).

These sentiments evoke a response from this court. In most cases we could join in the "universally shared emotion and sentiment" expressed by the majority of the Illinois court, but we do not believe we hold office to impose our views of morality by deciding cases on the basis of personal emotion and sentiment, though we realize we cannot and should not escape the effect of human characteristics shared by all mankind. However, we believe our function is to leave the emotion and sentiment to others and attempt to examine the problem with logic and by application of the relevant principles of law. In this case, we believe that the strict rule is based upon an emotional premise and ignores logical considerations. While we recognize that in most cases a family can and will adjust to the birth of the child, even though they had not desired to have it, we must recognize also that there are cases where the birth of an unplanned child can cause serious emotional or economic problems to the parents.[3] We therefore reject the hospital's claim that the cost of rearing and educating the child can never be compensable elements of damage.

We consider next the "full damage" rule urged by the Heimanns and adopted by the Illinois Court of Appeals in *Cockrum v. Baumgartner* and the California court in *Custodio v. Bauer*. The courts applying this rule have relied on traditional tort principles and determined that the cost of rearing the child is a foreseeable consequence of the physician's negligence and therefore compensable. *Cockrum v. Baumgartner*, 99 Ill. App. 3d at 272-73, 54 Ill. Dec. at 752, 425 N.E.2d at 969. We agree that these damages are compensable; however, we believe that a rule which does not allow for an offset for the benefits of the parent-child relationship prevents the trier of fact from considering the basic values inherent in the

[3] The examples which may be cited are as various as human experience can provide. Suppose, for instance, a husband learns that he is suffering from cancer and that his prognosis is uncertain. He and his wife already have four children and decide that in view of his medical situation it is unwise to run the risk that the wife become pregnant again. He arranges for a vasectomy, which is negligently performed. Suppose further that the child which results is born shortly before or after the husband's death from cancer. Can one say as a matter of law that the benefits of having a normal child outweigh the financial and emotional obligations which the struggling mother must undertake? We think not.

relationship and the dignity and sanctity of human life. We believe that these "sentiments," if they may be called such, are proper considerations for the fact finder in tort cases, whether they be used to mitigate or enhance damages. No doubt ascertaining and assigning a monetary value to such intangibles will be a difficult task, but we do not believe it more difficult than the task of ascertaining the pecuniary and non-pecuniary damages that the parents will experience after the birth of the child. Therefore, we agree with the Illinois Supreme Court (*Cockrum v. Baumgartner, supra*) that the "full damage" approach is an exercise in mechanical logic and we reject it.

In our view, the preferable rule is that followed by the courts which, although permitting the trier of fact to consider both pecuniary and non-pecuniary elements of damage which pertain to the rearing and education of the child, also require it to consider the question of offsetting the pecuniary and non-pecuniary benefits which the parents will receive from the parental relationship with the child.[4] Some may fear that adoption of such a rule will permit juries to recognize elements of damage which, because of our private philosophy or views of ethics, we, as judges, believe should not be recognized. We feel, however that the consensus of a cross-section of the community on such important issues is better and more accurately obtained from the verdict of a jury than from the decision of any particular group of that community. A jury verdict based on knowledge of all relevant circumstances is a better reflection of whether real damage exists in each case than can be obtained from use of any abstract, iron-clad rule which some courts would adopt and apply regardless of the circumstances of the particular case.

There may be those who fear that the rule which we adopt will permit the award of damages where no real injury exists. We feel this danger is minimized by giving weight and consideration in each case to the plaintiffs' reasons for submitting to sterilization procedures. Such evidence is perhaps the most relevant information on the question of whether the subsequent birth of a child actually constitutes damage to the parents. *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983). The parents' preconception calculation of the reasons for preventing procreation is untainted by bitterness, greed or sense of duty to the child and is perhaps the most telling evidence of whether or to what extent the birth of the child actually injured the parents. *Id.* For example, where the parent sought sterilization in order to avoid the danger of genetic defect, the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing rather than a "damage." Such evidence should be admissible, and the rule which we adopt will allow the jury to learn all the factors relevant to the determination of whether there has been any real damage and, if so, how much. We are confident that the inherent good sense of the jury is the best safeguard to "runaway" verdicts and unfounded speculation in the award of damages, provided that the jury is allowed to consider the issues in realistic terms.

It may be argued also that the rule which we adopt will have the unhappy effect of creating situations in which parents will testify to their feeling or opinion that the child is "not worth" the burden of having and rearing. Such testimony could be harmful if or when the child learns of it. "We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most cases; ... we think the parents, not the courts, are the ones who must weigh the risk." *Hartke v. McKelway*, at 1552 n.8; *accord* *Sherlock v. Stillwater Clinic*, 260 N.W.2d 176-77.

We agree, therefore, with the special concurrence of Chief Justice Rose of the Wyoming Supreme Court: [T]hrough application of the "benefit rule" the courts give recognition to the philosophy that the costs and benefits associated with the introduction of an unplanned child to the family will vary depending upon the circumstances of the parents. As was stated in *Troppi v. Scarf, supra*, 187 N.W.2d at 519: "The essential point, of course, is that the trier must have the power to evaluate the benefit according

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[4] The application of the benefit rule has been criticized by some courts which argue that § 920 applies only when the injury and benefit are to the same interest. *See* RESTATEMENT, *supra*, § 920, comments a and b. These courts argue that the emotional benefits of child rearing in no way offset the economic costs. *Cockrum v. Baumgartner*, 99 Ill. App. 3d at 274, 54 Ill. Dec. at 753, 425 N.E.2d at 970. We are not persuaded by this argument since we agree with the special concurrence of Justice Faulkner in *Boone v. Mullendore*, *supra*, that "the economic burden and emotional distress of rearing an unexpected child are inextricably related to each other...." *Id*. at 726. We also note that the benefit rule is based on the concept of unjust enrichment and agree with Justice Faulkner that strict interpretation of the same interest limitation would result in unjust enrichment in wrongful pregnancy cases. *Id*.

to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable." By recognizing these considerations, the "benefit rule" encourages and entrusts the trier of fact with the responsibility of weighing and considering all of the factors associated with the birth of the unplanned child in a given "wrongful pregnancy" case. For me, it is the soundest approach for dealing with the right of the parents to prove their damages caused by the unplanned birth of a child without, at the same time, uprooting the law of tort damages. *Beardsley v. Wierdsma*, 650 P.2d at 296-97.

In reaching our decision, we are influenced greatly by what we perceive to be the uniform rules of damages for all tort cases. One of the basic principles of damage law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong. *Sherlock v. Stillwater Clinic*, 260 N.W.2d at 174; *Cockrum v. Baumgartner*, 95 Ill. 2d at 206-07, 69 Ill. Dec. at 175, 447 N.E.2d at 392 (CLARK, J., dissenting). We have recognized before in Arizona that the right to damages must be established without speculation, but that uncertainty as to the amount of those damages will not preclude recovery and is a question for the jury. Compare *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 446 P.2d 458 (1968), with *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (App. 1978).

We see no reason why ordinary damage rules, applicable to all other tort cases, should not be applicable to this situation.[5] By allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence. By permitting the jury to consider the reason for the procedure and to assess and offset the pecuniary and non-pecuniary benefits which will inure to the parents by reason of their relationship to the child, we allow the jury to discount those damages, thus reducing speculation and permitting the verdict to be based upon the facts as they actually exist in each of the unforeseeable variety of situations which may come before the court. We think this by far the better rule. The blindfold on the figure of justice is a shield from partiality, not from reality.

Accordingly, we hold that the respondent trial judge did not err in his ruling on the motion for summary judgment. The prayer for relief is denied.

HOLOHAN, C.J., and HAYS, J., concur.

GORDON, Vice Chief Justice (concurring in part and dissenting in part)

I would agree with the majority that health care providers should be responsible in damages for costs attendant to birth when they negligently perform a surgical sterilization. I would allow damages for obstetrical care, pre and post partum; all costs of lying in; where appropriate, loss of wages by the mother up to delivery and a short period thereafter, and her pain and suffering caused by delivery. Also if this were a case where the child were born seriously retarded, deformed, or chronically ill, I too would hold the health care provider responsible for the cost of lifetime support and care for the child. But here we are dealing with the birth of a normal and healthy, although undesired, child whose life I consider above monetary value. At this point I must respectfully dissent.

One of the most important functions of a state's highest appellate court is to guide and shepherd the growth of the common law of that state according to the Court's perception of existing public policy. This task is at once delicate and awesome. Emotion and sentimentality indeed

[5] In holding that ordinary damages rules are to be applied, we do not indicate or imply that parents should be forced to mitigate damages by choosing abortion or adoption, or that the parents' failure to do so may be considered as an offset. The rules requiring mitigation of damages require only that reasonable measures be taken. *Troppi v. Scarf*, 31 Mich. App. at 258, 187 N.W.2d at 519; *see also*, *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979). The decision not to conceive a child is quite different from the decision to abort or put the child up for adoption once it has been conceived. "If parents are confronted in such a situation with choices which they consider to be unenviable alternatives, they should not be precluded from recovering damages because they select the most desirable of these unpalatable choices." *Cockrum v. Baumgartner*, 95 Ill. 2d at 207, 69 Ill. Dec. at 175, 447 N.E.2d at 392 (CLARK, J., dissenting); *see also* Kelly, *Wrongful Life, Wrongful Birth and Justice in Tort Law*, WASH. U. L.Q. 919, 949-50 (1979).

should not play a part in our Court's decision of whether to apply an existing principle of law to a given set of facts. Were it otherwise the doctrine of stare decisis would be a fraud. But when, as members of this Court, we are called upon to extend an existing rule of damages to an entirely new concept within our jurisprudence, especially one so fraught with subjective differences in values, opinion and personal belief, we should tread cautiously, led by our most trusted senses, with both the goals of justice and the strengths and weaknesses of our system equally in mind.

The rule of damages established by the majority in this case may indeed be logical and legally scientific. Logic and science may, however, lead to results at variance with public policy. Although I have a very high degree of respect for our country's system of civil justice, and readily admit that our common law concepts of tort liability have caused products manufactured in the United States to be among the safest in the world, I feel that there are some human misfortunes that do not lend themselves to solution by combat in the courtroom. Wrongful pregnancy, in my opinion, is one of those. I believe the rule allowing damage recovery beyond the costs of birth in cases such as these would violate what I consider the public policy of our state in several ways.

(1) As is pointed out in the majority opinion, the prosecution of this type of action requires parents to deny the worth of the child, thus placing the values of the parents over those of the child. Under the "benefits rule," a judgment for the parents is a conclusion by the court that a child is not worth what it takes to raise him or her. This problem has been recognized by several authors who refer to such a child as an "emotional bastard" when attempting to describe the stigma that will attach to the child when he learns the true circumstances of his upbringing. *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65 (1981). In attempting to minimize the effect of a wrongful pregnancy action on the child, some courts have addressed part of their opinion to the child: "Since the child involved might some day read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy. This case and this complaint are well beyond such limits." *Rieck v. Medical Protective Co. of Fort Wayne, Ind.*, 64 Wis. 2d 514, 520, 219 N.W.2d 242, 245-46 (1974). *See also Coleman v. Garrison*, 349 A.2d 8 (Del. 1975) (advising the child that the case was not founded on rejection of him as a person, but rather was a malpractice action "sounding for the outlimits of physician liability." *Id.* at 14). One court has gone so far as to guarantee the parents' anonymity by captioning the case *Anonymous v. Hospital*, 33 Conn.Sup. 126, 366 A.2d 204 (1976). The above authorities indicate the practical effect that such litigation may have on the child in future years. Although later discovery of their parents' feelings toward them may harm only a few children, I think a few are too many.

(2) The decision in this matter will likely impinge upon the availability and costs of sterilization surgery in Arizona. It is conceivable that hereafter many health care providers will either refuse to perform these procedures, or they will become so expensive that only the wealthy will be able to afford them. If the intended result of the majority is to lessen the number of unwanted pregnancies by requiring more skill and caution in the performance of sterilization procedures, I believe that this case will be self-defeating. There will probably be an increase in the number of unwanted pregnancies due to the increased cost and relative unavailability of surgical sterilization.

(3) Finally, it is well known that our courts are already overcrowded with cases. The majority has by this decision created a new and expansive concept which will generate new and protracted litigation. For example, in *Cox v. Stretton*, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974), the plaintiff became pregnant and bore a child after her husband had received a vasectomy and was told by the defendant that the procedure would result in sterility. Aside from alleging causes of action in negligence and breach of contract, the complaint also set forth a cause of action on behalf of the plaintiffs' infant children. The court summarized the cause of action as follows: "[On behalf of the infant children, the plaintiffs' allege] that they, as prior born children, by reason of the defendant's negligence and breach of contract, will be deprived in the future of a portion of the care, affection, training and financial support that each would have received, except for the birth of

their unexpected brother." *Id.* at 158-59, 352 N.Y.S.2d at 839. Although the court refused to recognize this cause of action, the case indicates the scope of actions that may potentially be brought in the aftermath of the decision handed down by this Court today. Such actions are particularly tempting both to the unscrupulous and the unethical which will further add to the court's burden.

A further non-policy criticism that I have of the majority opinion is that it is not entirely consistent. If the Court is to allow some of the logical principles of tort law to apply in this very sensitive area, then I feel that all of them should apply. The majority, however, fails to do so in at least two instances.[1] First, in the usual lawsuit if a plaintiff has failed to mitigate his or her damages, this fact is allowed as an offset against recovery. In this case the Court, although eschewing emotions and sentiment, has for reasons unexplained decided that the parents' failure to choose abortion or adoption should not be considered in mitigation. The majority has apparently decided that these methods of mitigating damages are unreasonable as a matter of law. The question of the reasonableness of a method of mitigating damages, however, is generally a question of fact to be decided by the trier of fact. In some cases abortion or adoption will not be reasonable, while in others it will be reasonable. If we are going to open the door, logically, we should open it all the way. If the plaintiff parents - who have endeavored not to have a child, pleaded his or her birth as an injury to them, and claimed substantial damages - chose not to take advantage of abortion or adoption, the defendant should be permitted to establish that by so doing the parents unreasonably failed to mitigate their damages. Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127, 164-170 (1978) [hereinafter cited as *Wrongful Birth Damages*]; Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1328 (1982) [hereinafter cited as *Limitations on Damages*]; *cf. Ziemba v. Sternberg*, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (question of whether option of abortion was appropriate cannot be decided on motion to dismiss).

Second, the majority misapplies RESTATEMENT (SECOND) OF TORTS § 920 (1977). Section 920 specifically states that for a benefit to be considered in mitigation of damages it must be "a special benefit to the interest of the plaintiff that was harmed...." Furthermore, a comment to § 920 explains how the "same interest" requirement operates: "Limitation to same interest. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication ... unless damages are claimed for harm to pecuniary interests.... Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act.... Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife." RESTATEMENT, *supra*, § 920 comment b. A proper application of the "same interest" requirement in a wrongful pregnancy case would require that pecuniary harm of raising the child be offset only by corresponding pecuniary benefit, and emotional benefits of the parent-child relationship be applied as an offset only to corresponding emotional harm. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Comment, *Robak v. United States: A Precedent-Setting Damage Formula For Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 746-47 (1982); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1416-17 (1977); *Wrongful Birth Damages*, *supra*, at 158; *Limitations on Damages*, *supra*, at 1326.

The majority's reasons for overlooking the "same interest" requirement of § 920 are unpersuasive. The majority argues that the economic burden and emotional distress of rearing an unexpected child are so closely related that they cannot be separated. This seems inconsistent with the majority's expressed confidence in the ability of jurors to assess intangible emotional and pecuniary factors.

[1] I point these inconsistencies out not because I believe the majority opinion should remedy them. Indeed, the rule adopted by the majority but purged of these inconsistencies would be even less desirable as a matter of policy. I point them out in an attempt to demonstrate that the majority's attempt to avoid the moral and policy problems associated with this area of the law by appealing to strict principles of tort law is flawed. I am convinced that any such attempt would be flawed.

The majority also argues that because the "benefits rule" of § 920 is designed to prevent unjust enrichment, the "same interest" requirement of the rule should not be applied. The same argument could be made in any case and amounts to little more than an argument for deleting the "same interest" requirement from the "benefits rule."

I am convinced that the proper balance between strict tort law principles and sound public policy would be struck by precluding recovery of the future costs of raising and educating the child.

CAMERON, J., concur.

HARBESON v. PARKE-DAVIS

98 Wash. 2d 460, 656 P.2d 483 (1983)

PEARSON, Justice

This case requires us to decide whether to recognize two new causes of action: "wrongful birth" and "wrongful life." We hold that, subject to the limitations set forth in this opinion, such actions may be brought in this state.

Plaintiffs brought against the United States an action for medical malpractice and failure to inform of the material risks of treatment. The action was based upon medical care that plaintiff Jean Harbeson received from physicians employed by the United States at Madigan Army Medical Center in 1972 and 1973. The case was tried during the week of November 30, 1981, in the United States District Court for the Western District of Washington, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2674-2680, § 1346(b), and § 2402 (1976). After hearing all the evidence and before giving judgment, the District Court, on its own motion, certified to this court questions of law pursuant to R.C.W. 2.60.020 and RAP 16.16. The District Court formulated from the evidence presented at trial a number of findings of fact and conclusions of law. These findings and conclusions comprise the record upon which we must resolve the issues certified.

The District Court found as follows. Plaintiff Leonard Harbeson has at all material times been a member of the United States Air Force. In 1970, while Mr. Harbeson was stationed at Malstrom Air Force Base, his wife Jean conceived their first child. In December 1970, Mrs. Harbeson learned, after suffering a grand mal seizure, that she was an epileptic. To control Mrs. Harbeson's seizures, physicians at the Air Force Base prescribed Dilantin, an anticonvulsant drug, which was the first choice of doctors in the treatment of epilepsy. Mrs. Harbeson took Dilantin during the remainder of her pregnancy and in March 1971 gave birth to Michael, a healthy and intelligent child.

After Michael's birth, Mr. Harbeson was transferred to McChord Air Force Base, near Tacoma. The medical facility serving the base was Madigan Army Medical Center. In May 1972, Mrs. Harbeson went to Madigan for evaluation and treatment of her epilepsy. A neurologist at Madigan prescribed Dilantin to control her seizures. Between November 1972 and July 1973, the Harbesons informed three doctors at Madigan that they were considering having other children, and inquired about the risks of Mrs. Harbeson's taking Dilantin during pregnancy. Each of the three doctors responded that Dilantin could cause cleft palate and temporary hirsutism. None of the doctors conducted literature searches or consulted other sources for specific information regarding the correlation between Dilantin and birth defects. The Harbesons relied on the assurances of the Madigan doctors and thereafter Mrs. Harbeson became pregnant twice, giving birth to Elizabeth in April 1974, and Christine in May 1975. Throughout these pregnancies, Mrs. Harbeson continued to take Dilantin as prescribed by the Madigan doctors.

Elizabeth and Christine are the minor plaintiffs in this action, and are represented by Leonard Harbeson, as guardian *ad litem*. Elizabeth and Christine have been diagnosed as suffering from "fetal hydantoin syndrome." They suffer from mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects. Had Mr. and Mrs. Harbeson been informed of the potential birth defects associated with the use of Dilantin during pregnancy, they would not have had any other children.

The District Court's conclusions of law include the following.

> 4. Dilantin was a proximate cause of the defects and anomalies suffered by Elizabeth and Christine Harbeson.

5. The physicians at Madigan were the agents of the Defendant United States of America, and said Defendant is responsible for the acts and omissions of the Madigan physicians.

6. Plaintiff, Leonard Harbeson, is the duly appointed guardian *ad litem* for the minor plaintiffs herein, Elizabeth and Christine Harbeson, and is authorized to bring the present action on their behalf.

7. The physicians at Madigan failed to conduct a literature search or to consult other sources in regard to the effects of Dilantin during pregnancy, even though the plaintiffs Leonard and Jean Harbeson specifically asked all three Madigan physicians of possible birth defects associated with the mother's consumption of Dilantin during pregnancy. Said acts of the Madigan physicians:

a. breached the standard of care for the average physician acting under the same or similar circumstances, and the physicians were thereby negligent;

b. were not reasonably prudent, and therefore, were negligent.

8. An adequate literature search, or consulting other sources, would have yielded such information of material risks associated with Dilantin in pregnancy that reasonably prudent persons in the position of the Harbesons would attach significance to such risks in deciding whether to have further children.

9. Each of the four Harbeson Plaintiffs has sustained permanent and severe damages and injuries past, present and future, as a direct and proximate result of the negligence of the Madigan physicians.

10. Plaintiffs are entitled to recover damages from the Defendant United States of America.

* * *

We have now arrived at the crucial issue: Does the wrongful birth action as formulated earlier in this opinion coincide with these principles by which we impose liability on providers of health care?

First, we measure the proposed wrongful birth action against the traditional concepts of duty, breach, injury, and proximate cause. The critical concept is duty. The core of our decision is whether we should impose upon health care providers a duty correlative to parents' right to prevent the birth of defective children.

Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and recurrence of defects attributable to genetic disorders has improved significantly. Parents can determine before conceiving a child whether their genetic traits increase the risk of that child's suffering from a genetic disorder such as Tay-Sachs disease or cystic fibrosis. After conception, new diagnostic techniques such as amniocentesis and ultrasonography can reveal defects in the unborn fetus. *See generally*, Peters and Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 857, 873-75 (1980). Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). We must decide, therefore, whether these developments confer upon potential parents the right to prevent, either before or after conception, the birth of a defective child. Are these developments the first steps towards a "Fascist Orwellian societal attitude of genetic purity," *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978), or Huxley's brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic cost of defective children?

We believe we must recognize the benefits of these medical developments and therefore we hold that parents have a right to prevent the birth of a defective child and health care providers a duty correlative to that right. This duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children. If medical procedures are undertaken to avoid the conception or birth of defective children, the duty also requires that these procedures be performed with due care. This duty includes, therefore, the requirement that a health care provider who

undertakes to perform an abortion use reasonable care in doing so. The duty does not, however, affect in any way the right of a physician to refuse on moral or religious grounds to perform an abortion. Recognition of the duty will "promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong." (Footnotes omitted.) Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 757 (1982) (hereinafter cited as *Rogers*).

We find persuasive the fact that all other jurisdictions to have considered this issue have recognized such a duty. These decisions are conveniently collected in *Rogers*, at 739-52, and we need not list them here.

Having recognized that a duty exists, we have taken the major step toward recognizing the wrongful birth action. The second element of the traditional tort analysis is more straightforward. Breach will be measured by failure to conform to the appropriate standard of skill, care, or learning. R.C.W. 4.24.290; R.C.W. 7.70.040. *Gates v. Jensen*, 92 Wash. 2d 246, 595 P.2d 919 (1979).

More problematical is the question of whether the birth of a defective child represents an injury to the parents. The only case to touch on this question in this state did not resolve it. *Ball v. Mudge*, 64 Wash. 2d 247, 250, 391 P.2d 201 (1964). However, it is an inevitable consequence of recognizing the parents' right to avoid the birth of a defective child that we recognize that the birth of such a child is an actionable injury. The real question as to injury, therefore, is not the existence of the injury, but the extent of that injury. In other words, having recognized that the birth of the child represents an injury, how do we measure damages? Other courts to have considered the issue have found this question troublesome. In particular, the New Jersey Supreme Court has taken a different approach to the question on each of the three occasions it has confronted it. In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), the court rejected the wrongful birth action altogether. One of the reasons for the rejection was the difficulty of measuring damages.[1] When the court next considered the issue in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), it upheld an action for wrongful birth and permitted damages for mental anguish. However, the court refused to allow damages to compensate for the medical and other costs incurred in raising, educating, and supervising the child. The court retreated from this position in the third case, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981), and allowed the parents damages for certain medical expenses related to the child's affliction.

Other courts to have considered the issue exhibit widely divergent approaches. Comment, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127 (1978); *Rogers*, at 750-51.[2]

More certain guidance than that provided by decisions of other jurisdictions on the issue of damages is provided by the Legislature in R.C.W. 4.24.010.[3] This statute provides that, in an action by parents for injury to a child, compensation may be recovered for four types of damages: medical, hospital, and medication expenses, loss of the

[1] "[A] court would have to evaluate the ... intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is ... impossible to perform". 49 N.J. at 29, 227 A.2d 689.

[2] "Courts generally allow the extraordinary expenses relating to the child's defect that must be borne by the parents, (*e.g.*, *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975)) and some courts have compensated for the parents' pain and suffering or mental anguish. (*Schroeder v. Perkel*, *supra*.) One court has allowed all expenses incident to the care of the child, without discounting those expenses not directly related to the child's defect that would be necessary for a normal child (*Robak v. United States*, 658 F.2d 471 (7th Cir.1981))." *Rogers*, at 751. *See also Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (allowing pecuniary but denying emotional damages); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981) (allowing pecuniary and emotional damages).

[3] RCW 4.24.010 provides, in part: "The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support....
"... In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just."

child's services and support, loss of the child's love and companionship, and injury to the parent-child relationship. Recovery of damages for loss of companionship of the child, or injury or destruction of the parent-child relationship is not limited to the period of the child's minority. *Balmer v. Dilley*, 81 Wash. 2d 367, 502 P.2d 456 (1972). We have held that this section allows recovery for parental grief, mental anguish, and suffering. *Hinzman v. Palmanteer*, 81 Wash. 2d 327, 501 P.2d 1228 (1972). The statute is not directly in point because a wrongful birth claim does not allege injury to the child as the cause of the parents' injury; rather it alleges the birth of the child is the cause of the injury. Nevertheless, the statute reflects a policy to compensate parents not only for pecuniary loss but also for emotional injury. There appears to be no compelling reason that policy should not apply in wrongful birth actions. Accordingly, we hold that recovery may include the medical, hospital, and medication expenses attributable to the child's birth and to its defective condition, and in addition damages for the parents' emotional injury caused by the birth of the defective child. In considering damages for emotional injury, the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child. RESTATEMENT (SECOND) OF TORTS § 920 (1977). *Rogers*, at 751-52; *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Kingsbury v. Smith*, N.H., 442 A.2d 1003 (1982).

The final element to be considered is whether a breach of duty can be a proximate cause of the birth of the child. Proximate cause must be established by, first, a showing that the breach of duty was a cause in fact of the injury, and, second, a showing that as a matter of law liability should attach. *King v. Seattle*, 84 Wash. 2d 239, 249, 525 P.2d 228 (1974). Cause in fact can be established by proving that but for the breach of duty, the injury would not have occurred. *King v. Seattle*, *supra*. The legal question whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists. We therefore hold that, as a matter of law in wrongful birth cases, if cause in fact is established, the proximate cause element is satisfied. This conclusion is consistent with the decisions of those other jurisdictions which have accepted wrongful birth actions, *e.g.*, *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

The action for wrongful birth, therefore, fits within the conceptual framework of our law of negligence. An action in negligence claiming damages for the birth of a child suffering congenital defects may be brought in this state.

We now turn to answer the first issue certified to us by the District Court. Our analysis leads us to conclude that plaintiffs Leonard and Jean Harbeson may maintain a cause of action for the wrongful births of Elizabeth and Christine. We have held above that physicians have a duty to protect their patient's right to prevent the birth of defective children. This duty requires physicians to act in accordance with the appropriate standard of care. The special standard of care formulated in *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974), had not been promulgated at the time the alleged negligence of the physicians occurred in 1972 and 1973. The standard which applied at that time was set forth in *Hayes v. Hulswit*, 73 Wash. 2d 796, 440 P.2d 849 (1968), the standard of the "average practitioner." The District Court concluded that the physicians' failure to conduct a literature search breached the standard of care of the "average physician." (Conclusion of law 7a.) The physicians therefore breached the duty of care they owed to Mr. and Mrs. Harbeson.

Moreover, as our analysis above indicates, the birth of children suffering congenital defects constitutes an actionable injury to the parents. The three elements of duty, breach, and injury are therefore established.

The final element which must be proved is that the negligence of the physicians was a proximate cause of this injury. The District Court concluded that Dilantin was the proximate cause of the birth defects suffered by the children (conclusion of law 4), and that an adequate literature search would have revealed the risks associated with Dilantin (conclusion of law 8). The court made a finding of fact that had the Harbesons been informed of those risks they would not have had any other children. These conclusions and findings establish that the breach of duty was a cause in fact of the birth of Elizabeth and Christine, and therefore a proximate cause of the injury.

The parents may therefore recover damages for the wrongful births of Elizabeth and Christine. These damages may include pecuniary damages for extraordinary medical, educational, and similar expenses attributable to the defective condition of the children. In other words, the parents should recover those expenses in excess of the cost of the birth and rearing of two normal children. In addition, the damages may

compensate for mental anguish and emotional stress suffered by the parents during each child's life as a proximate result of the physicians' negligence. Any emotional benefits to the parents resulting from the birth of the child should be considered in setting the damages. (Implicit in this conclusion, in response to the District Court's question 2a, is that neither R.C.W. 4.24.290 nor R.C.W. 4.24.010 applies directly to the claims of the Harbesons.)

Mr. and Mrs. Harbeson also have a cause of action on a theory of informed consent. The health care which gives rise to the cause of action occurred between November 1972 and July 1973. At that time, the doctrine of informed consent was governed by *ZeBarth v. Swedish Hosp. Med. Ctr.*, 81 Wash. 2d 12, 499 P.2d 1 (1972). The doctrine required the physicians, in treating Mrs. Harbeson with Dilantin, to exercise reasonable care in disclosing "grave risks" of that treatment. It appears from the findings and conclusions of the District Court that the potential teratogenetic effects of Dilantin would constitute a "grave risk" of which Mrs. Harbeson ought to have been informed in order to intelligently exercise her judgment whether to have further children. Failure to impart the information renders the physicians liable for injuries proximately caused by the failure. As we explained in our discussion of the negligence action, the failure to inform was a proximate cause of the births of the minor plaintiffs. Mr. and Mrs. Harbeson are entitled to damages for pecuniary and emotional injuries attributable to those births.

Wrongful Life

In a wrongful life claim,

> [t]he child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence - his failure to adequately inform the parents of the risk - has caused the birth of the deformed child. The child argues that but for the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity. Comments, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980).

To this definition we would add that the physician's negligence need not be limited to failure to adequately inform the parents of the risk. It may also include negligent performance of a procedure intended to prevent the birth of a defective child: sterilization or abortion.

Wrongful life is the child's equivalent of the parents' wrongful birth action. However, whereas wrongful birth actions have apparently been accepted by all jurisdictions to have considered the issue, wrongful life actions have been received with little favor. There is an excellent discussion of the law relating to recognition of an action for wrongful life in *Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The action has been rejected in Alabama, *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978); New Jersey, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); New York, *e.g.*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); South Carolina, *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); Texas, *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); and Wisconsin, *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

Two other jurisdictions have come closer to embracing the cause of action. In Pennsylvania, a trial court decision that the action was not legally cognizable was affirmed only as a result of the even division of the Supreme Court. *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981). The Supreme Court of California rejected the claim of a child for general damages, but allowed the recovery of extraordinary medical expenses occasioned by the child's defect. *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982). The court acknowledges that "it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care."[4] We agree. The child's need for medical care and other special

[4] The court goes on to say: "If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.
"Realistically, a defendant's negligence in failing to diagnose an hereditary ailment places a significant medical and financial burden on the whole family unit. Unlike the child's claim for general damages, the damage here is both certain and readily measurable. Furthermore, in many instances these expenses will be vital not only to the child's well-being but to his or her very survival." (Footnote omitted.) *Turpin v. Sortini*, at 348, 182 Cal. Rptr. 337, 643 P.2d 954.

costs attributable to his defect will not miraculously disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.

We hold, accordingly, that a child may maintain an action for wrongful life in order to recover the extraordinary expenses to be incurred during the child's lifetime, as a result of the child's congenital defect. Of course, the costs of such care for the child's minority may be recovered only once. *Wooldridge v. Woolett*, 96 Wash. 2d 659, 666, 638 P.2d 566 (1981). If the parents recover such costs for the child's minority in a wrongful birth action, the child will be limited to the costs to be incurred during his majority.

The analysis whereby we arrived at our holding is similar to that which we used in considering the parents' wrongful birth action. It is convenient therefore to consider wrongful life according to the four traditional tort concepts of duty, breach, injury, and proximate cause.

We begin with duty. The first potential difficulty with this element of a wrongful life action is that in every case the alleged negligent act will occur before the birth of the child, and in many cases (including the one before us) before the child is conceived. Prenatal injuries to a fetus have been recognized as actionable in this state for 20 years. *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962). We have not previously considered whether a duty could exist prior to conception. Other courts have recognized such a preconception duty. *E.g.*, *Turpin v. Sortini*, *supra*, and authorities cited therein. We now hold that a duty may extend to persons not yet conceived at the time of a negligent act or omission. Such a duty is limited, like any other duty, by the element of foreseeability. *Hunsley v. Giard*, 87 Wash. 2d 424, 435-36, 553 P.2d 1096 (1976).[5] A provider of health care, or anyone else, will be liable only to those persons foreseeably endangered by his conduct. In most wrongful life cases, it should not be difficult to establish foreseeability. In the case before us, for example, the parents informed the defendant physicians of their intention to have further children. Such future children were therefore foreseeably endangered by defendants' failure to take reasonable steps to determine the danger of prescribing Dilantin for their mother.

One reason for the reluctance of other jurisdictions to recognize a duty to the child appears to be the attitude that to do so would represent a disavowal of the sanctity of a less-than-perfect human life. *Berman v. Allan*, 80 N.J. at 430, 404 A.2d 8. This reasoning was rejected in *Turpin v. Sortini*, at 233, 182 Cal. Rptr. 337, 643 P.2d 954.

> [I]t is hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.
>
> We agree.

Furthermore, the policies which persuaded us (along with several other jurisdictions) to recognize parents' claims of wrongful birth apply equally to recognition of claims of wrongful life. Imposition of a corresponding duty to the child will similarly foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice. In a footnote, the court in *Turpin v. Sortini* wrote at 349 n.15, 182 Cal. Rptr. 337, 643 P.2d 954:

> Permitting recovery of these extraordinary out-of-pocket expenses whether the cost is to be borne by the parents or the child should also help ensure that the available tort remedies in this area provide a comprehensive and consistent deterrent to negligent conduct.

In addition to providing a comprehensive and

[5] "The element of foreseeability plays a large part in determining the scope of defendant's duty. *Wells v. Vancouver*, 77 Wash. 2d 800, 467 P.2d 292 (1970). The point is summarized by the Hawaii Supreme Court: `[A] further limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.' *Rodrigues v. State*, 52 Hawaii 156, 174, 472 P.2d 509 (1970)." *Hunsley v. Giard*, 87 Wash. 2d at 435-36, 553 P.2d 1096.

consistent deterrent to malpractice, recognition of the duty will provide more comprehensive and consistent compensation for those injured by such malpractice (at least for extraordinary out-of-pocket expenses) than would be available were the duty confined to the parents. In order to achieve these ends, therefore, we recognize the existence of a duty to the unborn or unconceived child.

This duty will be breached by failure to observe the appropriate standard of care. *See Rogers* at 332-33.

The most controversial element of the analysis in other jurisdictions has been injury and the extent of damages. The New Jersey Supreme Court gave two reasons for rejecting a child's wrongful life claim in *Berman v. Allan*. First, the quantum of damages in such an action would be impossible to compute because the trier of fact would be required to "measure the difference in value between life in an impaired condition and the `utter void of nonexistence.' " 80 N.J. at 427, 404 A.2d 8. Second, to recognize life itself as an actionable injury would be inimical to deeply held beliefs that life is more precious than nonlife.

We agree with the New Jersey court that measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether. General damages are certainly beyond computation. They are therefore incapable of satisfying the requirement of Washington law that damages be established with "reasonable certainty." *Dyal v. Fire Companies Adj. Bur., Inc.*, 23 Wash. 2d 515, 521, 161 P.2d 321 (1945). But one of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training. These expenses are calculable. Thus, although general damages are impossible to establish with reasonable certainty, such special damages can be proved. In respect of special damages, therefore, the objection advanced in *Berman v. Allan* is not persuasive.

The second objection advanced by the New Jersey court in *Berman v. Allan* we have already discussed. Suffice it to say here that we do not agree that requiring a negligent party to provide the costs of health care of a congenitally deformed child is a disavowal of the sanctity of human life.

The final element which requires consideration is proximate cause.

The causation issue in a wrongful life claim is whether "[b]ut for the physician's negligence, the parents would have avoided conception, or aborted the pregnancy, and the child would not have existed." Comments, 54 TUL. L. REV. at 491. Some early cases advanced a proximate cause argument based on the fact that the negligence of the physician did not cause the defect from which the plaintiff suffered; rather, the negligence was in failing to disclose the existence of the defect. *E.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 27-28, 227 A.2d 689 (1967). This argument does not convince us. It is clear in the case before us that, were it not for the negligence of the physicians, the minor plaintiffs would not have been born, and would consequently not have suffered fetal hydantoin syndrome. More particularly, the plaintiffs would not have incurred the extraordinary expenses resulting from that condition. There appears to be no reason a finder of fact could not find that the physicians' negligence was a proximate cause of the plaintiffs' injuries.

For these reasons, we hold that a claim for wrongful life may be maintained in this state. We therefore answer the District Court's questions 3 and 4, as follows.

Elizabeth and Christine Harbeson may maintain a wrongful life action. We have held that the physicians' duty to inform the parents of the risks associated with Dilantin extends to the unconceived children. The District Court held that this standard was breached by the Madigan physicians in failing to conduct a literature search. The minor plaintiffs suffer an actionable injury to the extent that they require special medical treatment and training beyond that required by children not afflicted with fetal hydantoin syndrome. They may recover damages to the extent of the cost of such treatment and training. The standard appropriate to the conduct of the physicians is the standard of the "average practitioner." R.C.W. 4.24.290 does not apply to the Harbesons' claim.

BRACHTENBACH, C.J., and DOLLIVER, ROSELLINI, WILLIAM H. WILLIAMS, STAFFORD, DIMMICK, UTTER and DORE, JJ., concur.

Questions and Notes

1. Based on *Harbeson*, what do you think would be the outcome in Washington in a case

where the doctor negligently failed to prevent pregnancy, but the parents gave birth to a normal, healthy child? *See McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984).

2. In *Wilson v. Kuenzi*, 751 S.W.2d 741, 744-45 (Mo. 1988), the defendant doctor was sued after the parents gave birth to a child with Down syndrome. The parents claimed that he negligently failed to advise them to obtain an amniocentesis test, which would have afforded them an opportunity to terminate the pregnancy. The court dismissed the claim, holding, "The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor." Would you agree?

3. Minnesota enacted a statute that specifically rejects any claim for wrongful life. MINN. STAT. ANN. § 145.424. *See also Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (holding statute constitutional).

4. In Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461 (1989), the authors note the use of two other terms, *wrongful conception* and *wrongful pregnancy*, which refer to claims for the pregnancy and delivery of the child, as distinct from the subsequent child-rearing costs. However, the term wrongful birth is often used generically to refer to claims brought by the parents for the birth of a child who, but for someone's negligence, would not have been born.

5. Much of the commentary about the impact of wrongful birth / wrongful life claims has been negative. See, for example, Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harv. C.R.-C.L. L. Rev. 141 (2005). One court went so far as to compare the logic of wrongful life claims to the eugenics philosophy of Nazi Germany, which encouraged in some cases required the sterlization or elimination of the "unfit." *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. App. 1999). Is this a fair comparison?

6. Cases involving wrongful birth / wrongful life claims continue to generate scholarly commentary: Thomas A. Burns, *When Life Is an Injury: an Economic Approach to Wrongful Life Lawsuits*, 52 Duke L.J. 807 (2003); Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 Ala. L. Rev. 327 (2004); Jennifer R. Granchi, *The Wrongful Birth Tort: a Policy Analysis and the Right to Sue for an Inconvenient Child* 43 S. Tex. L. Rev. 1261 (2002); Katherine Say, *Wrongful Birth-preserving Justice for Women and Their Families*, 28 Okla. City U. L. Rev. 251 (2003).

3. Bystander Injuries

Introductory Note. As noted earlier, some claims for emotional distress arise from a negligent act toward the plaintiff that doesn't cause physical harm (for example, *Johnson v. State of New York* or *Molien v. Kaiser Foundation Hospitals*). Here, however, we have a case of severe physical injury to one individual - so severe that it causes a related party (typically a family member) to seek damages for emotional distress. After you have read these cases, you should consider whether such "parasitic" claims are more or less deserving of recovery than those where no physical harm occurs.

DILLON v. LEGG

68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968)

[*Plaintiff was the mother of two girls. While the girls were crossing a street defendant's automobile collided with one of them, killing her; the other girl was physically unhurt. The complaint alleged that plaintiff and the surviving daughter suffered severe emotional shock, with resulting physical injury. The daughter alleged she was within the "zone of danger" - the area where she might have apprehended physical contact from the defendant's automobile - but the mother admitted she witnessed the accident from a place of safety. The trial court granted summary judgment as to the mother's complaint,*

*following the rule announced in **Amaya v. Home Ice**, 379 P.2d 513 (Cal. 1963) that damages for emotional loss could only be recovered where plaintiff was within the zone of danger. The mother appealed.*]

TOBRINER, Justice

* * *

The posture of this case differs from that of *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 Cal. 2d 295, 298, 29 Cal. Rptr. 33, 35, 379 P.2d 513, 515, which involved "fright or nervous shock [with consequent bodily illness] induced solely by ... apprehension of negligently caused danger or injury to a third person" because the 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. In the second place, to rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery (*Cook v. Maier* (1939) 33 Cal. App. 2d 581, 584, 92 P.2d 434.) 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*. At the threshold, then, we point to the incongruity of the rules upon which any rejection of plaintiff's recovery must rest.

We further note, at the outset, that defendant has interposed the defense that the contributory negligence of the mother, the sister, and the child contributed to the accident. If any such defense is sustained and defendant found not liable for the death of the child because of the contributory negligence of the mother, sister or child, we do not believe that the mother or sister should recover for the emotional trauma which they allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be adjudicated liability and fault of defendant; that liability and fault must be the foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma.

We turn then to an analysis of the concept of duty, which, as we have stated, has furnished the ground for the rejection of such claims as the instant one. 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.... But it should be recognized that `duty' 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.)

Indeed, the idea of court-imposed restrictions on recovery by means of the concept of "duty" contrasted dramatically with the preceding legal system of feudal society.[1] In the enclosed feudal

[1] "The gradual development of the law in the matter of

society, the actor bore responsibility for any damage he inflicted without regard to whether he was at fault or owed a "duty" to the injured person. Thus, at that time, the defendant owed a duty to all the world to conduct himself without causing injury to his fellows. It may well be that the physical contraction of the feudal society imposed an imperative for maximum procurable safety and a corresponding absolute responsibility upon its members.

The Industrial Revolution, which cracked the solidity of the feudal society and opened up wide and new areas of expansion, changed the legal concepts. Just as the new competitiveness in the economic sphere figuratively broke out of the walls of the feudal community, so it broke through the rule of strict liability. In the place of strict liability it introduced the theory that an action for negligence would lie only if the defendant breached a duty which he owed to plaintiff. As Lord Esher said in *Le Lievre v. Gould* (1893) 1 Q.B. 491, 497: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

We have pointed out that this late 19th century concept of duty, as applied to the instant situation, has led the courts to deny liability. We have noted that this negation of duty emanates from the twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims. We shall point out why we think neither fear justified.

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 possibility that some fraud will escape detection does not justify an abdication of the judicial responsibility to award damages for sound claims: if it is "to be conceded that our procedural system for the ascertainment of truth is inadequate to defeat fraudulent claims ..., the result is a virtual acknowledgment that the courts are unable to render justice in respect to them." (*Chiuchiolo v. New England Wholesale Tailors* (1930) 84 N.H. 329, 335, 150 A. 540, 543.)

* * *

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 potential 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."...

* * *

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

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civil liability is discussed and traced by the late Sir William Holdsworth with ample learning and lucidity in his HISTORY OF ENGLISH LAW, vol. 8, pp. 446 *et seq.*, and need not here be rehearsed. Suffice it to say that the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent." (*Read v. J. Lyons & Co., Ltd.* (1947) A.C. 156, 171.)

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 does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it 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. The courts thus mark out the areas of liability, excluding the remote and unexpected.

In the instant case, the presence of all the above factors indicates that plaintiff has alleged a sufficient prima facie case....

... To the extent that it is inconsistent with our ruling here, we therefore overrule *Amaya v. Home Ice, Fuel & Supply Co., supra*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513.

To deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good reason compels our captivity to an indefensible orthodoxy.

The judgment is reversed.

PETERS, MOSK, and SULLIVAN, JJ., concur.

TRAYNOR, Chief Justice

I dissent for the reasons set forth in *Amaya v. Home Ice, Fuel & Supply Co.* (1963) 59 Cal. 2d 295, 297-315, 29 Cal. Rptr. 33, 379 P.2d 513. In my opinion that case was correctly decided and should not be overruled.

BURKE, Justice [dissenting]

As recently as 1963 this court, in *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513, thoroughly studied and expressly rejected the proposition (pp. 298-299, 29 Cal. Rptr. 33, 379 P.2d 513) that tort liability may be predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person. As related in our *Amaya* opinion, plaintiff there was the mother of a 17-month-old boy who saw him struck by a truck; accordingly our ruling necessarily included all mothers of small children who observe them being injured. Yet today this court's *Amaya* decision is overruled by an opinion which disdains any discussion whatever of the history and policy of pertinent law painstakingly set forth in *Amaya*.

* * *

It appears to me that in the light of today's majority opinion the matter at issue should be commended to the attention of the Legislature of this state. Five years have elapsed since our *Amaya* decision, during which that body has not undertaken to change the law we there declared. We may presume, therefore, that the limitations upon liability there affirmed comport with legislative views. But if all alleged California tortfeasors, including motorists, home and other property owners, and governmental entities, are now to be faced with the concept of potentially infinite liability beyond any rational relationship to their culpability, then surely the point has been reached at which the Legislature should reconsider the entire subject and allow all interests affected to be heard.

I would affirm the judgment.

Questions and Notes

1. Recall that *Dillon* is a classic example of what might be termed a *derivative* claim for emotional distress: Mrs. Dillon's derives from the physical injury to her daughter. These cases are also sometimes called "bystander" cases, because they involve injury to someone "standing by" while someone related to them is injured.

2. The California Supreme Court decided in *Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1 (1985), that the death of a child need not be sudden in order for a mother to have a claim of negligent infliction of emotional distress. Nor did the mother need to have actually witnessed the child's death.

However, that same decision refused to allow a claim by the father, who had seen his son well before the boy was in the process of dying of pneumonia, and neglect, in a state hospital. The issue continues to divide the court. In *Thing v. La Chusa*, 771 P.2d 814, 257 Cal. Rptr. 865 (1989), the court denied a recovery to a parent who was not present at the accident scene, *see* VanDeWeghe, *California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress*, 24 LOY. L.A. L. REV. 89 (1990).

3. In *Ballinger v. Palm Springs Aerial Tramway*, 269 Cal. Rptr. 583 (Cal. App. 1990), plaintiffs were riding on an aerial tramway when a part of the system fell through the car they were riding in and struck a passenger, who later died from her injuries. Although plaintiffs were unrelated to the decedent, and did not suffer any physical injury, they sued the tramway company for their emotional distress. The defendant claimed that they could not recover, based upon *Dillon*. The judge granted summary judgment for the defendants. The plaintiffs appealed. How would you decide the case?

4. Loss of Consortium

Introductory Note. Like the claims for bystander injuries, suits claiming loss of consortium (the "society" and companionship with another) argue that the injury to one person has caused injuries to someone dependent upon or related to the immediate victim. Whereas the *bystander* claims often involve a claim for the emotional impact caused by observing the injury (claims which can be made even by unrelated parties), in the following cases a related party sues for compensation even where he or she doesn't witness the original injury.

RODRIGUEZ v. BETHLEHEM STEEL CORPORATION

12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669 (1974)

MOSK, Justice

In this case we are called upon to decide whether California should continue to adhere to the rule that a married person whose spouse has been injured by the negligence of a third party has no cause of action for loss of "consortium," *i.e.*, for loss of conjugal fellowship and sexual relations. (*Deshotel v. Atchison, T.& S.F. Ry. Co.* (1958), 50 Cal. 2d 664, 328 P.2d 449; *West v. City of San Diego* (1960), 54 Cal. 2d 469, 475-478, 6 Cal. Rptr. 289, 353 P.2d 929.) As will appear, we have concluded that the reasons for this rule have ceased and that California should join the large and growing majority of jurisdictions which now recognize such a cause of action.

The case is here on an appeal from a judgment of dismissal entered upon the sustaining of general demurrers without leave to amend. From the pleadings and supporting declarations filed by the parties, the following picture emerges.

On May 24, 1969, Richard and Mary Anne Rodriguez were married. Both were gainfully employed. In their leisure time they participated in a variety of social and recreational activities. They were saving for the time when they could buy their own home. They wanted children, and planned to raise a large family.

Only 16 months after their marriage, however, their young lives were shattered by a grave accident. While at work, Richard was struck on the head by a falling pipe weighing over 600 pounds. The blow caused severe spinal cord damage which has left him totally paralyzed in both legs, totally paralyzed in his body below the midpoint of the chest, and partially paralyzed in one of his arms.

The effects of Richard's accident on Mary Anne's life have likewise been disastrous. It has transformed her husband from an active partner into a lifelong invalid, confined to home and bedridden for a great deal of the time. Because he needs assistance in virtually every activity of daily living, Mary Anne gave up her job and undertook his care on a 24-hour basis. Each night she must wake in order to turn him from side to side, so as to minimize the occurrence of bedsores. Every morning and evening she must help him wash,

dress and undress, and get into and out of his wheelchair. She must help him into and out of the car when a visit to the doctor's office or hospital is required. Because he has lost all bladder and bowel control, she must assist him in the difficult and time-consuming processes of performing those bodily functions by artificial inducement. Many of these activities require her to lift or support his body weight, thus placing a repeated physical strain on her.

Nor is the psychological strain any less. Mary Anne's social and recreational life, evidently, has been severely restricted. She is a constant witness to her husband's pain, mental anguish, and frustration. Because he has lost all capacity for sexual intercourse, that aspect of married life is wholly denied to her: as she explains in her declaration, "To be deeply in love with each other and have no way of physically expressing this love is most difficult physically and mentally." For the same reason she is forever denied the opportunity to have children by him - he is, for all practical purposes, sterilized: again she explains, "I have lost what I consider is the fulfillment of my existence because my husband can't make me pregnant so as to bear children and have a family." The consequences to her are predictable: "These physical and emotional frustrations with no outlet have made me nervous, tense, depressed and have caused me to have trouble sleeping, eating and concentrating." In short, Mary Anne says, "Richard's life has been ruined by this accident. As his partner, my life has been ruined too."

At the time of the accident Richard was 22 years old and Mary Anne was 20. The injuries, apparently, are permanent.

To paraphrase our opening observation in *Dillon v. Legg* (1968), 68 Cal. 2d 728, 730, 69 Cal. Rptr. 72, 74, 441 P.2d 912, 914, "That the courts should allow recovery" to a wife for losses she personally suffers by reason of negligent injury to her husband "would appear to be a compelling proposition." But the pathway to justice is not always smooth. Here, as in *Dillon*, the obstacle is a prior decision of this court; and as in *Dillon*, the responsibility for removing that obstacle, if it should be done, rests squarely upon us.

The point was clearly made by the courts below. Richard and Mary Anne jointly filed an amended complaint against Richard's employer and various subcontractors. In the first cause of action, predicated on his own injuries, Richard prayed for substantial general damages, past and future medical expenses, and compensation for the loss of his earnings and earning capacity. In the second cause of action Mary Anne alleged the consequences to her of Richard's injuries, and prayed for general damages in her own right, the reasonable value of the nursing care she furnishes her husband, and compensation for the loss of her earnings and earning capacity. Defendants filed general demurrers to the second cause of action on the ground that no recovery for any such loss is permitted in California under the authority of *Deshotel v. Atchison T. & S.F. Ry. Co.* (1958), *supra*, 50 Cal. 2d 664, 328 P.2d 449.

When the demurrers came on for hearing the trial court emphasized the rule, recognized in *Deshotel* (*id.*, at p. 669, 328 P.2d 449), that in a wrongful death case a widow can recover damages for the loss of her deceased husband's society, comfort, and protection. The court criticized the contrary rule applicable when, as here, the husband is severely injured but does not die: "I have never been able to justify the law which permitted a widow to be compensated for the detriment suffered as a result of loss of companionship and so forth, but at the same time won't compensate her for the loss, together with the burden, of somebody made a vegetable as a result of something happening to her husband. I can't see it, but I feel kind of hide bound by the Appellate Court. That is my problem." Addressing Mary Anne's counsel, the court made it clear that it would have ruled in his client's favor but for the precedent of *Deshotel*: "I go along with you, counsel, on your philosophy of the law, as to what the law ought to be. What about the torque in me that is being created by the proposition that I have the expression of the courts on a higher level than this one that I feel duty bound to follow? You say I can blaze a trail. I don't think trial judges are entitled to blaze trails." On its own motion the court then severed Mary Anne's cause of action from that of Richard and sustained the general demurrers thereto without leave to amend, "In order to expedite the determination of the legal issues raised by defendants by a court of higher level than this...." Eventually a judgment of dismissal as to Mary Anne was entered (Code Civ. Proc. § 581, subd. 3), and she appealed.

In affirming the judgment the Court of Appeal likewise indicated its dissatisfaction with the *Deshotel* rule, but correctly deferred to this court for any reconsideration of the doctrine: Presiding Justice Kaus, writing for a unanimous court, stated that "In spite of counsel's eloquent

exhortations to the contrary, we must hold that it is up to the Supreme Court to qualify or overrule its decisions. We say this in full recognition of Mary Anne's argument that several Supreme Court cases since *Deshotel* and *West* can be read as undermining the rationale of those holdings." This is a perceptive and accurate reading of our decisions, as we shall explain.

To begin with, we delineate the rationale of *Deshotel* and *West*. Clearly it is not the original common law view, which held that a wife could not recover for loss of her husband's services by the act of a third party for the starkly simple reason that she had no independent legal existence of her own (1 BLACKSTONE, COMMENTARIES, p. *442) and hence had no right to such services in the first place.[1] That rationale was explicitly rejected in *West*, when the court declined to recognize the husband's common law right to recover for loss of his wife's consortium: "his right," we said, "was based upon the wife's subservient position in the marriage relationship whereas, under present-day law, spouses are generally regarded as equals." (54 Cal. 2d at p. 477, 6 Cal. Rptr. at p. 294, 353 P.2d at p. 934.)[2]

* * *

As the Massachusetts court observed, "We should be mindful of the trend although our decision is not reached by a process of following the crowd." (*Diaz v. Eli Lilly and Company* (Mass. 1973), *supra*, 302 N.E.2d 555, 561.)[3] Quantitative at first, the trend took a qualitative leap when the American Law Institute reversed its position on the subject not long ago. Consonant with prior law, section 695 of the first RESTATEMENT OF TORTS, published in 1938, had declared that a wife was not entitled to recover for any harm caused to any of her marital interests by one who negligently injured her husband. In 1969, however, at a time when the weight of authority was still slightly against such recovery - although the trend was running in its favor - the institute adopted a new section 695, declaring in relevant part that "One who by reason of his tortious conduct is liable to a husband for illness or other bodily harm is also subject to liability to his wife for resulting loss of his society, including any impairment of his capacity for sexual intercourse...." (REST. 2D TORTS (Tent. Draft No. 14, Apr. 15, 1969) § 695, adopted May 21, 1969 (Proceedings of American Law Inst. (46th Annual Meeting, 1969) pp. 148-157).)[4]

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[1] As the Iowa court neatly put it, "at common law the husband and wife were considered as one, and he was the one." (*Acuff v. Schmit* (1956), 248 Iowa 272, 78 N.W.2d 480, 484.)

[2] Prior to *Deshotel* and *West* the medieval view of the legal identity of husband and wife had been vigorously denounced in *Follansbee v. Benzenberg* (1954), 122 Cal. App. 2d 466, 476, 265 P.2d 183, 189. Holding that a wife who pays for necessary medical services for her negligently injured husband can obtain reimbursement from the tortfeasor who caused the expenses, the Court of Appeal reasoned: "The old common law rule that a wife had no right of action of this character obtained on the theory that the wife's personality merged in that of the husband's, that she had no right to hold property separate and apart from her husband, and had no right to sue in her own name. This hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course. These archaic notions no longer obtain. "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the need of justice for married women." (*Bernhardt v. Perry*, 276 Mo. 612 (208 S.W. 462, 470, 13 A.L.R. 1320).) The legal status of a wife has changed. Her legal personality is no longer merged in that of her husband. A husband has no longer any domination over the separate property of his wife. A wife may sue in her own name without joining her husband in the suit. Generally a husband and wife have, in the marriage relation, equal rights which should receive equal protection of the law."
Despite this declaration the anachronistic theory of the identity of spouses lingered on in other contexts, and was finally buried by the decisions in which this court held that one spouse can sue the other for a negligent or intentional personal tort (*Self v. Self* (1962), 58 Cal. 2d 683, 26 Cal. Rptr. 97, 376 P.2d 65, and *Klein v. Klein* (1962), 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P.2d 70) and that two spouses can be prosecuted for conspiring between themselves to commit a crime (*People v. Pierce* (1964), 61 Cal. 2d 879, 40 Cal. Rptr. 845, 395 P.2d 893).

[3] The trend of cases allowing the wife's recovery was taken into account in many of the decisions cited in footnote 5, *Ante*. In other contexts, this court has also given weight to similarly strong currents of judicial thinking in our sister states. (*See, e.g.*, *Vesely v. Sager* (1971), *supra*, 5 Cal. 3d 153, 161-162, 95 Cal. Rptr. 623, 486 P.2d 151; *Gibson v. Gibson* (1971), 3 Cal. 3d 914, 922-923, 92 Cal. Rptr. 288, 479 P.2d 648.) And the vast majority of commentators have long supported the movement in favor of recovery for loss of consortium. (See authorities collected in *Gates v. Foley* (Fla. 1971), *supra*, 247 So. 2d 40, 42-43, fn.2.)

[4] Section 693 of both the first and second RESTATEMENTS recognizes an identical right of the husband to recover for loss of his wife's consortium, but

In these circumstances we may fairly conclude that the precedential foundation of *Deshotel* has been not only undermined but destroyed. In its place a new common law rule has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse. Accordingly, to adopt that rule in California at this time would not constitute, as the court feared in *Deshotel* (50 Cal. 2d at p. 667, 328 P.2d 449), an "extension" of common law liability, but rather a recognition of that liability as it is currently understood by the large preponderance of our sister states and a consensus of distinguished legal scholars.

* * *

The injury is indirect, the damages speculative, and the cause of action would extend to other classes of plaintiffs.

Under this heading we group three arguments relied on in *Deshotel* which could be invoked against any proposed recognition of a new cause of action sounding in tort. As will appear, each has been refuted by application of fundamental principles of the law of negligence.

First the *Deshotel* court asserted that "Any harm [the wife] sustains occurs *only indirectly* as a consequence of the defendant's wrong to the husband" (italics added; 50 Cal. 2d at p. 667, 328 P.2d at p. 451). The argument was negated 10 years after *Deshotel* in *Dillon v. Legg* (1968), *supra*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912. There the issue was whether a driver who negligently runs over a small child in the street is also liable to the child's mother for emotional shock and resulting physical disorders suffered by the latter when she personally witnessed the occurrence of the accident. Finding such liability, we in effect rejected the argument that the injury to the mother was too "indirect." The critical question, we explained, was foreseeability: "In order to limit the otherwise potential 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." (*Id.* at p. 739, 69 Cal. Rptr. at p. 79, 441 P.2d at p. 919.) The 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 unreasonable dangerous. (*Ibid.*) The foreseeable risk need not be of an actual physical impact, but may be of emotional trauma alone. (*Id.* at pp. 739-740, 69 Cal. Rptr. 72, 441 P.2d 912.) Whether a risk is sufficiently foreseeable to give rise to a duty of care depends on the circumstances of each case, including the relationship of the parties and the nature of the threatened injury. (*Id.* at p. 741, 69 Cal. Rptr. 72, 441 P.2d 912.) We concluded that "In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable foreseeability does not turn on whether the particular (defendant) as an individual would have in actuality foreseen the exact accident and loss; it 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. The courts thus mark out the areas of liability, excluding the remote and unexpected." (*Ibid.*)

Applying these rules to the facts alleged, we were of the opinion in *Dillon* that "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." (*Ibid.*) By parity of reasoning, we conclude in the case at bar that one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury. In our society the likelihood that an injured adult will be a married man or woman is substantial,[5] clearly no less than the likelihood that a small child's mother will personally witness an injury to her offspring. And the probability that the spouse of a severely disabled person will suffer a personal loss by reason of that injury is equally substantial.

* * *

The next rationale of the *Deshotel* court (50

includes liability for loss of her services as well.

[5] As of 1972, 74.8 percent of all men in the United States over age 18 were married. During the peak working years of ages 25 to 65, the proportion of married men ranged between 77.8 percent and 89.7 percent. In the case of women the corresponding figures are 68.5 percent for all adult females and 69.5 percent to 87.3 percent for women between the ages of 25 and 65. (Statistical Abstract of the United States (94th ed. 1973) p. 38, table No. 47.)

Cal. 2d at p. 667, 328 P.2d at p. 451) was that "the measurement of damage for the loss of such things as companionship and society would involve conjecture since their value would be hard to fix in terms of money." This argument, too, has fared badly in our subsequent decisions. (Although loss of consortium may have physical consequences, it is principally a form of mental suffering. We have full recognized that "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. (Citation.) In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy." (*Beagle v. Vasold* (1966), 65 Cal. 2d 166, 172, 53 Cal. Rptr. 129, 131, 417 P.2d 673, 675.) "Yet," we emphasized in *Beagle* (at p. 176, 53 Cal. Rptr. at p. 134, 417 P.2d at p. 678), "the inescapable fact is that this is precisely what the jury is called upon to do."

* * *

The third argument of this group set forth in *Deshotel* is that if the wife's cause of action were recognized "on the basis of the intimate relationship existing between her and her husband, other persons having a close relationship to the one injured, such as a child or parent, would likely seek to enforce similar claims, and the courts would be faced with the perplexing task of determining where to draw the line with respect to which claims should be upheld." (50 Cal. 2d at pp. 667-668, 328 P.2d at p. 451.) Here again the answer was subsequently given in *Dillon v. Legg*. In that case it was likewise urged that any cause of action granted to a mother who witnesses her child's injury could also be asserted by other close relatives present at the scene such as siblings or grandparents, thus involving the courts "in the hopeless task of defining the extent of the tortfeasor's liability." (68 Cal. 2d at p. 730, 69 Cal. Rptr. at p. 74, 441 P.2d at p. 914.)

We rejected this argument in *Dillon* on the ground that "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." (*Id*. at p. 731, 69 Cal. Rptr. at p. 74, 441 P.2d at p. 914.) Those guidelines, as noted hereinabove, are the general principles of negligence law limiting liability to persons and injuries within the scope of the reasonably foreseeable risk. "We do not believe that the fear that we cannot successfully adjudicate future cases of this sort, pursuant to the suggested guidelines, should bar recovery in an otherwise meritorious cause." (*Id*. at pp. 743-744, 69 Cal. Rptr. at p. 82, 441 P.2d at p. 922.) ...

... That the law might be urged to move too far, in other words, is an unacceptable excuse for not moving at all.

The fear of double recovery and of the retroactive effect of a judicial rule.

In this final group we deal with two *Deshotel* arguments which apply principally to loss of consortium cases. As will appear, the overwhelming majority of decisions since *Deshotel* have established that each of these objections is without substance and can satisfactorily be resolved by procedural means.

First, the *Deshotel* court expressed the concern that "A judgment obtained by a husband after he is injured by a third person might include compensation for any impairment of his ability to participate in a normal married life, and, if his wife is allowed redress for loss of consortium in a separate action, there would be danger of double recovery." (50 Cal. 2d at p. 667, 328 P.2d at p. 451.) Virtually every decision granting the wife the right to recover for loss of consortium since *Deshotel* has considered and rejected this argument (see fn. 5, *Ante*), calling it "fallacious," "fictional," and a "bogey" that is "merely a convenient cliche" for denying the wife her action for loss of consortium. The cases have made it crystal clear that, in the quoted words of *Deshotel*, recovery of damages for impairment of "his" ability to participate in a normal married life does not necessarily compensate for the impairment of "her" ability to participate in that life.

* * *

Nor is the wife's personal loss limited to her sexual rights. As we recognized in *Deshotel* (50 Cal. 2d at p. 665, 328 P.2d at p. 449), consortium includes "conjugal society, comfort, affection, and companionship." An important aspect of consortium is thus the Moral support each spouse gives the other through the triumph and despair of life. A severely disabled husband may well need all the emotional strength he has just to survive

the shock of his injury, make the agonizing adjustment to his new and drastically restricted world, and preserve his mental health through the long years of frustration ahead. He will often turn inwards, demanding more solace for himself than he can give to others. Accordingly, the spouse of such a man cannot expect him to share the same concern for *her* problems that she experienced before his accident. As several of the cases have put it, she is transformed from a happy wife into a lonely nurse. Yet she is entitled to enjoy the companionship and moral support that marriage provides no less than its sexual side, and in both cases no less than her husband. If she is deprived of either by reason of a negligent injury to her husband, the loss is hers alone. "In the light of the foregoing danger of double recovery is not real for presumably the husband is recovering for his own injuries and she is recovering for injury done to herself by the loss of his companionship. There is no duplication, instead, this is an example of a single tortious act which harms two people by virtue of their relationship to each other." (*General Electric Company v. Bush* (1972), *supra*, 88 Nev. 360, 498 P.2d 336, 371.)

* * *

We therefore overrule *Deshotel v. Atchison, T.& S.F. Ry. Co.* (1958), *supra*, 50 Cal. 2d 664, 328 P.2d 449, and *West v. City of San Diego* (1960) *supra*, 54 Cal. 2d 469, 475-478, 6 Cal. Rptr. 289, 353 P.2d 929, and declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party.

McCOMB, Justice (dissenting)

I dissent. I adhere to the view that any change in the law denying the wife recovery for loss of consortium should be left to legislative action. (*Deshotel v. Atchison, T. & S.F. Ry. Co.*, 50 Cal. 2d 664, 669, 328 P.2d 449.)

Questions and Notes

1. Should it matter whether the claimant is related by marriage to the victim? *See* Cavanaugh, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 Hastings L.J. 447 (1990); Note, *Elden v. Sheldon (758 P.2d 982 (Cal.)): Negligent Infliction of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants*, 26 CAL. W.L. REV. 175 (1989).

2. "Eileen Dunphy and Michael T. Burwell became engaged to marry in April 1988 and began cohabitating two months later. The couple set a date of February 29, 1992, for their wedding. On September 29, 1990, the couple responded to a friend's telephone call for assistance in changing a tire on Route 80 in Mount Arlington. As Michael changed the left rear tire of the friend's car on the shoulder of the roadway, he was struck by a car driven by defendant, James Gregor. After being struck by the vehicle, his body was either dragged or propelled 240 feet. Eileen, who had been standing approximately five feet from Michael, witnessed the impact, and ran to him immediately. Realizing that he was still alive, she cleared pebbles and blood from his mouth to ease his breathing. She attempted to subdue his hands and feet as they thrashed about, all the while talking to him in an effort to comfort him. The following day, after a night-long vigil at Dover General Hospital, Eileen was told that Michael Burwell had died as a result of his injuries. Since the accident, Eileen has undergone psychiatric and psychological treatment for depression and anxiety. She instituted an action seeking to recover damages for the `mental anguish, pain and suffering' experienced as a result of witnessing the events that led to the death of her fiance."

Will Eileen be able to recover? Why or why not? *See Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372, (N.J. 1994).

BORER v. AMERICAN AIRLINES

138 Cal. Rptr. 302, 563 P.2d 858 (1977)

TOBRINER, Acting Chief Justice

In *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669 we held that a married person whose spouse had been injured by the negligence of a third party may maintain a cause of action for loss of

"consortium." We defined loss of "consortium" as the "loss of conjugal fellowship and sexual relations" (12 Cal. 3d at p. 385, 115 Cal. Rptr. at p. 766, 525 P.2d at p. 670), but ruled that the term included the loss of love, companionship, society, sexual relations, and household services. Our decision carefully avoided resolution of the question whether anyone other than the spouse of a negligently injured person, such as a child or a parent, could maintain a cause of action analogous to that upheld in *Rodriguez*. We face that issue today:...

... Plaintiffs, the nine children of Patricia Borer, allege that on March 21, 1972, the cover on a lighting fixture at the American Airlines Terminal at Kennedy Airport fell and struck Patricia. Plaintiffs further assert that as a result of the physical injuries sustained by Patricia, each of them has been "deprived of the services, society, companionship, affection, tutelage, direction, guidance, instruction and aid in personality development, all with its accompanying psychological, educational and emotional detriment, by reason of Patricia Borer being unable to carry on her usual duties of a mother."...

* * *

Plaintiffs point out that courts have permitted recovery of monetary damages for intangible loss in allowing awards for pain and suffering in negligence cases and in sanctioning recovery for loss of marital consortium. The question before us in this case, however, pivots on whether we should recognize a wholly new cause of action, unsupported by statute or precedent; in this context the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, constitutes a strong reason for refusing to recognize the asserted claim. To avoid misunderstanding, we point out that our decision to refuse to recognize a cause of action for parental consortium does not remotely suggest the rejection of recovery for intangible loss; each claim must be judged on its own merits, and in many cases the involved statutes, precedents, or policy will induce acceptance of the asserted cause of action.

* * *

Plaintiffs place particular emphasis on *Dillon v. Legg* (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, which upheld a cause of action for injuries flowing from a mother's emotional trauma in witnessing the death of her child. We suggested that the cause of action should be sustained whenever the injury was "reasonably foreseeable" (p. 741, 69 Cal. Rptr. 72, 441 P.2d 912), and that one factor to be considered was "whether plaintiff and the victim were closely related." (*Ibid.*) Plaintiffs urge that we follow that paradigm for decision of the instant case.

In *Dillon*, however, we carefully limited our ruling to a case in which the plaintiff suffered physical injury. (68 Cal. 2d at p. 740, 69 Cal. Rptr. 72, 441 P.2d 912.) Subsequent decisions, interpreting our holding in *Dillon*, have refused to recognize a cause of action in a case in which the plaintiff suffered no physical injury himself as a result of witnessing the infliction of injury upon a family member. (*See Krouse* v. Graham, Cal., 137 Cal. Rptr. 863, 562 P.2d 1022; *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal. 3d 889, 892 fn. 1, 103 Cal. Rptr. 856, 500 P.2d 880; *Hair v. County of Monterey, supra*, 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639.) Thus *Dillon* and subsequent authority support our decision in this case to deny a cause of action founded upon purely intangible injury.

We therefore conclude that we should not recognize a cause of action by a child for loss of parental consortium.[1]

* * *

In summary, we do not doubt the reality or the magnitude of the injury suffered by plaintiffs. We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community. We conclude, however, that taking into account all considerations which bear on this question, including the inadequacy of monetary compensation to alleviate that tragedy, the

[1] The considerations which lead us to reject a cause of action for negligent injury to consortium in a parent-child context do not bar an action for intentional interference with parental consortium. An action for intentional interference with consortium, recognized by precedent in California (*see Rosefield v. Rosefield* (1963) 221 Cal. App. 2d 431, 34 Cal. Rptr. 479) is a relatively unusual tort that presents no danger of multiplication of claims or damages. The ruling, moreover, may serve to deter child stealing and similar antisocial conduct.

difficulty of measuring damages, and the danger of imposing extended and disproportionate liability, we should not recognize a nonstatutory cause of action for the loss of parental consortium.

The judgment is affirmed.

CLARK, RICHARDSON, SULLIVAN (Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council), and WRIGHT (Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council), JJ., concur.

MOSK, Justice, dissenting

I dissent.

Each of the policy arguments which the majority marshal against recognizing the cause of action for loss of consortium in the parent-child relationship was expressly considered and rejected by this court in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669.

First, the majority assert that because deprivation of consortium is an "intangible, nonpecuniary" loss, it is an injury which "can never be compensated." In *Rodriguez*, however, we held that loss of consortium is principally a form of mental suffering, and like all such subjective disabilities, it is compensable in damages. (*Id.* 12 Cal. 3d at p. 401, 115 Cal. Rptr. 765, 525 P.2d 669.) Nor was this new law, as we showed by quoting with approval from earlier decisions of this court.

* * *

The majority reject plaintiffs' claim for a second reason, *i.e.*, that "because of its intangible character, damages for such a loss are very difficult to measure." This merely restates the first reason, and was likewise rejected in *Rodriguez*. The loss here is no more and no less "intangible" than that experienced by Mrs. Rodriguez, whose husband became permanently incapacitated, and yet we held the valuation problem to be difficult but manageable....

* * *

I conclude that there is no escaping the conflict between the reasoning of the majority herein and the letter and spirit of *Rodriguez*. Yet the majority repeatedly reaffirm the holding of that decision. One can only infer that the majority's true motivation is neither the claimed inadequacy of monetary compensation for this loss, nor the difficulty of measuring damages, nor the danger of disproportionate liability. These are mere window-dressing, designed to lend an appearance of logic and objectivity to what is in fact a purely discretionary exercise of the judicial power to limit the potential liability of common law tort-feasors. The majority suggest their actual incentive earlier in the opinion, when they reason that the victim foreseeably has not only a husband, children, and parents, but also "brothers, sisters, cousins, inlaws, friends, colleagues, and other acquaintances who will be deprived of her companionship. No one suggests that all such persons possess a right of action for loss of (the victim's) consortium; all agree that somewhere a line must be drawn."

I agree that it must, but I cannot subscribe to the majority's ad terrorem argument for determining the proper place to draw such a line....

* * *

There is, in short, no valid excuse for denying these children their day in court. Justice, compassion, and respect for our humanitarian values require that the "line" in this matter be drawn elsewhere.

I would reverse the judgment.

Questions and Notes

1. *Dillon*, *Rodriguez* and *Borer* were decided by the same court. Are they consistent?

2. The treatment of claims for parental consortium continues to vary from jurisdiction to jurisdiction; Ernest J. Szarwark, *Recovery for Loss of Parental Consortium in Non-wrongful Death Cases*, 25 Whittier L. Rev. 3 (2003); Radensky, *The Child's Claim for Loss of Parental Consortium - the Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)*, 17 W. St. U.L. Rev. 277 (1990).

3. If you were writing a statute to codify the computation of damages in personal injury actions, what rule(s) would you adopt with respect to recovery by parties who either witness accidents or are related to injury victims?

§ C. The Size of Damage Awards

1. How Much is Too Much (or Too Little)?

FORTMAN v. HEMCO, INC

211 Cal. App. 3d 241, 259 Cal. Rptr. 311 (1989)

Arleigh M. WOODS, Presiding Justice

[*Nichole Fortman, a minor, sustained permanent and extensive injuries when she was ejected from her parents' jeep after inadvertently unlatching the passenger door while the car was in operation. The door, which was rear hinged and front opening, caught the wind and flew open ejecting Nichole, who had snagged her sleeve on the door handle. She fell to the street and was run over by another vehicle. In her lawsuit Nichole alleged that the jeep door was defective by reason of being rear hinged and front opening and because of its use of exposed door handles. The door was part of a fiberglass jeep top sold to jeep owners as an after-market product.*[1]

The liability theory applied in this case is that of strict liability. The main liability issue discussed is: Did Hemco's participation in the production of the rear-hinged, front-opening doors (which were determined to be defective) on the jeep contribute to the overall manufacturing enterprise of the jeep doors? The sub-issues that determine this question include Hemco's making of the mold for the jeep top and doors, the use of exposed, nonrecessed interior door handles, and the participation of Ronald Hill, the president of Hemco. The court answered "yes" to the principal issue and declared Hemco strictly liable.]

* * *

III

A

Hemco makes a number of arguments regarding the propriety of the damages that were awarded to Nichole. Before reaching those arguments it is necessary to set forth the evidence relevant to the damages issue.[9]

The record reveals that the injuries that Nichole sustained from the accident are permanent and catastrophic.

Dr. William Kneeland, a board certified pediatric neurologist, testified to her injuries and future medical expenses. Immediately after the accident, she was rushed from the scene to a nearby hospital where she remained in a coma for four months. Dr. Kneeland began to treat Nichole five weeks later. Dr. Kneeland was brought in because of Nichole's continuing coma and because she was experiencing convulsions. At the time he first saw her she was being treated by a number of doctors for her various injuries: an orthopedic doctor for broken bones, an oral surgeon for broken jaw and facial bones, a urologist for kidney damage, and a pulmonary specialist for lung damage. She required mechanical ventilation in order to breath and had undergone a tracheotomy.

Dr. Kneeland's examination of Nichole revealed significant brain injury, specifically to the cerebral hemispheres of her brain and to her spinal cord. X-rays also showed atrophy, a shrinkage of the brain, which is an irreparable condition. Nichole underwent a craniotomy to relieve pressure from fluids that had collected in her brain.

At the time of her release, Nichole was still comatose. When she eventually regained consciousness, she was, and is, a paraplegic. She has no bowel or bladder function. She suffers from scoliosis, and must wear a body brace. To prevent seizures she takes phenobarbital, and macrodantin to prevent urinary tract infections. At some point she may require a colostomy.

---

[1] The Fortmans had purchased their jeep second hand from a private party.

[9] Hemco failed to set forth an account of the evidence to support its claim of excessive damages. Such failure can result in the argument being deemed waived. (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal. 2d 343, 356, 282 P.2d 23.) Nonetheless, we will consider Hemco's argument in the interests of justice.

As a result of the severe damage to her brain, Nichole will function at a five-year-old's intellectual level for the rest of her life. For awhile she suffered cortical blindness, a condition in which the brain is unable to recognize an object that the eyes see. Even now she has perceptual problems and is sometimes unable to identify objects correctly.

Nonetheless, given appropriate care, Nichole will have a normal life expectancy which, at the time of trial, was estimated to be 70.9 years. She will never be self-sufficient, however, and will incur lifetime expenses for nursing and medical care and for therapy. Dr. Kneeland estimated that, in 1985 dollars, this care would cost $180,895 per year.

The largest single component of this expense is 16-hour-a-day nursing care estimated by Dr. Kneeland to cost $125,000 per year. Additionally, Dr. Kneeland testified that Nichole would require physician services for the rest of her life from a range of doctors, including a neurologist, a pediatrician, an orthopedic surgeon and an ophthalmologist. Extensive and varied laboratory services will also be required. Further expenses will also be incurred for educational and therapeutic services, including physical, occupational and speech therapy. Dr. Kneeland testified that Nichole would require a specially-equipped van, wheelchairs and other medical appliances over the course of her life. Finally, she will also require medicines.

Peter Formuzis, an economist, testified to the present cash value of Nichole's future expenses based, in part, upon Dr. Kneeland's figures. Using an actuarial table showing Nichole's life expectancy to be 70.9 years he calculated the present cash value of her future medical expenses to be $16 million. He also calculated her lifetime lost wages to be between $884,078 and $1,132,599.

Hemco did not put on evidence regarding damages.

The jury's subsequent award for economic losses was $17,742,620. Noneconomic damages were assessed at $6 million.

B

Hemco argues that the trial judge failed to make an independent assessment of the evidence relating to damages before denying Hemco's new trial motion. This contention is utterly without substance.

Code of Civil Procedure section 657 provides in part: "A new trial shall not be granted ... upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury should have reached a different verdict or decision." Accordingly, in deciding whether to grant a new trial "the trial court must independently weigh the evidence and assess whether it sufficiently supports the jury's verdict. [Citations.]" (*People v. Capps* (1984) 159 Cal. App. 3d 546, 552, 205 Cal. Rptr. 898, fn. omitted.) As a corollary to this rule, the trial court's ruling "is entitled to great weight" on appeal. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal. App. 3d 374, 414, fn. 28, 196 Cal. Rptr. 117.)

Hemco relies on *Lippold v. Hart* (1969) 274 Cal. App. 2d 24, 78 Cal. Rptr. 833, a rare reversal of a trial court's denial of a new trial. The judge in *Lippold* denied the motion for new trial in a personal injury action even though he believed the verdict was unfair and questioned the defendant's credibility as a witness. His reason for denying the motion was his belief that he was bound by the jury's unanimous verdict. On appeal, his ruling was reversed. The appellate court stated that the trial court is not bound by the jury's verdict but must "reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury `clearly should have reached a different verdict' [citations]." (*Id.*, at pp. 25-26, 78 Cal. Rptr. 833.)

Hemco would liken the actions of the judge in *Lippold* to that of the judge in the case before us, but there is no comparison.

Here, the trial judge conducted the trial in an informed, intelligent and scrupulously unbiased manner. On the specific issue of his handling of the new trial motion, it is quite clear that he was well aware of his duty to independently assess the evidence. Indeed, in reference to the liability issue, the judge expressly stated that he had "reviewed the evidence" and made his "own independent assessment" of whether it supported imposition of liability. It is simply not plausible that the judge could have discharged his duty properly with reference to the liability issue but not damages. The fact that he did not make explicit reference to the independent assessment standard in passing upon damages is not determinative. On appeal, where the record is silent we presume that an official duty has been correctly performed. (*People v. Mack* (1986) 178 Cal. App. 3d 1026, 1032, 224 Cal. Rptr. 208;

Evid. Code, § 664.)

Equally unconvincing is Hemco's citation to a remark by the trial judge that he was "limited by the evidence at trial" in ruling on the new trial motion. This observation is absolutely correct. A trial judge is limited to a review of the evidence at trial and, as this judge recognized, cannot be guided by personal bias or belief. This remark in no way shows that he failed to independently assess the evidence. Rather, the remark reveals that he had performed his function fairly and impartially and determined there was no rational basis in the evidence to warrant a new trial on damages. We accord this determination great weight as we approach Hemco's remaining arguments.

C

Hemco maintains that the award of damages was excessive. It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may have been presumed to have been the result of passion or prejudice. Then the reviewing court must act. (*Bertero v. National General Corp.* (1974) 13 Cal. 3d 43, 64, 118 Cal. Rptr. 184, 529 P.2d 608; *Fagerquist v. Western Sun Aviation, Inc.* (1987 191 Cal. App. 3d 709, 727, 236 Cal. Rptr. 633.) The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive "is entitled to great weight" because it is bound by the "more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule...." (*Hilliard v. A.H. Robins Co., supra*, 148 Cal. App. 3d at p. 414, fn. 28, 196 Cal. Rptr. 117.) All presumptions favor the trial court's determination (*Fagerquist v. Western Sun Aviation, Inc., supra*, 191 Cal. App. 3d at p. 727, 236 Cal. Rptr. 633), and we review the record in the light most favorable to the judgment (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927, 148 Cal. Rptr. 389, 582 P.2d 980).

In light of these rules we reject Hemco's attack on the substantiality of the evidence to support that portion of the jury's award of $17,742,620 attributable to Nichole's economic losses.[10] Hemco attacks the testimony of economist Formuzis, claiming that his reliance upon Dr. Kneeland's estimate of Nichole's medical expenses was improper because Dr. Kneeland had no sufficient basis for estimating those costs. Hemco's argument is more rhetorical than real and amounts to a belated attack on the credibility of Nichole's witnesses. As we previously observed, however, it is not our function to weigh credibility. (*Hilliard v. A.H. Robins Co., supra*, 148 Cal. App. 3d at p. 414, fn. 23, 196 Cal. Rptr. 117.)

Nor is Hemco's reliance on *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 234 Cal. Rptr. 630, persuasive insofar as it purports to support Hemco's argument that Formuzis's reliance on Dr. Kneeland's estimations was improper. The Pacific Gas decision involved expert testimony on the noel issue of the value of storage rights for underground reservoirs of gas. In that decision the record revealed that the plaintiff's expert disregarded pertinent information and fabricated information without a factual basis to arrive at a vastly overinflated valuation of those storage rights. (*Id.*, at pp. 1128-1134, 234 Cal. Rptr. 630.)

Nothing comparable occurred in the case before us. There was nothing novel in the medical or rehabilitative services which Dr. Kneeland testified (orally and by written statement) Nichole would require. Nor did Hemco challenge the veracity of Dr. Kneeland's cost estimation or the manner by which it was derived. Hemco put on no evidence of its own on this issue. Only now, on appeal, does Hemco find reason to quarrel with those assumptions. It does so in the wrong forum.

Addressing a similar contention, the court in *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230, 243, 116 Cal. Rptr. 733, said: "The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants ... might better have been presented to the jury in opposition to respondents' expert testimony." In our case, too, the testimony which we set forth in part III A is substantial evidence supporting the award for Nichole's future medical expenses.

* * *

The judgment is affirmed. Nichole to recover

[10] Actually, Hemco's challenge goes only to future medical expenses, leaving unchallenged that evidence which goes to lost future wages.

her costs on appeal.

Questions and Notes

1. Note also that when a physician commits malpractice after an auto accident, she is not liable for whatever damage was already present (no causation). Instead, she is liable only for the damage she caused; for that "second" injury she will be jointly and severally liable with the original tortfeasor, subject to an allocation by the jury of their relative proportions of fault. Suppose, for example, that a negligent driver strikes the plaintiff, causing an injury that, with proper medical care, would have been valued at $100,000. However, negligent medical care turns it into a $200,000 injury. If the jury finds that both the physician and the driver are equally to blame for the worsening of the plaintiff's condition (the driver for causing the plaintiff to need medical care in the first place and the physician for failing to deliver good medical care), then the cost of the total injury should be borne (assuming both the driver and the doctor have deep enough pockets) in the ratio of $150,000 for the driver and $50,000 for the doctor.

FEIN v. PERMANENTE MEDICAL GROUP

175 Cal. Rptr. 177 (1981)

REYNOSO, Associate Justice

The constitutionality of major portions of the Medical Injury Compensation Reform Act (MICRA) is challenged.

[*Plaintiff suffered chest pains and was negligently cared for by defendant medical group. - ed.*]

* * *

The jury found in favor of plaintiff and entered special findings on the amount of damages. Noneconomic damages, to compensate for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and other intangible damages from the time of injury until plaintiff's death were found to be $500,000. Additional damages included lost wages until the time of trial in the sum of $24,733; present cash value of future lost wages as a result of the reduction of plaintiff's life expectancy totalling $700,000; and present value of future medical expenses, amounting to $63,000.

Pursuant to Civil Code section 3333.2, the trial court ordered that the award of damages for noneconomic losses be reduced from $500,000 to $250,000. And following Civil Code section 3333.1, the trial court ordered that the award for lost wages to the time of trial be reduced by collateral source disability payments of $19,302.83, leaving an award of $5,430.40. The court further ordered that defendant pay future medical expenses which are not covered by medical insurance provided by plaintiff's employer up to $63,000. The court declined, however, to order that future lost wages and general damages awarded by the jury be paid periodically pursuant to Code of Civil Procedure section 667.7; it ruled that the section is directory and should not be applied to the case at bench. Both parties appeal.

I

We are called upon to determine the constitutionality of several provisions of MICRA. These sections deal with periodic payment of the judgment (Code of Civ. Procedure, § 667.7),[1] applicability of collateral benefits to offset damages (Civ. Code § 3333.1),[2] and the $250,000

[1] Code of Civil Procedure section 667.7 provides in relevant part:

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages.

[2] Civil Code section 3333.1 states:

(a) In the event the defendant so elects, in an action for personal injury against a health care provider

maximum recovery for noneconomic damages (Civ. Code § 3333.2) in personal injury actions against health providers.[3] The attack is focused on the asserted unconstitutionality of classifications created by the Act. It is incumbent on us, therefore, to be respectful of the role courts play in such a review.

The power to legislate, needless to say, is in the Legislature, not the courts. Courts do not substitute their social and economic beliefs for the judgment of the legislative bodies. (*Ferguson v. Skrupa* (1963) 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, 97.) "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, " (*Berman v. Parker* (1954) 348 U.S. 26, 32, 75 S. Ct. 98, 102, 99 L. Ed. 27, 37.) The California Supreme Court has enunciated the same concept: "Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations." (*Lockard v. City of Los Angeles* (1949) 33 Cal. 2d 453, 461-462, 202 P.2d 38.)

With the above principles in mind, we turn to the constitutional attack on the legislation.

Plaintiff assails the constitutionality of selected provisions of MICRA on the following grounds: (1) MICRA violates the equal protection clause of the United States and California Constitutions; (2) MICRA deprives plaintiff of due process of law; (3) MICRA violates the right to trial by jury and (4) the Act is unconstitutionally vague and uncertain.

The provisions of MICRA which plaintiff attacks involve three changes affecting plaintiffs who prevail in medical malpractice suits against health care providers. Civil Code section 3333.1 abrogates the "collateral source rule" in such suits. (*See Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 13, 84 Cal. Rptr. 173, 465 P.2d 61, for a statement of the rule.) Civil Code section 3333.2 limits awards for noneconomic or nonpecuniary damages to $250,000. Finally, under Code of Civil Procedure section 667.7, awards for future losses may be ordered to be paid in periodic installments rather than a lump-sum. Plaintiff argues that these sections cannot be shown to be a rational method of dealing with the purported "crisis" which spawned their enactment.

A. The Equal Protection Argument

We first address the assertion by plaintiff that the above provisions of the Act violate the equal protection clauses of both the federal and state Constitutions. In making this argument, plaintiff asserts that the Act unlawfully discriminates against plaintiffs who are victims of medical malpractice, by setting up arbitrary and unreasonable classifications which bear no substantial relation to the object of the legislation.

As a foundation to his argument that the legislation at issue is arbitrary and unreasonable

based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

[3] Civil Code section 3333.2 provides:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

and thus violative of equal protection, plaintiff seeks to show that the alleged "crisis" pursuant to which the legislation was enacted was largely fabricated. This "crisis," plaintiff maintains, was brought about, not by increasing medical malpractice suits and verdicts, but by stock market losses incurred by insurance companies. Hence, he contends that there is and was no legitimate state purpose to sustain the Act.

In 1975, a special session of the Legislature was called by the governor to grapple with the problem of increasing medical malpractice insurance premiums. Upon enacting MICRA, the Legislature proclaimed: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, Second Ex. Sess., ch. 2, § 12.5, p. 4007.)

Plaintiff urges us to reconsider the Legislature's findings and to declare that there was no health care crisis. In making this argument plaintiff cites various published articles and studies, and has appended certain articles to his brief. Defendant responds that a crisis did exist, and in support of that argument cites published articles to that effect. Amicus curiae have cited additional articles and appended texts to their briefs to support the Legislature's finding.

In making this request, plaintiff asks the court to assume a role which is not ours to assume. "A court cannot declare legislation invalid because it disagrees with its desirability." *(Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal. 2d 121, 130, 216 P.2d 825.) Rather, our role is limited to a determination of whether the legislation is constitutional. (*See Lockard v. City of Los Angeles* (1949) 33 Cal. 2d 453, 461, 202 P.2d 38.)

In assessing the constitutional validity of the Act, our initial inquiry concerns the appropriate standard of review. California courts, together with the U.S. Supreme Court, employ the two-tiered standard of review where statutes are attacked upon equal protection grounds. (*See D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10.) In cases involving suspect classifications such as race or sex, or affecting fundamental interests that are explicitly or implicitly guaranteed by the Constitution (*i.e.*, voting rights or education), the "strict scrutiny" test is applied (*Hawkins v. Superior Court* (1978) 22 Cal. 3d 584, 592, 150 Cal. Rptr. 435, 586 P.2d 916). Under this standard, the courts conduct an "active and critical analysis" of the controverted classification. (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 597, 96 Cal. Rptr. 601, 487 P.2d 1241.) The state must sustain its burden of establishing "`not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' (Citations.)" (*Ibid.*) In all other cases, such as those involving economic regulation or social welfare legislation "in which there is a `discrimination' or differentiation of treatment between classes or individuals(,)" the traditional standard of review is employed. (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal. 3d at p. 16, 112 Cal. Rptr. 786, 520 P.2d 10.) This standard simply requires that "distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." (*Westbrook v. Mihaly* (1970) 2 Cal. 3d 765, 784, 87 Cal. Rptr. 839, 471 P.2d 487; *D'Amico v. Board of Medical Examiners, supra*, 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10; *Cooper v. Bray* (1978) 21 Cal. 3d 841, 846, 148 Cal. Rptr. 148, 582 P.2d 604.)

It is the latter "rational relationship" standard we now apply to review the constitutionality of MICRA pursuant to plaintiff's equal protection challenge. Clearly no "suspect classification" or fundamental interest is here involved which would subject the statute to a higher level of judicial scrutiny. (*See Brown v. Merlo* (1973) 8 Cal. 3d 855, 862, 106 Cal. Rptr. 388, 506 P.2d 212: the right to sue for negligently inflicted personal injuries is not a fundamental interest.)

Plaintiff contends that the provisions of MICRA limiting the amount of recovery in an action against a health care provider and authorizing periodic payment of the judgment deny him the right to a jury trial and thus must be considered under the "strict scrutiny" test of equal protection. We reject this contention. Plaintiff's argument fails to consider the distinction between

legislative acts and judicial acts. It is the province of the Legislature to make general rules and the province of the courts to apply the general rule to a state of facts. (*Smith v. Strother* (1885) 68 Cal. 194, 197, 8 P. 852. *See also Marin Water etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 712, 154 P. 864.) It is within the power of the Legislature to create and abolish causes of action and to determine a remedy which will be provided in a given set of circumstances. (*See Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal. 2d 720, 723, 192 P.2d 916.) In enacting Civil Code section 3333.2 and Code of Civil Procedure section 667.7, the Legislature has performed a function within the ambit of this authority. In doing so, it has not denied the right to a jury trial to determine the factual issues in the case.

Therefore, we deem the "rational basis" test the correct standard to apply. Plaintiff contends that MICRA fails to satisfy this test. We disagree. Under that standard wide discretion is vested in the Legislature in making a classification. Further, the statute is imbued with a presumption of constitutional validity (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal. 3d 719, 739, 100 Cal. Rptr. 301, 493 P.2d 1165; *Cooper v. Bray, supra*, 21 Cal. 3d 841, 846, 148 Cal. Rptr. 148, 582 P.2d 604), and the party challenging it bears the burden of proving it invalid. (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal. 2d 228, 233, 18 Cal. Rptr. 501, 368 P.2d 101.) A distinction is not arbitrary if any set of facts may be reasonably conceived in its support.

After applying the proper standard to this case we cannot disturb the Legislature's finding that a health care crisis did exist. The sum total of the articles on the question submitted by the parties to this litigation establish that the question cannot be said to be one where there may be no difference of opinion or which is not debatable. Indeed, the issue appears to be one which is widely debated and subject to substantial divergence of opinion. In such circumstances it is for the Legislature and not the courts to determine whether the exercise of the state police power is warranted.

We likewise decline to hold that the "crisis" is past and that the legislation is therefore of no continued validity. When the Legislature has determined that a need for legislation exists it is also for the Legislature to determine whether the need has passed and the legislation should be repealed. Moreover, everything submitted in support of the need for legislation indicates that the "crisis" was not of a sudden nature, but was built up over an extensive period of time. As the Joint Legislative Audit Committee stated in its report to the Legislature: "It is apparent from a close reading of the report that harbingers of the present `malpractice crisis' have been evident for years to the Department of Insurance." Under such circumstances the Legislature could well conclude that continued application of its reform act is necessary to prevent recurrence of the crisis.

Moreover, we cannot rule, as plaintiff requests, that the means chosen by the Legislature were irrational and arbitrary responses to the perceived crisis. The crisis which MICRA was designed to relieve was in the health care industry. Indicia of the problem included significantly increasing numbers of suits against health care providers and increasing settlements and awards in those suits, projected losses related to malpractice insurance, a decrease in the number of companies willing to provide malpractice insurance, and skyrocketing costs of such insurance. The Legislature could reasonably determine that the elimination of the collateral source rule, limitation of awards for nonpecuniary damages, and the payment of damages by periodic installments over the period during which the damages would be incurred would have the effect of reducing the costs of insuring health care providers without depriving the injured party of provision for his needs. Whether this is the method we would have chosen to deal with the situation is irrelevant so long as it is not a constitutionally defective method.

Under such circumstances, the legislative decision to focus its reform efforts upon lawsuits against health care providers rather than upon tort actions in general bore a rational relationship to the state purpose involved in the legislation and cannot be said to be arbitrary.

Thus, we reject plaintiff's attack on equal protection grounds and uphold the challenged provisions of the Act which limit plaintiff's recovery of noneconomic losses, restrict application of the collateral source rule, and provide for periodic payments of future damages.

B. Due Process

Plaintiff contends that Code of Civil Procedure section 667.7 of MICRA, providing for periodic payment of the judgment, denies him due process in arbitrarily depriving him of a property right. He argues further that the section fails to provide for additional care should plaintiff's condition worsen, and that these burdens are not

imposed upon other similarly situated plaintiffs.

We agree with the statement that a personal injury judgment cannot be taken away arbitrarily. However, Code of Civil Procedure section 667.7 does not deprive plaintiff of his judgment; it merely changes the form the award takes. Plaintiff has no constitutional property right or interest in the manner of payment for future damages. Except as constitutionally limited, the Legislature has complete power to determine the rights of individuals. (*Modern Barber Col. v. Cal. Emp. Stab. Com., supra*, 31 Cal. 2d 720, 726, 192 P.2d 916.) It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights. (*Ibid.*) It has consistently been held that the Legislature has the power to abolish causes of action altogether. (*Werner v. Southern Cal. etc. Newspapers, supra*, 35 Cal. 2d, at p. 126, 216 P.2d 825; *Langdon v. Sayre* (1946) 74 Cal. App. 2d 41, 43-44, 168 P.2d 57.)

Therefore, in view of this authority, the Legislature was justified in imposing the challenged limitations upon plaintiff's right of recovery. Further, in light of the fact we have determined that MICRA satisfies constitutional requisites in creating classifications bearing a rational relation to the state goal, we reject plaintiff's averment that the Act arbitrarily denies him due process of law.

C. Right to Jury Trial

Plaintiff argues that Code of Civil Procedure section 667.7 impermissibly deprives him of the constitutional right to jury trial since it requires the judge to determine the dollar amount of periodic payments. We disagree. Plaintiff's right to jury trial was strictly observed in this instance, and we see no reason to believe other cases will differ in safeguarding this important right. The jury in this case heard evidence as to the facts, made findings on those facts and decided the amount of damages to be awarded. Section 667.7 merely requires that at least a portion of the judgment payments be made on a periodic basis. We do not find this to be an unwarranted compromise or curtailment of the jury trial to which plaintiff was entitled.

* * *

Questions and Notes

1. Would you have voted for MICRA? Why or why not? Was it an appropriate response to cases of this type?

2. Should MICRA's limits on damages be imposed in areas other than medical malpractice? Why or why not?

3. One recurring complaint by health care providers is the compensation provided by the contingent fee system. Recent empirical research sheds some light on the issue: Lester Brickman, *Effective Hourly Rates of Contingency-fee Lawyers: Competing Data and Non-competitive Fees*, 81 Wash. U. L.Q. 653

3. Tort reform legislation similar to MICRA has been proposed in virtually every state, with an overwhelming number adopting some form of "reform." From 1985 to 1987 "forty-two legislatures have enacted some form of tort reform legislation." Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1587 (1987). Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). Courts are divided on the constitutionality of statutes which reduce defendants' liability for negligently caused injuries. For a survey of cases considering these issues, see Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?*, 40 Ala. L. Rev. 533 (1989).

4. In *Sofie v. Fibreboard*, 112 Wash. 2d 636, 771 P.2d 711 (1989), the Washington Supreme Court declared unconstitutional a legislative restriction on the award of non-economic (pain and suffering) damages. The court found that the state constitution's guarantee that the "right of trial by jury shall remain inviolate" was breached by limiting noneconomic damages to a formula based on the plaintiff's life expectancy.

2. Collateral Source Benefits

SCHONBERGER v. ROBERTS

456 N.W.2d 201 (Iowa 1990)

HARRIS, J.

When the legislature, in two separate statutes, prohibits the application of a rule of common law we are clearly obliged to yield to the mandate. The question here is whether we should give the mandate double effect. This appeal calls for interpretation of an Iowa statute which is in part designed to deal with a situation already controlled by another statute. A literal interpretation of the latter statute, in view of the prior one, would call for doubling an intended reduction in tort recoveries. We believe the goal of the two statutes should be fully realized, but only once. We affirm the trial court.

On July 22, 1987, the plaintiff, Rodney Schonberger, was driving west on U.S. Highway 30 in Carroll, Iowa. He had picked up his employer's mail and was headed to work when an accident occurred. Schonberger was preparing to turn into his employer's parking lot when he was struck by the defendant, Carroll John Roberts, who was driving a truck owned by defendant Buck Hummer Trucking, Inc.

As a result of the accident Schonberger was unable to return to work for three and one-half weeks. He suffered injuries to his neck, back, and knee. His medical bills totaled $7625.40 at the time of trial. These expenses, as well as future medical expenses, are being reimbursed as a part of the workers' compensation benefits Schonberger is receiving. Schonberger's injuries were permanent, and he will continue to incur medical expenses as a result of the accident.

Schonberger then brought this tort suit for his injuries which resulted in a jury verdict in his favor. The jury assessed eighty percent of the negligence to Roberts and twenty percent to Schonberger. It determined past damages were $18,000 and that future damages were $115,000. The jury also found that Schonberger was not wearing a seat belt and determined the award should be reduced an additional two percent.

Although defendants assert the damage awards were excessive - a matter we later address - the preeminent issue in the case is defendants' challenge to a trial court ruling refusing to admit evidence. Defendants sought to introduce evidence regarding the payment of medical bills and other workers' compensation benefits to Schonberger. The trial court ruled the evidence inadmissible. This ruling is defendants' first assignment of error on appeal.

Since 1913 an Iowa statute, now Iowa Code section 85.22 (1989), has provided a right of indemnity to workers' compensation employers (or their insurers) for amounts paid under the Act from recoveries realized by the worker in tort actions for the same injuries. Without doubt Schonberger's workers' compensation insurer is entitled to be compensated from his recovery in this suit for any amounts paid to or for him on account of this injury. *See, e.g.*, *Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 531-32 (Iowa 1986).

In 1987 the General Assembly amended the comparative fault Act, to include a special provision, Iowa Code § 668.14,[1] also aimed at

[1] Section 668.14 provides:

668.14 Evidence of previous payment or future right of payment.

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family. [*Ed. Note: Apparently the worker's compensation program at issue here was privately run and therefore did not fall within this exception.*]

2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

prohibiting an injured worker to recover twice for the same industrial injury. Both section 85.22 (in a limited situation) and section 668.14 (in a broader sense) are limitations on the collateral source rule, a principle long recognized as a part of our common law. Under the collateral source rule a tortfeasor's obligation to make restitution for an injury he or she caused is undiminished by any compensation received by the injured party from a collateral source. *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938).

The trial court's rejection of the proffered evidence was in reaction to the obvious inconsistency between compelling the injured worker to pay back his benefits from his recovery and at the same time have the jury reduce his recovery because of them. To remedy this inconsistency the trial court rested its exclusion of evidence of workers' compensation benefits on Iowa rule of evidence 402 (all irrelevant evidence is inadmissible). Schonberger argues in support of the ruling in part by contending that the workers' compensation Act is, because of its design and regulated status, a state program. State programs are expressly exempted from the sweep of section 668.14.

I. There are well-recognized limits to the extent to which courts will slavishly ascribe literal meanings to the words of a statute. Because legislative intent is the polestar of statutory interpretation

> it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or if such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.07 (Sands 4th Ed. 1984) (citing *Graham v. Worthington*, 259 Iowa 845, 854, 146 N.W.2d 626, 633 (1966)).

In construing various statutes we have often applied this rule by refusing to attribute to the General Assembly an intention to produce an absurd result....

In the last cited case we were faced with a statute which, literally interpreted, would lead to an absurd result. We said:

> Such absurdity of result calls for scrutiny of the statute. Ad absurdum is a "Stop" sign, in the judicial interpretation of statutes. It is indicative of fallacy somewhere, either in the point of view or in the line of approach. In such case, it becomes the duty of the court to seek a different construction, and to presume always that absurdity was not the legislative intent. To this end, it will limit the application of literal terms of the statute, and, if necessary, will even engraft an exception thereon. *Trainer*, 199 Iowa at 59, 201 N.W. at 67 (citations omitted).

A literal application of section 668.14 under the present circumstances would also lead to an absurd result. Under section 85.22 Schonberger must repay from his recovery his workers' compensation insurer any benefits he has received. The only conceivable purpose of informing the jury of those benefits is to invite the jury to reduce his recovery because of them. But, to any extent the jury does reduce the damage award because of the benefits, Schonberger is in effect paying, not once, but twice. We are convinced the legislature did not intend to call for this double reduction.

To avoid this unintended result we interpret the statute so as to deem its requirements satisfied when the requirements of section 85.22 are complied with. The case is remanded to district court for a proceeding in which it must be established that the proceeds of any recovery received by Schonberger are pledged to reimburse his workers' compensation insurer in accordance with Iowa Code section 85.22. Upon such a showing the judgment of the trial court shall stand as affirmed.

II. Defendants also complain of the amount of the award which, by present standards, does appear to be generous for the injuries sustained. The amount is not however so flagrantly excessive as to compel our interference. *See Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988).

Affirmed and Remanded.

All Justices concur except McGIVERIN, C.J., and NEUMAN, and ANDREASEN, JJ., who dissent.

McGIVERIN, Chief Judge (dissenting)

4. This section does not apply to actions governed by section 147.136. [*Medical malpractice cases.*]

I respectfully dissent.

The majority opinion substantially sets aside the clear terms of Iowa Code section 668.14 and, as a practical matter, fully reinstates the judicially created collateral source rule by use of Iowa Rule of Evidence 402, at least in cases where collateral benefits are paid subject to a statutory right of subrogation.

Unlike the majority, I believe that the terms of section 668.14 can be respected without visiting inequity on Schonberger and others in his position....

One effect of the common law collateral source rule is that in cases where the plaintiff receives collateral benefits which are not paid subject to a right of subrogation in the payor, and also is compensated for the same injuries from a tort suit against the defendant, the plaintiff receives duplicate damages to the extent that the collateral benefits and tort recovery overlap. 22 AM. JUR. 2D *Damages* § 566 (1988). This is commonly known as "double dipping" and is thought by tort defendants to unfairly overcompensate the plaintiff. Carlson, *Fairness in Litigation or "Equity for All*," 36 DRAKE L. REV. 713, 719 (1987). The counterargument is that to allow collateral benefits to reduce the tort recovery would relieve the defendant of the consequences of tortious conduct. *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938). As between the plaintiff and the tortfeasor, the common law deems it more just that the plaintiff profit from collateral benefits. *See id.*; 22 AM. JUR. 2D *Damages* § 566 (1988).

On the other hand, in cases where collateral benefits are paid subject to a right of subrogation, the plaintiff is not double dipping because the subrogee will recover the collateral benefits out of the plaintiff's tort recovery from the defendant. Schonberger's case is a prime example of this situation because under Iowa Code section 85.22, the workers' compensation benefits he received will have to be repaid out of his tort recovery....

IV. Instead of working within the statutory framework mandated by the legislature in section 668.14, the majority opinion sets it aside. The majority's approach would require the trial judge to exclude all evidence from the jury of collateral benefits as irrelevant whenever the judge found that the benefits were paid subject to a right of subrogation. It would then be up to the judge to enforce those subrogation rights at a separate hearing following a plaintiff's verdict in the tort suit....

V. I would reverse the trial court judgment and remand for a new trial on the issue of damages. The parties should be allowed to introduce evidence before the jury pursuant to Iowa Code section 668.14. Then the jury should be instructed appropriately and allowed to state the effect of such evidence on its verdict.

The court should work within the intent and language of section 668.14 rather than against it. Section 668.14 was the result of a studied decision by the legislature to abrogate the collateral source rule as a common law rule of evidence, and to prevent double dipping. The majority effectively refuses to acknowledge that fact. Therefore, I dissent.

NEUMAN and ANDREASEN, JJ., join this dissent.

Questions and Notes

1. For a discussion of the history of the collateral source rule and legislative modifications, see Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. Tol. L. Rev. 39 (1990).

2. The collateral source rule is a common ingredient in tort reform statutes. *See Fein v. Permanente, supra*; and R.C.W. 7.70.080, *infra* Chapter Ten.

3. *Subrogation* is a means by which insurance companies recover damages they have been forced to pay to their customers for damage caused by the negligence of a third party. For example, when a homeowner suffers a fire caused by the negligence of a neighbor who was burning leaves, the fire insurance carrier for the homeowner is obligated to pay the homeowner for the damage. However, under the standard terms of a homeowner's insurance policy the company then has the right to file an action against the negligent party as though the insurance company were the homeowner. "Subrogation" is the equivalent of allowing one party to "stand in the shoes" of someone who has the power to assign certain legal rights.

4. Aside from the question of how much the defendant will be forced to pay, is there any other reason for allowing the evidence of collateral payments to be presented to the jury?

3. The Scope of Acceptable Argument

BOTTA v. BRUNNER

26 N.J. 82, 138 A.2d 713 (1958)

FRANCIS, J.

* * *

In prosecuting the appeal, plaintiff urged that the trial court also erred in refusing to permit counsel to suggest to the jury in summation a mathematical formula for the admeasurement of damages for pain and suffering. The Appellate Division agreed with plaintiff's viewpoint. The problem is of sufficient current urgency to demand our attention.

In his closing argument to the jury, after speaking of actual monetary losses, plaintiff's counsel said:

> You must add to that, next, the pain and suffering and the disability that she has undergone from August 2d, 1953 to now. Take that first. That is 125 weeks of pain and suffering. Now, that is difficult to admeasure, I suppose. How much can you give for pain and suffering? As a guide, I try to think of myself. What would be a minimum that a person is entitled to? And you must place yourself in the position of this woman. If you add that disability which has been described to you, and you were wearing this 24 hours a day, how much do you think you should get for every day you had to go through that harrowing experience, or every hour?
>
> Well, I thought I would use this kind of suggestion. I don't know. It is for you to determine whether you think I am low or high. Would fifty cents an hour for that kind of suffering be too high?"

On objection, the court declared the argument to be improper as to "the measure of damages for pain and suffering" and directed that it be discontinued.

But the Appellate Division sanctioned the practice, saying:

> [W]e see no logical reason why the fair scope of argument in summation by trial counsel should not be permitted to include mention of recovery in terms of amount. It is well settled that counsel may advise the jury as to the amount sued for, *Rhodehouse v. Director General*, 95 N.J.L. 355, 111 A. 662 (Sup. Ct. 1920), and we have recently held that he may state his opinion that the jury should allow a stated amount short of the sum sued for. *Kulodzej v. Lehigh Valley R. Co.*, 39 N.J. Super. 268, 120 A.2d 763 (App. Div. 1956).
>
> The argument is sometimes heard that since there is no evidence in the case as to how much pain and suffering, or a given physical disability, is worth in dollars, and since it is the exclusive function of the jury to fix the amount by its verdict, counsel should not be allowed to ask the jury to return a named amount. *Stassun v. Chapin*, 324 Pa. 125, 188 A. 111 (Sup. Ct. 1936). We do not think this follows. Counsel may argue from the evidence to any conclusion which the jury is free to arrive at, and we perceive no sound reason why one of the most vital subjects at issue, the amount of recovery, should not be deemed within the permitted field of counsel's persuasion of the jury by argument. This, within reasonable limits, includes his supporting reasoning, as in the present case, whether soundly conceived on the merits or not. *Cf. Standard Sanitary Mfg. Co. v. Brian's Adm'r*, 224 Ky. 419, 6 S.W.2d 491, 493 (Ct. App. 1928); *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S.W. 953, 962 (Sup. Ct. 1910). If necessary, the trial court can in its instructions caution the jury that the argument does not constitute evidence as to the amount of damages.

For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been "fair and reasonable compensation." This general standard was adopted because of universal acknowledgment that a more specific or definitive

one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated. No market place exists at which such malaise is bought and sold. A person can sell quantities of his blood, but there is no mart where the price of a voluntary subjection of oneself to pain and suffering is or can be fixed. It has never been suggested that a standard of value can be found and applied. The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.

* * *

There can be no doubt that the prime purpose of suggestions, direct or indirect, in the opening or closing statements of counsel of per hour or *per diem* sums as the value of or as compensation for pain, suffering and kindred elements associated with injury and disability is to instill in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence. An outspoken exponent of the approach described its aim in this fashion:

> When you break down pain and suffering into seconds and minutes and do it as objectively as this (on a blackboard), then you begin to make a jury realize what permanent pain and suffering is and that $60,000 at five dollars a day isn't an adequate award. (Insertion ours.)
>
> So let's put on the board $60,000 for pain and suffering. Of course in your opening statement you are only privileged to say that you are going to explain to the jury and ask for $60,000 as pain and suffering in order to make up your total figure. It would be improper *to argue*, this must be reserved for the final summation. (Emphasis added.)
>
> The jurors must start thinking in days, minutes and seconds and in five dollars, three dollars and two dollars, so that they can multiply to the absolute figure. Maybe your juror will feel that $5 a day is not enough, that it should be $10 per day. They may feel that it should be $4 or $3 a day. At least you have started them thinking; and when they follow the mechanics of multiplication they must by this procedure come to some substantial figure if they are fair. A jury always tries to be fair. Never forget this." Belli, "*The Use of Demonstrative Evidence in Achieving the More Adequate Award*," Address before the Mississippi State Bar Association (1954); BELLI, MODERN TRIALS, p. 1632 (1954).

And:

> Depending on the jurisdiction it may be permissible during argument to ask for $2 a day for pain and suffering." *Id.*, § 305(8).

Clearly these statements are what analysis shows them to be - suggestions of valuations or compensation factors for pain and suffering. They have no foundation in the evidence. They import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible of evaluation on any such basis. No one has ever argued that a witness, expert or otherwise, would be competent to estimate pain on a per hour or per diem basis....

* * *

[*The court ultimately affirmed the refusal of plaintiff's requested instruction - ed.*]

Questions and Notes

1. The jurisdictions are about evenly split on the question of whether some variant of the "per diem" argument is acceptable.

2. Would you permit use of the "per diem" argument? Why or why not?

STECKER v. FIRST COMMERCIAL TRUST CO.

331 Ark. 452, 962 S.W.2d 792 (1998)

NEWBERN, Justice.

This is the second appeal concerning the liability of Dr. Rheeta Stecker for the death of her patient, sixteen-month-old Laura Fullbright. First Commercial Trust Company ("First Commercial"), as administrator of the child's estate, sued Dr. Stecker for medical malpractice and for failure to report under the child-abuse-reporting statute, Ark.Code Ann. §§ 12-12-501 through 12-12-518 (Repl.1995 and Supp.1997). In addition to the action on behalf of the estate, First Commercial sued on behalf of several of Laura Fullbright's relatives, individually. It was alleged that Dr. Stecker's failure to report evidence of physical abuse of the child resulted in the child's death. In addition to Dr. Stecker, Mary Ellen Robbins, the child's mother, and Joseph Rank who lived with Ms. Robbins and her child and who was convicted of murdering the child, *see* *Rank v. State*, 318 Ark. 109, 883 S.W.2d 843 (1994), were named as defendants.

In the first trial, Ms. Robbins was found not liable. Mr. Rank was found liable for damages to Laura Fullbright's halfbrother, but no damages were awarded to the estate. Dr. Stecker was found not liable for civil penalties prescribed under the child-abuse-reporting statute, and she was awarded a directed verdict on the medical malpractice claim because the only medical expert witness sought to be presented by First Commercial was found not to be qualified to testify as to the standard of medical care concerning child abuse in Hot Springs. We reversed and remanded for a new trial on the medical malpractice claim, holding it was error to have excluded the testimony of Dr. Frederick Epstein, the expert medical witness whose testimony First Commercial sought to introduce on behalf of the estate. *First Commercial Trust Co. v. Rank*, 323 Ark. 390, 396, 915 S.W.2d 262, 264 (1996).

In the second trial, a jury verdict resulted in a judgment against Dr. Stecker. She argues three points on appeal. First, she contends the doctrine of law of the case precludes any recovery against her because the estate recovered no damages in the first trial. Second, she contends her motion for a directed verdict should have been granted because there was insufficient evidence that her failure to report the child's condition resulted in the death. Finally, she argues her motion for a mistrial should have been granted because of improper closing argument by counsel for First Commercial. We affirm the judgment.

At the second trial, there was evidence from which the jury could have concluded the following. Dr. Stecker, a family practitioner, treated Laura Fullbright on several occasions prior to the child's death which occurred on September 12, 1992. On June 12, 1992, Dr. Stecker saw Laura, who was 12 1/2 months old, for a "well baby check-up." Laura was brought to Dr. Stecker by Ms. Robbins, a pharmacist, whom Dr. Stecker regarded as a friend and colleague. She noticed a visible angulation of one of the baby's arms, and she pointed the problem out to Ms. Robbins and to Mr. Rank. An x-ray showed the fracture of two bones in the child's left forearm. Ms. Robbins and Mr. Rank indicated that they did not know that there was a problem. Dr. Stecker became concerned about the possibility of neglect or abuse. Dr. Stecker referred Laura to Dr. Robert Olive, an orthopedist. After seeing the x-rays as well as the child and her mother, Dr. Olive wrote Dr. Stecker that he did not think that there was any evidence of neglect on the part of the parents.

The letter from Dr. Olive did not totally alleviate Dr. Stecker's suspicions of possible abuse; however, she did not confront Ms. Robbins or Mr. Rank about her suspicions, contact the baby's father, Jim Fullbright, about her suspicions, or report her suspicions to any law enforcement agency. Ms. Robbins did not tell Jim Fullbright about the broken arm because she knew that he would "raise a fuss about it."

On July 9, Dr. Stecker again examined Laura. Her notes reflect that the family had observed that the child was "wobbly" and running into things. Dr. Stecker found that she was better and diagnosed the problem as ataxia or dizziness and concluded that the child had been drinking too much juice. However, she also recognized that the symptoms were consistent with other possibilities, including head trauma.

On July 21, Laura was brought to the clinic with both eyelids swollen, and Ms. Robbins reported that the bruises were a result of the child falling down several stairs. Dr. Stecker was not present and Dr. Stecker's husband, Dr. Elton Stecker, saw the baby. Dr. Elton Stecker's nurse recorded that the child had been nauseated the previous day and had vomited that morning. When she awoke, there was swelling on the right

side of the head in the temple area and over the right eye.

On July 22, Dr. Stecker again saw Laura, and she read the record of the July 21 visit. At this time, the child's eyelids were swollen, and Ms. Robbins reported that the child had fallen down several stairs. Ms. Robbins wondered if the swelling of the upper lids could be the result of an allergy or a spider bite, and she stated that Laura had had watery nasal discharge which she felt was due to an allergy. Dr. Stecker wondered why there were new falls when child had been seen in the clinic the day before. Dr. Stecker discussed the possibility of abuse with Ms. Robbins. Ms. Robbins was adamant that abuse was highly unlikely. She stated that her five-year-old son carried Laura around and that he might have dropped her. She also told Dr. Stecker that her boyfriend did not have a temper. Dr. Stecker again considered reporting her suspicions of child abuse to the authorities; however, she did not. She made a conscious decision that there was not enough evidence to put the family in jeopardy of an investigation.

In August, there was an adult guest in Ms. Robbins's home, and nothing happened to the child while he was present. On September 12, 1991, Ms. Robbins returned home from work and found Laura, whom she had left in the care of Mr. Rank, unconscious. She took the child to St. Joseph's Regional Medical Center in Hot Springs. Laura was transported to Arkansas Children's Hospital in Little Rock, where she was later pronounced dead. The medical examiner determined that the cause of death was homicide.

* * *

3. *Closing argument*

In her third point on appeal, Dr. Stecker argues that prejudicial error occurred during First Commercial's closing argument when First Commercial wove a "send a message" theme into the argument even though punitive damages were not at issue in the case. Early in First Commercial's closing argument on behalf of Laura Fullbright's estate, it asked the jury not to apply a "weak" or "watered down" standard of care. Counsel for Dr. Stecker objected on the ground that punitive damages had not been sought, and the argument was a "send a message" argument. The Trial Court responded that he would take no action "until it happens." Later, First Commercial's counsel on several occasions referred to protecting "the children" and to protecting "the Lauras of the world." Dr. Stecker's counsel moved for a mistrial, and the motion was denied.

It has indeed been held that an argument having a "send a message" to the community theme may be improper when punitive damages are not sought. *See, e.g.*, *Smith v. Courter*, 531 S.W.2d 743 (Mo.1976); *Maercks v. Birchansky*, 549 So.2d 199 (Fla.App.1989). At first blush, the argument made on behalf of Laura Fullbright's estate might seem to have had that as its theme. In response to that contention, however, First Commercial argues that its counsel was addressing the standard of care to be exercised by a physician in circumstances such as those with which Dr. Stecker was presented and not the matter of damages.

We agree with the contention of First Commercial that the opinions of Dr. Epstein and that of Dr. Smith were very much at odds concerning the duty of a physician to report suspected child abuse. Dr. Smith felt a physician should be more than fifty percent certain before making a report. Dr. Epstein opined that any suspicion should be reported so that an objective government agency could make a determination. It is at least plausible that the reference to "the children" had to do with the standard of care to be taken by physicians rather than with a "message" to them.

A mistrial is a drastic remedy that should only be used when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when fundamental fairness of the trial itself has been manifestly affected. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). The Trial Court has wide discretion in granting or denying a motion for mistrial, and absent an abuse the decision will not be disturbed. *Id.*

We hold that, viewing the closing argument in its entirety, the repeated references to protection of "the children" did not necessarily evidence a "send a message" theme when combined with the discussion of the standard of care and the other points made in the closing argument. *See* *Beis v. Dias*, 859 S.W.2d 835 (Mo.App. S.D.1993); *Derossett v. Alton and Southern Ry. Co.*, 850 S.W.2d 109 (Mo.App. E.D.1993).

Affirmed.

PART II

DEFENSES TO A PERSONAL INJURY CASE

Introductory Note

Even if the plaintiff can meet all four of the elements of a traditional personal injury case—duty, breach, causation and damages—she may still be unable to recover compensation if the defendant is able to establish an affirmative defense. The term "defense" is sometimes used generically to mean the defendant's strategy at trial: for example, where the plaintiff claims that a driver was negligent, the driver may pursue the "defense" of denying that he was negligent, or denying that his negligence caused the accident. This isn't the kind of defense we will be looking at in Part II, because to that extent we would simply be looking at a mirror image of the issues as have been previously discussed. Instead, we are interested here in *affirmative defenses*. The affirmative defense differs from the simple denial of the plaintiff's case in two respects: First, it is usually based upon some new principle of law, such as the ones discussed in the next four chapters - immunity, contributory fault, multiple tortfeasor liability, and statutes of limitation. Second, the defendant usually bears the burden of proof for an affirmative defense. Thus, it is up to the defendant to plead and prove the existence of circumstances exonerating him from liability.

Chapter 4
Immunity

§ A. Governmental Immunity

Federal Tort Claims Act

28 U.S.C. § 1346 *et seq*. (1946)

§ 1346. United States as Defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such

statute or regulation be valid, or 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 involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Questions and Notes

1. This chapter begins with a statute rather than a case, because the scope of government liability is determined by statute rather than developed by caselaw. In the case that follows you should note the way in which the court looks to the stsatute—and competing interpretations of that statute—rather than

1. Claims based on the FTCA are tried by the Court sitting without a jury.

2. The federal government and many states impose special procedural requirements before a suit can be filed. Often the claimant must first file an administrative claim for compensation. *See, e.g.*, R.C.W. 4.92.110. There are also unique statutes of limitation. *See, e.g.*, 28 U.S.C. § 2401 (15). *See generally*, Tillman, *Presenting a Claim Under the FTCA*, 43 LA. L. REV. 961 (1983).

LAIRD v. NELMS

406 U.S. 797 (1972)

Mr. Justice REHNQUIST delivered the opinion of the Court

Respondents brought this action in the United States District Court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. They sought recovery for property damage allegedly resulting from a sonic boom caused by California-based United States military planes flying over North Carolina on a training mission. The District Court entered summary judgment for petitioners, but on respondents' appeal the United States Court of Appeals for the Fourth Circuit reversed. That

court held that, although respondents had been unable to show negligence "either in the planning or operation of the flight," they were nonetheless entitled to proceed on a theory of strict or absolute liability for ultrahazardous activities conducted by petitioners in their official capacities. That court relied on its earlier opinion in *United States v. Praylou*, 4 Cir., 208 F.2d 291 (1953), which in turn had distinguished this Court's holding in *Dalehite v. United States*, 346 U.S. 15, 45, 73 S. Ct. 956, 972, 97 L. Ed. 1427 (1953). We granted certiorari. 404 U.S. 1037, 92 S. Ct. 711, 30 L. Ed. 2d 728.

Dalehite held that the Government was not liable for the extensive damage resulting from the explosion of two cargo vessels in the harbor of Texas City, Texas, in 1947. The Court's opinion rejected various specifications of negligence on the part of Government employees that had been found by the District Court in that case, and then went on to treat petitioners' claim that the Government was absolutely or strictly liable because of its having engaged in a dangerous activity. The Court said with respect to this aspect of the plaintiffs' claim:

> [T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a `negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity." 346 U.S., at 44, 73 S. Ct., at 972.

This Court's resolution of the strict-liability issue in *Dalehite* did not turn on the question of whether the law of Texas or of some other State did or did not recognize strict liability for the conduct of ultrahazardous activities. It turned instead on the question of whether the language of the Federal Tort Claims Act permitted under any circumstances the imposition of liability upon the Government where there had been neither negligence nor wrongful act. The necessary consequence of the Court's holding in *Dalehite* is that the statutory language "negligent or wrongful act or omission of any employee of the Government," is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued. Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance," 346 U.S., at 45, 73 S. Ct. at 972, on the part of the Government.

It is at least theoretically possible to argue that since *Dalehite* in discussing the legislative history of the Act said that "wrongful" acts could include some kind of trespass, and since courts imposed liability in some of the early blasting cases on the theory that the plaintiff's action sounded in trespass, liability could be imposed on the Government in this case on a theory of trespass which would be within the Act's waiver of immunity. We believe, however, that there is more than one reason for rejecting such an alternate basis of governmental liability here.

The notion that a military plane on a high-altitude training flight itself intrudes upon any property interest of an owner of the land over which it flies was rejected in *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). There this Court, construing the Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401, said:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe - *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just Claim." 328 U.S., at 260-261, 66 S. Ct., at 1065.

Thus, quite apart from what would very likely be insuperable problems of proof in connecting the passage of the plane over the owner's air space with any ensuing damage from a sonic boom, this version of the trespass theory is ruled out by established federal law. Perhaps the precise holding of *United States v. Causby, supra*, could be skirted by analogizing the pressure wave of air

characterizing a sonic boom to the concussion that on occasion accompanies blasting, and treating the air wave striking the actual land of the property owner as a direct intrusion caused by the pilot of the plane in the mold of the classical common-law theory of trespass.

It is quite clear, however, that the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity, rather than any attenuated notion of common law trespass. *See* RESTATEMENT OF TORTS §§ 519, 520(e); W. PROSSER, LAW OF TORTS § 75 (4th ed. 1971). While a leading North Carolina case on the subject of strict liability discusses the distinction between actions on the case and actions sounding in trespass that the earlier decisions made, it, too, actually grounds liability on the basis that he who engages in ultrahazardous activity must pay his way regardless of what precautions he may have taken. *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). More importantly, however, Congress in considering the Federal Tort Claims Act cannot realistically be said to have dealt in terms of either the jurisprudential distinctions peculiar to the forms of action at common law or the metaphysical subtleties that crop up in even contemporary discussions of tort theory. *See* PROSSER, *supra*, at 492-496. The legislative history discussed in *Dalehite* indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of respondeat superior, but to exclude liability based solely on the ultrahazardous nature of an activity undertaken by the Government.

A House Judiciary Committee memorandum explaining the "discretionary function" exemption from the bill when that exemption first appeared in the draft legislation in 1942 made the comment that "the cases covered by that subsection would probably have been exempted ... by judicial construction" in any event, but that the exemption was intended to preclude any possibility

> that the act would be construed to authorize suit for damages against the Government growing out of a legally authorized activity, such as a floodcontrol or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious...." *Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary*, 77th Cong., 2d Sess., ser. 13, pp. 65-66 (1942).

The same memorandum, after noting the erosion of the doctrine of sovereign immunity over the years, observed with respect to the bill generally:

> Yet a large and highly important area remains in which no satisfactory remedy has been provided for the wrongs of Government officers or employees, the ordinary `commonlaw' type of tort, such as personal injury or property damage caused by the negligent operation of an automobile." *Id.*, at 39.

The type of trespass subsumed under the Act's language making the Government liable for "wrongful" acts of its employees is exemplified by the conduct of the Government agents in *Hatahley v. United States*, 351 U.S. 173, 181, 76 S. Ct. 745, 751, 100 L. Ed. 1065. Liability of this type under the Act is not to be broadened beyond the intent of Congress by dressing up the substance of strict liability for ultrahazardous activities in the garments of common-law trespass. To permit respondent to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.

Shortly after the decision of this Court in *Dalehite*, the facts of the Texas City catastrophe were presented to Congress in an effort to obtain legislative relief from that body. Congress, after conducting hearings and receiving reports, ultimately enacted a bill granting compensation to the victims in question. 69 Stat. 707; H.R. REP. NO. 2024, 83d Cong., 2d Sess. (1954); S. REP. NO. 2363, 83d Cong., 2d Sess. (1954); H.R. REP. NO. 1305, 84th Cong., 1st Sess. (1955); H.R. REP. NO. 1623, 84th Cong., 1st Sess. (1955); S. REP. NO. 684, 84th Cong., 1st Sess. (1955). At no time during these hearings was there any effort made to modify this Court's construction of the Tort Claims Act in *Dalehite*. Both by reason of stare decisis and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in *Dalehite* as

controlling here.

Since *Dalehite* held that the Federal Tort Claims Act did not authorize suit against the Government on claims based on strict liability for ultrahazardous activity, the Court of Appeals in the instant case erred in reaching a contrary conclusion. While as a matter of practice within the Circuit it may have been proper to rely upon *United States v. Praylou*, 208 F.2d 291, it is clear that the holding of the latter case permitting imposition of strict liability on the Government where state law permits it is likewise inconsistent with *Dalehite*. *Dalehite* did not depend on the factual question of whether the Government was handling dangerous property, as opposed to operating a dangerous instrument but, rather, on the Court's determination that the Act did not authorize the imposition of strict liability of any sort upon the Government. Indeed, even the dissenting opinion in *Dalehite* did not disagree with the conclusion of the majority on that point.

Our reaffirmation of the construction put on the Federal Tort Claims Act in *Dalehite*, makes it unnecessary to treat the scope of the discretionary-function exemption contained in the Act, or the other matters dealt with by the Court of Appeals.

Reversed.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, dissenting.

Under the Federal Tort Claims Act, the United States is liable for injuries to persons or property

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if 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).

* * *

The rule announced by the Court today seems to me contrary to the whole policy of the Tort Claims Act. For the doctrine of absolute liability is applicable not only to sonic booms, but to other activities that the Government carries on in common with many private citizens. Absolute liability for injury caused by the concussion or debris from dynamite blasting, for example, is recognized by an overwhelming majority of state courts.[34] A private person who detonates an explosion in the process of building a road is liable for injuries to others caused thereby under the law of most States even though he took all practicable precautions to prevent such injuries, on the sound principle that he who creates such a hazard should make good the harm that results. Yet if employees of the United States engage in exactly the same conduct with an identical result, the United States will not, under the principle announced by the Court today, be liable to the injured party. Nothing in the language or the legislative history of the Act compels such a result, and we should not lightly conclude that Congress intended to create a situation so much at odds with common sense and the basic rationale of the Act. We recognized that rationale in *Rayonier*, [*Rayonier v. U.S.*, 352 U.S. 315 (1957)], a case involving negligence by employees of the United States in controlling a forest fire:

> Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. 352 U.S., at 320, 77 S. Ct., at 377.

For the reasons stated, I would hold that the doctrine of absolute liability is applicable to conduct of employees of the United States under the same circumstances as those in which it is applied to the conduct of private persons under the law of the State where the conduct occurs. That holding would not by itself be dispositive of this case, however, for the petitioners argue that liability is precluded by the "discretionary

[34] *See, e.g.*, *Whitman Hotel Corp. v. Elliott & Watrous Eng. Co.*, 137 Conn. 562, 79 A.2d 591 (1951); *Louden v. City of Cincinnati*, 90 Ohio St. 144, 106 N.E. 970 (1914); *Thigpen v. Skousen & Hise*, 64 N.M. 290, 327 P.2d 802 (1958); *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960); and cases cited in n.3, *supra*. *See generally* W. PROSSER, LAW OF TORTS 514 (4th ed. 1971).

function" exception in the Act. While the Court does not reach this issue, I shall state briefly the reasons for my conclusion that the exception is inapplicable in this case.

No right of action lies under the Tort Claims Act for any claim

> based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 involved be abused. 28 U.S.C. § 2680(a).

The Assistant Attorney General who testified on the bill before the House committee indicated that this provision was intended to create no exceptions beyond those that courts would probably create without it:

> [I]t is likely that the cases embraced within that subsection would have been exempted from [a bill that did not include the exception] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but [the recommended bill] makes this specific. *Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary*, 77th Cong., 2d Sess., ser. 13, p. 29.

The *Dalehite* opinion seemed to say that no action of a Government employee could be made the basis for liability under the Act if the action involved "policy judgment and decision." 346 U.S., at 36, 73 S. Ct., at 968. Decisions in the courts of appeals following *Dalehite* have interpreted this language as drawing a distinction between "policy" and "operational" decisions, with the latter falling outside the exception.[35] That distinction has bedeviled the courts that have attempted to apply it to torts outside routine categories such as automobile accidents, but there is no need in the present case to explore the limits of the discretionary function exception.

The legislative history indices that the purpose of this statutory exception was to avoid any possibility that policy decisions of Congress, of the Executive, or of administrative agencies would be second-guessed by courts in the context of tort actions.[36] There is no such danger in this case, for liability does not depend upon a judgment as to whether Government officials acted irresponsibly or illegally. Rather, once the creation of sonic booms is determined to be an activity as to which the doctrine of absolute liability applies, the only questions for the court relate to causation and damages. Whether or not the decision to fly a military aircraft over the respondents' property, at a given altitude and at a speed three times the speed of sound, was a decision at the "policy" or the "operational" level, the propriety of that decision is irrelevant to the question of liability in this case, and thus the discretionary function exception does not apply.

Questions and Notes

1. In *Berkovitz v. United States*, 108 S. Ct.

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[35] *See, e.g.*, *Eastern Air Lines v. Union Trust Co.*, 95 U.S. App. D.C. 189, 21 F.2d 62, *aff'd*, 350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 796; *Fair v. United States*, 5 Cir., 234 F.2d 288; *Hendry v. United States*, 2 Cir., 418 F.2d 774. For a thorough discussion of the "policy/operational" distinction that has developed, see Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968).

[36] The policy behind the exception is explained by one leading commentator as follows:

> [A]lmost no one contends that there should be compensation for all the ills that result from governmental operations. No one, for instance, suggests that there should be liability for the injurious consequence of political blunders such as the unwise imposition of tariff duties or the premature lifting of OPA cont-rols.... The separation of powers in our form of government and a decent regard by the judiciary for its co-ordinate branches should make courts reluctant to sit in judgment on the wisdom or reasonableness of legislative or executive political action. Moreover, courts are not particularly well suited to pursue the examinations that would be necessary to make this kind of judgment. James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957).

1954 (1988), the Supreme Court considered a polio victim's claim that the FDA and other federal agencies had negligently sanctioned the release of a defective lot of polio vaccine. The court rejected the government's argument that any actions of a regulatory agency should be immune. "[T]he discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 1959 (case remanded for further factual determination). *See* Note, 20 ST. MARY'S L.J. 1018 (1989).

2. For discussions of the discretionary function exemption, *see* Amy M. Hackman, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?* 19 CAMPBELL L. REV. 411 (1997); Brian H. Hess, *The Planning/Operational Dichotomy: a Specious Approach to the Discretionary Function Exception in the Idaho Tort Claims Act*, 40 IDAHO L. REV. 225 (2003).

3. A medical aide for the U.S. Navy got drunk and was seen in the hospital by fellow hospital employees, who saw a rifle in his duffel bag. They tried to detain him and get him treated, but the aide escaped. They then negligently failed to report his escape, and shortly thereafter the aide shot the plaintiff. Is the claim covered by the Federal Tort Claims Act? *See Sheridan v. United States*, 108 S. Ct. 2449 (1988).

4. Government contractors are sometimes entitled to immunity when they provide products or services to the government and the government supplies the specifications. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); Popov, *Sovereign Immunity: The Government Contractor's Defense in Boyle v. United Technologies Corp.*, 1989 ANN. SURV. OF AMERICAN LAW 245.

VANDERPOOL v. STATE

672 P.2d 1153 (Okla. 1983)

LAVENDER, Justice

This is an appeal from an order of the trial court granting summary judgment in favor of defendants below, State of Oklahoma and the Oklahoma Historical Society.

The facts are not in dispute. Appellant and plaintiff below while employed as an office worker by the Oklahoma Historical Society at a state historical site known as Fort Washita was en route to deliver a telephone message. While traversing the grounds, she was struck in the eye by a rock thrown up by a "Brush Hog" mower operated by a fellow employee while mowing weeds on the site, resulting in permanent loss of sight in her right eye. Plaintiff alleged negligence in that a protective shield on the mower had been removed by an employee of the State making the brush hog defective and allowing objects to be propelled from the mower, thus rendering the mower totally unfit, unsafe and highly dangerous. Plaintiff seeks damages from the State and from the Society. The district court granted defendants' motion for summary judgment and dismissed the cause, holding that the doctrine of governmental immunity bars the action. Plaintiff appeals.

The nature, purposes, powers and duties of the Oklahoma Historical Society are statutory and are set forth in 53 O.S. 1981, § 1, *et seq*. For the purposes of this appeal, suffice it to say:

The Society is authorized to acquire, operate and maintain real and personal property pertaining and relating to the history of Oklahoma, for the benefit of the public, to purvey the same, and to charge reasonable visitation fees. The Society is empowered to grant concessions, leases or permits after competitive bids, and to develop an education program and service for the purpose of publishing facts regarding Oklahoma historic sites, buildings and property of state significance. Reasonable charges may be made for the dissemination of any such facts or information. The Society is declared to be an agency of the State.

Fort Washita was purchased by the Merrick Foundation of Ardmore, Oklahoma, in 1962 from Douglas and Billie Colbert, and deeded to the Oklahoma Historical Society in April, 1962. Since 1968, the Fort Washita historical site has been staffed, maintained and operated by the Oklahoma Historical Society through state appropriations. Its purpose is to tell that particular aspect of Oklahoma history - antebellum military history in the Indian Territory - to the general public.

The case before us places squarely in issue the

doctrine of sovereign immunity and impels us to reexamine the viability and efficacy of that doctrine as applied to tort liability of the State, the counties and of other governmental entities within the State of Oklahoma.

The doctrine of sovereign immunity was first recognized in early England and required that the sovereign could not be sued without his permission. It was not so much a matter of the king being above the law, embodied in the maxim, "the king can do no wrong," as it was in the oft-expressed concept that the courts were a part of the government and could not be used to enforce claims against the government - without the express permission of that government.

The doctrine found its way into the common law of the United States, and in 1821, in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257, Chief Justice Marshall applied it in suits against the United States, declaring that suits could not be commenced or prosecuted against the federal government without its consent. Subsequently, the doctrine was applied to the states. In applying the doctrine to local government entities, it was early recognized that local government entities occupy a dual character which affected its liability in tort. On the one hand it is a subdivision of the State, endowed with governmental and political powers, and charged with governmental functions and responsibilities. On the other hand, it is a corporate body, capable of much the same acts as a private corporation, and capable of much the same special and local interests and relations, not shared by the State at large. This duality resulted in the attempted differentiation between governmental and proprietary functions, the first generally protected by immunity, the second generally not. RESTATEMENT OF THE LAW OF TORTS, 2d ed., § 895B; *City of Purcell v. Hubbard*, Okl., 401 P.2d 488 (1965); *Oklahoma City v. Baldwin*, 133 Okl. 289, 272 P. 453 (1928).

Meanwhile, the expansion of governmental functions with its attendant complexities gave rise to a plethora of governmental agencies whose purpose and function took on characteristics of both governmental and proprietary. Judicial attempts to grapple with what has become a multi-addered medusa has resulted in confusion and uncertainty all too painfully apparent to legal scholars, and an inability on the part of the courts to evolve any definitive guidelines for the demarcation between governmental and proprietary functions.

Reexamination of the soundness of the concept of governmental immunity in the light of the expanded role of government in today's society has, for various reasons, the enumeration of which would unduly lengthen this opinion, resulted in a retreat from the concept both legislatively and by case law.

In 1946, by the adoption of the Federal Tort Claims Act, Congress gave its consent for the United States to be sued in the district courts, and waived its governmental immunity, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if 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). Various states have enacted statutes imposing more or less general liability in tort on local governmental entities and abrogating governmental immunity, generally or under prescribed circumstances.

In 1957, the Florida Supreme Court in the case of *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), declared that there was no valid distinction between governmental and proprietary functions and determined that under the facts of that case the municipality had no immunity from tort liability, thus presaging a steady flow of case law away from the concept of governmental immunity and abrogating it in whole or in part, until today, there are not more than five states, including Oklahoma, which have not abolished the doctrine or have not, in some manner, retreated from its universal application as an immutable concept of the law. *See Pruett v. City of Rosedale*, Miss., 421 So. 2d 1046 (1982).

While Oklahoma has been more cautious in its retreat from governmental immunity as a bar to actions for tort, it has not been heretofore totally immune from inroads upon the doctrine.

In 1978, the Oklahoma Legislature enacted the Political Subdivision Tort Claims Act (51 O.S. 1981 § 151, *et seq.*) extending political subdivision tort liability for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in the Act. Included in the political subdivisions covered by the act are municipalities, school districts, counties and public trusts where a city, town, school district or

county is a beneficiary.

In *Hershel v. University Hospital Foundation*, 610 P.2d 237 (Okl. 1980), we brought the application of the doctrine of sovereign immunity of the State of Oklahoma for tort into lock-step with the doctrine as it is applied to counties and municipalities where each is engaged in proprietary functions, thus holding that the State is liable for injuries committed by the State arising from proprietary functions. We thus repudiated the idea the State may not be sued without its consent, express or implied.

We have further held that in certain instances where the State insures itself against liability under legislative authority to do so, governmental immunity is waived by implication to the extent of its insurance coverage. *Schrom v. Oklahoma Industrial Development*, Okl., 536 P.2d 904 (1975).

While in the case of *Gable v. Salvation Army*, 186 Okl. 687, 100 P.2d 244 (1940), the doctrine of charitable immunity and not governmental immunity was challenged and repudiated in a personal injury action brought against a charitable corporation for activities within the corporate powers and carried on to accomplish its charitable purposes, this Court did not hesitate to strike down the alleged immunity where upon critical examination the immunity was found to be unjust and unwarranted on every basis postulated in its favor.

We hold that the governmental-proprietary-function inquiry shall no longer be determinative in assessing liability for tort as to all levels of government in this State.

The doctrine of governmental immunity is hereby modified to bring it in line with what we perceive to be the more just and equitable view, and that which is in conformity with the generally prevailing view determined by the highest courts of our sister states.[1]

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[1] In the absence of a statute granting partial or total immunity, a municipality has been held to be liable for its negligence in the same manner as a private person or corporation in the following states by the following cases:

Jackson v. Florence, 294 Ala. 592, 320 So.2d 68 (1975);
City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962);
Veach v. Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967);
Div. of Admin. v. Oliff, 350 So.2d 484 (Fla. App. 1977);
Runnels v. Okamoto, 56 Haw. 1, 525 P.2d 1125 (1974);
Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970);
Klepinger v. Bd. of Comm'rs, 143 Ind. App. 155, 239 N.E.2d 160 (1968);
Goodwin v. Bloomfield, 203 N.W.2d 582 (Iowa 1973);
Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978);
Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964);
Bd. of Comm'rs v. Splendour Shipping & Enterprises Co., Inc., 255 So.2d 869 (La. App. 1971);
Davies v. Bath, 364 A.2d 1269 (Me. 1976);
Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 199 N.W.2d 158 (1972);
Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977);
Webber v. Anderson, 187 Neb. 9, 187 N.W.2d 290 (1971);
Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973);
Merrill v. Manchester, 114 N.H. 722, 332 A.2d 378 (1974);
Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975);
Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.W.2d 63 (1960);
Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974);
Fry v. Williamalane Park & Rec. Dist., 4 Or. App. 575, 481 P.2d 648 (1971);
Ayala v. Philadelphia Bd. of Pub. Ed., 453 Pa. 584, 305 A.2d 877 (1973);
Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970);
Beaumont v. Fuentez, 582 S.W.2d 221 (Tex. Civ. App. 1979);
Kelso v. Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964);
Long v. Weirton, 214 S.E.2d 832 (W. Va. 1975);
Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

Judicial abolishment of governmental immunity as applied to municipalities has been decreed in the following states in the following cases:

City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962);
Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963);
Davies v. Bath, 364 A.2d 1269 (Me. 1976);
Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977);
Merrill v. Manchester, 114 N.H. 722, 332 A.2d 378 (1974);
Kitto v. Minot Park. Dist., 224 N.W.2d 795 (N.D. 1974);
Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970);

In light of the foregoing, it is the finding and determination of this Court that:

> A STATE OR LOCAL GOVERNMENTAL ENTITY IS LIABLE FOR MONEY DAMAGES FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY OR DEATH CAUSED BY THE NEGLIGENT OR WRONGFUL ACT OR OMISSION OF ANY GOVERNMENTAL ENTITY OR ANY EMPLOYEE OR AGENT OF THE GOVERNMENTAL ENTITY WHILE ACTING WITHIN THE SCOPE OF THE GOVERNMENTAL ENTITY'S OFFICE, AND PURPOSE FOR WHICH IT IS CREATED, UNDER CIRCUMSTANCES WHERE THE ENTITY, IF A PRIVATE PERSON, WOULD BE LIABLE TO THE CLAIMANT IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED.
>
> PROVIDED, HOWEVER, SAID GOVERNMENTAL ENTITY IS IMMUNE FROM TORT LIABILITY FOR ACTS AND OMISSIONS CONSTITUTING
>
> (A) THE EXERCISE OF A LEGISLATIVE OR JUDICIAL FUNCTION, AND
>
> (B) THE EXERCISE OF AN ADMINISTRATIVE FUNCTION INVOLVING THE DETERMINATION OF FUNDAMENTAL GOVERNMENTAL POLICY.
>
> AND FURTHER PROVIDED, THAT THE REPUDIATION OF GENERAL TORT IMMUNITY AS HEREINABOVE SET FORTH DOES NOT ESTABLISH LIABILITY FOR AN ACT OR OMISSION THAT IS OTHERWISE PRIVILEGED OR IS NOT TORTIOUS.[2]

In rendering this opinion, this Court is mindful of the oft-expressed view of this Court that if the doctrine of governmental immunity is to be totally abrogated, such should be done by the Legislature and not by the courts of this State. *See Spaulding v. State ex rel. Dept. of Transp.*, Okl., 618 P.2d 397 (1980); *Ruble v. Dept. of Transportation of the State of Oklahoma*, 660 P.2d 1049 (1983). But having come to the conclusions that the judicially recognized doctrine of governmental immunity in its present state under the case law is no longer supportable in reason, justice or in light of the overwhelming trend against its recognition, our duty is clear. Where the reason for the rule no longer exists, that alone should toll its death knell.

Our decision is limited in its effect to the heretofore judicially created and recognized doctrine of governmental immunity and is not to be taken as in any way rendering ineffective any act of the Legislature in the area of governmental immunity whether presently in effect or hereafter passed.

We are aware of and sensitive to the effect that the immediate application of the rules of law herein enunciated would have upon the various governmental entities affected thereby. These are matters which lie within the sphere of the Legislature alone. We invoke its consideration of the many problems presented, including whether some or all of the governmental entities should be insulated from unlimited tort liability through the enactment of comprehensive or specific Tort Claims Acts which limit or prescribe conditions of liability, their insurance against loss, the maximum monetary liability to be allowed, or, indeed, whether it is the will of the People of the State of Oklahoma, as expressed through the Legislature, that governmental immunity be established by statute, and the terms and conditions thereof. Ample time for consideration of these matters must be afforded.

Except as to the case before us, this opinion shall be effective only as to those claims or causes of action which accrue after 12:01 A.M., October 1, 1985. *Great Northern Railway Co. v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

All previous opinions of this Court which are in conflict with the views herein expressed are hereby overruled.

Reversed and remanded.

IRWIN, Justice, dissenting

Long v. Weirton, 214 S.E.2d 832 (W. Va. 1975); *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[2] Enunciation of the foregoing rule is not to be construed as abrogating or modifying our holding in *Nixon v. Oklahoma City*, Okl., 555 P.2d 1283 (1976) pertaining to the non-liability of governmental sub-divisions including municipalities for exemplary damages, and the reasons therein set forth for denying such a recovery. *Nixon* comports with what appears to be the majority view. 1 A.L.R. 4th 454, *et seq.*

As late as March 15, 1983, this court recognized the doctrine of governmental immunity and said that if sovereign immunity is to be abrogated, it should be done by the Legislature and not by the courts. *Ruble v. Department of Transportation of the State of Oklahoma*, Okl., 660 P.2d 1049 (1983).

Various statutes have been enacted by the Legislature which demonstrate legislative intent that the State remain immune from suit on tort claims arising from governmental functions. Some of these are:

(A) 51 O.S. 1981, 151-170, "The Political Subdivisions Tort Claims Act." This legislation became effective July 1, 1978, and abolished the sovereign/governmental immunity of municipalities, school districts, counties, and public trusts where a city, town, school district or county is a beneficiary; and all their institutions, instrumentalities or agencies, to the extent of the limitation on liability contained in § 154 of the Act. Governmental immunity continues to bar claims in excess of § 154 limitations. The Legislature could have included the State in this limited waiver of sovereign immunity but chose not to do.

(B) 47 O.S. 1981, §§ 157.1-158.2, Liability Insurance for State-owned motor vehicles and equipment. Sections 157.1 and 158.1 contain identical provisions:

> the governmental immunity of such department or state agency shall be waived only to the extent of the amount of insurance purchased. Such department or state agency shall be liable for negligence only while such insurance is in force, but in no case in any amount exceeding the limits of coverage or any such insurance.

(C) 74 O.S. 1981, §§ 20f-20h, which provide for the Legal Defense of State Officers and Employees Sued in Performance of Official Duties. This legislation requires the Attorney General or state agency staff attorneys to defend state officials who are sued upon causes of action arising from the performance of official duties. Under § 20h(A), the cost of the litigation is paid out of the Attorney General's Evidence fund. However, § 20h(B) contains this proviso:

> except that this act shall not be construed as authorizing the payment by the State of Oklahoma or any agency thereof of any judgment making an award of money damages.

In my opinion if sovereign immunity is to be abrogated, it should be done by the Legislature and not by the courts. If the Legislature had wanted to abrogate sovereign immunity, it would have done so. I respectfully dissent.

Questions and Notes

1. Remember that each state (and Native American tribe) is sovereign, and so the enactment of the Federal Tort Claims Act did not affect the individual states' or tribes' ability to claim sovereign immunity. However, as *Vanderpool* illustrates, the approach to waiving sovereign immunity often follows the general pattern established in the FTCA. Nonetheless, since such waivers are usually a creature of statute, the waiver (if there is one) must be carefully scrutinized to determine whether the grant is broader (or narrower) than the FTCA provides.

§ B. Family Immunities

HOLODOOK v. SPENCER

36 N.Y.2d 35, 364 N.Y.S.2d 859 (1974)

SAMUEL RABIN, Judge

* * *

The Holodook infant, at age four, allegedly darted out from between parked cars and was struck by an automobile driven by defendant. The infant, by his father, sued for personal injuries and his father brought a derivative action for both medical expenses and loss of services. The defendant then brought a third-party action for indemnification and apportionment of responsibility pursuant to *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, *supra* against the infant's mother alleging that at the time of the accident the infant was in her

custody and that she negligently failed to perform her parental duty to instruct, control and maintain her child. Defendant also counterclaimed for Dole apportionment and contribution against the infant's father alleging negligent failure to provide for the proper care, maintenance and supervision of his child. The infant's parents then moved to dismiss the third-party complaint and the counterclaim for failure to state a cause of action. Special Term denied the motion finding that *Gelbman [Gelbman v. Gelbman*, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 (1969)] had completely removed the bar against intrafamilial suits, that *Dole* permitted the claims over against the parents and that a parent's negligent supervision of his child is an actionable tort. The Appellate Division reversed, one Justice dissenting, stating that while *Gelbman* might be read to allow survival of the immunity rule in the area of parental functions, this was unnecessary since a parent's misjudgment in supervising his child does not amount to the breach of a legal duty and therefore is not a tort. As a consequence, the court granted the parents' motion to dismiss the *Dole* counterclaim and third-party complaint for failure to state a cause of action. Defendant, third-party plaintiff, appeals as of right and is opposed not only by the third-party defendant, Mrs. Holodook, but, unlike the *Graney* and *Ryan* cases, by the infant plaintiff and his father as well.

I. Background

As stated, in *Gelbman* we abrogated the defense of intrafamilial immunity for nonwillful torts.

* * *

II. A parent's negligent failure to supervise his child is not presently recognized in New York as a tort, actionable by the child.

In abolishing the immunity defense, *Gelbman* allows suits between parents and children which would previously have been actionable between the parties absent the family relationship. It also opens for exploration the area of duties which exist Because of the family relationship, and which, if breached, entail legal consequences. We ask whether a parent owes a legal duty to supervise his child giving rise to an action for damages for negligent performance of that duty, and if so, to whom that duty is owed - whether only to third parties who may be injured by a negligently supervised child, or whether the duty is also owed personally to the child to be protected by his parent from accidental injury.

Of the many duties arising from the parent-child relation, only very few give rise to legal consequences for their breach. Parents are obligated in accordance with their means to support and maintain their children - *i.e.*, to furnish adequate food, clothing, shelter, medical attention and education. A parent's failure to observe minimum standards of care in performing these duties entails both remedial sanctions, such as the forfeiture of custody, and criminal sanctions. (*See* Family Ct. Act, § 1012, subd. f, par. (i), cl. (A); Penal Law, Consol. Laws, c. 40, § 260.05.) Parents are also obligated to provide proper guidance and guardianship of their children and are vulnerable to legal sanction for failure to meet minimum standards of care, for example, by the excessive infliction of corporal punishment, by the excessive use of drugs or alcohol, or by directing or authorizing a child under 16 to engage in an occupation involving substantial risk of danger to his life or health. (*See* Family Ct. Act, § 1012, subd. f, par. (i), cl. (B); Penal Law, § 260.10.) Parents are also obligated to supervise their children. Failure to supervise may entail legal consequence where injury to a third party results, for example, under circumstances where a parent negligently entrusts to his child a dangerous instrument, or an instrument potentially dangerous in the child's hands, so as to create an unreasonable risk to others.

* * *

III. A parent's negligent failure to supervise his child should not now be recognized as a tort, actionable by the child.

The element which persistently stands out as we consider and contrast these cases and the implications of our decision on future cases, is the potential impact of *Dole* apportionment and contribution upon the fundamental family relation between parent and child. We can conceive of few, if any, accidental injuries to children which could not have been prevented, or substantially mitigated, by keener parental guidance, broader foresight, closer protection and better example. Indeed, a child could probably avoid most

physical harm were he under his parents' constant surveillance and instruction, though detriment more subtle and perhaps more harmful than physical injury might result. If the instant negligent supervision claims were allowed, it would be the rare parent who could not conceivably be called to account in the courts for his conduct toward his child, either by the child directly or by virtue of the procedures allowed by *Dole*.

* * *

The mutual obligations of the parent-child relation derive their strength and vitality from such forces as natural instinct, love and morality, and not from the essentially negative compulsions of the law's directives and sanctions. Courts and Legislatures have recognized this, and consequently have intruded only minimally upon the family relation. This is so, and properly, because the law's external coercive incentives are inappropriate to assuring performance of the subtle and shifting obligations of family. Of course, where the duty is ordinarily owed, apart from the family relation, the law will not withhold its sanctions merely because the parties are parent and child. This is the consequence of *Gelbman*. There, the duty to drive carefully was owed to the world at large and derived from the parties' relation as driver and passenger; that the parties were also child and parent was a fortuitous fact, irrelevant to both the duty and to a determination of its breach. By contrast, the cases before us involve a parent's duty to protect his child from injury - a duty which not only arises from the family relation but goes to its very heart. *Gelbman* did not pave the way for the law's superintendence of this duty.

Like the Appellate Divisions, which so thoughtfully approached these cases before they came to us (*see, also*, the analysis of the Second Department in the similar case of *Lastowski v. Norge Coin-O-Matic*, 44 A.D.2d 127, 355 N.Y.S.2d 432), we are not persuaded that a parent's failure to supervise his child is, or on balance should be, a tort actionable by the child. We hold, therefore, that the infant plaintiffs have no cause of action against their parents for negligent supervision in the cases before us. Because the secondary right to contribution in these cases is dependent upon the parent's alleged failure to perform a duty owing to the plaintiff child, the absence of the primary cause of action defeats the counterclaim and third-party complaint in *Holodook* and, if made, the cross claim in *Ryan*.

Accordingly, in each case, we affirm the order of the Appellate Division.

JASEN, Judge (dissenting)

I cannot ascribe to the policy reasons assigned by the majority for today's holding that negligent parental supervision is not actionable and that a negligent parent is not subject to a claim for apportionment of responsibility.

The parental duty to supervise was recognized in our early law (*e.g.*, *Longacre v. Yonkers R.R. Co.*, 236 N.Y. 119, 123, 140 N.E. 215, 216; *see, also*, *Mangam v. Brooklyn R.R. Co.*, 38 N.Y. 455, 457) although usually in conjunction with the issue of the child's own negligence, commonly on the now disapproved imputed negligence theory (Ann., 51 A.L.R. 209, 223; *cf.* General Obligations Law, § 3-111). But it should not matter that the parental conduct under review has not previously been explicitly denominated a tort. Nor for that matter should, as is implied by the majority, violation of a statute be the sole measure of tortious parental conduct. The fundamental issue is whether, under all the circumstances, there has been a breach of the duty of care reasonably to be expected. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 having removed the bar of intrafamily negligence immunity in New York, the duty of supervision persists unconfined by that defense. Where that duty is breached, only the most cogent reasons of public policy should warrant denial of a remedy and consequent deviation from the central principle of Anglo-American tort law, which is that wrongdoers should bear the losses they cause.

* * *

To the assertion that the duty to supervise cannot be delineated or applied, I answer that juries daily perform greater miracles. What a reasonable and prudent parent would have done in similar circumstances should be the test and jurors, many of them parents themselves, drawing on their life experiences, should not find the task insuperable....

Moreover, the concept of elemental fairness underlying our decisions in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 and *Kelly v. Long Is. Light Co.*, 31

N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241 impels recognition of the tort. For as is so well illustrated by the Holodook case now before the court, what logic can there be for a rule that denies the negligent driver recourse against the parent whose responsibility for the child's injuries may be greater?

... That the nonparent defendant should bear the full loss to which the parent has contributed runs counter to the evolution in our law which is toward a system of comparative fault.

BREITEL, C.J., and GABRIELLI, JONES and WACHTLER, JJ., concur with SAMUEL RABIN, J.

JASEN, J., dissents and votes to reverse in a separate opinion in which STEVENS, J., concurs.

Questions and Notes

1. Which of the following caretakers would be entitled to parental immunity?

a) grandmother who lives in the home and cares for the child without pay while the parents are at work;

b) same as (a), except grandmother doesn't live at home;

c) an aunt who lives in the home but receives compensation for day care;

d) a neighbor who cares for the child in exchange for similar services for her own child; and

e) a day care center owned by a for profit corporation?

2. Although parents may be immune from suits by their children for negligent parenting, third parties may sue the parents if the third party is injured due to a parent's negligence. However, such claims are limited; *see* RESTATEMENT (2D), TORTS:

§ 316. Duty of Parent to Control Conduct of Child

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

See *Carey v. Reeve*, 56 Wash. App. 18, 781 P.2d 904 (1989) (child's parents sued playmate's mother and grandparents for burn injuries sustained from allegedly negligent supervision). Is the imposition of this obligation inconsistent with the concern expressed elsewhere that courts ought to grant families some discretion in decisions regarding childrearing?

3. Other intra-family immunities (*e.g.*, spousal immunity) have largely been eliminated. *See*, Carl Tobias, *The Imminent Demise of Interspousal Immunity*, 60 MONT. L. REV. 101 (1999).

4. Some jurisdictions have enacted statutes that make parents strictly liable for malicious torts committed by their children, but typically the statutes place modest upper limits on the parents' liability; *see*, *e.g.*, CAL. CIV. CODE § 1714.1. (maximum $25,000).

5. It is possible for courts or legislatures to reduce rather than eliminate the duty to use reasonable care. A prominent example is the "automobile guest statute," which has declined in popularity over the years. As automobiles came into general use, a variety of legislatures enacted statutes which lowered the standard of care drivers owed to "guest passengers" (defined as those who were transported gratuitously, rather than as fare-paying patrons of a railroad, taxicab, etc.). Failure to use ordinary care was insufficient to establish liability; instead, a plaintiff needed to establish that the driver acted with either willful, wanton, or reckless (or all three!) behavior regarding the passenger's safety. The rationale for such statutes was to protect and encourage the hospitable sharing of automobiles and to prevent collusion between a driver and a passenger in seeking insurance awards.

More recently, these statutes have been superseded, either through legislative reform (as in Washington (RCW 46.080.080, repealed, Laws of 1974)) or through equal-protection constitutional challenges (as in Utah, *Malan v. Lewis*, 693 P.2d 661 (Utah 1984)). Only a few states still have such statutes and further changes seem likely. For a history of the decline of automobile guest statutes,

see PROSSER & KEETON, § 34.

§ C. Worker's Compensation

WOLF v. SCOTT WETZEL SERVICES, INC.

113 Wash. 2d 665, 782 P.2d 203 (1989)

ANDERSEN, Justice

In this case we are presented with the question of whether the Industrial Insurance Act bars an employee from bringing a civil action, outside the workers' compensation system, against the claims administrator of a self-insured employer for wrongful delay or termination of workers' compensation benefits.

The parties have stipulated to the following facts. On April 27, 1979, Scott Wolf injured his lower back while working as a truck driver for St. Regis Lumber Company in Marysville. While driving his truck near Mt. Vernon, he noticed that his load of lumber had shifted. He injured his lower back while attempting to lift a 4x16x22 timber back into place. Mr. Wolf's claim was administered by Scott Wetzel Services, Inc. Scott Wetzel Services contracted with St. Regis to manage its worker's compensation claims, for which St. Regis is self-insured pursuant to R.C.W. Chapter 51.14. From the date of his injury until November 7, 1979, Mr. Wolf received time loss compensation and payment of medical bills from St. Regis. On November 7, 1979, Gary Ladd of Scott Wetzel Services terminated time loss compensation to Mr. Wolf based on a report from Wolf's attending physician, Dr. Charles Anderson, that Mr. Wolf was capable of gainful employment. In January 1980, Mr. Wolf and his new treating physician, Dr. Richard McCollum, asked Scott Wetzel Services to pay for psychiatric treatment, suggesting that his back injury may have contributed to psychological problems. At that time, Mr. Ladd denied this request. On February 14, 1980, Mr. Ladd recommended to the Department of Labor & Industries that the claim be closed. The Department closed the claim by order dated that same day, February 14, 1980, with time loss compensation as paid and a permanent partial disability award for five percent of the maximum for unspecified disabilities. This was for low back injuries only and did not contemplate any award for psychological impairments. On appeal, the Board of Industrial Insurance Appeals reversed the Department by order dated June 25, 1980, re-opening the claim for all purposes, including psychiatric care. Since that time, Scott Wetzel Services has paid for Mr. Wolf's visits with his psychiatrist, Dr. Jules Sicotte, pursuant to the Board's order. At this time, Mr. Wolf's worker's compensation claim is still open. Mr. Wolf filed the present lawsuit [in Superior Court] in November 1982, alleging that the initial refusal by Scott Wetzel Services to pay for psychiatric care constitutes bad faith administration of his worker's compensation claim. The specific allegation in the complaint is that "within three years last past, defendant has, by many words, acts and deeds (of omission as well as commission), tortiously withheld and/or delayed plaintiff's workmen's compensation benefits proximately resulting in great injury to plaintiff...." Mr. Wolf's claims in this lawsuit are based only on the initial refusal to pay for psychiatric care and what Mr. Wolf believes was premature claim closure, and not on any other alleged conduct.

Scott Wetzel Services, Inc., which administered the self-insurer's workers' compensation claims (and which was the defendant below and is the respondent in this court), moved for summary judgment in the trial court. The motion was based on its claim that exclusive subject matter jurisdiction over disputes of this kind is vested in the Department of Labor and Industries. The Superior Court granted the motion and dismissed Mr. Wolf's claims for lack of subject matter jurisdiction. Mr. Wolf then sought direct review in this court. We agreed and retained the case for decision.[1]

One principal issue is presented.

Issue

Does the Industrial Insurance Act bar an employee from bringing a civil action against a

[1] RAP 4.2.

company, which was hired by a self-insured employer to administer workers' compensation claims, for wrongful delay or termination of benefits?

Decision

Conclusion. The Industrial Insurance Act expressly provides a remedy within the workers' compensation system for wrongful delay or termination of workers' compensation benefits; that is the exclusive remedy for any such wrongful delay or termination.

It has long been recognized that the Industrial Insurance Act (IIA) (RCW Title 51) reflects a quid pro quo compromise between employees and employers.[2] Under the IIA, the employer pays some claims for which it would not be liable under the common law in exchange for limited liability.[3] The employee, on the other hand, gives up common law actions and remedies in exchange for sure and certain relief.[4] As enacted by the Legislature, the IIA accomplishes this quid pro quo compromise through the following exclusive remedy provisions:

> The state of Washington, ... exercising herein its police and sovereign power, declares that *all phases of the premises are withdrawn from private controversy*, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end *all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided*. (Italics ours.) R.C.W. 51.04.010 (part).

> Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, *such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever*:... (Italics ours.) R.C.W. 51.32.010 (part).

Mr. Wolf contends in effect, however, that a civil action for wrongful delay or termination of workers' compensation benefits is not one of the actions abolished by these exclusive remedy provisions. Thus, according to his view, he should be able to maintain the present civil action in the Superior Court, quite apart from the statutory workers' compensation system. We disagree.

Several courts in other jurisdictions have addressed the issue of whether a civil cause of action lies for wrongful delay or termination of workers' compensation benefits.[5] According to Professor Arthur Larson, a leading authority on workers' compensation law, and one whose teachings we have often quoted with approval, "[i]n the *great majority* of these cases, for one reason or another, a cause of action was held *not* to lie." (Italics ours.) 2A A. LARSON, WORKMEN'S COMPENSATION § 68.34(c), at 13-127 to 13-128 (1988).

Courts have held against the existence of such a cause of action for essentially two reasons. First, they have been persuaded by the policies underlying the exclusive remedy provisions of their state workers' compensation statutes.[6] As Professor Larson explains in this connection:

> The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this

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[2] *McCarthy v. Department of Social & Health Servs.*, 110 Wash. 2d 812, 816, 759 P.2d 351 (1988); *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590, 158 P. 256 (1916).

[3] *McCarthy*, 110 Wash. 2d at 816, 759 P.2d 351; *Stertz*, 91 Wash. at 590, 158 P. 256.

[4] *McCarthy*, at 816, 759 P.2d 351; *Stertz*, at 590-91, 158 P. 256.

[5] *See* 2A A. LARSON, WORKMEN'S COMPENSATION § 68.34(c) (1988); Annot., *Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal To Make Payments Due*, 8 A.L.R. 4th 902 (1981).

[6] *See Robertson v. Travelers Ins. Co.*, 95 Ill. 2d 441, 448, 69 Ill. Dec. 954, 448 N.E.2d 866 (1983); 2A A. LARSON § 68.34(c), at 13-145; Annot., 8 A.L.R. 4th 902, § 2.

> possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality. (Footnote omitted.) 2A A. LARSON, § 68.34(c), at 13-145.

Second, courts have been greatly influenced by the fact that workers' compensation statutes typically contain provisions that impose a penalty for wrongful delay or termination of benefits.[7] Courts generally take the view that the presence of such a penalty provision in the workers' compensation statute evinces a legislative intent that the remedy for wrongful delay or termination of benefits remain within the workers' compensation system.[8] Significantly, as will be further discussed in some detail, our IIA contains just such a provision.[9]

Consistent with the foregoing, the Illinois Supreme Court, after exhaustively reviewing the cases on the subject, aptly summarized the reasons for the majority view:

> The rationale of these cases has typically been that the legislature, anticipating that bad faith in delaying payment of benefits would occur on occasion, provided a quick, simple and readily accessible method of resolving disputes over such payments without the proof and defenses incident [to a common law action], the intolerable delay in resolution of a lawsuit, economic waste to all and expense to the worker or the spectre of multiple jurisdictions being engaged in the resolution of the same basic questions with the possibility of conflicting results. (Citations and internal quotation marks omitted.) *Robertson v. Travelers Ins. Co.*, 95 Ill. 2d 441, 448, 69 Ill. Dec. 954, 448 N.E.2d 866 (1983).

A *minority* of courts, on the other hand, have permitted a civil cause of action to lie for the wrongful delay or termination of benefits.[10] It has been the reasoning of these courts that the injury at issue does not arise out of the employment relationship, but rather out of the worker's status as a claimant seeking benefits.[11] They thus conclude that the injury complained of does not fall within the purview of the exclusive remedy provisions of the workers' compensation statute.[12]

* * *

[*The court further affirmed the finding that defendant did not engage in outrageous conduct. Such a finding would have allowed the plaintiff to sue outside the IIA.*]

Mr. Wolf further argues, however, that the exclusive remedy provisions of the IIA apply only to an employer, not to a company hired by the employer to administer workers' compensation claims. Thus, as his argument goes, he should not be barred by the IIA from bringing a civil action against Scott Wetzel Services, Inc., the claims administrator hired by his employer. This argument lacks merit. It is true that the exclusive remedy provisions of the IIA appear to be directed to actions against the employer.[13] It is also true that the IIA allows actions to be brought against "a third person, not in a worker's same employ". R.C.W. 51.24.030(1). However, as Judge Grosse of the Court of Appeals responded to a similar argument in his concurring opinion in *Deeter*, "[t]o permit a right of action against the claims adjuster merely because it is a `third party' would vitiate the policy of [the] IIA." *Deeter v. Safeway Stores, Inc.*, 50 Wash. App. 67, 84, 747 P.2d 1103 (1987) (GROSSE, J., concurring), *review denied*, 110 Wash. 2d 1016 (1988).

* * *

Affirmed.

CALLOW, C.J., and DORE, BRACHTENBACH, DOLLIVER, UTTER,

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[7] 2A A. LARSON § 68.34(c), at 13-145; Annot., 8 A.L.R. 4th 902, § 2.

[8] 2A A. LARSON § 68.34(c), at 13-145.

[9] *See* RCW 51.48.017 (penalty of $500 or 25 percent of amount due assessed for unreasonable delay or refusal to pay benefits).

[10] 2A A. LARSON § 68.34(c), at 13-137 to 13-138.

[11] Annot., 8 A.L.R. 4th 902, § 2.

[12] Annot., 8 A.L.R. 4th 902, § 2.

[13] *See* RCW 51.04.010, 51.32.010.

PEARSON, DURHAM and SMITH, JJ., concur.

Questions and Notes

1. In *Birklid v. Boeing Co.*, 127 Wash.2d 853, 904 P.2d 278 (1995), the Washington Supreme Court permitted employees to sue for injuries received when employees breathed noxious fumes from phenol-formaldehyde resin. Prior to employing this chemical in building airplanes, Boeing had conducted preproduction testing, which was described by Dan Johnson, a Boeing supervisor: "During MR & D layup of phenolic pre-preg, obnoxious odors were present. Employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach. We anticipate this problem to increase as temperatures rise and production increases." When the production process began, several workers requested more effective ventilation, but Boeing declined to provide it, apparently for economic reasons. The court described what happened next: "As Boeing's supervisor predicted, when full production began, workers experienced dermatitis, rashes, nausea, headaches, and dizziness. Workers passed out on the job. Mr. Johnson said he knew these complaints were reactions to working with the phenolic material."

Under the standard announced in *Wolf*, would the employees have a tort claim against their employer, or is it barred by the statutory immunity under the worker's compensation statute?

2. In *Vallandigham v. Clover Park School Dist. No. 400*, 79 P.3d 18 (Wash. App. 2003), special education teachers sued their employer after suffering harm from intentional assaults by students. The teachers claimed that, based on the behavioral profile of the students, the abuse was certain to occur and fell with in the "deliberate intent" exception to the statutory immunity granted to employers. Do you think the teachers' claims would survive the immunity defense?

Chapter 5
Contributory Fault

§ A. The Contributory Negligence Rule

LI v. YELLOW CAB COMPANY OF CALIFORNIA

13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)

SULLIVAN, Justice

In this case we address the grave and recurrent question whether we should judicially declare no longer applicable in California courts the doctrine of contributory negligence, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of comparative negligence, which assesses liability in direct proportion to fault. As we explain in detail *infra*, we conclude that we should. In the course of reaching our ultimate decision we conclude that: (1) The doctrine of comparative negligence is preferable to the "all-or-nothing" doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; (2) judicial action in this area is not precluded by the presence of section 1714 of the Civil Code, which has been said to "codify" the "all-or-nothing" rule and to render it immune from attack in the courts except on constitutional grounds; (3) given the possibility of judicial action, certain practical difficulties attendant upon the adoption of comparative negligence should not dissuade us from charting a new course - leaving the resolution of some of these problems to future judicial or legislative action; (4) the doctrine of comparative negligence should be applied in this state in its so-called "pure" form under which the assessment of liability in proportion to fault proceeds in spite of the fact that the plaintiff is equally at fault as or more at fault than the defendant; and finally (5) this new rule should be given a limited retrospective application.

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 in 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." (REST. 2D 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." (REST. 2D TORTS, § 467.) (Italics added.)

This rule, rooted in the long-standing principle that one should not recover from another for damages brought upon oneself (*see* *Baltimore & P.R. Co. v. Jones* (1877) 95 U.S. 439, 442, 24 L. Ed. 506; *Buckley v. Chadwick* (1955) 45 Cal. 2d 183, 192, 288 P.2d 12, 289 P.2d 242), has been the law of this state from its beginning. (*See* *Innis v. The Steamer Senator* (1851) 1 Cal. 459, 460-461; *Griswold v. Sharpe* (1852) 2 Cal. 17, 23-24; *Richmond v. Sacramento Valley Railroad Company* (1861) 18 Cal. 351, 356-358; *Gay v. Winter* (1867) 34 Cal. 153, 162-163; *Needham v. S.F. & S.J.R. Co.* (1869) 37 Cal. 409, 417-423.) Although criticized almost from the outset for the harshness of its operation, it has weathered numerous attacks, in both the legislative 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 contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.[1] Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task.[2] The basic objection to the

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[1] Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." (PROSSER, TORTS (4th ed. 1971) § 67, p. 433.) Harper and James express the same basic idea: "[T]here is no justification - in either policy or doctrine - for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule." (2 HARPER & JAMES, THE LAW OF TORTS (1956) § 22.3, p. 1207.)

[2] Dean Prosser, in a 1953 law review article on the subject which still enjoys considerable influence, addressed himself to the commonly advanced justificatory arguments in the following terms: "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

doctrine - grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability - remains irresistible to reason and all intelligent notions of fairness.

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, 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." (Prosser, *Comparative Negligence*, *supra*, p. 4; fn. omitted.) (*See also* PROSSER, TORTS, *supra*, § 67, pp. 436-437; Comments of Malone and Wade in *Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* (1968) 21 VAND. L. REV. 889, at pp. 934, 943; ULMAN, A JUDGE TAKES THE STAND (1933) pp. 30-34; *cf.* Comment of Kalven, 21 VAND. L. REV. 889, 901-904.) 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. (*See* Keeton, *Creative Continuity in the Law of Torts* (1962) 75 HARV. L. REV. 463, 505; Comment of Keeton in *Comments on Maki v. Frelk, supra*, 21 VAND. L. REV. 889, at p. 916[3]; Note (1974) 21 UCLA L. REV. 1566, 1596-1597.)

It is in view of these theoretical and practical considerations that to this date 25 states,[4] 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) 280 So. 2d 431.) We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering

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." (Prosser, *Comparative Negligence* (1953) 41 CAL. L. REV. 1, 3-4; fns. omitted. For a more extensive consideration of the same subject, see 2 HARPER & JAMES, *supra*, § 22.2, pp. 1199-1207.) To be distinguished from arguments raised in justification of the "all or nothing" rule are practical considerations which have been said to counsel against the adoption of a fairer and more logical alternative. The latter considerations will be discussed in a subsequent portion of this opinion.

[3] Professor Keeton states the matter as follows in his Vanderbilt Law Review comment: "In relation to contributory negligence, as elsewhere in the law, uncertainty and lack of evenhandedness are produced by casuistic distinctions. This has happened, for example, in doctrines of last clear chance and in distinctions between what is enough to sustain a finding of primary negligence and what more is required to sustain a finding of contributory negligence. Perhaps even more significant, however, is the casuistry of tolerating blatant jury departure from evenhanded application of the legal rules of negligence and contributory negligence with the consequence that a kind of rough apportionment of damages occurs, but in unpoliced, irregular, and unreasonably discriminatory fashion. Moreover, the existence of this practice sharply reduces the true scope of the substantive change effected by openly adopting comparative negligence. [&] Thus, stability, predictability, and evenhandedness are better served by the change to comparative negligence than by adhering in theory to a law that contributory fault bars when this rule has ceased to be the law in practice." (21 VAND. L. REV. at p. 916).
A contrary conclusion is drawn in an article by Lewis F. Powell, Jr., now an Associate Justice of the United States Supreme Court. Because a loose form of comparative negligence is already applied in practice by independent American juries, Justice Powell argues, the "all-or-nothing" rule of contributory negligence ought to be retained as a check on the jury's tendency to favor the plaintiff. (Powell, *Contributory Negligence: A Necessary Check on the American Jury* (1957) 43 A.B.A.J. 1055.)

[4] Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. (SCHWARTZ, COMPARATIVE NEGLIGENCE (1974), Appendix A, pp. 367-369.) In the federal sphere, comparative negligence of the "pure" type (*see Infra*) has been the rule since 1908 in cases arising under the Federal Employers' Liability Act (*see* 45 U.S.C. § 53) and since 1920 in cases arising under the Jones Act (*see* 46 U.S.C. § 688) and the Death on the High Seas Act (*see* 46 U.S.C. § 766.)

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.[5]

The foregoing conclusion, however, clearly takes us only part of the way. It is strenuously and ably urged by defendants and two of the amici curiae that whatever our views on the relative merits of contributory and comparative negligence, we are precluded from making those views the law of the state by judicial decision. Moreover, it is contended, even if we are not so precluded, there exist considerations of a practical nature which should dissuade us from embarking upon the course which we have indicated. We proceed to take up these two objections in order.

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* (K.B. 1809) 103 Eng. Rep. 926 - the enactment of section 1714 of the Civil Code[6] 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. Subsequent cases of this court, it is pointed out, have unanimously affirmed that - barring the appearance of some constitutional infirmity - the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise. The fundamental constitutional doctrine of separation of powers, the argument concludes, requires judicial abstention.

* * *

We have concluded that the foregoing argument, in spite of its superficial appeal, is fundamentally misguided. As we proceed to point out and elaborate below, it 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.

* * *

We think that the foregoing establishes conclusively that the intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance. It remains to determine whether by so doing the Legislature intended to restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability.

* * *

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. (*See*

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[5] 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.

[6] 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." (Italics added.)

generally Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV. 1, 33-37; SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra*, §§ 16.1-16.9, pp. 247-274.)

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. (SEE SCHWARTZ, *supra*, § 17.1, pp. 275-279.) These inherent difficulties are not, however, insurmountable. Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry (*see, e.g.*, SCHWARTZ, *supra*, § 17.1, pp. 278-279), and the utilization of special verdicts[7] 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. (*See* SCHWARTZ, *supra*, § 17.4, pp. 282-291; Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV., pp. 28-33.)

The third area of concern, the status of the doctrines of last clear chance and assumption of risk, involves less the practical problems of administering a particular form of comparative negligence than it does a definition of the theoretical outline of the specific form to be adopted. Although several states which apply comparative negligence concepts retain the last clear chance doctrine (*see* SCHWARTZ, *supra*, § 7.2, p. 134), the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the "all-or-nothing" rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. (*See* SCHWARTZ, *supra*, § 7.2, pp. 137-139; Prosser, *Comparative Negligence*, *supra*, 41 CAL. L. REV., p. 27.) As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed ... that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence.... Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." (*Grey v. Fibreboard Paper Products Co.* (1966) 65 Cal. 2d 240, 245-246, 53 Cal. Rptr. 545, 548, 418 P.2d 153, 156; *see also Fonseca v. County of Orange* (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566; *see generally*, 4 WITKIN, SUMMARY OF CAL. LAW, *Torts*, § 723, pp. 3013-3014; 2 HARPER & JAMES, THE LAW OF TORTS, *supra*, § 21.1, pp. 1162-1168; *cf.* PROSSER, TORTS, *supra*, § 68, pp. 439-441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (*See generally*, SCHWARTZ, *supra*, ch. 9, pp. 153-175.)

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 (*see* REST. 2D TORTS, § 503; PROSSER, TORTS, *supra*, § 65, p. 426), and this is the present rule in California. (*Williams v. Carr* (1968) 68 Cal. 2d 579, 583, 68 Cal. Rptr. 305, 440 P.2d 505.) 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, *supra*, § 65, p. 426.) The thought is that the difference between willful and wanton

[7] It has been argued by one of the amici curiae that the mandatory use of special verdicts in negligence cases would require amendment of section 625 of the Code of Civil Procedure, which reposes the matter of special findings within the sound discretion of the trial court. (*See Cembrook v. Sterling Drug Inc.* (1964) 231 Cal. App. 2d 52, 62-65, 41 Cal. Rptr. 492.) This, however, poses no problem at this time. For the present we impose no mandatory requirement that special verdicts be used but leave the entire matter of jury supervision within the sound discretion of the trial courts.

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. In 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. (SCHWARTZ, *supra*, § 5.3, p. 108.) The law of punitive damages remains a separate consideration. (*See* SCHWARTZ, *supra*, § 5.4, pp. 109-111.)

The existence of the foregoing areas of difficulty and uncertainty (as well as others which we have not here mentioned - *see generally* SCHWARTZ, *supra*, § 21.1, pp. 335-339) has not diminished our conviction that the time for a revision of the means for dealing with contributory fault in this state is long past due and that it lies within the province of this court to initiate the needed change by our decision in this case. Two of the indicated areas *(i.e.*, multiple parties and willful misconduct) are not involved in the case before us, and we consider it neither necessary nor wise to address ourselves to specific problems of this nature which might be expected to arise....

* * *

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, supra*, and it applies by statute in Mississippi, Rhode Island, and Washington. Moreover it is the form favored by most scholars and commentators. (*See e.g.*, Prosser, *Comparative Negligence, supra*, 41 CAL. L. REV. 1, 21-25; PROSSER, TORTS, *supra*, § 67, pp. 437-438; SCHWARTZ, *supra*, § 21.3, pp. 341-348; *Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, *supra*, 21 VAND. L. REV. 889 (Comment by Keeton at p. 906, Comment by Leflar at p. 918.) 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. (*See* authorities cited in SCHWARTZ, *supra*, § 21.3, pp. 344-346; *see also Vincent v. Pabst Brewing Co.* (1970) 47 Wis. 2d 120, 138, 177 N.W.2d 513 (dissenting opinion).)

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."[8] Prosser, *Comparative Negligence, supra*, 41 CAL. L. REV. 1, 25; fns. omitted.) 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

[8] 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. (*See* Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company* (1972) 18 WAYNE L. REV. 3, 50-51.)

of contributory negligence." (Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Company, supra*, 18 WAYNE L. REV. 3, 50; *see also* SCHWARTZ, *supra*, § 21.3, p. 347.)

For all of the foregoing reasons we conclude that the "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Therefore, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. The doctrine of last clear chance is abolished, and the defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; both of these are to be subsumed under the general process of assessing liability in proportion to negligence. Pending future judicial or legislative developments, the trial courts of this state are to use broad discretion in seeking to assure that the principle stated is applied in the interest of justice and in furtherance of the purposes and objectives set forth in this opinion.

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.... Upon mature reflection, in view of the very substantial number of cases involving the matter here at issue which are now pending in the trial and appellate courts of this state, and with particular attention to considerations of reliance applicable to individual cases according to the stage of litigation which they have reached, we have concluded that a rule of limited retroactivity should obtain here. Accordingly we 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.

* * *

The judgment is reversed.

CLARK, Justice (dissenting)

* * *

I dispute the need for judicial - instead of legislative - action in this area. The majority is clearly correct in its observation that our society has changed significantly during the 103-year existence of section 1714. But this social change has been neither recent nor traumatic, and the criticisms leveled by the majority at the present operation of contributory negligence are not new. I cannot conclude our society's evolution has now rendered the normal legislative process inadequate.

Further, the Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best....

* * *

By abolishing this century old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

Questions and Notes

1. The advantages of comparative negligence are widely recognized, reflected in the overwhelming number of jurisdictions that have adopted it. A recent article suggests additional support based upon economic analysis; *see* Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. Legal Stud. 119 (1991). As of 1996, only four states (Alabama, Maryland, North Carolina, and Virginia) retained the contributory negligence rule. Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1 (1996). *See also* Christopher J. Robinette and Paul G. Sherland. *Contributory or Comparative: Which Is the Optimal Negligence Rule?* 24 N. Ill. U. L. Rev. 41 (2003)

2. "Contributory negligence" has a specific legal meaning; it refers to the plaintiff's negligence. Some say that contributory negligence was done away with when comparative negligence was adopted. However, most commentators have retained the term contributory negligence to refer to the phenomenon of a plaintiff's negligence, even though the *treatment* of that phenomenon changed with the adoption of comparative negligence. Thus, although contributory negligence no longer bars a plaintiff's right to recover, it still is assigned a share of fault to be used in reducing (or in so-called "modified" contributory negligence states, potentially barring) a plaintiff's recovery.

3. **Imputed Contributory Negligence.** Just as an employer can be held vicariously liable for the acts of his employee, even if the employer was without fault, courts at one time held plaintiffs vicariously liable for the acts of others, using the doctrine of "imputed contributory negligence." For example, when a passenger was injured in an automobile accident caused in part by the negligence of the driver, some courts would treat the driver as an agent of the passenger, and impute the driver's negligence to the passenger for purposes of applying the contributory negligence rule. Most uses of imputed contributory negligence have fallen to the wayside, either swallowed by theories of comparative fault, prohibited by statute (*e.g.*, R.C.W. 4.22.020, eliminating imputed contributory negligence for spouses and minors) or overturned by case law (*e.g.*, *Buck v. State*, 222 Mont. 423, 723 P.2d 210 (1986) (passengers may be contributorily negligent by choosing to ride with an intoxicated driver but driver's negligence could not be imputed to passengers)). The most significant area where a form of imputed contributory negligence has survived is in cases where a wrongful death action is provided for the relatives of a decedent, but the decedent's contributory fault is imputed to the claims of the surviving relatives.

4. **Seat Belt Defense.** Over half of those states with comparative negligence have made room for the so-called "seat belt defense." Prior to the adoption of comparative fault, the seat belt defense was viewed skeptically by courts, who were afraid that its use might bar otherwise legitimate plaintiffs' claims. A distinction was drawn between negligence that caused the accident itself, and negligence that merely exacerbated the damages. One issue currently pending is whether or not the recently enacted mandatory seatbelt laws will allow a negligence per se instruction. Some jurisdictions have provided to the contrary by statute. (CALIF. VEH. CODE § 27315(j): "In any civil action, a violation [of the seatbelt requirement] ... shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation.") *See generally*, Schwartz, *The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics, and Economics*, 24 IDAHO L. REV. 275 (1988), calling for the defense's incorporation into comparative negligence systems, and *Note on Recent Cases*, 102 HARV. L. REV. 925 (1989) (arguing that a negligence per se finding when seat belt statutes have been violated would best encourage the use of seat belts).

5. One of the most interesting features of the *Li* case is the Court's treatment of the codification of the common law. The debate over how courts should treat statutory modifications of common law is reviewed in G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

§ B. Assumption of Risk

SMITH v. BAKER & SONS

H.L. [1891] 4 All E.L.R. 69

Lord HALSBURY

The action was an action in which the plaintiff sued his employers for injuries sustained while in the course of working in their employment. He was employed in working at a drill where two fellow workmen were engaged in striking with a

hammer at the drill, which he was employed to hold in the proper position. The nature of the employment was one which involved his attention being fixed upon the drill, that it might be held in a proper position when receiving alternate strokes from the hammers wielded by his fellow workmen. The place where he was employed was in a cutting, and in his immediate proximity another set of workmen were engaged in working in the cutting, and taking stones out of it. For the purposes of this operation a steam crane was used, and occasionally, though not invariably, the stones lifted by the crane were swung over the place where the plaintiff was employed. On the occasion which gave rise to the action a stone was swung over the plaintiff, and from some cause not explained, and not attempted to be explained, the stone slipped from the crane, fell upon the plaintiff, and did him serious injury.

The first point attempted to be argued at your Lordships' Bar was that there was no evidence to go to the jury of any negligence. It is manifest upon the notes of the learned county court judge that no such point was taken at the trial, and it is, therefore, perfectly intelligible why no evidence is referred to with respect both to the crane, the manner of slinging the stone, or the mode in which the stone was fastened. Each of these things would have been material to consider if any such question had in fact been raised. I will not myself suggest, or even conjecture, what was the cause of the stone falling, or what precautions ought properly to have been taken against such a contingency. What is, or is not, negligence under such circumstances may depend upon a variety of considerations.

* * *

The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with. The facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice. Giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head, or negligently permitted to fall on him and do him injury.

I am of opinion that the application of the maxim volenti non fit injuria is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall.... I think that a person who relies on the maxim must show a consent to the particular thing done.

* * *

LORD BRAMWELL....

In the course of the argument, I said that the maxim volenti non fit injuria did not apply to a case of negligence; that a person never was volens that he should be injured by negligence, at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is volens to undertake the work. What are maxims but the expression of that which good sense has made a rule.... But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt; in effect he undertook the work with its risks for his wages and no more. He says so. Suppose he had said "If I am to run this risk you must give me 6s. a day and not 5s.," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No, I will only give the 5s."? None. I am ashamed to argue it.

Questions and Notes

1. How would you translate the maxim *volenti non fit injuria*?

2. Why was Lord Bramwell "ashamed to argue" his position?

3. In *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (1929), the plaintiff was injured at an amusement park in Coney Island. He was riding on an attraction called "The Flopper," which challenged the passengers to stay upright. "The tumbling bodies and the screams and laughter supplied the merriment and fun." Judge Cardozo reversed a verdict for the plaintiff, noting "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."

4. Consider Justice Frankfurter's description of this doctrine, often cited in cases and comments on the doctrine:

> 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, undiscriminatingly used to express different and sometimes contradictory ideas. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68 (1963) (FRANKFURTER, J., concurring).

5. "Assumption of Risk" actually covers a variety of different reasons for denying (or reducing) the plaintiff's recovery. Can you identify the distinct reasons in the following three cases?

BROWN v. SAN FRANCISCO BALL CLUB

222 P.2d 19 (Cal. 1950)

Fred B. WOOD, Justice

This is an appeal by plaintiff from a judgment entered upon a directed verdict for the defendant in an action against San Francisco Ball Club, Inc., for damages for personal injuries sustained while attending a professional baseball game at Seals' Stadium, San Francisco.

* * *

Appellant, a woman of 46 years, attended the game as the guest of friends, one of whom furnished and purchased the tickets which were for seats in an unscreened portion of the stadium near the first-base line. The game was in progress when they arrived and about an hour later the accident occurred while the players were changing sides. Appellant was struck by some object and sustained serious injury. Evidence is lacking whether or not it was a baseball, or from what direction it came. However, the motion for directed verdict appears to have been made, and the issues discussed by the parties upon this appeal, upon the assumption that appellant was hit by a baseball, possibly thrown from second to first base, touching the first baseman's glove and passing thence into the stand.

Respondent owned and operated the stadium which had a seating capacity of 18,601, divided into screened and unscreened areas. Approximately 5,000 seats were behind a screen back of the home plate. The remainder were unscreened and in two sections behind the first-base and third-base lines respectively. Tickets for seats were sold at separate windows, one window for each of these three sections, each window marked for a particular section. Patrons decided where they would sit, and went to the appropriate window for their seats. It is generally true of all the games held in this stadium that a great majority of the patrons are situated in the unscreened sections, because they prefer an unobstructed view.

The attendance at this particular game was approximately 5,000. There were many vacant seats in each seating area. Most of the spectators were seated in the first-base and third-base unscreened sections, very few in the home-plate

screened area.

* * *

It would seem necessarily to follow that respondent fully discharged its duty toward appellant, as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them, in fact many more screened seats than were requested. Hence, the injury suffered by her when struck by a thrown ball, while voluntarily occupying an unscreened seat, did not flow from, was not caused by, any failure of performance by respondent of any duty owed to her, and did not give rise to a cause of action in her favor against respondent for damages for such injury.

Appellant seeks to take this case out of the application of the rule upon the theory that she was ignorant of the game of baseball and the attendant risks, hence cannot be said to have knowingly assumed the risk. The point is not well taken. Although she had a limited experience with baseball, she was a mature person in possession of her faculties with nothing about her to set her apart from other spectators and require of her a lower standard of self-protection from obvious, inherent risks than that required of other spectators. She was, at the time of the accident, 46 years of age; had lived in the San Francisco area since 1926; was about to go to a school for training and to have a job as saleswoman in a real estate office;...

We conclude that the evidence herein, viewing it most favorably to the appellant, does not take her outside the application of the rule announced in the *Quin* case; that she assumed the risk of injury in respect to which she complains; that the injury was not caused by any negligence upon the part of the respondent; and that determination thereof was a proper function of the trial court upon motion for directed verdict.

In the absence of negligence upon the part of the respondent, it is unnecessary to consider the question of contributory negligence upon the part of the appellant.

The judgment is affirmed and the appeal from the order denying a new trial is dismissed.

Questions and Notes

1. The liability of baseball parks is considered in Ted J. Tierney, *Heads Up!: The Baseball Facility Liability Act*, 18 N. Ill. U. L. Rev. 601 (1998); and David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. Rev. 339 (2003).

ALSTON v. BLYTHE

88 Wash. App. 26, 943 P.2d 692 (1997)

MORGAN, Judge.

The dispositive issue in this auto-pedestrian case is whether the trial court erred by giving an assumption-of-risk instruction. Holding that it did, we reverse and remand for new trial.

Portland Avenue is an arterial street in Tacoma. Near its intersection with East 29th Street, it has two northbound lanes, two southbound lanes, and a left-turn lane in the center.

On September 20, 1991, Alston started across Portland Avenue on foot.[1] She was walking from east to west, at or near East 29th Street. It is agreed she was not in a marked crosswalk, but the parties contest whether she was in an unmarked crosswalk.

Steven McVay was driving south on Portland Avenue in the inside (easterly) southbound lane. He was operating a tractor with a flatbed trailer. Seeing Alston as she crossed the northbound lanes, he stopped so she could continue across the southbound lanes. Alston alleges he waved her across the southbound lanes, but he denies the allegation. In any event, Alston crossed in front of his truck and stepped into the outside (westerly) southbound lane. At that moment, Michael Blythe was driving his vehicle south in that lane, and his vehicle struck and injured Alston.

* * *

[1] Alston was accompanied by her child, but that fact is not material here.

Alston sued Blythe, McVay, and McVay's employer, Kaelin Trucking, alleging negligence. At the close of the evidence, Alston objected to many of the trial court's instructions, but not to its instruction on contributory negligence. Ultimately, the jury decided that neither McVay nor Blythe had been negligent, and Alston filed this appeal.

Initially, we discuss whether the trial court erred in giving an assumption-of-risk instruction. Then, even though that issue is dispositive, we discuss several additional issues likely to recur on retrial.[75]

I

Alston contends the trial court erred by giving Instruction 13, which stated:

> It is a defense to an action for personal injury that the plaintiff impliedly assumed a specific risk of harm.
>
> A person impliedly assumes the risk of harm, if that person knows of a specific risk associated with a course of conduct, understands its nature, and voluntarily chooses to accept the risk by engaging in that conduct.[76]

Alston objected to this instruction on the ground that it was not supported by the evidence, and on the further ground that it could be misinterpreted to mean that assumption of risk was a complete bar to recovery. She reiterates the same objections on appeal.

Two of the elements of negligence are duty and breach.[77] Thus, a plaintiff claiming negligence must show that the defendant owed a duty of reasonable care to the plaintiff, and that the defendant failed to exercise such care.[78]

Two of the elements of contributory negligence are duty and breach.[79] Thus, a defendant claiming contributory negligence must show that the plaintiff owed a duty to exercise reasonable care for the plaintiff's own safety, and that the plaintiff failed to exercise such care.[80]

The doctrine of assumption of risk has four facets. They are (1) express assumption of risk; (2) implied primary assumption of risk; (3) implied reasonable assumption of risk; and (4) implied unreasonable assumption of risk.[81]

The third and fourth facets, implied

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[75] *See* *Falk v. Keene Corp.*, 53 Wash. App. 238, 246, 767 P.2d 576, aff'd, 113 Wash.2d 645, 782 P.2d 974 (1989).

[76] Clerk's Papers at 334.

[77] *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121, 127-28, 875 P.2d 621 (1994); *Hansen v. Friend*, 118 Wash.2d 476, 479, 824 P.2d 483 (1992); *Mathis v. Ammons*, 84 Wash. App. 411, 415-16, 928 P.2d 431 (1996), review denied, 132 Wash.2d 1008, 940 P.2d 653 (1997); *Doherty v. Municipality of Metro. Seattle*, 83 Wash. App. 464, 469, 921 P.2d 1098 (1996). Other elements, not in issue here, are causation and damages. *Mathis*, 84 Wash. App. at 416, 928 P.2d 431.

[78] *See* *Geschwind v. Flanagan*, 121 Wash.2d 833, 854 P.2d 1061 (1993); *Schooley v. Pinch's Deli Market, Inc.*, 80 Wash. App. 862, 874, 912 P.2d 1044, review granted, 129 Wash.2d 1025, 922 P.2d 98 (1996); *Daly v. Lynch*, 24 Wash. App. 69, 76, 600 P.2d 592 (1979). As we have explained elsewhere, duty in this context involves at least three questions: What is the obligated class, what is the protected class, and what is the standard of care? Breach mirrors duty, and thus also involves three questions: Does the defendant belong to the obligated class, does the plaintiff belong to the protected class, and did the defendant violate the standard of care? Here, we have no need to consider duty and breach in this much detail. *See* *Gall v. McDonald Indus.*, 84 Wash. App. 194, 202, 205, 926 P.2d 934 (1996), review denied, 131 Wash.2d 1013, 932 P.2d 1256 (1997); *Nivens v. 7-11 Hoagy's Corner*, 83 Wash. App. 33, 41, 47, 920 P.2d 241 (1996), review granted, 131 Wash.2d 1005, 932 P.2d 645 (1997); *Schooley*, 80 Wash. App. at 866, 874, 912 P.2d 1044.

[79] *See* *Geschwind*, 121 Wash.2d at 838, 854 P.2d 1061; *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 238, 588 P.2d 1308 (1978). Another element, not in issue here, is that the plaintiff's breach of duty be a cause of plaintiff's own damages. *Price v. Kitsap Transit*, 70 Wash. App. 748, 756, 856 P.2d 384 (1993), aff'd, 125 Wash.2d 456, 886 P.2d 556 (1994); *Alvarez v. Keyes*, 76 Wash. App. 741, 744, 887 P.2d 496 (1995). *See also* *Grobe v. Valley Garbage Serv. Inc.*, 87 Wash.2d 217, 231-232, 551 P.2d 748 (1976).

[80] *Geschwind*, 121 Wash.2d at 838, 854 P.2d 1061; *Alvarez*, 76 Wash. App. at 744, 887 P.2d 496.

[81] *Tincani*, 124 Wash.2d at 143, 875 P.2d 621; *Scott v. Pacific West Mt. Resort*, 119 Wash.2d 484, 496, 834 P.2d 6 (1992); *Kirk v. Washington State Univ.*, 109 Wash.2d 448, 453, 746 P.2d 285 (1987); *Shorter v. Drury*, 103 Wash.2d 645, 655, 695 P.2d 116 (1985); *Leyendecker v. Cousins*, 53 Wash. App. 769, 773, 770 P.2d 675 (1989).

reasonable and implied unreasonable assumption of risk, are nothing more than alternative names for contributory negligence. As the Supreme Court has said, they "involve the plaintiff's voluntary choice to encounter a risk created by the defendant's negligence," and they "retain no independent significance from contributory negligence after the adoption of comparative negligence."[82] In sum, they bear on the plaintiff's duty to exercise ordinary care for his or her own safety.

The first and second facets, express assumption of risk and implied primary assumption of risk, bear not on the plaintiff's duty to exercise ordinary care for his or her own safety, but rather on the defendant's duty to exercise ordinary care for the safety of others. Both facets raise the same question: Did the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff?[83] If the plaintiff did so consent, "the defendant does not have the duty, there can be no breach and hence no negligence."[84] Thus, when either facet applies, it bars any recovery based on the duty that was negated.[85]

Although the first and second facets involve the same idea--the plaintiff's consent to negate a duty the defendant would otherwise have owed to the plaintiff--they differ with respect to the way in which the plaintiff manifests consent.[86] With express assumption of risk, the plaintiff states in so many words that he or she consents to relieve the defendant of a duty the defendant would otherwise have. With implied primary assumption of risk, the plaintiff engages in other kinds of conduct, from which consent is then implied.[87] Consent is an issue of fact for the jury, except when the evidence is such that reasonable minds could not differ.[88]

Because the plaintiff's consent lies at the heart of both express and implied primary assumption of risk, "[i]t is important to carefully define the scope" of that consent.[89] This is done by identifying the duties the defendant would have had in the absence of the doctrine of assumption of risk, and then segregating those duties into (a) those (if any) which the plaintiff consented to negate, and (b) those (if any) which the defendant retained.[90] Like consent itself, the scope of consent is an issue of fact for the jury, unless the evidence is such that reasonable minds could not differ.[91]

These principles mean, among other things, that a trial court may instruct on both contributory negligence and assumption of risk if the evidence produced at trial is sufficient to support two distinct findings: (a) that the plaintiff consented to

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82 *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also* *Leyendecker*, 53 Wash. App. at 774-75, 770 P.2d 675.

83 *Scott*, 119 Wash.2d at 498, 834 P.2d 6; *Kirk*, 109 Wash.2d at 453-54, 746 P.2d 285; *Dorr v. Big Creek Wood Products, Inc.*, 84 Wash. App. 420, 426-27, 927 P.2d 1148 (1996).

84 *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also* *Tincani*, 124 Wash.2d at 143, 875 P.2d 621 (implied primary assumption of risk "is really a principle of no duty, or no negligence, and so denies the existence of the underlying action"); *Dorr*, 84 Wash. App. at 427, 927 P.2d 1148 (implied primary assumption of risk "is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk"); *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

85 *Scott*, 119 Wash.2d at 496-98, 834 P.2d 6; *Dorr*, 84 Wash. App. at 425, 927 P.2d 1148; *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

86 *Kirk*, 109 Wash.2d at 453, 746 P.2d 285; *Leyendecker*, 53 Wash. App. at 773, 770 P.2d 675.

87 *Scott*, 119 Wash.2d at 496-97, 834 P.2d 6; *Kirk*, 109 Wash.2d at 453, 746 P.2d 285; *Dorr*, 84 Wash. App. at 427, 927 P.2d 1148 ("Those who choose to participate in sports or other amusements likely to cause harm to the participant, for example, impliedly consent in advance to excuse the defendant from any duty to protect the participant from being injured by the risks inherent in such activity"); cf. *Foster v. Carter*, 49 Wash. App. 340, 346, 742 P.2d 1257 (1987) (plaintiff elected to participate in BB gun war).

88 *Dorr*, 84 Wash. App. at 431, 927 P.2d 1148.

89 *Scott*, 119 Wash.2d at 497, 834 P.2d 6; *see also* *Kirk*, 109 Wash.2d at 456, 746 P.2d 285 ("plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered.")

90 *See* *Scott*, 119 Wash.2d at 497, 834 P.2d 6.

91 *See* *Dorr*, 84 Wash. App. at 431, 927 P.2d 1148.

relieve the defendant of one or more duties that the defendant would otherwise have owed to the plaintiff, and (b) that the plaintiff failed to exercise ordinary care for his or her own safety.[92] In most situations, however, the evidence will support only the second of these findings, and "an instruction on contributory negligence is all that is necessary or appropriate."[93]

The record in this case contains no evidence that Alston expressly or impliedly consented to relieve either McVay or Blythe of the duty of ordinary care that he owed to her as a matter of law. She merely tried to cross the street in a way that may or may not have involved contributory negligence, depending on whose testimony the jury chooses to believe. The evidence supported an instruction on contributory negligence, but not an instruction on assumption of risk, and Instruction 13 was erroneous.

The defendants argue that Instruction 13 was harmless, but we do not agree. Instruction 13 stated that the defendants had a "defense" (and, by implication, Alston could not recover) if Alston knew of a specific risk associated with crossing the street, understood that risk, and voluntarily chose to cross anyway. Given that the evidence showed nothing more than arguable contributory negligence, this contravened Washington's comparative negligence scheme, and it may well have been the reason the jury rendered a defense verdict. There is a reasonable likelihood that Instruction 13 skewed the verdict, and a new trial is required.[94]

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92 *Dorr*, 84 Wash. App. at 426, 927 P.2d 1148.

93 *Dorr*, 84 Wash. App. at 426, 927 P.2d 1148. In passing, we observe that Division One has expressed skepticism concerning the propriety of some of the Washington Pattern Jury Instructions (WPI) on assumption of risk. *Dorr*, 84 Wash. App. at 430-31, 927 P.2d 1148. Sharing that skepticism, we additionally suggest that the term "assumption of risk" is needlessly confusing, at least when used in jury instructions. When assumption of risk is properly an issue for the jury, the jury should simply be asked to decide whether the plaintiff consented to relieve the defendant of a duty the defendant would otherwise have owed to the plaintiff.

94 *See Hill v. GTE Directories Sales Corp.*, 71 Wash. App. 132, 144, 856 P.2d 746 (1993) (error not prejudicial "unless it is likely the outcome would have been different without it").

KIRK v. WASHINGTON STATE UNIVERSITY

109 Wash. 2d 448, 746 P.2d 285 (1987)

DOLLIVER, Justice

Defendants Washington State University (WSU), its Board of Regents and the Associated Students of WSU appeal from a judgment substantially against them in a personal injury action brought by plaintiff Kathleen Kirk. The plaintiff cross-appeals certain portions of the judgment. We affirm.

In the spring of 1978, Kathleen Kirk, a 20-year-old student at WSU, became a member of its cheerleading team, known as the WSU Yell Squad. The team received funding from both the athletic department and the Associated Students of WSU. The defendants conceded the team was a university-approved student activity. The cheerleaders performed other functions besides attending the games: they attended alumni functions, appeared at promotional functions and parades, and helped in fundraising for WSU. The team also practiced daily. The recruiters told the cheerleaders they "were in public relations."

The team had a faculty advisor, William Davis, from 1971 to 1978. Davis had actively supervised the team and emphasized safety. Sometime in the spring of 1978, Davis was transferred to a different position and replaced by another faculty member who did not attend the cheerleader practices.

In the fall of 1978, the team attempted to use the mat room, where they had practiced previously, but were told not to use that room. As a result, the team conducted its practices on the astroturf surface of Martin Stadium. Other faculty members were aware the astroturf was harder and caused more injuries than nonartificial turf. The cheerleaders were given no warning of the dangers of practicing on the astroturf.

Kirk was injured on October 18, 1978, during a cheerleading practice on the astroturf in preparation for an upcoming game. At the time she was injured the team was practicing shoulder stands. The end result of the maneuver was to have each female cheerleader standing on the shoulders of a male cheerleader. The method of reaching the stand had recently been modified in order to arrive at the completed stand more quickly. Teams in earlier years had performed the stand in the manner shown in pamphlets made available to them, the female placing one foot on the squatting male's upper leg, then one foot on his shoulder, then bringing the other foot up to his other shoulder. These pamphlets had not been made known to the 1978 team. In the modified version being used at the time of Kirk's injury, the female would stand behind the male, take his hands and "pop up", pulled up by the male, so both her feet landed on his shoulders at the same time. The male's hands would transfer immediately to the female's lower calves or ankles while she steadied herself.

Kirk's feet landed on the shoulders of the male cheerleader Mark Winger, but her body tipped backward. Winger had taken hold of her right above her ankles. Kirk stated she told him to let go, but he held her as she fell backward. She landed on the astroturf with her full weight on her left elbow, shattering all three bones in the elbow. Her left ankle was also fractured.

Shortly after Kirk's injury, WSU hired a new program supervisor with 10 years' experience in cheerleading to coach the team.

Kirk's injury to her elbow is permanent. She had surgery on the elbow due to the fractures, and one of the bones in the forearm is no longer connected to the joint. She will have continuing pain and arthritis in the area. She also became very depressed and suicidal after the injury and spent over a month in a psychiatric ward. There was some evidence Kirk had been depressed prior to the injury.

Kirk brought this action against WSU, its Board of Regents, and the Associated Students of WSU. The jury's verdict found the defendants had been negligent, and the negligence proximately caused Kirk's injuries and damages. The jury specifically found the defendants negligent for failure to provide adequate supervision, training, and coaching of the practices; failure to provide safety padding for the outdoor practices; failure to warn regarding the hardness of the astroturf surface; and failure to provide adequate literature regarding the proper and safe method of performing partner (double) stunts. The jury also

found Kirk's own acts or omissions were the proximate cause of 27 percent of her injuries and reduced her damages by that amount. The total judgment for Kirk, including statutory fees and costs, was $353,791.

Both parties appeal various elements of the judgment, and this court granted direct review.

I

The defendants argue the trial court erred in refusing to adopt their proposed instructions regarding assumption of risk. They assert the assumption of risk doctrine should act as a complete bar to recovery and that the facts of this case present substantial evidence to support the proposed instructions to the jury on this issue.

The defendants' proposed instructions 12 and 13 read:

> If plaintiff assumed the risk of harm from attempting to perform a shoulder stunt she may not recover damages for an injury resulting therefrom.
>
> In order for plaintiff to have assumed such risk, she must have had actual knowledge of the particular danger and an appreciation of the risk involved and the magnitude thereof, and must thereafter have voluntarily assumed such risk.
>
> For a person to act voluntarily he must have freedom of choice. This freedom of choice must come from circumstances that provide him a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose himself to the danger in question.
>
> In determining whether the plaintiff assumed such risk, you may consider her maturity, intelligence, experience and capacity, along with all the other surrounding circumstances as shown by the evidence.

The basis of assumption of risk is the plaintiff's consent to assume the risk and look out for herself. Therefore she will not be found, in the absence of an express agreement, to assume any risk unless she had knowledge of its potential danger and the risk is generally recognized as dangerous. This means that she must not only be aware of the facts that created the danger but also must appreciate the nature, character and extent which make it unreasonable. Thus even though the plaintiff might be aware of a potential danger arising from an activity she is engaged in it may appear to her to be so slight as to be negligible. In such a case the plaintiff does not assume the risk and it is not a proper defense to the action.

Kirk in a cross appeal contests instruction 6 given by the court which allowed the jury to reduce Kirk's damages for participating in the decision to perform the stunt in question, participating in the decision to practice on the astroturf, or "[v]oluntarily participating in an activity which she knew to be dangerous and in which she knew she could be hurt by falling."

The issues raised by the parties require this court to review the status of assumption of risk in Washington. The law in effect at the time of the events leading to this action was the 1973 comparative negligence statute, R.C.W. 4.22.010, Laws of 1973, 1st Ex. Sess., ch. 138, § 1, p. 949. The statute has since been superseded by the adoption of comparative fault in 1981. Laws of 1981, ch. 27.

The position of the assumption of the risk doctrine after the adoption of comparative negligence has been the subject of extensive discussion by various courts, including ours, as well as numerous commentators. *See generally* W. KEETON, TORTS § 68 (5th ed. 1984); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 153-180 (2d ed. 1986); 2 F. HARPER & F. JAMES, TORTS 1162-92 (1956 & Supp. 1968); Annot., *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R. 4th 700 (1982); *Shorter v. Drury*, 103 Wash. 2d 645, 695 P.2d 116, *cert. denied*, 474 U.S. 827, 106 S. Ct. 86, 88 L. Ed. 2d 70 (1985); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973). The commentators have agreed the general rubric "assumption of risk" has not signified a single doctrine but rather has been applied to a cluster of different concepts. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444, 452, 87 L. Ed. 610, 143 A.L.R. 967 (1943) (FRANKFURTER, J., concurring); W. KEETON, at 496; F. HARPER & F. JAMES, at 1162. The commentators have identified and labeled four separate concepts to which "assumption of risk" has been applied in the past: express, implied primary, implied reasonable, and implied unreasonable. We recognized this classification scheme in *Shorter*, 103 Wash. 2d at 655, 695 P.2d 116, and will begin with this framework, as explained below, for our current discussion of these issues.

[*The court proceeded to discuss four categories of assumption of risk: express, implied primary, implied reasonable, and implied unreasonable. In this case, the court deemed the plaintiff's assumption of risk as implied reasonable, and tailored their analysis accordingly. Due to the fact that not all jurisdictions have adopted this classification system, the court's discussion of each category's nuances may only lead to confusion, and has therefore been deleted. For the purposes of understanding assumption of risk, the important thing is to be able to understand that the theory, as applied under a specific set of circumstances, may operate to reduce a plaintiff's damages award or act as a complete bar to recovery.*]

With this basic understanding of the existing law of assumption of risk, we turn to the arguments of the parties in this case. The defendants contend they were entitled to have the jury instructed on assumption of risk as a complete bar to any recovery by the plaintiff because the injury occurred during the plaintiff's participation in an athletic activity. We disagree. The appellant misinterprets the nature of the assumption of the risk concept and our earlier opinions on the subject. Assumption of the risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the defendant, the defendant remains liable for that portion.

The use of assumption of risk in this manner can be seen in *Shorter v. Drury, supra*. The court in *Shorter* did not allow express or implied primary assumption of risk to act as a complete bar to recovery by the plaintiff where the defendant's negligence was also a cause of the damages to the plaintiff. *Shorter*, at 657, 695 P.2d 116. The court instead treated the assumption of the risk as a damage-reducing factor, attributing a portion of the causation to the plaintiff's assumption of the risk and a portion to the defendant's negligence.

In *Shorter*, a woman had in writing expressly assumed the risk of her refusal, on religious grounds, to accept any blood transfusions during a medical procedure involving the risk of bleeding even if performed without negligence by the doctor. The doctor did, however, negligently lacerate her during the procedure. She continued to refuse transfusions and bled to death. The trial court instructed the jury:

> If you find that Mr. or Mrs. Shorter assumed a risk which was a proximate cause of Mrs. Shorter's death, you must determine the degree of such conduct, expressed as a percentage, attributable to Mr. and Mrs. Shorter.... Using 100% as to the total combined conduct of the parties (negligence and assumption of the risk) which contributed to the damage to the plaintiff, you must determine what percentage of such conduct is attributable to Mr. or Mrs. Shorter. *Shorter*, at 653-54, 695 P.2d 116.

Thus, the *Shorter* court treated the plaintiff's assumption of the risk as a damage-reducing factor rather than a complete bar in cases where the defendant's negligence caused some portion of the plaintiff's damages. *See also Lyons*, 83 Wash. 2d at 96, 515 P.2d 821 ("the calculus of balancing the relative measurements of fault inevitably incorporates the degree to which the plaintiff assumed the risk").

We find support for this approach to the issue of assumption of risk in the language of Professor Schwartz:

> A rigorous application of implied assumption of risk as an absolute defense could serve to undermine seriously the general purpose of a comparative negligence statute to apportion damages on the basis of fault. This is perhaps the reason that every commentator who has addressed himself to this specific problem has agreed that plaintiff should not have his claim barred if he has impliedly assumed the risk, but rather that this conduct should be considered in apportioning damages under the statute. (Footnotes omitted.) V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5, at 180 (2d ed. 1986).

He notes only one jurisdiction "vigorously applies" assumption of risk as an absolute defense after the adoption of comparative negligence. V. SCHWARTZ, at 180 n.78.

We also find support for our position in the opinions of numerous courts, including our own, holding a plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered. *Regan v. Seattle*, 76 Wash. 2d 501, 458 P.2d 12 (1969) (driver of "go-cart" on race course does not assume unknown risk of spilled water on the course); *Wood v. Postelthwaite*, 6 Wash. App. 885, 496 P.2d 988 (1972), *aff'd*, 82 Wash. 2d 387, 510 P.2d 1109 (1973) (golfer does not assume unknown, unforeseen risk of being hit by golf ball due to inadequate warning but may assume other known risks inherent in the game); *Miller v. United States*, 597 F.2d 614 (7th Cir. 1979) (swimmer in public lake did not assume risk of diving off pier into too shallow water); *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983) (participant in recreational flag football game did not voluntarily assume risk for injuries inflicted by another player in violation of the rules); *Leahy v. School Bd.*, 450 So. 2d 883 (Fla. Dist. Ct. App. 1984) (high school football player injured during a drill did not assume risks of improper supervision and inadequate safety equipment); *Rieger v. Zackoski*, 321 N.W.2d 16 (Minn. 1982) (spectator who walked onto raceway after auto race did not assume all risks of unauthorized vehicles racing around the track; defendant 32 percent negligent); *Shurley v. Hoskins*, 271 So. 2d 439 (Miss. 1973) (hunter did not assume risk of being negligently shot by companion); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 82 A.L.R.2d 1208 (1959) (skater did not assume risks of unusually hard and slippery ice at defendant's rink, even though known); *Rutter v. Northeastern Beaver Cy. Sch. Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981) (high school football player did not voluntarily assume all risks of playing "jungle" football at coaches' request without equipment); *Meese v. Brigham Young Univ.*, 639 P.2d 720 (Utah 1981) (student beginner skier did not assume unknown risk of improperly adjusted bindings fitted by defendant; defendant 75 percent responsible for plaintiff's injuries); *Sunday v. Stratton Corp.*, 136 Vt. 293, 390 A.2d 398 (1978) (skier did not assume unknown risk of becoming entangled in brush concealed by the snow).

In the present case, the trial court did not err in rejecting proposed instructions regarding assumption of the risk as a complete bar to recovery. Although express and implied primary assumption of the risk remain valid defenses, they do not provide the total defense claimed by the defendant. Implied unreasonable assumption of the risk has never been considered a total bar to recovery in comparative negligence jurisdictions.

Kirk in her cross appeal argues the trial court erred in allowing the jury to consider assumption of the risk in any manner, even as a damage-reducing factor. Kirk argues even if she did assume certain risks that contributed to her injuries, her conduct in doing so was reasonable and should not be used to reduce her damages. This contention requires us to determine the status of implied reasonable assumption of the risk, the last remaining category. Its status had been left undecided by our earlier opinions.

One commentator has proposed implied reasonable assumption of risk should not be allowed to reduce a plaintiff's damages in any way. W. KEETON, at 497-98. There are several weaknesses in this approach, however, which lead us not to adopt it. First, Professor Keeton proposed this treatment of implied reasonable assumption of risk in part to counter the harsh effects of the absolute bar to recovery approach for express and implied primary assumption of risk. *See* W. KEETON, at 497 (proposed approach prevents implied reasonable assumption of risk from acting as "*an absolute bar*" (italics ours)). Since we have not adopted that harsh approach, we see no reason to adopt this exception to it. Second, other commentators have not favored providing special treatment for this rather elusively defined category. *See* V. SCHWARTZ, at 156-57, 180; RESTATEMENT (SECOND) OF TORTS § 496C, comment g, at 572 (1965). We favor the reasoning of Professor Schwartz allowing implied reasonable assumption of risk to be given to the jury as a factor for consideration:

> The reasoning ... that *reasonable* implied assumption of risk should not serve to diminish the amount of plaintiff's recovery ... is seriously flawed. When a person's conduct under the facts is truly voluntary and when he knows of the specific risk he is to encounter, this is a form of responsibility or fault that the jury should

> evaluate. Those who argue that the "jury cannot do this" have not met too many jurors.... When a plaintiff engages in classic assumption of risk conduct, he is *in part* responsible for his injury. V. SCHWARTZ, at 180.

We do note this form of assumption of the risk is still subject to the voluntariness element assumption of the risk; even though the plaintiff's conduct may be reasonable it must still be shown to be voluntary in order to warrant an instruction of assumption of the risk. *See* *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 174, 191 Cal. Rptr. 578, 587 (1983) ("[u]nless the plaintiff has reasonable alternatives available to him, he cannot be said to have voluntarily assumed the risk").

The trial court below therefore did not err in allowing the jury to consider the conduct of the plaintiff, including implied reasonable assumption of risk, in reaching its findings reducing the damages.

* * *

Questions and Notes

1. For a proposal to apply assumption of risk narrowly to those cases involving abnormally dangerous activities by plaintiffs, *see* DeWolf and Hander, *Assumption of Risk and Abnormally Dangerous Activities: A Proposal*, 51 Mont. L. Rev. 161 (Winter 1990).

Chapter 6
Multiple Tortfeasors

§ A. Overview and Statutory Excerpts

Introductory Note. The application of comparative fault principles is complicated enough when the plaintiff sues only one defendant. However, it is quite common (probably more common than not, particularly in cases where large dollar amounts are at stake) for the plaintiff to sue multiple defendants. In Chapter Two we looked at mass tort cases (*e.g.*, the DES cases) in terms of the causation problems. Even where causation questions can be answered satisfactorily, there are numerous problems associated with allocating liability among multiple defendants, particularly when one or more of the defendants is immune, or has settled, or is insolvent, or is beyond the jurisdiction of the court. Although full coverage of these issues cannot be hoped for, an appreciation of some of the problems is essential for an understanding of modern tort law.

This chapter focuses heavily on using statutes to determine how joint tortfeasors are to be treated. The discussion begins with excerpts from three different statutes: two are actual statutes, and the third is a model statute drafted by the American Law Institute.

Idaho Code (1990 Supplement)

§§ 6-801 to 6-806

§ 6-801. Comparative negligence or comparative responsibility - Effect of contributory negligence.

Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

§ 6-802. Verdict giving percentage of negligence or comparative responsibility attributable to each party.

The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence or comparative responsibility attributable to the person recovering. Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

§ 6-803. Contribution among joint tortfeasors - Declaration of right - Exception - Limited joint and several liability.

(1) The right of contribution exists among joint tortfeasors, but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(2) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not

extinguished by the settlement.

(3) The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsections (5), (6) and (7) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.

(4) As used herein, "joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

(5) A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party.

(6) Any cause of action arising out of violation of any state or federal law or regulation relating to hazardous or toxic waste or substances or solid waste disposal sites.

(7) Any cause of action arising from the manufacture of any medical devices or pharmaceutical products.

§ 6-804. Common law liabilities preserved.

Nothing in this act affects: (1) The common law liability of the several joint tortfeasors to have judgment recovered and payment made from them individually by the injured person for the whole injury shall be limited to causes of action listed in section 6-803, Idaho Code. However, the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors.

§ 6-805. Effect of release of one tortfeasor on liability of others.

(1) A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if such amount or proportion is greater than the consideration paid.

(2) A release by the injured person of one (1) or more tortfeasors who are not jointly and severally liable to the injured person, whether before or after judgment, does not discharge another tortfeasor or reduce the claim against another tortfeasor unless the release so provides and the negligence or comparative responsibility of the tortfeasor receiving the release is presented to and considered by the finder of fact, whether or not the finder of fact apportions responsibility to the tortfeasor receiving the release.

§ 6-806. Effect of release of one tortfeasor on his liability for contribution to others - Limits on application of section.

A release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. This section shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action.

Oregon Revised Statutes

Title 18 (1989)

§ 18.455. Covenant not to sue; effect; notice.

(1) When a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death or claimed to be liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but the claimant's claim against all other persons specified in ORS 18.470 (2) for the injury or wrongful death is reduced by the share of the obligation of the tortfeasor who is given the covenant, as determined under ORS 18.480 and 18.485; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

(2) When a covenant described in subsection (1) of this section is given, the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims.

§ 18.470. Contributory negligence not bar to recovery; comparative negligence standard; third party complaints.

(1) Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant. This section is not intended to create or abolish any defense.

(2) The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:

(a) Who is immune from liability to the claimant;

(b) Who is not subject to the jurisdiction of the court; or

(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.

(3) A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:

(a) The fault of the third party defendant or the fault of the person who settled with the claimant; and

(b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.

(4) Any party to an action may seek to establish that the fault of a person should not be considered by the trier of fact by reason that the person does not meet the criteria established by subsection (2) of this section for the consideration of fault by the trier of fact.

(5) This section does not prevent a party from alleging that the party was not at fault in the matter because the injury or death was the sole and exclusive fault of a person who is not a party in the matter.

§ 18.475. Doctrines of last clear chance and implied assumption of risk abolished.

(1) The doctrine of last clear chance is abolished.

(2) The doctrine of implied assumption of the risk is abolished.

§ 18.480. Special questions to trier of fact; jury not to be informed of settlement.

(1) When requested by any party the trier of fact shall answer special questions indicating:

(a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault.

(b) The degree of fault of each person specified in ORS 18.470 (2). The degree of each person's fault so determined shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 18.470.

(2) A jury shall be informed of the legal effect of its answer to the questions listed in subsection (1) of this section.

(3) The jury shall not be informed of any settlement made by the claimant for damages arising out of the injury or death that is the subject of the action.

(4) For the purposes of subsection (1) of this section, the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 18.470 (2).

§ 18.485. Liability of defendants several only; determination of defendants' shares of monetary obligation; reallocation of uncollectible obligation; parties exempt from reallocation.

(1) Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint.

(2) In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 18.480 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS 18.480. The court shall calculate and state in the judgment a monetary amount reflecting the share of the obligation of each person specified in ORS 18.470 (2). Each person's share of the obligation shall be equal to the total amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS 18.480.

(3) Upon motion made not later than one year after judgment has become final by lapse of time for appeal or after appellate review, the court shall determine whether all or part of a party's share of the obligation determined under subsection (2) of this section is uncollectible. If the court determines that all or part of any party's share of the obligation is uncollectible, the court shall reallocate any uncollectible share among the other parties. The reallocation shall be made on the basis of each party's respective percentage of fault determined by the trier of fact under ORS 18.480. The claimant's share of the reallocation shall be based on any percentage of fault determined to be attributable to the claimant by the trier of fact under ORS 18.480, plus any percentage of fault attributable to a person who has settled with the claimant. Reallocation of obligations under this subsection does not affect any right to contribution from the party whose share of the obligation is determined to be uncollectible. Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant, reallocation under this subsection does not affect continuing liability on the judgment to the claimant by the party whose share of the obligation is determined to be uncollectible.

(4) Notwithstanding subsection (3) of this section, a party's share of the obligation to a claimant may not be increased by reason of reallocation under subsection (3) of this section if:

(a) The percentage of fault of the claimant is equal to or greater than the percentage of fault of the party as determined by the trier of fact under ORS 18.480; or

(b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact under ORS 18.480.

(5) If any party's share of the obligation to a claimant is not increased by reason of the application of subsection (4) of this section, the amount of that party's share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subsection (4) of this section, including the claimant, in the same manner as otherwise provided for reallocation under subsection (3) of this section.

(6) This section does not apply to:

(a) A civil action resulting from the violation of a standard established by Oregon or federal statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in ORS 466.005, hazardous substance, as defined in ORS 453.005 or radioactive waste, as defined in ORS 469.300.

(b) A civil action resulting from the violation of Oregon or federal standards for air pollution, as defined in ORS 468A.005 or water pollution, as defined in ORS 468B.005.

§ 18.490. Setoff of damages not allowed.

Setoff of damages shall not be granted in actions subject to ORS 18.470 to 18.490.

Uniform Comparative Fault Act
Uniform Law Commissioners (1977)

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgement is entered, the court shall

determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief][causes of action] accruing after its effective date.

Questions and Notes

1. The Uniform Comparative Fault Act has not been adopted in its entirety by any state; it has, however, served as a template for comparative fault systems in a number of states. For example, the reallocation provisions for joint and several liability, contained in § 2(d), have been adopted in Florida (FLA. STAT. § 768.59), Michigan (MICH. STAT. § 600.6304), Minnesota (MINN. STAT. ANN. § 604.02), and Missouri (MO. STAT. § 537.067). Washington and Iowa have comparative fault systems that adopted the percentage method of calculating settlement credit. For a survey of each state, see HENRY. WOODS & BETH DEERE, COMPARATIVE FAULT (3d ed. 1996).

§ B. Joint and Several Liability

LAUBACH v. MORGAN

588 P.2d 1071 (Okla. 1978)

DOOLIN, Justice

This appeal arose out of a suit for damages resulting from a three car collision. The circumstances surrounding the accident itself are immaterial to the appeal. Plaintiff Laubach sued defendants Morgan and Martin. Defendant Martin cross-petitioned against defendant.[38] The case was tried to a jury under 23 O.S. 1975 Supp. §§ 11, 12, Oklahoma's version of comparative negligence. The jury returned a verdict in favor of plaintiff, finding he was damaged in the amount of $4,000.00. The jury apportioned the negligence of the parties in the following manner:

Plaintiff's negligence.....30 percent
Defendant Martin's
negligence .....50 percent
Defendant Morgan's
negligence .....20 percent

The trial court entered judgment giving plaintiff recovery against defendants Morgan and Martin in the amount of $4,000.00, reduced by plaintiff's negligence in the amount of 30%, for a total of $2,800.00. Morgan appeals.

Martin also filed a brief as appellant. However, she did not file a petition in error and her brief takes a contrary position to Morgan's. We will therefore consider her as an appellee.

In 1973, the 34th Legislature of the State of Oklahoma enacted comparative negligence statutes (23 O.S. 1977 Supp. §§ 11, 12) based on an Arkansas statute[39] which provided for a "modified" comparative negligence system,[40] thereby abolishing the common law doctrine that contributory negligence of a plaintiff will preclude

[38] On Martin's cross-petition, the jury found her damages to be $530.15, 40 percent attributable to her negligence and 60 percent to co-defendant Morgan. This portion of the award is not appealed.

[39] 23 O.S. 1977 Supp. § 11 provides:

> Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of lesser degree than the negligence of any person, firm, or corporation causing such damage.
>
> In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed *is of lesser degree than any negligence of the person, firm, or corporation causing such damage*; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence. (Emphasis supplied).

The Arkansas statute, from which this statute was patterned, is virtually identical to Oklahoma's. It has since that time been repealed and replaced by a statute based upon fault. *See* ARK. STATS. ANN. §§ 27-1763-1765.

[40] Under Oklahoma's "modified comparative negligence" system a plaintiff may recover if his negligence is less than the defendant's. Under "pure comparative negligence" a plaintiff is allowed to recover something regardless of the percentage of his fault.

his recovery. The theory of contributory negligence originated in 1809 in England with the case of *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). By 1940, England had decided the doctrine no longer met present day needs and contributory negligence was abandoned and overruled. At present in the United States, around thirty-three states have adopted, either judicially or by statute, some type of comparative negligence system.[41]

Oklahoma's very general comparative negligence statute is admittedly ambiguous in reference to situations involving multiple parties such as we have here. When two or more defendants are involved, its application becomes unclear and the need for definitive guidelines from this court is readily apparent.

The first problem concerns whether a negligent plaintiff will or will not be allowed to recover, under the language of § 11. Is a plaintiff's negligence to be compared with the combined negligence of all defendants, or should it be compared to each defendant's individually? The first issue submitted by Morgan in his appeal is that under our statute, because he was found to be less negligent than plaintiff, there should be no judgment entered against him. In the alternative he suggests he should be responsible only for 20% of the award.

Under Morgan's first theory of comparison of negligence, as the number of defendants increases, the likelihood of a plaintiff's recovery may diminish. For example assume a plaintiff is found to be 40 percent negligent. If only one defendant is involved, plaintiff will recover 60 percent of his damages. If two more defendants are liable and the 60 percent negligence is equally distributed among them, plaintiff would recover nothing because he was more negligent than each defendant. We believe this is an unsatisfactory construction.

Two state courts in decisions cited to us by the parties have come to opposite conclusions. In Wisconsin in the above situation, plaintiff recovers nothing.[42] In Arkansas, he would be entitled to judgment.

In *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20, 8 A.L.R.3d 708 (1962), the Arkansas Supreme Court interpreted its statute, to allow a plaintiff's negligence to be compared to the Combined negligence of all defendants. In *Walton* this principle entitled the plaintiff, determined by a jury to be only ten percent negligent, to recover from one of the defendants who was also ten percent negligent. The Arkansas court stated the basic purpose of the comparative negligence statute was to distribute the total damages among those who cause them. It was convinced the Legislature, in enacting comparative negligence did not mean to go any further than to deny a plaintiff recovery, when his negligence was at least 50 percent of the cause of damages.[43] We agree.

We are not unmindful that this interpretation is not of universal acceptance. As indicated above, Wisconsin has come to a different conclusion. We believe the Arkansas approach is the better view. A plaintiff's recovery is not thereby jeopardized by the fact that multiple tortfeasors are involved. Further, if one state adopts a statute from another, it is presumed to adopt the construction placed upon that statute by the highest court of the other state.[44] Accordingly we adopt the rationale of *Walton v. Tull, supra*, and hold, in an action based on comparative negligence, a plaintiff's percentage of negligence is to be compared with the aggregate negligence of all defendants combined, and if the plaintiff is less than 50 percent negligent he shall be entitled to recovery from each negligent defendant. Plaintiff here is entitled to recover from both Morgan and Martin.

This brings us to a second problem involved concerning multiple tortfeasors. Historically, if the negligence of two or more tortfeasors caused a single and indivisible injury, the concurrent

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41 *See generally* HEFT AND HEFT, COMPARATIVE NEGLIGENCE MANUAL (1971) and 1977 Supp.

42 *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

43 Texas, Nevada and Connecticut have expressly provided by statute that multiple defendants are to be treated as a unit for purpose of deciding issue of whether or not a plaintiff committed less or greater degree of negligence than defendants. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.6 pp. 256-260 (1974). *Also see Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973) and *Rawson v. Lohsen*, 145 N.J. Super. 71, 366 A.2d 1022 (1976) which follows Wisconsin rule.

44 *Baker v. Knott*, 494 P.2d 302 (Okl. 1972); *Chesmore v. Chesmore*, 484 P.2d 516 (Okl. 1971).

tortfeasors would be liable "in solidium," each being liable for the total amount of the award, regardless of his percentage of responsibility. Each defendant was jointly and severally liable for the entire amount of damages. This principle of entire liability is of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party.

In the present case, under the theory of joint and several liability, plaintiff may collect his entire award from Morgan. The unfairness of this approach is magnified where, as in Oklahoma, no contribution is available among joint tortfeasors.[45] In states where contribution is allowed, by judicial decision or through the Uniform Contribution Among Tortfeasors Act, this inequity is somewhat relieved.[46]

Some jurisdictions have taken care of the multiple party problems through various, but by no means uniform, statutory provisions in conjunction with their comparative negligence statutes.[47] Absent specific legislation, this court must augment our statutory scheme to meet the intent and underlying principle of comparative negligence, which is founded on attaching total responsibility to each person whose lack of care contributed to the damages. We therefore must make one of two possible decisions.

1. Allow "comparative contribution" among joint tortfeasors in proportion to the party's negligence.[48]

2. Do away with the "entire liability rule" and provide that multiple tortfeasors are severally liable only, thus each defendant will be liable only for the percentage of the award attributable to him.[49]

We opt for the second solution. This in effect drastically changes the theory of joint-tortfeasors.[50] So be it.

Under the common law system of contributory negligence, a plaintiff who was guilty of even slight negligence, could recover nothing. The law balanced this possible inequity by allowing a plaintiff who was found to be legally "pure" because he was not even slightly negligent, to collect his entire judgment from any defendant who was guilty of "even slight negligence". The adoption of comparative negligence, even in the modified form, gives judgment to any plaintiff whose negligence is less than 50 percent. There is no longer a need to compensate a "pure" plaintiff. By doing away with joint liability a plaintiff will collect his damages from the defendant who is responsible for them.

This solution does not affect our rules against contribution which will continue to control when the proportion of negligence attributable to each defendant is not determined, for example where negligence is imputed. Under our comparative negligence system, a jury sets liability in a precise manner. If a jury is capable of apportioning fault between a plaintiff and defendant, it should be no more difficult for it to allocate fault among several defendants. Holding a defendant tortfeasor, who is only 20 percent at fault, liable for entire amount of damages is obviously inconsistent with the

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[45] 12 O.S. 1971 § 831 dealing with contracts has not been applied to joint tortfeasors. *See* *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 434 P.2d 238 (Okl. 1967).

[46] Arkansas has retained the concept of joint and several liability. *See Walton v. Tull*, *supra*; *Wheeling Pipe Line, Inc. v. Edrington*, 535 S.W.2d 225 (Ark. 1976). However, Arkansas has adopted a version of the Uniform Contribution Among Tortfeasors Act which allows pro rata contribution. *See* 9 U.L.A. 235.

[47] For example Texas adopted its comparative negligence statutes at the same time as Oklahoma, but it provides answers to a variety of issues. The Texas statute provides each defendant is jointly and severally liable for entire amount, except that a defendant whose negligence is less than that of the plaintiff is liable only for that portion of the judgment which represents the percentage of negligence attributable to him. Our statute results in more uncertainty and thus more litigation. *See* Keeton "*Comparative Negligence the Oklahoma Version*," 10 TUL. L. R. 19 (1975).

[48] This is Wisconsin's solution. *See* *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (Wis. 1962).

[49] *See* Fleming, *Comparative Negligence at Last By Judicial Choice*, 64 CAL. L. R. 239 (1976).

[50] We do not deal here with such problems as imputed or vicarious liability, where negligence of two or more tortfeasors is treated as a unit, so that so far as the comparative negligence doctrine is concerned it is the same as if only one defendant is involved. Neither do we attempt to discuss problems involved when a plaintiff does not sue all those who are potentially responsible for injuries, such as situations involving hit and run.

equitable principles of comparative negligence as enacted by the Legislature. We should allow a jury to apportion fault as it sees fit. Joint and several liability then will only exist where, for some reason, damages cannot be apportioned by the jury. By abrogating joint liability, a simple general verdict between plaintiff and each defendant may be made.[51] In this situation no problem of contribution arises, because no defendant has a basis upon which to seek contribution from a co-defendant.

It is argued this could work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrongdoer is always with us, whether there is one defendant or many. We decline to turn a policy decision on an apparition. There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent.

An examination of the law of other jurisdictions shows no two statutory or judicial schemes to be identical or even similar to ours.[52] There appears to be no pattern related to the consequences of the elimination of the bar of contributory negligence upon the question of joint versus several liability of co-defendants. We call your attention to an appellate California decision on this subject, *American Motorcycle Association v. Superior Court*, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977). Although the decision in this case was recently overruled[53] its rationale is very persuasive. Further the appendix to that decision is an exhaustive compilation as to each jurisdiction's treatment of multiple tortfeasors under its comparative negligence system.

Our comparative negligence statutes are incomplete both in scope and detail as to how it should be applied to multiple parties. The underlying principle of comparative negligence is founded on attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage. The logical extension of this doctrine would apply it as among multiple tortfeasors as well as between plaintiff and defendant. If liability attaches to each tortfeasor in proportion to his comparative fault, there will be no need for added litigation by defendants seeking contribution. The adoption of the theory of comparative fault satisfies the need to apportion liability without invading the Legislature's power to grant contribution. "The only completely satisfactory method of dealing with the situation is to bring all parties into court in a single action to determine the damages sustained by each, and to require that each bear a proportion of the total loss according to his fault."[54]

We therefore REVERSE and REMAND the proceeding to trial court with directions to enter judgment against each defendant in accordance with his degree of negligence as found by the jury, Martin for 50% And Morgan 20% Of total damages of $4,000.00.

WILLIAMS, IRWIN, BERRY, BARNES and SIMMS, JJ., concur.

HODGES, C.J., and LAVENDER, V.C.J., dissent.

Rehearing denied.

WILLIAMS, IRWIN, BARNES, SIMMS, HARGRAVE and OPALA, JJ., concur.

HODGES, C.J., and LAVENDER, V.C.J., dissent.

Questions and Notes

1. An important prerequisite for a finding of joint and several liability is a finding that there was a single (indivisible) injury to the plaintiff. In general, indivisible injuries are those in which multiple tortfeasors are responsible for a single result. On the other hand, divisible injuries (as the term implies) can be caused by multiple tortfeasors, but result in distinguishable injuries. For example, if two cars collide in an intersection, causing one of the cars to jump the curb and hit a pedestrian on the sidewalk, the pedestrian can sue

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[51] *See Contribution Act Construed Should Joint and Several Liability Have Been Considered First?* 30 U. MIAMI L. R. 747 (1976).

[52] *See* annotations at 8 A.L.R.3d 722 and 53 A.L.R.3d 184.

[53] *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

[54] Prosser, *Comparative Negligence*, 51 MICH. L. R. 465 (1953).

both drivers for the indivisible injuries caused by the collision. On the other hand, if two cars are driven negligently in unrelated incidents, and one runs over the plaintiff's leg, while the other runs over the plaintiff's arm, each defendant can claim that the injuries are divisible, and each should be liable only for the damage caused by his or her negligent act. For a general discussion, *see* PROSSER AND KEETON, § 52.

BOYLES v. OKLAHOMA NATURAL GAS CO.

619 P.2d 613 (Okla. 1980)

OPALA, Justice

The issues presented by these appeals are: (1) Did the trial court err in sustaining Oklahoma Natural Gas Company's (ONG) demurrer to plaintiff's evidence? (2) Did the trial court err in refusing to instruct the jury that it apportion liability among the defendants in proportion to the percentage of causal negligence it finds attributable to each? (3) Was it error to instruct the jury on defendant's violation of a local municipal ordinance? (4) Did refusal of a requested jury instruction that liability cannot be supported by one inference placed upon another constitute reversible error? (5) Did the trial court err in allowing testimony of a city mechanical inspector as to certain custom and usage in the trade? (6) Is the jury's verdict tainted by an inconsistency in finding both the building owner and its contractor-plumber negligent?

We hold that: (1) ONG's demurrer was properly sustained; (2) there was no error in refusing to instruct the jury to apportion the several defendants' liability; (3) the jury instruction with respect to the ordinance was free from error; (4) the refusal to submit the requested instruction was not prejudicial and reversible error; (5) specific allegation of custom was not a necessary predicate for the admitted testimony as to certain trade practice; and (6) the jury verdict is not inconsistent since there was evidentiary basis upon which the jury could find both codefendants-owner and plumber-negligent by reason of separate acts.

A passerby [Plaintiff] was injured in an explosion which leveled a building owned by Canteen Corporation [Owner], one of four codefendants. The building had been occupied as a restaurant. It was equipped with a "fire suppression system". The device, attached to the structure's gas pipes directly above the cooking equipment, functioned in conjunction with a gas valve that, in the event of a fire, would automatically shut off the gas.

Owner engaged Accurate Fire Equipment Company [Accurate], another codefendant, to install three identical fire suppression systems at a different location. The system that was in place in the vacant restaurant was to be dismantled and used as one of the three to be installed. An employee of Accurate, who had removed the fire suppression system, did not take out the automatic gas valve which was a part of it. Later, when other employees of Accurate were waiting to begin installation of the system at the new location, they were instructed to "pick up" the missing gas valve from the vacant building. They then removed the valve. In the process they left uncapped the gas pipe they had cut for this purpose. Several months later, during the winter, water froze in the vacant building and its pipes burst. The Owner engaged Carder Plumbing Company (Carder), a third codefendant, to restore heat and prevent refreezing. One of Carder's plumbers turned on the gas into the building and within an hour an explosion occurred in which plaintiff was injured. Plaintiff brought suit against the Owner, ONG, Carder and Accurate to recover damages for injuries sustained in the gas explosion alleged to have been caused by defendants' negligence. The trial court sustained ONG's demurrer to plaintiff's evidence and a jury verdict found against the remaining three defendants. Accurate did not appeal. Owner and Carder brought separate appeals which stand consolidated for decision.

* * *

II

ERROR IN JURY'S FAILURE TO ASSESS PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO EACH DEFENDANT

The Owner and Carder assert error in trial court's refusal to instruct the jury separately to assess against each of the defendants the

percentage of negligence found attributable to each. Both the Owner and Carder argue that *Laubach v. Morgan*, Okl., 588 P.2d 1071 (1978), should have been applied here to the multiple tortfeasors in a negligence action. If apposite, *Laubach* would require that the negligence of each party be separately assessed.

Laubach was a comparative negligence case, within the meaning of 23 O.S. Supp. 1978 § 11, Repealed by Okla. Sess. L. 1979, c. 38 § 4 and replaced by 23 O.S. Supp. 1979 § 13, in which the plaintiff was found partially at fault in producing his injury. Here, we are concerned not with comparative negligence, but rather with an admittedly blame-free plaintiff seeking recovery from multiple tortfeasors whose negligence is said to have "concurred, commingled and combined" to produce the harm.

The common-law negligence liability concept may be described as "all or nothing" to the plaintiff. If he be blame-free "all" is due him; if he be at fault, however slightly, "nothing" is his due. The statutory comparative negligence approach allows the victim at fault to secure some, but not all, of his damages. The raison d'être and rationale of comparative negligence are tied, hand-and-foot, to the narrow parameters of a blameworthy plaintiff's claim. McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence - A Puzzling Choice*, 32 OKLA. L. REV. 1, 11 and 12 (1979). We hold that neither the rationale nor the holding of *Laubach* applies to that class of negligence litigation in which the plaintiff is not one among several negligent co-actors.

Several liability, fashioned in *Laubach*, was held applicable in a comparative negligence context where the plaintiff was found to be one of several negligent co-actors. There is absolutely nothing in *Laubach* to negate the continued force of the common-law rule of joint and several liability in those negligent torts which fall completely outside the purview of our comparative negligence legislation.[1] Although some of the language in *Laubach* appears sweeping at first blush,[2] it is to be viewed as limited to cases in which the trier is called upon to compare between the plaintiff's want of care on the one hand, and that of one or more defendants on the other hand. Several reasons militate in favor of this conclusion. No foundation exists for extending *Laubach*'s proportionate-fault-assessment doctrine to multiple negligent tortfeasors in all cases. The states which have abrogated joint and several liability have done so - if at all - only within the context of comparative negligence and quite limitedly at that.[3] Absent an express legislative abrogation, no jurisdiction has found it necessary completely to abolish the common-law liability rule. Except as modified in *Laubach* for comparative negligence cases, the common-law rule of joint and several tortfeasors' liability remained unaltered and in force when the claim here under review arose and at the time it came for adjudication.[4] That rule casts - not on the

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[1] 23 O.S. Supp.1979 § 13. Our new comparative negligence provision remains yet to be interpreted. *Laubach* dealt with its antecedent version.

[2] The pertinent language in *Laubach*, *supra* note 5 at 1074, provides: "2. Do away with the `entire liability rule' and provide multiple tortfeasors are severally liable only,... This in effect drastically changes the theory of joint-tortfeasors." At page 1075 the opinion states: "Joint and several liability then will only exist where, for some reason, damages cannot be apportioned by the jury." *See also* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence - A Puzzling Choice*, *supra* note 7 at 27.

[3] Arkansas has retained the concept of joint and several liability. *Walton v. Tull*, 356 S.W.2d 20, 26 (Ark. 1962); *Wheeling Pipe Line, Inc. v. Edrington*, 535 S.W.2d 225, 226 (Ark. 1976). California also retained joint and several liability rule, finding, along with the great majority of jurisdictions, that it does not conflict with comparative negligence theory. *See American Motorcycle Ass'n. v. Superior Court*, 578 P.2d 899, 901 (Cal. 1978). Texas' comparative negligence statute provides that each defendant is jointly and severally liable for the entire amount, except that a defendant whose negligence is less than that of the plaintiff is liable only for that portion of the judgment which is attributable to him. Wisconsin provides for "comparative contribution" among joint tortfeasors in proportion to the party's negligence. *See Bielski v. Schulze*, 114 N.W.2d 105, 108 (Wis. 1962).

[4] *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, Okl., 434 P.2d 238, 240 (1967); *Okla. Ry. Co. v. Ivery*, 201 Okl. 245, 204 P.2d 978, 982 (1949); *Selby Oil and Gas Co. v. Rogers*, 94 Okl. 269, 221 P. 1012, 1013 (1924); *Northup v. Eakes*, 72 Okl. 66, 178 P. 266, 268 (1919). Our newly enacted statute on contribution among tortfeasors, Okla. Sess. L. 1978, c. 78 § 1, 12 O.S. Supp. 1978 § 832, became effective October 1, 1978, which date is subsequent to both the occurrence of the harm and the rendition of the judgment in this case.

blameless victim - but on each of the legally vanquished wrongdoers the risk of an insolvent tortfeasor. Because of the recognized difficulty in apportioning fault in most instances, the common-law rule allocates liability as an integrity. In so doing it strives to afford an injured plaintiff full and just satisfaction of the adjudged obligation. Note, *Multiple Party Litigation Under Comparative Negligence in Oklahoma - Laubach v. Morgan*, 13 TULSA L. J. 266, 269 and 280 (1977).

In the instant case there was but a single injury. Implicit in the jury's verdict is its finding that the separate and independent acts of negligence on the part of the codefendants concurred and combined to produce the harmful result for which damages were sought.[5] Even though concert among the tortfeasors was lacking and the act of one codefendant alone may not have brought about the result, each is at common law responsible for the entire damage. There is no statutory warrant for a conclusion that the common-law rule was to be scuttled in order to alter the legal obligation owed by negligent co-actors to a fault-free tort claimant.

We hold *Laubach* does not apply to tort litigation in which the injured party is not a negligent co-actor.

* * *

[5] *Green v. Sellers*, Okl., 413 P.2d 522, 528 (1966); *W.L. Hulett Lumber Co. v. Bartlett-Collins Co.*, 206 Okl. 93, 241 P.2d 378, 383 (1952); *Oklahoma Ry. Co. v. Ivery*, *supra* note 11.

AMERICAN MOTORCYCLE ASS'N v. SUPERIOR COURT

578 P.2d 899 (Cal. 1978)

TOBRINER, Justice

Three years ago, in *Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, we concluded that the harsh and much criticized contributory negligence doctrine, which totally barred an injured person from recovering damages whenever his own negligence had contributed in any degree to the injury, should be replaced in this state by a rule of comparative negligence, under which an injured individual's recovery is simply proportionately diminished, rather than completely eliminated, when he is partially responsible for the injury. In reaching the conclusion to adopt comparative negligence in *Li*, we explicitly recognized that our innovation inevitably raised numerous collateral issues, "[t]he most serious [of which] are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties." (13 Cal. 3d at p. 823, 119 Cal. Rptr. at p. 87, 532 P.2d at p. 1239.) Because the *Li* litigation itself involved only a single plaintiff and a single defendant, however, we concluded that it was "neither necessary nor wise" (13 Cal. 3d at p. 826, 119 Cal. Rptr. 858, 532 P.2d 1226) to address such multiple party questions at that juncture, and we accordingly postponed consideration of such questions until a case directly presenting such issues came before our court. The present mandamus proceeding presents such a case, and requires us to resolve a number of the thorny multiple party problems to which *Li* adverted.

For the reasons explained below, we have reached the following conclusions with respect to the multiple party issues presented by this case. First, we conclude that our adoption of comparative negligence to ameliorate the inequitable consequences of the contributory negligence rule does not warrant the abolition or contraction of the established "joint and several liability" doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. Contrary to petitioner's contention, we conclude that joint and several liability does not logically conflict with a comparative negligence regime. Indeed, as we point out, the great majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability rule; we are aware of no judicial decision which intimates that the adoption of comparative negligence compels the abandonment of this long-standing common law rule. The joint and several liability doctrine continues, after *Li*, to play an important and legitimate role in protecting the ability of a negligently injured person to obtain adequate compensation for his injuries from those tortfeasors who have negligently inflicted the harm.

Second, although we have determined that *Li* does not mandate a diminution of the rights of injured persons through the elimination of the joint and several liability rule, we conclude that the general principles embodied in *Li* do warrant a reevaluation of the common law equitable indemnity doctrine, which relates to the allocation of loss among multiple tortfeasors. As we explain, California decisions have long invoked the equitable indemnity doctrine in numerous situations to permit a "passively" or "secondarily" negligent tortfeasor to shift his liability completely to a more directly culpable party. While the doctrine has frequently prevented a more culpable tortfeasor from completely escaping liability, the rule has fallen short of its equitable heritage because, like the discarded contributory negligence doctrine, it has worked in an "all-or-nothing" fashion, imposing liability on the more culpable tortfeasor only at the price of removing liability altogether from another responsible, albeit less culpable, party.

Prior to *Li*, of course, the notion of apportioning liability on the basis of comparative fault was completely alien to California common law. In light of *Li*, however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. As we explain, many jurisdictions which have adopted comparative negligence have

embraced similar comparative contribution or comparative indemnity systems by judicial decision. Such a doctrine conforms to *Li*'s objective of establishing "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal. 3d at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232.)

Third, we conclude that California's current contribution statutes do not preclude our court from evolving this common law right of comparative indemnity. In *Dole v. Dow Chemical Company* (1972) 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, the New York Court of Appeals recognized a similar, common law partial indemnity doctrine at a time when New York had a contribution statute which paralleled California's present legislation. Moreover, the California contribution statute, by its own terms, expressly subordinates its provisions to common law indemnity rules; since the comparative indemnity rule we recognize today is simply an evolutionary development of the common law equitable indemnity doctrine, the primacy of such right of indemnity is expressly recognized by the statutory provisions. In addition, the equitable nature of the comparative indemnity doctrine does not thwart, but enhances, the basic objective of the contribution statute, furthering an equitable distribution of loss among multiple tortfeasors.

Fourth, and finally, we explain that under the governing provisions of the Code of Civil Procedure, a named defendant is authorized to file a cross-complaint against any person, whether already a party to the action or not, from whom the named defendant seeks to obtain total or partial indemnity. Although the trial court retains the authority to postpone the trial of the indemnity question if it believes such action is appropriate to avoid unduly complicating the plaintiff's suit, the court may not preclude the filing of such a cross-complaint altogether.

In light of these determinations, we conclude that a writ of mandate should issue, directing the trial court to permit petitioner-defendant to file a cross-complaint for partial indemnity against previously unjoined alleged concurrent tortfeasors.

1. The facts

In the underlying action in this case, plaintiff Glen Gregos, a teenage boy, seeks to recover damages for serious injuries which he incurred while participating in a cross-country motorcycle race for novices. Glen's second amended complaint alleges, in relevant part, that defendants American Motorcycle Association (AMA) and the Viking Motorcycle Club (Viking) the organizations that sponsored and collected the entry fee for the race negligently designed, managed, supervised and administered the race, and negligently solicited the entrants for the race. The second amended complaint further alleges that as a direct and proximate cause of such negligence, Glen suffered a crushing of his spine, resulting in the permanent loss of the use of his legs and his permanent inability to perform sexual functions. Although the negligence count of the complaint does not identify the specific acts or omissions of which plaintiff complains, additional allegations in the complaint assert, inter alia, that defendants failed to give the novice participants reasonable instructions that were necessary for their safety, failed to segregate the entrants into reasonable classes of equivalently skilled participants, and failed to limit the entry of participants to prevent the racecourse from becoming overcrowded and hazardous.[1]

AMA filed an answer to the complaint, denying the charging allegations and asserting a number of affirmative defenses, including a claim that Glen's own negligence was a proximate cause of his injuries. Thereafter, AMA sought leave of court to file a cross-complaint, which purported to state two causes of action against Glen's parents. The first cause of action alleges that at all relevant times Glen's parents (1) knew that motorcycle racing is a dangerous sport, (2) were "knowledgeable and fully cognizant" of the training and instruction which Glen had received on the handling and operation of his motorcycle, and (3) directly participated in Glen's decision to enter the race by signing a parental consent form.

[1] Glen's second amended complaint is framed in six counts and names, in addition to AMA and Viking, numerous individual Viking officials and the Continental Casualty Company of Chicago (AMA's insurer) as defendants. In addition to seeking recovery on the basis of negligence, plaintiff claims that various defendants (1) were guilty of fraud and misrepresentation in relation to the race, (2) acted in bad faith in refusing to settle a medical reimbursement claim allegedly covered by insurance and (3) intentionally inflicted emotional distress upon him. Only the negligence claim, however, is relevant to the present proceeding.

This initial cause of action asserts that in permitting Glen's entry into the race, his parents negligently failed to exercise their power of supervision over their minor child; moreover, the cross-complaint asserts that while AMA's negligence, if any, was "passive," that of Glen's parents was "active." On the basis of these allegations, the first cause of action seeks indemnity from Glen's parents if AMA is found liable to Glen.

In the second cause of action of its proposed cross-complaint, AMA seeks declaratory relief. It reasserts Glen's parents' negligence, declares that Glen has failed to join his parents in the action, and asks for a declaration of the "allocable negligence" of Glen's parents so that "the damages awarded [against AMA], if any, [may] be reduced by the percentage of damages allocable to cross-defendants' negligence." As more fully explained in the accompanying points and authorities, this second cause of action is based on an implicit assumption that the *Li* decision abrogates the rule of joint and several liability of concurrent tortfeasors and establishes in its stead a new rule of "proportionate liability," under which each concurrent tortfeasor who has proximately caused an indivisible harm may be held liable only for a portion of plaintiff's recovery, determined on a comparative fault basis.

The trial court, though candidly critical of the current state of the law, concluded that existing legal doctrines did not support AMA's proposed cross-complaint, and accordingly denied AMA's motion for leave to file the cross-complaint. AMA petitioned the Court of Appeal for a writ of mandate to compel the trial court to grant its motion, and the Court of Appeal, recognizing the recurrent nature of the issues presented and the need for a speedy resolution of these multiple party questions, issued an alternative writ; ultimately, the court granted a peremptory writ of mandate. In view of the obvious statewide importance of the questions at issue, we ordered a hearing in this case on our own motion. All parties concede that the case is properly before us.

2. The adoption of comparative negligence in *Li* does not warrant the abolition of joint and several liability of concurrent tortfeasors.

In evaluating the propriety of the trial court's ruling, we begin with a brief review of the established rights of injured persons vis a vis negligent tortfeasors under current law. Under well-established common law principles, a negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause; stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was the sole proximate cause of the injury, but only that such negligence was a proximate cause. (*See generally* 4 WITKIN, SUMMARY OF CAL. LAW (8th ed. 1974) *Torts*, § 624, pp. 2906-2907 and cases cited; REST. 2D TORTS, §§ 432, subd. (2), 439.) This result follows from Civil Code section 1714's declaration that "[e]very one is responsible ... for an injury occasioned to another by his want of ordinary care or skill...." A tortfeasor may not escape this responsibility simply because another act either an "innocent" occurrence such as an "act of God" or other negligent conduct may also have been a cause of the injury.

In cases involving multiple tortfeasors, the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is a proximate cause has commonly been expressed in terms of "joint and several liability." As many commentators have noted, the "joint and several liability" concept has sometimes caused confusion because the terminology has been used with reference to a number of distinct situations. (*See, e.g.*, PROSSER, LAW OF TORTS (4th ed. 1971) §§ 46, 47, pp. 291-299; 1 HARPER & JAMES, LAW OF TORTS (1956) § 10.1, pp. 692-709.) The terminology originated with respect to tortfeasors who acted in concert to commit a tort, and in that context it reflected the principle, applied in both the criminal and civil realm, that all members of a "conspiracy" or partnership are equally responsible for the acts of each member in furtherance of such conspiracy.

Subsequently, the courts applied the "joint and several liability" terminology to other contexts in which a preexisting relationship between two individuals made it appropriate to hold one individual liable for the act of the other; common examples are instances of vicarious liability between employer and employee or principal and agent, or situations in which joint owners of property owe a common duty to some third party. In these situations, the joint and several liability concept reflects the legal conclusion that one individual may be held liable for the consequences of the negligent act of another.

In the concurrent tortfeasor context, however, the "joint and several liability" label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, noted above, that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

Prior to *Li*, of course, a negligent tortfeasor's liability was limited by the draconian contributory negligence doctrine; under that doctrine, a negligent tortfeasor escaped liability for injuries which he had proximately caused to another whenever the injured person's lack of due care for his own safety was also a proximate cause of the injury. In *Li*, however, we repudiated the contributory negligence rule, recognizing with Dean Prosser that "[p]robably the true explanation [of the doctrine's development in this country was] that the courts [of the 19th century] 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." (13 Cal. 3d at p. 811, fn.4, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231 (quoting Prosser, *Comparative Negligence* (1953) 41 CAL. L. REV. 1, 4)); *cf. Dillon v. Legg* (1968) 68 Cal. 2d 728, 734-735, 69 Cal. Rptr. 72, 441 P.2d 912.) Concluding that any such rationale could no longer justify the complete elimination of an injured person's right to recover for negligently inflicted injury, we held in *Li* that "in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (13 Cal. 3d at p. 829, 119 Cal. Rptr. at p. 875, 532 P.2d at p. 1243.)

In the instant case AMA argues that the *Li* decision, by repudiating the all-or-nothing contributory negligence rule and replacing it by a rule which simply diminishes an injured party's recovery on the basis of his comparative fault, in effect undermined the fundamental rationale of the entire joint and several liability doctrine as applied to concurrent tortfeasors. In this regard AMA cites the following passage from *Finnegan v. Royal Realty Co.* (1950) 35 Cal. 2d 409, 433-434, 218 P.2d 17, 32: "Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole.... *The reason for imposing liability on each for the entire consequences is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant*. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result." (Emphasis added.) Focusing on the emphasized sentence, AMA argues that after *Li* (1) there is a basis for dividing damages, namely on a comparative negligence basis, and (2) a plaintiff is no longer necessarily "innocent," for *Li* permits a negligent plaintiff to recover damages. AMA maintains that in light of these two factors it is logically inconsistent to retain joint and several liability of concurrent tortfeasors after *Li*. As we explain, for a number of reasons we cannot accept AMA's argument.

First, the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign

some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.

Second, abandonment of the joint and several liability rule is not warranted by AMA's claim that, after *Li*, a plaintiff is no longer "innocent." Initially, of course, it is by no means invariably true that after *Li* injured plaintiffs will be guilty of negligence. In many instances a plaintiff will be completely free of all responsibility for the accident, and yet, under the proposed abolition of joint and several liability, such a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages.

Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others. Although we recognized in *Li* that a plaintiff's self-directed negligence would justify reducing his recovery in proportion to his degree of fault for the accident,[2] the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious. (*See* PROSSER, LAW OF TORTS, *supra*, § 65, p. 418.)

Finally, from a realistic standpoint, we think that AMA's suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the "wronged party should not be deprived of his right to redress," but that "[t]he wrongdoers should be left to work out between themselves any apportionment." (*Summers v. Tice* (1948) 33 Cal. 2d 80, 88, 199 P.2d 1, 5.) The *Li* decision does not detract in the slightest from this pragmatic policy determination.

For all of the foregoing reasons, we reject AMA's suggestion that our adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors....

3. Upon reexamination of the common law equitable indemnity doctrine in light of the principles underlying Li, we conclude that the doctrine should be modified to permit partial indemnity among concurrent tortfeasors on a comparative fault basis.

Although, as discussed above, we are not persuaded that our decision in *Li* calls for a fundamental alteration of the rights of injured plaintiffs vis a vis concurrent tortfeasors through the abolition of joint and several liability, the question remains whether the broad principles underlying *Li* warrant any modification of this state's common law rules governing the allocation of loss among multiple tortfeasors. As we shall explain, the existing California common law

[2] A question has arisen as to whether our *Li* opinion, in mandating that a plaintiff's recovery be diminished in proportion to the plaintiff's negligence, intended that the plaintiff's conduct be compared with each individual tortfeasor's negligence, with the cumulative negligence of all named defendants or with all other negligent conduct that contributed to the injury. The California BAJI Committee, which specifically addressed this issue after *Li*, concluded that "the contributory negligence of the plaintiff must be proportioned to the combined negligence of plaintiff and of all the tortfeasors, whether or not joined as parties ... whose negligence proximately caused or contributed to plaintiff's injury." (Use note, BAJI No. 14.90 (5th ed. 1975 pocket pt.) p. 152.) We agree with this conclusion, which finds support in decisions from other comparative negligence jurisdictions. (*See, e.g.*, *Pierringer v. Hoger* (1963) 21 Wis. 2d 182, 124 N.W.2d 106; *Walker v. Kroger Grocery & Baking Co.* (1934) 214 Wis. 519, 252 N.W. 721, 727-728.) In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner.

equitable indemnity doctrine while ameliorating inequity and injustice in some extreme cases suffers from the same basic "all-or-nothing" deficiency as the discarded contributory negligence doctrine and falls considerably short of fulfilling *Li*'s goal of "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal. 3d at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232.) Taking our cue from a recent decision of the highest court of one of our sister states, we conclude in line with *Li*'s objectives that the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

In California, as in most other American jurisdictions, the allocation of damages among multiple tortfeasors has historically been analyzed in terms of two, ostensibly mutually exclusive, doctrines: contribution and indemnification. In traditional terms, the apportionment of loss between multiple tortfeasors has been thought to present a question of contribution; indemnity, by contrast, has traditionally been viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two. (*See, e.g.*, *Alisal Sanitary Dist. v. Kennedy* (1960) 180 Cal. App. 2d 69, 74-75, 4 Cal. Rptr. 379; *Atchison, T.& S.F. Ry. Co. v. Franco* (1968) 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660.) As we shall explain, however, the dichotomy between the two concepts is more formalistic than substantive,[3] and the common goal of both doctrines, the equitable distribution of loss among multiple tortfeasors, suggests a need for a reexamination of the relationship of these twin concepts. (*See generally* Werner, *Contribution and Indemnity in California* (1969) 57 CAL. L. REV. 490.)

Early California decisions, relying on the ancient law that "the law will not aid a wrongdoer," embraced the then ascendant common law rule denying a tortfeasor any right to contribution whatsoever. (*See, e.g.*, *Dow v. Sunset Tel. & Tel. Co.* (1912) 162 Cal. 136, 121 P. 379.) In 1957, the California Legislature enacted a bill to ameliorate the harsh effects of that "no contribution" rule; this legislation did not, however, sweep aside the old rule altogether, but instead made rather modest inroads into the contemporary doctrine, restricting a tortfeasor's statutory right of contribution to a narrow set of circumstances. We discuss the effect of the 1957 contribution legislation in more detail below; at this point it is sufficient to note that the passage of the 1957 legislation had the effect of foreclosing any evolution of the California common law contribution doctrine beyond its pre-1957 "no contribution" state. Over the past two decades, common law developments with respect to the allocation of loss between joint tortfeasors in this state have all been channeled through the equitable indemnity doctrine.

* * *

Because of the all-or-nothing nature of the equitable indemnity rule, courts were, from the beginning, understandably reluctant to shift the entire loss to a party who was simply slightly more culpable than another. As a consequence, throughout the long history of the equitable indemnity doctrine courts have struggled to find some linguistic formulation that would provide an appropriate test for determining when the relative culpability of the parties is sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other.

A review of the numerous California cases in this area reveals that the struggle has largely been a futile one. (Compare and contrast, *e.g.*, *Gardner v. Murphy* (1975) 54 Cal. App. 3d 164, 168-171, 126 Cal. Rptr. 302; *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230, 237-240, 116 Cal. Rptr. 733; *Kerr Chemicals, Inc. v. Crown Cork & Seal Co.* (1971) 21 Cal. App. 3d 1010, 1014-1017, 199 Cal. Rptr. 162; *Pearson Ford Co. v. Ford Motor Co.* (1969) 273 Cal. App. 2d 269, 271-278, 78 Cal. Rptr. 279; *Aerojet General Corp. v. D. Zelinsky & Sons* (1967) 249 Cal. App. 2d 604, 607-612, 57 Cal. Rptr. 701; *Herrero v. Atkinson* (1964) 227 Cal. App. 2d 69, 73-78, 38 Cal. Rptr. 490;...

As one Court of Appeal has charitably stated: "The cases are not always helpful in determining whether equitable indemnity lies. The test[s]

[3] As Judge Learned Hand observed more than a quarter of a century ago: "[I]ndemnity is only an extreme form of contribution." (*Slattery v. Marra Bros.* (2d Cir. 1951) 186 F.2d 134, 138.)

utilized in applying the doctrine are vague. Some authorities characterize the negligence of the indemnitor as "active," "primary," or "positive," and the negligence of the indemnitee as "passive," "secondary," or "negative." [Citations.] Other authorities indicate that the application of the doctrine depends on whether the claimant's liability is "primary," "secondary," "constructive," or "derivative." [Citations.] These formulations have been criticized as being artificial and as lacking the objective criteria desirable for predictability in the law. [Citations.]" (*Atchison, T.& S.F. Ry. Co. v. Franco, supra*, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664.)

Indeed, some courts, as well as some prominent commentators,[4] after reviewing the welter of inconsistent standards utilized in the equitable indemnity realm, have candidly eschewed any pretense of an objectively definable equitable indemnity test....

[*The court also addressed complaints by amici curiae that adoption of apportioned liability would undermine public policy favoring settlements. The court concluded "that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has recovered in a good faith settlement," rather than reducing the amount according to the settling tortfeasor's proportion of responsibility. The implications of this position are considered below in Justice Clark's dissent. - ed.*]

[4] Dean Prosser was at a loss in attempting to state the applicable standard: "Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a "great difference" in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct." (Fns. omitted.) (PROSSER, LAW OF TORTS, *supra*, § 52, p. 313.)

6. Conclusion

In *Li v. Yellow Cab Co., supra*, this court examined and abandoned the time-worn contributory negligence rule which completely exonerated a negligent defendant whenever an injured plaintiff was partially at fault for the accident, recognizing with Dean Prosser the indefensibility of a doctrine which "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." (13 Cal. 3d at p. 810, fn. 3, 119 Cal. Rptr. at p. 862, 532 P.2d at 1230 (quoting PROSSER, LAW OF TORTS, *supra*, § 67, p. 433).)

In the instant case we have concluded that the force of *Li*'s rationale applies equally to the allocation of responsibility between two or more negligent defendants and requires a modification of this state's traditional all-or-nothing common law equitable indemnity doctrine. Again, we concur with Dean Prosser's observation in a related context that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were ... unintentionally responsible, to be shouldered onto one alone, ... while the latter does scot free." (PROSSER, LAW OF TORTS, *supra*, § 50, p. 307.) From the crude all-or-nothing rule of traditional indemnity doctrine, and the similarly inflexible per capita division of the narrowly circumscribed contribution statute, we have progressed to the more refined stage of permitting the jury to apportion liability in accordance with the tortfeasors' comparative fault.

Accordingly, we hold that under the common law equitable indemnity doctrine a concurrent tortfeasor may obtain partial indemnity from cotortfeasors on a comparative fault basis.

Let a peremptory writ of mandate issue directing the trial court (1) to vacate its order denying AMA leave to file its proposed cross-complaint, and (2) to proceed in accordance with the views expressed in this opinion. Each party shall bear its own costs.

BIRD, C.J., and MOSK, RICHARDSON, MANUEL and SULLIVAN (Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council), JJ., concur.

CLARK, Justice, dissenting

I

Repudiating the existing contributory negligence system and adopting a system of comparative negligence, this court in *Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, repeatedly like the tolling bell enunciated the principle that the extent of liability must be governed by the extent of fault. Thus, the court stated, "the extent of fault should govern the extent of liability" (*id.*, at p. 811, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231), "liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault" (*id.*, at p. 813, 119 Cal. Rptr. at p. 864, 532 P.2d at p. 1232), and "the fundamental purpose of (the rule of pure comparative negligence) shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties" (*id.*, at p. 829, 119 Cal. Rptr. at p. 875, 532 P.2d at p. 1243). And in a cacophony of emphasis this court explained that the "basic objection to the doctrine (of contributory negligence) grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability remains irresistible to reason and all intelligent notions of fairness." (*Id.*, at p. 811, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231.)

Now, only three years later, the majority of my colleagues conclude that the *Li* principle is not irresistible after all. Today, in the first decision of this court since *Li* explaining the operation of the *Li* principle, they reject it for almost all cases involving multiple parties.

The majority reject the *Li* principle in two ways. First, they reject it by adopting joint and several liability holding that each defendant including the marginally negligent one will be responsible for the loss attributable to his codefendant's negligence. To illustrate, if we assume that the plaintiff is found 30 percent at fault, the first defendant 60 percent, and a second defendant 10 percent, the plaintiff under the majority's decision is entitled to a judgment for 70 percent of the loss against each defendant, and the defendant found only 10 percent at fault may have to pay 70 percent of the loss if his codefendant is unable to respond in damages.

The second way in which the majority reject *Li*'s irresistible principle is by its settlement rules. Under the majority opinion, a good faith settlement releases the settling tortfeasor from further liability, and the "plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury." (Ante, p. 199 of 146 Cal. Rptr.) The settlement rules announced today may turn *Li*'s principle upside down the extent of dollar liability may end up in inverse relation to fault.

Whereas the joint and several liability rules violate the *Li* principle when one or more defendants are absent or unable to respond in damages, the settlement rules will ordinarily preclude effecting the majority's principle in cases when all defendants are involved in the litigation and are solvent. To return to my 30-60-10 illustration and further assuming both defendants are solvent, the plaintiff is ordinarily eager to settle quickly to avoid the long delay incident to trial. Further, he will be willing to settle with either defendant because under the majority's suggested rules, he may then pursue the remaining defendant for the balance of the recoverable loss (70 percent) irrespective whether the remaining defendant was 10 percent at fault or 60 percent at fault. The defendants' settlement postures will differ substantially. Realizing the plaintiff is eager for quick recovery and is capable of pursuing the codefendant, the defendant 60 percent liable for the loss will be prompted to offer a sum substantially below his share of fault, probably paying 20 to 40 percent of the loss. The defendant only 10 percent at fault will be opposed to such settlement, wishing to limit his liability. To compete with his codefendant in settlement offers he will be required to offer substantially in excess of his 10 percent share of the loss, again frustrating the *Li* principle that the extent of liability should be governed by the extent of fault. Should he fail to settle, the 10 percent at fault defendant runs the risk that his codefendant will settle early for perhaps half of his own liability, while the lesser negligent person must eventually pay the remainder, not only frustrating the *Li* principle but turning it upside down. In any event, it is extremely unlikely he can settle for his 10 percent share.[5]

[5] In addition, the policy in favor of settlement will be frustrated by the majority's rule that the plaintiff's recovery against nonsettling tortfeasors should be diminished only

Questions and Notes

1. The rule of joint and several liability received severe criticism by the proponents of tort reform. As of 1986, fifteen states had modified the rule of joint and several liability. *See* PROSSER & KEETON, § 84 (1988 Supp.). Similar issues are raised in the next section on joint tortfeasors.

2. An excellent resource for resolving comparative negligence issues is V. SCHWARTZ, COMPARATIVE NEGLIGENCE (4th ed. 2002, with annual supplements).

3. Another resource you may wish to consult is DeWolf, *Several Liability and the Effect of Settlement on Claim Reduction*, 23 GONZ. L. REV. 37, 38-45 (1987/88).

by the amount recovered in a good faith settlement rather than by settling tortfeasor's proportionate responsibility. (*Ante*, p. 604.) As the majority recognize: "Few things would be better calculated to frustrate (section 877's) policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint tortfeasors, and perhaps further liability." (*Id*.) Settlement by one tortfeasor is not going to compel the other tortfeasor to withdraw his cross-complaint for total or partial indemnity. Rather there will be a claim of bad faith because if the jury awards the plaintiff all of the damages sought and concludes that the settling tortfeasor should bear the lion's share of the responsibility for the laws, the settling tortfeasor would have escaped for a small fraction of his actual liability. This alone, although not determinative, would indicate bad faith. (*River Garden Farms, Inc. v. Superior Court* (1973) 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498 ("price is the immediate signal for the inquiry into good faith").)

§ C. The Effect of Settlement

Introductory Note. When the plaintiff enters into a settlement with only one defendant (as distinguished from settling with all of them), there must be a determination of the amount by which the liability of the remaining defendant(s) is reduced. One possibility is simply to deduct the dollar amount (sometimes called in the statute the "consideration") received by the plaintiff in exchange for the release that the plaintiff gives to the settling defendant. Typically a defendant will consider this inadequate. The settling defendant may be primarily responsible for the plaintiff's injury, but be unable to pay more than a modest amount. If the plaintiff is permitted to recover everything from the non-settling defendant except what the settling defendants have already paid, the "last one standing" may get hit with a disproportionate share of the liability. Instead, many jurisdictions have adopted a different system, in which the reduction of the plaintiff's claim is in proportion to the *percentage share* of fault as allocated by the jury. Thus, if the defendant settles with Defendant A for $50,000, and later recovers a judgment against Defendant B after establishing damages in the amount of $500,000, the liability of Defendant B will be determined by deducting Defendant A's *share* of the liability. For example, if the jury determines that Defendant A was 60% at fault in causing the plaintiff's injury, Defendant B would owe $500,000 minus 60% of the damages, or a net judgment against Defendant B of $200,000. Contrast that result with the previous method (sometimes called the "dollar method"), which would have resulted in a judgment against Defendant B of $450,000.

The following case describes the result under a "percentage share" approach, but with some unusual facts.

WASHBURN v. BEATT EQUIPMENT COMPANY

120 Wash.2d 246, 840 P.2d 860 (1992)

BRACHTENBACH, Justice.

This appeal by defendant is from a judgment rendered upon special jury verdicts. The plaintiffs are Norman Washburn and his wife Sharon. Mr. Washburn was extensively burned and permanently injured when a standby propane fuel system caught fire and exploded. The jury awarded plaintiff[12] $6 million and his wife $2 million.

Plaintiffs cross-appeal the calculation of the amount of judgment against defendant, Beatt Equipment Company, which was reduced to a total of $5,670,000. We affirm except to modify the amount of the judgment, for reasons explained hereafter.

We briefly summarize the defendant's contentions. (1) Defendant's principal argument on liability is that plaintiffs' action is barred by a statute of repose. The statute of repose does not protect a manufacturer. The jury was instructed on the definition of "manufacturer". *That instruction was proposed by defendant.* The jury, by special verdict, found as a matter of fact that defendant was a manufacturer, *as defined by defendant.* Further, by special verdict, the jury found that defendant's product was not reasonably safe, *as defined in an instruction to which no exception was taken.* (2) Defendant claims an abuse of discretion in admitting certain photographs. (3) Defendant attacks the size of the verdicts. (4) Defendant claims error in a pretrial procedural ruling.

On October 15, 1986, plaintiff Norman Washburn and a fellow Boeing employee, Scottie Holmes, were at a Boeing/Kent building to test a standby propane fuel system. The propane system had been in place since its construction and installation by defendant in 1969, but had never been put to regular use. Plaintiff turned on the propane and saw there was no pressure showing on the gauge. Before he could investigate, "everything just blew up." Verbatim Report of Proceedings (VRP) vol. 3, at 159.

The building caught fire. Automobiles in the

[12] When we refer to plaintiff in the singular, it is in reference to Norman Washburn.

adjacent parking lot caught fire and exploded. Fire was shooting out of the ground. There was a wall of fire. VRP vol. 3, at 88, 160. Plaintiff and Holmes were both on fire; Holmes was completely aflame. Plaintiff "had fire on his head, his hair, his back." VRP vol. 3, at 91. Plaintiff rolled on the ground, but Holmes ran in circles. Plaintiff ran to help Holmes but caught on fire again. Skin was falling off both of them. Plaintiff helped put out the fire on Holmes and yelled for someone to turn off the propane to prevent the storage tank from exploding. VRP vol. 3, at 160-63.

Holmes died 10 hours later. Plaintiff, with burns on 70 percent of his body, was hospitalized from October 15 to December 24. He underwent six surgeries during that confinement, and four additional surgeries over the next 16 months. His injuries will be described in the discussion of the damages award.

The defendant Beatt Equipment Company was known as Mid-Mountain Contractors when it contracted to construct the pipeline system. It specialized in pipeline excavation and construction in the 11 western states. It had experience in installing gas pipelines, having done about $150 million of work in Washington State alone. Defendant's president agreed that defendant held itself out as an expert in installing pipelines. VRP vol. 5, at 305. Defendant became involved in creation of the standby heating system when a subcontract was awarded to it by Petrolane, which had a contract with Boeing to install a standby propane fuel system at its Kent facility. Defendant was to supply all the piping material, do various finishing processes, and bury the pipeline. Exhibit 26.

There was substantial evidence that defendant did not comply with contract specifications and did not meet industry standards. One expert testified, without objection, that these failures by defendant caused the explosion. VRP vol. 6, at 215. There was expert testimony that the pipe was significantly thinner than called for in the specifications. VRP vol. 6, at 196; vol. 7, at 323. The pipe was not properly prepared before it was welded, wrapped and coated. As a result corrosion was inevitable. VRP vol. 7, at 322, 337-38. The coating which is applied to the welded and wrapped joints is critical to protection against corrosion. The specifications called for a coal tar enamel; defendant used cheaper, less durable and more permeable asphalt coating, and applied a thickness roughly a third less than specified. VRP vol. 5, at 273-83. The thinner coating would "definitely decrease the life of the coating." VRP vol. 5, at 282-83.

A coatings expert testified, without objection, that the improper coating material, applied at less thickness than specified, contributed to the corrosion which caused the explosion. VRP vol. 5, at 283.

The coating was damaged before the pipe was buried. VRP vol. 6, at 204. The backfill material did not meet specifications; consequently chunks of asphalt material damaged the coating. This was a very important defect. VRP vol. 6, at 201-02, 205. The experts testified that the installation was substandard, and that the variations from the specifications and industry standards were "[g]reatly significant." VRP vol. 6, at 199, 211. The experts testified, without objection, that these deficiencies were the proximate cause of the explosion.

* * *

Share of Verdict to Be Paid

Prior to trial three defendants settled and were released by plaintiffs. Petrolane, Inc., paid $780,000 in settlement, Buckeye Gas Products Company paid $520,000, and Washington Natural Gas paid $210,000. As required by RCW 4.22.070(1), the jury in this case apportioned fault among all entities causing plaintiffs' damages. The jury found that defendant Beatt was 80 percent at fault, and that Petrolane, Inc., was 20 percent at fault. The jury determined that Buckeye Gas Products Company, Washington Natural Gas, and other entities (expressly including Boeing) were not at fault.

In a cross appeal, plaintiffs contend that the trial court erred in calculating the amount of the judgment against defendant Beatt. This issue arises because there is a fault-free plaintiff, an at-fault nonsettling defendant, and both at-fault and fault-free settling defendants. It is a complex issue of first impression under RCW 4.22.070. The trial court entered judgment against defendant Beatt by calculating 80 percent of the total verdict of $8 million, with a result of $6,400,000, and then reducing that result by amounts paid by settling fault-free entities, $730,000, for a net amount of $5,670,000.

Initially, defendant contends that plaintiffs'

argument should not be considered since it was not presented to the trial court. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Arguments or theories not presented to the trial court will generally not be considered on appeal. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wash. App. 648, 655, 789 P.2d 118 (1990).

Plaintiffs agree that they did not argue their interpretation of relevant statutes to the trial court, but maintain that the trial court recognized the interpretation as being a possible interpretation of the statute. Plaintiffs urge this court to consider the issue in that the purpose of argument is to apprise the court of an issue, that the trial court here recognized the issue, and that the bench and bar need this court's interpretation on this difficult issue.

While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Bennett v. Hardy*, 113 Wash.2d 912, 917, 784 P.2d 1258 (1990). In order to decide how much defendant Beatt must pay, it is necessary to construe RCW 4.22.070. The record shows that plaintiffs clearly objected to the judgment and the trial judge's comments show he was aware of the construction of RCW 4.22.070 now advanced by plaintiffs. Moreover, despite plaintiffs' concession that they did not argue their present interpretation of the statute to the trial court, part of the argument they now make was advanced to the trial court (regarding whether the trial court erred by allowing a credit, or offset, against the judgment for the amount paid by settling fault-free entities). Clerk's Papers, at 1005-14. We conclude the argument was adequately presented to the trial court; we will review the issue.

Washington's rule before the tort reform act of 1986 was joint and several liability of concurrent and successive tortfeasors. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 235-36 (1987). Where liability was joint and several, each tortfeasor was liable for the entire harm and the injured party could sue one or all of the tortfeasors to obtain a full recovery. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 234-36, 588 P.2d 1308 (1978). The rule was codified at RCW 4.22.030, which prior to the tort reform act of 1986 provided that "[i]f more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several." *See* Laws of 1981, ch. 27, § 11.

The joint and several liability rule developed when another common law rule provided that contributory negligence on the part of the plaintiff, no matter how slight, was a complete bar to recovery. "Conceptually, the question was whether a totally innocent plaintiff should be permitted to recover the full amount of his or her damages from a wrongdoer whose conduct had concurred with that of another wrongdoer to produce a single and indivisible injury or causally unallocable harm." Peck, 62 WASH. L. REV. at 236.

At the common law, contribution was not allowed between joint tortfeasors; however, this rule was increasingly subject to criticism, and in 1981 the right to contribution was established in Washington with the basis for contribution being the comparative fault of the tortfeasors. RCW 4.22.040, .050, .060. However, where there was no joint and several liability, there was no right to contribution. RCW 4.22.050; *George v. Parke-Davis*, 107 Wash.2d 584, 601, 733 P.2d 507 (1987); *Glass v. Stahl Specialty Co.*, 97 Wash.2d 880, 886-87, 652 P.2d 948 (1982).

The rule that plaintiffs' contributory negligence was a complete bar to recovery, like the no-contribution rule, was also subject to criticism. In 1973 comparative negligence was adopted in Washington, under a "pure" comparative negligence scheme which allows a plaintiff to recover some damages even if plaintiff's fault is greater than that of defendant's. Peck, 62 WASH. L. REV. 233, 235-37 (summarizing development of the law).

Largely due to the adoption of the comparative negligence rule, an argument developed against joint and several liability. Given that plaintiff's negligence was no longer a bar to recovery, it was argued that it was unjust to impose joint and several liability on a tortfeasor whose wrong combined with that of plaintiff and others to cause the harm. "In other words, responsibility for harm done should be distributed in proportion to the fault of all of the parties involved and not governed by concepts of causation." Peck, 62 WASH. L. REV. at 238.

In addition to this argument, concerns about affordable liability insurance were voiced to the

Legislature. *See* Laws of 1986, ch. 305, § 100. As a result, RCW 4.22.030 was amended to provide that joint and several liability is the rule for liability on an indivisible claim where there are concurrent and successive tortfeasors "*[e]xcept as otherwise provided in RCW 4.22.070* ...". RCW 4.22.070 was enacted as part of the tort reform act of 1986.

Thus, to decide how much of the $8 million verdict defendant Beatt must pay, we must examine RCW 4.22.070. Our goal is to construe the statute to give effect to the intent of the Legislature. *Yakima v. International Ass'n of Fire Fighters, Local 469*, 117 Wash.2d 655, 669, 818 P.2d 1076 (1991). We look for intent as it is expressed in the language of the statute. *Draper Mach. Works, Inc. v. Department of Natural Resources*, 117 Wash.2d 306, 313, 815 P.2d 770 (1991). Statutes should be read as a whole. *Avlonitis v. Seattle Dist. Court*, 97 Wash.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982). Particularly in this case, the sections of RCW 4.22.070 must be carefully read together because terms of art found in some sections are explained in other sections.

RCW 4.22.070(1) and (1)(b) provide:

> (1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:
>
> ....
>
> (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [*sic*] total damages.

From this part of RCW 4.22.070, it is clear that several liability is now intended to be the general rule.[13] The statute evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity's proportionate share of damages only. The statute also evidences legislative intent that certain entities' share of fault not be at all recoverable by a plaintiff; for example, the proportionate shares of immune parties.

However, under RCW 4.22.070(1)(b), joint and several liability exists where there is a fault-free plaintiff. Significantly, however, the form of joint and several liability which exists where there is a fault-free plaintiff is not, under RCW 4.22.070, the same as the joint and several liability which existed prior to the tort reform act of 1986. Where, prior to the tort reform act of 1986, "pure" joint and several liability enabled a plaintiff to sue one tortfeasor and recover all of his or her damages from one of multiple tortfeasors, RCW 4.22.070(1) and (1)(b) do not permit that.

Under RCW 4.22.070(1)(b), *only* defendants against whom judgment is entered are jointly and severally liable and only for the sum of *their* proportionate shares of the total damages. A defendant against whom judgment is entered is specifically defined by RCW 4.22.070(1) as "each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense ...". Thus, settling, released defendants do not have judgment entered against them within the meaning of RCW 4.22.070(1), and therefore are not jointly and severally liable defendants.

The only jointly and severally liable defendant here is defendant Beatt. Petrolane, Inc., is not a jointly and severally liable defendant because it was released.

RCW 4.22.070(2) provides:

> If a defendant is jointly and severally liable under one of the exceptions listed in

[13] While RCW 4.22.030 suggests that RCW 4.22.070 is an exception to a general rule, RCW 4.22.070 is in fact an exception that has all but swallowed the general rule. Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67, 73 (1986-1988).

> subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

Defendant claims that RCW 4.22.070(2) applies here and directs that RCW 4.22.060 be applied. RCW 4.22.060(2) provides that a claim of a releasing person against other persons is reduced by the amount of the settlement if reasonable. Defendant argues for application of this provision for a credit, or offset, against what a nonsettling defendant has to pay of a total verdict.

Under RCW 4.22.070(2), however, *if* defendants are jointly and severally liable under subsection (1)(a) or (1)(b), *then* those defendants have rights of contribution as to each other, RCW 4.22.040, .050, and the effect of a settlement by such a jointly and severally liable defendant is to be determined under RCW 4.22.060. By its terms, RCW 4.22.070 restricts credits, or offsets, by amounts paid by settling defendants to amounts paid by *jointly and severally liable* settling defendants. In other words, where there is a fault-free plaintiff, RCW 4.22.070(1), (1)(b) and (2) direct application of RCW 4.22.060 *only if* there are jointly and severally liable defendants. Thus, under the plain language of the statute the effect of settlement statute (RCW 4.22.060) does not apply in the circumstances here because there are no settling jointly and severally liable defendants.

Plaintiffs argue, however, that RCW 4.22.070(2) is internally inconsistent with RCW 4.22.070(1)(b). They contend that by referring to jointly and severally liable settling defendants, RCW 4.22.070(2) is inconsistent with that part of subsection (1)(b) which speaks only of joint and several liability with respect to defendants *against whom judgment is entered*.

This argument simply overlooks the plain language of subsection (2). That subsection speaks of defendants who are jointly or severally liable under *either* RCW 4.22.070(1)(a) *or* (1)(b). If liability is under (1)(a) (not the case here), liability is premised on parties who "were acting in concert or when a person was acting as an agent or servant of the party." Liability under subsection (1)(a) is joint and several. With this in mind, it is easy to see why RCW 4.22.070(2) refers to the possibility of jointly and severally liable settling defendants. Where liability is premised on subsection (1)(a), one of two parties acting in concert, or in agency situations, can settle while still being a jointly and severally liable defendant. Further, plaintiffs appear to overlook the possibility of RCW 4.22.070(2) applying to postjudgment settlements.

There is thus no inconsistency between RCW 4.22.070(2) and subsection (1)(b), contrary to plaintiffs' position, and it is clearly possible to give meaningful effect to all the statutory language.

How much of the total verdict must defendant Beatt pay? Under RCW 4.22.070(1) judgment is entered against a defendant "in an amount which represents that party's proportionate share of the claimant's total damages." The jury found defendant 80 percent at fault. Beatt must pay 80 percent of the total verdict. There are no other jointly and severally liable defendants (those against whom judgment has been entered). Defendant Beatt is entitled to no credit or offset for any amounts paid by any settling entities, whether fault-free or at-fault, because none of those entities are jointly and severally liable defendants within the meaning of the express language of RCW 4.22.070. RCW 4.22.070(2) does not apply, and thus does not direct that RCW 4.22.040, .050, or .060 is to be applied. Had there been more than one defendant against whom judgment was entered according to RCW 4.22.070(1), then, as among those defendants, there would have been joint and several liability. If any settling defendants were jointly and severally liable, then RCW 4.22.070(2) would have been applicable.

As a policy matter, defendant argues that if there is no reduction from defendant's proportionate share for amounts paid by settling entities, plaintiff may recover more than plaintiff's actual damages, in contravention of policy favoring only one full recovery for plaintiff.

We note, however, first, that a plaintiff suing only one defendant is in the same position. If the plaintiff settles for more than what a trier of fact might ultimately determine total damages are, plaintiff has more than "one full recovery". Similarly, a plaintiff suing only one defendant may receive less than total damages as a result of the settlement, also a possibility under our holding here. While plaintiff has the possibility of

obtaining a seeming windfall, plaintiff also bears the burden of the possibility of less than full recovery. Unlike the law existing before the tort reform act of 1986, under which a solvent jointly and severally liable tortfeasor might be required to bear the burden of insolvency of other tortfeasors, the law now puts a heavier burden on the plaintiff who settles with an entity for an amount less than that entity's share of fault as determined by the trier of fact.

The truth is, very few cases result in plaintiff obtaining exactly one full recovery, no more and no less, regardless of the method of crediting, or offsetting, used.

Second, defendant is not harmed and cannot complain that it is being asked to pay more than its share of damages resulting from its share of fault. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 431 (Tex.1984).

Amicus Washington State Trial Lawyers Association (WSTLA) argues that settlements should be encouraged, and that they will be encouraged if the sum of the proportionate shares in RCW 4.22.070(1)(b) includes the shares of settling at-fault entities, with judgment against nonsettling defendant(s) offset by the amount of any settlement with at-fault entities. WSTLA reasons that potentially fault-free plaintiffs will be inclined to settle because they will know in advance of trial the consequences of settlement and will not bear the entire risk of an adverse settlement. WSTLA also reasons that since nonsettling defendants will bear the risk of being responsible for the proportionate shares of at-fault settling entities, nonsettling defendants will have a stake in a reasonableness hearing in much the same way as before RCW 4.22.070 was enacted.

For three reasons, this argument is unconvincing. First, RCW 4.22.070(1) provides that "[j]udgment shall be entered against each defendant *except those who have been released by the claimant* ...". (Italics ours.) RCW 4.22.070(1)(b) provides that if the plaintiff is found to be fault-free, "the defendants against whom judgment is entered shall be jointly and severally liable for the sum of *their proportionate shares* of the claimants [*sic*] total damages." Under these provisions, the proportionate share of a released entity is *not* part of the sum of proportionate shares referenced in RCW 4.22.070(1)(b). *See* Peck, 62 WASH. L. REV. 233, 243; Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67, 91 (1986-1988).

Second, WSTLA's argument appears to put the cart before the horse, arguing the necessity of defendant's involvement in reasonableness hearings without demonstrating the necessity of the hearings themselves. We do not address the latter issue, but note that WSTLA'a policy argument assumes their necessity. Deciding the necessity of reasonableness hearings must await another day.

Third, while it can be said in advance of trial that a plaintiff may be potentially fault free, that plaintiff may in fact be found by the trier of fact to be partially at fault. Should that be the case, and if RCW 4.22.070(1)(a) and (3) are inapplicable, then liability in the case of a single indivisible harm will be several only. In such circumstances a plaintiff will bear the risk of any adverse settlement (just as when there is only one defendant, as explained above) with considerable uncertainty about the ultimate recovery following a trial. Given such uncertainty built into RCW 4.22.070's "general rule" of several liability, and the fact that the question of plaintiff's fault is not determined by a trier of fact until close of trial, we have considerable doubt that the Legislature intended that the statute be construed according to the policy argued by WSTLA, particularly in the face of statutory language which contradicts that proposed construction. *See generally* Harris, 22 GONZ.L.REV. 82 (Legislature has shown by provisions of RCW 4.22.070 "that it is not concerned with claimant uncertainty regarding the effects of partial settlement").

We remand with directions to the trial court to modify the judgment entered against Beatt.

* * *

DORE, C.J., and UTTER, ANDERSEN, SMITH, DURHAM and JOHNSON, JJ., concur.

DOLLIVER, Justice (concurring) (omitted).

Chapter 7
Statutes of Limitation

Introduction

One of the most important defenses is that the plaintiff's claim was not filed within the statutory period. This issue is sometimes covered, at least in part, in a civil procedure course. *See* JAMES & HAZARD, CIVIL PROCEDURE, § 4.16. However, the student of torts should be aware that in addition to the procedural issues there are peculiarities within particular fields of tort law where the statute has been specifically modified as part of a "tort reform" package. For example, product liability and medical malpractice reform statutes contain specific provisions for modification of the statute of limitations applying to such claims. *See* Chapters Nine and Ten.

In general, there are three important issues in resolving a statute of limitations case: (1) What limitations period applies to this cause of action? (2) When did the limitation period accrue? and (3) Has the limitation period been tolled for any reason?

§ A. Applying the Correct Limitation Period

DICKENS v. PURYEAR

302 N.C. 437, 276 S.E.2d 325, 335 (1981)

EXUM, Justice

Plaintiff's complaint is cast as a claim for intentional infliction of mental distress. It was filed more than one year but less than three years after the incidents complained of occurred. Defendants moved for summary judgment before answer was due or filed. Much of the factual showing at the hearing on summary judgment related to assaults and batteries committed against plaintiff by defendants. Defendants' motions for summary judgment were allowed on the ground that plaintiff's claim was for assault and battery; therefore it was barred by the one-year statute of limitations applicable to assault and battery. G.S. 1-54(3).

Thus this appeal raises two questions. First, whether defendants, by filing motions for summary judgment before answer was due or filed, properly raised the affirmative defense of the statute of limitations. Second, whether plaintiff's claim is barred by the one-year statute of limitations applicable to assault and battery. We hold that defendants properly raised the limitations defense but that on its merits plaintiff's claim is not altogether barred by the one-year statute because plaintiff's factual showing indicates plaintiff may be able to prove a claim for intentional infliction of mental distress a claim which is governed by the three-year statute of limitations. G.S. 1-52(5). We further hold that summary judgment was, nevertheless, appropriately entered as to the femme defendant inasmuch as plaintiff has made no showing sufficient to indicate he will be able to prove a claim against her.

The facts brought out at the hearing on summary judgment may be briefly summarized: For a time preceding the incidents in question plaintiff Dickens, a thirty-one year old man, shared sex, alcohol and marijuana with defendants' daughter, a seventeen year old high school student. On 2 April 1975 defendants, husband and wife, lured plaintiff into rural Johnston County, North Carolina. Upon plaintiff's arrival defendant Earl Puryear, after identifying himself, called out to defendant Ann Puryear who emerged from beside a nearby building and, crying, stated that she "didn't want to see that SOB." Ann Puryear then left the scene. Thereafter Earl Puryear pointed a pistol between plaintiff's eyes and shouted "Ya'll come on out." Four men wearing ski masks and armed with nightsticks then approached from

behind plaintiff and beat him into semi-consciousness. They handcuffed plaintiff to a piece of farm machinery and resumed striking him with nightsticks. Defendant Earl Puryear, while brandishing a knife and cutting plaintiff's hair, threatened plaintiff with castration. During four or five interruptions of the beatings defendant Earl Puryear and the others, within plaintiff's hearing, discussed and took votes on whether plaintiff should be killed or castrated. Finally, after some two hours and the conclusion of a final conference, the beatings ceased. Defendant Earl Puryear told plaintiff to go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed. Plaintiff was then set free.[55]

Plaintiff filed his complaint on 31 March 1978. It alleges that defendants on the occasion just described intentionally inflicted mental distress upon him. He further alleges that as a result of defendants' acts plaintiff has suffered "severe and permanent mental and emotional distress, and physical injury to his nerves and nervous system." He alleges that he is unable to sleep, afraid to go out in the dark, afraid to meet strangers, afraid he may be killed, suffering from chronic diarrhea and a gum disorder, unable effectively to perform his job, and that he has lost $1000 per month income.

On 28 April 1978 Judge Preston by order extended the time in which defendants would be required to file responsive pleadings or motions until twenty days after the Court of Appeals decided a case then pending before that court.[56] Defendants, acting pursuant to this order, filed no answer. On 7 September and 15 November 1978 defendants filed, respectively, motions for summary judgment. The motions made no reference to the statute of limitations nor did they contest plaintiff's factual allegations. Judge Braswell, after considering arguments of counsel, plaintiff's complaint, plaintiff's deposition and evidence in the criminal case arising out of this occurrence,[57] concluded that plaintiff's claim was barred by G.S. 1-54(3), the one-year statute of limitations applicable to assault and battery. On 29 March 1979 he granted summary judgment in favor of both defendants.

I

We first address plaintiff's contention that defendants' motions for summary judgment were procedurally defective. Plaintiff argues initially that defendants' failure to file answer was fatal, procedurally, to the trial court's allowing the motions on statute of limitations grounds. We disagree.

* * *

Here plaintiff was not surprised by the limitations defense and had full opportunity to argue and present evidence relevant to the limitations question. Plaintiff's complaint is cast in terms of the tort of intentional infliction of mental distress rather than assault and battery. This demonstrates plaintiff's awareness that the statute of limitations was going to be an issue. Plaintiff did present evidence and briefs on the question before Judge Braswell. Thus, as the Court of Appeals said, "this affirmative defense was clearly before the trial court." Therefore defendants' failure expressly to mention this defense in their motions will not be held to bar the court's granting the motions on the limitations ground.

II

We turn now to the merits of defendants' motions for summary judgment. Defendants contend, and the Court of Appeals agreed, that this is an action grounded in assault and battery. Although plaintiff pleads the tort of intentional infliction of mental distress, the Court of Appeals concluded that the complaint's factual allegations and the factual showing at the hearing on summary judgment support only a claim for assault and battery. The claim was, therefore, barred by the one-year period of limitations applicable to assault and battery. Plaintiff, on the other hand, argues that the factual showing on the

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55 This same occurrence gave rise to a criminal conviction of defendant Earl Puryear for conspiracy to commit simple assault. *See* *State v. Puryear*, 30 N.C. App. 719, 228 S.E.2d 536, *appeal dismissed*, 291 N.C. 325, 230 S.E.2d 678 (1976).

56 The order provided, in pertinent part: "Defendants are allowed until twenty (20) days following the filing of a decision by the North Carolina Court of Appeals in *Byrd v. Hodges*, 77 CVS 4422, Wake County, which case is presently on appeal to that Court, to file responsive pleadings or motions herein."

57 *See* n.1, *supra*.

motion supports a claim for intentional infliction of mental distress[,] a claim which is governed by the three-year period of limitations.[58] At least, plaintiff argues, his factual showing is such that it cannot be said as a matter of law that he will be unable to prove such a claim at trial. We agree with plaintiff's position.

To resolve the question whether defendants are entitled to summary judgment on the ground of the statute of limitations we must examine both the law applicable to the entry of summary judgment and the law applicable to the torts of assault and battery and intentional infliction of mental distress. We think it better to begin with a discussion of applicable tort law.

A

North Carolina follows common law principles governing assault and battery. An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow. *Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530 (1931); *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E.2d 405, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979); *see also* PROSSER, LAW OF TORTS §§ 9, 10 (4th ed. 1971) (hereinafter "PROSSER"). The apprehension created must be one of an immediate harmful or offensive contact, as distinguished from contact in the future. As noted in *State v. Ingram*, 237 N.C. 197, 201, 74 S.E.2d 532, 535 (1953), in order to constitute an assault there must be:

> [A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another....
>
> ... The display of force or menace of violence must be such to cause the reasonable apprehension of *immediate* bodily harm. *Dahlin v. Fraser*, 206 Minn. 476 (288 N.W. 851). (Emphasis supplied.) *See also State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967); *State v. Johnson*, 264 N.C. 598, 142 S.E.2d 151 (1965).

A mere threat, unaccompanied by an offer or attempt to show violence, is not an assault. *State v. Daniel*, 136 N.C. 571, 48 S.E. 544 (1904); *State v. Milsaps*, 82 N.C. 549 (1880). The damages recoverable for assault and battery include those for plaintiff's mental disturbance as well as for plaintiff's physical injury. *Trogdon v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916); *Hodges v. Hall*, 172 N.C. 29, 89 S.E. 802 (1916); *Bedsole v. Atlantic Coast Line R.R. Co.*, 151 N.C. 152, 65 S.E. 925 (1909).

Common law principles of assault and battery as enunciated in North Carolina law are also found in the RESTATEMENT (SECOND) OF TORTS (1965) (hereinafter "THE RESTATEMENT"). As noted in § 29(1) of THE RESTATEMENT, "*[t]o make the actor liable for an assault he must put the other in apprehension of an imminent contact.*" (Emphasis supplied.) The comment to § 29(1) states: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future. `Imminent' does not mean immediate, in the sense of instantaneous contact.... It means rather that there will be no significant delay." Similarly, § 31 of THE RESTATEMENT provides that "*[w]ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.*" (Emphasis supplied.) The comment to §

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[58] Although defendants argue that even the tort of intentional infliction of mental distress is governed by the one-year statute of limitations, we are satisfied that it is not. The one-year statute, G.S. 1- 54(3), applies to "libel, slander, assault, battery, or false imprisonment." As we go to some length in the opinion to demonstrate, the tort of intentional infliction of mental distress is none of these things. Thus the rule of statutory construction embodied in the maxim, expressio unius est exclusio alterius, meaning the expression of one thing is the exclusion of another, applies. *See Appeal of Blue Bird Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953). No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, G.S. 1-52(5), which applies to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." Even if we had substantial doubt about which statute of limitations applies, and we do not, the rule would be that the longer statute is to be selected. *See, e.g.*, *Payne v. Ostrus*, 50 F.2d 1039 (8th Cir. 1931); *Matthews v. Travelers Indemnity Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968); *Scovill v. Johnson*, 190 S.C. 457, 3 S.E.2d 543 (1939); *Shew v. Coon Bay Loafers, Inc.*, 76 Wash. 2d 40, 455 P.2d 359 (1969); *see generally* 51 AM. JUR. 2D *Limitation of Actions* § 63 (1970).

31 provides, in pertinent part:

> a. Ordinarily mere words, unaccompanied by some act apparently intended to carry the threat into execution, do not put the other in apprehension of an imminent bodily contact, and so cannot make the actor liable for an assault under the rule stated in § 21 [the section which defines an assault]. For this reason it is commonly said in the decisions that mere words do not constitute an assault, or that some overt act is required. This is true even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults. Any remedy for words which are abusive or insulting, or which create emotional distress by threats for the future, is to be found under §§ 46 and 47 [those sections dealing with the interest in freedom from emotional distress].
>
> Illustration:
>
> 1. ***A***, known to be a resolute and desperate character, *threatens to waylay* ***B*** *on his way home on a lonely road on a dark night.* ***A*** *is not liable to* ***B*** *for an assault under the rule stated in § 21.* ***A*** *may, however, be liable to* ***B*** *for the infliction of severe emotional distress by extreme and outrageous conduct*, under the rule stated in § 46. (Emphasis supplied.)

Again, as noted by PROSSER, § 10, p. 40, "[t]hreats for the future ... are simply not present breaches of the peace, and so never have fallen within the narrow boundaries of [assault]." Thus threats for the future are actionable, if at all, not as assaults but as intentional inflictions of mental distress.

The tort of intentional infliction of mental distress is recognized in North Carolina. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). "[L]iability arises under this tort when a defendant's `conduct exceeds all bounds usually tolerated by decent society' and the conduct `causes mental distress of a very serious kind.'" *Id.* at 196, 254 S.E.2d at 622, quoting PROSSER, § 12, p. 56. In *Stanback* plaintiff alleged that defendant breached a separation agreement between the parties. She further alleged, according to our opinion in *Stanback*, "that defendant's conduct in breaching the contract was `wilful, malicious, calculated, deliberate and purposeful' ... [and] that `she has suffered great mental anguish and anxiety' as a result of defendant's conduct in breaching the agreement ... [and] that defendant acted recklessly and irresponsibly and `with full knowledge of the consequences which would result....'" *Id.* at 198, 254 S.E.2d at 622-23. We held in *Stanback* that these allegations were "sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress. Plaintiff has alleged that defendant intentionally inflicted mental distress." *Id.* at 196, 254 S.E.2d at 621-22.

The tort alluded to in *Stanback* is defined in THE RESTATEMENT § 46 as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The holding in *Stanback* was in accord with THE RESTATEMENT definition of the tort of intentional infliction of mental distress. We now reaffirm this holding.

There is, however, troublesome dictum in *Stanback* that plaintiff, to recover for this tort, "must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct" and that the harm she suffered was a "foreseeable result." *Id.* at 198, 254 S.E.2d at 623. Plaintiff in *Stanback* did not allege that she had suffered any physical injury as a result of defendant's conduct. We noted in *Stanback*, however, that "physical injury" had been given a broad interpretation in some of our earlier cases, *e.g.*, *Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906), where the Court said,

> The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when `out of tune' cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the

> physical injury consists of a wrecked nervous system instead of lacerated limbs.

We held in *Stanback* that plaintiff's "allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety (which she alleges) has caused physical injury." *Stanback v. Stanback, supra*, 297 N.C. at 199, 254 S.E.2d at 623. We held, further, that plaintiff's allegation that "defendant acted with full knowledge of the consequences of his actions ... sufficiently indicated that the harm she suffered was a foreseeable result of his conduct." *Id*. at 198, 254 S.E.2d at 623.

After revisiting *Stanback* in light of the earlier authorities upon which it is based and considering an instructive analysis of our cases in the area by Professor and former Dean of the University of North Carolina Law School, Robert G. Byrd,[59] we are satisfied that the dictum in *Stanback* was not necessary to the holding and in some respects actually conflicts with the holding. We now disapprove it.

If "physical injury" means something more than emotional distress or damage to the nervous system, it is simply not an element of the tort of intentional infliction of mental distress. As noted, plaintiff in *Stanback* never alleged that she had suffered any physical injury, yet we held that she had stated a claim for intentional infliction of mental distress. In *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930), defendants came to the home of the plaintiff at night and accused him of stealing hogs. They told him that if he did not leave their community within 10 days they "would put a rope around his neck." Defendants' threats caused the plaintiff to remove his family from the area. Plaintiff testified that he was afraid they would kill him if he did not leave and that he suffered great mental agony and humiliation because he had been accused of something of which he was not guilty. In sustaining a jury verdict in favor of plaintiff, the Arkansas Supreme Court rejected defendants' contention that plaintiff was required to show some physical injury before he could recover. The Court said, 181 Ark. 139, 25 S.W.2d at 428:

> The [defendants] rely upon the rule ... that in actions for negligence there can be no mental suffering where there has been no physical injury.
>
> The rule is well settled in this state, but it has no application to willful and wanton wrongs and those committed with the intention of causing mental distress and injured feelings. Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress.

Similarly, the question of foreseeability does not arise in the tort of intentional infliction of mental distress. This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he "desires to inflict severe emotional distress ... (or) knows that such distress is certain, or substantially certain, to result from his conduct ... (or) where he acts recklessly ... in deliberate disregard of a high degree of probability that the emotional distress will follow" and the mental distress does in fact result. RESTATEMENT § 46, Comment i, p. 77. "The authorities seem to agree that if the tort is wilful and not merely negligent, the wrong-doer is liable for such physical injuries as may proximately result, whether he could have foreseen them or not." *Kimberly v. Howland, supra*, 143 N.C. at 402, 55 S.E. at 780.

We are now satisfied that the dictum in *Stanback* arose from our effort to conform the opinion to language in some of our earlier cases the holdings of which led ultimately to our recognition in *Stanback* of the tort of intentional infliction of mental distress.

The earliest of these cases is *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936). This case involved a bill collector who used highhanded collection tactics against plaintiff debtor. In an effort to collect the debt defendant said to plaintiff, "By G , you are like all the rest of the damn deadbeats. You wouldn't pay when you could.... If you are so damn low you won't pay, I guess when I get the sheriff and bring him down here you will pay then." Plaintiff, who was pregnant, became emotionally distraught and her evidence tended to show that her distress caused her child to be prematurely stillborn. This Court sustained a verdict and judgment for the plaintiff. The Court recognized that earlier cases permitting

[59] *See generally* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. REV. 435 (1980).

recovery under such circumstances required that there be a forcible trespass. Without deciding whether a forcible trespass existed in the case before it the Court concluded that "[t]he gravamen of plaintiff's cause of action is trespass to the person. (Citation omitted.) This may result from an injury either willfully or negligently inflicted." 210 N.C. at 810, 188 S.E. at 626. The Court said further, 210 N.C. at 812, 813, 188 S.E. at 627-28:

> "It is no doubt correct to say that fright alone is not actionable, *Arthur v. Henry*, (157 N.C. 438, 73 S.E. 211) *supra*, but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright. *Hickey v. Welch*, 91 Mo. App., 4; 17 C.J., 838. Fear long continued wears away one's reserve." `As a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such character as to produce some physical or mental impairment directly and naturally resulting from the wrongful act' SUTTON, J., in *Candler v. Smith*, 50 Ga. App., 667, 179 S.E., 395.
>
> If it be actionable willfully or negligently to frighten a team by blowing a whistle, *Stewart v. Lumber Co.*, (146 N.C. 47, 59 S.E. 545) *supra*, or by beating a drum, *Loubz v. Hafner*, (12 N.C. 185) *supra*, thereby causing a run-away and consequent damage, it is not perceived upon what logical basis of distinction the present action can be dismissed as in case of nonsuit. *Arthur v. Henry, supra*.

Kirby, rightly or wrongly, has been read to require some physical injury in addition to emotional distress. *See* PROSSER § 12, p. 59, n.19.

Statements that "fright" alone is not actionable and that the harm suffered must be a foreseeable result of defendant's conduct appear in other cases relied on in *Stanback*, all of which, in turn, rely on *Kirby*. These are: *Crews v. Finance Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967) (highhanded debt collection efforts; held, plaintiff could recover for resulting nervousness, acute angina, and high blood pressure); *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E.2d 683 (1965) (defendant, son of plaintiff, exploded firecrackers outside his home where plaintiff was a guest with the purpose of frightening his children who were in the room with plaintiff; held, plaintiff could recover for a fractured left hip suffered when she fell as a result of becoming emotionally upset at the noise); *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962) (plaintiff, defendant's next door neighbor, frightened by defendant's practical joke, a "mongoose box," stumbled while fleeing the box, fell and tore a cartilage in her knee; held, plaintiff could recover for damages to her knee); *Martin v. Spencer*, 221 N.C. 28, 18 S.E.2d 703 (1942) (defendant directed verbal abuse at plaintiff and engaged in altercation with plaintiff's brother in a dispute over a boundary; held, plaintiff could recover for a miscarriage which, according to her evidence, resulted from "fright occasioned by the conduct of the defendant."); *Sparks v. Products Corp.*, 212 N.C. 211, 193 S.E. 31 (1937) (held, plaintiff could recover for "shock and injury to her nerves, resulting in loss of weight, nervousness, periodical confinement in bed, and other ailments" caused by defendant's blasting operation which hurled a rock through the roof of plaintiff's home).

Although these earlier cases, except for *Sparks v. Products Corp.*, did permit recovery under circumstances similar to those to which the modern tort of intentional infliction of mental distress is directed, the cases did not actually come to grips with the tort as it is now recognized by PROSSER and THE RESTATEMENT and as we recognized it in *Stanback*. These earlier cases were concerned with a broader concept of liability than the relatively narrow one now known as intentional infliction of mental distress. They were concerned with permitting recovery for injury, physical and mental, intentionally or negligently inflicted. The opinion in *Kirby* consistently refers to injuries which result from either wilful or negligent conduct. Crews, which relied on *Kirby*, dealt with intentional actions of a bill collector. The opinion, however, relied on § 436 of THE RESTATEMENT. This section deals with negligent infliction of mental distress which results in physical harm. *Compare* RESTATEMENT § 46, particularly Comment a, p. 72, with § 436. To the extent, then, that these earlier cases required some "physical injury"[60] apart from mere mental or

[60] A strong argument can be made that even these earlier decisions did not intend to make "physical injury" an essential element of the claims asserted. When the Court said that "mere fright" was not actionable it was probably

emotional distress and, in addition, talked in terms of foreseeability, they did so in the context of negligently inflicted injuries and not in the context of the tort, as it is now recognized, of intentional infliction of mental distress. This Court in *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960) denied recovery for a serious nervous disorder unaccompanied by physical injury, allegedly caused by defendant's negligent operation of an automobile. Denial, however, was on the ground that the connection between the relatively minor accident and plaintiff's condition was too tenuous and too "highly extraordinary" to permit recovery. The Court noted, however, *id.* at 503, 112 S.E.2d at 51:

> This cause involves mental distress and invasion of emotional tranquility. It concerns itself with fear and resultant neurasthenia allegedly caused by *ordinary negligence*. In so far as possible we shall avoid consideration of those situations wherein fright, mental suffering and nervous disorder result from intentional, wilful, wanton or malicious conduct. (Emphasis original.)

Stanback, then, should not be read as grafting "physical injury" and "foreseeability" requirements on the tort of intentional infliction of mental distress. Neither should it be read as grafting the requirements of this tort on other theories of recovery for mental and emotional distress dealt with in our earlier cases. We leave those theories where they lay before *Stanback*.

Stanback, in effect, was the first formal recognition by this Court of the relatively recent tort of intentional infliction of mental distress. This tort, under the authorities already cited, consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

attempting to distinguish not between physical injury and emotional disturbance but rather between momentary or minor fright and serious emotional or nervous disorders. *But see Williamson v. Bennett*, *infra*, in text.

B

We now turn to some principles governing the entry of summary judgment. The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E.2d 375 (1978). The record is considered in the light most favorable to the party opposing the motion. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972), quoting 6 MOORE'S FEDERAL PRACTICE P 56.15(3) at 2337 (2d ed. 1971).

In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). An issue is material "if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim, *Best v. Perry*, 41 N.C. App. 107, 254 S.E.2d 281 (1979), or cannot surmount an affirmative defense which would bar the claim.

Summary judgment is, furthermore, a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a prima facie case or that he will be able to surmount an affirmative defense. Under such circumstances claimant need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent or that he cannot surmount an affirmative defense. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 421 (1979); *see generally* Louis, *"Federal Summary Judgment Doctrine: A Critical Analysis,"* 83 YALE LAW JOURNAL, 745 (1974).

C

The question, then, is whether in light of the principles applicable to motions for summary

judgment and those applicable to the torts of assault and battery and intentional infliction of mental distress, the evidentiary showing on defendants' motions for summary judgment demonstrates as a matter of law the non-existence of a claim for intentional infliction of mental distress. Stated another way, the question is whether the evidentiary showing demonstrates as a matter of law that plaintiff's only claim, if any, is for assault and battery. If plaintiff, as a matter of law, has no claim for intentional infliction of mental distress but has a claim, if at all, only for assault and battery, then plaintiff cannot surmount the affirmative defense of the one-year statute of limitations and defendants are entitled to summary judgment on the ground of the statute.

Although plaintiff labels his claim one for intentional infliction of mental distress, we agree with the Court of Appeals that "[t]he nature of the action is not determined by what either party calls it...." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E.2d 540, 545-46 (1956). The nature of the action is determined "by the issues arising on the pleading and by the relief sought," *id.*, and by the facts which, at trial, are proved or which, on motion for summary judgment, are forecast by the evidentiary showing.

Here much of the factual showing at the hearing related to assaults and batteries committed by defendants against plaintiff. The physical beatings and the cutting of plaintiff's hair constituted batteries. The threats of castration and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Plaintiff's recovery for injuries, mental or physical, caused by these actions would be barred by the one-year statute of limitations.

The evidentiary showing on the summary judgment motion does, however, indicate that defendant Earl Puryear threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state. The Court of Appeals characterized this threat as being "an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff...." 45 N.C. App. at 700, 263 S.E.2d at 859. The Court of Appeals thus concluded that this threat was also an assault barred by the one-year statute of limitations.

We disagree with the Court of Appeals' characterization of this threat. The threat was not one of imminent, or immediate, harm. It was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; therefore it is actionable, if at all, as an intentional infliction of mental distress. *Wilson v. Wilkins, supra*, 181 Ark. 137, 25 S.W.2d 428; RESTATEMENT § 31, Comment a, pp. 47-48.

The threat, of course, cannot be considered separately from the entire episode of which it was only a part. The assaults and batteries, construing the record in the light most favorable to the plaintiff, were apparently designed to give added impetus to the ultimate conditional threat of future harm. Although plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.[61]

Having concluded, therefore, that the factual showing on the motions for summary judgment was sufficient to indicate that plaintiff may be able to prove at trial a claim for intentional infliction of mental distress, we hold that summary judgment for defendants based upon the one-year statute of limitations was error and we remand the matter for further proceedings against defendant Earl Puryear not inconsistent with this opinion.

* * *

For the reasons stated the decision of the Court of Appeals affirming summary judgment in favor of Earl Puryear is reversed. The claim against Earl Puryear is remanded to that court with instructions that it be remanded to Wake Superior Court for further proceedings not inconsistent with this opinion. The decision of the Court of Appeals affirming summary judgment in favor of Ann Puryear is affirmed.

REVERSED IN PART.

AFFIRMED IN PART.

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[61] We note in this regard plaintiff's statement in his deposition that "[i]t is not entirely (the future threat) which caused me all of my emotional upset and disturbance that I have complained about. It was the ordeal from beginning to end." If plaintiff is able to prove a claim for intentional infliction of mental distress it will then be the difficult, but necessary, task of the trier of fact to ascertain the damages flowing from the conditional threat of future harm. Although the assaults and batteries serve to color and give impetus to the future threat and its impact on plaintiff's emotional condition, plaintiff may not recover damages flowing directly from the assaults and batteries themselves.

MEYER, J., did not participate in the consideration and decision of this case.

Questions and Notes

1. *Dickens* is presented here to illustrate the way in which a limitation period is identified. In addition, it serves as a good primer on intentional torts, which will be addressed in greater detail in Chapter 12.

2. Suppose you were the lawyer that Dickens went to see about taking his case, and assume that your practice emphasizes representing personal injury plaintiffs. Based upon what you learned about the case from reading the court's opinion, would you be inclined to represent him? Why or why not?

§ B. Accrual of the Cause of Action

ESTATES OF HIBBARD v. GORDON, *et al.*

118 Wash. 2d 737, 826 P.2d 690 (1992)

SMITH, Justice

The State of Washington (State) petitioned for review of a decision of the Court of Appeals, Division Two, which reversed a dismissal on summary judgment in the State's favor by the Pierce County Superior Court. 60 Wash. App. 252, 803 P.2d 1312. We granted review. The State contends that respondents are not aggrieved by the trial court's order and that they therefore had no standing to appeal to the Court of Appeals. It further contends that the statute of limitations has run on plaintiff's original complaint and that the "discovery rule" does not apply to extend the applicable 3-year statute of limitations. We reverse the Court of Appeals.

Plaintiff in the trial court was Ms. Heidi L. Hibbard (Hibbard), appearing on her own behalf and as personal representative of the estate of her parents, Robert G. and Maxine Hibbard, deceased.[1] Defendants in the trial court were Puget Sound National Bank (Bank), the original personal representative of the Hibbards' estate; and E.M. Murray and the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson and O'Hern (Gordon Thomas), attorneys for the personal representative. The defendants were served with the original summons and complaint on December 2, 1983. A second amended complaint adding the State as a defendant was filed by Ms. Hibbard on February 10, 1986.

The primary question in this case is whether the "discovery rule" applies and whether the 3-year statute of limitations barred Ms. Heidi L. Hibbard's claims against the State of Washington. Because we answer "no" to the first prong of that question and "yes" to the second prong, it is not necessary for us to address the further question whether Respondents Bank and Gordon Thomas had standing to appeal to the Court of Appeals the trial court's summary judgment order dismissing the State from the lawsuit filed by Ms. Hibbard.

On December 6, 1977, Larry W. Knox murdered Robert G. and Maxine Hibbard and allegedly raped their daughter, Ms. Heidi L. Hibbard.[2] Knox was on probation for burglary and had been treated at Western State Hospital and released 7 months prior to the December incident. On December 12, 1977, the Bank was appointed personal representative of the Hibbard estate and Gordon Thomas was retained as attorneys for the estate. Probate was closed on March 4, 1980.

In the fall of 1983, Ms. Hibbard read a newspaper account of this court's decision in *Petersen v. State*.[3] She consulted an attorney in

[1] *Estates of Robert G. and Maxine Hibbard, Deceased, and Heidi L. Hibbard v. Gordon, Thomas, Honeywell, Malanca, Peterson and O'Hern, et al.*, Pierce County cause 84-2-00651-5 (Feb. 3, 1984).

[2] Larry W. Knox pleaded "guilty" and was convicted of the murders on May 2, 1978. However, the record does not indicate whether rape charges were filed against him.

[3] *Petersen v. State*, 100 Wash. 2d 421, 671 P.2d 230 (1983). Ms. Cynthia Petersen was injured when her automobile was struck by a vehicle driven by Larry W. Knox. It was revealed in the case that Knox was on probation for burglary and had been committed to Western State Hospital where he was treated by Dr. Alva E. Miller. Dr. Miller, aware of Knox's drug abuse and dangerous behavior, released him from Western State Hospital 5 days

October 1983. The estate of her parents was then reopened and Ms. Hibbard was appointed as personal representative.[4]

On November 23, 1983, Ms. Hibbard filed a claim with the State for personal injuries arising out of her rape by Larry W. Knox on December 6, 1977. The State denied her claim for the reason that it exceeded the statute of limitations, "pursuant to R.C.W. 26.28.015."[5] On December 2, 1983, Ms. Hibbard served the Bank with a summons and complaint and filed her lawsuit in the Pierce County Superior Court on February 3, 1984.[6] Gordon Thomas was made a defendant prior to consolidation of these actions on February 3, 1986. Ms. Hibbard claimed that the Bank and Gordon Thomas acted negligently in failing to bring suit against the State and Larry W. Knox.[7]

The Bank moved for summary judgment, asking dismissal of the action based upon the statute of limitations. On January 17, 1986, visiting judge Karen B. Conoley, Kitsap County Superior Court, in an oral decision denied the Bank's motion because there remained an issue concerning the date Ms. Hibbard knew all the elements of her cause of action against the Bank.[8] At this point, the Bank and Gordon Thomas asked that the State be joined as a party.

On January 17, 1986, Ms. Hibbard filed a claim with the State for the wrongful death of her parents. On February 10, 1986, she filed a second amended complaint for damages in the Pierce County Superior Court, adding the State as a party.[9] The complaint acknowledged that the 3-year statute of limitations had expired on December 6, 1980, but asked for judgment against the State in the event the court determined that the statute of limitations had not run against it for its "tortious and outrageous conduct."

On July 27, 1987, the State filed a summary judgment motion for dismissal based on the statute of limitations.[10] Gordon Thomas filed a memorandum opposing the State's motion.[11] On August 4, 1987, the Bank filed a motion for summary judgment, adopting the State's arguments and contending that the claims against the Bank were also barred if the claims against the State were barred by the statute of limitations.[12]

On September 11, 1987, visiting judge David E. Foscue, Grays Harbor County Superior Court, granted the State's motion, but denied the Bank's motion. In his memorandum decision dated September 11, 1987, Judge Foscue ruled that the statute of limitations expired on December 6, 1980, on the claims against the State and that the "discovery rule" did not apply. However, Judge Foscue concluded that a genuine issue of material fact remained concerning the date the cause of action accrued against the Bank.[13] The Bank and

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before the accident.

[4] Pierce County cause 84-2-00651-5. Clerk's Papers, at 50.

[5] This is obviously an erroneous statutory reference, but is not a matter of contention.

[6] Pierce County cause 84-2-00651-5. Clerk's Papers, at 50.

[7] An unsigned, unacknowledged and undated "affidavit" by Ms. Hibbard, with the typewritten date "September CC 1985," is part of the record before us. The document cannot be considered in that form.

[8] Pierce County cause 84-2-00651-5. No order for this ruling is in the file. Nor does the file indicate an appeal of the ruling by any party. REPORT OF PROCEEDING, vol. I, at 2.

[9] Pierce County cause 84-2-00651-1. Ms. Hibbard claimed that the State knew or should have known that Knox had violent propensities and that it was negligent in its failure to protect her parents from being murdered by Knox and her from being raped by him She claimed damages for "emotional distress, personal humiliation, pain, suffering, emotional trauma, and loss of love, companionship, care and guidance of her parents." Clerk's Papers, at 32-38.

[10] Pierce County cause 84-2-00651-5. Clerk's Papers, at 1. The memorandum in support of the motion for summary judgment cites RCW 4.16.080(2), which provides:

> The following actions shall be commenced within three years:
>
> (1) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or any other injury to the person or rights of another not hereinafter enumerated[.]

[11] Clerk's Papers, at 62-67.

[12] Clerk's Papers, at 42-57.

[13] Pierce County cause 84-2-00651-5. The order granting summary judgment was signed October 5, 1987. Clerk's Papers, at 84-86.

Gordon Thomas filed notices of appeal. However, Ms. Hibbard did not appeal.

On December 30,1988, the Court of Appeals, Division Two, certified the appeal to this court. This court declined certification on January 31, 1989, and returned the case to the Court of Appeals. An order confirming appealability was signed on March 9, 1989.

On August 22, 1989, in reversing the trial court, the Court of Appeals determined that the "discovery rule" applied and that there was an issue of fact whether Ms. Hibbard should have known of her cause of action against the State within the allowable statute of limitations period. The State filed a motion for reconsideration.[14] Following this court's decision in *Gevaart v. Metco Constr., Inc.*,[15] the Court of Appeals issued an order calling for an answer, withdrew its opinion and set the case for reargument.

On January 14, 1991, after reargument, the Court of Appeals again reversed the trial court.[16] The majority (ALEXANDER, J.) held that the discovery rule applied and that there remained a question of fact whether Ms. Hibbard knew or should have known of the State's alleged negligence within the allowable statute of limitations period. The dissent (REED, J.) concluded that the Bank and Gordon Thomas had no standing to appeal the State's dismissal[17] and that the "discovery rule" did not apply in the case.

On February 13, 1991, the State petitioned this court for review, which we granted on May 8, 1991.

Two orders were entered in this case by the trial court: an order granting the State's motion for summary judgment of dismissal, which determined the issues between Plaintiff Hibbard and the State, and an order denying the Bank's motion for summary judgment of dismissal, which determined the issue between Plaintiff Hibbard and the Bank. Plaintiff, Ms. Heidi L. Hibbard, was not a party to any appeal in this case.

In ruling on the summary judgment motions, the trial court followed our established rule that:

> A summary judgment motion can be granted only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.... The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion....[18]
>
> Additionally, we follow the rule that "[w]hen reviewing an order of summary judgment, this court engages in the same inquiry as the trial court."[19]

Inasmuch as Plaintiff Hibbard did not appeal any of the rulings in this case, there is actually not before this court any basis for reviewing the decision of the trial court on summary judgment between her and the State. However, the Court of Appeals having spoken on the rulings by the trial court, we must necessarily direct our attention to the principal question whether the "discovery rule" applies in this case between Ms. Hibbard and the State.

The general rule in ordinary personal injury

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[14] The record does not indicate the disposition of this motion.

[15] 111 Wash. 2d 499, 760 P.2d 348 (1988), where this court held that, under the discovery rule, a cause of action accrues when the injured party knows or should know, by the exercise of due diligence, all the facts necessary to establish the elements of the party's claim.

[16] *In re Estates of Hibbard*, 60 Wash. App. 252, 803 P.2d 1312 (1991).

[17] The majority assumed that the parties had agreed that the Bank and Gordon Thomas were aggrieved parties:

> Only an aggrieved party may appeal to this court. RAP 3.1. The parties have not addressed the right of Gordon, Murray, and Puget Sound to appeal the trial court's dismissal of Heidi and the estate's cause of action against the State. The claims of Heidi and the estate against Gordon, Murray, and Puget Sound fail if the court finds that the action against the State was not time barred. Therefore, *we can only assume that the parties agree that Gordon, Murray, and Puget Sound are aggrieved parties* because their pecuniary rights are substantially affected by the trial court's dismissal of the case against the State. *See Cooper* v. Tacoma, 47 Wash. App. 315, 734 P.2d 541 (1987)." (Italics ours.) *Hibbard*, at 256 n.2, 803 P.2d 1312.

[18] *Marincovich v. Tarabochia*, 114 Wash. 2d 271, 274, 787 P.2d 562 (1990) (citing *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wash. 2d 6, 15, 548 P.2d 1085 (1976); *Wilson v. Steinbach*, 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982)).

[19] *Marincovich*, at 274.

actions is that a cause of action accrues at the time the act or omission occurs.[20] "In certain torts, ... injured parties do not, or cannot, know they have been injured; in [those] cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action." This is an exception to the general rule and is known as the "discovery rule."[21]

This court first adopted the discovery rule in *Ruth v. Dight*.[22] That was a medical malpractice case in which a plaintiff, alleging that her doctor had negligently left a surgical sponge in her abdomen, brought an action against the doctor 23 years after he had performed surgery on her. During those 23 years, plaintiff had sought the help of various physicians who treated her for recurrent pain. However, the sponge was not discovered until she underwent exploratory surgery just a year before she filed suit.

The court recognized the practical and policy considerations underlying statutes of limitations, observing that stale claims may be spurious and generally rely on untrustworthy evidence. The court further observed that society benefits when it can be assured that a time comes when one is freed from the threat of litigation. The court also recognized the remedial goal of the justice system, stating that "when an adult person has a justiciable grievance, [that person] usually knows it and the law affords [the person] ample opportunity to assert it in the courts,"[23] but that that goal is balanced by recognition that compelling one to answer a stale claim is in itself a substantial wrong. The court resolved these competing interests - where neither party is responsible for the delay in discovery of the asserted action - by tolling the statute of limitations and by preserving the remedy. Thus, this court has held that in medical malpractice cases asserting negligence in leaving foreign substances or articles in a surgical wound and which remain in the body after the wound has been closed, "the statute of limitations (RCW 4.16.080(2)), commences to run when the patient discovers or, in the exercise of reasonable care for [the patient's] own health and welfare, should have discovered the presence of the foreign substance or article in [the patient's] body."[24]

After *Ruth v. Dight, supra*, this court in *Gazija v. Nicholas Jerns Co.*[25] extended the discovery rule to an action for negligent cancellation of an insurance policy, characterizing the extension a "judicial policy determination." The court determined that application of the discovery rule was warranted because of the fiduciary relationship between plaintiff policyholder and defendant insurance company.[26] Plaintiff in *Gazija* had no way of knowing his insurance policy had been canceled. He relied on a fiduciary relationship and was not aware of the negligent act until after the limitation period had expired. The court then concluded that plaintiff "respondent's cause of action accrued when he first suffered actual loss and had the first opportunity by the exercise of reasonable diligence to discover he had an actionable claim for unauthorized cancellation of the `floater' policy," and that the cause of action was not barred by the statute of limitations.[27]

Even with extended application of the discovery rule, this court continues to emphasize the exercise of due diligence by the injured party. In *Gevaart v. Metco Constr., Inc.*,[28] this court held that a negligent design and construction claim was barred by the statute of limitations. Plaintiff, while ascending the stairs to her condominium residence, upon reaching the downward-sloping top step, lost her balance and fell backward. The court concluded that since plaintiff knew the step

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20 *White v. Johns-Manville Corp.*, 103 Wash. 2d 344, 348, 693 P.2d 687, 49 A.L.R.4th 955 (1985).

21 *White*, at 348, 693 P.2d 687.

22 75 Wash. 2d 660, 453 P.2d 631 (1969).

23 *Ruth*, at 665, 453 P.2d 631.

24 *Ruth*, at 667-68, 453 P.2d 631.

25 86 Wash. 2d 215, 543 P.2d 338 (1975).

26 *Gazija*, at 221, 543 P.2d 338. The discovery rule has since been applied to other similar professional relationships. See *Peters v. Simmons*, 87 Wash. 2d 400, 552 P.2d 1053 (1976) (attorney); *Kundahl v. Barnett*, 5 Wash. App. 227, 486 P.2d 1164 (1971) (surveyor); *Hunter v. Knight, Vale & Gregory*, 18 Wash. App. 640, 571 P.2d 212 (1977) (accountant), *review denied*, 89 Wash. 2d 1021 (1978); *Hermann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 17 Wash. App. 626, 564 P.2d 817 (1977) (stockbroker).

27 *Gazija*, at 223, 543 P.2d 338.

28 111 Wash. 2d 499, 760 P.2d 348 (1988).

sloped, she could by the exercise of due diligence have determined not only that the step did not conform to code, but also that the slope was a construction defect. We affirmed the Court of Appeals.

* * *

Although there has been increased application of the discovery rule by this court, we still follow the reasoning of *Ruth v. Dight*.[29] Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know of the cause of their injuries.

* * *

Recognizing our prior decisions and the policy behind the discovery rule, we conclude that, in this case, a correct formulation of the rule is that a cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action, specifically duty, breach, causation and damages.[30]

Neither Ms. Heidi L. Hibbard nor the Estates of Robert G. and Maxine Hibbard, Deceased, plaintiffs in the trial court, have appealed from or sought review of the adverse action against them. They are therefore not parties to the action in the Court of Appeals or before this court.[31]

We reverse the Court of Appeals and affirm the decision of the trial court which found that the "discovery rule" did not apply to the State in this case and that the negligence action against the State was barred by the three-year statute of limitations, which began to run on December 6, 1977, the date Ms. Hibbard's parents were murdered and she was allegedly raped.

DORE, C.J., ANDERSON, Acting C.J., and UTTER, BRACHTENBACH, DOLLIVER, DURHAM and JOHNSON, JJ., concur.

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[29] 75 Wash. 2d 660, 453 P.2d 631 (1969).

[30] *Gevaart v. Metco Constr. Inc.*, 111 Wash. 2d 499, 760 P.2d 348 (1988). *See also Ruth v. Dight*, 75 Wash. 2d 660, 453 P.2d 631; *Ohler v. Tacoma Gen. Hosp.*, 92 Wash. 2d 507, 598 P.2d 1358 (1979).

[31] *Gevaart v. Metco Constr., Inc.*, 111 Wn. 2d 499, 760 P.2d 348 (1988). *See also Ruth v. Dight*, 75 Wn. 2d 660, 453 P.2d 631 (1969); *Ohler v. Tacoma Gen. Hosp.*, 92 Wn. 2d 507, 598 P.2d 1358 (1979).

PFEIFER v. CITY OF BELLINGHAM

112 Wash. 2d 562, 772 P.2d 1018 (1989)

UTTER, Justice

Holly Pfeifer brought an action against Island Construction Company for injuries suffered when she had to jump from a burning building. Island Construction claims it was not liable because the construction statute of repose barred the action. Appellant contends that the statute of repose does not cover builder/vendors when the cause of action is based on the sellers' concealing a known, dangerous condition during the sale. The trial court granted summary judgment in favor of the builder/vendors based on the statute of repose. We reverse. Because sellers incur separate liability, actions based on the sale are not covered by the statute of repose for construction.

The parties debate some of the essential facts. Island Construction Company completed building the Willowwood condominium complex in 1979. Island Construction hired Michael Kohl to modify stock plans to ensure compliance with municipal codes. M. Kohl prequalified his plans by consulting with Bellingham Building Department and Fire Department personnel. Island Construction does not contest that Mr. Kohl's plans were altered before they were submitted to the City of Bellingham for approval. Mr. Kohl claims that the alterations resulted in cheaper construction, a dangerous structure, and noncompliance with City codes.

The altered plans changed the finish grade of the terrain surrounding building D, allowing the building to be classified as a 2-story, rather than a 3-story, structure. Two-story structures require only one stairwell and fewer fire protection designs. Mr. Kohl states that the building was ultimately constructed as a 3-story structure, while Island Construction contends it is a 2-story structure with a basement.

The Bellingham Building Department issued a building permit, inspected the project during construction, and, on June 12, 1979, issued a final certificate of occupancy certifying that the complex complied with the applicable codes and ordinances.

Island Construction and its principals sold the condominium units to individual buyers in 1979. During 1986, Holly Pfeifer leased unit 302 in building D from one of the original owners.

On June 2, 1986, a fire, which began in unit 102D, spread quickly through building D, allegedly due to the lack of required fire stops and 2-hour fire walls. Because fire blocked the only exit, appellant jumped from her third story window. As a result, she suffered physical and emotional injuries.

Ms. Pfeifer brought a negligence action against, among others, the City of Bellingham and Island Construction Company with its principals, the Masseys and the Bedfords (Island Construction). The City and Island Construction cross-claimed against each other. Ms. Pfeifer filed an amended complaint against Island Construction alleging negligent and intentional concealment f a dangerous condition and consumer protection act violations.

The trial court granted the City's motion for summary judgment, concluding that both the public duty doctrine and R.C.W. 4.16.300, the statute of repose for construction, barred Ms. Pfeifer's action. Similarly, the trial court granted Island Construction's motion for summary judgment based on R.C.W. 4.16.300.

We accepted direct review but, finding our recent public duty doctrine cases controlling, granted the City's motion to dismiss claims against it. The remaining issue is whether the construction statute of repose, R.C.W. 4.16.300-.320, bars action against a seller, who is also the builder, for concealment of a dangerous construction defect when the plaintiff is personally injured.

Ms. Pfeifer bases her claim against Island Construction as a seller, not a builder, under the RESTATEMENT (SECOND) OF TORTS, § 353 (1965):

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
>
> (a) the vendee does not know or have reason to know of the condition or the risk involved, and

> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
>
> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

The principles stated in 353 provide an "accepted post-sale theory" of recovery in this state. *See* *Wilson v. Thermal Energy, Inc.*, 21 Wash. App. 153, 155, 583 P.2d 679 (1978); *see also* *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960). Therefore, the cause of action is part of the common law, using the term in its broader sense, of Washington. "Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 50.01, at 422 (4th ed. 1984).

Island Construction argues that the theory of recovery is immaterial: Ms. Pfeifer has no cause of action because R.C.W. 4.16.300-.320 clearly bars all claims against builders that do not accrue within 6 years of substantial completion of construction or termination of certain services. The injury occurred in 1986, more than 6 years after completion in 1979. A proviso allows claims against an owner who is in possession of the building when the injury occurs. However, Island Construction had sold all of the units by 1979.

The pertinent parts of the construction statute in effect at the time of the injury read as follows:

> RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. RCW 4.16.300.
>
> All claims or causes of action as set forth in R.C.W. 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in R.C.W. 4.16.300, whichever is later.... Any cause of action which has not accrued within six years after such substantial completion of construction ... shall be barred: Provided, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. RCW 4.16.310.

This court has used a 3-step approach in construing the statute. First, the court must determine the statute's scope, whether it applies at all. If the statute applies, the cause of action must accrue within 6 years of substantial completion. If the cause of action accrues, then the party must file suit within the appropriate statute of limitations for that cause of action. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wash. 2d 878, 882-883, 719 P.2d 120 (1986).

The debate centers around the first step, scope. Both parties frame arguments based on statutory construction, policy, and Washington's constitution. Island Construction contends that the statute bars recovery for the following reasons: 1) Pfeifer's claim arises from construction of the building and the statute bars claims of any kind against any person involved in construction; 2) the statute would be meaningless if a builder could not sell his product without losing the protection of the statute; and 3) construing the statute to apply only to builders who do not sell the property would be unconstitutional.

Pfeifer counters that the statute is not applicable for several reasons: 1) her claim arises from the concealment during the sale, not from the construction itself, and the statute does not cover sales and marketing activity; 2) exempting vendors from coverage would not render the statute meaningless; and 3) if the statute is interpreted to cover only sellers who were also involved in construction, it would fail as special legislation prohibited by article 2, section 28(17) of the Washington State Constitution.

The "arising from" statutory language provides the key for resolving the statutory construction dispute. Island Construction's argument that the statute bars all claims of any kind against any person "involved" in construction is inaccurate. On its face the statute bars only claims "arising from" the enumerated activities. The "all claims of any kind against any person" language is qualified by the requirement that these claims "arise from" certain activities.

In addressing a similar builders' statute of repose, a New Mexico appellate court found that the language required an activity analysis. *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied*, *Albuquerque v. Howell*, 91 N.M. 3, 569 P.2d 413 (1977). The language in *Howell* provided benefits to "`any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction ... and on account of such activity....'" 568 P.2d at 223. The *Howell* court concluded that summary judgment was appropriate to the extent that the defendant was sued as an installer of glass, but it was inappropriate where he was sued as a manufacturer or seller. 568 P.2d at 223.

Logic supports this analysis. Had Island Construction been only the seller but not the builder, the statute would offer no protection against an action for concealment of a known dangerous condition during sale. A seller who also happens to be the builder should not be shielded from liability. Selling and building involve different activities. The statute shields builders. If builders also engage in the activity of selling, they should face the liability of sellers. A primary purpose of the limitation is to protect contractors from the "possibility of being held liable for the acts of others." *Jones v. Weerhaeuser Co.*, 48 Wash. App. 894, 899, 741 P.2d 75 (1987). The protection is based on the premise that the longer the owner possesses the improvement, "the more likely it is that the damage was the owner's fault or the result of natural forces." 48 Wash. App. at 899, 741 P.2d 75. These considerations do not apply when a seller conceals a known dangerous condition that the buyer has no reason to discover.

In two cases, this court has indicated that an activities analysis is appropriate. "RCW 4.16.310 applies to all claims of *[sic]* causes of action arising from the activities covered." (Second italics ours.) *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 500, 687 P.2d 212 (1984). This court has also emphasized activities as a means of defining persons covered by the statute. *Condit v. Lewis Refrigeration Co.*, 101 Wash. 2d 106, 110, 676 P.2d 466 (1984) (the statute protects those whose activities relate to the structural aspects of the building).

Island Construction argues that as long as it worked on structural aspects, it is a person who is covered by the statute. The argument misses the focal point of the analysis: the focus is on activities. If the claim arises from those activities, the person is covered; if it does not, he is not covered. Here the claim arises from concealment during sale - the activity of selling is not covered.

Island Construction errs in contending that *Smith v. Showalter*, 47 Wash. App. 245, 734 P.2d 928 (1987) requires a contrary result. There, the plaintiffs alleged only negligent installation of wiring, failure to meet building codes, and lack of proper inspection. 47 Wash. App. at 247, 734 P.2d 928. They did not bring suit against the defendants as sellers, alleging concealment of a known dangerous condition. The statute bars actions against a builder/seller where a plaintiff alleges only negligence against the defendant in his capacity as builder.

Island Construction also argues that the statute bars recovery even if the defendant has violated another statute. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 532, 503 P.2d 108 (1972). In *Yakima Fruit*, the defendant had performed work it was not licensed to do. However, in terms of an activity analysis, *Yakima Fruit* is not in point; the plaintiff sued the defendant as a builder, not as a seller.

As a final point in its statutory construction argument, Island Construction points out that the only proviso in R.C.W. 4.16.310 prevents owners or those in possession of the property at the time the cause of action accrues from using the statute of repose defense, and argues that by implication, an owner/builder who no longer owns the property is protected. The proviso should not be expanded because provisos are strictly construed; only cases falling within the specific terms of a proviso are exempted from the statute. *Seattle v. Western Union Tel. Co.*, 21 Wash. 2d 838, 850, 153 P.2d 859 (1944).

The proviso argument fails for two reasons. First, the proviso is consistent with the underlying premise noted above, that the statute is designed to protect builders from being held liable for the acts

of others. If we were to accept Island Construction's argument, we would reject that premise. Second, by applying an activity analysis, there is no need to expand the proviso. If the cause of action arises from the sale, then no proviso is needed because the statute is inapplicable.

As a policy matter, we reject the respondents' contentions that accepting a builder/seller distinction would gut the statute. The proof required for a case brought against a seller under § 353 is greater than that required for mere negligence. The statute would still protect builder/sellers charged with negligence.

The constitutional arguments of both partes lack merit. Article 2, section 28(17) of the Washington State Constitution prohibits "special" legislation limiting civil or criminal actions. "Special" laws apply only to particular persons rather than to all natural members of a class. *Wenatchee v. Boundary Review Bd.*, 39 Wash. App. 249, 251, 693 P.2d 135 (1984). "[T]o survive a challenge as special legislation, any exclusions from a statute's applicability ... must be rationally related to the purpose of the statute." *Seattle v. State*, 103 Wash. 2d 663, 675, 694 P.2d 641 (1985). It could be rational for the Legislature to distinguish between sellers who improve property and those who do not when the purpose of the statute is to provide protection to those who improve property. However, it is equally rational to impose the duties of a seller on those builders who also sell their property.

Resolving this case on the basis of statutory construction, we find the statute inapplicable because it does not protect the activity of selling. We need not address the argument advanced by amicus curiae urging us to create an exception to the statute for a cause of action based on intentional or fraudulent concealment. We reverse the trial court and remand for further proceedings.

PEARSON, BRACHTENBACH, DOLLIVER, DORE, ANDERSEN and SMITH, JJ., concur.

DURHAM, Justice (dissenting)

The majority's analysis of the construction statute of repose effectively repeals it, contrary to established rules of statutory interpretation and plain sense. Thus, I dissent.

Pursuant to R.C.W. 4.16.310, a builder is protected from any cause of action arising out of defective construction unless it accrues within 6 years of the substantial completion of construction, or the termination of the builder's activities, whichever comes later. It is undisputed that the builder in this case, Island Construction Company, completed the condominium at issue here in 1979, and the plaintiff's cause of action did not accrue until a fire in 1986. Therefore, if the statute of repose applies, it bars the plaintiff's claims.

The construction statute of repose applies to a wide range of claims:

> [The statute of repose] shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.... RCW 4.16.300.

The majority holds that this statute protects builders from claims alleging defects in construction, but not from claims alleging a failure to disclose those defects when the property is sold to others. The majority bases this interpretation on the absence of any language in the statute expressly extending protection to builders for failing to disclose their own construction defects.

Where this analysis breaks down is in its failure to realistically measure its impact. As the record demonstrates, residential construction commonly takes two forms. In "spec" construction, a builder constructs an improvement on "speculation" that a buyer can later be found to purchase the property. In custom construction, another party has already contracted to purchase the property. In "virtually 100%" of "spec" construction, and in "typically one-half" of the custom projects, the builder owns the property during the construction process.[1,2] Moreover,

[1] *Gevaart v. Metco Constr., Inc.*, 111 Wn. 2d 499, 760 P.2d 348 (1988). *See also Ruth v. Dight*, 75 Wn. 2d 660, 453 P.2d 631 (1969); *Ohler v. Tacoma Gen. Hosp.*, 92 Wn. 2d 507, 598 P.2d 1358 (1979).

[2] In custom project, the builder's ownership serves to

general contractors often have ownership interests even in larger commercial construction projects. Most construction projects, therefore, involve builders owning the property for subsequent re-sale.

When a builder/owner is involved, any claim that the builder defectively constructed a project is just as easily framed as a claim that the builder failed to disclose those defects when he sold the property after construction was complete.[3] Thus, the majority's analysis allows plaintiffs in most cases to avoid operation of the statute by simply recasting their allegations of defective construction as allegations of inadequate disclosure.

The majority attempts to downplay the effect of its holding with the curious statement that even though the statute of repose does not apply to builder/sellers in this case, it "would still protect builder/sellers charged with negligence." Majority, at 1023. The statute, however, contains no language suggesting a distinction for negligence claims. Apparently, the majority conjured up this explanation in an attempt to assign meaning to a statute that will have little use after today's decision.

This court should not attribute to the Legislature an intent to so severely restrict what was obviously intended to be a statute of sweeping application. "A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result." 2A N. SINGER, STATUTORY CONSTRUCTION § 45.12, at 54 (4th ed. 1984) (and cases cited therein). A statute must be given a reasonable interpretation so as to give effect to its purpose and avoid absurd results. *Pasco v. Napier*, 109 Wash. 2d 769, 773, 755 P.2d 170 (1988); 2A N. SINGER, at § 45.12.

Analysis of the statute's purpose reveals that a defendant who builds and sells an improvement should be treated in the same manner as one who only builds the improvement. Statutes of repose are designed to avoid placing undue burdens on potential defendants by limiting the applicability of the discovery rule; liability attaches only for those causes of action that accrue within a certain period of time after the defendant has acted.[4] *See Gazija v. Nicholas Jerns Co.*, 86 Wash. 2d 215, 222 n.2, 543 P.2d 338 (1975); R.C.W. 4.16.310. The policy is to protect defendants from having to defend against stale claims, because such claims are more likely to be spurious and supported by untrustworthy evidence, and the defendant often has not been in control of the improvement for a number of years. *See Gazija*, at 222, 543 P.2d 338; *New Meadows Holding Co. v. Washington Water Power Co.*, 34 Wash. App. 25, 29, 659 P.2d 1113 (1983), *aff'd in part, rev'd in part*, 102 Wash. 2d 495, 687 P.2d 212 (1984). The builder's lack of control over the premises is important because "[t]he longer the owner has possession of the improvement, the more likely it is that the damage was the owner's fault or the result of natural forces." *Jones v. Weyerhaeuser Co.*, 48 Wash. App. 894, 899, 741 P.2d 75 (1987).

These expressions of legislative policy are served equally when the defendant is a builder/seller as when the defendant is only a builder. In each instance, the defendant is burdened with litigating stale claims relating to alleged defects in the defendant's construction activity. That one claim involves defective construction and the other involves failure to disclose those defects does not affect the burden on the defendant in having to defend himself from tardy claims. Because the two claims are so intimately related, and because one claim can so easily be transformed into the other, no distinction should be drawn between the two in applying the construction statute of repose. The majority's limitation of the statute simply cannot be squared with a reasonable interpretation of legislative intent.[5]

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assist and simplify the construction financing.

[3] The present case serves as a good example. Pfeifer's original complaint in this case predicated Island Construction Company's liability solely on its activities of building and inspecting the condominium. Pfeifer later amended her complaint, however, to add a claim that Island Construction Company actively concealed, or failed to disclose, these defects to the buyer.

[4] A cause of action "accrues" under this statute "`at the time the plaintiff knew or should have known all of the essential elements of the cause of action.'" *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wash. 2d 878, 884, 719 P.2d 120 (1986) (quoting *White v. Johns-Manville Corp.*, 103 Wash. 2d 344, 348, 693 P.2d 687, 49 A.L.R.4th 955 (1985)).

[5] My dissent should not be taken as a criticism of the majority's holding that the construction statute of repose calls for an activity analysis. I differ from the majority, however, in concluding that the Legislature intended

By deciding that the statute should apply, I need to address the argument raised by amicus curiae calling for a judicially created exception to R.C.W. 4.16.310 for fraudulent concealment. This court long ago stated that absent "a statute making concealment an exception to the statute of limitations, the court cannot create one." *Reeves v. John Davis & Co.*, 164 Wash. 287, 295, 2 P.2d 732 (1931) (citing *Cornell v. Edsen*, 78 Wash. 662, 139 P. 602 (1914)). This statement is equally applicable in the context of a statute of repose. Although the proposed exception might make sense as a matter of policy, the argument raised by amicus should be addressed to the Legislature, not this court.

The trial court's summary judgment in favor of Island Construction Company should be affirmed.

CALLOW, C.J., concurs.

builders to be protected in both their selling and building activities when the two activities are so intimately related.

§ C. Tolling of the Limitation Period

STRAHLER v. ST. LUKE'S HOSPITAL

706 S.W.2d 7 (Mo. banc 1986)

BILLINGS, Judge

This appeal challenges the constitutionality of Missouri's medical malpractice statute of limitations, § 516.105, RSMo 1978, as it applies to minors. We ordered the case transferred to this Court prior to opinion by the court of appeals because of the constitutional issue. MO. CONST. art. V, § 10. We reverse the dismissal of plaintiff's petition and remand the case for further proceedings.

On September 23, 1982, plaintiff Carol A. Strahler, then nineteen years old, filed a single count petition for damages in the Circuit Court of Jackson County. Plaintiff's petition alleged that when she was a fifteen year old minor, defendant Dr. Sandow and four other named defendants had provided her with careless and negligent medical treatment and that as a direct and proximate result of defendants' negligence, she suffered the complete amputation of her right leg above the knee.

Defendants moved to dismiss the action on the ground that plaintiff's common law cause of action was barred by § 516.105, RSMo 1978, because a suit of this kind must be brought within two years from the date of the complained of actionable wrong and plaintiff did not bring suit until four years after the alleged malpractice. Plaintiff appeals from the trial court's order dismissing her medical malpractice action against defendant Dr. Sandow.[1]

Section 516.105 is as follows:

> **Actions against health care providers (medical malpractice.)** - All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of, except that a minor[2] under the full age of ten years shall have until his twelfth birthday to bring action, and except that in cases in which the act of neglect complained of its introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs, but in no event shall any action for damages for malpractice, error, or mistake be commenced after the expiration of ten years from the date of the act of neglect complained of.

Although plaintiff has propounded a number of constitutional arguments,[3] the dispositive challenge that she raises to the constitutionality of

[1] The four other defendants who were named in the petition have reached a settlement with plaintiff and are no longer parties to this action.

[2] In Missouri a minor, or infant, in connection with the commencement of a civil action, is defined as any person who has not attained the age of eighteen years. Section 507.115, RSMo 1978. And, when a minor sustains injuries due to another's negligence, he acquires his own independent common law cause of action, separate and distinct from any his parents may acquire from the tortfeasor's negligent acts. *See generally*, *Evans v. Farmers Elevator Co.* 347 Mo. 326, 147 S.W.2d 593 (1941).

[3] Plaintiff has also advanced state and federal equal protection and due process arguments as well as the theory that § 516.105, RSMo 1978, constitutes a special or local law in violation of article 3, § 40 of our state constitution. Our disposition of plaintiff's challenge to § 516.105, RSMo 1978, under MO. CONST., art. I, § 14 eliminates the necessity of reaching the merits of these other constitutional points.

§ 516.105, RSMo 1978, is that it violates the mandate of MO. CONST. art. I, § 14, which guarantees to every Missouri citizen "that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person...."

We begin our analysis by pointing out that although our federal Constitution is an important and frequently relied upon source of individual rights, our state Constitution is also a reservoir of personal rights and liberties - some of which are not enumerated in or accorded protection by our federal Constitution. Article I, section 14 is one such provision in our state Constitution which grants to the people of Missouri an express constitutional guarantee not enumerated in our federal Constitution. *But see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

In State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979), we found Missouri's statutorily mandated Professional Liability Review Board, §§ 538.010-.080, RSMo 1978, violative of MO. CONST. art. I, § 14 because it imposed an unduly burdensome precondition on a litigant's right of access to the courts. *State ex rel. Cardinal Glennon v. Gaertner*, 583 S.W.2d at 110. Our holding in *Cardinal Glennon* simply reaffirmed the principle that MO. CONST. art. I, § 14 is a part of this State's organic law and that it was intended to give constitutional protection to a litigant's ability to gain access to Missouri's courts. *See generally*, *DeMay v. Liberty Foundry Co.*, 327 Mo. 495, 37 S.W.2d 640 (1931); *see also State ex rel. National Refining Co., v. Seehorn*, 344 Mo. 547, 127 S.W.2d 418 (1939). The language contained in MO. CONST. art. I, § 14 is not simply advisory in nature: it gives express constitutional protection to a litigant's right of access to our court system.

Here, plaintiff contends that § 516.105, RSMo 1978 - in violation of MO. CONST. art. I, § 14 - unconstitutionally devitalizes and effectively extinguishes her common law right and practical opportunity to seek legal redress for injuries sustained through defendant's alleged negligent medical treatment. Defendant, however, argues that § 516.105, RSMo 1978, does not contravene MO. CONST. art. I, § 14 because plaintiff, who was fifteen years of age at the time of the alleged malpractice, could have recruited a next friend to bring suit and was thus able to institute an action in her own right under Missouri law.

In Missouri, a person who is under the legal disability of minority still lacks capacity to institute, in his own right, a civil lawsuit. *See Scott v. Royston*, 223 Mo. 568, 123 S.W. 454 (1909); *see, e.g.*, *Martin v. Martin*, 539 S.W.2d 756 (Mo. App. 1976) (an award of child support is made to the custodial parent for the benefit of children who because of minority lack legal status to bring suit directly). Rule 52.02(a) requires that "civil actions by minors ... be commenced and prosecuted only by a duly appointed guardian ... or by a next friend appointed for him...." This legal principle is also codified in statutory form and is found at §§ 507.110-.120, RSMo 1978.

Defendant suggests that Rule 52.02(c) serves to relieve a minor who is at least fourteen years of age of the legal disability of minority. To the contrary, Rule 52.02(c) provides only that in the case of a minor who is fourteen or older, appointment of a next friend can be made without notice to the persons with whom the minor resides, and it can be accomplished without formal application to the court. The minor, however, must still have a next friend who agrees in writing to serve as such. This provision of Rule 52 simply does not imbue a minor who is at least fourteen years old with the legal capacity necessary to maintain a civil action in his own right.[4]

It should not escape notice that although the present case involves a fifteen year old minor, §

[4] Defendant also cites Rule 52.02(m) and our decision in *Concerned Parents v. Caruthersville School District 18*, 548 S.W.2d 554 (Mo. banc 1977), as additional authority for the proposition that appellant was free to initiate her own law suit as a fifteen year old minor.

In *Concerned Parents*, we determined only that the minor plaintiffs' failure to comply with our rules governing appointment of a next friend proved to be harmless under Rule 52.02(m) because it was shown that the minors' interests had been adequately protected. We note that the adult plaintiffs, though not formally appointed, were the natural guardians of the minor plaintiffs and were also real parties in interest. We also instructed the parties to comply with the rule upon remand. *Concerned Parents*, *supra*, at 558, n.3. Rule 52.02(m) provides only that the failure to appoint a next friend will not render a proceeding invalid if it is determined that the interests of the minor were adequately protected. Application of this rule contemplates a minor gaining entry to the courtroom. In the present case, however, the rule would have no application because the minor was barred *from ever getting inside the courthouse doors*.

516.105, RSMo 1978, applies with equal force to all minors past the ripe old age of ten.[5] We think defendant's contention that plaintiff should not now be heard to complain because she was free to "initiate her own suit" plainly ignores the disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years - who has little if any understanding of the complexities of our legal system.

The many value-laden issues to which this controversy gives rise were eloquently distilled and put into sharp relief by a commentator writing in a recent edition of the *Journal of Legal Medicine*:

> State legislatures reacted in the 1970's to a perceived crisis in medical malpractice insurance by enacting these types of limitations provisions. While such provisions no doubt go some distance in alleviating the problems of malpractice insurers and health care providers, they do so only at a high cost. *Their effect is to bar the malpractice suits of minors without regard to the validity of their claims or the fact that the minors are wholly innocent in failing to timely pursue their claims. Such a result seems to unfairly penalize the blameless minor in order to protect the potentially negligent health care provider*. (emphasis added). Andrews, *Infant Tolling Statutes in Medical Malpractice Cases: State Constitutional Challenges*, 5 J. LEGAL MEDICINE, 469 (1984).

The fact of the matter is that for most minors the opportunity to pursue a common law cause of action for injuries sustained from medical malpractice is one that is inextricably linked to the diligence and willingness of their parents to act in a responsible and timely manner. When faced with a controversy involving very similar legal issues, the Texas Supreme Court concluded that "it is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided...." *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983). In this connection, we think it is equally unreasonable to expect a minor, whose parents fail to timely vindicate his legal rights, to independently seek out another adult willing to serve as a next friend. Such an expectation would ignore the realities of the family unit and the limitations of youth.

The *Sax* case involved a similarly restrictive, though not identical, medical malpractice limitations period[6] which ran against minors, who under Texas law lacked the capacity to bring their own lawsuits.[7] The Texas Supreme Court held that the statute ran afoul of the state's constitutional due process clause and open courts provision. The court employed a test that balanced the litigant's right to redress and the extent to which this right

[5] In this connection we note that under the operation of § 516.105, RSMo 1978, minors under the full age of ten have until two years after their tenth birthday to file an action of this kind. *See McLeran v. St. Luke's Hospital of Kansas City*, 687 S.W.2d 892, 893 (Mo. banc 1985).

[6] The Texas statute read as follows:

> Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Art. 4437f, Vernon's Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability. TEXAS INS. CODE ANN. art. 5.82 (Vernon 1975) (repealed 1977).

[7] Texas is not the only jurisdiction which has held a state medical malpractice limitations statute unconstitutional as applied to minors. *See Barrio v. San Manuel Div., Magma Copper*, 143 Ariz. 101, 692 P.2d 280 (1984) (statute unconstitutional under Arizona's state constitutional guarantee against abolition of the fundamental right to recover damages by way of a common law action); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (statute violates state constitution because it contravenes equal protection principles); *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983) (statute declared unconstitutional under state equal protection analysis).

had been burdened against the legislative purpose of the statute and the method employed by the legislature to reach the ends desired. After applying this test, the Texas Supreme Court held the statute to be an arbitrary and unreasonable exercise of legislative power as it pertains to minors because the statute "effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative." *Sax v. Votteler*, 648 S.W.2d at 667.

Turning to the present case, we fully appreciate the legislative purpose intended by § 516.105, RSMo 1978, and we are unwilling to denominate it as being illegitimate, but we think the method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs like Carol Strahler and all other minors similarly situated. For minor plaintiffs like Carol Strahler, the cure selected by the legislature would prove no less pernicious than the disease it was intended to remedy.

The requirement that "[c]ivil actions by minors may be commenced and prosecuted only by a duly appointed guardian of such minor ..." (emphasis added), acts as an impediment to a minor's access to the courts. *See* Rule 52.02(a) and § 507.110. That right of access is "an aspect of the right to petition the government ... explicitly preserved in the constitution of Missouri." *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W.2d at 110.

Recognizing that a minor lacks the legal capacity to bring an action in his own right as well as the difficulties which generally surround a minor's ability to vindicate, by his own initiative, his legal rights, our statutes of limitations applicable to personal injury suits have traditionally been tolled for minors. Section 516.170, RSMo Cum. Supp. 1984. The prosecution of an action by a guardian or next friend is an option available to the minor; failure of a next friend to bring the action during minority does not, however, destroy the cause of action, generally speaking. Nor for that matter does the running of a statute of limitations technically "destroy" a minor plaintiff's right of action: it merely bars the maintenance of the action and leaves the injured party without a remedy. *See generally*, *Herrman v. Dixon*, 285 S.W.2d 716 (Mo. App. 1956). Thus, the general tolling provisions of § 516.170 preserve the cause of action for a minor and safeguard the minor's constitutionally guaranteed right of access to the courts - even if parents, guardians or others having custody of a child fail to protect the child's legal rights.

The statutory limitation period, as applied to minors, violates their right of access to our courts[8] under MO. CONST. art. I, § 14 and renders vacant the guarantee contained in this constitutional provision which declares in no uncertain terms "that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person...." To the extent that it deprives minor medical malpractice claimants the right to assert their own claims individually, makes them dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, the provisions of § 516.105 are too severe an interference with a minors' state constitutionally enumerated right of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice crisis.

Our society takes great pride in the fact that the law remains forever at the ready to "jealously guard" the rights of minors. Section 516.105, RSMo 1978 arbitrarily and unreasonably denies them a set of rights without providing any adequate substitute course of action for them to follow. We consider § 516.105, RSMo 1978, as it pertains to minors, a statutory aberration which

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[8] According to defendant, the result we reach today is foreclosed by our decision in *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1968). Our decision in *Laughlin*, however, does not speak to the issues raised in the present case - because in *Laughlin* we decided only that the medical malpractice statute of limitations in force at that time, § 516.140, RSMo 1959, was not tolled until the damage complained of was discovered.

In the course of our decision we also reaffirmed the unquestioned right of the legislature to enact statutes of limitations, but we also noted in the same breath that the legislature is not empowered to create a statute of limitations which would be "unreasonable" - that is one which would infringe upon an enumerated constitutional right. Though we found the operation of the particular statute of limitations in *Laughlin* to be harsh and our decision distasteful, we nevertheless concluded that the plaintiff failed to demonstrate how the statute was constitutionally infirm. In the present case, however, the plaintiff has succeeded at this task. Our holding in *Laughlin* does not remedy the constitutional infirmity present in § 516.105, RSMo 1978.

runs afoul of our state Constitution and we accordingly hold it constitutionally infirm.

The judgment is reversed and the case remanded to the circuit court for further proceedings.[9]

HIGGINS, C.J., and RENDLEN, J., concur.

ROBERTSON, J., concurs in separate opinion filed.

BLACKMAR, DONNELLY and WELLIVER, JJ., dissent in separate opinions filed.

ROBERTSON, J., concurring. (opinion omitted)

BLACKMAR, Judge, dissenting

Two assumptions necessarily underlie the statute in issue, as follows: (1) parents, guardians, or others having custody of children may be depended upon to protect the children's legal rights, and (2) a child of the age of 10 and above is able to advise his custodian of any physical problems which might indicate a need for inquiry as to possible medical malpractice.

These assumptions are not unreasonable, and the legislature is entitled to make them in balancing the interests of claimants and defendants, while drafting a statute of limitation. The statutes of limitation on wrongful death actions,[1] and on securities claims,[2] have been held to run against minors. Any protection, then, must necessarily come from parents or guardians. Any suggested distinction between actions created by statute and those existing at common law is lacking in constitutional substance. The matter is one for legislative choice.

* * *

DONNELLY, Judge, dissenting. (opinion omitted)

WELLIVER, Judge, dissenting

I respectfully dissent.

The obvious flaw in the principal opinion lies in the ease with which it reaches its conclusion without constitutional analysis and without the application of a constitutional test or standard. Under the guise of construing our State Constitution, a majority of this Court has emasculated the legislature's latest effort to deal with the malpractice crisis and the crisis of escalating medical costs. This they have done while the legislature was considering further limitation and restriction of the existing law of malpractice. Such action is reminiscent of the *Lochner* era, as it came to be known,[1] when state and federal courts acted like super-legislatures in striking down legislation not consistent with their own views.

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[9] The dissent of WELLIVER, J., conjures up and then knocks down the dual straw men of due process and equal protection. The dissent of DONNELLY, J., creates a third diversion. As we carefully note this case is narrowly ruled under the open courts guarantee found in Mo. Const. art. I, § 14. Questions concerning limiting the amount of recovery, "caps", and other statute of limitations relating to minors are not before us in this case.

[1] *See, e.g.* *Crane v. Riehn*, 568 S.W.2d 525 (Mo. banc 1978) (superseded by statute as stated in *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 938 (Mo. App. 1982)); *Kausch v. Bishop*, 568 S.W.2d 532 (Mo. banc 1978); *Edmonsond v. Lakeside Hospital*, 562 S.W.2d 361 (Mo. banc 1978) (all holding minors to the provisions of the former Missouri wrongful death statute which prevented minors from bringing suit more than one year following the death of a parent if a parent of the decedent was alive).

[2] *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 486 F. Supp. 56 (E.D. Mo.1980), *aff'd.*, 644 F.2d 690 (8th Cir. 1981).

[1] *See generally* A. PAUL, CONSERVATIVE CRISIS & THE RULE OF LAW: ATTITUDES OF BAR & BENCH, 1870-1895 (1976); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests*," 52 U. CHI. L. REV. 324 (1985).

PART III

MODIFICATION OF DUTY BY STATUS AND RELATIONSHIPS

Introduction

In Chapter One we looked at two major theories by which a defendant can be made liable for a plaintiff's injuries: negligence and strict liability. I noted at that time that the question of "duty" is a deceptively difficult one. In this chapter we return to the issue of duty, and seek to answer the question in the abstract, "How do we know whether a defendant owes a duty of care to a plaintiff, and what that duty is?" Our earlier approximation of that question was that most of the time the defendant must use reasonable care for the plaintiff's safety. That is true of the vast majority of cases. However, several qualifications must be made:

(1) sometimes the nature of the relationship between defendant and plaintiff requires a modification of that standard. For example, special rules apply in premises liability (Chapter Eight), product liability (Chapter Nine) and Professional Negligence cases (Chapter Ten).

(2) Sometimes a defendant can escape liability because she can successfully claim that she was under no duty to use reasonable care at all. These cases include rescuers, agencies responsible for protection of the public (police, fire, etc.). The question in those cases is when a defendant's *failure to act* is actionable under negligence principles.

In an earlier edition of this book I gave this section the subtitle "The (Ir)relevance of Contract" because tort law is strangely unaffected by the frequency with which tort law grows out of what are essentially contractual relationships. Products liability, medical malpractice, slip-and-fall, airplane crash, and other kinds of cases can be looked at as an outgrowth of some kind of agreement between the plaintiff and the defendant: the landowner invites a visitor; the buyer agrees to purchase a product; the patient agrees to be treated by the doctor. This is a luxury we do not always have in tort law. In fact, one might argue that tort law ought to defer to contract law except in those situations where contract is unavailable: where the parties have no opportunity to bargain ahead of time for who will bear the risks of injury arising from their potential "collision." Thus, tort law is ideally suited for intersection collisions, where the parties have no means of bargaining with each other over who should bear what risks; but contract would be ideally suited for doctor/patient or owner/visitor or seller/buyer relationships, where the parties have a much better (if still imperfect[1]) opportunity to decide.[2] Although contract principles were to a large extent displaced by tort law in the 20th century, tort law continues to reflect the origin of many important principles in the law of contracts. Moreover, in deciding what duty of care to impose upon the defendant, courts may very well look at the kind of relationship that was formed prior to the injury.

In a previous edition of this casebook, I included an excerpt from a book that was hot off the press when I was a first-year law student, but I now shudder to think that it is more than thirty years old. Grant Gilmore wrote THE DEATH OF CONTRACT in the belief that "what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.'" However, he acknowledged that there is a cyclical quality to trends in society, including law, and that the retreat from contract into tort might be part of a cycle that would in time reverse itself. He pointed to the existence of "classical periods" being followed by "romantic" periods: "The romantics spurn the exquisitely stated rules of the preceding period; they

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[1] One justification for tort law's refusal to defer to contract law is that in many "contractual" relationships the potential plaintiff has only limited opportunity to make an informed decision. The fine print on the back of a parking lot stub should not be allowed to prevent the car owner from recovering for negligent handling of his car by the lot. A similar argument is made where the consumer buys a lawnmower or the patient checks into the hospital. This argument is well illustrated by the *Henningsen* case, *infra* § 6B. Of course, even in contract law the language of the contract is not always followed mechanically; there is always U.C.C. § 2-302, preventing unconscionability. However, at some point the consumer must be given a measure of freedom to structure the relationship, even if it may mean the acceptance of a large measure of the risk.

[2] Many of these issues are discussed in Atiyah, *Medical Malpractice and the Contract/Law Boundary*, 49 L. & CONTEMP. PROB. 287 (Spring 1986); and Law, *A Consumer Perspective on Medical Malpractice*, 49 L. & CONTEMP. PROB. 305 (Spring 1986).

experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic - as well as frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation - and so the rhythms continue."

Twenty years after the publication of Gilmore's book, one commentator called his book "a huge success": Robert A. Hillman, *The Triumph of Gilmore's* THE DEATH OF CONTRACT, 90 N.W. U. L. REV. 32 (1995).

Questions and Notes

1. If your client has been damaged by some action of the defendant, how do you know whether you should bring an action based upon breach of a tort duty or breach of a contract?

2. For another historical overview, see Swanton, *The Convergence of Tort and Contract*, 12 SYDNEY L. REV. 40 (1989).

Chapter 8
Premises Liability

§ A. The Status Distinctions

1. Are the Status Distinctions Desirable?

YOUNCE v. FERGUSON

106 Wash. 2d 658, 724 P.2d 991 (1986)

GOODLOE, Justice

In this case, we determine whether the common law classifications of entrants as invitees, licensees, or trespassers should continue to be determinative of the standard of care owed by an owner or occupier of land and whether the status of the entrant in this case was correctly determined. We answer both questions affirmatively and affirm the trial court.

Appellant Lisa Younce appeals the dismissal of respondents Charles, Thelma, and Dean Strunk from the suit. Lisa was injured when a car driven by Tamera Ferguson ran into her on a parcel of Strunk property, where a high school graduation "kegger" party was being held.

Dean Strunk, the son of Charles and Thelma Strunk, was a member of the 1977 Evergreen High School graduating class. Class members planned a graduation party to follow commencement exercises on June 7, 1977. Tickets to the party were sold for $4.00 to purchase beer, food, and music. Dean made arrangements to and did buy 15 kegs of beer from a local tavern for the party with ticket proceeds. The party was originally scheduled to be held on another class member's property, but during the commencement exercises it was generally agreed that the party would be moved to the Strunk property on 109th Avenue.

The 109th Avenue property was the largest of eight parcels of land that Charles and Thelma Strunk had under lease for farming purposes. The property was located 6 miles or 8-9 minutes driving time from the Strunk residence. Dean and his younger brother, Brad, took care of family duties at the property.

Following commencement exercises, Dean went home, changed clothes, and transported the kegs to the 109th Avenue property. Charles and Thelma returned home from the commencement exercises around 10:20 p.m. to 10:30 p.m. From about 11 p.m. to 11:10 p.m., four or five carloads of people arrived at the Strunk residence asking the location of the party. The Strunks also received a phone call from someone looking for the site. More than one inquirer advised the Strunks that the party was on Strunk property. Charles Strunk drove to 4 parcels within 1 mile of the family residence to see if there was a party, testifying he would have run the kids off the property if he had found them. He did not, however, check the 109th Avenue property.

When Dean arrived at the 109th Avenue property around 11 p.m. with the kegs, 100-400 minors were present, including graduating seniors, school mates, students from other schools, and other minors not attending school. Brad was collecting tickets, directing cars to parking areas, and advising cars' occupants of the kegs' location.

Tamera Ferguson, a minor, paid for attendance when she arrived. Lisa Younce, a minor, arrived around 11:30 p.m. with Judy Bock, who had previously bought two tickets for their admission. Lisa and Judy had had one mixed drink before arriving. They mixed another after arriving but Lisa did not drink it.

When the accident occurred, at approximately 12:15 a.m., drinking had been going on at the site for at least an hour, but the party attendees were well behaved. There had been no excessive drinking except for Dean and Tamera, who both admitted they were intoxicated from alcohol consumed at the party site. No automobile had been driven through the area where party attendees were standing. Lisa was standing in a dimly lit grassy and gravel area near the main barn and approximately 150 feet away from the kegs.

Lisa was hit from behind by a Volkswagen driven by Tamera. The car hit her in the right knee and knocked her to the ground. Lisa was not under the influence of or affected by alcohol at the time she was hit. Tamera left or was taken from the scene. Lisa was taken to the hospital. Charles and Thelma Strunk were notified of the accident. They went to the 109th Avenue property with cooking utensils and prepared hamburgers from 1:30 a.m. to 5:30 a.m. when the kegs were emptied and the last attendees left.

Dean and Lisa both knew that when minors drink they become intoxicated, and when they become intoxicated they will drive. Charles and Thelma Strunk knew that minors drink at parties

Lisa sued Tamera. The trial court found that Tamera had negligently injured Lisa and entered judgment for $69,543.31. Tamera did not appear at trial and has not appealed.

Lisa also sued the Strunks. Her first theory alleged negligence per se based on a violation of R.C.W. 26.28.080 (selling or furnishing intoxicating liquor to a minor). Based on the case of *Hulse v. Driver*, 11 Wash. App. 509, 524 P.2d 255 (1974), the trial court dismissed this portion of the plaintiff's complaint with prejudice. This issue has not been appealed, and no argument has been presented. Lisa's second theory which is the basis of the entire appeal relates to the common law classifications between invitee, licensee, and trespasser and the duty of care owed by the owner or occupier of land.

The trial court found that liability on the part of the Strunks depended upon Lisa's status on the property. The court found Lisa was a social guest, and therefore only a licensee. Applying the duty of care applicable to licensees and articulated in RESTATEMENT (SECOND) OF TORTS § 332 (1965), the trial court found the duty had not been breached. The Strunks were dismissed with prejudice. The court explained in its memorandum opinion, however, that if Lisa had been an invitee and the duty of care therefore had been one of reasonable care under all the circumstances, the court would have concluded that the Strunks had breached their duty to Lisa. The court also noted, however, that this was a case where Lisa could appreciate the dangers or conditions of the premises. Lisa appealed. The case is before this court on an administrative transfer from the Court of Appeals, Division Two.

Two issues must be addressed. First, we must decide whether in a claim for injury against an owner or occupier of land, the standard of care owed should continue to turn upon the common law distinctions between invitee, licensee, and trespasser, or whether such distinctions should be replaced by a negligence standard of reasonable care under all the circumstances. Because we retain the common law classifications, we must also decide whether Lisa Younce was properly characterized as a licensee or whether she should have been characterized as an invitee.

Lisa argues that the common law distinctions of invitee, licensee, and trespasser should no longer determine the applicable standard of care owed by an owner or occupier of land in Washington. She urges they be abandoned and replaced by a standard of reasonable care under all the circumstances. *See* 16 GONZ. L. REV. 479 (1981). Washington relies upon and has adopted many of the definitions and corresponding duties outlined in RESTATEMENT (SECOND) OF TORTS (1965). *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wash. 2d 127, 131-32, 606 P.2d 1214 (1980).

In *Egede-Nissen* we acknowledged past questioning of the common law classification scheme, *see Ward v. Thompson*, 57 Wash. 2d 655, 660, 359 P.2d 143 (1961) ("timeworn distinctions"); *Mills v. Orcas Power & Light Co.*, 56 Wash. 2d 807, 820, 355 P.2d 781 (1960) ("ancient categories"), but decided that we were not ready then to totally abandon the traditional categories and adopt a unified standard. *Egede-Nissen*, 93 Wash. 2d at 131, 606 P.2d 1214. We still are not ready and reaffirm use of common law classifications to determine the duty of care owed by an owner or occupier of land.

A recent annotation, Annot., *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4TH 294 (1983), outlines the current positions of the different jurisdictions on this issue. Retention of the common law classifications continues to be the majority position.

Nine jurisdictions have abolished use of the common law classifications of invitees, licensees, and trespassers as determinative of the landowner's or land occupier's duty of care. *See* Annot., at 301-307; *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97, 32 A.L.R.3d 496 (1968); *Pickard v. City & Cy. of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Smith v. Arbaugh's*

Restaurant, Inc., 152 U.S. App. D.C. 86, 469 F.2d 97 (D.C. Cir. 1972); *Mariorenzi v. Joseph Diponte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So. 2d 367 (La. 1976); *Webb v. Sitka*, 561 P.2d 731 (Alaska 1977); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984).

The typical analysis in these cases includes noting that England, where the distinctions originated, has abolished them by statute. Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31. The cases also note that the United States Supreme Court refused to adopt the rules relating to the liability of a possessor of land for the law of admiralty. *Kermarec v. Compagnie Generale Transalantique*, 358 U.S. 625, 630-31, 79 S. Ct. 406, 409-10, 3 L. Ed. 2d 550 (1959).

The cases rejecting the classifications list the subtleties and subclassifications created in their respective jurisdictions. The opinions explain that it is difficult to justify a system with so many exceptions and that while the distinctions were justified in feudal times, they are not justified in modern society. As explained in *Rowland*, 69 Cal. 2d at page 118, 443 P.2d 561, 70 Cal. Rptr. 97, the first case to reject the classifications:

> 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.

Rowland then announced the standard for determining the liability of the possessor of land would be "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." *Rowland*, at 119, 443 P.2d 561, 70 Cal. Rptr. 97. The principle is generally referred to as the reasonable care under all of the circumstances standard.

Six jurisdictions have abolished the distinction between licensee and invitee. *See* Annot., at 307-10; *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973) (extending reasonable care to social guests or invited licensees but retaining distinction for uninvited licensees and trespassers); *Antoniewicz v. Reszczynski*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979). The rationales for abandoning the distinction between invitee and licensee are the same as the rationales given by the cases abolishing the distinction between all three classifications. The reason given for not extending the standard of reasonable care to trespassers is that even in modern society it is significant that a trespasser does not come upon property under a color of right o that a trespasser was not involved in the case where the distinction between licensee and invitee was abolished.

However, the majority of jurisdictions have not rejected the classifications. *See* Annot., at 310-12. Some have directly confronted the issue of whether to abandon the distinctions and have declined to do so. *Whaley v. Lawing*, 352 So. 2d 1090 (Ala. 1977); *Bailey v. Pennington*, 406 A.2d 44 (Del. 1979); *Huyck v. Hecla Mining Co.*, 101 Idaho 299, 612 P.2d 142 (1980); *Hessler v. Cole*, 7 Ill. App. 3d 902, 289 N.E.2d 204 (1972); *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978); *Murphy v. Baltimore Gas & Elec. Co.*, 290 Md. 186, 428 A.2d 459 (1981) (choose not to abandon at least with respect to trespassers); *Astleford v. Milner Enters., Inc.*, 233 So. 2d 524 (Miss. 1970); *Steen v. Grenz*, 167 Mont. 279, 538 P.2d 16 (1975); *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979); *Moore v. Denune & Pipic, Inc.*, 26 Ohio St. 2d 125, 269 N.E.2d 599 (1971); *Sutherland v. Saint Francis Hosp., Inc.*, 595 P.2d 780 (Okla. 1979); *Buchholz v. Steitz*, 463 S.W.2d 451 (Tex. Civ. App. 1971); *Tjas v. Proctor*, 591 P.2d 438 (Utah 1979); *Yalowizer v. Husky Oil Co.*, 629 P.2d 465, 22 A.L.R.4th 285 (Wyo. 1981). Some without

directly confronting the issue, or by deferring to a higher appellate court, continue to adhere to the common law classifications. *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 639 P.2d 330 (1982); *Ramsey v. Mercer*, 142 Ga. App. 827, 237 S.E.2d 450 (1977); *Barbre v. Indianapolis Water Co.*, 400 N.E.2d 1142 (Ind. App. 1980); *Champlin v. Walker*, 249 N.W.2d 839 (Iowa 1977); *Davis v. Jackson*, 604 S.W.2d 610 (Mo. App. 1980); *Caroff v. Liberty Lumber Co.*, 146 N.J. Super. 353, 369 A.2d 983 (1977); *Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E.2d 630 (1977); *Taylor v. Baker*, 279 Or. 139, 566 P.2d 884 (1977); *Crotty v. Reading Indus., Inc.*, 237 Pa. Super. 1, 345 A.2d 259 (1975); *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970).

The reasons proffered for continuing the distinctions include that the distinctions have been applied and developed over the years, offering a degree of stability and predictability and that a unitary standard would not lessen the confusion. Furthermore, a slow, piecemeal development rather than a wholesale change has been advocated. Some courts fear a wholesale change will delegate social policy decisions to the jury with minimal guidance from the court. *See* Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions* UTAH L. REV. 15 (1981). Also, it is feared that the landowner could be subjected to unlimited liability.

We find these reasons to be compelling. As noted by the Kansas court in *Gerchberg*, 223 Kan. at pages 450-51, 576 P.2d 593: "The traditional classifications were worked out and the exceptions were spelled out with much thought, sweat and even tears". We are not ready to abandon them for a standard with no contours. It has been argued that jury instructions can provide adequate guidance. In fact, amicus has suggested and other courts have found that the following factors should be considered by the jury: (1) the circumstances under which the entrant was on the property; (2) the foreseeability of the injury or damage given the type of condition involved; (3) the nature of the property and its uses; (4) the feasibility of either correcting the condition on the property or issuing appropriate warnings; and (5) such other factors as may be relevant in the particular case. These factors are similar to the concerns being addressed by the current RESTATEMENT rules and caselaw. We do not choose to erase our developed jurisprudence for a blank slate. Common law classifications continue to determine the duty owed by an owner or occupier of land in Washington.

Lisa argues alternatively that, if the common law classifications are retained, she was incorrectly characterized as a licensee at trial. Lisa argues that she should have been characterized as an invitee under the facts of this case. Lisa's status on the property determines the standard of care owed her by the Strunks.

In *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wash. 2d 644, 650, 414 P.2d 773 (1966), this court adopted the RESTATEMENT (SECOND) OF TORTS § 332 (1965) definition of invitee. An invitee is owed a duty of ordinary care.

Section 332 defines an invitee as follows:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

A licensee is defined as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT, § 330. A licensee includes a social guest, that is, a person who has been invited but does not meet the legal definition of invitee. In *Memel v. Reimer*, 85 Wash. 2d 685, 689, 538 P.2d 517 (1975), this court replaced the willful and wanton misconduct standard of care toward licensees with a duty to exercise reasonable care toward licensees where there is a known dangerous condition on the property which the possessor can reasonably anticipate the licensee will not discover or will fail to realize the risks involved. *Memel* specifically adopted the standard of care for licensees outlined in RESTATEMENT, § 342:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they

> will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. (Italics ours.) *Memel*, at 689, 691, 538 P.2d 517.

The possessor fulfills his duty by making the condition safe or warning of its existence.

Lisa contends that she was a member of the public on the land for a purpose for which the land is held open and therefore is an invitee. We disagree. The facts of this case do not parallel the facts of other cases where the plaintiff was found to be a public invitee. In *McKinnon*, a federal savings and loan association posted a sign saying it had meeting rooms available for public use. The plaintiff in *McKinnon* was part of a Girl Scout group using the room for Scout meetings. In *Fosbre v. State*, 70 Wash. 2d 578, 424 P.2d 901 (1967), the plaintiff was injured at a recreational area on a National Guard fort. The area had been improved and maintained for use by National Guard families of which plaintiff was a member. In these "invitee" cases, "the occupier, by his arrangement of the premises or other conduct, has led the entrant to believe that the premises were intended to be used by visitors, as members of the public, for the purpose which the entrant was pursuing, and that reasonable care was taken to make the place safe for those who enter for that purpose." (Italics ours.) *McKinnon*, 68 Wash. 2d at 649, 414 P.2d 773. *See* W. PROSSER, TORTS § 61, at 388-89 (4th ed. 1971); RESTATEMENT, § 332, commente d.

This implied assurance helps to distinguish between invitees and social guests, who are considered licensees. As explained in comment h(3) to RESTATEMENT, § 330:

> The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family.

Under the facts of this case, it is hard to imagine how the Strunks could have prepared or could have been expected to prepare a dairy farm for a kegger.

We are not persuaded by Lisa's argument that payment of a $4.00 admission price made her an invitee. Analysis in cases where an admission was paid and the plaintiff was characterized as an invitee did not focus on the money as indicative of the plaintiff's status as an invitee. *Hooser v. Loyal Order of Moose, Inc.*, 69 Wash. 2d 1, 416 P.2d 462, 15 A.L.R.3d 1008 (1966) ($1.00 for New Year's Eve Party held at Moose Lodge); *Dickinson v. Tesia*, 2 Wash. App. 262, 467 P.2d 356 (1970) ($2.00 for picnic in recreational area).

The trial court correctly identified Lisa as a licensee. She was privileged to enter or remain on the land only by virtue of the owner's consent. We question whether Charles and Thelma did consent to her presence on the property, but recognize that Dean did consent. In any event, we find the duty owed licensees was not breached because no known dangerous condition existed of which Lisa was not aware or of which she did not realize the risks involved. Lisa had knowledge of the risks involved by staying on the property. We affirm the trial court.

DOLLIVER, C.J., and PEARSON, UTTER, CALLOW, BRACHTENBACH, ANDERSEN, DORE and DURHAM, JJ.

ROWLAND v. CHRISTIAN

70 Cal. Rptr. 97, 443 P.2d 561 (1968)

PETERS, Justice

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action.

In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and

should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses. He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. 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...." This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle. (*Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal. App. 2d 91, 96, 219 P.2d 73.)

* * *

California cases have occasionally stated a similar view: "All persons are required to use ordinary care to prevent others being injured as the result of their conduct." Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

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. (2 HARPER AND JAMES, THE LAW OF TORTS, *supra*, p. 1432.)

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. (*Oettinger v. Stewart*, 24 Cal. 2d 133, 136, 148 P.2d 19, 156 A.L.R. 1221.)

* * *

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....

* * *

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.

Considerations such as these have led some courts in particular situations to reject the rigid common law classifications and to approach the issue of the duty of the occupier on the basis of ordinary principles of negligence. (*E.g.*, *Gould v. DeBeve*, 117 U.S. App. D.C. 360, 330 F.2d 826, 829-830; *Anderson v. Anderson*, *supra*, 251 Cal. App. 2d 409, 413, 59 Cal. Rptr. 342; *Taylor v. New Jersey Highway Authority*, 22 N.J. 454, 126 A.2d 313, 317, 62 A.L.R.2d 1211; *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453, 462-463; *Potts v. Amis*, 62 Wash. 2d 777, 384 P.2d 825, 830-831; *see* Comment (1957) 22 MO. L. REV. 186; Note (1958) 12 RUTGERS L. REV. 599.) And the common law distinctions after thorough study have been repudiated by the jurisdiction of their birth. (Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31.)

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.

It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. 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. As we have seen, when we view the matters presented on the motion for summary judgment as we must, we 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.

TRAYNOR, C.J., and TOBRINER, MOSK and SULLIVAN, JJ., concur.

BURKE, Justice (dissenting)

I dissent. In determining the liability of the occupier or owner of land for injuries, the distinctions between trespassers, licensees and invitees have been developed and applied by the courts over a period of many years. They supply a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law. The unfortunate alternative, it appears to me, is the route taken by the majority in their opinion in this case; that such issues are to be decided on a case by case basis under the application of the basic law of negligence, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another.

Liability for negligence turns upon whether a duty of care is owed, and if so, the extent thereof. Who can doubt that the corner grocery, the large department store, or the financial institution owes a greater duty of care to one whom it has invited to enter its premises as a prospective customer of its wares or services than it owes to a trespasser seeking to enter after the close of business hours and for a nonbusiness or even an antagonistic purpose? I do not think it unreasonable or unfair that a social guest (classified by the law as a licensee, as was plaintiff here) should be obliged to take the premises in the same condition as his host finds them or permits them to be. Surely a homeowner should not be obliged to hover over his guests with warnings of possible dangers to be found in the condition of the home (*e.g.*, waxed floors, slipping rugs, toys in unexpected places, etc., etc.). Yet today's decision appears to open the door to potentially unlimited liability despite the purpose and circumstances motivating the plaintiff in entering the premises of another, and despite the caveat of the majority that the status of the parties may "have some bearing on the question of liability...," whatever the future may show that language to mean.

In my view, it is not a proper function of this court to overturn the learning, wisdom and experience of the past in this field. Sweeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future. I would affirm the judgment for defendant.

McCOMB, J., concurs.

Questions and Notes

1. Would you retain, modify or abolish the distinctions between invitee, licensee and trespasser?

2. Since the modification of the landowner's duty to a visitor is justified by an implied agreement between the visitor and the landowner, what rules would you predict to apply when a condition of the land injures someone outside the land (*e.g.*, where a tree limb falls from the owner's property onto a passing motorist)?

2. How is the Visitor's Status Determined?

MARKLE v. HACIENDA MEXICAN RESTAURANT

570 N.E.2d 969 (Ind. App. 1991)

MILLER, Judge

Robert Markle, Plaintiff-appellant, appeals the

grant of a summary judgment in favor of Hacienda Restaurant, Prairie Jackson Corp., Miller Monuments, M.E. Miller Testamentary Trust and Easy Shopping Place Businessmen's Association (collectively referred to as the Shopping Center), Defendants-Appellees. Markle claimed he was injured in the parking lot of Easy Shopping Place Shopping Center and alleged that the Shopping Center's negligent maintenance of the parking lot led to his injuries. The trial court determined Markle was a licensee at the time he was injured. Therefore, the only affirmative duty the Shopping Center owed to Markle was to refrain from willfully or wantonly injuring him. The court then granted summary judgment in favor of the Shopping Center. Markle now appeals, arguing that the question of his status at the time of the injury - invitee or licensee - is a question of fact, making summary judgment inappropriate. He also requests this court to abandon the common law distinction between invitee and licensee.

We reverse, holding that Markle's status at the time of his injury is a question of fact. Therefore, summary judgment should not have been granted.

Facts

These facts are not disputed: On July 11, 1986, Markle, a salesman for Ron's Painting, was returning to Elkhart, Indiana, after making sales calls, when he decided to eat at the Hacienda Restaurant in the Shopping Center in Elkhart. When he turned into the parking lot, he noticed Tim Lusher, a friend and co-worker, sitting in his truck in the parking lot. Markle stopped his car next to Lusher's truck, which was parked in a marked parking spot at the end of a row of parking spaces. When Markle pulled up next to it, he was not in a marked parking spot. Markle asked Lusher if he would take a twenty-five pound piece of steel that Markle had in his car to work the next morning. Lusher agreed, and Markle got out of the car to move the steel from his car to Lusher's truck. As he was lifting the steel into Lusher's truck, Markle stepped into a chuckhole with his right foot. He fell, injuring his knee.

On February 12, 187, Markle brought suit against Hacienda, Prairie Jackson Corporation as owners of the Shopping Center, and John Does. He amended his complaint in February, 1988, to include Miller Monument, Inc., and M.E. Miller Testamentary Trust as parties, alleging the parties had an ownership interest in the shopping center. The Elkhart Superior Court granted summary judgment in favor of the Shopping Center on September 6, 1989. The court entered the following order:

> On April 27, 1989, this cause came on for hearing on a Motion for Summary Judgment by defendants. The facts are as follows: On July 11, 1986 the plaintiff, Robert Markle, went to the Easy Shopping Place Center to eat at the Hacienda Restaurant. When the plaintiff arrived at Easy Shopping Place he saw a fellow employee in the parking lot. The plaintiff had a piece of sample steel that he wished to transfer from his car to the fellow employee's pickup truck. The plaintiff stepped in a chuckhole with his right foot while he was putting the steel from his car into the pickup truck. The plaintiff allegedly sustained injury as a result of the fall.
>
> The central issue in this case is whether the plaintiff is an invitee, trespasser, or licensee. *Barbre v. Indianapolis* [sic] (1980) Ind. App., 400 N.E.2d 1142. The duty owed by an owner or occupant of land to one coming on the premises depends largely on the relationship between them. *Fort Wayne National Bank v. Doctor*, (1971) 149 Ind. App. 365, 272 N.E.2d 876; *Olson v. Kushner*, (1965) 138 Ind. App. 73, 211 N.E.2d 620. Under Indiana law, an invitee is a person who goes onto the land of another at the express or implied invitation of owner or occupant either to transact business or for the mutual benefit of invitee and owner or occupant. *Clem v. United States*, 601 F. Supp. 835 (1985). A licensee is one who enters premises of another for his own convenience, curiosity, or entertainment. *Id*. at 836.
>
> The facts of this case show the plaintiff entered the defendant's premises as an invitee. This is clearly demonstrated by the plaintiff's intention to eat at the Hacienda Restaurant. However, once the plaintiff decided to move the steel from his car, his status changed to that of a licensee. The transferring of the steel was of no benefit to the owner of the premises, but rather the action was of benefit to the plaintiff and his employer. It is possible for a person's status to change once he has entered the land of another. *Standard Oil*

Company of Indiana v. Scoville, 132 Ind. App. 521, 175 N.E.2d 711 (1961).

The plaintiff cites *Silvestro v. Walz*, (1943) [222] Ind. [163], 51 N.E. [2d] 629 as support for his case. The plaintiff's argument is that the main relationship between plaintiff and defendant was that of invitee and the transferring of the piece of steel was incidental to the main relationship of the invitee. The *Silvestro* case is clearly distinguishable from the case at bar. The Indiana Supreme Court held the defendant liable because defendant should have reasonably expected invitees to wander the entire business premises. The question is whether the defendant in this case could have reasonably expected plaintiff to transfer steel in this parking lot.

Where controlling facts are undisputed, the determination of the status is for the court to determine. *Standard Oil, supra.* The plaintiff was not performing an action incidental to his primary intention when he entered the premises. An incidental task is an instance whereby a business invitee does something which he could reasonably be expected to do under the circumstances. The deviation from his main intention when he entered the business premises is only slight. For example, in the *Silvestro* case, the plaintiff used the rest room facilities while waiting for car repairs. In that case, the owner of the premises could have reasonably expected the business invitee to do this.

The transferring of the steel was not incidental to the plaintiff's main purpose. The facts of the case at bar more closely resemble the facts of the *Standard Oil* case, *supra.* The plaintiff in the case at bar changed his status once he entered the premises. The facts of this case are undisputed.

A summary judgment motion may be entered only where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *First Savings and Loan Ass'n v. Treater [Treaster]*, (1986) Ind. App., 490 N.E.2d 1149.

The Court now holds that the plaintiff held the status of licensee at the time of the accident. The only affirmative duty a landowner owes a licensee† is to refrain from willfully or wantonly injuring him in a way which would increase the licensee's peril. *French v. Sunburst Properties Inc.*, (1988) Ind. App., 521 N.E.2d 1355. There being no material dispute as to the facts, as a matter of law, summary judgment must be granted for the defendant. (R. 110-12).

Decision and Discussion

When we review a motion for summary judgment, we apply the same standards employed by the trial court. Ind. Trial Rule 56(C), *Travel Craft v. Wilhelm Mende GMBH* (1990), Ind., 552 N.E.2d 443. Summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits and testimony, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The court must liberally construe all evidence in favor of the non-movant. Even if there are no conflicting facts, summary judgment is inappropriate where the undisputed facts lead to conflicting inferences. *Id.*

In Indiana, the status of a person when he is injured on the premises of another determines the duty owed to that person by the owner of the property. *Barbre v. Indianapolis Water Co.* (1980), Ind. App., 400 N.E.2d 1142. A person entering the land of another is either a trespasser, a licensee or an invitee. *Burrell v. Meads* (1991), Ind., 569 N.E.2d 637. A landowner owes a trespasser the duty to refrain from willfully or wantonly injuring him after discovering his presence and owes a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to increase his peril. *Id.* However, a landowner owes an invitee a duty to exercise reasonable care for the invitee's protection while the invitee is on the landowner's premises. *Id.*

In *Burrell*, our supreme court was faced with the question of how to determine whether one entering the land of another is an invitee. Burrell and Meads were friends who, over the years,

† [Ed. note: This misstates the rule that most jurisdictions follow for licensees; a licensee is entitled to be warned of any hidden perils.]

helped each other perform various tasks. One afternoon, Burrell worked on his car in Meads' garage. As Burrell was preparing to leave, Meads told Burrell he would be installing a drop ceiling in the garage later that day. Burrell agreed to help. Later, Burrell climbed a ladder to remove some items which were stored on top of the garage rafters. He was injured when he fell to the floor of the garage from the rafters.

Burrell sued Meads for negligence, and the trial court granted summary judgment for Meads. This court affirmed, holding that Burrell, a social guest, was a licensee at the time of his injury and that Meads owed him only the duty to refrain from willfully or wantonly injuring him or acting in a way to increase his peril.

Our supreme court vacated this court's decision, holding that invited social guests are invitees and are entitled to a duty of reasonable care from landowners. In reaching its decision, the court examined the two tests which have been used by Indiana courts in determining invitee status - the "economic benefit test" and the "invitation test". The theory behind the "economic benefit test" is to impose affirmative obligations on the landowner only in exchange for some consideration or benefit. *See, e.g.*, *Hammond v. Allegretti* (1974), 262 Ind. 82, 311 N.E.2d 821; *Standard Oil Co. of Indiana v. Scoville* (1961), 132 Ind. App. 521, 175 N.E.2d 711. The court rejected the "economic benefit test" and instead adopted the "invitation test" as defined in the RESTATEMENT (SECOND) OF TORTS § 332:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. RESTATEMENT (SECOND) OF TORTS § 332, quoted in *Burrell, supra*, at 642.

Thus, an examination of the invitation itself must be the first step of any inquiry into invitee status. *Burrell, supra*, at 641.

Markle argues that it is undisputed that when he entered the parking lot, he was an invitee and that a trier of fact could infer from the facts that his actions were incidental to his main reason for coming to the Shopping Center. After all, he argues, friends often see each other in the local shopping center and may talk to each other or conduct some type of business - such as stopping to write a check to one whom he owes money or transferring packages from one car to another. He argues that a jury could find that the Shopping Center could have reasonably expected such a routine, incidental action; therefore, his status did not change from that of an invitee to that of a licensee. He cites *Silvestro v. Walz* (1943), 222 Ind. 163, 51 N.E.2d 629, to support his argument.

In *Silvestro*, the plaintiff was injured when he went beyond the repair area of the defendant's car repair shop in search of a washroom while waiting for his car to be repaired. The court held that although the plaintiff was not engaged in activity which directly benefitted the defendant, his trip to the washroom was merely incidental to his reason for being at the shop. The court reasoned:

> A customer is invited to all parts of the premises that may reasonably be expected to be used in the transaction of the mutual business, those incidental and those necessary.
>
> Nor would it seem unreasonable to hold that the owner of the premises should anticipate what is usually and customarily done by an invitee within the scope of, and to carry out the purpose of, the invitation.
>
> The proprietor of any automobile repair shop may reasonably expect that his customers will not sit or stand in one place awaiting completion of the repairs. Appellant could not be blind to this common practice. *Id.* at 171, 51 N.E.2d at 632 (citations omitted).

Thus, the court focused on the invitation extended by the car repair shop owner to his customers instead of whether the shop owner received a direct benefit from the plaintiff's action to determine whether the plaintiff was an invitee or a licensee. The court concluded that a visitor to another's property does not lose his status as an invitee as long as the visitor is engaged in activity reasonably related - or incidental to - the invitation extended by the owner.

The Shopping Center, however, argues that the activity in which Markle was engaged when he was injured was purely for his own benefit and

convenience and not for the mutual benefit of Markle and the Shopping Center. Further, the Shopping Center argues that the parking lot was held open for parking for customers of the tenants of the Shopping Center, as evidenced by a posted sign which limited parking to customers only. When Markle transferred the piece of steel from his car to Lusher's truck, he was not a customer of any of the Shopping Center tenants. The Shopping Center also agues that Markle was using the parking lot for a purpose other than that for which the lot was held open to the public. Finally, the Shopping Center argues that Markle's activities are substantially different from the acts in which the plaintiff in *Silvestro* engaged. Therefore, Markle's action could not be considered incidental to his invitation.

First of all, we note that the Shopping Center's first argument centers on economic benefit, which, under *Burrell*, is not the proper focus of the discussion. However, the Shopping Center's other arguments center on the invitation, or its reason for holding the lot open.

We agree that even though a visitor may be an invitee when he comes on to the property, his status may change to that of a licensee while he is on the premises if the use to which he puts the property does not correspond to the owner's reason for holding the property open. *See*, *e.g.*, *Hoosier Cardinal Corp. v. Brizius* (1964), 136 Ind. App. 363, 199 N.E.2d 481 (holding that although workman removing a conveyor belt from defendant's property was an invitee, he stepped out of that role when he made an unusual, unanticipated or improbable use of structures on the defendant's property).[1] *See also* 62 AM. JUR. 2D *Premises Liability* §§ 105, 107 (1990).

Thus, an invitation may be limited as to the manner in which the invitee may use the premises:

> An invitation to come on premises for one purpose does not invite entry for all purposes. The status of an invitee continues only as long as he is using the premises for a purpose reasonably intended by the invitation, and when used for another purpose the invitee loses the status of invitee. The invitee must use the owner's premises in the usual, ordinary, and customary way. "The inviter is under a duty to keep the premises which are within the scope of the invitation safe for all uses by the invitee, and he is not bound to keep them safe for uses which are outside the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated, except where he is

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[1] *See also* *Dry v. Ford* (1960), 238 Miss. 98, 117 So. 2d 456 (holding that the plaintiff, who was helping his employer install a dimmer switch in the employer's truck on the defendant's property, was a licensee when he was injured, because, even though he had gone to the defendant's car repair shop with his employer to purchase the switch, and was therefore an invitee at that time, his status changed once he and his employer decided to install the switch themselves when they learned that the mechanics would not have time to install it until the next day); *Gavin v. O'Conner* (1923), 99 N.J.L. 162, 122 A. 842 (holding that injured person was not an invitee when he was killed swinging from a clothesline because, although he was impliedly invited to play in the yard, he was not using the clothesline in a manner consistent with the owner's purpose for erecting the line and was therefore a licensee at the time of his injury); *Bird v. Clover Leaf-Harris Dairy* (1942), 102 Utah 330, 125 P.2d 797 (holding that although employee was clearly an invitee to the extent he worked at defendant's dairy, his use of the premises - parking a car in an area forbidden by the defendant - was not using the property in the usual, ordinary and customary way; therefore, when the car was damaged, the employee was a licensee as a matter of law); *Robbillard v. Tillotson* (1954), 118 Vt. 294, 108 A.2d 524 (holding that although a husband and his wife were invitees while buying something at defendant's service station, they could no longer be considered invitees when the husband, after concluding his business, waited in the car in the parking lot of the service station, while she conducted business at another location).

fThe trial court cited *Standard Oil Co. of Indiana v. Scoville* (1961), 132 Ind. App. 521, 175 N.E.2d 711, for the proposition that a person's status can change once he is on the premises of another. Scoville had gone into Standard Oil's bulk plant in Bloomington, Indiana, to pay his gas bill. After parking his car in the lot, Scoville ascended a flight of stairs into the building, and went to the office to pay the bill. He returned to his car safely, but returned to the office to discuss a personal matter with an employee. Upon returning to his car the second time, Scoville fell on the steps and was injured. The trial court granted judgment in favor of Scoville. This court reversed, holding that because Scoville returned to the office for his own convenience and not to transact business, he was clearly a licensee at the time of his injury. Scoville, however, is distinguishable from the case at bar. First of all, the court there focused on the "economic benefit test" which was expressly rejected by our supreme court in *Burrell*. Secondly, there were two distinct entries into the building for two distinct purposes. Here, however, Markle was injured on his original trip to the Shopping Center.

> present and actively co-operates with the invitee in the particular use of the premises." 65 C.J.S. *Negligence* § 63(52) (1966) (emphasis supplied, footnotes omitted).

Here, it is not disputed that, because Markle originally went into the Shopping Center to eat at the Hacienda, he was an invitee when he first entered the parking lot. However, Markle's status - invitee or licensee - at the time he was allegedly injured is disputed. In other words, were Markle's business activities - taking a piece of steel from his car to put in a friend's truck - activities which the Shopping Center could reasonably anticipate from customers coming to their property and which could be considered incidental to its invitation to customers to park in its lot and shop in its stores?

We do not agree with the Shopping Center's argument that Markle was acting entirely outside of the scope of the Shopping Center's invitation. This is not a situation where Markle went into the parking just to give his friend the piece of steel he had in his car. Rather, the evidence is undisputed that Markle went into the parking lot to eat at the restaurant - a reason clearly within the scope of the invitation. The question that must be asked therefore, is whether Markle's activity was merely incidental to this purpose. Under *Silvestro, supra*, this is a question of what could be reasonably expected to be within the scope of the invitation. The question of what is reasonable under these circumstances is a question more properly left to the trier of fact.

The Shopping Center also argues that *Silvestro* limits the types of activities which may be considered as incidental to the main purpose of the invitation. However, a careful reading of *Silvestro* reveals that the case limited activities which could be considered "incidental" to those activities which are "usually and customarily" carried on by visitors to a particular location. This would necessarily depend on the particular location. The activities which could be considered incidental to a visit to a car repair shop would necessarily vary greatly from those activities which could be considered incidental to a visit to a shopping center. One might expect any number of social or business activities to be conducted between patrons of a shopping center - planned and unplanned. For example, a patron, who has gone to the center to shop, may meet a business associate by chance and discuss a business matter. On the other hand, two business associates may plan to meet at the restaurant to have a business dinner, and one of them steps into the same chuckhole into which Markle fell. Or, two patrons may meet by chance and discuss a purely social matter. While this may be a common occurrence at shopping centers, the same activity might not commonly occur at another location. What is "usual" and "customary", therefore, would be a question of fact to be determined from all of the surrounding circumstances.

In conclusion, we find that although the material facts are not in dispute, we find that a trier of fact could reach the conclusion opposite that reached by the trial court and could infer Markle's actions were incidental to his reason for going to the Shopping Center.[2]

Markle also argues that this court should abandon the distinction between invitees, licensees and trespassers. Our supreme court has recently declined the invitation to abandon these distinctions. *See Burrell, supra.* We likewise decline the invitation.

Reversed and remanded.

CHEZEM and CONOVER, JJ., concur.

Questions and Notes

1. In the following two cases, evaluate the facts and analyze the plaintiff's status at the time of the injury.

[2] We would reach this same result if, for instance, Markle was discussing business with an associate while eating dinner at the restaurant and injured himself in the same parking lot by stepping into the same chuckhole when going out to his car for some papers to use in the discussion. One could say that Markle stepped out of his role as an invitee - although briefly - by leaving the restaurant to get the papers. However, it is also reasonable that the owners could anticipate patrons would meet to discuss business over dinner. Thus, the question of whether the patron who has left the restaurant to get some papers from his car has stepped out of his role as invitee is one properly left to the trier of fact. Likewise, the question of whether the Shopping Center could have anticipated that Markle - or any other customer - would transact business in the parking lot is one properly left to the trier of fact.

HOSTICK v. HALL

386 P.2d 758 (Okl. 1963)

PER CURIAM

Betty Jo Hall, a 17 months old child at the time of the injuries involved herein, together with her mother, had gone to the Speed Queen Coin-O-Matic laundry in Bartlesville, which was open to the public for washing, drying and starching clothes for a charge. The plaintiff was awarded damages for injuries received when she was scalded and severely burned when she turned on a hot water faucet at the sink....

Plaintiff's petition alleged in substance that the laundry in question was open to the public for washing, starching and drying clothes and that it was the custom of parents to bring their small children with them when doing their laundry in said place of business; that small children were daily in and about said premises with their parents with the knowledge and consent of the owner defendant. That the defendant maintained a scalding hot water faucet on the sink which was unattended and unguarded and that the faucets as maintained by the defendant were constructed in a negligent and improper manner and that the easy access thereto created an attractive nuisance and that the defendant was negligent in not maintaining a reasonably safe condition for a child of plaintiff's age. That plaintiff crawled upon a chair which was near the sink, turned on the hot water faucet causing severe and serious burns and permanent scars from the hot water emitted therefrom.

* * *

GUILFORD v. YALE UNIVERSITY

128 Conn. 449, 23 A.2d 917 (1942)

JENNINGS, Judge

The plaintiff, a graduate of Sheffield Scientific School of Yale University of the class of 1899, while visiting the university during the commencement period on June 20, 1939, fell on premises owned by the defendant and was injured. He brought this action claiming that his injuries were due to the negligence of the defendant. The case was tried to the jury and a verdict rendered in favor of the plaintiff. The defendant has appealed, the only ground of error claimed being the refusal of the trial court to set aside the verdict upon the defendant's motion. Unless otherwise indicated, defendant refers to the named defendant.

Viewing the evidence in the light most favorable to the plaintiff, the jury might reasonably have found the following facts: The Yale University authorities, upon the application of the chairman of the reunion committee of any class, assign to it a building owned by the university as headquarters for members of the class returning to the reunion. Pursuant to that custom, a building formerly occupied by an organization known as the Wolf's Head Society had been assigned to the class of 1936 as reunion headquarters. It is customary for members of classes having reunions to visit the headquarters of other classes, and it is also the custom for those attending reunions to use the grounds about the headquarters building as a general gathering place, as the university authorities knew.

In the basement of the building in question was a toilet room and dining room and on the ground floor two club rooms. It was of substantial stone construction. The entrance was at the corner and consisted of two paved walks extending from the door of the building to Trumbull and Prospect Streets, respectively. Between these entrance walks was a circular grass plot. On the Trumbull Street side the entrance walk was bordered by a curb; next east of the curb was a grass plot twenty-two feet and two inches in length. The width of the grass plot was eleven feet eight inches measured from the face of the building to a stone wall on the Trumbull Street boundary line. At the east end of the grass plot was a retaining wall, the top of which formed a parapet extending from nine and one-half inches to eleven and one-half inches above the level of the ground on the west side. On the east of the retaining wall there was a perpendicular drop from its top to the ground below of ten feet six inches, thus forming a pit.

The plaintiff had returned to New Haven for the fortieth reunion of his class. On the night in question, at about 12 o'clock, he, accompanied by one of his classmates, proceeded to these premises

and there met a number of younger men of the class of 1936. After arriving he spent a pleasant period with those gathered there, remaining until about 2 o'clock, at which time it was suggested that the place be closed. Those of the party then remaining left the building and proceeded to the sidewalk in the street where they talked for five or ten minutes. While they were conversing, the plaintiff expressed a desire to urinate and was informed that there was a toilet in the basement. At this time, the lights in the building had been turned out. The plaintiff did not re-enter the building but stepped back upon the premises, crossed the curb between the Trumbull Street walk and the grass plot and proceeded across the grass plot, walking about midway between the side of the building and the stone wall enclosing the property on the Trumbull Street side. There was a tree growing from the lower level beyond the retaining wall at the east of the grass plot. The shape of the tree was such that its top projected above the level of the top of the retaining wall. The plaintiff thought that the top of this tree was a bush growing on the grass plot, and walked towards it. He tripped over the parapet at the top of the retaining wall and fell to its bottom at the lower level. The region generally was well lighted at the time, but the plaintiff claimed that, while he was able to see the street and the sidewalk very well, the ground under his feet was in a dark shadow and that he was walking into the shadow to find a secluded place near the bush to urinate.

* * *

Questions and Notes

1. When the owner transfers possession of the property to another, the new possessor usually assumes the duties of the owner, such as to warn of hidden dangers, to inspect for defects, etc. It depends, however, on the structure of the relationship. In many rental contracts or leases the owner will retain some duties to repair, and to the extent he does, his negligent failure to do so may create liability, perhaps in addition to the possessor's duty to warn visitors or to make repairs himself.

2. For a review of the history of a lessor's obligations to tenants and to other visitors, see *Bellikka v. Green*, 306 Or. 630, 762 P.2d 997 (1988). For a discussion of the landlord's duty to the tenant, see Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, 64 ST. JOHN'S L. REV. 527 (1990).

3. Courts have been troubled by cases where the visitor is unexpected, but provides substantial benefits to the property owner. Public employees that enter property in connection with business being conducted there are usually thought of as invitees. However, the usual definitions of invitee and licensee are strained as public employees carry out their public duties. To a landowner, the tax collector or building inspector may represent an intrusion. At the same time, such employees may be authorized to make such intrusions and can anticipate being expected by the landowner - possibly raising their status to that of invitees. But firefighters and police officers have traditionally been held to be licensees, to whom a lesser duty of care is owed. This status has usually only been applied to situations in which the firefighter or officer is injured by the thing she was there to investigate. A landowner may possibly be held liable for failure to warn of other hazards. *See generally*, PROSSER AND KEETON, § 61. In one sense it matters very little whether a firefighter is considered a licensee or an invitee, since a reasonable person would hardly exert much care to keep the premises safe for unexpected visitors. For that matter, even someone who is expected and who is clearly a business visitor (like a plumber called to deal with a burst pipe in the basement) may not require much care. After all, a plumber could hardly complain that the owner failed to fix the flooded basement when that is the condition that the plumber had been hired to deal with.

4. Business and public invitees are owed reasonable care. That includes an obligation to inspect as well as to repair (at least so far as a reasonable person would do so). This distinguishes the invitee from the licensee, whom the owner or occupier need only warn of hidden perils. At the same time, even invitees cannot complain about a dangerous condition of the premises unless there has been "notice" to the owner. For example, if a customer slips and falls in a grocery store because someone dropped a bottle of distilled water, leaving a puddle on the floor, the injured party must establish that the puddle was there long enough that the owner had "notice" and therefore was negligent in failing to

correct the condition. Some jurisdictions have modified this rule by considering "self-service" operations to be exempt from the notice rule.

3. An Exception for Trespassing Children - "Attractive Nuisance"

OSTERMAN v. PETERS

260 Md. (App.) 313, 272 A.2d 21 (1971)

SINGLEY, Judge

This case is the aftermath of the tragic death of Lawrence Bruce Osterman, a four and a half year old boy, who was drowned when he fell into the swimming pool at a neighbor's vacant house while attempting, with a friend, to retrieve a ball. The boy's father, as administrator of his son's estate, and in his own right as parent, brought suit for damages in the Circuit Court for Montgomery County against Mr. and Mrs. Barry J. Peters, the owners of the property upon which the pool was located. At the end of the entire case, the Peters' motion for a directed verdict was granted and judgment was entered in their favor for costs, from which Dr. Osterman has appealed.

In *Hensley v. Henkels & McCoy, Inc.*, 258 Md. 397, 265 A.2d 897 (1970), decided seven months ago, in *Mondshour v. Moore*, 256 Md. 617, 261 A.2d 482 (1970) and in *Hicks v. Hitaffer*, 256 Md. 659, 261 A.2d 769 (1970), both decided less than a year ago and in *Herring v. Christensen*, 252 Md. 240, 249 A.2d 718 (1969), decided less than two years ago, we had occasion to reiterate the Maryland rule that the owner of land owes no duty to a trespasser or licensee, even one of tender years, except to abstain from willful or wanton misconduct or entrapment, since trespassers or bare licensees, including trespassing children, take the premises as they find them. Judge Smith, who wrote the Court's opinion in *Hicks, supra*, collected and categorized our prior decisions extending over a period of 75 years involving injuries to trespassing children, 256 Md. at 669-670, 261 A.2d 769.

Dr. Osterman, doubtless aware that Maryland is one of only seven states which reject the doctrine of attractive nuisance without qualification, PROSSER, LAW OF TORTS § 59, at 373, n.44 (3d ed. 1964), argues that there are four reasons why this case should be taken from under the rule of our prior decisions and should have gone to the jury on the issue of negligence.

First, he relies on the age of the child, who was four and a half. However, in both *Herring v. Christensen, supra*, 252 Md. 240, 249 A.2d 718 and *Barnes v. Housing Authority of Baltimore City*, 231 Md. 147, 189 A.2d 100 (1963), we declined to make an exception for a three year old child, and our predecessors were unwilling to except a mentally subnormal boy of 11 years of age in State, to Use of *Alston v. Baltimore Fidelity Warehouse Co.*, 176 Md. 341, 4 A.2d 739 (1939).

Next, the appellant argues that the child came on the Peters' property for the sole purpose of retrieving a ball, and not to play or swim in the pool. We view this argument as inapposite, since it is reminiscent of the concept of allurement, once thought to be essential to recovery in attractive nuisance cases, but now largely discredited in states which accept the attractive nuisance doctrine, *McGettigan v. National Bank of Washington*, 115 U.S. App. D.C. 384, 320 F.2d 703 (1963); PROSSER, *supra*, § 59 at 374, and particularly the cases collected in notes 46, 48 and 50. Compare, however, State to Use of *Potter v. Longeley*, 161 Md. 563, 569, 158 A. 6 (1932) which found demurrable a declaration which failed to allege that the hazard was in sight of any place where the plaintiff's decedent could be without trespassing.

There was testimony that the Peters had vacated their house on 9 May, three days before the accident, leaving the pool filled with water for the convenience of the new occupants, who planned to move in on 2 June. This, the appellant argues, was "almost criminal indifference" to the rights of the Peters' neighbors. Assuming for purposes of argument that it was an act of indifference, this is not the sort of willful or wanton misconduct or entrapment identified in our prior decisions. In *Hensley, supra*, 258 Md. 397, 412, 265 A.2d 897, 905, we held that a contracting firm which left unguarded a rope dangling between transmission towers, within reach of a 10 year old boy who was injured when swinging on the rope, created "no covert change or entrapment" and "no hidden danger or secret pitfall." It seems to us that the filled swimming pool may well have

been less of a hazard than the dangling rope.

Finally, the appellant points out that Montgomery County Code (1965) § 105-2 requires that private pools be fenced or surrounded with impenetrable planting, and that gates be equipped with self-closing and self-latching devices. The Peters' pool was fenced, but there was testimony that there were apertures about twelve inches high in the fence and that the gate was kept closed by placing a stone in front of it. The boys had pushed the stone aside to gain access to the pool itself. The Peters' violation of this statute, the appellant says, is evidence of negligence. And so it may be, assuming that there was a violation, *McLhinney v. Lansdell Corp. of Maryland*, 254 Md. 7, 14-15, 254 A.2d 177 (1969); *Aravanis v. Eisenberg*, 237 Md. 242, 259, 206 A.2d 148 (1965); *Gosnell v. Baltimore & O. R.R. Co.*, 189 Md. 677, 687, 57 A.2d 322 (1948). The difficulty with the appellant's contention is that this precise point was made in State to Use of *Potter v. Longeley, supra*, 161 Md. 563, 158 A. 6 where it was alleged that a 12 year old boy had drowned in an abandoned quarry which the owners had failed to inclose with a six foot fence, as required by a Baltimore City ordinance. In rejecting this contention, our predecessors said:

> The ordinance in this case was passed for the benefit of the public. Any violation of it subjects the owner of a quarry to a fine. But, before an individual can hold such owner liable for an injury alleged to have resulted from such violation, there must be shown a right on the part of the plaintiff, a duty on the part of the defendant with respect to that right, and a breach of that duty by the defendant whereby the plaintiff has suffered injury. *Maenner v. Carroll, supra* (46 Md. 193 (1877)). A trespasser can acquire no such right except in case of willful injury. The mere violation of a statute would not give it. The effect of such violation is only to raise a presumption of negligence in favor of one entitled to assert it. See an interesting discussion on 24 HARVARD LAW REVIEW, p. 333." 161 Md. at 569-570, 158 A. 8.

For these reasons, we conclude that Dr. Osterman could no more take his case from under the Maryland rule than could the plaintiff in *Hensley v. Henkels & McCoy, Inc., supra*, 258 Md. 397, 265 A.2d 897, who attempted to do so by alleging that the contractor knew that the area where the accident occurred was customarily traversed by children.

What Chief Judge McSherry, speaking for the Court, said in *Demuth v. Old Town Bank of Baltimore*, 85 Md. 315, 37 A. 266 (1897), which we referred to in *Mondshour v. Moore, supra*, 256 Md. 623-624, 261 A.2d 482, is equally appropriate to the distressing situation which this case presents:

> This is a case of exceedingly great hardship, and we have diligently, but in vain, sought for some tenable ground upon which the appellants could be relieved from the loss that an affirmance of the decree appealed from will necessarily subject them to. But hard cases, it has often been said, almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions, invented and resorted to solely to escape such consequences, long-settled and firmly-fixed doctrines should be shaken, questioned, confused, or doubted. *Lovejoy v. Irelan*, 17 Md. (525) 527. It is often difficult to resist the influence which a palpable hardship is calculated to exert; but a rigid adherence to fundamental principles at all times, and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured. It is for the legislature, by appropriate enactments, and not for the courts, by metaphysical refinements, to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles." 85 Md. at 319-320, 37 A. at 266.

Judgment affirmed, costs to be paid by appellant.

HOFER v. MEYER

295 N.W.2d 333 (1980)

HERTZ, Circuit Judge

At a pretrial conference the trial court granted summary judgment in favor of defendants (Clifford and Evelyn Meyer and Richard and Dorothy Kiefer) as to Counts 2, 3, 5, 6 and 7 of the complaint. The trial court ruled that trial would proceed on Counts 1 and 4. At the close of the trial, defendants' motions for directed verdict were granted, and judgment was entered accordingly. Plaintiffs (Myron and Doreen Hofer for themselves and on behalf of their son Jason) appeal. We affirm the judgment as to Counts 1 and 4 and remand the matter to the trial court for trial on Count 6, which alleged a cause predicated upon RESTATEMENT (SECOND) OF TORTS § 339.

On January 16, 1974, Jason Hofer, then three years of age, was found injured and semi-conscious on premises owned by the Kiefers. There were no eyewitnesses to the incident. The evidence shows that Mrs. Hofer was employed as a nurse and that Jason stayed with a babysitter while she was at work. On the day of Jason's injury, he and his mother had returned home. The weather was pleasant for that time of the year and Mrs. Hofer permitted Jason to remain outside while she changed her clothes. Jason had never left the yard before, but when Mrs. Hofer checked a short time later, he had disappeared. Jason was subsequently found lying within a barbed wire enclosure on the Kiefer property, which was within a few blocks of the Hofer residence. The enclosure was used by Meyers to contain their horse. The horse was a seven-year-old gelding, and it is undisputed that he was an extremely gentle horse and that he was used by the children and grandchildren of the Meyers and Kiefers for riding purposes. To the north of the enclosure, on property owned by Winston Olson, two other horses were kept. The Kiefer and Olson properties were separated by two strands of barbed wire. The testimony at trial indicates that the Kiefer enclosure consisted mostly of a two-strand barbed wire fence and that in one area there was only a single barbed wire. The Meyers apparently maintained the fence because their horse was kept in the enclosure.

There was evidence from which the jury could have found that Jason had been kicked by Meyers' horse.

The Kiefer property is within the city limits of Rapid City, South Dakota. There was testimony indicating that on three sides of the premises where Jason was found there were a number of other residences and that there were a number of children living in the area. There was a hill on the fourth side of the property. Mr. Olson testified that during the wintertime "some kids" would play there and slide down the hill. Mr. Meyer testified as follows:

> **Q**. To your knowledge, were there ever any strange children other than your own that you didn't know or weren't acquainted with back in that area?
>
> **A**. Not in Dick's area. I saw one little boy over in Mr. Olson's pasture chasing the horses one day, and I run him out, but that's about the only one I could say.

Both Mr. Kiefer and Mr. Meyer testified that they had never seen other children on the Kiefer property, nor had they ever received any complaints about children being in the area.

Mrs. Ormie Martin, a neighbor to the immediate west of Kiefers, testified with regard to an event she witnessed on the day of the accident:

> Well, I saw - I was sitting in the chair, and all I saw was two little red clad legs in front of the garage, and it flashed through my mind that Tricia was there, their little granddaughter, and that's all I saw. I couldn't tell you what the top part was, I just saw the little legs.

There is evidence that Jason's little dog accompanied him when he left the yard that day, although the dog was not found near Jason after the accident. Mr. Meyer testified that he was aware of the danger created by horses trying to defend themselves from dogs and that on at least one occasion he had witnessed dogs and the horses facing off.

At the pretrial conference, the trial judge ruled on the counts in the complaint as follows:

> Count 1 was construed by the court to be a general negligence cause of action and the Hofers were permitted to proceed to trial on that count.

> Count 2 alleged certain city ordinance violations, and the court ruled, as a matter of law, that these were health ordinances, not safety ordinances, and that no private action for damages could be maintained.
>
> Count 3 was held by the trial court to be a claim based upon a violation of city ordinance and alleging a public nuisance. The court held that no private right of action existed on behalf of the Hofers.
>
> Count 4 was an allegation that Jason was a licensee on the Kiefer property. The trial court held that this was essentially a negligence claim and permitted the Hofers to proceed to trial on that count.
>
> Count 5 alleged an attractive nuisance, and the court ruled, as a matter of law, that the horse in question was not an artificial condition within the attractive nuisance doctrine and that no cause of action was stated.
>
> Count 6 was determined by the court to allege a cause of action based upon RESTATEMENT (SECOND) OF TORTS § 339, and it ruled, as a matter of law, that § 339 was not applicable.
>
> Count 7 was construed by the court to allege a cause of action based upon the "playground" doctrine, but the court determined that the allegation did not state a cause of action.

Counts 1 and 4 proceeded to trial. After all parties had rested, defendants renewed their motions for directed verdict made at the close of plaintiffs' case. The trial court found that there was no evidence that would raise Jason's status above that of trespasser and that, accordingly, the only duty owed by defendants was to avoid wanton or willful conduct that would cause injury. The trial court further held that there was no evidence to show any knowledge on the part of the Kiefers that anyone was trespassing on their property. With regard to the Meyers, the trial court held that owners of a domestic animal must have reason to have knowledge of a dangerous propensity of the animal or of that class of animals as a whole and that there was simply no evidence to show such knowledge on the part of the Meyers or to put them on notice of any problem with the horse in question. The court further stated that mere inference when all other possible causes are equal is not sufficient to present the matter to the jury. The trial court granted defendants' motions for directed verdict.

This case is a classic example of the confusion created by the land entrance concepts embodied in those classifications still persisting in South Dakota, namely, "invitee," "licensee," and "trespasser." The Hofers urge that these classifications have now outlived their usefulness and that they should be abolished and the case decided as in other negligence cases. This would mean that cases such as this one would be determined under the theory of ordinary negligence or, as sometimes stated, "due care under the circumstances." Because of our determination that a cause of action exists under the attractive nuisance doctrine, we decline to consider rejection of the various classifications above noted.At oral argument, counsel for plaintiffs admitted that Jason was a trespasser at the time of his injury. Even so, we are of the opinion that plaintiffs have stated a cause of action under the attractive nuisance doctrine. In South Dakota that doctrine is the same as that stated in RESTATEMENT (SECOND) OF TORTS § 339:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the

> danger or otherwise to protect the children.

See: *Cargill, Incorporated v. Zimmer*, 374 F.2d 924 (8th Cir. 1967), and *Morris v. City of Britton*, 66 S.D. 121, 279 N.W. 531 (1938).

In our opinion, the facts elicited at the trial were sufficient to present a jury issue under appropriate instructions embodying the elements set forth in RESTATEMENT (SECOND) OF TORTS § 339.

The trial court found as a matter of law that the horse owned by the Meyers and kept in the yard owned by the Kiefers was not an "artificial condition" upon the land. We, however, conclude that whether a horse is an "artificial condition" within the meaning of RESTATEMENT (SECOND) OF TORTS § 339, is a matter to be determined by the special facts in each case. It is said that when a condition on the land is created by the action of man, the condition is "artificial" and not "natural" for the purposes of the attractive nuisance doctrine. *Clarke v. Edging*, 20 Ariz. App. 267, 512 P.2d 30 (1973). In the *Cargill* case, *supra*, a twelve-year-old boy climbed the ladder up the side of a seventy-two-foot silo. His climb resulted in a fall, and the court held that the pigeons at the top of the silo constituted a distraction that obscured the present danger of excessive height. Consistent with RESTATEMENT (SECOND) OF TORTS § 339, the court held that the pigeons constituted an artificial condition upon the land.

In the instant case, defendants placed a horse in a poorly fenced yard easily accessible to children. A child of three, indeed even older children, would not perceive the horse as being imminently dangerous. Add to the child's presence that of his little dog, and you have the ingredients of a foreseeably dangerous condition in that defendants had prior knowledge of dogs disturbing the tranquility of the Olson horses located on property adjacent to the Kiefer property. Further, even a gentle horse may kick when startled by the sudden presence of a little boy appearing without warning.

RESTATEMENT (SECOND) OF TORTS § 339(a) requires that the possessor "knows or has reason to know that children are likely to trespass." Here, there is evidence that children occasionally were seen in the area, albeit, not specifically on the Kiefer property. There were residential areas on at least two sides of the property. Mr. Meyer testified that on at least one occasion he saw a little boy chasing the horses in the Olson pasture, which is immediately adjacent to the Kiefer property. The fence around the Kiefer yard consisted of only one or two strands of barbed wire, admittedly inadequate protection against the curiosity of the children in the area. The evidence, as a whole, is sufficient, under appropriate instructions, to put the foreseeability issue to the jury.

RESTATEMENT (SECOND) OF TORTS § 339(b) requires that the condition be one that the possessor knows or has reason to know involves an unreasonable risk of death or serious bodily harm to children. Here, the horse was placed within the city limits of Rapid City in a poorly fenced yard near other residences with children nearby. A horse situated thusly could be found by the jury to be an unreasonable risk, and the condition created by the presence of the horse constituted a submissible issue under the facts presented.

RESTATEMENT (SECOND) OF TORTS § 339(c) requires that a determination be made that because of his youth, the child was unable to discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it. Here we have a three-year-old boy certainly unable to comprehend the danger involved in coming near what was then a gentle and peaceful animal. Jason was obviously at an age where he could not comprehend that his sudden presence or that of his little dog would change the demeanor of an otherwise gentle horse.

RESTATEMENT (SECOND) OF TORTS § 339(d) requires the possessor to eliminate the danger where the cost of doing so is slight as compared with the risk to children in the area. Here it was just a matter of some additional wiring that would have been adequate to keep little children out of the horse yard.

RESTATEMENT (SECOND) OF TORTS § 339(e) requires plaintiffs to show that defendants failed to exercise reasonable care to eliminate the danger or otherwise protect the children. This issue, under all of the facts, was one that should have been submitted to the jury.

In *Cargill, Incorporated v. Zimmer*, it was stated:

> South Dakota law does not require a landowner to make his land "child-proof." But at the same time we recognize that modern decisions in this area of the law increasingly acknowledge the humanitarian viewpoint that the life of a child is to be balanced as a heavy interest

> when weighed against the utility of simple precautions to guard against danger. In applying the RESTATEMENT, § 339, no one of the five factors can be given isolated treatment in determining defendant's negligence. Their relationship is closely interwoven with one another in determining the basic question of whether there is a foreseeable harm. 374 F.2d at 930.

The question presented is whether there was sufficient evidence from which the jury could reasonably find that defendants could have foreseen that an unreasonable risk of harm to trespassing children existed under the facts and the law stated. We hold that a submissible issue did exist and that the trial court erred in granting defendants' summary judgment motions as to Count 6 of the complaint. The issue should have been resolved by the jury. We find the other errors claimed by plaintiffs to be without merit.

Accordingly, the judgment as to Counts 1 and 4 is affirmed, and the matter is remanded to the trial court for trial of plaintiffs' cause of action predicated on RESTATEMENT (SECOND) OF TORTS § 339.

DUNN, MORGAN and FOSHEIM, JJ., concur.

WUEST, Circuit Judge, concurs specially.

Questions and Notes

1. In *Henry v. State*, 406 N.W.2d 608, two young boys were camping with their parents at a state park. During the night, a storm hit, causing a tree branch to fall on the boys' tent. One of the boys eventually died from the incident, and the other was seriously injured. The parents brought suit against the state and a tree service, both of which took care of the park. The parents alleged that the park was an artificial condition, and soil compaction caused by the creation of the park weakened the tree's health and began internal decay. The court held:

> Even if the construction of the park affected the health of the tree, this is not an artificial condition. Cases from this and other jurisdictions indicate that changes in natural environments do not create an "artificial" condition where the affected terrain duplicates nature, except that an artificial condition will be found if there is some type of trap or concealment.

Other jurisdictions that agree with this holding include Florida in *Cassel v. Price*, 396 So. 2d 258, 264 (Fla. Dist. Ct. App.), and New Jersey in *Ostroski v. Mt. Prospect Shop-Rite, Inc.*, 94 N.J. Super. 374, 380-81, 228 A.2d 545.

2. Most jurisdictions have adopted the RESTATEMENT test regarding attractive nuisance. *See, e.g.*, *Ochampaugh v. City of Seattle*, 91 Wash. 2d 514, 588 P.2d 1351 (1979); *Barnhizer v. Paradise Valley Unified School District*, 123 Ariz. 253, 599 P.2d 209 (1979); *Lister v. Campbell*, 371 So. 2d 133, (Fla. App. 1979); and *Gerchberg v. Loney*, 223 Kan. 446, 576 P.2d 593 (1978).

3. Note that the RESTATEMENT test *does not* include a requirement that the dangerous condition "allure" the child. You will recall that Justice Holmes made allurement the basis (and thus the limitation) of the attractive nuisance doctrine. Some states require it. But most do not. *See, generally*, Gurwin, *The RESTATEMENT's Attractive Nuisance Doctrine: An Attractive Alternative for Ohio*, 46 OHIO ST. L.J. 135 (1985).

§ B. When Does Premises Liability Govern the Case?

POTTS v. AMIS

62 Wash. 2d 777, 384 P.2d 825 (1963)

ROSELLINI, Judge

In this personal injury action, the plaintiff alleged that the defendant had negligently struck him in the jaw with a golf club while he was a guest at the defendant's summer home. The trial court found that, while engaged in demonstrating the proper use of the club, the defendant had failed to exercise ordinary care and had struck the plaintiff, but that his action was not wilful or wanton. The court further found that the plaintiff had exercised ordinary care for his own safety, but had not exercised extraordinary care.

Upon these findings, the court held that the defendant was not liable for the injuries, inasmuch as he had no duty to exercise ordinary care to avoid inflicting harm upon his guest. The correctness of this holding is challenged on appeal.

We have adopted the general rule that a social guest, although he is invited to the premises, is a licensee, rather than an invitee, as regards his host's duties toward him. *Dotson v. Haddock*, 46 Wash. 2d 52, 278 P.2d 338; *McNamara v. Hall*, 38 Wash. 2d 864, 233 P.2d 852.

Traditionally, owners and occupiers of land have been accorded a certain immunity from tort liability, especially where injuries result from the condition or use of the premises. It has been felt that one in possession of land should not be required to take affirmative steps to make the premises safe for trespassers or gratuitous licensees. In accord with this view, we have consistently stated the rule to be that the duty toward a licensee or trespasser is not to wilfully or wantonly injure him. *Hanson v. Freigang*, 55 Wash. 2d 70, 345 P.2d 1109; *Dotson v. Haddock, supra*; *McNamara v. Hall, supra*; *Deffland v. Spokane Portland Cement Co.*, 26 Wash. 2d 891, 176 P.2d 311; *Christensen v. Weyerhaeuser Timber Co.*, 16 Wash. 2d 424, 133 P.2d 797; *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wash. 2d 599, 105 P.2d 838; *Garner v. Pacific Coast Coal Co.*, 3 Wash. 2d 143, 100 P.2d 32; *Holm v. Investment & Securities Co.*, 195 Wash. 52, 79 P.2d 708; *Buttnick v. J. & M., Inc.*, 186 Wash. 658, 59 P.2d 750; *Kinsman v. Barton & Co.*, 141 Wash. 311, 251 P. 563; *Hiatt v. Northern Pac. R. Co.*, 138 Wash. 558, 244 P. 994; *Bolden v. Independent Order of Odd Fellows*, 133 Wash. 293, 233 P. 273; *Waller v. Smith*, 166 Wash. 645, 200 P. 95; *Smith v. Seattle School Dist.*, 112 Wash. 64, 191 P. 858; *Gasch v. Rounds*, 93 Wash. 317, 160 P. 962; and *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 P. 526.

However, in *Christensen v. Weyerhaeuser Timber Co., supra*, exceptions to this rule were noted. This court said:

> [T]he only duty which the owner of premises, or the proprietor of a business conducted thereon, owes to a mere licensee is the duty not to injure such licensee wantonly or willfully.... The rule as thus expressed does not exclude liability on the part of the owner proprietor for extraordinary concealed perils ... or for unreasonable risks incident to the possessor's activities.

It is the contention of the plaintiff in this action that his injuries were the result of an `unreasonable risk incident to the possessor's activities,' and that it was the duty of the defendant to exercise ordinary care, knowing that if he did not wield the golf club with care he might injure the plaintiff.

The defendant argues that this court has never applied the exception relating to activities and has in fact rejected it. It is true that this court has never expressly applied the rule, but it has rendered decisions in which its applicability has been tacitly recognized. In *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, supra*, children who had come to watch the unloading of a circus train were injured when they were struck by the tongue of a runaway wagon. This court said that the unloading operation was not an attractive nuisance, and that the defendant was liable only for wilful and wanton injury. However, it held as a matter of law that the defendant did all that reasonable care required, saying:

> If we look at the matter wholly aside from the relevancy of the attractive nuisance doctrine, and consider the case simply from the standpoint of appellant's duty under the circumstances to the spectators in general, whether adults or minors, we come to the same conclusion. If we proceed upon the theory that

> appellant was bound by the rule of reasonable care rather than by the `wilfull and wanton negligence' rule, we are convinced that appellant fully complied with its duty when it repeatedly warned the multitude to stay away from the platform. Appellant was not an insurer, and in the exercise of reasonable care it was not required to suspend its operations until, by inspection and test, it had found every piece of machinery and equipment to be free from all possible defects.

In the case of *Waller v. Smith, supra*, the plaintiff had parked his automobile in an area where logging operations were being carried on. A falling tree damaged the car. While this court said, in exonerating the logging operator, that his only duty was not to wilfully or wantonly injure the plaintiff's property, it held as a matter of law that there was no negligence. Again, the statement regarding the duty of the logger was not necessary to the decision.

Our research and that of counsel have revealed only two other cases involving alleged active negligence on the part of a defendant. In *Hiatt v. Northern Pac. R. Co., supra*, the plaintiff, a trespasser, was killed by a train as he was proceeding along a railway track. This court held that it was for the jury to decide whether the crew of the train were guilty of wilful and wanton negligence, when they must have seen the plaintiff and other trespassers and a very short time thereafter made a flying switch, sending a car along after them without any lights or anyone on board to give warning.

This court was asked to apply the dictum of the *Christensen* case, *supra*, in *McNamara v. Hall*, 38 Wash. 2d 864, 233 P.2d 852. There, the plaintiff was injured when an overloaded elevator in defendants' home fell. It was found that the complaint fell short of alleging that the defendants knew of the defective condition of the elevator; therefore, the act of the defendants in inviting the plaintiff to ride in it was not wilful or wanton.

In speaking of the exceptions to the rule set forth in the dictum of the *Christensen* case, this court said that the first exception required actual knowledge. In regard to the second exception, it said that the overloading of the elevator was only an action in entertaining guests, and

> Whether this second exception is or is not recognized in this state, we need not now determine since we do not consider that the actions of the occupier in entertaining and accommodating his guests constituted an 'activity' within the meaning of the rule.

In all the other cases proclaiming that an owner or occupier is liable only for wilful and wanton conduct, the injuries complained of have been caused, not by an activity of the defendant, but by some condition of the premises.

* * *

In *Mills v. Orcas Power & Light Co.*, cited in the above quotation, this court imposed upon the owner of an easement the duty of giving warning of the presence of its power lines, because of the risk of harm to passengers in airplanes flying over it. In the opinion written by Judge Foster, it was said:

> The imposition of such duties accords with the foreseeability criterion of requiring a duty of care. If is also in conformity with the well-settled common-law principle that one must exercise reasonable care to maintain his property so as not to injure those using the adjacent highway. [citing cases.]

Also in *Sherman v. Seattle*, 57 Wash. 2d 233, 356 P.2d 316, we applied the doctrine of foreseeability in a case where a child was injured by a lift apparatus at a dam site owned by the city. We held that the apparatus was not an attractive nuisance because it was not enticing to young children. Liability was imposed nevertheless, the court saying:

> In view of the peculiar facts of this case, we feel that the standard of care owed respondent by appellant cannot be made to depend upon respondent's technical status on appellant's premises at the time of the accident. On the contrary, we think that regardless of respondent's status - be it that of an invitee, licensee, or trespasser - appellant owed him the duty to use reasonable care.

It is this duty which the plaintiff seeks to have imposed in this case. There is no question but that the harm which was inflicted upon him was foreseeable; and the trial court's findings show that the defendant failed to exercise ordinary care to avoid injuring the plaintiff, while the plaintiff did

exercise ordinary care for his own safety. Under the well-established principles of the law of negligence, the plaintiff is entitled to recover. The mere fortuitous circumstances that this injury occurred while the plaintiff stood upon land belonging to the defendant should not relieve the latter of liability.

We need not determine at this time whether the rule applicable to injuries resulting from the condition of the premises should be revised. But we hold that, an owner or occupier of land has a duty to exercise reasonable care to avoid injuring a person who is on the land with his permission and of whose presence he is, or should be, aware. This holding is in accord with the second exception mentioned in the dictum of the *Christensen* case. Insofar as *McNamara v. Hall, supra*, *Waller v. Smith, supra*, and *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, supra*, are inconsistent with this holding, they are hereby overruled.

The judgment is reversed and the cause remanded with directions to determine the plaintiff's damages and enter judgment accordingly.

* * *

Questions and Notes

1. In *Zuniga v. Pay Less Drug Stores, N.W., Inc.*, 82 Wash.App. 12, 917 P.2d 584 (1996), a case arose based on the following facts described by the court of appeals: "Jose Zuniga is a homeless person living in Seattle. On the night of March 8, 1993, he went to sleep near a loading dock off an alley in downtown Seattle. The loading dock is leased and used by Pay Less Drug Stores. At about 5 a.m., Robert Huff, a driver for Pay Less, arrived at the dock with a truckload of merchandise. As Huff backed the tractor-trailer up to the dock, a wheel on the trailer ran over Zuniga's leg. Zuniga sued." Based on *Potts v. Amis*, can you predict what result the court would reach?

Chapter 9
Product Liability

§ A. History: The Rise and Fall of Privity

WINTERBOTTOM v. WRIGHT

[1842] 10 M.& W. 109, 152 Eng. Rep. 402

[*Plaintiff was an employee of the post office. He was injured when the wheel of a coach he was riding fell off, allegedly because of the negligence of the defendant in repairing coaches for the post office. Plaintiff sued.*]

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. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge*, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the 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 however contended, that this contract being made on the behalf of the public by the Post-master-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 every thing 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.

* * *

ROLFE, B.

... The [alleged] duty [to the plaintiff], therefore, is shown to have arisen solely from the contract and the fallacy consists in the use of that word `duty.' If a duty to the Postmaster-General be meant, that is true but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but is it *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.

Questions and Notes

1. Should the court have been more or less inclined to permit a recovery if the victim in this case had been a pedestrian - a "person passing along the road"?

2. The story of how the rule in *Winterbottom* was incorporated into American law is told in Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951), and O'Brian, *The History of Product Liability*, 62 Tul. L. Rev. 313 (1988).

MACPHERSON v. BUICK MOTOR CO.

217 N.Y. 382, 111 N.E. 1050 (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 case, in other words, is not brought within the rule of *Kuelling v. Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098, 2 L.R.A.(N.S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. 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, 57 Am. Dec. 455. 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. Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to any one except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected today. The principle of the distinction is, for present purposes, the important thing. *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.

* * *

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*, 89 N.Y. 470, 42 Am. Rep. 311. 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.*, 195 N.Y. 478, 480, 88 N.E. 1063. 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 scaffold (*Devlin v. Smith, supra*) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (*Statler v. Ray Mfg. Co., supra*) 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 life and 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 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 50 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 stagecoach 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.

HENNINGSEN v. BLOOMFIELD MOTORS, INC.

32 N.J. 358, 161 A.2d 69 (1960)

FRANCIS, J.

Plaintiff Claus H. Henningsen purchased a Plymouth automobile, manufactured by defendant Chrysler Corporation, from defendant Bloomfield Motors, Inc. His wife, plaintiff Helen Henningsen, was injured while driving it and instituted suit against both defendants to recover damages on account of her injuries. Her husband joined in the action seeking compensation for his consequential losses. The complaint was predicated upon breach of express and implied warranties and upon negligence. At the trial the negligence counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issues of implied warranty of merchantability. Verdicts were returned against both defendants and in favor of the plaintiffs. Defendants appealed and plaintiffs cross-appealed from the dismissal of their negligence claim. The matter was certified by this court prior to consideration in the Appellate Division.

The facts are not complicated, but a general outline of them is necessary to an understanding of the case.

On May 7, 1955 Mr. and Mrs. Henningsen visited the place of business of Bloomfield Motors, Inc., an authorized De Soto and Plymouth dealer, to look at a Plymouth. They wanted to buy a car and were considering a Ford or a Chevrolet as well as a Plymouth. They were shown a Plymouth which appealed to them and the purchase followed. The record indicates that Mr. Henningsen intended the car as a Mother's Day gift to his wife. He said the intention was communicated to the dealer. When the purchase order or contract was prepared and presented, the husband executed it alone. His wife did not join as a party.

The purchase order was a printed form of one page. On the front it contained blanks to be filled in with a description of the automobile to be sold, the various accessories to be included, and the details of the financing. The particular car selected was described as a 1955 Plymouth, Plaza "6", Club Sedan. The type used in the printed parts of the form became smaller in size, different in style, and less readable toward the bottom where the line for the purchaser's signature was placed. The smallest type on the page appears in the two paragraphs, one of two and one-quarter lines and the second of one and one-half lines, on which great stress is laid by the defense in the case. These two paragraphs are the least legible and the most difficult to read in the instrument, but they are most important in the evaluation of the rights of the contesting parties. They do not attract attention and there is nothing about the format which would draw the reader's eye to them. In fact, a studied and concentrated effort would have to be made to read them. De-emphasis seems the motive rather than emphasis. More particularly, most of the printing in the body of the order appears to be 12 point block type, and easy to read. In the short paragraphs under discussion, however, the type appears to be six point script and the print is solid, that is, the lines are very close together.

The two paragraphs are:

> The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized. I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of this agreement.
>
> I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am 21 years of age, or older, and hereby acknowledge receipt of a copy of this order.

On the right side of the form, immediately below these clauses and immediately above the signature line, and in 12 point block type, the following appears:

> CASH OR CERTIFIED CHECK ONLY ON DELIVERY.

On the left side, just opposite and in the same style type as the two quoted clauses, but in eight point size, this statement is set out:

> This agreement shall not become

> binding upon the Dealer until approved by an officer of the company.

The two latter statements are in the interest of the dealer and obviously an effort is made to draw attention to them.

The testimony of Claus Henningsen justifies the conclusion that he did not read the two fine print paragraphs referring to the back of the purchase contract. And it is uncontradicted that no one made any reference to them, or called them to his attention. With respect to the matter appearing on the back, it is likewise uncontradicted that he did not read it and that no one called it to his attention.

The reverse side of the contract contains $8^{1}/_{2}$ inches of fine print. It is not as small, however, as the two critical paragraphs described above. The page is headed "Conditions" and contains ten separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject, as in the case of the "Owner Service Certificate" to be referred to later. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth. It is as follows:

> 7. It is expressly agreed that there are no warranties, express or implied, Made by either the dealer or the manufacturer on the motor vehicle, chassis, of parts furnished hereunder except as follows.
>
> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part*, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.... (Emphasis ours.)

After the contract had been executed, plaintiffs were told the car had to be serviced and that it would be ready in two days. According to the dealer's president, a number of cars were on hand at the time; they had come in from the factory about three or four weeks earlier and at least some of them, including the one selected by the Henningsens, were kept in the back of the shop display purposes. When sold, plaintiffs' vehicle was not "a serviced car, ready to go." The testimony shows that Chrysler Corporation sends from the factory to the dealer a "New Car Preparation Service Guide" with each new automobile. The guide contains detailed instructions as to what has to be done to prepare the car for delivery. The dealer is told to "Use this form as a guide to inspect and prepare this new Plymouth for delivery." It specifies 66 separate items to be checked, tested, tightened or adjusted in the course of the servicing, but dismantling the vehicle or checking all of its internal parts is not prescribed. The guide also calls for delivery of the Owner Service Certificate with the car.

This certificate, which at least by inference is authorized by Chrysler, was in the car when released to Claus Henningsen on May 9, 1955. It was not made part of the purchase contract, nor was it shown to him prior to the consummation of that agreement. The only reference to it therein is that the dealer "agrees to promptly perform and fulfill and terms and conditions of the owner service policy." The Certificate contains a warranty entitled "Automobile Manufacturers Association Uniform Warranty." The provisions thereof are the same as those set forth on the reverse side of the purchase order, except that an additional paragraph is added by which the dealer extends that warranty to the purchaser in the same manner as if the word "Dealer" appeared instead of the word "Manufacturer."

The new Plymouth was turned over to the Henningsens on May 9, 1955. No proof was adduced by the dealer to show precisely what was done in the way of mechanical or road testing beyond testimony that the manufacturer's instructions were probably followed. Mr. Henningsen drove it from the dealer's place of business in Bloomfield to their home in Keansburg. On the trip nothing unusual appeared

in the way in which it operated. Thereafter, it was used for short trips on paved streets about the town. It had no servicing and no mishaps of any kind before the event of May 19. That day, Mrs. Henningsen drove to Asbury Park. On the way down and in returning the car performed in normal fashion until the accident occurred. She was proceeding north on Route 36 in Highlands, New Jersey, at 20-22 miles per hour. The highway was paved and smooth, and contained two lanes for northbound travel. She was riding in the right-hand lane. Suddenly she heard a loud noise "from the bottom, by the hood." It "felt as if something cracked." The steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall. No other vehicle was in any way involved. A bus operator driving in the left-hand lane testified that he observed plaintiffs' car approaching in normal fashion in the opposite direction; "all of a sudden [it] veered at 90 degrees ... and right into this wall." As a result of the impact, the front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident. The condition was such that the collision insurance carrier, after inspection, declared the vehicle a total loss. It had 468 miles on the speedometer at the time.

The insurance carrier's inspector and appraiser of damaged cars, with 11 years of experience, advanced the opinion, based on the history and his examination, that something definitely went "wrong from the steering wheel down to the front wheels" and that the untoward happening must have been due to mechanical defect or failure; "something down there had to drop off or break loose to cause the car" to act in the manner described.

As has been indicated, the trial court felt that the proof was not sufficient to make out prima facie case as to the negligence of either the manufacturer or the dealer. The case was given to the jury, therefore, solely on the warranty theory, with results favorable to the plaintiffs against both defendants.

I

The Claim of Implied Warranty against the Manufacturer

* * *

The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.... But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability.

... The language gave little and withdrew much. In return for the delusive remedy of replacement of defective parts at the factory, the buyer is said to have accepted the exclusion of the maker's liability for personal injuries arising from the breach of the warranty, and to have agreed to the elimination of any other express or implied warranty. An instinctively felt sense of justice cries out against such a sharp bargain....

The form and the arrangement of its face, as described above, certainly would cause the minds of reasonable men to differ as to whether notice of a yielding of basic rights stemming from the relationship with the manufacturer was adequately given. The words "warranty" or "limited warranty" did not even appear in the fine print above the place for signature, and a jury might well find that the type of print itself was such as to promote lack of attention rather than sharp scrutiny. The inference from the facts is that Chrysler placed the method of communicating its warranty to the purchaser in the hands of the dealer. If either one or both of them wished to make certain that Henningsen became aware of that agreement and its purported implications, neither the form of the document nor the method of expressing the precise nature of the obligation intended to be assumed would have presented any difficulty.

But there is more than this. Assuming that a jury might find that the fine print referred to reasonably served the objective of directing a buyer's attention to the warranty on the reverse side, and, therefore, that he should be charged with awareness of its language, can it be said that an ordinary layman would realize what he was relinquishing in return for what he was being granted? Under the law, breach of warranty against defective parts or workmanship which caused personal injuries would entitle a buyer to damages even if due care were used in the manufacturing process. Because of the great

potential for harm if the vehicle was defective, that right is the most important and fundamental one arising from the relationship. Difficulties so frequently encountered in establishing negligence in manufacture in the ordinary case make this manifest. 2 HARPER & JAMES, *supra*, §§ 28.14, 28.15; PROSSER, *supra*, 506. Any ordinary layman of reasonable intelligence, looking at the phraseology, might well conclude that Chrysler was agreeing to replace defective parts and perhaps replace anything that went wrong because of defective workmanship during the first 90 days or 4,000 miles of operation, but that he would not be entitled to a new car. It is not unreasonable to believe that the entire scheme being conveyed was a proposed remedy for physical deficiencies in the car. In the context of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase "its obligation under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile. Such claims are nowhere mentioned. The draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard. No one can doubt that if the will to do so were present, the ability to inform the buying public of the intention to disclaim liability for injury claims arising from breach of warranty would present no problem.

In this connection, attention is drawn to the Plymouth Owner Certificate mentioned earlier. Obviously, Chrysler is aware of it because the New Car Preparation Service Guide sent from the factory to the dealer directs that it be given to the purchaser. That certificate contains a paragraph called "Explanation of Warranty." Its entire tenor relates to replacement of defective parts. There is nothing about it to stimulate the idea that the intention of the warranty is to exclude personal injury claims.

* * *

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. In the matter of warranties on the sale of their products, the Automotive Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security. Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another. *See* *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 39, 141 A.2d 276 (1958). Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way. *Hodnick v. Fidelity Trust Co.*, 96 Ind. App. 342, 183 N.E. 488 (App. Ct. 1932).

Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions. In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. The warranty does not depend upon the affirmative intention of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. *Minneapolis Steel & Machinery Co. v. Casey Land Agency*, 51 N.D. 832, 201 N.W. 172 (Sup. Ct. 1924). The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining

strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity. *See* 57 YALE L.J., *supra*, at pp. 1400-1404; proposed Uniform Commercial Code, 1958 Official Text, § 202.

* * *

IV.

Proof of Breach of the Implied Warranty of Merchantability.

* * *

Both defendants contend that since there was no privity of contract between them and Mrs. Henningsen, she cannot recover for breach of any warranty made by either of them. On the facts, as they were developed, we agree that she was not a party to the purchase agreement. *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959). Her right to maintain the action, therefore, depends upon whether she occupies such legal status thereunder as to permit her to take advantage of a breach of defendants' implied warranties.

For the most part the cases that have been considered dealt with the right of the buyer or consumer to maintain an action against the manufacturer where the contract of sale was with a dealer and the buyer had no contractual relationship with the manufacturer. In the present matter, the basic contractual relationship is between Claus Henningsen, Chrysler, and Bloomfield Motors, Inc. The precise issue presented is whether Mrs. Henningsen, who is not a party to their respective warranties, may claim under them. In our judgment, the principles of those cases and the supporting texts are just as proximately applicable to her situation. We are convinced that the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant Chrysler.

Questions and Notes

1. This case illustrates the difficulty of conceptualizing products liability cases as both contract and tort cases. Should the Henningsens be required to state a cause of action in contract? If they want to base their claim on tort law, can the manufacturer force the case to be treated as a contract case?

2. Warranty law (and contract law, of which it was usually a component) was advantageous in some respects for the plaintiff, but disadvantageous in others. Before examining the cases that follow, which adopt a tort analysis completely, see if you can list the advantages and disadvantages of warranty law from the consumer's perspective.

§ B. The Adoption of Strict Liability in Tort

ESCOLA v. COCA COLA BOTTLING COMPANY OF FRESNO

24 Cal. 2d 453, 150 P.2d 436 (1944)

GIBSON, Chief Justice

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling "bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous ... and likely to explode." 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 nearby 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....

* * *

Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

* * *

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. *Druzanich v. Criley*, 19 Cal. 2d 439, 444, 122 P.2d 53; *Michener v. Hutton*, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480.

The judgment is affirmed.

SHENK, CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice

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 Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440 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. *Sheward v. Virtue*, 20 Cal. 2d 410, 126 P.2d 345; *Kalash v. Los Angeles Ladder Co.*, 1 Cal. 2d 229, 34 P.2d 481. 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 (*see* *Sheward v. Virtue*, 20 Cal. 2d 410, 126 P.2d 345; *O'Rourke v. Day & Night Water Heater Co., Ltd.*, 31 Cal. App. 2d 364, 88 P.2d 191; *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576), 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." *Blank v. Coffin*, 20 Cal. 2d 457, 461, 126 P.2d 868, 870. 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.

* * *

Questions and Notes

1. What was the basis upon which the majority affirmed liability?

2. What was Justice Traynor's approach to liability?

3. Which is the better approach?

GREENMAN v. YUBA POWER PRODUCTS

27 Cal. Rptr. 697, 377 P.2d 897 (1963)

TRAYNOR, Justice

Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About ten and a half months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

After a trial before a jury, the court ruled that there was no evidence that the retailer was negligent or had breached any express warranty and that the manufacturer was not liable for the breach of any implied warranty. Accordingly, it submitted to the jury only the cause of action alleging breach of implied warranties against the retailer and the causes of action alleging

negligence and breach of express warranties against the manufacturer. The jury returned a verdict for the retailer against plaintiff and for plaintiff against the manufacturer in the amount of $65,000. The trial court denied the manufacturer's motion for a new trial and entered judgment on the verdict. The manufacturer and plaintiff appeal. Plaintiff seeks a reversal of the part of the judgment in favor of the retailer, however, only in the event that the part of the judgment against the manufacturer is reversed.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties,[64] and that plaintiff's injuries were caused by their breach.

* * *

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code.[65] A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (*see e.g.*, *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 418; *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614, 75 A.L.R.2d 103; *Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 617, 164 S.W.2d 828, 142 A.L.R. 1479), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 84-96; *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655, 658-661; *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449, 455-456; *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773, 778; *Linn v. Radio Center Delicatessen*, 169 Misc. 879, 9 N.Y.S.2d 110, 112) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

We need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. (*See also* 2 HARPER AND JAMES, TORTS, §§ 28.15-28, 16, pp. 1569-1574; Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099; *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, concurring opinion.) 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

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64 In this respect the trial court limited the jury to a consideration of two statements in the manufacturer's brochure.

(1) WHEN SHOPSMITH IS IN HORIZONTAL POSITION Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insurers perfect alignment of components.

(2) SHOPSMITH maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work.

65 "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. (*See* Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1124-1134.) In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not control whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. (Civ. Code § 1735.) "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." (*Ketterer v. Armour & Co., D.C.*, 200 F. 322, 323; *Klein v. Duchess Sandwich which Co.*, 14 Cal. 2d 272, 282, 93 P.2d 799.) To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

The manufacturer contends that the trial court erred in refusing to give three instructions requested by it. It appears from the record, however, that the substance of two of the requested instructions was adequately covered by the instructions given and that the third instruction was not supported by the evidence.

The judgment is affirmed.

GIBSON, C.J., and SCHAUER, McCOMB, PETERS, TOBRINER and PEEK, JJ., concur.

Questions and Notes

1. The RESTATEMENT (2D), TORTS, provides:

§ 402 A. 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

(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.

PHILLIPS v. KIMWOOD MACHINE CO.

269 Or. 485, 525 P.2d 1033 (1974)

HOLMAN, Justice

Plaintiff was injured while feeding fiberboard into a sanding machine during his employment with Pope and Talbot, a wood products manufacturer. The sanding machine had been purchased by Pope and Talbot from defendant. Plaintiff brought this action on a products liability theory, contending the sanding machine was unreasonably dangerous by virtue of defective design. At the completion of the testimony, defendant's motion for a directed verdict was granted and plaintiff appealed.

As is required in such a situation, the evidence is recounted in a manner most favorable to the plaintiff. The machine in question was a

six-headed sander. Each sanding head was a rapidly moving belt which revolved in the direction opposite to that which the pieces of fiberboard moved through the machine. Three of the heads sanded the top of the fiberboard sheet and three sanded the bottom. The top half of the machine could be raised or lowered depending upon the thickness of the fiberboard to be sanded. The bottom half of the machine had powered rollers which moved the fiberboard through the machine as the fiberboard was being sanded. The top half of the machine had pinch rolls, not powered, which, when pressed down on the fiberboard by use of springs, kept the sanding heads from forcefully rejecting it from the machine.

On the day of the accident plaintiff was engaged in feeding the sheets of fiberboard into the sander. Because of the defective operation of a press, a large group of sheets of extra thickness was received for sanding. These sheets could not be inserted into the machine as it was set, so the top half of the sander was adjusted upwards to leave a greater space between the top and bottom halves to accommodate the extra thick fiberboard sheets. During the sanding of the extra thick sheets, a thin sheet of fiberboard, which had become mixed with the lot, was inserted into the machine. The pressure exerted by the pinch rolls in the top half of the machine was insufficient to counteract the pressure which the sanding belts were exerting upon the thin sheet of fiberboard and, as a result, the machine regurgitated the piece of fiberboard back at plaintiff, hitting him in the abdomen and causing him the injuries for which he now seeks compensation.

Plaintiff asserts in his complaint that the machine was defective in its design and unreasonably dangerous because (1) "it ... could not be operated in the manner and for the purpose for which it was manufactured and sold without throwing back towards the operator panels of material being sanded...." and (2) "it did not ... contain ... any guards, catches, shields, barricades or similar devices to protect the operator of said machine from being struck by panels of material thrown back out of the sanding machine...." The two allegations assert substantially the same thing, the first one in general terms, and the second one in particular terms. In effect, they allege the machine was defective and was unreasonably dangerous because there were no safety devices to protect the person feeding the machine from the regurgitation of sheets of fiberboard.

While we do not here attempt to recount all of the testimony presented by plaintiff concerning the defective design of the machine, there was evidence from which the jury could find that at a relatively small expense there could have been built into, or subsequently installed on, the machine a line of metal teeth which would point in the direction that the fiberboard progresses through the machine and which would press lightly against the sheet but which, in case of attempted regurgitation, would be jammed into it, thus stopping its backward motion. The evidence also showed that after the accident such teeth were installed upon the machine for that purpose by Pope and Talbot, whereupon subsequent regurgitations of thin fiberboard sheets were prevented while the efficiency of the machine was maintained. There was also evidence that defendant makes smaller sanders which usually are manually fed and on which there is such a safety It was shown that the machine in question was built for use with an automatic feeder and that the one installed at Pope and Talbot is the only six-headed sander manufactured by defendant which is manually fed. There also was testimony that at the time of the purchase by Pope and Talbot, defendant had automatic feeders for sale but that Pope and Talbot did not purchase or show any interest in such a feeder. Pope and Talbot furnished a feeding device of their own manufacture for the machine which was partially automatic and partially manual but which, the jury could find, at times placed an employee in the way of regurgitated sheets.

There was testimony that at the time defendant's employee inspected the installation of the machine purchased by Pope and Talbot, which inspection was required by their contract, the inspecting employee became aware that the machine was being manually fed. There was no testimony of any warning given by defendant of the danger concerning regurgitated sheets to a person manually feeding the machine. Neither was there any evidence that Pope and Talbot was told that the machine was built for use with a fully automatic feeder and that it was not to be fed manually, nor was the recommendation made to plaintiff's employer that if the machine was to be used without a fully automatic feeder, some sort of safety device should be used for the protection of anyone who was manually feeding the machine. There was evidence that one of Pope and Talbot's

representatives was told that the top of the machine should not be raised sanding was taking place, but there was no evidence of the danger from doing so ever being mentioned.

Defendant contends there is no proper assignment of error because, instead of being designated as an assignment of error, the claim that the trial court should not have granted a directed verdict is designated as an issue on appeal. Because plaintiff's contention upon appeal is clearly evident, we choose in this case to overlook the formal defects in his opening brief which have somewhat been alleviated by his reply brief.

In defense of its judgment based upon a directed verdict, defendant contends there was no proof of a defect in the product, and therefore strict liability should not apply. This court and other courts continue to flounder while attempting to determine how one decides whether a product is "in a defective condition unreasonably dangerous to the user."[1] It has been recognized that unreasonably dangerous defects in products come from two principal sources: (1) mismanufacture and (2) faulty design.[2] Mismanufacture is relatively simple to identify because the item in question is capable of being compared with similar articles made by the same manufacturer. However, whether the mismanufactured article is dangerously defective because of the flaw is sometimes difficult to ascertain because not every such flaw which causes injury makes the article dangerously defective.[3]

The problem with strict liability of products has been one of limitation.[4] No one wants absolute liability where all the article has to do is to cause injury. To impose liability there has to be something about the article which makes it dangerously defective without regard to whether the manufacturer was or was not at fault for such condition. A test for unreasonable danger is therefore vital. A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*.[5] The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*.[6] Strict liability imposed what amounts to constructive knowledge of the condition of the product.

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[1] 2 RESTATEMENT (SECOND) OF TORTS § 402A, at 347 (1965).

[2] Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 830 (1973) (including failure to warn as a design defect).

[3] The California Supreme Court recognized this problem and attempted to eliminate it by requiring only a defect that causes injury, and not an unreasonably dangerous defect. In *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972), the court felt that requiring proof of an *unreasonably dangerous* defect would put an additional burden on plaintiff which the court deemed improper. We, however, feel that regardless of whether the term used is "defective," as in *Cronin*, or "defective condition unreasonably dangerous," as in THE RESTATEMENT, or "dangerously defective," as used here, or "not duly safe," as used by Professor Wade, the same considerations will necessarily be utilized in fixing liability on sellers; and, therefore, the supposedly different standards will come ultimately to the same conclusion. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L. J. 5, 14-15 (1965); Wade, *supra* note 2.

[4] *Cf. Markle v. Mulholland's, Inc.*, 265 Or. 259, 266, 509 P.2d 529 (1973). Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81 (1973).

[5] *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973); *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967), *cert. denied*, 391 U.S. 913, 88 S. Ct. 1806, 20 L. Ed. 2d 652 (1968); *Olsen v. Royal Metals Corporation*, 392 F.2d 116, 119 (5th Cir. 1968); *Dorsey v. Yoder*, 331 F. Supp. 753, 759-760 (E.D. Pa. 1971). *aff'd*, 474 F.2d 1339 (3 Cir. 1973). *See generally*, P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969); P. Keeton, *Products Liability - Inadequacy of Information*, 48 TEX. L. REV. 398, 403-404 (1970); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L. J. 5, 15-16 (1965).

[6] *Cf. Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973). *See generally*, Wade, *supra* note 2, at 834-835; P. Keeton, *Products Liability - Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1335 (1966). The Wade and Keeton formulations of the standard appear to be identical except that Keeton would impute the knowledge of dangers at time of trial to the manufacturer, while Wade would impute only the knowledge existing at the time the product was sold. Compare P. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973), with Wade, *supra* note 3, at 15, and Wade, *supra* note 2, at 834.

On the surface such a test would seem to be different than the test of 2 RESTATEMENT (SECOND) OF TORTS § 402A, Comment I., of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." This court has used this test in the past.[7] These are not necessarily different standards, however. As stated in *Welch v. Outboard Marine Corp.*,[8] where the court affirmed an instruction containing both standards:

> We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risk involved or if the risks are greater than a reasonable buyer would expect.

To elucidate this point further, we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing. That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers, and jurors customarily deal.

While apparently judging the seller's conduct, the test set out above would actually be a characterization of the product by a jury. If the manufacturer was not acting reasonably in selling the product, knowing of the risks involved, then the product would be dangerously defective when sold and the manufacturer would be subject to liability.

In the case of a product which is claimed to be dangerously defective because of misdesign, the process is not so easy as in the case of mismanufacture. All the products made to that design are the same. The question of whether the design is unreasonably dangerous can be determined only by taking into consideration the surrounding circumstances and knowledge at the time the article was sold, and determining therefrom whether a reasonably prudent manufacturer would have so designed and sold the article in question had he known of the risk involved which injured plaintiff. The issue has been raised in some courts concerning whether, in this context, there is any distinction between strict liability and negligence.[9] The evidence which proves the one will almost always, if not always, prove the other.[10] We discussed this matter recently in the case of *Roach v. Kononen*, 99 Or. Adv. Sh. 1092, 525 P.2d 125 (1974), and pointed out that there is a difference between strict liability for misdesign and negligence. We said:

> However, be all this as it may, it is generally recognized that the basic difference between negligence on the one hand and strict liability for a design defect on the other is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article. As Professor Wade points out, a way of determining whether the condition of the article is of the requisite degree of dangerousness to be defective (unreasonably dangerous; greater degree of danger than a consumer

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7 *See Markle v. Mulholland's, Inc.*, 265 Or. 259, 266, 509 P.2d 529 (1973); *Cornelius v. Bay Motors, Inc.*, 258 Or. 564, 572, 484 P.2d 299, 54 A.L.R.3D 340 (1971).

8 481 F.2d 252, 254 (5th Cir. 1973).

9 *See Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. 1973).

10 Wade, *supra* note 2, at 836-837.

> has a right to expect; not duly safe) is to assume that the manufacturer knew of the product's propensity to injury as it did, and then to ask whether, with such knowledge, something should have been done about the danger before it was sold. In other words, a greater burden is placed on the manufacturer than is the case in negligence because the law assumes he has knowledge of the article's dangerous propensity which he may not reasonably be expected to have, had he been charged with negligence. 99 Or. Adv. Sh. at 1099, 525 P.2d at 129.

To some it may seem that absolute liability has been imposed upon the manufacturer since it might be argued that no manufacturer could reasonably put into the stream of commerce an article which he realized might result in injury to a user. This is not the case, however. The manner of injury may be so fortuitous and the chances of injury occurring so remote that it is reasonable to sell the product despite the danger. In design cases the utility of the article may be so great, and the change of design necessary to alleviate the danger in question may so impair such utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale. Again, the cost of the change necessary to alleviate the danger in design may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility. Such an article is not dangerously defective despite its having inflicted injury.

In this case defendant contends it was Pope and Talbot's choice to purchase and use the sander without an automatic feeder, even though it was manufactured to be used with one, and, therefore, it was Pope and Talbot's business choice which resulted in plaintiff's injury and not any misdesign by defendant. However, it is recognized that a failure to warn may make a product unreasonably dangerous.[11] Comment j, Section 402A, 2 RESTATEMENT (SECOND) OF TORTS, has the following to say:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he had knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

Although the examples cited in the comment do not encompass machinery or such products, it has been recognized that a piece of machinery may or may not be dangerously defective, depending on the directions or warnings that may be given with it.[12]

It is our opinion that the evidence was sufficient for the jury to find that a reasonably prudent manufacturer, knowing that the machine would be fed manually and having the constructive knowledge of its propensity to

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[11] *See* *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1088-1090, (5th Cir. 1973). *See generally*, P. Keeton, *Products Liability - Inadequacy of Information*, 48 TEX. L. REV. 398, 403-404 (1970); P. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33-34 (1973).

[12] HURSH & BAILEY, 1 AMERICAN LAW OF PRODUCTS LIABILITY 2D, § 4.13 and cases cited therein (1974); *See* *Berkebile v. Brantly Helicopter Corp.*, 225 Pa. Super. 349, 311 A.2d 140, 143 (1973). In fact, in the leading case in the area of strict liability, *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3D 1049 (1963), the California Supreme Court stated: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of Which plaintiff was not aware that made the Shopsmith unsafe for its intended use." (Emphasis added.) 27 Cal. Rptr. at 701, 377 P.2d at 901. Thus it appears that the piece of machinery might not have been "defective" had the purchaser been made aware of its propensities through proper warnings.

regurgitate thin sheets when it was set for thick ones, which the courts via strict liability have imposed upon it, would have warned plaintiff's employer either to feed it automatically or to use some safety device, and that, in the absence of such a warning, the machine was dangerously defective. It is therefore unnecessary for us to decide the questions that would arise had adequate warnings been given.

In *Anderson v. Klix Chemical*, 256 Or. 199, 472 P.2d 806 (1970), we came to the conclusion that there was no difference between negligence and strict liability for a product that was unreasonably dangerous because of failure to warn of certain characteristics. We have now come to the conclusion that we were in error. The reason we believe we were in error parallels the rationale that was expressed in the previously quoted material from *Roach v. Kononen, supra*, where we discussed the difference between strict liability for misdesign and negligence. In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it. A way to determine the dangerousness of the article, as distinguished from the seller's culpability, is to assume the seller knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, he would have been negligent in selling it without a warning.

It is apparent that the language being used in the discussion of the above problems is largely that which is also used in *negligence* cases, *i.e.*, "unreasonably dangerous," "have reasonably anticipated," "reasonably prudent manufacturer," etc. It is necessary to remember that whether the doctrine of negligence, ultrahazardousness, 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. Therefore, the same language and concepts of reasonableness are used by courts for the determination of unreasonable danger in products liability cases. For example, see the criteria set out in *Roach v. Kononen*, *supra*.[13] The difference between the three theories of recovery is in the manner in which the decisional functions are distributed between the court and the jury. The following language, we believe, is appropriate:

> In an action for negligence it is normally the function of the jury to determine whether the defendant was negligent, subject, of course, to the authority of the judge to direct a verdict for the defendant, if he finds that the jury could not reasonably find for the plaintiff. On the other hand, in an action based on strict liability of the *Rylands* [*Rylands v. Fletcher*] type, for an abnormally dangerous activity, the determination as to whether strict liability will be imposed for the activity is held to be one for the judge, not the jury - for the reason that the decision involves issues of general social policy. In the products cases the courts seem not to have approached the problem in this fashion. Instead, they seem to have assumed that strict products liability is like negligence in this respect, so that a plaintiff, in order to recover, must convince the jury that the product was `defective' or `unreasonably dangerous' or `not duly safe,' or whatever test is used. This generally works quite satisfactorily when the question is whether the product was unsafe because of an error in the manufacturing process so that it was not in the condition in which it was intended to be. The issue then seems more factual,

[13] (1) The usefulness and desirability of the product - its utility to the user and to the public as a whole. (2) The safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe. (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions. (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

> of the kind the jury is accustomed to handling. The difficulty comes when it is not just the single article which is to be classed as unsafe because something went wrong in the making of it, but a whole group or class or type which may be unsafe because of the nature of the design. It is here that the policy issues become very important and the factors which were enumerated above must be collected and carefully weighed [as set out in *Roach v. Kononen*, *supra*]. It is here that the court - whether trial or appellate - does consider these issues in deciding whether to submit the case to the jury. If a plaintiff sues the manufacturer of a butcher knife because he cut his finger, on the sole ground that the knife was so sharp that it was likely to cut human flesh, the court would probably take the case out of the hands of the jury and not give it the opportunity to find that the knife was unsafe. Similarly with an aspirin manufacturer, when an ordinary tablet stuck to the lining of the plaintiff's stomach and caused a hemorrhage, or the manufacturer of the Pasteur treatment for rabies, when there were untoward reactions. The problem in these cases is likely to be called one of law and decided by the court. Court control of jury action is more extensive here than in the ordinary negligence action. And yet, of course, if the court decides that it would be reasonable to allow the jury to find for the plaintiff, the issue of lack of due safety will be submitted to the jury even in these cases." (Footnotes omitted.)[14]

It is important to point out, as indicated in the above quotation, that while the decision is made by the court whether an activity is abnormally dangerous and strict liability of the *Rylands v. Fletcher*[15] type is to be applied, the determination of whether a product is dangerously defective and strict liability is to be applied has been treated as one primarily for the jury, similar to the manner in which negligence is determined. Therefore, the factors set forth by Wade and used in *Roach v. Kononen, supra*, are not the bases for instructions to the jury but are for the use of the court in determining whether a case has been made out which is submissible to the jury. If such a case has been made out, then it is submitted to the jury for its determination under instructions as to what constitutes a "dangerously defective" product, much in the same manner as negligence is submitted to the jury under the "reasonable man" rule.[16]

Defendant contends that other and different instructions were given to plaintiff's employer, Pope and Talbot, and the accident occurred because these instructions were not followed and, therefore, the sander was misused and defendant is not responsible for the accident. Defendant's employee who inspected the installation of the sander testified that he told Pope and Talbot's sander superintendent, as previously indicated, that the top half of the sander should not be raised while material was being run through it, and this evidence was not refuted. It is not clear from the testimony of the sander operator whether the top half of the machine was in the process of being raised at the time the accident occurred, as is contended by defendant. believe the testimony is capable of being interpreted to the effect that when the thicker sheets caused by the press malfunction showed up, they all seemed to be of a uniform thickness, and the top of the machine was set to accommodate the extra thickness; then a number of pieces were run through before the thin piece, which had been mixed in with the thick ones, came along and was regurgitated due to the insufficient pressure exerted by the pinch rolls to offset the backward pressure of the sanding heads.

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[14] Wade, *supra* note 2, at 838-839.

[15] *Fletcher v. Rylands*, 3 H & C 774, 159 Eng. Rep. 737 (Ex. 1865), *Reversed in Fletcher v. Rylands*, LR 1 Ex. 265 (1866), *Affirmed in Rylands v. Fletcher*, LR 3 HL 330 (1868).

[16] Wade, *supra* note 2, at 834-835. Professor Wade also suggests an appropriate jury instruction which embodies the new standard. We have taken the liberty of modifying his suggestion to a form which seems to us more appropriate for use by a jury. It is as follows: `The law imputes to a manufacturer [supplier] knowledge of the harmful character of his product whether he actually knows of it or not. He is presumed to know of the harmful characteristics of that which he makes [supplies]. Therefore, a product is dangerously defective if it is so harmful to persons [or property] that a reasonable prudent manufacturer [supplier] with this knowledge would not have placed it on the market."

In any event, we believe the testimony would permit the jury to find that whether the top had been regulated for a specific thickness of material at the time of the accident or was in the process of being raised, the accident would have occurred in either circumstance.

Even if the testimony is capable of the sole construction which defendant puts on it, there is no testimony that the danger of raising the top of the sander while running material through it was ever explained to Pope and Talbot,[17] and, in the absence of such an explanation, we believe the question of whether the accident occurred because the sander was dangerously defective or because it was misused was one for the jury and should not be decided as a matter of law, as contended by defendant.

Defendant calls to our attention that one of the principal rationales behind the imposition of strict liability upon the manufacturer for injuries caused by dangerously defective products is that the manufacturer is in the position of distributing the cost of such risks among all users of the product. Defendant then argues that in the present situation Pope and Talbot would normally bear the responsibility for the injury to its employee and that because Pope and Talbot is just as capable of spreading the cost of injury by the sale of its product as is defendant, there is no logic in imposing liability without fault upon defendant for the purpose of distributing the risk.

Defendant thus confronts us with the problem we have already been faced with in *Wights v. Staff Jennings*, 241 Or. 301, 405 P.2d 624 (1965), where we noted the difficulty of limiting the applicability of the enterprise liability theory as a basis for recovery in tort. While the enterprise liability theory may be indifferent as to whether the defendant or plaintiff's employer should bear this loss, there are other theories which allow us to make a choice.

Where a defendant's product is adjudged by a jury to be dangerously defective, imposition of liability on the manufacturer will cause him to take some steps (or at least make calculations) to improve his product. Although such inducement may not be any greater under a system of strict liability than under a system of negligence recovery, it is certainly greater than if the liability was imposed on another party simply because that other party was a better risk distributor. We suspect that, in the final analysis, the imposition of liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give.

The case is reversed and remanded for a new trial.

[17] Where a user might not realize that a minor departure from instructions may cause serious danger, an additional duty to warn of a danger arises. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 263 (1969).

Questions and Notes

1. Oregon adopted a product liability statute that rendered the court's holding in *Phillips* obsolete. *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320 (2001).

2. Note that evidence of post-accident improvements was admitted. Should it have been? *See Ault v. International Harvester Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974) (holding post-accident evidence admissible); *contra*, *Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc.*, 695 F.2d 883 (5th Cir. 1983).

3. What does the court mean in footnote 3?

4. Some courts consider failure to warn as a negligence theory. "[N]otwithstanding what a few courts have said, a claimant who seeks recovery on this basis [failure to warn] must, according to the generally accepted view, prove that the manufacturer-designer was negligent." PROSSER & KEETON, § 99, at 697. Is this sound public policy?

5. Note that in some cases the duty to warn extends beyond the sale of the product, so that a defect discovered only after the product is sold will still create a duty to warn. *See* the Washington statute, R.C.W. 7.72.030(1)(c).

6. One commentator suggests that in this type of case the court is making the employer into a "conscripted samaritan" through "the use of tort law to force one actor (*e.g.*, a manufacturer) to adopt measures to protect a potential victim (*e.g.*, a worker) from the misdeeds of a third party (*e.g.*, an employer) or even from the foolhardiness of the victim himself." Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort*

and a Non-Tort Regime, 50 OHIO ST. L.J. 825, 829 (1989). Do you agree?

7. As this case illustrates, one of the thorniest problems in products liability law is the harmonization of the workers' compensation regime (which is a "no-fault" system of compensation) and tort liability for manufacturers of products (which requires, at leats in multiple-tortfeasor cases, the allocation of fault). If the injured victim is partially at fault, and if the employer appears to be at fault, how does this affect the liability of the manufacturer? In *Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1992), the court wrestled with these issues, but its resolution was superseded by a statute which prevented the employer's share of liability from being included in any comparative fault analysis. The net effect is that the manufacturer can't take advantage of the employer's fault to try to reduce its liability. For a thoughtful analysis of the general problem of integrating the two regimes (product liability and worker's compensation), see the Weiler article, *supra* note 6.

BROWN v. SUPERIOR COURT

44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988)

[*You will recall that portions of this opinion were included supra (Chapter Three, § B). The court held that the Sindell market share approach was not available for actions of fraud and breach of warranty and that defendants would in other ways be severally, not jointly, liable based on their market share. The following sections address the product liability issues.*]

* * *

A. Strict Liability in General

The doctrine of strict liability had its genesis in a concurring opinion by Justice Roger Traynor in *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal. 2d 453, 461, 150 P.2d 436. He suggested that a manufacturer should be absolutely liable if, in placing a product on the market, it knew the product was to be used without inspection, and it proved to have a defect that caused injury. The policy considerations underlying this suggestion were that the manufacturer, unlike the public, can anticipate or guard against the recurrence of hazards, that the cost of injury may be an overwhelming misfortune to the person injured whereas the manufacturer can insure against the risk and distribute the cost among the consuming public, and that it is in the public interest to discourage the marketing of defective products. This court unanimously adopted Justice Traynor's concept in *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897, holding a manufacturer strictly liable in tort and using the formulation of the doctrine set forth in *Escola*.

Strict liability differs from negligence in that it eliminates the necessity for the injured party to prove that the manufacturer of the product which caused injury was negligent. It focusses not on the conduct of the manufacturer but on the product itself, and holds the manufacturer liable if the product was defective.

In 1965, soon after our decision in *Greenman*, the RESTATEMENT SECOND OF TORTS published section 402A, which set forth the strict liability doctrine (hereinafter section 402A).[1] Almost all states have adopted some form of strict liability since that time. (PROSSER & KEETON ON TORTS (5th ed. 1984) § 99, p. 694.)

This court refined and explained application of the principle in *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153, and *Barker v. Lull Engineering Co.* (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (hereafter *Barker*). In *Cronin*, we rejected the requirement of section 402A that the defect in a product must be "unreasonably dangerous" to the consumer in order to invoke strict liability, holding that the requirement "rings of negligence" (8 Cal. 3d at p. 132, 104 Cal. Rptr. 433, 501 P.2d 1153)

[1] Section 402A provides: "(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 [&] (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 the product, and [&] (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

and that the showing of a defect which proximately caused injury is sufficient to justify application of the doctrine.

Barker defined the term "design defect" in the context of strict liability. In that case the plaintiff was injured while operating a piece of heavy construction equipment, and claimed that a safety device called an "outrigger" would have prevented the accident. We held that the defendant could be held liable for a defect in design.

Barker identified three types of product defects. (20 Cal. 3d at p. 428, 143 Cal. Rptr. 225, 573 P.2d 443.) First, there may be a flaw in the manufacturing process, resulting in a product that differs from the manufacturer's intended result. The archetypal example of such a defect was involved in *Escola, supra*, 24 Cal. 2d 453, 150 P.2d 436, a Coca Cola bottle that exploded. Such a manufacturing defect did not exist in the heavy equipment that caused the injury in *Barker*, and is not alleged in the present case.

Second, there are products which are "perfectly" manufactured but are unsafe because of the absence of a safety device, *i.e.*, a defect in design. This was the defect alleged in *Barker*. It held that a product is defectively designed if it failed to perform as safely as an ordinary consumer would expect when used as intended or reasonably foreseeable, or if, on balance, the risk of danger inherent in the challenged design outweighs the benefits of the design. (20 Cal. 3d at p. 430, 143 Cal. Rptr. 225, 573 P.2d 443.) Plaintiff asserts this test should be applied in the present case because DES contained a design defect.

The third type of defect identified in *Barker* is a product that is dangerous because it lacks adequate warnings or instructions. According to plaintiff, defendants here failed to warn of the dangers inherent in the use of DES. We are concerned, therefore, with the second and third types of defects described in *Barker*.

B. Strict Liability and Prescription Drugs

Even before *Greenman* was decided, the members of the American Law Institute, in considering whether to adopt a rule of strict liability, pondered whether the manufacturer of a prescription drug should be subject to the doctrine. (38 ALI Proc. 19, 90-92, 98 (1961).) During a rather confusing discussion of a draft of what was to become section 402A, a member of the institute proposed that drugs should be exempted from strict liability on the ground that it would be "against the public interest" to apply the doctrine to such products because of "the very serious tendency to stifle medical research and testing." Dean Prosser, who was the reporter for the RESTATEMENT SECOND OF TORTS, responded that the problem was a real one, and that he had it in mind in drafting section 402A. A motion to exempt prescription drugs from the section was defeated on the suggestion of Dean Prosser that the problem could be dealt with in the comments to the section.[2] However, a motion to state the exemption in a comment was also defeated. (38 ALI Proc. 19, 90-98, *supra*.) At the next meeting of the institute in 1962, section 402A was approved together with comment *k* thereto. (41 ALI Proc. 227, 244 (1962).)

The comment provides that the producer of a properly manufactured prescription drug may be held liable for injuries caused by the product only if it was not accompanied by a warning of dangers that the manufacturer knew or should have known about. It declares: "k. Unavoidably unsafe products.[3] There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs

[2] One commentator has pointed out that at the 1961 meeting Dean Prosser proposed an exemption even broader than that suggested by the motion to exempt prescription drugs from strict liability. (Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability* (1983) 58 N.Y.U. L. REV., 853, 863, 866.)

[3] We discuss in footnote 11, *post*, plaintiff's assertion that comment *k* does not apply to all prescription drugs but only to those found to be "unavoidably dangerous."

as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

Comment *k* has been analyzed and criticized by numerous commentators. While there is some disagreement as to its scope and meaning, there is a general consensus that, although it purports to explain the strict liability doctrine, in fact the principle it states is based on negligence. (*E.g.*, Schwartz, *Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K* (1985) 42 WASH. & LEE L. REV. 1139, 1141; McClellan, *Drug Induced Injury* (1978) 25 WAYNE L. REV. 1, 2; Kidwell, *The Duty to Warn: A Description of the Model of Decision* (1975) 53 TEX. L. REV. 1375, 1377-1378; Merrill, *Compensation for Prescription Drug Injuries* (1973) 59 VA. L. REV. 1, 50.) That is, comment *k* would impose liability on a drug manufacturer only if it failed to warn of a defect of which it either knew or should have known. This concept focuses not on a deficiency in the product - the hallmark of strict liability - but on the fault of the producer in failing to warn of dangers inherent in the use of its product that were either known or knowable - an idea which "rings of negligence," in the words of *Cronin, supra*, 8 Cal. 3d 121, 132, 104 Cal. Rptr. 433, 501 P.2d 1153.[4]

Comment *k* has been adopted in the overwhelming majority of jurisdictions that have considered the matter. (*E.g.*, *DeLuryea v. Winthrop Laboratories, etc.* (8th Cir. 1983) 697 F.2d 222, 228-229; *Basko v. Sterling Drug, Inc.* (2d Cir. 1969) 416 F.2d 417, 425-426; *Stone v. Smith, Kline & French Lab.* (Ala. 1984) 447 So. 2d 1301, 1303-1304; *Gaston v. Hunter* (App. 1978) 121 Ariz. 33, 588 P.2d 326, 338-341; *Chambers v. G.D. Searle & Co.* (D. Md. 1975) 441 F. Supp. 377, 380-381; *Johnson v. American Cyanamid Co.* (1986) 239 Kan. 279, 718 P.2d 1318, 1323.) In California, several decisions of the Courts of Appeal have embraced the comment *k* exemption (*Carmichael v. Reitz* (1971) 17 Cal. App. 3d 958, 988-989, 95 Cal. Rptr. 381; *Christofferson v. Kaiser Foundation Hospitals* (1971) 15 Cal. App. 3d 75, 79-80, 92 Cal. Rptr. 825; *Toole v. Richardson-Merrell Inc.* (1967) 251 Cal. App. 2d 689, 708-711, 60 Cal. Rptr. 398), but this court has never spoken to the issue.[5]

We are aware of only one decision that has applied the doctrine of strict liability to prescription drugs. (*Brochu v. Ortho Pharmaceutical Corp.* (1st Cir. 1981) 642 F.2d 652, 654-657.)[6] Most cases have embraced the

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[4] The test stated in comment k is to be distinguished from strict liability for failure to warn. Although both concepts identify failure to warn as the basis of liability, comment k imposes liability only if the manufacturer knew or should have known of the defect at the time the product was sold or distributed. Under strict liability, the reason why the warning was not issued is irrelevant, and the manufacturer is liable even if it neither knew nor could have known of the defect about which the warning was required. Thus, comment k, by focussing on the blameworthiness of the manufacturer, sets forth a test which sounds in negligence, while imposition of liability for failure to warn without regard to the reason for such failure is consistent with strict liability since it asks only whether the product that caused injury contained a defect. (*See Little v. PPG Industries, Inc.* (1978), 19 Wash. App. 812, 579 P.2d 940, 946.)

[5] Contrary to plaintiff's assertion, we did not "envision" the application of strict liability to prescription drugs in *Sindell*. That issue was not discussed in the opinion, although we relied on some of the policy considerations underlying strict liability in justifying modification of the rules of proximate cause in a manner we discuss below. Nor do we agree with plaintiff's claim that *Carmichael* and *Toole* did not adopt comment k. Even though *Carmichael* was decided before Barker defined a design defect, *Carmichael's* holding that comment k applies to prescription drugs was not affected by that definition. *Toole* relied on and applied the comment k test, since its conclusion that the defendant was liable for the plaintiff's injuries was based on the defendant's failure to provide adequate warnings regarding dangers of the drug and to disclose certain test results to the government.

[6] In *Brochu*, the plaintiff had taken an oral contraceptive which contained 100 milligrams of estrogen as well as other ingredients. According to the evidence at trial, estrogen posed a serious risk of harm to her, and the defendant manufactured another contraceptive pill containing only 50 milligrams of estrogen which was equally effective.

rule of comment *k* without detailed analysis of its language. A few, notably *Kearl v. Lederle Laboratories, supra*, 172 Cal. App. 3d 812, 218 Cal. Rptr. 453 (hereafter *Kearl*), have conditioned application of the exemption stated therein on a finding that the drug involved is in fact "unavoidably dangerous," reasoning that the comment was intended to exempt only such drugs from strict liability. (*Accord*, *Toner v. Lederle Laboratories* (1987) 112 Idaho 328, 732 P.2d 297, 303-309; *see also Feldman v. Lederle Laboratories* (1984) 97 N.J. 429, 479 A.2d 374, 382-383 (involving allegations of a failure to warn, but stating that "whether a drug is unavoidably unsafe should be decided on a case-by-case basis.").) And in *Collins v. Eli Lilly Co.* (1984) 116 Wisc. 2d 166, 342 N.W.2d 37, 52, it was held that comment *k* was applicable only if the drug in question was placed on the market without adequate testing because of exigent circumstances.[7]

We appear, then, to have three distinct choices: (1) to hold that the manufacturer of a prescription drug is strictly liable for a defect in its product because it was defectively designed, as that term is defined in *Barker*, or because of a failure to warn of its dangerous propensities even though such dangers were neither known nor scientifically knowable at the time of distribution;[8] (2) to determine that liability attaches only if a manufacturer fails to warn of dangerous propensities of which it was or should have been aware, in conformity with comment k; or (3) to decide, like *Kearl* and *Toner v. Lederle Laboratories, supra*, 732 P.2d 297, 303-309, that strict liability for design defects should apply to prescription drugs unless the particular drug which caused the injury is found to be "unavoidably dangerous."

We shall conclude that (1) a drug manufacturer's liability for a defectively designed drug should not be measured by the standards of strict liability; (2) because of the public interest in the development, availability, and reasonable price of drugs, the appropriate test for determining responsibility is the test stated in comment k; and (3) for these same reasons of policy, we disapprove the holding of *Kearl* that only those prescription drugs found to be "unavoidably dangerous" should be measured by the comment *k* standard and that strict liability should apply to drugs that do not meet that description.

1. Design Defect

* * *

[T]here is an important distinction between prescription drugs and other products such as construction machinery (*Barker*; *Pike v. Frank G. Hough Co.* (1970) 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229), a lawnmower (*Luque v. McLean* (1972) 8 Cal. 3d 136, 104 Cal. Rptr. 443, 501 P.2d 1163), or perfume (*Moran v. Faberge, Inc.* (1975) 273 Md. 538, 332 A.2d 11), the producers of which were held strictly liable. In the latter cases, the product is used to make work easier or to provide pleasure, while in the former it may be necessary to alleviate pain and suffering or to sustain life. Moreover, unlike other important medical products (wheelchairs, for example), harm to some users from prescription drugs is unavoidable. Because of these distinctions, the broader public interest in the availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use.

Perhaps a drug might be made safer if it was withheld from the market until scientific skill and knowledge advanced to the point at which additional dangerous side effects would be revealed. But in most cases such a delay in marketing new drugs - added to the delay required to obtain approval for release of the product from the Food and Drug Administration - would not serve the public welfare. Public policy favors the development and marketing of beneficial new drugs, even though some risks, perhaps serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering.

If drug manufacturers were subject to strict liability, they might be reluctant to undertake research programs to develop some pharmaceuticals that would prove beneficial or to distribute others that are available to be marketed,

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[7] In her dissenting opinion in *Finn v. G.D. Searle & Co.* (1984) 35 Cal. 3d 691, 705, 200 Cal. Rptr. 870, 677 P.2d 1147, Chief Justice Bird advocated a strict liability rule for prescription drugs based on the test set forth in *Barker*.

[8] We agree with the suggestion of a commentator that a manufacturer's knowledge should be measured at the time a drug is distributed because it is at this point that the manufacturer relinquishes control of the product. (Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing* (1983) 58 N.Y.U. L. REV. 734, 753-754.)

because of the fear of large adverse monetary judgments. Further, the additional expense of insuring against such liability - assuming insurance would be available - and of research programs to reveal possible dangers not detectable by available scientific methods could place the cost of medication beyond the reach of those who need it most.

* * *

The possibility that the cost of insurance and of defending against lawsuits will diminish the availability and increase the price of pharmaceuticals is far from theoretical. Defendants cite a host of examples of products which have greatly increased in price or have been withdrawn or withheld from the market because of the fear that their producers would be held liable for large judgments.

For example, according to defendant E.R. Squibb & Sons, Inc., Bendectin, the only antinauseant drug available for pregnant women, was withdrawn from sale in 1983 because the cost of insurance almost equalled the entire income from sale of the drug. Before it was withdrawn, the price of Benedictin increased by over 300 percent. (132 CHEMICAL WEEK (June 12, 1983) p. 14.)

Drug manufacturers refused to supply a newly discovered vaccine for influenza on the ground that mass inoculation would subject them to enormous liability. The government therefore assumed the risk of lawsuits resulting from injuries caused by the vaccine. (Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) 65 CAL. L. REV. 754, 769 *et seq.*; *Feldman v. Lederle Laboratories* (1983) 189 N.J. Super. 424, 460 A.2d 203, 209.) One producer of diphtheria-tetanus-pertussis vaccine withdrew from the market, giving as its reason "extreme liability exposure, cost of litigation and the difficulty of continuing to obtain adequate insurance." (*Hearing Before Subcom. on Health and the Environment of House Com. on Energy and Commerce on Vaccine Injury Compensation*, 98th Cong., 2d Sess. (Sept. 10, 1984) p. 295.) There are only two manufacturers of the vaccine remaining in the market, and the cost of each dose rose a hundredfold from 11 cents in 1982 to $11.40 in 1986, $8 of which was for an insurance reserve. The price increase roughly paralleled an increase in the number of lawsuits from one in 1978 to 219 in 1985. (232 SCIENCE (June 13, 1986) p. 1339.) Finally, a manufacturer was unable to market a new drug for the treatment of vision problems because it could not obtain adequate liability insurance at a reasonable cost. (N.Y. TIMES (Oct. 14, 1986) p. 10.)

There is no doubt that, from the public's standpoint, these are unfortunate consequences. And they occurred even though almost all jurisdictions follow the negligence standard of comment k. It is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products.[9]

We decline to hold, therefore, that a drug manufacturer's liability for injuries caused by the defective design of a prescription drug should be measured by the standard set forth in *Barker*.

2. Failure to Warn

For these same reasons of policy, we reject plaintiff's assertion that a drug manufacturer should be held strictly liable for failure to warn of risks inherent in a drug even though it neither knew nor could have known by the application of scientific knowledge available at the time of distribution that the drug could produce the undesirable side effects suffered by the plaintiff.

Numerous cases have recognized that a product may be defective because of the absence of a warning that was necessary to allow its safe use.... While some decisions apply strict liability principles to such a defect by holding that it is irrelevant whether the manufacturer knew of the danger or should have known of it ..., most jurisdictions hold to the contrary. That is, liability is conditioned on the actual or constructive knowledge of the risk by the manufacturer as of the time the product was sold or distributed.... This rule is consistent with comment j to section 402A, which confines the duty to warn to a situation in which the seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of ... the danger."

It has been said that to "hold the manufacturer

[9] We express no opinion whether the products to which these examples relate were in fact beneficial to the public health. Our purpose is to demonstrate that there is a rational connection between the cost and availability of pharmaceuticals and the liability imposed on their manufacturers for injuries resulting from their use.

liable for failure to warn of a danger of which it would be impossible to know based on the present state of human knowledge would make the manufacturer the virtual insurer of the product...." (*Woodill v. Parke Davis & Co., supra*, 402 N.E.2d 194, 199; *accord*, *Leibowitz v. Ortho Pharmaceutical Corp.* (1973) 224 Pa. Super. 418, 307 A.2d 449, 458; *see* Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine* (1983) 58 N.Y.U. L. REV. 892, 894-905.) The likelihood of the producer's liability would increase with significant advances in scientific knowledge, discouraging the development of new and improved drugs to combat disease. Thus, we disagree with plaintiff's assertion that defendants should be held liable for failing to warn the physician who prescribed DES to plaintiff's mother of alleged defects in the drug that were neither known by defendants nor scientifically knowable at the time the drug was distributed.

* * *

§ C. The Restatement (3d) of Torts (Product Liability)

The most recent development in product liability law is the drafting of the Restatement (3d) of Torts (Product Liability). It has generated a fair degree of controversy because of the perception that it is unduly favorable to manufacturers. *See, e.g.*, Frank J. Vandall, *State Judges Should Reject the Reasonable Alternative Design Standard of the Restatement (3rd) Products Liability, § 2(B)*, KANSAS JOURNAL OF LAW AND PUBLIC POLICY, Fall, 1998. Proponents of the Restatement, however, have argued that it is a balanced approach to the issue that will resolve many of the uncertainties left over from the adoption of the Restatement (2d), § 402A. Read the provisions of the Restatement (3d) yourself and see if you can detect any significant change from what § 402A provided.

Restatement of the Law Third
Torts: Products Liability
Proposed Final Draft
(April 1, 1997)
Chapter 1. Liability of Commercial Product Sellers Based on Product Defects at Time of Sale
Topic 1. Liability Rules Applicable to Products Generally

§ 1. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2. CATEGORIES OF PRODUCT DEFECT

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 warnings. 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.[1]

§ 3. CIRCUMSTANTIAL EVIDENCE SUPPORTING INFERENCE OF PRODUCT DEFECT

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) Was of a kind that ordinarily occurs as a result of product defect; and

(b) Was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

§ 4. NONCOMPLIANCE AND COMPLIANCE WITH PRODUCT SAFETY STATUTES OR REGULATIONS

In connection with liability for defective design or inadequate instructions or warnings:

(a) A product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and

(b) A product's compliance with an applicable product safety statute or administrative regulation is properly

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[1] [Ed. Note: The following appears in Comment a. *Rationale*.])

. . . 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 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 the products useful and desirable. Thus, trade-offs are necessary to determine which accident costs are more fairly and efficiently borne by those who incur them, on the one hand, and, on the other hand, by product users and consumers through the mechanism of holding product sellers liable and having product prices reflect the relevant costs.

Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence. The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe -- for example, automobiles designed with maximum speeds of 20 miles per hour -- any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.

In general, the rationale for imposing strict liability on manufacturers for harm caused by manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning. Consumer expectations as to proper product design or warning are typically more difficult to discern than in the case of a manufacturing defect. Moreover, the element of deliberation in setting appropriate levels of design safety is not directly analogous to the setting of levels of quality control by the manufacturer. When a manufacturer sets its quality control at a certain level, it is aware that a given number of products may leave the assembly line in a defective condition and cause injury to innocent victims who can generally do nothing to avoid injury. The implications of deliberately drawing lines with respect to product design safety are different. A reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer since some risks cannot be designed out of the product at reasonable cost.

For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks were reasonably foreseeable.

considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

§ 5. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR OF PRODUCT COMPONENTS FOR HARM CAUSED BY PRODUCTS INTO WHICH COMPONENTS ARE INTEGRATED

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

(a) The component is defective in itself, under §§ 1-4, and the defect causes the harm; or

(1) The seller or distributor of the component substantially participates in the integration of the component into the design of the product; and

(2) The integration of the component causes the product to be defective as defined under §§ 1-4; and

(3) The defect in the product causes the harm.

§ 7. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR FOR HARM CAUSED BY DEFECTIVE FOOD PRODUCTS

One engaged in the business of selling or otherwise distributing food products who sells or distributes a defective food product under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a) a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

§ 8. LIABILITY OF COMMERCIAL SELLER OR DISTRIBUTOR OF DEFECTIVE USED PRODUCTS

One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:

(a) results from the seller's failure to exercise reasonable care; or

(b) is a manufacturing defect under § 2(a) or a defect that may be inferred under § 3 and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or

(c) is a defect under § 2 or § 3 in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product.

A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.

§ 9. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR FOR HARM CAUSED BY MISREPRESENTATION

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

§ 10. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR FOR HARM CAUSED BY POST-SALE FAILURE TO WARN

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property

caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale when:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

§ 11. LIABILITY OF COMMERCIAL PRODUCT SELLER OR DISTRIBUTOR FOR HARM CAUSED BY POST-SALE FAILURE TO RECALL PRODUCT

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable person in recalling the product.

§ 12. LIABILITY OF SUCCESSOR FOR HARM CAUSED BY DEFECTIVE PRODUCTS SOLD COMMERCIALLY BY PREDECESSOR

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor's becoming a continuation of the predecessor.

§ 14. SELLING OR OTHERWISE DISTRIBUTING AS ONE'S OWN A PRODUCT MANUFACTURED BY ANOTHER

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.

§ 15. GENERAL RULE GOVERNING CAUSAL CONNECTION BETWEEN PRODUCT DEFECT AND HARM

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.

§ 16. INCREASED HARM DUE TO PRODUCT DEFECT

(a) When a product is defective at the time of sale and the defect is a substantial factor in increasing the plaintiff's harm

beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

(d) A seller of a defective product who is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

§ 17. APPORTIONMENT OF RESPONSIBILITY BETWEEN OR AMONG PLAINTIFF, SELLERS AND DISTRIBUTORS OF DEFECTIVE PRODUCTS, AND OTHERS

(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

§ 18. DISCLAIMERS, LIMITATIONS, WAIVERS, AND OTHER CONTRACTUAL EXCULPATIONS AS DEFENSES TO PRODUCTS LIABILITY CLAIMS FOR HARM TO PERSONS

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

§ 19. DEFINITION OF "PRODUCT"

For purposes of this Restatement:

(a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

(b) Services, even when provided commercially, are not products.

(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

Questions and Notes

1. A scholar of product liabilty law sees in the adoption of the Restatement (3d) of Torts (Product Liability) an opportunity to re-examine the fundamental purposes of tort law. *See* M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 Ga. L. Rev. 1017 (1998).

2. A call for a reformulation of several key features of the Restatement can be found in Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect* 33 U. Mem. L. Rev. 909 (2003).

Chapter 10
Professional Negligence

§ A. Medical Malpractice

1. Negligence

KNIGHT v. HAYDARY

165 Ill. Dec. 847, 585 N.E.2d 243 (1992)

Justice McLAREN delivered the opinion of the court

This appeal involves an action in malpractice against two doctors, A. Lee Haydary and Erwin Robin. The case is brought by Fredrick Knight, as special administrator of the estate of Patrice Knight, deceased, in a wrongful death action and a survival action. The alleged negligence resulted in severe brain damage causing death while Patrice was under the care of Dr. Haydary for treatment of a miscarriage. The case was tried before a jury in the circuit court of Kane County. At the close of plaintiff's case in chief, the trial court granted a directed verdict in favor of Dr. Robin. After a full trial, the jury returned a verdict in favor of Dr. Haydary. Plaintiff now appeals from these verdicts.

The issues presented for review are (1) whether plaintiff is entitled to a judgment notwithstanding the verdict (j.n.o.v.) on the issue of Dr. Haydary's liability and a new trial on the issue of damages, (2) whether the jury verdict in favor of Dr. Haydary was contrary to the manifest weight of the evidence, and (3) whether the trial court erred in barring one of plaintiff's experts from testifying. We affirm.

On July 18, 1983, Patrice Knight was admitted to the Sherman Hospital emergency room in order to receive care for a miscarriage occurring between the 12th and 14th weeks of pregnancy. Her obstetrician and gynecologist, Dr. A. Lee Haydary, instructed her to come to the hospital after determining through a telephone conversation that her amniotic sac had ruptured, indicating an abnormal event in her pregnancy. After passing the fetus, Patrice was admitted to the labor and delivery unit of the hospital where she received an IV of 1,000 cc's of "Lactated Ringer's" solution containing one ampule (1 cc) of Pitocin. Following surgery, patients who should not eat solid foods are given an IV which injects a nourishing solution into the body. When patients receive liquids of this type, they must also receive electrolytes in order to maintain the proper balance of certain elements in the body, such as sodium, with the fluids within the body. Electrolytes are contained in the foods people eat. However, they can also be reduced to a fluid state. "Lactated Ringer's" is a solution which contains these essential electrolytes and is administered to a patient through an IV.

Pitocin, a brand-name manufactured drug, is a synthetic preparation of a naturally occurring hormone, oxytocin, which is produced in the area of the brain called the hypothalamus. Pitocin is used to promote the expulsion of the products of conception that might still be in the uterus. If the uterus is not emptied of the products of conception, it will continue to bleed. One potential side effect of Pitocin is that it may cause hyponatremia, due to its intrinsic antidiuretic effect. In other words, it may cause an individual to retain water which would otherwise be excreted. Such water retention could result in damaging swelling to the body including parts of the brain.

Upon her admission to the hospital, a complete blood count (CBC) was taken from Patrice. A CBC is used in order to determine, among other things, whether there is a proper balance between essential electrolytes and body water.

Approximately $2^{1}/_{2}$ hours after her admission to the labor and delivery department, Patrice passed additional tissue. Later that evening, a second IV bottle of 1,000 cc's of "Lactated Ringer's" with one ampule of Pitocin was administered with Dr. Haydary's consent. The following morning of July 19, Patrice received a

third IV bottle of "Lactated Ringer's" with one ampule of Pitocin. Because the previous IV became clotted with blood, it was discontinued with 200 cc's remaining in the bottle. That morning, Dr. Haydary visited Patrice, performed an examination, and diagnosed an incomplete abortion based upon his findings of uterus enlarged to six times normal size and a vagina filled with blood. In order to remove the tissue or products of conception from the uterine cavity, Dr. Haydary performed a dilation and curettage (D&C), a surgical procedure involving a scraping of the wall of the uterus. Following the D&C procedure at approximately 1:45 p.m., Patrice received a fourth IV bottle. This IV contained one ampule of Pitocin, along with 1,000 cc's of 5% dextrose and water (D5W). This IV was to be administered over a 12-hour period. The D5W solution has a nutritive value but contains no electrolytes. In addition, Patrice was permitted to have a general diet and to take fluids as desired.

Patrice received a fifth IV bottle of 1,000 cc's D5W with one ampule of Pitocin at 3:30 a.m. July 20. At this time Patrice began to develop a headache for which she received several forms of medication and treatment from the nurses on duty. At approximately 5:30 a.m., Patrice vomited and reported some relief of her headache. At approximately 8 a.m., Patrice stated to a nurse that she was experiencing a less-severe headache for which she obtained pain medication from the nurse in the form of a pill. Patrice then became weepy and spoke with the nurse about her miscarriage. Patrice subsequently vomited a small amount.

Dr. Haydary visited Patrice in her hospital room at approximately 10:50 a.m. on July 20. Patrice complained of headache, nausea, vomiting, and diarrhea to Dr. Haydary. She believed that she had the flu and felt unable to go home. As a result, Dr. Haydary decided to keep her in the hospital. Prior to leaving that morning, Dr. Haydary ordered Vistaril to control the vomiting and relieve the headache. While he was at the hospital, Dr. Haydary told a nurse to discontinue Patrice's IV with Pitocin, which had about 200 cc's of fluid remaining. A nurse hung an IV of D5W without Pitocin at around noon.

At approximately 1 p.m. Patrice was found to be unconscious and having seizure-like movement in her arms. A nurse called Dr. Haydary to inform him of Patrice's condition. Dr. Haydary, who was out of the hospital at the time, ordered a complete blood count and a blood clotting test and arranged to have a physician see Patrice. This physician was Dr. Erwin Robin, an internist with a specialty in cardiac medicine. Following the seizure-like movements, Patrice began screaming, and then she began to rest.

Dr. Robin arrived at approximately 2 p.m. and examined Patrice. In the course of this examination he was able to listen to her heart, take her blood pressure, and conduct a brief neurological examination by checking her pupillary reflexes. Patrice was unable to respond verbally to his questions. Dr. Robin found Patrice to be medically and neurologically normal and determined that her actions reflected possible psychological problems. Dr. Robin called Dr. Haydary, suggested that he come to the hospital, and advised that the patient be seen by either a psychiatrist or a neurologist.

At 3 p.m. a psychiatrist arrived who also conducted a neurological examination. This examination included a look into Patrice's eyes in order to assess whether there was pressure in the brain by examining the fundus of the eye with an ophthalmoscope. The psychiatrist found the eyes to be within normal limits. Her reflexes were also assessed to be within normal limits. However, after 10 or 15 minutes, the psychiatrist observed Patrice undergo a grand mal seizure lasting approximately 10 minutes. After witnessing the seizure and noting that one pupil was markedly dilated compared to the other one, as well as finding a positive babinski sign (where the big toe moves when the outer side of the foot is scratched) the psychiatrist felt there was an organic problem with Patrice's brain. The psychiatrist then transferred Patrice to the intensive care unit at Sherman Hospital and called Dr. Haydary to advise him of the patient's development. The psychiatrist indicated that the situation required a neurologist or a neurosurgeon. Dr. Haydary agreed. Within five minutes, a neurologist (Dr. Lupton) arrived.

When Dr. Lupton arrived at approximately 4:30 p.m., Patrice was confused and combative, so Dr. Lupton prescribed valium. Dr. Lupton proceeded to conduct a neurological examination. His initial assessment was that Patrice was normal, but at approximately 5 p.m., Patrice became less responsive and her pupils became dilated and fixed. Her blood pressure then became exceedingly elevated and suddenly fell to zero. She stopped breathing and signs of an intact brain

stem were absent.

Patrice died of hyponatremia, a state characterized by the retention of water in the body and inappropriately low levels of sodium. The decreased sodium level causes the brain to swell. In this instance, the swelling took place to such an extent that the brain was herniated from the brain stem, ineluctably causing death.

Plaintiff first argues that he is entitled to a judgment notwithstanding the verdict (j.n.o.v.) on the issue of Dr. Haydary's liability for damages resulting from the death of Patrice. Under the *Pedrick* standard, plaintiff is entitled to a j.n.o.v. only if all of the evidence viewed in the aspect most favorable to the defendant so overwhelmingly favors the plaintiff that no contrary verdict based on the evidence could ever stand. (*Pedrick v. Peoria & Eastern R.R. Co.* (1967)), 37 Ill. 2d 494, 510, 229 N.E.2d 504; *Connelly v. General Motors Corp.* (1989), 184 Ill. App. 3d 378, 385, 132 Ill. Dec. 630, 540 N.E.2d 370.) The *Pedrick* standard is properly applied in reviewing the denial of a motion for j.n.o.v. *Runimas v. Howe* (1981), 94 Ill. App. 3d 357, 359, 49 Ill. Dec. 936, 418 N.E.2d 956.

In a medical malpractice case, the plaintiff, by use of expert testimony, must establish the standards of care against which the defendant/doctor's conduct is measured. (*Borowski v. Von Solbrig* (1975), 60 Ill. 2d 418, 423, 328 N.E.2d 301.) The plaintiff must then prove that, judged in the light of these standards, the doctor was unskillful or negligent and that his want of skill or care caused the injury to the plaintiff. (*Borowski*, 60 Ill. 2d at 423, 328 N.E.2d 301.) Whether the doctor deviated from the standard of care and whether his conduct was a proximate cause of plaintiff's injury are questions of fact for the jury. *Borowski*, 60 Ill. 2d at 423, 328 N.E.2d 301.

It is improper for a trial court to enter a j.n.o.v. when there is a substantial factual dispute in the case, or when it is necessary to evaluate conflicting evidence in order to determine the outcome of the case. (*Connelly*, 184 Ill. App. 3d at 385, 132 Ill. Dec. 630, 540 N.E.2d 370.) This same standard is used by the reviewing court in determining whether the trial court applied the standard properly. (*Connelly*, 184 Ill. App. 3d at 386, 132 Ill. Dec. 630, 540 N.E.2d 370.) Accordingly, we will not enter a j.n.o.v. in a medical malpractice action when the jury has weighed conflicting expert testimony and determined that the essential elements of a medical malpractice case have not been sufficiently proved.

In order to prevail on this claim, plaintiff must show that the evidence overwhelmingly indicates Dr. Haydary breached his standard of care and caused injury to Patrice. The malpractice alleged here was Dr. Haydary's failure to diagnose and treat the cerebral edema (brain swelling), due to hyponatremia, that caused Patrice's death.

Experts for the plaintiff testified that the standard of care in this instance demanded that Dr. Haydary: (1) be aware hyponatremia is a known side effect of Pitocin; (2) proceed to the hospital upon learning of Patrice's condition from the nurses attending Patrice and from Dr. Robin; (3) recognize the possibility of hyponatremia in his diagnosis; (4) treat Patrice for hyponatremia; (5) properly administer Pitocin and not order it for too long of a duration; and (6) evaluate Patrice's sodium level on an emergency basis.

We determine that, when viewed in the aspect most favorable to defendant, the defendant's case gives rise to a substantial factual dispute with respect to plaintiff's assertion of Dr. Haydary's duty and his compliance with that duty. Plaintiff asserts that Dr. Haydary should have known what was wrong with Patrice and he should have treated her for it. However, there was no general agreement between the experts as to how Patrice should have been treated. We distinguish the facts of the case at bar from those in *Carman v. Dippold* (1978), 63 Ill. App. 3d 419, 427, 20 Ill. Dec. 297, 379 N.E.2d 1365, where the medical experts were in total accord as to the proper standard of medical care to be followed in the context of the facts. In *Carman*, the court held that when all the experts are in agreement on the proper standard of care, the *Pedrick* standard was met, a j.n.o.v. was proper, and the defendant/doctor could be held liable for damage resulting from his actions which did not conform to the undisputed standard of care. *Carman*, 63 Ill. App. 3d at 428, 20 Ill. Dec. 297, 379 N.E.2d 1365.

The deciding issue in this case is whether Dr. Haydary's conduct fell below the accepted standard of care by failing to diagnose and treat Patrice for hyponatremia. Plaintiff's attempt to establish this standard of care failed, in part, because his counsel asked hypothetical questions that did not adequately address the adequacy of Dr. Haydary's diagnosis. Plaintiff's counsel's questioning at trial evoked testimony to the effect

that if a patient is found to have hyponatremia, then it should be treated. All the experts unsurprisingly agreed on this point.

However, the dispute involves what Dr. Haydary's duty compelled him to do given Patrice's undiagnosed condition *at that time*, not whether a doctor, in general, should treat hyponatremia. The primary duty was to diagnose. It is only then that the adequacy of the treatment can be debated. If Dr. Haydary negligently diagnosed Patrice, then his treatment based on that diagnosis could be examined. Because medicine is a profession which involves the exercise of individual judgment within the framework of established procedures, differences in opinion are consistent with the exercise of due care. (*Walski v. Tiesenga* (1978), 72 Ill. 2d 249, 261, 21 Ill. Dec. 201, 381 N.E.2d 279.) We find that Dr. Haydary presented sufficient evidence to raise a factual issue that he acted with due care by exercising his individual judgment in diagnosing Patrice's problem and treating her accordingly.

The defendant provided expert testimony expressing opinions that Dr. Haydary carried out his responsibilities as a physician in a normal and acceptable manner and that he acted within the standard of care. One expert provided an opinion that it is a perfectly normal type of practice for a gynecologist to administer Pitocin to a woman prior to and following a D&C. The expert expressed an opinion that the dosage of Pitocin Patrice received over a 42-hour period was a minimal amount. He also expressed an opinion that Dr. Haydary met his obligations with regard to taking care of Patrice on the morning after the D&C procedure had been performed.

The expert further offered an opinion that Patrice's symptoms of nausea, vomiting, and headache could have been due to a mild viral infection, a gastroenteritis, a bowel problem, and, even more likely, to the lingering effects of coming out of the anesthesia she received. She also could have been responding negatively to the Demerol she received. In addition, Patrice had a long history of migraine headaches which, it was testified, are also associated with nausea and vomiting. The expert testified that there were probably over 100 different conditions that could be associated with the headache, nausea, and vomiting that Patrice was experiencing. He said that of these diagnoses, he would put water intoxication (hyponatremia) at the very bottom of the list. Defendants' expert testified that based on the symptoms Patrice was experiencing at 11 a.m. on July 20, there was no need to perform an electrolyte test on Patrice. The expert expressed the opinion that Dr. Haydary did not violate his standard of care by calling for an internist to see Patrice, particularly in light of the fact that Dr. Haydary had just visited with her.

The expert also opined that putting Patrice on a general diet after the operation was an effective way to replace the electrolytes that were no longer being administered through the Ringer's solution, which was discontinued on July 19. Furthermore, there was testimony that Patrice received Pitocin in connection with an earlier pregnancy and that she suffered no ill effects from it.

Both Dr. Haydary and Dr. Robin ordered CBCs on July 20. Dr. Haydary's CBC was performed at approximately 1 p.m., and Dr. Robin's at about 4 or 5 p.m. Defendant's expert pointed out that the white blood cell count went up considerably from the first CBC to the second. He indicated that he would expect the white cell count to be diluted along with the red cell count had hemodilution taken place. In addition, the plaintiff brings out testimony that the absence of certain elements of the blood could indicate the presence of hyponatremia. However, experts for the defense pointed out that such figures could also reflect the loss of blood Patrice experienced both before, during and after her operation.

Defendants' experts further testified that Dr. Haydary applied the knowledge and used the skill and the care ordinarily used by a reasonably well-qualified obstetrician/gynecologist when Dr. Haydary sought the aid of an internist to evaluate Patrice when she developed her peculiar symptoms. The expert further testified about the possibility of Patrice's symptoms as being indicative of post-partum depression associated with pregnancy, and, thus, potentially a psychological problem.

We find that this evidence presented by the defense was sufficient to create a substantial question of fact concerning the elements of Dr. Haydary's standard of care and how his actions should have conformed to that standard. Viewing this dispute in the aspect most favorable to defendant, we cannot say that the evidence overwhelmingly favors plaintiff. Therefore, we hold that it was appropriate for the trial court to deny plaintiff's motion for a j.n.o.v.

* * *

Affirmed.

WOODWARD and INGLIS, JJ., concur.

Questions and Notes

1. RESTATEMENT (2D), TORTS, § 299A, comment f, provides: "Where there are different schools of thought in a profession, or different methods are followed by different groups engaged in a trade, the actor is to be judged by the professional standards of the group to which he belongs. The law cannot undertake to decide technical questions of proper practice over which experts reasonably disagree, or to declare that those who do not accept particular controversial doctrines are necessarily negligent in failing to do so. There may be, however, minimum requirements of skill applicable to all persons, of whatever school of thought, who engage in any profession or trade." Based on this comment, by what standard should a chiropractor be judged if his treatment is unsuccessful, and if his treatment differs significantly from that of an orthopedic surgeon?

2. At one time the plaintiff had to produce an expert familiar with the practice of medicine in the locality where the alleged malpractice occurred. This severely restricted the list of eligible witnesses to ones likely to be disinclined to testify negatively about a colleague. Most jurisdictions have moved to a standard that requires the plaintiff to supply an expert familiar with the practice of that type of medicine in the state where the case arose. (This is the standard adopted in RCW 7.70.040, *infra*.) While this is the standard applied for general practitioners, some jurisdictions now apply a standard of care for specialists that is nationwide in scope. This reflects both the more limited number of qualified witnesses and the recognition that the practice of medical specialties does not vary significantly from state to state.

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2. Informed Consent

WACHTER v. UNITED STATES

877 F.2d 257 (4th Cir. 1989)

ERVIN, Chief Judge

Jean M. Wachter appeals from an order granting defendant, the United States, summary judgment in Wachter's Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. § 2671 *et seq.*, suit for medical malpractice. The district court found no evidence creating genuine issues that harm had accrued to Wachter from the misrepresentations and failures to disclose that she alleged. We agree, and affirm.

I

A

Wachter, then fifty-five years old, entered the Bethesda Naval Hospital ("Bethesda") for double coronary artery bypass surgery on March 1, 1983. Wachter's attending surgeon during this hospitalization was Commander Reginald Peniston. Commander Edward L. Woods, Jr., a resident in thoracic surgery, performed Wachter's March 4, 1983, operation under Peniston's direct supervision. Woods used segments of saphenous veins removed from Wachter's leg to bypass occluded portions of the native coronary arteries. Prior to the operation, Woods had apprised Wachter of what the saphenous vein graft procedure ("SVG") involved, what alternative procedures existed, the possible complications and sequelae of SVG[66] and that the decision whether to proceed was ultimately hers. Wachter indicated that she understood what Woods had said and signed an SVG consent form.

By July, 1983, it had become clear that Wachter's SVG had failed. Wachter's symptoms, and the results of a cardiac catheterization, revealed that the grafted veins were between seventy and ninety percent occluded. Bethesda surgeons recommended a second double bypass procedure.

Wachter had begun reading about the heart and bypass surgery while hospitalized after the March operation. After her doctors counseled a second procedure, and with her husband's

[66] Woods specifically indicated the possibilities of post-surgical hemorrhage, myocardial infarction, stroke, death, infection, and occlusion of the grafted veins.

assistance, Wachter began a concerted campaign of self-education.[67] After investigating alternative techniques and facilities, Wachter satisfied herself that entering Bethesda for a second bypass was her only alternative.

It is on what Bethesda surgeons told her when she submitted herself for the second procedure that Wachter's claims center. Wachter's primary surgeon for the August 1, 1983, operation was Dr. Donal M. Billig. Billig was then Bethesda's chief of cardiothoracic surgery.

Since Wachter's second SVG, the Navy has cashiered Billig based on a number of revelations.[68] One of Wachter's complaints is that she was unable to give her informed consent to the second SVG because Bethesda withheld word of Billig's shortcomings.

Wachter first met Billig in July, 1983, when Billig delivered the results of Wachter's cardiac catheterization and recommended an immediate second SVG. Wachter, having reviewed other facilities and procedures, returned to Bethesda later that month. Wachter was still uncertain whether to accept Billig as her primary surgeon, and proceeded to interview one of Billig's colleagues, Dr. George W. Haggerson,[69] about Bethesda's and Billig's record on second SVGs.

There can be little doubt that Wachter's questions to Haggerson were designed to elicit information about Billig rather than about SVG or alternative procedures.[70] Haggerson recited mortality rates for Bethesda and for Billig that apparently did not alarm Wachter. Wachter stated that Haggerson finished by assuring her that in Billig she "was getting one of the finest doctors in the country ... and it was rather senseless ... to go to outside doctors when [she] had the best right here." There is no evidence that Haggerson then knew anything that should have persuaded him that his statements about Billig were untrue.

The second root of Wachter's grievance, after her conviction that she received harmful misinformation about Billig, is her belief that Bethesda should have told her about an alternative to SVG, the internal mammary artery bypass procedure (IMA).[71] IMA uses chest rather than leg

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[67] Despite her doctor's advice that she remain hospitalized for a prompt second SVG following her cardiac catheterization, Wachter insisted that she be discharged to plumb her options. "This time," Wachter explained in her deposition, "I wanted to get smart."

[68] While this case only incidentally involves Billig's relationship with the Navy and patients other than Wachter, we digress to summarize what the record reveals about an imbroglio that has achieved considerable notoriety. The report of the Navy's Formal Board of Investigation of the Billig affair records a story that, while most disturbing, suggests that Wachter was among the lucky fraction of patients not hurt by Billig's shortcomings.

The report reveals that at least two Navy officers recommended that the Navy hire Billig as a surgeon while withholding or softpedaling information that two civilian health centers had terminated Billig's privileges because of incompetence and lack of diligence and that the Air Force had found Billig unqualified for service because of reduced vision in his right eye. The report found Billig's cardiothoracic surgery mortality rate at Bethesda "unacceptably high", and presented a number of histories of Bethesda patients who had died from what other surgeons opined was Billig's culpable negligence. A Navy court-martial subsequently found Billig guilty of, among other things, dereliction of duty.

[69] Haggerson, with Dr. Geoffrey M. Graeber, Director of the Division of Surgery at Washington, D.C.'s Walter Reed Army Institute of Research, and a fourth surgeon, would assist Billig at Wachter's August 1 operation.

[70] Wachter does not allege that she received insufficient or incorrect reports about her SVG operations. Wachter did not discuss the SVG with Haggerson because, as she stated, "they [i.e. Bethesda] knew I knew" the particulars from her March, 1983, briefing and her independent investigation. Haggerson related that the second SVG would use veins from the leg not used in the first surgery and that a second SVG imported a higher risk of complications, including death, than had the first surgery.

Wachter stated that she had gotten information on "probably three" surgeons other than Billig before entering Bethesda in late July. On the eves of the March and August SVGs, Wachter signed identical consent forms. Among the form's acknowledgments is that the "possibility of complications [has] been fully explained to [the signatory, who] acknowledge[s] that no guarantees have been made to me concerning the results of the operation or procedure...."

[71] Wachter's memorandum in opposition to the United States' motion for summary judgment also argued that Bethesda should have told Wachter of a third alternative, that of angioplasty. Angioplasty is a procedure, less intrusive than SVG or IMA, in which a surgeon maneuvers small balloons into the occluded portions of the coronary blood vessels. When inflated, the balloons compress the occluding material against the walls of the vessels, allowing for improved blood flow and eliminating the need for bypass grafts. Wachter's deposition makes clear that she was familiar with the alternative of angioplasty through her own research, and that she had elected not to

vessels as the graft stock for a coronary bypass.

Dr. Robert D. Brickman, whose affidavits Wachter tendered in opposition to the United States' motion for summary judgment, opined that Billig should have offered Wachter the option of an IMA. Brickman stated that IMA, "although not commonly used throughout the United States in July, 1983, [was] a preferable alternative in selected patients." While Brickman admitted that the question remained unsettled until well after Wachter's second SVG, he opined that IMA could have had a higher chance of success than a second SVG in a patient like Wachter. Brickman's statements make plain that the availability as well as the advisability of IMA for Wachter was problematic in 1983.

Brickman believed that "[p]robably 20 percent" of U.S. hospitals offered IMA in 1983; it is undisputed that Bethesda was not among them.[72] In 1983, though, only one facility had compared the success rates of IMA and SVG for patients undergoing a second bypass. Brickman was "not sure of" the results of that study. As to Billig's performance of Wachter's second SVG, Brickman had no opinion whether Billig "deviated from the acceptable standard in the manner and technique employed in the performance of the bypass grafts.[73]

B

Wachter, with her husband, Robert, commenced this action on August 6, 1987. The Wachters sought $3,000,000.00 in damages for the failure of Jean Wachter's second SVG. The second set of vein grafts had, like the first, become occluded and unable to transfer blood at a rate sufficient to alleviate Wachter's preoperative symptoms.

Wachter's complaint presented four theories of recovery. The first count generally alleged that Bethesda failed properly to obtain Wachter's informed consent. The second count charged various acts of medical negligence by Bethesda personnel. Counts three and four alleged that Bethesda negligently hired, supervised, and credentialed Billig.

In response to the United States' June 3, 1988, motions for summary judgment and for dismissal for lack of subject matter jurisdiction under the FTCA, the Wachters moved voluntarily to dismiss the last three counts of the complaint and so much of the first count as bore on the first SVG. The district court granted both parties' motions, dismissing with prejudice the bulk of Wachter's complaint and granting the United States summary judgment on Wachter's informed consent objection to the second SVG. We do not understand Wachter to dispute the district court's construction of the applicable law of informed consent. Our attention is accordingly directed only toward the question of whether any genuine issues exist that should have precluded summary judgment.

II

Maryland law supplies the rules of decision on informed consent in this action. 28 U.S.C. § 1346(b). *Sard v. Hardy*, 379 A.2d 1014 (Md. 1977), is Maryland's principal elaboration of the doctrine of informed consent. The doctrine "imposes on a physician ... the duty to explain the procedure to the patient and to warn [her] of any material risks or dangers inherent in or collateral to the therapy, so as to enable [her] to make an intelligent and informed choice about whether or not to undergo such treatment." *Id.* at 1020. (Citations omitted).[74] The duty to disclose specifically requires a physician "to reveal ... the nature of the ailment, the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with

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pursue the alternative, which Bethesda did not then offer, before entering Bethesda for her second SVG. There is, therefore, no doubt that Bethesda's omission of the angioplasty alternative did not affect Wachter's ability to give informed consent to an SVG.

[72] Brickman cited the Norfolk [Va.] General Hospital as a facility near Bethesda that offered IMA in July, 1983. Brickman also stated, however, that of "hundreds" of United States medical institutions, "probably about four or five" would have urged Wachter to elect IMA in 1983.

[73] Brickman candidly admitted that "[t]here's no way that I could comment on [Wachter's] case ... because I was not present in the operating room and, therefore, did not observe what actually took place." Brickman also testified that nothing he had read concerning the second SVG had led him to suspect surgical error. Similarly, Brickman stated at his deposition that he could not conclude that Wachter has been misinformed or underinformed of the risks attending a second SVG."

[74] We assume what the parties have not elected to quarrel over directly, that Bethesda, rather than Haggerson alone, stood as Wachter's "physician" for purposes of our analysis of the sufficiency of disclosures concerning Billig.

such treatment." *Id.* (Citations omitted). As to what data are significant enough to warrant disclosure, *Sard* held the measure to be that of materiality, of whether a reasonable person in the patient's position would consider the data significant to the decision whether to submit to a particular treatment or procedure. *Id.* at 1022.

In keeping with the tort character of an informed consent action, Wachter is bound to show that Bethesda's breach of its duty of informed consent, if it occurred, caused her harm. *Lipscomb v. Memorial Hosp.*, 733 F.2d 332, 338 (4th Cir. 1984) (applying Maryland law). *Lipscomb* interpreted *Sard* to articulate three elements of a prima facie case of medical malpractice by failure to obtain informed consent. *Id.* The elements are that: (1) a material, undisclosed risk existed; (2) the risk occurred; and (3) injury flowed from the occurrence. 733 F.2d at 338.

A

We read *Sard* to leave at issue whether revelations of information about one's physician are within the scope of the duty to disclose as Maryland has chosen to define it. We conclude, however, following the district court, that the evidence speaks with one voice that the failure of Wachter's second SVG does not trace to the competence of Billig and that for another surgeon to have performed the second SVG would not have increased the procedure's likelihood of success. We refer to Brickman's affidavit and deposition and to Graeber's affidavits as the only lode of information about Billig's performance as it bears on this case. Brickman was forthright about his inability to critique Billig's conduct, even though Brickman had reviewed evidence of Wachter's condition after the second SVG. By contrast, Graeber, who had assisted Billig in the August, 1983, surgery, stated that there had been no "notable intraoperative complications" and that the second set of grafts had failed "for reasons not apparently related to the conduct of the [second SVG]."[75] We therefore conclude, following *Sard* and *Lipscomb*, that the district court correctly granted summary judgment in favor of the United States on Wachter's claim insofar as it bears on Billig's competence.

B

The district court granted the United States summary judgment on Wachter's claim that she should have been told of the IMA alternative based on its conclusions that IMA was not, in 1983, a "medically significant" alternative to SVG and that no credible evidence suggested that IMA would have produced a better result. We agree with the district court that Maryland did not require Bethesda to educate Wachter about every conceivable alternative to a second SVG. This conclusion is implicit in *Sard's* definition of material information, because a reasonable person would not consider information about experimental or arcane "alternatives" as significant to her decision whether to submit to a recommended procedure. *Lipscomb*, 733 F.2d at 838; *Sard*, 379 A.2d at 1022. Rather than expressly ratify the district court's assessment of the evidence of IMA's significance in 1983, however, we rest our affirmance on our perception that the evidence does not suggest that information on IMA would have prompted Wachter to elect the procedure or that the procedure would have averted the health problems Wachter now experiences.

The only evidence in Wachter's favor on this point is Brickman's affidavit statement that Wachter "was an ideal candidate for an IMA graft." We believe the district court properly discredited this statement as a "bare conclusion." The affidavit does not explain the conclusion. A medical journal article, an excerpt from which accompanies Brickman's affidavit in the record before us, reveals considerable disagreement among surgeons on the relative merits of SVG and IMA.[76] Brickman's deposition also shows that in 1983, only one clinic in the United States had information about the benefits of IMA for a patient whose earlier SVG had failed. Brickman was not sure what results that clinic had witnessed in patients such as Wachter. Brickman remarked that "[t]here's all kinds of stuff in literature subsequent

[75] Graeber observed that Wachter's outcome "is often associated with short stature female patients who are obese or have abnormally high serum cholesterol levels" but admitted that he knew "of no definitive means of establishing the precise pathogenesis" of the unfortunate result.

[76] The article, entitled *Comparison of Saphenous Vein and IMA Grafts*, appeared in the September, 1980 issue of the *Journal of Thoracic and Cardiovascular Surgery*, and appears to be a transcription of a surgeons' colloquium on experiences with the two procedures.

to [that clinic's pioneering turn]", but referred specifically only to the 1980 article attached to his affidavit and to another paper, apparently the product of the same physicians as contributed to the first, that is not in the record. We do not believe Brickman's evidence suggests that Wachter would have done anything differently had she learned everything known about IMA in 1983.

Even if we assume that Wachter would have sought and been approved for IMA, though, the evidence does not suggest that Wachter would have benefited from the procedure. The evidence tendered by the United States speaks with one voice that Wachter's current health problems do not stem from the sort of bypass procedure used. Graeber noted that "in [Wachter's] case SVG grafting of at least one artery was required, even if IMA grafting was attempted, because of specific perfusion needs." Billig recalled that he did not discuss IMA with Wachter because IMA was "not known to produce a superior result, and required a longer operation ... [Wachter] ... was short and very heavy [and] using an IMA graft would have been very difficult." Like Graeber, Billig averred that Wachter would have had to have at least one saphenous vein graft in the second procedure and stated "it was not advisable to use both IMA and [SVG] because it required a more tedious dissection ... and might have required more blood transfusions." This evidence that IMA would not have benefited Wachter, and the infirmity of Brickman's conclusion that Wachter might reasonably have sought IMA in 1983, persuades us that the district court correctly ruled for the United States on Wachter's IMA claim.

III

For the foregoing reasons, we believe the district court was correct to order summary judgment in favor of the United States.

Affirmed.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Wachter produced no evidence that Dr. Billig's alleged surgical incompetence contributed to the failure of her saphenous vein grafts (SVG). The district court therefore properly granted summary judgment in favor of the United States on Wachter's claim insofar as it focused on the failure of Bethesda personnel to disclose Billig's purported surgical shortcomings.

However, the district court erred in granting summary judgment against Wachter insofar as she based her informed consent claim on the failure of Billig and other physicians at Bethesda to advise her of the internal mammary artery (IMA) procedure as an alternative to an SVG bypass. Wachter has raised genuine issues of material fact as to the three elements necessary to sustain an informed consent claim under Maryland law: (1) whether the physicians at Bethesda had a duty to disclose the existence of the IMA alternative as well as its risks and prospects for success, (2) whether a causal link existed between Wachter's consent to the SVG bypass and the physicians' failure to disclose information about IMA and (3) whether Wachter suffered any harm as a result of undergoing the SVG procedure rather than the IMA alternative.

In upholding the grant of summary judgment, the majority has overlooked crucial evidence favorable to Wachter and has usurped the function of the fact finder by resolving disputed issues of material fact. For those reasons, I dissent from the majority decision on the IMA issue.

I. Duty to Disclose

I begin with an issue that the majority declined to address, namely, whether the physicians at Bethesda had a duty to inform Wachter of the IMA alternative to the SVG bypass procedure. Maryland law imposes on physicians a duty to disclose the existence of alternatives to proposed surgery or treatment, as well as the risks and benefits adhering to each option, if such information would be "material to the intelligent decision of a reasonably prudent patient." *Sard v. Hardy*, 281 Md. 432, 444, 379 A.2d 1014, 1022 (1977).

The evidence here would allow a trier of fact to find that a reasonable patient in 1983 would have considered information about IMA material to her decision to undergo bypass surgery.[1] Dr. Brickman, Wachter's expert, testified in deposition that medical evidence in 1983 demonstrated that IMA grafts had superior long-term patency rates (in other words, remained non-occluded or non-obstructed longer) than SVG grafts. Brickman also testified that he and other physicians in 1983 found IMA grafts especially preferable to the SVG option for women, such as Wachter, who had previously experienced blockage of saphenous vein grafts.

[1] The case turns on the state of medical knowledge in 1983, the year of Wachter's surgery.

The IMA alternative had been used in bypass surgery since at least 1968, and Brickman pointed to medical studies from as early as 1980 indicating that IMA grafts remained patent longer than the saphenous vein grafts. The results of those studies were contained in a 1980 medical journal article which Wachter submitted in support of Brickman's affidavit. In that article, at least one surgeon characterized IMA patency rates as "vastly superior" to those for saphenous vein grafts. *Comparison of Saphenous Vein and IMA Grafts*, *Journal of Thoracic & Cardiovascular Surgery*, Sept. 1980, at 341 [hereinafter "*Comparison*"].

To be sure, many physicians in 1983 apparently disagreed with Brickman over the relative merits of the IMA and SVG options. However, evidence of such disagreement in no way compels summary judgment in favor of the United States. A reasonable patient may find information about an alternative medical procedure material to her decisionmaking even though the medical community is divided over its relative benefits as compared to other surgical options. The medical community need not reach a consensus on the superiority of a particular surgical alternative before a physician has a duty under Maryland law to inform the patient of that option. The doctrine of informed consent in Maryland rests on the notion that the patient, not her physician, has the ultimate right to decide what is best for her own body: Thus, the appropriate test is not what the physician in the exercise of his medical judgment thinks a patient should know before acquiescing in a proposed course of treatment; rather, the focus is on what data the patient requires in order to make an intelligent decision. *Sard*, 281 Md. at 442, 379 A.2d at 1021. The patient cannot exercise her "fundamental right of physical self-determination," *id.*, when she is kept in the dark about a medical alternative favored by a significant number of physicians.

Wachter's evidence at a minimum raises a factual question as to the degree of acceptance the IMA option enjoyed in the medical community in 1983. It is impossible to quantify, as a matter of law, the percentage of the medical community that must accept or favor a given alternative before that option becomes "material". That percentage will vary depending on the circumstances of each case. In some cases, a reasonably prudent patient might find a medical alternative material to her decision even though only a minority of the medical community favored the procedure. To require a clear majority of the medical community to prefer a procedure before it could be considered a material option would fly in the face of the decision of the Maryland Court of Appeals in *Sard*, which expressly refused to allow the medical community's view of the significance of a procedure to define the scope of the duty to disclose. *See id.*

Of course, certain procedures may be so experimental or accepted by such a small fringe of the medical community that, as a matter of law, information about them cannot be considered "material" to a reasonably prudent patient's decisionmaking. However, Wachter has produced evidence that as early as 1980 many members of the medical community preferred the IMA option to the SVG for most bypass grafts. Moreover, Brickman's testimony and the medical journal article submitted in support of his affidavit suggest that even some of the physicians who preferred SVG over IMA for first-time recipients of bypass grafts favored using IMA for patients who had previously received SVG grafts that had failed. At the very least, the evidence raises a question for the fact finder as to whether a reasonable patient in Wachter's position in 1983 would have considered IMA a significant medical option.

That only about 20% of the hospitals in the United States offered the IMA procedure in 1983 does not render irrelevant a belief that a reasonably prudent patient could have considered information about IMA material to her decision to undergo bypass surgery.[2] A patient who faces a serious health risk may wish to know about important medical procedures, particularly those that might prove highly successful, even though only a few hospitals offer such procedures. At any rate, 20% is a significant proportion of the hospitals in the country. That one-fifth of the medical facilities offered IMA strongly suggests that the procedure was neither purely experimental nor isolated to a small fringe of the medical community.

I find unacceptable the district court's

[2] It is unclear from Brickman's deposition whether he meant that 20% of all hospitals in the United States offered the IMA option in 1983, or instead, that 20% of the nation's hospitals that performed bypass surgery provided the IMA alternative. Whichever Brickman meant, his testimony suggests that IMA was available in 1983 at a significant number of medical centers in the United States.

argument that, as a matter of law, the choice between SVG and IMA grafts represented a mere "choice of tactical surgical approaches" akin to a surgeon's selection of which sutures to use or the location of an incision, and that Billig and his colleagues therefore had no duty to inform Wachter about the IMA option. *Wachter v. United States*, 689 F. Supp. 1420, 1424 (D. Md. 1988).[3] To be sure, some mechanical or technical choices in surgery will be so immaterial to a patient's decisionmaking that, as a matter of law, the surgeon need not discuss them with the patient. The evidence here, however, would allow a trier of fact to find that the IMA option was more than an insignificant tactical choice, but instead was an important medical alternative which a reasonable patient would find material to her decision to submit to bypass surgery. That the medical community actively debated the relative benefits of IMA and SVG well before 1983 suggests that most patients in Wachter's position would have wanted to know about the IMA option before deciding to have a second bypass operation.

The district court misconstrued Maryland law when it suggested that the doctrine of informed consent has no applicability whatsoever when the choice presented is between various techniques of accomplishing a type of operation (*e.g.*, bypass surgery), instead of between surgery and a non-surgical treatment. *See Wachter*, 689 F. Supp. at 1424. *Sard*, the premier case on informed consent in Maryland, clearly demonstrates that a physician may have a duty under some circumstances to inform the patient of the various methods of performing a given operation. That case held, inter alia, that a jury could reasonably conclude that a physician had a duty to disclose to a patient the various methods of accomplishing female sterilization through tubal ligation. *Sard*, 281 Md. at 437, 445-46, 448, 379 A.2d at 1018, 1023, 1024. The physician in *Sard* had informed the patient of birth control methods other than tubal ligation, but had failed to discuss with her the most common methods of performing tubal ligation, even though success rates among the options varied considerably. *Id.* at 437, 379 A.2d at 1018. The facts of *Sard* belie the district court's suggestion that once a physician discloses the alternatives to surgery, he or she never has a further duty to disclose the various methods of accomplishing the operation.

In sum, the evidence in the record raises a genuine issue as to whether a reasonably prudent patient would have considered information about IMA material to her decision to undergo bypass surgery. Were the IMA information material, Maryland law would have required Billig and his colleagues to discuss it with Wachter before performing surgery.

II. Causation

I disagree with the majority's assertion that Wachter has presented no evidence that she would have chosen the IMA procedure had she received information about it prior to her surgery on August 1, 1983. The majority has ignored crucial evidence in Wachter's favor in reaching its conclusion.

Maryland has adopted an objective standard for determining causation in informed consent cases. No causal link exists between the plaintiff's injury and the physician's violation of the duty to disclose medial alternatives unless a reasonable person in the patient's position would have made a different choice had she been fully informed. *Sard*, 281 Md. at 450, 379 A.2d at 1025. The evidence in the record would support a finding that a reasonable person in Wachter's shoes would have chosen the IMA procedure over the SVG if given a choice.

The majority and the district court improperly dismissed as "bare conclusion" Brickman's assertion that Wachter "was an ideal candidate for an IMA graft." Contrary to the majority's assertion, the record contains abundant support for Brickman's conclusion. Brickman testified that the IMA grafts had a significantly greater patency rate than the SVG. That opinion was echoed by a

[3] Although the recent decision of the Maryland Court of Special Appeals in *Nash v. Raneri*, 77 Md. App. 402, 550 A.2d 717 (1988), quoted extensively from the Wachter opinion below, nothing in *Nash* suggests that the Court of Special Appeals intended to endorse the district court's analysis of the evidence or its decision to grant summary judgment. At most, *Nash* illustrates that Maryland law does not require a physician to discuss every tactical decision in surgery with the patient. I fully concur in that reading of Maryland law. What I find objectionable is the district court's decision to deprive the fact finder of the opportunity to decide whether the IMA was an insignificant tactical surgical choice or, as Wachter asserts, an important medical option that she would have found material to her decisionmaking. *Nash* certainly did not endorse the district court's depriving the fact finder of the opportunity to assess the materiality of the IMA procedure. In *Nash*, the trial court had allowed the jury to decide the informed consent issue, and the Court of Special Appeals agreed that the matter was properly left to the jury. *See* 77 Md. App. at 408-10, 550 A.2d at 720-21.

number of physicians who sang the praises of the IMA option in a medical journal article submitted in support of Brickman's affidavit. Most notably, Brickman emphasized that IMA was especially preferable to SVG for patients, particularly females, who had earlier already experienced failure with saphenous vein grafts.

In concluding that Wachter would not have chosen IMA if given a chance, the majority places too much emphasis on the lack of consensus in the medical community in 1983 as to whether IMA or SVG was preferable for bypass grafts. The majority misperceives the nature of the dispute over IMA. Brickman emphasized that the conflict in the medical literature over IMA focused on the preferable approach for patients receiving bypass grafts for the first time, not on the proper choice for individuals, such as Wachter, who had already experienced failure of a saphenous vein graft. The medical journal article submitted in support of Brickman's affidavit suggests that some physicians who preferred SVG to IMA grafts in first-time bypass operations would opt for IMA grafts the second time around in patients who had experienced SVG failure. For example, the article provides the following summary from Dr. Alexander S. Geha, a skeptic about claims of IMA superiority:

> I really do not see much of a controversy. I do not think that, at present, the difference in results between these two types of grafts is worth the effort of dissecting the IMA and using it except in patients who have had failure of a previous vein graft or in whom a relatively high risk of occlusion of a vein graft into a small anterior coronary artery can be anticipated. *Comparison*, at 339 (emphasis added).

Even assuming, arguendo, that the evidence here would preclude a finding that a reasonable patient would have chosen IMA grafts for first-time bypass surgery, Wachter's evidence would allow a fact finder to infer that such a patient would have opted for IMA in 1983 for a second bypass that was necessitated by previous failure of saphenous vein grafts.

To be sure, the government has presented evidence that the IMA alternative would have made the bypass operation more complicated and perhaps more dangerous than SVG surgery. A trier of fact could permissibly find, however, that a reasonable person in Wachter's position would have chosen to risk the added surgical hazards in exchange for the greater likelihood of long-term success presented by the IMA alternative.

III. Injury

Wachter can succeed on her informed consent claim only by showing that she suffered some injury by receiving the saphenous vein grafts rather than the IMA option. Under the circumstances presented here, Wachter need not prove that her bypass grafts would not have occluded had Billig performed the IMA procedure rather that the SVG. To require such a showing where the plaintiff has never received an IMA graft would present a virtually insurmountable barrier to her claim. Instead, Wachter need only show that she would have enjoyed a better chance of success with the IMA grafts than with the SVG.[4]

The evidence here would allow a fact finder to conclude that IMA grafts would have offered a greater likelihood of success for Wachter's second bypass operation than the SVG option provided. Wachter produced evidence that IMA grafts provided greater long-term patency than saphenous vein grafts. Brickman, Wachter's expert, also testified that IMA grafts were a particularly superior option for women who had previously experienced failure with saphenous vein grafts.

I find utterly unsupportable the majority's assertion that the evidence "speaks with one voice that Wachter's current health problems do not stem from the sort of bypass procedure used." Majority Op. at 11. The majority apparently finds dispositive the government's assertion that Wachter's bypass surgery would have required at least one saphenous vein graft, even if IMA were used. Wachter's evidence contradicts the government's allegation that her surgery could not have been performed with IMA grafts alone. The principal support for the government's contention is Billig's affidavit, which states that "Wachter was

[4] Perhaps the standard would be different had Wachter undergone a third bypass operation using IMA grafts which subsequently occluded. Such failure of the IMA grafts would present strong evidence that the grafts would also have occluded had she received them in the second operation. However, I have seen no evidence in the record that Wachter had submitted to a third bypass operation at the time the district court granted summary judgment.

having a double bypass (left anterior descending and obtuse marginal grafts) and we could not use IMA for the obtuse marginal graft." Although Brickman never contradicted Billig's assertion that Wachter needed a double bypass, his affidavit does dispute Billig's claim that IMA could not be used for both grafts. Specifically, Brickman declared in his affidavit that:

> The left internal mammary artery can be used to bypass the left anterior descending *or the obtuse marginal branch* of the circumflex artery. The right internal mammary can be used to bypass *either of the same two vessels*. (Emphasis added).

Even if Wachter's double bypass would have required at least one SVG, that fact would not compel summary judgment in favor of the United States. The majority apparently assumes that had Wachter received both an SVG and IMA graft in the August 1983 surgery, the single SVG would have failed as it had after the first bypass surgery. Even were I to accept that assumption, I cannot agree with the majority's further implicit assumption that Wachter would have been no better off with the combination of a successful IMA graft and an occluded SVG than with two occluded saphenous vein grafts. I respectfully submit that we on the panel simply lack the medical expertise to engage in such speculation, especially in the absence of any supporting evidence in the record. The question is a factual one best left to the trier of fact which would have the benefit of expert medical testimony.

IV. Conclusion

Wachter has raised a genuine issue of material fact as to each of the three elements - duty to disclose, causation and injury - she must prove to succeed on her informed consent claim under Maryland law. I therefore dissent from the majority opinion insofar as it upholds the grant of summary judgment on the IMA issue.

Questions and Notes

1. In determining whether the patient gave truly informed consent, the trier of fact must determine whether the patient was informed of material risks and alternative treatment options. Particularly where the risks are remote or the alternatives novel, the question arises as to who decides which risks are "material." What is agreed upon is that the standard is what would be reasonable. But jurisdictions differ on whether the standard is set by the "reasonable physician" or by the "reasonable patient." The two should be very close, but the standard of the reasonable patient may suggest a greater willingness to recognize subjective and idiosyncratic considerations unique to the patientCso long as those have been disclosed to the physician. *See* Eccleston v. Chait, 492 N.W.2d 860 (Neb. 1992); Scott v. Bradford, 606 P.2d 554 (Okla. 1979); Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974).

2. Would it make sense to restructure medical malpractice law by switching from a system based on tort to one based on contract? How would such a system differ from the present one? *See* Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87 (1976).

3. Medical malpractice law has been the subject of significant statutory changes. For a general overview of the phenomenon, see Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295 (1989); Bovbjerg, *Legislation on Medical Malpractice*, 22 U.C. DAVIS L. REV. 499 (1989). Some statutory reforms have been subjected to challenge based on arguments that such statutes deprive the patient of constitutional rights. Recall *Fein v. Permanente Medical Group*, 175 Cal. Rptr. 177 (1981), *supra* Chapter Four, § C.

4. One statutory response to complaints about the medical malpractice system has been the creation of pre-litigation screening panels to identify meritorious cases (and their opposite) at an early stage of litigation. The findings of the panel (usually in the form of an opinion that the standard of care was met or was not met) are usually admissible in any subsequent litigation. For a review of existing proposals and a model

act, see Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990).

Another suggestion for improving relations between doctors and patients is to expand participation by patients in the decisionmaking process; *see* Dobson, *Achieving Better Medical Outcomes and Reducing Malpractice Litigation Through the Healthcare Consumer's Right to Make Decisions*, 15 J. CONTEMP. L. 175 (1989).

For a comparative analysis of British and American approaches to medical malpractice, see Note, *Medical Malpractice Litigation: A Comparative Analysis of United States and Great Britain*, 12 SUFFOLK TRANSNAT'L L.J. 577 (1989) (suggests that similarities in malpractice explosion have produced or will produce similar pressures for reform). *See also* Neil Vidmar and Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy* 22 MISS. C.L. REV. 9 (2002).

5. Virginia and Florida have adopted "no-fault" plans for catastrophic obstetrical injuries. *See* Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487 (1988).

6. The liability of HMOs (health maintenance organizations) has been clouded by the argument that suits against HMOs are pre-empted by ERISA. *See* Vicki Lawrence MacDougall, *The "Shared Risk" of Potential Tort Liability of Health Maintenance Organizations and the Defense of ERISA Preemption*, 32 VAL. U. L. REV. 855 (1998).

§ B. Other Forms of Professional Malpractice

Legal Malpractice. One fast developing area of professional negligence is legal malpractice. For a good overview of the state of legal malpractice law, see Symposium, *Mistakes*, 15 LITIGATION 7 (Winter 1989); *Kellos v. Sawilowsky*, 254 Ga. 4, 325 S.E.2d 757 (1985). One of the sticky questions in legal malpractice cases is deciding how far the lawyer's duty extends. In many cases the lawyer will commit malpractice in performing services for client A, but the effects of the mistakes are borne by B. For example, if lawyer L negligently draws up a will that by which testator A intended to benefit descendant B, then B may want to sue L for malpractice. But L was never B's lawyer. Does the duty extend to non-clients? *See Bohn v. Cody*, 119 Wash.2d 357, 832 P.2d 71 (1992).

Accountant Malpractice. Accountants have also been the target of professional malpractice suits. One of the difficult issues in such cases is deciding whether the accountant is liable not only to his client, but also to others who rely upon the accountant's analysis of the financial health of the company. *See Toro Co. v. Krouse, Kern & Co.*, 827 F.2d 155 (7th Cir. 1987); Sliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929 (1988).

Other Forms of Professional Malpractice. The list extends to real estate brokers, engineers, veterinarians (*Ponder v. Angel Animal Hosp.*, 62 S.W.2d 844 (Mo. App. 1988) [dog brought in for grooming, castrated instead]), *see* King, *The Standard of Care for Veterinarians in Medical Malpractice Cases*, 58 TENN. L. REV. 1 (1990); etc. So far educators have escaped significant exposure for negligent educating; but a change may be afoot. *See* McBride, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*, 1990 ILL. L. REV. 475; Todd A. Demitchell and Terri A. Demitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?* 2003 BYU EDUC. & L.J. 485.

There are even claims for clergy malpractice. *See* Note, *Nalley v. Grace Community Church of the Valley (763 P.2d 948 (Cal.): Absolution for Clergy Malpractice?*, 1989 B.Y.U. L. REV. 913. A frequent basis for lawsuits against clergy is the sexual exploitation of parishioners who rely upon them for spiritual guidance. *See, e.g., Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988); Janna Satz Nugent, *A Higher Authority: the Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957 (2003).

Chapter 11
Rescuers, Justifiable Reliance, and the Extension of Duty to Remote Plaintiffs

Introductory Note. In the previous cases the plaintiff's relationship with the defendant usually started out in a contractual relationship: by entering the defendant's premises, or buying the defendant's product, or going to the defendant for medical care. In the following cases it is the *existence* of a relationship between the plaintiff and the defendant that is at issue. The plaintiff will claim that the defendant owed the plaintiff a duty of care, while the defendant will argue that no such duty was owed.

Most of the previous cases in this book concern situations where the defendant created the initial risk: by driving too fast, or producing a defective product, or putting noxious fumes into the air. Because the defendant's conduct appears to have *caused* the injury, the question is whether the defendant's conduct violated some standard of care—either the duty to use reasonable care or a standard based on strict liability. By contrast, in the cases in this chapter the plaintiff wants to hold the defendant accountable for *failing to prevent* the injury the plaintiff suffered. Important public policy questions are raised, including the argument that imposing liability on the defendant will make it *more* rather than *less* likely that the plaintiff will be injured. Again, there is a contrast with those defendants whose activity raises the risk of injury: as to them, discouraging their activity will reduce the risk that the plaintiff will be injured. Tort liability in such cases results in "internalizing the externality" (as the economists put it)—the externality being the risk of injury. If on the other hand the defendant is in the business of injury prevention (by treating mentally ill patients, or operating a weather prediction service), then if tort liability is imposed for doing a less than adequate job of preventing injuries, the defendant may choose to limit or even abandon its efforts, with the result that society is worse off.

As we shall see, defendants are typically given some opportunity to choose the level of care to which they will be held accountable—again, making the *contractual* or *relational* aspect important. Courts still need to determine whether or not the defendant behaved in a way that makes the imposition of tort liability appropriate.

BUCH v. AMORY MANUFACTURING CO.

44 A. 809 (N.H. 1898)

* * *

There is a wide difference, - a broad gulf, - both in reason and in law, between causing and preventing an injury; between doing, by negligence or otherwise, a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another, and guarding him from injury that may accrue to him from the condition of the premises which he was unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger, and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If *A* sees an 8

year old boy beginning to climb into his garden over a wall stuck with spikes and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? 1 Hurl. & N. 777. I see my neighbor's two year old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in the damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (Pub. St. c. 278, 8), because the child and I are strangers, and I am under no legal duty to protect him. Now, suppose I see the same child trespassing in my own yard, and meddling in like manner with dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant, by coming unlawfully upon my premises, impose upon me the legal duty of a guardian? None has been suggested, and we know of none.

* * *

Questions and Notes

1. "Good Samaritan" statutes are frequently misunderstood. The typical statute provides that if a person who renders aid voluntarily to someone injured in an automobile accident, he is not held to the standard of reasonable care, but is only liable for willful or wanton conduct. *See, e.g.*, R.C.W. 70.136.070. Such statutes do not create a duty to stop in the first place, but instead encourage those who do stop by assuring them that they will not be subject to tort liability if their skills are below what the average person possesses.

2. Vermont does have a statute that requires a person to render aid if he can do so at no trouble to himself. VT. STAT. ANN. ch. 23, § 519(a) ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.") Would you favor adding that provision to the statutes in your jurisdiction?

TARASOFF v. REGENTS OF UNIVERSITY OF CALIFORNIA

17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976)

TOBRINER, Justice

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.[1] 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.[2] This appeal ensued.

Plaintiffs' complaints predicate liability on two grounds: defendants' failure to warn plaintiffs

[1] The criminal prosecution stemming from this crime is reported in *People v. Poddar* (1974) 10 Cal. 3d 750, 111 Cal. Rptr. 910, 518 P.2d 342.

[2] The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry who countermanded Moore's decision and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar.

of the impending danger and their failure to bring about Poddar's confinement pursuant to the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000ff.) Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana and that they are immune from suit under the California Tort Claims Act of 1963 (Gov. Code, § 810ff.).

We shall explain that defendant therapists cannot escape liability merely because Tatiana herself was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

* * *

2. Plaintiffs can state a cause of action against defendant therapists for negligent failure to protect Tatiana.

The second cause of action can be amended to allege that Tatiana's death proximately resulted from defendants' negligent failure to warn Tatiana or others likely to apprise her of her danger. Plaintiffs contend that as amended, such allegations of negligence and proximate causation, with resulting damages, establish a cause of action. Defendants, however, contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana's life and safety.

In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in *Dillon v. Legg* (1968) 68 Cal. 2d 728, 734, 69 Cal. Rptr. 72, 76, 441 P.2d 912, 916: "The assertion that liability must ... be denied because defendant no `duty' to plaintiff `begs the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.... [Duty] 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 [3d ed. 1964] at pp. 332-333.)"

In the landmark case of *Rowland v. Christian* (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, Justice Peters recognized that liability should be imposed "for an injury occasioned to another by his want of ordinary care or skill" as expressed in section 1714 of the Civil Code. Thus, Justice Peters, quoting from *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 stated: "whenever one person is by circumstances placed in such a position with regard to another ... that if he did not use ordinary care and skill in his own conduct ... he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

We depart from "this fundamental principle" only upon the "balancing of a number of considerations"; 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."[3]

The most important of these considerations 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." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 399, 115 Cal. Rptr. 765, 776, 525 P.2d 669, 680; *Dillon v. Legg, supra*, 68 Cal. 2d 728, 739, 69 Cal. Rptr. 72, 441 P.2d 912; *Weirum v. R.K.O. General, Inc.* (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36; *see* Civ. Code § 1714.) As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special

[3] *See Merrill v. Buck* (1962) 58 Cal. 2d 552, 562, 25 Cal. Rptr. 456, 375 P.2d 304; *Biakanja v. Irving* (1958) 49 Cal. 2d 647, 650, 320 P.2d 16; *Walnut Creek Aggregates Co. v. Testing Engineers Inc.* (1967) 248 Cal. App. 2d 690, 695, 56 Cal. Rptr. 700.

relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonably care to protect a potential victim of another's conduct.

Although, as we have stated above, under the common law, as a general rule, one person owed no duty to control the conduct of another[4] (*Richards v. Stanley* (1954) 43 Cal. 2d 60, 65, 271 P.2d 23; *Wright v. Arcade School Dist.* (1964) 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812; REST. 2D TORTS (1965) § 315), nor to warn those endangered by such conduct (REST. 2D TORTS, *supra*, § 314, com. c.; PROSSER, LAW OF TORTS (4th ed. 1971) § 56, p. 341), 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 (*see* REST. 2D TORTS, *supra*, §§ 315-320). 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.[5] 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.[6] 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.[7]

Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship both to the victim and to the person whose conduct created the danger,[8] we do not think that the duty

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[4] This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. (*See* Harper & Kime, *The Duty to Control the Conduct of Another* (1934) 43 YALE L.J. 886, 887.) Morally questionable, the rule owes its survival to "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue...." (PROSSER, TORTS (4th ed. 1971) § 56, p. 341.) Because of these practical difficulties, the courts have increased the number of instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule. (*See* PROSSER, *supra*, § 56, at pp. 348-350.)

[5] The pleadings establish the requisite relationship between Poddar and both Dr. Moore, the therapist who treated Poddar, and Dr. Powelson, who supervised that treatment. Plaintiffs also allege that Dr. Gold personally examined Poddar, and that Dr. Yandell, as Powelson's assistant, approved the decision to arrange Poddar's commitment. These allegations are sufficient to raise the issue whether a doctor-patient or therapist-patient relationship, giving rise to a possible duty by the doctor or therapist to exercise reasonable care to protect a threatened person of danger arising from the patient's mental illness, existed between Gold or Yandell and Poddar. (*See* HARNEY, MEDICAL MALPRACTICE (1973) p. 7.)

[6] When a "hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital* (1967) 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 580, 432 P.2d 193, 196.) (Emphasis added.) A mental hospital may be liable if it negligently permits the escape or release of a dangerous patient (*Semler Psychiatric Institute of Washington*, *D.C.* (4th Cir. 1976) 44 U.S.L. WEEK 2439; *Underwood v. United States* (5th Cir. 1966) 356 F.2d 92; *Fair v. United States* (5th Cir. 1956) 234 F.2d 288). *Greenberg v. Barbour* (E.D. Pa. 1971) 322 F. Supp. 745, upheld a cause of action against a hospital staff doctor whose negligent failure to admit a mental patient resulted in that patient assaulting the plaintiff.

[7] *Kaiser v. Suburban Transp. System* (1965) 65 Wash. 2d 461, 398 P.2d 14; *see Freese v. Lemmon* (Iowa 1973) 210 N.W.2d 576 (concurring opn. of UHLENHOPP. J.).

[8] *Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 253 P.2d 675, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; *Johnson v. State of California* (1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; *Morgan v. City of*

should logically be constricted to such situations. Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease (*Hofmann v. Blackmon* (Fla. App. 1970) 241 So. 2d 752), or, having diagnosed the illness, fails to warn members of patient's family (*Wojcik v. Aluminum Co. of America* (1959) 18 Misc. 2d 740, 183 N.Y.S.2d 351, 357-358; *Davis v. Rodman* (1921) 147 Ark. 385, 227 S.W. 612; *Skillings v. Allen* (1919) 143 Minn. 323, 173 N.W. 663; *see also Jones v. Stanko* (1928) 118 Ohio St. 147, 160 N.E. 456).

Since it involved a dangerous mental patient, the decision in *Merchants Nat. Bank & Trust Co. of Fargo v. United States* (D. N.D. 1967) 272 F. Supp. 409 comes closer to the issue. The Veterans Administration arranged for the patient to work on a local farm, but did not inform the farmer of the man's background. The farmer consequently permitted the patient to come and go freely during nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

In their summary of the relevant rulings Fleming and Maximov conclude that the "case law should dispel any notion that to impose on the therapists a duty to take precautions for the safety of persons threatened by a patient, where due care so requires, is in any way opposed to contemporary ground rules on the duty relationship. On the contrary, there now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." (Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1030.)

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. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right.[9] Since predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

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." (*Bardessono v. Michels* (1970) 3 Cal. 3d 780, 788, 91 Cal. Rptr. 760, 764, 478 P.2d 480, 484; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal. 2d 154, 159-160, 41 Cal. Rptr. 577, 397 P.2d 161; *see* 4 WITKIN, SUMMARY OF CAL. LAW

Yuba (1964) 230 Cal. App. 2d 938, 41 Cal. Rptr. 508, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.

[9] *See, e.g., People v. Burnick* (1975) 14 Cal. 3d 306, 325-328, 121 Cal. Rptr. 488, 535 P.2d 352; Monahan, *The Prevention of Violence*, in COMMUNITY MENTAL HEALTH IN THE CRIMINAL JUSTICE SYSTEM (Monahan ed. 1975); Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U. PA. L. REV. 439; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (1974) 62 CAL. L. REV. 693.

(8th ed. 1974) *Torts*, § 514 and cases cited.) Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

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.

Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case,[10] in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. (*Accord* *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1.) As explained in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1067: "the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise.... In sum, the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury."

Contrary to the assertion of amicus, this conclusion is not inconsistent with our recent decision in *People v. Burnick, supra*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352. Taking note of the uncertain character of therapeutic prediction, we held in *Burnick* that a person cannot be committed as a mentally disordered sex offender unless found to be such by proof beyond a reasonable doubt. (14 Cal. 3d at p. 328, 121 Cal. Rptr. 488, 535 P.2d 352.) The issue in the present context, however, is not whether the patient should be incarcerated, but whether the therapist should take any steps at all to protect the threatened victim; some of the alternatives open to the therapist, such as warning the victim, will not result in the drastic consequences of depriving the patient of his liberty. 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.

Defendants further argue that free and open communication is essential to psychotherapy (*see* *In re Lifschutz* (1970) 2 Cal. 3d 415, 431-434, 85 Cal. Rptr. 829, 467 P.2d 557); that "Unless a patient ... is assured that ... information (revealed by him) can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment ... depends." (Sen. Com. on Judiciary, comment on Evid. Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.[11]

[10] Defendant therapists and amicus also argue that warnings must be given only in those cases in which the therapist knows the identity of the victim. We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity, or to conduct an independent investigation. But there may also be cases which a moment's reflection will reveal the victim's identity. The matter thus is one which depends upon the circumstances of each case, and should not be governed by any hard and fast rule.

[11] Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients. This contention was examined in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1038-1044; they conclude that such predictions are entirely speculative. In *In re Lifschutz*,

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy (*see In re Lifschutz, supra*, 2 Cal. 3d at p. 432, 85 Cal. Rptr. 829, 467 P.2d 557), and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In evidence Code section 1014, it established a broad rule of privilege to protect confidential Communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."[12]

We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. (*See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1065-1066.)[13]

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."[14] (Emphasis added.) 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.

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supra, 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy could no longer be practiced successfully. (2 Cal. 3d at p. 426, 85 Cal. Rptr. 829, 467 P.2d 557.) We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsel's forecast of harm in the present case strikes us as equally dubious. We note, moreover, that Evidence Code section 1024, enacted in 1965, established that psychotherapeutic communication is not privileged when disclosure is necessary to prevent threatened danger. We cannot accept without question counsels' implicit assumption that effective therapy for potentially violent patients depends upon either the patient's lack of awareness that a therapist can disclose confidential communications to avert impending danger, or upon the therapist's advance promise never to reveal nonprivileged threats of violence.

[12] Fleming and Maximov note that "While [section 1024] supports the therapist's less controversial *right* to make a disclosure, it admittedly does not impose in him a *duty* to do so. But the argument does not have to be pressed that far. For if it is once conceded ... that a duty in favor of the patient's foreseeable victims would accord with general principles of tort liability, we need no longer look to the statute for a source of duty. It is sufficient if the statute can be relied upon ... for the purposes of countering the claim that the needs of confidentiality are paramount and must therefore defeat any such hypothetical duty. In this more modest perspective, the Evidence Code's `dangerous patient' exception may be invoked with some confidence as a clear expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims." (Emphasis in original.) Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1063.

[13] Amicus suggests that a therapist who concludes that his patient is dangerous should not warn the potential victim, but institute proceedings for involuntary detention of the patient. The giving of a warning, however, would in many cases represent a far lesser inroad upon the patient's privacy than would involuntary commitment.

[14] *See also* Summary Report of the Task Force on Confidentiality of the Council on Professions and Associations of the American Psychiatric Association (1975).

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest. For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana.[15]

* * *

CLARK, Justice (dissenting)

Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society's safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

The issue whether effective treatment for the mentally ill should be sacrificed to a system of warnings is, in my opinion, properly one for the Legislature, and we are bound by its judgment. Moreover, even in the absence of clear legislative direction, we must reach the same conclusion because imposing the majority's new duty is certain to result in a net increase in violence.

[15] Moore argues that after Powelson countermanded the decision to seek commitment for Poddar, Moore was obliged to obey the decision of his superior and that therefore he should not be held liable for any dereliction arising from his obedience to superior orders. Plaintiffs in response contend that Moore's duty to members of the public endangered by Poddar should take precedence over his duty to obey Powelson. Since plaintiffs' complaints do not set out the date of Powelson's order, the specific terms of that order, or Powelson's authority to overrule Moore's decisions respecting patients under Moore's care, we need not adjudicate this conflict; we pass only upon the pleadings at this stage and decide if the complaints can be amended to state a cause of action.

Questions and Notes

1. *Tarasoff* naturally raises the question of what kind of liability is faced by psychiatric institutions when they discharge (or fail to prevent the escape of) patients who later commit acts of violence. *See* Comment, *Tort Liability for California Public Psychiatric Facilities: Time for a Change*, 29 SANTA CLARA L. REV. 459 (1989).

Remember that when one negligently allows another tortfeasor to engage in criminal conduct, the argument can be made that the criminal conduct was a superseding cause of the injury and that the negligent failure to prevent the injury was not a proximate cause. This argument, of course, is less persuasive when it is precisely the risk of future criminal conduct that makes the defendant's act negligent in the first place. *See* RESTATEMENT (2D), TORTS, § 485.

2. There is a countervailing interest in the maintenance of confidentiality between therapist and patient. *See* Ellen W. Grabois, *The Liability of Psychotherapists for Breach of Confidentiality*, 12 J.L. & HEALTH 39 (1997-98). *See also* Todd Waller, M.D., *Application of Traditional Tort Law Post-Tarasoff*, 31 Akron L. Rev. 321 (1997).

3. Tenants' suits against landlords for assaults committed on the premises are common; such cases raise difficult issues both about reliance and about the duty to rescue. *See* *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986).

4. *Tarasoff* has even been extended to the Internet: Jon B. Eisenberg and Jeremy B. Rosen, *Unmasking "Crack_smoking_jesus": Do Internet Service Providers Have a Tarasoff Duty to Divulge the Identity of a Subscriber Who Is Making Death Threats?* 25 Hastings Comm. & Ent. L.J. 683 (2003).

BROWN v. UNITED STATES

790 F.2d 199 (1st Cir. 1986)

Bailey ALDRICH, Senior Circuit Judge

Friday noon, November 21, 1980, the F/V SEA FEVER and the F/V FAIRWIND set out from their home port of Hyannis, Massachusetts, for the southeastern edge of Georges Bank to engage in lobster fishing. Before leaving, they listened, as was their custom, on their radio receivers, to the National Weather Service (NWS) marine weather predictions. On VHF and sideband radios there can be received regularly, at 5:00 a.m., 11:00 a.m., 5:00 p.m. and 11:00 p.m., reports prepared by NWS as of 21 minutes before, with duplicate broadcasts 20 minutes later. The Friday 11:00 a.m. broadcast predicted good weather, as did those at 5:00 and 11:00 p.m. thereafter. Early Saturday morning the vessels arrived at the fishing grounds. The 5:00 a.m. report carried a gale warning, predicting northwest winds, 30 to 40 knots for the area, diminishing by night, with seas 6 to 12 feet, subsiding at night. In point of fact, the vessels were already experiencing such winds, and even greater seas. This was too much weather, but because of the wind's direction, it was impossible to turn back.

The 10:39 a.m. report, broadcast at 11:00 and 11:20, read, Storm warning in effect at 10 a.m. EST ... northwest winds 40 to 50 knots overnight ... Seas 15 to 25 rest of today subsiding tonight.

Again, the storm was already even greater than the forecast. The SEA FEVER was experiencing winds in excess of 70 knots, with seas running between 30 and 40 feet in height. This was a storm known, because of its sudden and explosive development, as a "bomb." At about this time the FAIRWIND pitchpoled and sank. Three of her crew were lost; the one other ultimately being rescued in a liferaft. In addition, one of the SEA FEVER's crew was swept overboard.

Based on a finding of negligence in not earlier predicting the storm's true path, the district court, following a bench trial pursuant to the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et seq*.,[1] awarded damages to plaintiff representatives of the deceased fishermen. *Brown v. United States*, 599 F. Supp. 877 (D. Mass. 1984); *s.c.* 615 F. Supp. 391 (D. Mass. 1985). On this appeal the government denies liability as a matter of law, and as a matter of fact. Plaintiffs' claims in both respects are based upon the government's failure to have repaired or replaced a sporadically malfunctioning weather-reporting buoy on Georges Bank. Put summarily, the government's position is that it owed no actionable duty, but, if it did, that it had acted reasonably, and that causation was lacking, viz., that the court's findings with respect to the buoy's contribution to the failure to predict were clearly erroneous.

First, the facts.[2] The government maintains a National Meteorological Center (NMC) near Washington, D.C., which processes weather information received from all over, including from weather buoys that transmit via satellite. It reports its computer-prepared data to the various NWS offices, which use it in preparing their forecasts. The Georges Bank buoy's station, known as 44003, is not always occupied by the same buoy. At the times here relevant the buoy was number 6N12. This buoy was scheduled to be replaced by an improved type. In the meantime, on August 11, 1980 it was discovered that it had been damaged, apparently by a passing ship. Limited repairs were made, leaving the buoy functioning in all respects, but on September 9 it was found that the wind speed and direction data was sometimes erratic, known as "spiking." Because it could not be sure when this was happening, NMC continued to log its wind data, but ceased transmitting it to the NWS offices.

The government Data Buoy Center (NDBC) had planned an early replacement of buoy 6N12 with buoy 6N3, after bringing 6N3 ashore and installing the new reporting system, but 6N3 went adrift, and though ultimately recovered, it was not expected to be ready until January. In the interim, because of 6N12's erratic performance, NDBC thought to deploy 6N9, which was itself about to be replaced, as a temporary substitute. However, 6N9, too, went adrift and was permanently lost. Further temporary repairs to 6N12 itself were not attempted. The court found this to have been unreasonable. The government disputes this, but for present purposes we will assume in plaintiffs' favor that if, as a matter of tort law, the

[1] Concededly liability corresponds with the Federal Tort Claims Act. *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S. Ct. 1599, 51 L. Ed. 2d 804.

[2] Many more facts are contained in the district court's 1984 opinion, 599 F. Supp. 877, *ante*.

government owed a duty of care, the finding was warranted.[3]

As to causation, plaintiffs' expert, whom the court credited, testified that an important component in predicting the future weather at Georges Bank would be an accurate report of what was the weather there at the moment, and that if NMC had received correct reports from station 44003 NWS should have forecast the storm in time for the SEA FEVER and FAIRWIND to escape by returning to port. The government's causation position is that, although its data was not used, 6N12 was not spiking at that time, and that plaintiffs' expert's factual assumptions to the contrary were unsupported, and hence his entire opinion was disproven. Rather than pursue the always difficult questions of clearly erroneous, because the court's finding or, more precisely, its ruling as to a government duty could have very significant repercussions, we will deal with that first.

Ever since enactment of the Federal Tort Claims Act, the area of government acceptance of liability on account of government functions has presented difficult questions. One line of demarcation is rejection if the undertaking was "discretionary." 28 U.S.C. § 2680(a).[4] Thus, when the government has discretion whether to issue a license to vessels carrying passengers for hire, it cannot be held liable for an alleged unjustifiable refusal. *Coastwise Packet Co. v. United States*, 398 F.2d 77 (1st Cir. 1968), *cert. denied*, 393 U.S. 937, 89 S. Ct. 300, 21 L. Ed. 2d 274. However, the test is not that simple. In the leading case of *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), the government negligently failed to maintain a lighthouse whose presence was advertised in the official Light List. The Court agreed with the government that the decision whether or not to provide the lighthouse was, in the first instance, a discretionary matter, and that there was no duty to do so. However, once it had done so, and had "engendered reliance on the guidance afforded by the light, the government was obligated to use due care...." 350 U.S. at 69, 76 S. Ct. at 125. Two principles are thus involved: the government's free right to engage, or not, in discretionary functions, but with a cut-off where by its conduct, it has induced justified reliance on its adequate performance. The important word is "justified."

As to the first, the government not only has discretion whether or not to engage, but discretion to determine the extent to which it will do so. Thus, in *Chute v. United States*, 610 F.2d 7 (1st Cir. 1978), *cert. denied*, 446 U.S. 936, 100 S. Ct. 2155, 64 L. Ed. 2d 789, the government marked a sunken wreck with a buoy that protruded only $3^1/_2$ feet above water. Plaintiff's vessel operator failed to see the buoy, and struck the wreck. The district court adopted the testimony - which we did not dispute - that a 15 foot day marker would have been "more effective." It further found that the $3^1/_2$ foot buoy was inadequate, and that the Coast Guard having recognized a need of marking the wreck, this was improper performance, and held for the plaintiff. In reversing, we discussed at length the teaching of *Indian Towing*.

> In that case damage was sustained when a lighthouse light operated by the Coast Guard was negligently allowed to go out. The Supreme Court stated that while the Coast Guard need not have undertaken the lighthouse service, once it had exercised its discretion to operate the light and engendered reliance on the guidance afforded thereby, it was obligated to use due care to make certain the light was kept in good working order.... [L]iability was not imposed in that case because a more powerful light or taller lighthouse would have been a better warning of the rocks marked by the lighthouse, but rather because the negligent non-functioning of the charted (*viz.*, advertised) lighthouse misled plaintiff to his detriment. 610 F.2d at 13-14.

We accordingly held that, even if a $3^1/_2$ foot buoy could be found inadequate had the government assumed a duty of due care, it was for the government to decide on the extent of care it wished to undertake.

The rationale of *Chute* was that although the

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[3] We have examined the record and, in fairness to the Weather Service, it is not certain that this finding is supportable. Clearly, a finding the other way would have been justified.

[4] "(a) Any 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 involved was abused, [is not consented to.]"

Coast Guard is known to have undertaken marking dangers to navigation, the extent to which it will do so is a discretionary function. There can be no justified reliance upon, or expectation of, any particular degree of performance; something more is needed to establish liability. "[T]here are various degrees of protection. Courts have neither the expertise, the information, nor the authority to allocate the finite resources available to the Secretary among competing priorities." 610 F.2d at 12. Similarly, in our earlier case of *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967), where we held the government liable for negligent performance by the Coast Guard of a rescue operation after it had undertaken it, we stated, after noting that the only rescue vessel available had an inoperable radio direction finder, a seriously defective fathometer, an error in its gyro compass, and an inaccurate and unreliable loran, "How much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion."

We note, in passing, that in *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985), the Second Circuit has disagreed with Chute, holding that although, concededly, there was no duty to mark the danger at all, by setting a buoy the Coast Guard had accepted a duty, and was thus obligated to perform it fully, even, if necessary, to the point of setting two or three buoys. With respect, for reasons we develop herein, we believe the court misunderstood the rationale of *Indian Towing* on which it relied.[5]

In the present case, the district court basically followed the *Eklof* reasoning. The very offering of weather service of itself accepted liability and destroyed the government's exemption from suit. "[O]nce a system was in place and mariners began to rely on it the time for policy judgments was past." 599 F. Supp. at 889. Put simply, the court's approach was this. The government established the service for the benefit, inter alia, of fishermen; fishermen relied upon it; the government knew they would rely on it; therefore the government induced reliance; having induced reliance, it became obligated to use due care. At first blush this perhaps seems plausible. The difficulty is, it proves too much. Every service that the government offers is presumably intended to benefit some class or classes of persons; ergo, they use it; ergo they relied on it; ergo the government induced reliance; ergo the government owed a duty of due care. On this basis, the only parties to whom the discretionary exception would apply would be who? Non-users? The court has read the discretionary function exception right out by finding it does not apply at precisely the place to which it is particularly directed.

In analyzing this we note first that, unlike *Indian Towing*, the government here did not make an affirmative misstatement of fact, viz., that an operating buoy was currently providing wind data from location 44003.[6] Although some weather broadcasts did, at least on occasion, report individual station findings, station 44003 wind data had not been released by NMC since September 9, 1980, a fact not contradicted. Plaintiffs' complaint is, rather, that the government's weather predictions were not up to an adequate standard because the forecasters lacked that particular information. Our question is whether the government, by issuing reports, assumed a duty to invest in that activity whatever resources a court might find necessary in order to achieve what it believed to be proper care. Although we think what we have already said indicates the answer to be no, we will pursue the matter further. To begin with, while, as we have already stated, we are dealing here with a tangible object, a particular supplier of information that goes into the mix, and while we accept the court's finding that this would be information of importance, the representation was not the buoy, but the prediction. Hence the principle involved is not limited to finding unreasonable the failure to maintain a particular supplier, but is universal, and would apply to anything judicially found unreasonably to impair the quality of the prediction. An expert might testify, and a court accept, that to prepare a fully adequate weather

[5] We believe, too, that the court failed to consider the pernicious consequences that could flow from its approach. With necessarily limited funds, and unable to afford three buoys, will a Coast Guard official place one and risk heavy damages ($382,000 in *Eklof*), or place none at all and play it safe - from the government's standpoint? *Eklof* cuts to the heart of governmental discretion, and, in effect, could deprive navigators of half a loaf, usually thought better than none.

[6] *Cf. De Bardeleben Marine Corp v. United States*, 451 F.2d 140 (5th Cir. 1971) (failure of government chart to show sunken pipeline; *dictum*).

report would call for still additional buoys, or for more advanced computers, or for more operators. Or it might find malfeasance in the processing. All of these are matters which Congress reserved, both to itself in respect to appropriations, and to the agencies' conduct, by the discretionary exception from the F.T.C.A.'s consent to suit. A compilation of early examples of discretionary functions may be found in *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953). *See, also, United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), hereafter *Varig Airlines*; *Shuman v. United States*, 765 F.2d 283 (1st Cir. 1985). Without question, a weather service constitutes such, and to say that the very exercise of the function justifies reliance and a right to expect complete care would make the discretionary exception self-destructive.

Although we did not so express it in *Chute*, the proper dividing line between liability and nonliability in such cases has been well stated in the recent case of *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir. 1986). "In these cases [imposing liability] the government created the danger after the critical discretionary decision had been made." In *Indian Towing*, the government created a danger by representing that an operating lighthouse was present. In *Varig Airlines*, *ante*, the government did not create the defective airplane; by merely making only spot checks it did not supply a fully efficient inspection service. For this it was not liable. So, in the case at bar, the government did not create the weather; it merely failed, in the court's opinion, to render adequate performance. In both cases this was a discretionary undertaking. The court failed to respect the statutory provision, n.4, *ante*, "whether or not the discretion involved was abused."

Nor does it advance matters to say, as did the district court, perhaps aware of the consequences of a broader ruling, that the "duty ... is ... limited ... to an identifiable group of mariners that place special reliance on the accuracy of the NWS weather forecast." 599 F. Supp. at 885. This was wrong in principle, and wrong in the particular. To take the latter first, we might judicially notice that VHF marine forecasts, in addition to local geographical designations, are divided into zones: "Up to 25 miles offshore;" "Georges Bank, Northeast Channel & Great South Channel;" and beyond, sometimes described as "Up to 1,000 fathoms." "Small craft advisories" are given when particular caution is indicated. Quite apart from these details, a cursory look at yacht marinas will show that, in summer, far more amateur seafarers are concerned with weather than are professional seamen. Are the former (who, because of lack of skill, might need warnings more?) not expected to rely? Or does the government represent due care for offshore waters, but not for inshore? Surely weather phenomena are not respecters of persons or places.

More important, the court's making an exception is unsupportable in principle. The court based this special treatment upon the legislative history recognizing a need for more accurate service. This proves too much. Presumably a need is found for every government service, or it would not be undertaken in the first place. Need cannot, by implication, amend the plain language of the discretionary exception. Nor can the court's finding that fishermen "had come to rely on the government forecasts." 599 F. Supp. *ante*, at 885. We are back to the beginning: the fishermen cannot unilaterally impose on the government a liability it expressly disclaimed.

We add that, from the standpoint of the government, the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions. If in only a small proportion parties suffering in consequence succeeded in producing an expert who could persuade a judge, as here, that the government should have done better, the burden on the fisc would be both unlimited and intolerable. What plaintiffs choose to disregard as a chamber of horrors in Judge Johnson's concurring opinion in *National Manufacturing Co. v. United States*, 210 F.2d 263, 280 (8th Cir. 1954), *cert. denied*, 347 U.S. 967, 74 S. Ct. 778, 98 L. Ed. 1108, because he was speaking in terms of strict liability, is not to be so dismissed. Rather, as the court said in *Varig Airlines*, *ante*, 104 S. Ct. at 2768,

> Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was

> precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

Finally, plaintiffs contend, and the court found, that the government should have reported in the Notice to Mariners the suspended use of wind data from station 44003. Notice to Mariners is a service by which interested parties are informed of current changes believed to be of moment. Loss or abandonment of an important navigational aid would be an example. The short answer to this claim is that the government has a policy not to report the underlying structure or basis of its weather computing system, or of changes therein. Such a policy is a classic discretionary matter not subject to judicial review. *Dalehite v. United States*, *ante*. Though not our affair, we add this seems a highly reasonable choice. For the government to add a service requiring it, with a penalty of judicial assessment (in both senses), to permit public scrutiny of its functioning would open up a whole new field, indeed one in terms excluded by the statute.

Reversed.

PETTINE, Senior District Judge, concurring

While I concur in the result reached by my brethren, I feel compelled to write separately to clarify my reasons for joining the reversal of the judgment below. The opinion of the district court judge was provocative, well-reasoned, and obviously carefully thought through. I feel constrained for two interrelated reasons, however, to reverse. First, our opinion in *Chute v. United States*, 610 F.2d 7 (1st Cir. 1979), *cert. denied*, 446 U.S. 936, 100 S. Ct. 2155, 64 L. Ed. 2d 789 (1980) indicated that the discretionary function exception precludes a court from evaluating whether a particular service provided by the government is "effective" or "adequate." We made clear, however, that under the rationale of *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), a government entity's discretion is confined by the requirement that once it undertakes to provide a given component of a service and renders reliance on that particular component, it is obligated to exercise due care in making certain that aspect of the service is kept in good working order. 610 F.2d at 13.

This brings me to my second reason. The plaintiffs' reliance in this case, as well stated by my colleagues, was not on an affirmative misstatement of fact, *i.e.*, was not on information provided by the Georges Bank buoy, but rested on the prediction itself, which at any one time is made up of a number of different factors, no one of which is necessarily determinative. If courts are to interfere so as to ensure that the weather service continues to maintain a given level or quality of prediction, which is made up of numerous and varied factors, in effect, courts would be assessing the adequacy of this government service, for who is to say what components are necessary to maintaining the previously set level of prediction. I, therefore, believe this case different from *Indian Towing*.

Questions and Notes

1. The RESTATEMENT (2D), TORTS, § 284 defines negligent conduct as "either (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Does this provide any help in determining whether a duty of reasonable care is owed?

2. Negligent failure to rescue is a frequent basis for tort claims, but courts are divided on when a duty to rescue attaches. In *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S. Ct. 998 (1989), the Supreme Court ruled that a child welfare agency's failure to prevent the death of a child at the hands of an abusive father did not constitute a violation of 42 U.S.C. § 1983, which creates a cause of action for deprivation of constitutional rights. The court specifically recognized the potential for claims based upon *state* tort law (*Id.* at 1007), but denied a *constitutional* basis for compensation. However, in a Washington case based on similar facts, social service caseworkers were held as a matter of state tort law to enjoy absolute immunity for the execution of the full range of their duties. *Babcock v. State*, 112 Wash. 2d 83, 768 P.2d 481 (1989). For a general treatment of failure to rescue cases, *see* Note, *Negligent Failure to Rescue: Liability Under 42 U.S.C. Section 1983: DeShaney v. Winnebago County Dept. of Social Serv., 109 S. Ct. 998 (1989)*, 12 Hamline L. Rev. 421 (1989).

3. **The Public Duty Doctrine**. Some courts

describe problems like the one presented in *Brown* under the heading "public duty doctrine." These cases typically involve a police department or social service agency that fails to provide some kind of assistance, leading to injury. The general rule is that the governmental entity must have owed a specific duty to the individual seeking to recover in tort, as opposed to a duty owed to the public at large. Unfortunately, there are a variety of conflicting principles, such as those at work in the *Brown* case, including sovereign immunity, concepts of reliance, and questions about whether the defendant increased the risk of injury to the plaintiff. *See generally*, Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401 (1989); *Gilbert v. Billman Construction, Inc.*, 371 N.W.2d 542 (Minn. 1985).

One particularly famous case is *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968), in which the plaintiff (Riss) repeatedly complained to police about the threats made by her boyfriend Pugach—an attorney, no less. Pugach hired thugs to throw lye in her face, blinding her. She sued the city, claiming the failure to protect her from Pugach constituted actionable negligence. Though the court rejected her claim, she eventually got something out of the case—she married Pugach after he was released from prison. The marriage lasted, despite Pugach's carrying on a five-year affair with a woman who accused him of threatening to kill her when she dumped the 70-year-old for a younger man. *See* (filed under "Truth is Stranger than Fiction") Hays, "Queens Man Acquitted of Threats to Lover Blinded Wife with Lye Before Marrying Her," (Bergen County) RECORD, May 1, 1997, page A8.

Coda
Wrongful Termination

A final illustration of the interplay of contract and tort is found in the area of wrongful termination. If an employee claims he was unjustly fired by his employer, what kind of claim is it? Is it simply a breach of contract action? Or if the motives for the firing are illegitimate, does it constitute a tort of some kind?

The common law rule was that all such cases were governed by contract; if the employer and the employee had entered into a contract which promised employment for a specific duration (or indefinitely), then the employer could not terminate the employee except for "just cause," *i.e.*, for a breach of the employment agreement by the employee. On the other hand, if there was no contract, then the employee was "terminable at will." (Does this initial classification as a contract action sound familiar?)

Beginning about 25 years ago, courts began to entertain suits for "wrongful termination" based upon either a more liberal view of contract (oral contracts would suffice; and a general understanding of a permanent employment might create an obligation to fire only for just cause), or by articulating tort doctrines that would create a duty even in the absence of a contract. For example, if an employer fired an employee for serving as a juror, or fired the employee for reporting illegal conduct by the employer, courts held that public policy required protection of the employee.

Some courts began to create a larger body of doctrine based upon so-called "bad faith" practices in a variety of contractual relations: insurer/insured; lender/borrower; landlord/tenant; employer/employee. Under UCC § 1-203, for example, all contracts are deemed to contain a covenant of good faith and fair dealing. Even if the transaction in question is not governed by the UCC, the plaintiff has frequently been successful in arguing that large institutions (insurance companies, banks, employers) should be bound by the same standard. Thus, an employee (or bank customer or insured) seeking a recovery from his former contracting party argues that even if he cannot prove a breach of contract, he is entitled to recover damages if the defendant exhibited "bad faith."

The rise (and retrenchment) of this concept of "bad faith" is summarized in *Foley v. Interactive*

Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988). Washington employment law is summarized in *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 685 P.2d 1051 (1984).

For a review of wrongful termination cases, see Grass, *Legal Reasoning and Wrongful Discharge Tort Law in California*, 26 CAL. W. L. REV. 69 (1989); Notes, 6 Alaska L. Rev. 265 (1989); *Symposium issue*, 11 INDUS. REL. L.J. 1 (1989). The U.S. Supreme Court has held that a union member's wrongful discharge claims are not pre-empted by federal labor law: *Lingle v. Norge*, 108 S. Ct. 1877 (1988).

An example of Washington law on the subject of wrongful termination can be found in *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223 (2002). In that case, Ford sued his former employer for wrongful discharge when, after returning from an alcohol rehabilitation program, the former employer refused to rehire him. Ford argued that the resort had promised to rehire him as an at-will employee after his treatment program ended. The court agreed with Ford; however, much to his dismay, they awarded him only nominal damages.

The court's rationale was that at-will employment, by nature, does not involve any expectation of future employment. Therefore, expectation damages for future lost earnings would be inappropriate where an expectation did not exist. Though the resort promised to rehire Ford as an employee, the at-will nature of his employment had not changed. In accordance with principles of contract law, the court held that only nominal damages were appropriate.

PART IV

INTENTIONAL TORTS

Chapter 12
Intentional Torts: The Prima Facie Case

Introduction

Intentional torts are among the oldest causes of action recognized in tort law. Although the negligence principle has come to dominate tort law, this is a relatively recent development, attributable in part to the importance of insurance as a compensation mechanism,[1] and in part to the utility of the negligence test as a means of balancing competing social interests. Relatively little of the personal injury practice of modern lawyers is taken up by intentional torts. However, for a variety of reasons they figure prominently in most law school torts courses.[2] Thus, most students' education would be incomplete without an understanding of intentional torts, despite the fact that they may never see one again, except on a typical bar exam.

The unique thing about intentional torts is the emphasis upon the defendant's state of mind. Whereas in the negligence case the jury is instructed to judge the defendant's conduct by an objective standard, *i.e.*, the hypothetical reasonably prudent person, in intentional torts cases the jury must ordinarily find that the defendant subjectively intended to inflict a certain consequence upon the plaintiff. It must be borne in mind that the plaintiff can rarely provide tangible proof of the defendant's state of mind other than by showing what the defendant did, and asking the jury to infer his intent. The defendant can usually claim that the injury to the plaintiff was accidental rather than intentional, and the plaintiff cannot offer an X-ray of the defendant's brain as proof. Nonetheless, the jury must find as a fact (based upon their experience in the world and their common sense) that the defendant's conduct was intentional (or in some cases highly reckless) rather than merely careless before the legal requirements of the intentional tort are met.

Once the plaintiff has met his burden of proof, the defendant can frequently offer a defense that his conduct was "privileged" or justified, and thereby avoid liability.

The "rules" governing intentional torts are relatively well settled; they are set forth in the RESTATEMENT (2D) OF TORTS. Their application, however, is often quite complex, as the succeeding cases demonstrate.

Restatement (2d) of Torts

§ 8A. Intent

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

§ 13. Battery: Harmful Contact

An actor is subject to liability to another for battery if

(a) he acts intending 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, and

(b) a harmful contact with the person of the other directly or indirectly results

[1] Insurance is an important consideration because it usually limits coverage to "accidental" harms. Intentional torts are frequently excluded from coverage because they do not meet the requirement that the loss arise from an "occurrence," which is typically defined as "an accident or a happening ... which unexpectedly and unintentionally results in personal injury...."

[2] One commonly cited reason is that the rules for intentional torts are relatively clear, and thus easier for the beginning student to understand and apply. Relative to product liability law, this statement is certainly true.

§ 15. What Constitutes Bodily Harm

Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness.

§ 18. Battery: Offensive Contact

(1) An actor is subject to liability to another for battery if

(a) he acts intending 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, and

(b) an offensive contact with the person of the other directly or indirectly results.

(2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§ 21. Assault

(1) An actor is subject to liability to another for assault if

(a) he acts intending 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, and

(b) the other is thereby put in such imminent apprehension.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§ 35. False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and

(b) his act directly or indirectly results in such a confinement of the other, and

(c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

§ 36. What Constitutes Confinement

(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.

§ 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

§ 63. Self-Defense by Force not Threatening Death or Serious Bodily Harm

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

§ 65. Self-Defense by Force Threatening Death or Serious Bodily Harm

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that

(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can be safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or

(b) permitting the other to intrude upon or dispossess him of his dwelling place, or

(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

§ A. Battery and Assault

Introductory Note. In *Dickens v. Puryear*, already considered in Chapter Seven, there is a good introduction to the general requirements of battery and assault.

ROGERS v. LOEWS L'ENFANT PLAZA HOTEL

526 F. Supp. 523 (D.C. D.C. 1981)

Joyce Hens GREEN, District Judge

Plaintiff, Norma Rogers, alleges in her complaint that while employed by the defendant Loews L'Enfant Plaza Hotel (Hotel) she was subjected to physical and emotional harassment by her superiors. Claiming that defendants' conduct has deprived her of rights guaranteed under the Constitution and federal, local and common law, she seeks monetary, declaratory and injunctive relief. Motions to dismiss are presently before the court. A recitation of the allegations is germane to the rulings on those motions.

In September, 1979, plaintiff was hired by the defendant Hotel as Assistant Manager of the Greenhouse Restaurant. Defendant James Deavers, Manager of that restaurant, was plaintiff's immediate supervisor with whom she was required to work closely in order to assure the smooth operation of the restaurant. Plaintiff alleges that after being employed a few weeks, Deavers began to make sexually oriented advances toward her, verbally and in writing, which extended over a period of two months. The defendant would write her notes and letters, pressing them into her hand when she was busy attending to her duties in the restaurant, or placing them inside menus that plaintiff distributed to patrons of the restaurant, or even slipping them into plaintiff's purse without her knowledge.

Plaintiff further claims that defendant would also telephone her at home or while she was on duty at the restaurant, which conversations included sarcastic, leering comments about her personal and sexual life. Plaintiff was frightened

and embarrassed by this defendant's actions and uncertain as to how she could protect herself. She contends that she continually rejected his suggestions and rebuffed his advances by telling defendant that she was not interested in him personally, and that his suggestions and advances were distressful and unwanted.

During this period, plaintiff received what she considered to be an abusive and violent telephone call from defendant Deavers' wife, who had apparently discovered a letter written by her husband to the plaintiff. Ms. Deavers warned Rogers not to become involved with her husband. Extremely disturbed by this call, plaintiff urged defendant to tell his wife that there was no relationship, other than a working one.

Plaintiff avers that for a short time after the telephone incident between herself and Ms. Deavers, the advances ceased, but soon they resumed again. This time in addition to leaving more notes, Deavers would pull at plaintiff's hair, touch her and try to convince her to spend a night or take a trip with him. The complaint states that he offered her gifts and favors and at times used abusive crude language, stating that he found her attractive and would never leave her alone.

The explicit sexual advances ceased at the end of November, but then the employment atmosphere and working conditions at the Greenhouse became difficult and very uncomfortable according to plaintiff. Defendant Deavers would sometimes exclude her from meetings of the Greenhouse staff; he suggested to the staff that plaintiff was unhappy with her job and might not stay; he used abusive language, belittling plaintiff in the presence of the staff; he refused to cooperate with her or share necessary information on occasion. Plaintiff claims he generally made it difficult for her to perform her job.

Plaintiff attempted to arrange a meeting with defendant Randy Gantenbein, the Hotel's Food and Beverage Manager, who had authority to resolve staff problems in the Greenhouse, in order to discuss defendant Deavers' conduct. She asserts Gantenbein avoided her and for three weeks declined to meet her. Near the end of this period, Deavers advised Rogers that defendant Gantenbein intended to discharge both Deavers and Rogers. After pursuing the matter, plaintiff was able to meet with Gantenbein in January, 1980, but only after the Hotel Manager suggested he do so. At that time, plaintiff states she explained the atmosphere and working conditions in the restaurant beginning with defendant Deavers' past sexual advances. Defendant Gantenbein denied he had any intention of discharging plaintiff as Deavers had warned, but acknowledged that he had known, prior to their meeting, about Ms. Deavers' telephone call to plaintiff in mid-October.[1] Gantenbein, according to plaintiff, advised her to be patient and to wait and see if the situation would improve.

Plaintiff's allegations continue that by the end of February, 1980, defendant Deavers notified her that he would do everything in his power to have her fired. Plaintiff contacted her attorney and requested Gantenbein to meet with him, which Gantenbein refused to do. The next day Gantenbein asked plaintiff to take an evening position with the Hotel, noting that it was obvious that things would not work out between plaintiff and defendant Deavers. She refused, again requesting that the Hotel management or its attorney promptly meet with her attorney, but the request was denied.

Plaintiff and her counsel eventually met with Hotel management on March 14, 1980. By a letter dated March 17, attorneys for the Hotel advised plaintiff that they had "admonished and reprimanded" Deavers. Hotel management, however, saw no reason to separate the two employees, and insisted that plaintiff report back to work with defendant Deavers. They advised Rogers that the company would "monitor" the relationship through weekly meetings. Plaintiff rejected this solution.

As an alternative, the Hotel offered to separate the two by transferring plaintiff to a higher paying position as night Room Service Manager with the Hotel. Plaintiff rejected this offer also. The Hotel refused to transfer defendant Deavers to a night position. Plaintiff thereafter filed a complaint against defendants with the Equal Employment Opportunity Commission (EEOC) on March 28,

[1] Plaintiff alleges that other supervisory personnel at the Hotel also knew of defendant Deavers' conduct toward plaintiff, but had taken no action to prevent it. Plaintiff further argues that defendant Deavers had engaged in sexually harassing conduct in the past with other female employees of the Greenhouse.

1980.[2]

Essentially then, the complaint before the Court alleges that defendant Deavers with knowledge of defendant Gantenbein and other supervisory employees at the Hotel willfully and with premeditation forced himself on plaintiff and attempted to force her either to submit to his importunings or lose her employment. She asserts that she has been severely damaged both mentally and physically by the conduct described above in violation of rights guaranteed her by 42 U.S.C. §§ 1981 and 1983 and by the District of Columbia Human Rights Act, D.C. CODE ANN. § 1-2501 *et seq*. (formerly § 6-2201 *et seq*.). Plaintiff further claims that defendants engaged in tortious conduct, specifically 1) invasion of plaintiff's right to privacy at her home, in her place of employment, and in her personal life; 2) infliction of extreme emotional distress; 3) assault and battery. The corporate defendants, it is charged, failed to exercise proper supervision and control over their employees, thereby causing plaintiff injury and making defendants jointly and severally liable to plaintiff.

Defendants have presented motions to dismiss pursuant to the FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6), 12(b)(1), and for partial summary judgment pursuant to Rule 56, as well as a motion to strike or dismiss. Each motion will be considered separately.

I

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants have moved to dismiss on the following grounds: (a) the complaint fails to state a claim upon which relief can be granted under Section 2000e-2(a) of Title 42 of the United States Code and Section 1-2512(1) (formerly § 6- 2221(a) (1)) of the District of Columbia Human Rights Act; and (b) the complaint fails to state a claim upon which relief can be granted under District of Columbia common-law principles of tort.

> For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. And, the complaint is to be liberally construed in favor of plaintiff."[3] A complaint "should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Mere vagueness or lack of detail is not ground for a motion to dismiss....[4]

* * *

(b) Common-Law Tort Claims

* * *

Assault & Battery: It is elemental that assault is a tort which protects a plaintiff's "interest in freedom from apprehension of a harmful or offensive contact with the person"[12] and battery is the "interest in freedom from intentional and unpermitted contacts with the plaintiff's person...."[13] One can be subject to liability to another for assault if:

> (a) he acts intending 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, and
>
> (b) the other is thereby put in such imminent apprehension.[14]

A defendant can be liable for battery if the requirements of (a) are met and

> (b) an offensive contact with the person of the other directly or indirectly

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[2] EEOC has twice issued and twice withdrawn a Notice of Right to Sue. The case is still pending before the EEOC.

[3] *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404, *reh. denied* 396 U.S. 869, 90 S. Ct. 35, 24 L. Ed. 2d 123 (1969).

[4] 2A J. MOORE, FEDERAL PRACTICE P 12.08 (2d ed. 1981).

[12] W. PROSSER, *supra* note 7, § 10, at 37.

[13] *Id*. at 34.

[14] RESTATEMENT OF (SECOND) TORTS § 21 (1979). *See also Madden v. D.C. Transit System, Inc.*, D.C. App., 307 A.2d 756 (1973).

results.[15]

To constitute the tort of assault, the apprehension must be one which would normally be aroused in the mind of a reasonable person and apparent ability and opportunity to carry out the threat immediately must be present. The mental injury which results could include, for example, fright or humiliation. [16]Here, plaintiff Rogers has asserted that she was frightened and embarrassed by defendant Deavers' actions, complaint ¶ 17, and was put in imminent apprehension of an offensive contact even though, or especially because, they were in a public restaurant, and she was attempting to perform her duties of employment.

"To be held liable for assault, the defendant must have intended to interfere with the plaintiff's personal integrity...."[17] Plaintiff alleges that although she expressed to defendant Deavers that his suggestions and advances were distressful and unwanted, he continued to engage in that conduct. Complaint ¶¶ 17 & 30. In construing plaintiff's pleadings as required in a motion to dismiss, plaintiff has made adequate claims to defeat a motion to dismiss her assault cause of action.

To constitute the tort of battery, a defendant can be found liable for any physical contact with the plaintiff which is offensive or insulting, as well as physically harmful. Of primary importance in such a cause of action is the absence of consent to the contact on the part of the plaintiff, rather than the hostile intent of the defendant, although intent is required. The intent, however, is only the intent "to bring about such a contact."[18]

Here, clearly, an absence of consent has been asserted, since plaintiff specifically told Deavers that his advances were unwanted. Plaintiff also recites a touching, which included pulling her hair, and that Deavers intended to bring about this conduct. Complaint ¶¶ 17, 19 & 30. These allegations are sufficient to survive the motion to dismiss as to the battery claim.

Infliction of Emotional Distress: Plaintiff's third and final tort claim, infliction of emotional distress, can result from either intentional or negligent conduct. Negligent infliction of emotional distress, recognized in the District of Columbia,[19] requires a physical injury,[20] whereas intentional infliction of emotional distress,[21] also recognized in the District of Columbia,[22] allows recovery in the absence of physical impact.[23] Since plaintiff has alleged only intentional tortious acts in her complaint, only intentional infliction of emotional distress will be considered.

Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939), the "landmark case in this jurisdiction"[24] states that:

> The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress. *Id.* at 64. (However) one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable

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[15] RESTATEMENT OF TORTS (SECOND) § 18 (1979). *See also Jackson v. District of Columbia*, D.C. App., 412 A.2d 948 (1980).

[16] W. PROSSER, *supra* note 7, § 10, at 38-39.

[17] *Id.* at 40-41.

[18] *Id.* at 35-37. *See also Madden v. D.C. Transit System, Inc.*, D.C. App., 307 A.2d 756, 757 (1973).

[19] *Waldon v. Covington*, D.C. App., 415 A.2d 1070, 1076 (1980), citing *Perry v. Capital Traction Co.*, 59 App. D.C. 42, 32 F.2d 938, *cert. denied*, 280 U.S. 577, 50 S. Ct. 31, 74 L. Ed. 627 (1929).

[20] *Gilper v. Kiamesha Concord, Inc.*, D.C. App., 302 A.2d 740, 745 (1973).

[21] Intentional infliction of emotional distress is a "comparatively recent development in state law." *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977).

[22] *Waldon v. Covington*, 415 A.2d at 1070; *Shewmaker v. Minchew*, 504 F. Supp. 156 (D.D.C. 1980); *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C.Cir.1939).

[23] *Waldon v. Covington*, 415 A.2d at 1076; *Shewmaker v. Minchew*, 504 F. Supp. at 163.

[24] *Waldon v. Covington*, 415 A.2d at 1077.

> physical consequences actually ensue. *Id.* at 65.

For a prima facie case to be made out, the tortfeasor's conduct must be "wanton, outrageous in the extreme, or especially calculated to cause serious mental distress." *Shewmaker v. Minchew*, 504 F. Supp. at 163.

> This liability "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities;" it is imposed only when the conduct goes "beyond all possible bounds of decency and (is) regarded as atrocious and utterly intolerable in a civilized community." *Waldon v. Covington*, 415 A.2d at 1076.

Severe emotional distress must have occurred and the conduct must have been intentional.

> Of course, subjective intent can rarely be proven directly; therefore, the requisite intent must be inferred, either from the very outrageousness of the defendant's acts or, for example, when the circumstances are such that "any reasonable person would have known that (emotional distress and physical harm) would result...." *Id.* at 1077.

The court in *Doyle v. Continental Air Lines*, No. 75 C 2407 (N.D. Ill. Oct. 29, 1979), a sexual harassment case brought under Title VII and various common law claims, including infliction of emotional distress, discussed the tort in the context of an advertising campaign the plaintiff airline attendants felt had sexual overtones which encouraged sexual harassment on the job, as well as in their personal lives. Plaintiffs were frequently exposed to comments which, it was asserted, the advertising campaign and slogan, "We move our tail for you" had prompted. Defendants' motion for summary judgment was granted with the holding that the insulting demeaning and harassing remarks provoked by Continental's advertising campaign were insufficient to establish that defendant's conduct was extreme and outrageous. In that case, however, only insulting demeaning and harassing remarks were alleged, whereas in this case, Rogers claims she has been subjected not only to that type of remark, but also to abusive language and physical advances from her direct supervisor which have resulted in harmful emotional, as well as physical, consequences.[25] Additionally, plaintiff alleges essentially that she left her employment as a result of defendant Deavers' conduct.

In a case somewhat similar to the instant one, but not concerning sexual harassment specifically, *Beidler v. W. R. Grace, Inc.*, 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F.2d 500 (3d Cir. 1979), a male plaintiff failed to state a cause of action for intentional infliction of emotional distress when he alleged harassment by, inter alia, exclusion from meetings necessary to the performance of his job, failure to receive communications concerning his work performance, and intimations that his new assistant would replace him. This case is clearly distinguishable because the extreme conduct alleged by Rogers deals not only with interference with her personal as well as professional life, but adds the dimension of sexual harassment.

The plaintiff further states that she suffered infliction of emotional distress as a result of intentional conduct by the defendants. Complaint ¶¶ 41 & 30. Her assertion of fright and embarrassment resulting from defendant Deavers' actions are added to her notification to Deavers that his suggestions and advances were distressful and unwanted; yet, she says he persisted even when it appeared the Hotel management knew of the problem. *Id.* ¶¶ 17, 19, 23 & 24. He excluded her from meetings of the staff, suggested that she was unhappy with her job and might not stay, used abusive language and belittled her in the presence of the staff, and did not share necessary information with her. *Id.* ¶ 20. Further, Deavers advised her he would do everything in his power to have her fired from her position. *Id.* ¶ 25. Alleging not only difficulty in discussing her problems with Hotel management, but also in arranging meetings between the two parties and their attorneys, *Id.* ¶ 32, and in attempting to resolve the problem over a period of months, plaintiff contends that at no time did the employer offer to remove defendant Deavers from his position as manager of the Greenhouse. *Id.* ¶ 35.

[25] It should also be noted that the Court is considering a motion to dismiss and not a summary judgment motion as in *Doyle v. Continental Air Lines*.

This conduct, she claims, precipitated the filing of her complaint with EEOC and necessitated her refusal to return to working conditions she found unacceptable at the Greenhouse.

In her complaint, the plaintiff has clearly alleged conditions and circumstances which are beyond mere insults, indignities and petty oppressions and which, if proved, could be construed as outrageous. Emotional distress and physical harm could reasonably result from the conduct of Deavers, as stated, as well as from the conduct of the Hotel management in response to plaintiff's plight. A cause of action for intentional infliction of emotional distress does, therefore, lie.

§ B. False Imprisonment

MOORE v. PAY'N SAVE CORPORATION

20 Wash. App. 482, 581 P.2d 159 (1978)

DORE, Judge

Patricia Moore commenced this action against Pay'N Save Corporation and an unknown employee alleging false imprisonment. Whatcom Security Agency was later joined as a third party defendant by Pay'N Save. Moore appeals from the granting of summary judgment in favor of defendants.

Issues

ISSUE 1: Are there material issues of fact as to whether Moore was falsely imprisoned?

ISSUE 2: Does the record indicate as a matter of law that the security guard had reasonable grounds under R.C.W. 4.24.220 to detain Moore for investigation or questioning?

Decision

ISSUE 1:

Summary judgment should be granted only if, after considering all the pleadings, affidavits, depositions, and all reasonable inferences therefrom in favor of the nonmoving party, a trial court determines that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wash. 2d 154, 531 P.2d 299 (1975); *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wash. 2d 871, 523 P.2d 186 (1974); *Balise v. Underwood*, 62 Wash. 2d 195, 381 P.2d 966 (1963). Summary judgment should not be used as a means to "cut litigants off from their right to a trial...." *Bernal v. American Honda Motor Co.*, 87 Wash. 2d 406, 416, 553 P.2d 107 (1976). However, when a moving party demonstrates that there is no material issue of fact, the nonmoving party may not rest on the allegations in the pleadings but must set forth specific facts demonstrating that there is a material issue of fact. *LaPlante v. State*, *supra*; *Matthies v. Knodel*, 19 Wash. App. 1, 573 P.2d 1332 (1977).

The pleadings, affidavits, and the deposition of Patricia Moore establish that while in a Pay'N Save store in Bellingham, Washington, Moore took a can of hairspray to the checkout counter. She stood in line for several minutes, but later decided to leave. She put the hairspray on a counter inside the store and left the premises. In her deposition, she testified as to what transpired after she exited from the store:

> **Q**. Well now, after you stepped outside the store, then what happened?
>
> **A**. Well, then I walked around to get in the car.
>
> **Q**. And then what?
>
> **A**. And this girl came up and tapped me on the back.
>
> **Q**. Were you already in the car when she tapped you?
>
> **A**. No.
>
> **Q**. Were you just getting in?
>
> **A**. Just at the end of the car.
>
> **Q**. So then what did you do?
>
> **A**. I turned around.
>
> **Q**. What did she say or what did you say?
>
> **A**. She had a wallet or a badge with a

wallet in her hand.

Q. Yes.

A. And she asked me where the hairspray was.

Q. What did you say?

A. I said, "What hairspray?"

Q. Then the girl who accosted you accosted you how soon after you had put it down?

A. Oh, as soon as I walked out the door and walked out of the building and up to the car and I got around to the end of the car.

Q. How long did all this take?

A. I don't think any more than about five seconds, maybe.

Q. Now, what you are telling me is that you had already dismissed this incident involving the spray from your mind in five seconds?

A. Yes, because I wasn't thinking about that.

Q. Then what did you say?

A. And then she flipped my coat and she said, "The hairspray you took out of the store."

Q. Then what did you say?

A. I said, "I never took any hairspray out of the store."

Q. Then what after that?

A. Then she said, "Would you mind coming back in and showing me where you put the hairspray?"

Q. Do you say alright?

A. I said, "Yes, certainly."

I went back and showed her where I had put the hairspray down.

Q. Now, you said

A. By this time we had about a dozen people standing there on the street.

Q. You said you had left the hairspray in the store?

A. Yes.

Q. Then she said, "Would you mind coming back in to show me where you put it?"

A. Yes.

Q. Did you mind going back in?

A. No, I didn't mind.

Q. Did you show her where you had put it?

A. Yes.

Q. Was it still there?

A. Yes.

Q. Then what did she say or do?

A. Then she just walked away from me. This is what I didn't mind.

Q. Beg pardon?

A. Then she just walked away from me which that I didn't like. [*sic]* I don't mind going back and showing her where the hairspray was.

Moore contends that these facts demonstrate a material issue of fact as to whether she was falsely imprisoned. We agree.

In an action for false imprisonment, the plaintiff must prove that the liberty of his or her person was restrained. *See* W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

> A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used. One acting under the apparent authority or color of authority as it is sometimes described or ostensibly having and claiming to have the authority and powers of a police officer, acts under promise of force in making an arrest and effecting an imprisonment.
>
> If the words and conduct are such as to induce a reasonable apprehension of

> force and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. *Kilcup v. McManus*, 64 Wash. 2d 771, 777-78, 394 P.2d 375, 379 (1964).

If the undisputed facts indicate that the person voluntarily accompanied a policeman or detective back to the store, the person is not restrained or imprisoned as a matter of law. *James v. MacDougall & Southwick Co.*, 134 Wash. 314, 235 P. 812 (1925). Likewise, the undisputed facts may indicate that the person was restrained by a threat of force, actual or implied. *Kilcup v. McManus, supra.* However, whether a person has a reasonable basis for believing he or she is restrained or imprisoned is generally a question of fact for the jury. *Harris v. Stanioch*, 150 Wash. 380, 273 P. 198 (1928). *See* 32 AM. JUR. 2D *False Imprisonment* § 10 (1967).

> It is essential ... that the restraint be against the plaintiff's will; and if he agrees of his own free choice to surrender his freedom of motion, as by remaining in a room or accompanying the defendant voluntarily, to clear himself of suspicion or to accommodate the desires of another, rather than yielding to the constraint of a threat, then there is no imprisonment. This gives rise, in borderline cases, to questions of fact, turning upon the details of the testimony, as to what was reasonably to be understood and implied from the defendant's conduct, tone of voice and the like, which seldom can be reflected accurately in an appellate record, and normally are for the jury. (Footnotes omitted). W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

Here, the record indicates that after Moore left the store, she was approached by a security guard who identified herself by displaying a badge. The guard asked Moore where the hairspray was, and following Moore's response, "What hairspray?" the security guard flipped open Moore's coat and said, "The hairspray you took out of the store." From these facts, we cannot say that as a matter of law Moore's freedom was not restrained. The security officer was acting under apparent authority, *i.e.*, claiming to have the authority and power of a police officer. Although the security officer subsequently "requested" Moore to accompany her back into the store, the "request" was implicitly coercive. *Cf. State v. Buyers*, 88 Wash. 2d 1, 559 P.2d 1334 (1977). The question of whether Moore reasonably believed that her liberty was restrained was a question for the jury. Accordingly, the trial court erred in granting summary judgment on the ground that Moore was not imprisoned.

ISSUE 2:

The defendants contend that even if there is a material issue of fact as to whether Moore was imprisoned, the security officer, as a matter of law, had a privilege pursuant to R.C.W. 4.24.220 to detain Moore for purposes of investigation. We disagree. R.C.W. 4.24.220 provides:

> In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

Under this statute, the security officer had a qualified privilege to detain Moore if the officer had "reasonable grounds" to believe that Moore

was committing, or attempting to commit, larceny or shoplifting. The question of whether the security officer had reasonable grounds under this statute can be analogized to the question of probable cause. Generally, whether probable cause exists to justify an arrest or detention is a factual issue to be resolved by the jury. *Smith v. Drew*, 175 Wash. 11, 26 P.2d 1040 (1933); *Coles v. McNamara*, 131 Wash. 377, 230 P. 430 (1924). The record is devoid of any evidence, such as an affidavit of the security guard, which would enable the trial court to determine whether the security guard "had reasonable grounds to believe that [Moore] was committing or attempting to commit larceny or shoplifting." R.C.W. 4.24.220.

Consequently, the record does not support the defendants' contention that any detention was privileged under R.C.W. 4.24.220, *i.e.*, that as a matter of law, the security guard had reasonable grounds to believe that Moore was shoplifting. This issue must be resolved by testimony at trial. *See generally* Annot., 47 A.L.R. 3D 998 (1973).

Reversed.

FARRIS, C.J., and WILLIAMS, J., concur.

Questions and Notes

1. In the 1970s there were many publicized cases dealing with "deprogramming" of members of "cults." Civil claims against the deprogrammers were often based on the tort of false imprisonment. The courts struggled with the clash between freedom of religion and false imprisonment on the one hand and charges of psychological imprisonment and mind control on the other. *See* Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277 (1983), and Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J. L. AND SOC. PROBS. 163 (1982).

§ C. Intentional Infliction of Emotional Distress (Outrage)

[See the discussion of the tort of outrage in *Dickens v. Puryear* and *Rogers v. Loews L'Enfant Plaza Hotel.*]

Chapter 13
Defenses to Intentional Torts

Introductory Note. Just as with the negligence cases, the defendant may admit that his conduct met the legal definition that ordinarily imposes liability, but deny that he is liable because of some defense available to him. With intentional torts defenses are often called "privileges"; thus, an assault to defend oneself is often termed a "privileged assault." This section considers the types of privileges that will justify or excuse the intentional infliction of harm upon another.

§ A. Consent

Introductory Note. To the extent that the plaintiff has consented to physical contact by the plaintiff, ordinarily it will not be considered harmful or offensive, since the plaintiff has asked for it. However, in some circumstances the law will refuse to recognize the plaintiff's consent as a defense. Consider the following two cases:

STRAWN v. INGRAM

191 S.E. 401 (W. Va. 1937)

HATCHER, Judge

In a fight between plaintiff, Ray Strawn, and defendant, Arley Ingram, the former received personal injuries, for which he recovered a judgment. Defendant alleges error.

The physician who treated plaintiff after the fight testified without contradiction that his skull was fractured, his brain severely concussed and permanently contused, his face and head lacerated, and his vision permanently impaired. The plaintiff, aged 36 years, testified without contradiction that, since the assault, his head has pained him intermittently at the place where his skull was fractured, that his eyes have ached almost continuously, that he can "scarcely see" with his left eye and can see "not more than half" with his right eye, that he has been dizzy at times and "night after night" has not "known what sleep is." The verdict specified that actual damages were assessed at $800 and punitive damages at $25.

The points of error are that the trial court (1) struck from the record defendant's special plea of justification; (2) directed a verdict for plaintiff; (3) instructed the jury (in writing) it could consider as a part of plaintiff's damages an element not proven; (4) refused to instruct on the burden of proof and preponderance of the evidence; and (5) orally instructed the jury to find both compensatory and punitive damages for plaintiff.

1. The plea was stricken because not filed within the time required by a court rule, as construed by the court. This action, however, need not be considered seriously. Defendant testified unequivocally that he and plaintiff mutually agreed to fight. Defendant admitted striking plaintiff on the head with an iron bar "not exactly to protect" himself. He admitted intentionally gouging plaintiff's eye with his thumb and hitting plaintiff with his fist after having him on the ground. Under such circumstances, the law recognizes no justification for the injuries inflicted, and striking defendant's plea did not prejudice him. "If men fight the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law.... The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. Where a combat involves a breach of the peace, the mutual consent of the parties thereto is generally regarded as unlawful, and as not depriving the injured party, or for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other." COOLEY ON TORTS (4th Ed.) § 97....

2 and 4. Because the combat was by mutual consent and no counterclaim was interposed,

verdict for the plaintiff was properly directed. The fact that plaintiff was also at fault is no defense. *Brown v. Patterson*, 214 Ala. 351, 108 So. 16, 47 A.L.R. 1093. That fact may be taken by the jury to preclude or mitigate punitive damages but not to reduce actual damages. *Grotton v. Glidden*, 84 Me. 589, 24 A. 1008, 30 Am. St. Rep. 413. And because there was no material conflict in the evidence as to the infliction or the extent of plaintiff's injuries, instruction on the burden of proof and preponderance of the evidence was uncalled for.

* * *

[*The trial court had directed the jury to award punitive damages; the appellate court found this erroneous, but since the jury only awarded $25 in punitive damages, the appellate court simply deducted that amount from the judgment and otherwise affirmed.*]

MILLER v. BENNETT

190 Va. 162, 56 S.E.2d 217 (1940)

HUDGINS, C.J., delivered the opinion of the court

Raymond J. Bennett, Adm'r of Kerneda C. Bennett, instituted this action against Iva Rodeffer Davis Coffman to recover $15,000 damages for the wrongful death of decedent. It was alleged that the death of decedent was the result of an abortion, or an attempted abortion, performed by defendant upon Mrs. Bennett. The trial court overruled defendant's contention that proof that decedent consented to the commission of the illegal or immoral act barred recovery. The jury returned a verdict for plaintiff in the sum of $8,000, on which judgment was entered.

This action was commenced before Mrs. Coffman was convicted under Code (Michie's 1942), sec. 4401, of an attempted abortion. After her conviction, and while she was confined in the State penitentiary, Francis S. Miller was appointed committee of her estate, and in his name the action was contested. There is no substantial difference in the evidence introduced in this case, and that introduced in the criminal case, which need not be repeated, as a full statement of it is found in *Coffman v. Commonwealth*, 188 Va. 553, 50 S.E.(2d) 431, to which reference is made.

The decisive question presented is, whether consent of a mature married woman to an attempt to produce an illegal abortion, resulting in death, bars recovery, under Lord Campbell's Act, in an action by her administrator against the party attempting to procure the abortion. This question has not been decided in this jurisdiction.

It is conceded that if the consent of decedent to the commission of the immoral or illegal act would have been a bar to decedent's right to recover had she survived, such consent bars recovery in an action by her administrator for her wrongful death under the provisions of Code (Michie's 1942), secs. 5786, 5787. *See Street v. Consumers Min. Corp.*, 185 Va. 561, 39 S.E.(2d) 271, 167 A.L.R. 886, and cases there cited.

The general rule, that a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act, is well settled. The rule itself, and the reasons therefore, are clearly stated in the often quoted excerpt from the opinion of Lord Mansfield, in *Holman v. Johnson*, 98 Eng. Rep. 1120, which is as follows:

> No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

* * *

The principle applies to civil actions, whether based on tort or contract. When applied to actions in tort, it is said that consent or participation in an

immoral or unlawful act by plaintiff precludes recovery for injuries sustained as a result of that act, on the maxim volenti non fit injuria. It is conceded that Mrs. Bennett consented to and participated in the immoral and illegal act when she solicited the services of Mrs. Coffman and submitted herself to treatment to produce abortion. If the general rule is applicable, then this action is barred.

Appellee contends that there is an exception to the general rule, and cites numerous authorities to support his contention. Each is based on the reasons stated in 1 COOLEY ON TORTS, 4th Ed., sec. 97, p. 326, thus: "The life of an individual is guarded in the interest of the state, and not in the interest of the individual alone; and not his life only is protected but his person as well. Consent cannot justify an assault.... Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to.... But in the case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification."

* * *

The better reasoned cases support the view that no recovery can be had in such cases. While abortion was not involved in *Levy v. Kansas City*, 93 C.C.A. 523, 168 F. 524, 22 L.R.A.(N.S.) 862, 870, Judge Sanborn, after reviewing many authorities on consent to an illegal act, said: "But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature."

* * *

In some states the anti-abortion statutes make the woman who consents to the procurement of an abortion upon herself an accomplice, and in others such a woman is not made an accomplice. But whether such a woman is or is not declared to be an accomplice is not regarded as material in a civil action brought by her to recover damages for injuries resulting from the abortion, or the illegal attempt to procure abortion.

It appears from the opinion in *Martin v. Morris*, 163 Tenn. 186, 42 S.W.(2d) 207, that the Tennessee statute does not make the woman who consents to take treatment for the purpose of procuring an abortion an accomplice. It was held that a woman of mature mind, who knew the serious consequences likely to result from such treatment, could not recover for personal injuries resulting therefrom, on the ground that she participated in an illegal or immoral act.

* * *

A number of cases are cited in the briefs in which a distinction is made between the purpose of an anti-abortion statute and assault and battery and dueling statutes. These cases hold that the former class of statutes are not designed for the protection of the woman, but only of the unborn child and through it society, while the assault and battery, dueling, etc., statutes are designed for the protection of the individuals concerned. Hence recovery is allowed in one class of cases and denied in the other. *See* *Herman v. Julian*, 117 Kan. 733, 232 P. 864; *Bowlan v. Lunsford*, 176 Okla. 115, 54 P.(2d) 666.

However, we do not deny recovery in this case on the distinction between the two classes of statutes, but upon the ground that the plaintiffs' decedent, a mature married woman, was guilty of moral turpitude and participated in the violation of a general anti-abortion statute, enacted to effectuate a public policy.

The judgment of the trial court is reversed, the verdict of the jury set aside, and final judgment entered for defendant.

Reversed and final judgment.

Questions and Notes

1. Are *Strawn* and *Miller* reconcilable? If you believe they are not, which was (more) correctly decided?

2. Athletic sports (*e.g.*, football) consist of a great deal of intentional physical contact - often quite painful, even injurious. What prevents an

injured player from suing for an intentional tort? *See* *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, *cert. denied*, 444 U.S. 931 (10th Cir. 1979), (football player sued for injuries sustained in a football game, when a defensive end hit the receiver after the play was essentially over; district court found for the defendants; held, reversed).

§ B. Defense of Self

COTE v. JOWERS

515 So. 2d 339 (Fl. 1987)

NIMMONS, Judge

Mary Bessent Cote, as the personal representative of the Estate of Michael Bessent (plaintiff below), appeals from an adverse judgment entered upon a verdict in favor of the appellee/defendant.[94] This was a civil suit for damages for the wrongful death of plaintiff's decedent, Michael Bessent, against the defendant, Michael Jowers, who the plaintiff claims either carelessly and negligently, or willfully, intentionally and maliciously, shot and killed Bessent. The defendant answered, admitting that he intentionally shot Bessent but claiming that he did so in self defense.

Appellant claims, among other things, that the trial court erred in denying her motion for new trial on the grounds that the verdict was contrary to the manifest weight of the evidence. We disagree.

At the time of this unfortunate incident, Bessent was trespassing on the property of his second former wife, Deborah Bessent. He had been harassing and cursing her and was abusive.[95] He was told to leave. He did not. He remained in the front yard with his motorcycle. When appellee/Jowers arrived home and learned of Bessent's presence and of his offensive conduct, Jowers went out to the front yard and asked that Bessent leave.[96] Instead of leaving, Bessent approached Jowers and shoved him. Jowers responded by striking Bessent. The two men scuffled until Jowers was finally able to pin Bessent to the ground. Jowers released Bessent when the latter agreed to calm down and leave. But as soon as Jowers released him, Bessent began kicking Jowers. Jowers ran into the house, closed the door and told Deborah, to call the police. She and a neighbor, who had also witnessed the altercation, already had the police on the telephone.

Bessent had chased Jowers to the house and was yelling and trying to beat the front door down. Jowers obtained a pistol from his dresser drawer. He went to the front door, opened it slightly, told Bessent to leave the premises, told him that the police had been called and displayed the pistol.

Instead of leaving, Bessent persisted and managed to force the front door open. He approached Jowers and backed Jowers all the way across the living room. Jowers was pointing the pistol at Bessent. While approaching Jowers menacingly, Bessent taunted Jowers saying, "What are you going to do with that, big boy? Come on, come on." Jowers told Bessent not to come any closer or he would pull the trigger. At that point, Bessent lunged at Jowers who pulled the trigger, fatally wounding Bessent in the chest.

The above facts are uncontradicted. Clearly, the trial court did not err in rejecting the plaintiff's argument that the verdict was contrary to the manifest weight of the evidence as that standard has been articulated in *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959). *See also* *Wackenhut Corporation v. Canty*, 359 So. 2d 430 (Fla. 1978); 38 FLA. JUR. 2D *New Trial* § 48. No citation of authority is needed for the proposition that the law does not

[94] Mary Bessent Cote was Michael Bessent's first wife. They had one child who survived Bessent's death.

[95] At the time, there was an outstanding order enjoining Bessent from exercising visitation with his children if he had consumed alcoholic beverages within 24 hours prior to such visitation. This was an unannounced visitation on a day that was not ordinarily one of his visitation days.

[96] Jowers was a Marine Corps sergeant who, at the time, was living on the subject premises. He and Deborah were subsequently married.

demand that we employ heroic efforts at the risk of life and limb to protect those who would break into our homes and assault us.

The appellant also complains of the trial court's denial of six requested jury charges regarding "self defense" and "privilege." We find no error in such denial as the requested instructions are repetitive of those given by the court, inapplicable and unsupported by the evidence, or fail to accurately state the law.

We have examined and find without merit the remaining points urged by the appellant.

AFFIRMED.

THOMPSON, J., concurs.

SHIVERS, J., dissents with written opinion.

SHIVERS, Judge, dissenting.

I respectfully dissent.

On September 4, 1984, appellee, Michael Jowers, intentionally shot and killed Michael Bessent in the home Bessent had shared with his wife and children during his marriage to Deborah Bessent. Bessent left surviving him three minor children, ages 5, 3, and 1, as well as his parents. Appellant, Mary Bessent Cote,[1] as the personal representative of the estate of the deceased, Michael Bessent, appeals final judgment, after jury verdict, in favor of Michael Jowers. The oldest child, Brittany Bessent, is the daughter of the decedent and Mary Bessent Cote. The other surviving children are the result of a marriage between the decedent and Deborah Bessent Jowers, who is now married to Michael Jowers.

The estate, by Mrs. Cote, seeks damages against Michael Jowers for the wrongful death of Michael Bessent. The estate contends that the defendant Michael Jowers either carelessly and negligently, or willfully, intentionally, and maliciously fired a gun at Michael Bessent, proximately causing his death. Jowers admits he intentionally shot Bessent, but he alleged below the following defenses: (1) self-defense; (2) trespass by Bessent; (3) violation of a restrictive court order prohibiting Bessent from coming on the premises after consuming alcohol; (4) lack of any justiciable issue of law or fact; (5) assumption of the risk; and (6) privilege to use deadly force. At issue is whether the trial court erred in its instructions to the jury and whether the verdict was contrary to the manifest weight of the evidence.

During Michael and Deborah Bessent's marriage, they and their two small children and Christopher Crews, Mrs. Bessent's child by a prior marriage, resided at 936 Player Road in Jacksonville. Mr. Bessent was a lineman who climbed telephone poles and installed lines for cable television. After their divorce, Deborah and the children continued to live on Player Road.

Through Michael Bessent, Deborah Bessent had met Michael Jowers, a 24-year-old Marine sergeant stationed at the Naval Air Station in Jacksonville. Jowers' duties as a Marine Sergeant included attending monthly drill and predrill meetings. When Jowers killed Bessent, Jowers was living with Deborah Bessent in the house on Player Road. Jowers was also paying rent on a separate apartment which, according to his testimony, he had to maintain until his lease had expired.

There was evidence that a strained relationship had developed between Bessent and Jowers. The apparent reason for this strain was that after Deborah Bessent divorced her husband and began to cohabit with Jowers, she nevertheless continued something of a relationship with Bessent. Bessent's visits to 936 Player Road after the divorce were fairly regular. Mrs. Deborah Bessent testified:

> **Question**: Now, on how many occasions prior to this would Mr. Bessent come to visit you or come to the house and see you or whatever or talk to you or how would that occur? How often would that occur?
>
> **Answer**: Approximately every other weekend and then sometimes he'd just pop over without - without me knowing.
>
> **Question**: Did he have a key to the house?
>
> **Answer**: No, sir.
>
> **Question**: Did you ever refuse him entry into the house when he would come?
>
> **Answer**: No, sir.

Jowers testified:

[1] Mary Bessent Cote was married to Michael Bessent prior to his marriage to Deborah Bessent.

Question: And you had been living there on Player Road at the House?

Answer: That's right.

Question: Was there any suggestion, Mr. Jowers, that Michael Bessent had been seeing or living with Debbie while you were away?

Answer: Yes, sir.

Question: And where did you get the information from?

Answer: Debbie told me.

Question: And had that created any animosity between you and Debbie?

Answer: Yes, sir.

Question: Tell me what took place in that regard.

Answer: When I got back - I had been back two or three days, and one evening Debbie told me, said, "Baby, I got something I've got to tell you."

So we went back in the bedroom. The kids were asleep. And she said, "While you were gone," she said, "Mike came over one night," said that he had tried to get her to go to bed with him, which he had done before on numerous occasions.

And she said he was saying, "You remember how good it used to be between us."

She said, "Yes, but it's over between us."

He says, "Just give it one more chance."

And she told me she saw this as a chance to prove to him once and for all that she didn't want him. And she went to bed with him.

And he had said to her, he said, "If you can make love to me and tell me that you don't love me, I'll leave you alone."

He told her that, is what she told me. I believed her with all my heart.

She said, "All right." And she did it. And she looked at him and said, "I don't love you no more. I love him."

And he left very upset.

Question: And this apparently occurred during the time you were gone?

Answer: That's right.

Question: Well, did that create an additional anger in your [sic] against Bessent?

Answer: No, sir. I was mad at Debbie, because I'm a firm believer that a man can't go to bed with a woman unless she wants him to, see; unless she lets it happen, whether she wants to or not, unless she lets it happen. I was mad at her.

Question: Was that subject brought up to Bessent or to you the night of the shooting?

Answer: No, sir.

According to Jowers' deposition testimony, on September 4, 1984, Jowers returned to 936 Player Road at approximately 8:00 p.m. from a meeting at the Naval Air Station and noticed Michael Bessent standing on the front porch. Jowers went into the house through the back door and asked Deborah what Bessent was doing at the house. Sheryl Young, a friend of Deborah's who was visiting the home at the time, informed Jowers that Bessent "just came over here causing trouble. He has been drinking, cussing at Debbie, aggravating her." Jowers announced that he was going to have a talk with Bessent, and went out the front door to where Bessent was standing beside his motorcycle in the front yard.

Jowers said he told Bessent that Bessent should not be visiting the children except on weekends when a visitation had been set up in advance, and that he was not supposed to visit when he had been drinking. According to Jowers, Bessent had obviously been drinking. The conversation lasted a minute or two, at which point Jowers said Bessent stepped up to Jowers and pushed him in the chest with both hands. Jowers then hit Bessent, and the two men scuffled on the ground until Jowers pinned Bessent and ended the fight. Jowers agreed to let Bessent up if he would calm down and leave the premises. Bessent agreed to leave but, upon rising, kicked at Jowers. Jowers ran into the house, closed the door, and instructed Deborah to call the police. Sheryl Young had already done so and had them on the line, she and Debbie having witnessed the scuffle from a bedroom window.

Bessent was still outside the house, but was beating on the front door and yelling. Jowers went into his bedroom, grabbed a loaded pistol from his

dresser drawer, returned to the wooden front door of the house (which had been closed since Jowers reentered the house) and opened it slightly. He again told Bessent to leave, warned him that he had called the police, and showed him the gun. Bessent then slammed into the door, forcing it to open further, and entered the house. Jowers testified that Bessent then approached him, causing him to back up across the living room. While approaching Jowers, Bessent said, "What are you going to do with that, big boy? Come on, come on." Jowers again told Bessent to leave. Bessent continued to approach, and Jowers continued to back up until he was into the kitchen area. Jowers then told Bessent not to come any closer or he would shoot him. At that point, Bessent (who was unarmed) "came at" him, and Jowers shot Bessent in the chest, killing him. Jowers picked up the telephone and informed the police, who were still on the line, that he had shot Bessent. The police arrived immediately thereafter.

The depositions of Sheryl Young and Deborah Bessent were read into the record at trial. The testimony of both women was fairly similar to Jowers' version of the facts. In addition, both testified that Bessent had been using foul language and harassing Deborah prior to Jowers' arrival. Deborah testified that Bessent had been drinking, and that she had asked him to leave the house. Both Jowers and Deborah testified that Bessent had stated on other occasions he was going to kill Jowers or have someone kill him, apparently because he was jealous of the relationship between Deborah and Jowers. Jowers did not testify in person; he relied instead on those portions of his deposition which were read into the record by appellant's attorney.

After the jury had retired to deliberate, it sent out the following question to the trial judge:

> We would like to hear a clarification of the law regarding self-defense and the right of privilege.

Over appellant's objection to rereading only that portion of the charge, the jury was brought in and the court reread Jowers' requested jury instructions (numbers 4 and 5), which were the sole instructions given on self-defense and privilege:

> THE COURT: You may be seated. Members of the jury, your question has been turned in to me and I believe it states: "We would like to hear a clarification of the law regarding self-defense and the right of privilege." Is that the question to me?
>
> A JUROR: Yes.
>
> THE COURT: I am going to read to you the instructions and law regarding self-defense and also privilege.
>
> > A defense raised by Michael Jowers and is [sic] an issue in this case, is whether Michael Jowers acted in self-defense. It is a defense if the death of Michael Bessent resulted from the justifiable use of force likely to cause death or great bodily harm.
> >
> > The use of force likely to cause death or great bodily harm is justifiable only if Michael Jowers reasonably believes [sic] that the force is necessary to prevent imminent death or great bodily harm to himself while resisting any attempt to commit burglary upon any dwelling occupied by him, or resisting any attempt to commit a burglary with intent to commit an assault in any dwelling house occupied by him.
> >
> > A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent the imminent commission of a burglary with intent to commit an assault against himself or another.
> >
> > However, the use of force likely to cause death or great bodily harm is not justifiable if you find Michael Jowers initially provoked use of force against himself, unless: in good faith, Michael Jowers withdrew from physical contact with Michael Bessent and indicated clearly to Michael Bessent that he wanted to withdraw and stop the use of force likely to cause death or

great bodily harm, but Michael Bessent continued or resumed the use of force.

In deciding whether Michael Jowers was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing Michael Jowers need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, Michael Jowers must have actually believed that the danger was real.

If Michael Jowers was attacked in his home or on his premises, he had no duty to retreat and had the lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm, if it was necessary to prevent commission of a forcible felony.

Another defense raised by Michael Jowers which is an issue for your determination is whether Michael Jowers was privileged to use deadly force against Michael Bessent.

The Florida Statute 782.02 states, the killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing. Those are your instructions on self-defense and privilege. You may -

A JUROR: Your Honor -

THE COURT: You can't ask any questions. You can return to the jury room to deliberate. The only questions I can answer are those questions that the jury sends out to me in written form.

After retiring again, the jury asked a second question:

> Is he within the law to kill in self-defense if he could have defended himself otherwise?

The trial judge then told the jury that since he had already read the self-defense and privilege instructions twice, there was no other appropriate comment he could make in response to the question. The jury returned a verdict in favor of Jowers. After final judgment, the court denied appellant's motion for new trial.

Jowers' intentional ending of a human life, through gunshot wounds fired at close range, warrants our close examination of the record. In this case there were six witnesses: Brian DeWitt Bessent, Brenda Hot, Mary Bessent Cote, Michael Jowers, Sheryl Young, and Deborah Bessent Jowers. Testimonies of Mr. Bessent, father of the decedent, Mrs. Cote, first wife of the decedent, and Brenda Holt, sister of the decedent, were all brief and not directly related to the killing. The testimonies of Michael Jowers, Mrs. Jowers, and Miss Young were by deposition. These key witnesses were not heard or observed by the jury or the trial judge.

In these circumstances, the presumption of correctness which ordinarily attaches to the trial court's fact findings is slight because the jury and trial judge have not seen and heard the witnesses. As to these key witnesses, the appellate court has the same record before it as did the trial court and therefore has the same opportunity to weigh its evidentiary value. *Hinkle v. Lindsey*, 424 So. 2d 983 (Fla. 5th DCA 1983). *See also* *West Shore Restaurant Corp. v. Turk*, 101 So. 2d 123 (Fla. 1958); *Conklin v. Pruitt*, 182 So. 2d 644 (Fla. 1st DCA 1966).

These evidentiary sources, I think, clearly reveal certain salient facts about the events immediately preceding Michael Bessent's death. First, at no time during his confrontation with Jowers, either in the yard, on the porch, or in the

house, did Bessent display or threaten Jowers with a weapon of any sort. Bessent was at all times unarmed. Second, Bessent had left the house and, in all probability, would have departed on his motorcycle had not Jowers initiated the argument by going out into the front yard to accost Bessent. Third, the disparate physical abilities of Bessent and Jowers are evidenced by the fact that Jowers had no real trouble in besting Bessent and pinning him to the ground. Fourth, Jowers reentered the house, closed the door, and told Deborah Bessent to call the police. It was Jowers who reopened the door (thus making it possible for Bessent to fore his way into the house) and exhibited his gun to Bessent. Once he had again entered the house, Bessent used no force whatsoever on Jowers when Jowers shot him at close range with a .357 magnum. At best, Jowers may have feared another fistfight with a man who had been drinking and whom he had already easily brought under control. But there was nothing to cause Jowers to fear for his life, or for that matter, for the lives of Deborah Bessent and her children; nothing, in short, which would have justified the use of deadly force. Finally, although Jowers had given instructions to call the police, he shot to kill rather than cripple. In my view, these facts amply demonstrate that Jowers had no legal justification in killing Bessent and that, accordingly, the jury's verdict was against the manifest weight of the evidence. On this basis alone, I would find that reversal and a new trial are warranted.

I also think that that part of the jury instruction which refers to section 782.02, Florida Statutes (1983)[2] severely misled the jury because it implies that once an intruder enters a home, the occupant can use deadly force to prevent any felony, and not merely those which are life-threatening. On this rationale, an armed homeowner, upon confronting an unarmed juvenile burglar in his home, may kill the juvenile with impunity, notwithstanding that the homeowner does not fear for his life and notwithstanding that a reasonable man similarly situated would not fear imminent death or serious bodily injury. *See* Note, *Lovers and Other Strangers: Or When Is a Home a Castle?*, 11 FLA. ST. U. L. REV. 465 (1983).

Clearly, this is not the law. Section 782.11, Florida Statutes (1983), which states that "[w]hoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter" limits the scope of section 782.02 by engrafting a standard of necessity on the justifiable use of deadly force. The Florida Supreme Court recognized this very principle in *Popps v. State*, 120 Fla. 387, 162 So. 701, 702 (1935), when it stated that "a plainly unnecessary killing, even defending oneself against an unlawful personal attack being made by the person slain, may be deemed manslaughter, where a plea of justifiable homicide under [section 782.02] is interposed as a justification, but such defense is not sufficiently supported to constitute an absolute bar to conviction." Just this past year, the court stated:

> A homeowner is not entitled to use deadly force to protect his person or dwelling in all instances. A homeowner may use deadly force to protect himself or his dwelling only if there exists a reasonable belief that such force is necessary. *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986); *see also Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981).

The trial court should not give instructions to the jury which are confusing, contradictory, or misleading. *Butler*, 493 So. 2d at 452. It is manifest that the trial judge's instructions suggesting that Jowers had a carte blanche right to kill Bessent once the latter entered the house confused the jury, for they requested not once, but twice, to be given a clarification on the justifiable use of deadly force. It bears repeating that the jury's second request for clarification queried whether Jowers was within the law to kill Bessent in self-defense if he could have defended himself otherwise. To my mind, that the jury posed this question to the trial judge after he had completely reread them the instructions on self-defense and privilege illustrates not only that the instructions were confusing; it also points to the inescapable conclusion that the jurors simply could not believe that the law as to the justifiable use of deadly force in a dwelling house was as the trial judge explained it to them.

I recognize that during the trial, appellant did not request instructions which would have taken

[2] The statute provides: "The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or in any dwelling house in which such person shall be."

into account the specific limitations on section 782.02 which I have discussed, and which Florida courts have acknowledged. I nevertheless would find that the trial court's statement of the law of justifiable use of deadly force, as it appears in section 782.02, is so misleading as to have been fundamental error. If it "is fundamental that when the trial judge purports to give a charge on justifiable homicide, that every element of justifiable homicide ... should be given," *Bagley v. State*, 119 So. 2d 400, 403 (Fla. 1st DCA 1960), then it follows that the limitations on such a defense, as they appear in statutes and case law, are similarly fundamental.

Jowers' killing of an intoxicated and unarmed man whom he had already outfought was a consequence he could have easily averted by simply remaining inside Deborah Bessent's house until the police arrived. For the foregoing reasons, and because I believe that the majority's opinion places this court's imprimatur on a senseless and unlawful killing, I respectfully dissent.

§ C. Defense of Others

YOUNG v. WARREN

95 N.C. App. 585, 383 S.E.2d 381 (1989)

GREENE, Judge

In this civil action the plaintiff appeals from a final judgment entered by the trial court, pursuant to a jury verdict, denying any recovery on a wrongful death action.

The evidence introduced at trial showed that defendant shot and killed Lewis Reid Young ("Young") on 12 May 1986. The death occurred as a result of a 20-gauge shotgun blast fired at close range into the deceased's back. On 14 October 1986, the defendant pled guilty to involuntary manslaughter.

Prior to the shooting, in the early morning hours of 12 May 1986, Young, who had been dating defendant's daughter for several months, went to the home of defendant's daughter who lived with her two children within sight of the defendant's residence. Upon arriving at the defendant's daughter's home, Young threw a large piece of wood through the glass in the front door. He then entered the home by reaching through the broken window and unlocking the door. Once inside the house Young argued with the defendant's daughter and "jerked" her arm. At that point, the defendant arrived with his loaded shotgun, having been awakened by a telephone call from a neighbor, his ex-wife, who had told him "something bad is going on" at his daughter's house. When the defendant arrived at his daughter's house, he heard screaming and saw Young standing inside the door. The defendant then testified:

> **A**. I told him like, `Come on out. This doesn't make any sense,' and he kind of came forward, you know, kind of had his hands up like that. (Indicating) I backed away from the door and I told him to get on out. `This can be taken care of tomorrow,' or something to that effect.
>
> **Q**. You told him to get the hell out, didn't you?
>
> **A**. Well, okay; something like that.
>
> **Q**. Okay. And then what happened?
>
> **A**. Then he walked out the door and I just backed up like he came out the door and he walked over about six feet. There is a cement porch there, and he stepped right there, and I was behind him anywhere from a foot to eighteen inches, maybe even two foot, and he stopped. And in my opinion, he started to turn around....
>
> **Q**. What did he do?
>
> **A**. He stopped and started to lower his hands and started to turn around.
>
> **Q**. What did you do?
>
> **A**. I prodded him with the gun and told him to get on out, and that's when it went off.

The trial judge submitted two issues to the jury, the second issue being submitted over the objection of the plaintiff:

> 1. Did Lewis Reid Young, deceased, die as a result of the negligent acts of the defendant, William S. Warren?

Answer: Yes.

2. Did the defendant, William S. Warren, act in the lawful defense of his daughter, Autumn Stanley, and her children, his grandchildren?

Answer: Yes.

Pursuant to the jury's answers to the issues submitted by the judge, the trial court ordered "that the plaintiff, Lewis Rankin Young, Jr., have and recover nothing of the defendant, William S. Warren, and that the costs be taxed against the plaintiff."

The determinative issue is whether the trial court erred in submitting the defense of family issue to the jury.

I

We first determine whether a defendant in a civil action may assert defense of family to justify assault on a third party. While self-defense and defense of family are seen more often in the context of criminal law, these defenses are nonetheless appropriate in civil actions. *See* *Haris v. Hodges*, 57 N.C. App. 360, 291 S.E.2d 346, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982); S. SPIESER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS Sec. 5:8 at 802 (1983) (self-defense and defense of others recognized in both criminal and civil law); 22A AM. JUR. 2D *Death* Sec. 163 at 237 (1988) (the "defense of self-defense is available in a wrongful death action").

If the defenses apply, the defendant's conduct is considered "privileged" and the defendant is not subject to tort liability for actions taken within the privilege. SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:6 at 794. The defenses, as they result in avoidance of liability, are considered affirmative defenses and must be affirmatively pled. N.C.G.S. Sec. 1A-1, Rule 8(c) (1983); *see also* SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:8 at 802. The burden of proof is on the defendant to prove the defenses by a preponderance of the evidence. Annot. "*Death Action - Self Defense - Proof*," 17 A.L.R.2D 597, 601 (1951).

An assault on a third party in defense of a family member is privileged only if the "defendant had a well-grounded belief that an assault was about to be committed by another on the family member...." *State v. Hall*, 89 N.C. App. 491, 494, 366 S.E.2d 527, 529 (1988). However, in no event may defendant's action be in excess of the privilege of self-defense granted by law to the family member. *Id.*; SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:10 at 810. The privilege protects the defendant from liability only to the extent that the defendant did not use more force than was necessary or reasonable. PROSSER & KEETON, THE LAW OF TORTS Sec. 20 at 130 (5th ed. 1984); *Hall*, 89 N.C. App. at 493, 366 S.E.2d at 528. Finally, the necessity for the defense must "be immediate, and attacks made in the past, or threats for the future, will not justify" the privilege. PROSSER & KEETON, THE LAW OF TORTS at 130.

The defendant did not properly plead in his answer the "defense of family." N.C.G.S. Sec. 1A-1, Rule 8(c) (matter constituting affirmative defense must be pled). The parties neither expressly nor impliedly consented to trying the issue of "defense of family." In fact, the plaintiff objected to the submission of this issue to the jury. Procedurally, no grounds existed for placing the issue before the jury. *See* *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984) (when affirmative defense is not pled, parties may by "express or implied consent" waive pleading of the affirmative defense).

Additionally, the record contains no evidence that the defendant reasonably believed his daughter was, at the time of the shooting of the plaintiff, in peril of death or serious bodily harm. At that time, the plaintiff stood outside the house with his back to the defendant. Defendant's daughter and children were inside the house, removed from any likely harm from plaintiff. Accordingly, assuming arguendo the "defense of family" had been adequately pled or tried by consent, the evidence in this trial did not support the submission of the issue to the jury, and the plaintiff is entitled to a new trial. *See* *Hall*, 89 N.C. App. at 494, 366 S.E.2d at 529; *cf.* *Harris*, 57 N.C. App. at 361, 291 S.E.2d at 347 (self-defense issue for jury only after evidence was presented from which jury may infer defendant acted in self-defense).

II

On remand, as several of the additional issues raised by plaintiff's assignments of error may arise at re-trial, we briefly address them.

A

Plaintiff first contends the trial court erred in denying his in limine motion seeking to prevent the admission of testimony concerning Young's possession of a firearm and his blood/alcohol

level. We agree. An autopsy report indicated Young's blood/alcohol level at the time of his death was .23 and that a detective removed a .22 caliber pistol from plaintiff's pocket after his death. However, no testimony exists on record that the defendant knew Young had a handgun in his possession or that he was aware that Young had consumed any alcohol. Accordingly, we determine this evidence was not relevant as it had no tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. Sec. 8C-1, Rule 401 (1988). Therefore the evidence was not admissible, and the motion in limine should have been allowed. N.C.G.S. Sec. 8C-1, Rule 402 (1988).

B

The plaintiff next argues the trial court incorrectly instructed the jury as follows:

> The defendant's plea of "guilty" in the criminal case may be considered by you on the issue of the defendant's potential liability in this civil case. However, I instruct you that this conviction is not conclusive of the defendant's civil liability because this case involves different parties....

We find no error in this part of the trial court's instructions. Evidence of a plea of guilty to a criminal charge is generally admissible in a civil case, but it is not conclusive evidence of defendant's culpable negligence. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963).

C

Plaintiff next argues that his motion for directed verdict on the issue of the defendant's negligence should have been allowed since defendant had pled guilty to manslaughter. Again, the evidence of the plea of guilty to manslaughter is only some evidence in the civil proceeding and does not justify a directed verdict for the plaintiff on the issue.

D

Plaintiff finally argued in his motion for directed verdict that, as a matter of law, Young was not contributorily negligent. Again we disagree. Whether Young's actions amounted to contributory negligence in this case is a question for the jury. *See Taylor v. Walker*, 320 N.C. 729, 734-35, 360 S.E.2d 796, 800 (1987). We do note, if on retrial the jury determines the defendant's negligence amounted to a wilfull or wanton injury, the defense of contributory negligence would not be available. *Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967).

As the other assignments of error raised by the plaintiff are not likely to recur at trial, we do not address them.

New trial.

Judges ARNOLD and LEWIS concur.

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§ D. Defense of Property

C.I.T. CORPORATION v. BREWER

146 Fla. 247, 200 So. 910 (1941)

PER CURIAM

On writ of error we review judgment in favor of the plaintiff in a suit for damages alleged to have been inflicted by an assault and battery. The facts to sustain a verdict as gleaned from the record are, in effect: One Amos had bought an automobile under conditional sales contract. The conditional sales contract had been assigned to C.I.T. Corporation, a corporation. J.B. Brewer was president and manager of J.B. Brewer, Inc., a Florida corporation, engaged in the business commonly known as an automobile garage in Fort Pierce, Florida. Amos had delivered the automobile to J.B. Brewer, Inc., to be repaired. The automobile had been repaired. Amos had not paid the repair bill. The automobile was in possession of J.B. Brewer, Inc., just outside of the garage building on the premises of J.B. Brewer, Inc. The ignition key had been removed from the automobile by the garage owner or its agent.

One Denmark was agent for C.I.T. Corporation with authority to collect installments due under conditional sales contract and to

repossess automobiles in event of default in payment. Amos and Denmark went into the garage of J.B. Brewer, Inc., and requested J.B. Brewer to make payment for Amos of the amounts in default under the conditional sales contract. Brewer declined to do so, whereupon Denmark said that he would repossess the automobile. J.B. Brewer told Denmark that he was holding the car for the amount due his corporation for repairs and also told Denmark that he could not remove the car from his possession without paying the repair bill. While they were discussing the matter Brewer's attention was called somewhere else and as he turned away Denmark got into the automobile, found the ignition key was not in it and thereupon attempted to remove the automobile from the premises by using the starter as motive power. The noise of the operation of the starter attracted Brewer; he returned and attempted to get Denmark out of the automobile. Denmark resisted and put up a fight. Brewer called on some of his employees to assist him and together they separated Denmark from the automobile. But, in the fight or altercation over possession of the automobile Denmark injured Brewer by either striking him or kicking him in or about the abdomen, thereby causing a serious hernia resulting in great pain and suffering and in permanent injury.

Plaintiff in error has posed seven questions for our consideration, stated as follows:

> **1**. Has the holder of a conditional sales contract upon an automobile the right to take possession of the automobile when it is parked on the premises of an automobile sales agency and garage serving the public when the holder or his agent is rightfully on the premises and did not commit a breach of the peace or trespass in entering into and taking possession of the automobile?
>
> **2**. Has the holder of a conditional sales contract on an automobile the right to defend his possession of the automobile after he has rightfully repossessed it and is in complete charge and control of it?
>
> **3**. Has the holder of a mechanic's and materialmen's lien on an automobile the right to physically and forcibly take possession of the automobile from one holding the conditional sales contract of prior date and effect, who is actually in custody and possession thereof?
>
> **4**. Is it incumbent upon a trial court to fully charge on all material questions of law pertaining to the facts before the jury after it is specifically requested by one of the parties litigant?
>
> **5**. Is it incumbent upon a trial court to instruct the jury at the request of one of the parties litigant as to the law of priority of liens when such issues being before the jury may be confusing in the absence of such instructions?
>
> **6**. Is it prejudicial error to charge the jury as follows: `One who attempts to take the law in his own hands and attain his property rights does so at his peril and is responsible in damages for an assault and battery committed in accomplishing the desired result without process of law' where there is no evidence in the record that plaintiff in error did attempt to take the law into his own hands, and at no time or place in the instructions to the jury did the Court enlarge or enlighten that statement?
>
> **7**. Is the verdict rendered in this cause in accordance with the substantial justice of the case as shown by the record?

The first and second questions indulge the unwarranted assumption that the agent of the holder of the conditional sales contract repossessed the automobile in question without committing a breach of the peace or a trespass in taking possession of the automobile.

In *C.I.T. Corporation et al. v. Reeves*, 112 Fla. 424, 150 So. 638, 639, in discussing the rights of the holder of retain title contract to retake property, we said: "Without doubt, trespasses or assaults perpetrated in exercising the right to peaceably retake possession, as conferred by the contract, are not contemplated by any of the contractual provisions, and if any such trespasses or assaults are committed by the title holder or his agent, in the course of exercising the contract right given, an action on the case for damages will clearly lie. *See* *Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177."

Authorities are legion to support that enunciation. *See* *Percifield v. State*, 93 Fla. 247, 111 So. 519; Annotation and authorities cited 9 A.L.R. 1180 *et seq*., also annotations and

authorities cited 105 A.L.R. 926 *et seq*.

The third question unwarrantedly assumes that the agent of the holder of the conditional sales contract had accomplished taking possession of the automobile, that is of divesting J.B. Brewer, Inc., of the possession of the automobile when Brewer undertook to remove Denmark from the automobile. The jury was warranted in finding a contrary condition. There is ample evidence to establish it as a fact that Denmark was attempting to forcibly and against the will of the person in possession of the property remove that property from the possession of the garage owner.

In *Crews et al. v. Parker*, 192 Ala. 383, 68 So. 287, 288, that court said: "Any act or action manifesting force or violence, or naturally calculated to provoke a breach of the peace, in the recaption of property renders the actor a trespasser, and precludes him from availing of his right to retake the property. To enter one's premises, and notwithstanding the possessor's protest, and in a rule and rough manner to take chattels against his will, is, we think, clearly not an assertion of a right in a peaceful manner."

In *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116, 94 N.E. 793, it was held: "A corporation is liable in damages as an individual for a tort committed by its agent in the line of his employment and within the scope of his authority, though it be malicious and against its express order." *See also* *Peddie v. Gally*, 109 App. Div. 178, 95 N.Y.S. 652; *Regg v. Buckley-Newhall Co.*, 72 Misc. 387, 130 N.Y.S. 172; *Gerstein v. C. F. Adams Co.*, 169 Wis. 504, 173 N.W. 209; *Singer Sewing Machine Co. v. Methvin*, 184 Ala. 554, 63 So. 997; *Lambert v. Robinson*, 162 Mass. 34, 37 N.E. 753, 44 Am. St. Rep. 326.

So it may be said that the attempt to seize manual control of a chattel and to remove it from the premises of one who is in lawful possession thereof by one claiming the right to repossess it under conditional sales contract after he had been expressly denied the right by the person in lawful possession constitutes a trespass for which damages may be awarded; and where such trespass is committed by the agent of the owner of a conditional sales contract when the agent is shown to have general authority to repossess property covered by such contracts the employer is liable for the trespass or assault and battery committed and may be required to answer in damages for the same.

The fourth, fifth and sixth questions may be considered together.

We have considered the charges and instructions given the jury by the trial court and find that they sufficiently cover the law of the case and sufficiently clearly state the issues to be determined by the jury.

No reversible error is reflected in the refusal to give certain requested charges. There appears ample evidence in the record to support the verdict and the judgment.

A consideration of the entire record discloses no reversible error. The judgment is affirmed.

So ordered.

BROWN, C.J., and WHITFIELD, TERRELL, BUFORD, and CHAPMAN, JJ., concur.

KATKO v. BRINEY

183 N.W.2d 657 (Iowa 1971)

MOORE, Chief Justice

The primary issue presented here is 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. We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer *infra*.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques. At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

After careful consideration of defendants' motions for judgment notwithstanding the verdict

and for new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants.

* * *

II. Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and "messing up of the property in general". The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted "no trespass" signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set "a shotgun trap" in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs. Briney's suggestion it was lowered to hit the legs. He admitted he did so "because I was mad and tired of being tormented" but "he did not intend to injure anyone". He gave no explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

III. Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

IV. The main thrust of defendants' defense in the trial court and on this appeal is that "the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief"....

* * *

PROSSER ON TORTS, Third Edition, pages 116-118, states:

> [T]he law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendants' personal safety as to justify a self-defense ... spring guns and other mankilling devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind." RESTATEMENT OF TORTS, section 85, page 180, states: "The value of human life and limb, not only tho the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as it is stated in § 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises.... A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present."

* * *

In *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268, 275, 42 S. Ct. 299, 66 L. Ed. 615, 617, the court states: "The liability for spring guns and mantraps arises from the fact that he defendant has ... expected he trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."

* * *

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

All Justices concur except LARSON, J., who dissents.

LARSON, Justice.

I respectfully dissent, first, because the majority wrongfully assumes that by installing a spring gun in the bedroom of their unoccupied house the defendants intended to shoot any intruder who attempted to enter the room. Under the record presented here, that was a fact question. Unless it is held that there property owners are liable for any injury to a intruder from such a device regardless of the intent with which it installed, liability under these pleadings must rest upon two definite issues of fact, *i.e.*, did the defendants intend to shoot the invader, and if so, did they employ unnecessary and unreasonable force against him?

It is my feeling that the majority oversimplifies the impact of this case on the law, not only in this but other jurisdictions, and that it has not thought through all the ramifications of this holding.

There being no statutory provisions governing the right of an owner to defend his property by the use of a spring gun or other like device, or of a criminal invader to recover punitive damages when injured by such an instrumentality while breaking into the building of another, our interest and attention are directed to what should be the court determination of public policy in these matters. On both issues we are faced with a case of first impression. We should accept the task and clearly establish the law in this jurisdiction hereafter. I would hold that there is no absolute liability for injury to a criminal intruder by setting up such a device on his property, and unless done with an intent to kill or seriously injure the intruder, I would absolve the owner from liability other than for negligence. I would hold the court had no jurisdiction to allow punitive damages when the intruder was engaged in a serious

criminal offence such as breaking and entering with intent to steal.

Questions and Notes

1. If spring guns are an unacceptable means of protecting property from burglary, what about ferocious dogs? If Katko had received the same injuries from a Doberman Pinscher, would there be liability? *See* RESTATEMENT (TORTS) 2d, § 516, Watchdogs, which in turn relies upon §§ 82-85.

2. A Miami storekeeper electrocuted a burglar by wiring a grate to an electrical outlet. *Miami Herald*, Oct. 4, 1984. What defenses could the storekeeper raise?

3. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court reviewed a case in which a policeman shot a burglar who was attempting to flee the burglary scene. The court held that it is unconstitutional to use deadly force against a fleeing felon unless the suspect poses an immediate threat to the officer or a threat to others. Would this ruling affect *Katko*-like cases in the future?

4. OKLA. STAT. ANN., tit. 21, provides:

§ 1289.25. Unlawful entry of a dwelling - Physical or deadly force against intruder - Affirmative defense and immunity from civil liability

A. The Legislature hereby recognizes that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes.

B. Any occupant of a dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made unlawful entry into that dwelling, and when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.

C. Any occupant of a dwelling using physical force, including but not limited to deadly force, pursuant to the provisions of subsection B of this section, shall have an affirmative defense in any criminal prosecution for an offence arising from the reasonable use of such force and shall be immune from any civil liability for injuries or death resulting from the reasonable use of such force.

Would you support the passage of such a statute in your jurisdiction?

§ E. Statutory Privilege

Note. In *Moore v. Pay'n'Save, supra*, the issue of statutory privilege is presented along with an analysis of whether the tort of false imprisonment had been committed. The privilege to detain someone has been created by statute not only for the storekeepers, but also for law enforcement personnel. Note that it extends only to detention based upon *reasonable grounds* and only for a *reasonable time*. That will make it a jury question in most cases.

APPENDIXES

APPENDIX A
THE PROCEDURAL HISTORY OF A SIMPLE CASE

Introduction. Appellate court cases are written for an audience that already understands the legal process. As a beginning law student you are trying to do (at least) two things at once: (1) understand the substantive doctrine (in this class, tort law) within a particular case; but to do so you must (2) learn how that doctrine gets expressed in the course of an appellate opinion. This Appendix is designed to help you quickly accomplish goal #2 so that you can do a better job with goal #1.

As noted in the introduction, appellate opinions are the bread and butter of this and most other casebooks. The key to understanding an appellate opinion is to recognize that it is based upon a claim of *error*. When the losing party appeals to a higher court to try to reverse the outcome of a case at trial, he must identify where along the line the trial court made its mistake(s). It is those mistakes that the appellate court is entitled to "correct" (if necessary by requiring the case to be retried). By understanding how a case proceeds from start to finish, you will have a better understanding of how the rights and obligations of the parties are enforced.

For the most part what follows assumes that something like the Federal Rules of Civil Procedure are in effect. Some states use different names for the procedures, but the general pattern is common to virtually all jurisdictions.

Background Facts and Investigation. Paula Prentice was driving down Oak Street in her red Oldsmobile convertible. She was observing the speed limit. A blue Ford, driven by Dennis Daniels, attempted to make a left turn onto Oak Street from Flag Drive, which has a stop sign. Dennis didn't see Paula coming. As Dennis came into view, Paula applied her brakes but could not avoid hitting him. Both cars were damaged extensively. Paula said she was in a lot of pain but managed to stay until the police arrived. The officer, Ophelia Orton, talked to all the witnesses and wrote up an accident report, finding Daniels at fault.

Both Paula and Dennis reported the accident to their insurance companies. Both had insurance that covered collision damage to their cars as well potential liability they might have to someone injured by their driving. Both insurance companies assigned **CLAIMS ADJUSTERS** to the case. The job of the claims adjuster is to work with the person making claims against the insurance company and attempt to get the case resolved.

Starting the lawsuit: The Pleadings.[1] Paula went to see a lawyer, Patricia Leonia, who said she would try to negotiate with the insurance company to get a favor-able settlement. To make a long story short, they could not agree, and so Patricia prepared a **COMPLAINT** against Dennis (*see* Figure 1). In the complaint Paula is listed as the **PLAINTIFF**, and Dennis, since he is the one against whom relief is sought, is named the **DEFENDANT**. The complaint contains the facts necessary to let the defendant know what the claim is all about and what kind of action the plaintiff wants the court to take against the defendant.[2]

After it was prepared and signed by the plaintiff's lawyer, the complaint was **FILED** at the County Courthouse in the county where the plaintiff wants the case to be heard, usually in the place where the plaintiff lives. When the complaint was taken down to the courthouse, a court clerk looked at it to see that it was ready for filing, then collected the filing fee and assigned the case a number. The plaintiff must also **SERVE** the complaint on the defendant,[3] along with a **SUMMONS** that requires the defendant to answer the complaint (*see* Figure 2). The filing of the complaint gets the case into the judicial system, but the defendant must be notified of other claim before he is obligated to respond to it.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	Action No. _____
v.	)	COMPLAINT FOR PERSONAL INJURIES (MOTOR VEHICLE)
Dennis Daniels, Defendant	)	

Paula Prentice, for her claim against Dennis Daniels, alleges as follows:

1. Plaintiff is a resident of the State of Columbia, County of Linden.

2. On information and belief, plaintiff alleges that Dennis Daniels is a resident of the State of Columbia.

3. On June 1, 1990, plaintiff was driving northbound on Oak Street.

4. At approximately 1:30 p.m. a car driven by defendant DENNIS DANIELS negligently made a left turn into the path of Paula Prentice, causing the cars to collide.

5. As a direct and proximate result of the negligence of DENNIS DANIELS, Paula Prentice suffered physical injury, property damage, and economic loss, in amounts to be proven at time of trial.

WHEREFORE, Paula Prentice prays for the following relief:

1. For a judgment against defendant DENNIS DANIELS for damages sustained, in an amount to be determined at time of trial;

2. For costs of the action, including a reasonable attorney's fee; and

3. For such other and further relief as this court should deem just and proper.

DATED this 9th day of September, 1990.

/s/ Patricia Leonia

Patricia Leonia
Attorney for Plaintiff

1 **PLEADINGS** refer to the complaint(s) and answer(s) setting forth the parties who are suing, whom they are suing, and the facts upon which they base their claims and defenses.

2 Note that in this case the complaint sets forth each of the elements of a negligence claim: the defendant was *negligent*, his negligence was a *proximate cause* of injury to the plaintiff, and the plaintiff suffered *compensable damages* as a result.

3 Usually the service of process is done by a professional process-server, who is experienced in locating defendants and making sure that they personally receive a copy of the summons and complaint.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	Action No. _____
v.	)	SUMMONS (20 DAY)
Dennis Daniels, Defendant	)	

TO THE ABOVE-NAMED DEFENDANT(S):

A lawsuit has been started against you in the above-entitled court by the above-named Plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and serve a copy upon the person signing this Summons within 20 days after the service of this Summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This summons is issued pursuant to Rule 4 of the Justice Court Rules.

DATED this 9th day of September, 1990.

/s/ Patricia Leonia

Patricia Leonia
Attorney for Plaintiff

Once the complaint has been served and filed, the defendant has a certain amount of time (in this case 20 days) in which to respond to the complaint. If the defendant does not respond to the complaint, the plaintiff may be able to take a **DEFAULT** judgment,[1] which (as the name implies) means that the plaintiff wins simply because the other side did not respond to the summons and com-plaint with an answer or appropriate motion.

However, Dennis Daniels took the summons and complaint immediately to his claims adjuster, who then hired a lawyer, Duane Ludlow, to represent Dennis.[2] A few days after receiving the com-plaint, and well within the time al-lowed, Duane filed an **ANSWER** on Dennis' behalf (*see* Figure 3).[3] The answer responds to each of the allegations of the complaint, and asserts any **AFFIRMATIVE DEFENSES** [4]

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1 Frequently a default judgment will be entered because the defendant (or his attorney) did not get a response in on time. (This is a common source of malpractice claims.) The defendant may ask for the default judgment to be set aside if he can show that his failure to answer was excusable, if there appears to be some merit to the defendant's position (so that further proceedings might produce a different result), and if the plaintiff has not been prejudiced by the delay. It is discretionary with the judge whether to grant such motions, and even if she does, she may condition setting aside the judgment upon payment of substantial sanctions.

2 Part of the insurance coverage provided by Dennis' policy is an agreement by the insurance company to provide legal representation (a defense) against any legal action brought against the insured.

3 He will also send (serve) a copy of the answer to the plaintiff's lawyer. After the initial service of the complaint, the parties must give the other side copies of any papers that they file. The attorneys, rather than the parties themselves, are sent the papers.

4 An affirmative defense is one that will defeat (or reduce) the plaintiff's claim even if the plaintiff is able to establish all of the elements of her claim. For example, the statute of limitations bars claims that are not filed within the time permitted (in Washington, three years after a personal injury claim accrues). Even if the plaintiff is able to prove negligence, causation, and damages, she will lose if the defendant can prove that the claims was not filed within the limitations period.

that the defendant thinks might apply to the case, and then informs the court of what action the defendant wants the court to take.[1]

Pretrial motions and discovery. If nothing else were done by either party, eventually the case would be put on the trial calendar. However, in modern practice the lawyers use the time interval between initial pleadings and trial to conduct **DISCOVERY** and to file any motions that might help them prepare for trial. Discovery is the opportunity for each side to learn what evidence the other party has that might be relevant to the case. There are several different forms of permissible discovery. One is **INTERROGATORIES**, which are written questions addressed to the other party. For example, Duane Ludlow, the defendant's attorney, might send a set of interrogatories to the plaintiff asking for information about her work history, the nature of her medical complaints, the names of witnesses who have knowledge of the accident, etc. Another commonly used form of discovery is the **DEPOSITION**, which is testimony by a witness in front of a court reporter. Patricia Leonia, Paula's lawyer, might schedule the deposition of Dennis to find out why he is claiming that Paula was negligent in failing to avoid the accident. The lawyers ask questions, and the witness must

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	Action No. 90-12345
v.	)	ANSWER
Dennis Daniels, Defendant	)	

DENNIS DANIELS, defendant, answers the plaintiff's complaint as follows:

1. Paragraph 1 is DENIED for lack of information and belief.

2. Paragraph 2 is ADMITTED.

3. Paragraph 3 is ADMITTED.

4. As to Paragraph 4, defendant admits that an accident occurred at approximately 1:30 p.m. involving plaintiff's car and defendant's car, and DENIES the balance of the allegation.

5. Paragraph 5 is DENIED.

AFFIRMATIVE DEFENSES

1. Plaintiff was negligent in failing to avoid the collision, and her damages, if any, were solely and proximately caused by her own negligence.

WHEREFORE, defendant prays for the following relief:

1. For a judgment dismissing plaintiff's claim with prejudice;

2. For costs of the action, including a reasonable attorney's fee; and

3. For such other and further relief as this court should deem just and proper.

DATED this 25th day of September, 1990.

/s/ Duane Ludlow

Duane Ludlow
Attorney for Defendant

[1] The defendant also might assert other claims in his answer. For example, if Dennis had been injured (or if his insurance company wanted to collect the money paid out for the damage to Dennis' car), he might file a **COUNTERCLAIM** against Paula. The counterclaim is just like a complaint, except it is filed by a defendant in response to being sued over the same incident. Or Dennis might wish to file a **THIRD-PARTY COMPLAINT** against someone else. A third-party complaint allows a defendant to sue a third party who might be responsible for the injury, as part of the same lawsuit. In this case the Dennis might file a third-party complaint against Linden County for failing to design or maintain the intersection properly to give him sufficient visibility of oncoming traffic.

answer them, and the testimony is taken down by a court reporter, who later transcribes it. The lawyers can also send a **REQUEST FOR PRODUCTION OF DOCUMENTS**, which requires the party to respond with any relevant documents such as photographs of the accident scene, medical records, etc.

The parties may also bring pre-trial motions to test the sufficiency of the other party's claims, or to get a legal ruling on some issue. If the defendant doesn't think that the plaintiff has stated enough facts in the complaint - even assuming the facts were true - to justify the relief requested, then he may file a **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**. In older cases this motion was called a **DEMURRER**. The judge would look at the facts alleged in the complaint and determine whether (if proven) they would justify compensation by the defendant.[1] For example, suppose in this case Patricia had left out of her complaint the allegation that Dennis had driven *negligently*. Without this allegation the complaint would be legally insufficient, since a collision by itself doesn't require one party to compensate the other. Appellate cases dealing with motions to dismiss or demurrers are commonly found in first-year casebooks, since in such cases the court will frequently attempt to articulate the dividing line between a case that adequately states a claim for negligence (or some other theory) and one that does not.

Another way to get a court's ruling on the law to be applied to the case is through a **MOTION FOR JUDGMENT ON THE PLEADINGS**. This motion is similar to the demurrer, except that it can be made by plaintiff as well as the defendant. Finally, either party may ask for **SUMMARY JUDGMENT**. Modern rules of procedure allow either party to test whether their opponent has enough evidence to support the claims made in the pleadings. For example, Dennis denied that he was negligent. Patricia might file a motion attaching a copy of the police report citing Dennis as the party at fault, asking for the judge to grant summary judgment on the issue of liability. It would then be up to Dennis to show that he had enough evidence (such as his own testimony that Paula was going too fast) to require that the jury decide.[2]

Trial. Once the parties are ready for trial, the case will be scheduled on the trial calendar, and on the appointed day (unless there is a continuance or delay in the proceeding) the lawyers and their clients will appear before the trial judge. If either party has requested a jury, the potential jurors will be prepared for jury selection. The process by which the prospective jurors are questioned about their background and potential attitudes about the case is called **VOIR DIRE**. After the jurors have been selected and sworn in, the lawyers get a chance to make an **OPENING STATEMENT**. The lawyers outline the evidence that the jurors are going to hear, and while they are not permitted to *argue* (that is reserved for closing argument), they will emphasize the facts that put their client in the most favorable light.

Then the plaintiff's lawyer calls witnesses, in whatever order she chooses. In this case, Patricia might call the police officer, Paula herself, and perhaps a doctor who can explain the nature of her physical complaints. After a witness is sworn in, the lawyer who called the witness asks questions. This is called **DIRECT EXAMINATION**. If a question is asked improperly, or if the opposing lawyer doesn't believe the testimony is relevant, he will object - interrupting between the asking of the question and the answer. The trial judge must then rule on the objection, either **SUSTAINING** the objection, which does not permit the witness to answer, or else **OVERRULING** the objection, and permitting the testimony to be given. In older cases, the procedure required a lawyer to **EXCEPT** to a ruling by the trial judge in order to preserve it for appeal. In modern procedure, the only requirement is a timely objection. Frequently on appeal the issue is whether the **EXCEPTION** to the trial judge's ruling should have been sustained or overruled.

When all of the plaintiff's witnesses have testified, she **RESTS**, meaning that the case is then turned over to the defendant to present his witnesses. Before presenting witnesses, however, the defendant

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[1] A motion to dismiss (or a **MOTION TO STRIKE**, which is limited to asking the judge to remove or ignore part of a pleading) might also be used by the *plaintiff* to attack the legal sufficiency of some pleading by the defendant. For example, in this case the defendant included an affirmative defense based upon contributory negligence. If Patricia thought there was no basis in law for using this defense, she might file a motion to strike or dismiss.

[2] In a summary judgment motion, the key is showing the court that there is no genuine dispute over what the facts are, and that a trial to determine the facts is therefore unnecessary. Unlike a motion for a directed verdict, discussed below, a summary judgment motion does not allow the judge to weigh the facts; rather, she must determine whether the law requires a judgment based upon undisputed facts.

may ask the judge for a dismissal of the case, or a **NONSUIT**. As with the motion to dismiss for failure to state a claim, the request for a nonsuit assumes that the jury believes all of the evidence presented by the plaintiff, but claims that even so, there is no basis for a judgment in the plaintiff's favor. A similar procedure is a **MOTION FOR DIRECTED VERDICT**. The defendant may claim that the evidence is so one-sided that no reasonable jury could return a verdict for plaintiff. If the judge grants the nonsuit or directs a verdict in the defendant's favor, the trial is over, and the plaintiff may then appeal if she thinks the trial judge made a mistake. For example, suppose that in our case no one had testified about the accident itself, and there was no evidence of any negligence on Dennis' part. Dennis could move for a directed verdict, because in the absence of any evidence of negligence, a reasonable jury could only return a verdict in favor of the defendant.

Frequently the issue is whether the plaintiff has presented a **PRIMA FACIE CASE.** A prima facie (literally, "at first blush") case consists of proof of the constituent elements which make up the cause of action under which the plaintiff is suing. In this case, for example, Paula is suing in negligence, and she must prove (1) negligence (which is breach of the duty to use reasonable care), (2) causation, and (3) damages. Usually the burden of proof is upon the plaintiff, and therefore the plaintiff must prove a prima facie case before the judge will even require the defendant to put on his own evidence. Failure to supply a critical element of the cause of action will result in failure to prove a prima facie case, and thus the plaintiff will have her case dismissed by a motion for a nonsuit or a directed verdict.

But in our case Patricia presented evidence of negligence, causation, and damages, and the judge denied motions for a nonsuit and/or for a directed verdict. Then the defendant had to call his witnesses, and this time *he* conducts the direct examination and the plaintiff ask questions on cross-examination. The defendant's lawyer called Dennis himself, and Bessy Brody, who claimed to be at the intersection when the accident took place. At the conclusion of the defendant's case, either party may request a directed verdict, if the evidence is such that a reasonable jury could only come out one way. For example, if Dennis has no evidence to contradict the police report, there might be a directed verdict of liability, leaving the jury to consider only damages. But in our case Dennis testified that the traffic was clear on Oak Street when he started his turn, and that Paula was driving so fast that she didn't allow him to complete the turn before she hit him. Thus, the judge denied both motions.

After the defendant rests, the plaintiff may call **REBUTTAL** witnesses, whose testimony is limited to new issues raised by the defendant. In this case, for example, Patricia might recall Paula to testify that Bessy had her back turned when the accident took place. After all the testimony is completed, the judge then **INSTRUCTS THE JURY** on the law that applies to the case.[3] (The jury instructions are included at the end of this summary.) **JURY INSTRUCTIONS** are one of the most important features of the trial from the perspective of the beginning law student. It is there that the judge summarizes the law that applies to the case. For example, in this case the judge assigns the **BURDEN OF PROOF** to each party; Paula has the burden of establishing negligence, proximate cause, and damages.[4] The defendant, on the other hand, has the burden of establishing any affirmative defenses, such as negligence on the part of the plaintiff. The jury instructions also contain definitions of terms like "negligence," "proximate cause," and so forth. Before the judge reads the instructions, she gives the parties an opportunity to submit proposed instructions. Some of the instructions are standard boilerplate, and the judge will simply use those that are customary in her jurisdiction. However, on other points each lawyer may propose instructions that favor his client, and the judge will have to decide which of the proposed instructions more accurately states the law. If a party believes that an instruction incorrectly states the law, he may object to it, and if he loses, he may appeal that mistake to an appellate

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[3] In most cases a jury decides the issues of fact. However,t here are some cases where there is no jury, and the judge decides the issues of fact. These cases are called **BENCH TRIALS**, or may be referred to as the **JUDGE SITTING WITHOUT A JURY**. There is no jury verdict to decide the issues of fact, and so the judge will announce his **FINDINGS OF FACT**, and along with them the **CONCLUSIONS OF LAW**. For example, in this case, if there had been no jury the judge would issue findings of fact on the issues of whether Dennis negligently entered the intersection, whether that negligence caused injury to Paula, whether Paula was herself negligent, and what damages were incurred. The judge might then issue conclusions of law that determine liability for the injuries. At that point there will be the basis for entering a judgment, and then the case will parallel a case tried to a jury.

[4] As Instruction 11 states, a "preponderance" of the evidence on an issue simply means a finding that the proposition is more probable than not. This is the standard in civil cases (on most issues), and is a much lower standard than "beyond a reasonable doubt," which is required in most criminal cases.

court. Such cases are again excellent starting points for the law student, since the court is forced to articulate the subtle differences between a correct and incorrect statement of law.

After the judge instructs the jury, the lawyers make their **CLOSING ARGUMENTS**, in which they summarize the evidence that was presented, and argue why their client should win. The jury then deliberates, and if they achieve sufficient unanimity (some courts require only 10 of 12 jurors[5] to agree on each point), they return a verdict. In older cases the jury was simply asked to return a verdict for one party or the other. Modern procedure sometimes permits the use of **JURY INTERROGATORIES** or **SPECIAL VERDICT FORMS**, which list the issues in the case and ask the jury to check off their decision on each issue. In this case, for example, the jury was asked to determine whether Dennis was negligent, whether his negligence proximately caused Paula's injuries, and so forth. (See the special verdict form at the end of the jury instructions.)

Once a verdict is rendered, the judge must then enter a **JUDGMENT**. The judgment is an order of the court that ends the case (unless someone appeals) by deciding who wins and who (if anyone) must pay, and how much.[6] Prior to entering the judgment, the lawyers may present motions to the judge. The losing party often files a **MOTION FOR A NEW TRIAL**, which attempts to convince the judge either that she made a serious mistake (for example, in admitting certain evidence, or in instructing the jury), or that he did not receive a fair trial (for example, because of jury or attorney misconduct). If the judge agrees, she may order a new trial; occasionally a party is permitted to appeal from that order to ask for a reinstatement of the jury's verdict.

Another post-trial motion is a **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)**. This motion is essentially like the motion for a directed verdict, but it occurs after the jury has already deliberated. A judge will grant a JNOV if she believes that there was insufficient evidence for a reasonable jury to render the verdict it did.[7] However, in most cases there will be enough evidence to create a question about which reasonable minds could differ, and then the jury's verdict must be honored. If the verdict is for the plaintiff, the judge will then enter a judgment ordering the defendant to pay the amount of money awarded by the jury, plus **TAXABLE COSTS**. If the defendant wins, the judge will enter a judgment dismissing the plaintiff's claim, and awarding taxable costs to the defendant. Taxable costs are certain costs of litigation (usually not including the lawyer's fees), such as filing fees, witness fees, deposition transcript fees, and other miscellaneous expenses.

Appeal. Once the judgement is entered, the losing party has the right to appeal within a certain time period (usually 30 days).[8] There are a variety of different names for the party who is appealing and the party who is defending the court's judgment (*see* Figure 4).

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[5] Some courts have juries of six; in such cases only 5 of 6 may be required to agree on any single issue.

[6] Most of the time the plaintiff seeks money damages. In some cases, however, the plaintiff may want **INJUNCTIVE RELIEF**, which asks the court to order the defendant to do something, for example, to stop construction activities threatening an endangered species.

[7] Although a trial judge may have denied a motion for a directed verdict, she may still grant the JNOV. Since they are based on the same standard (whether there is enough evidence to create a jury question), does this mean the judge has changed her mind? Not necessarily. The trial judge may have actually been inclined to grant the motion for a directed verdict, but decided to allow the jury to deliberate, since it could eliminate an appeal. For example, if (as the moving party suggests) the evidence is so one-sided that it will support only one conclusion, then the jury may very well reach that conclusion. Then the prospect of appeal has been eliminated, since the losing party has had his day in court. On the other hand, if the jury reaches the "wrong" conclusion, the judge can "fix" it by granting a JNOV. Then the appellate court must decide whether there was indeed enough evidence to support the jury's verdict. If the trial court is found to be in error, the appellate court will reinstate the jury's verdict, and the case ends. Otherwise, if the trial judge doesn't let the jury deliberate, and the appellate court decides the trial judge was wrong, the case would have to be retried.

[8] Sometimes both parties will appeal; a defendant will claim that there was no basis for liability to be imposed, while the plaintiff will argue that the jury's verdict was inadequate, or the judge didn't permit the introduction of evidence which would have produced a more generous award. If both parties appeal, one party will be designated as the appellant, and the other party will be the **CROSS-APPELLANT**.

Appealing Party	Party Defending the Court=s Judgement
Appellant	Appellee
Petitioner	Respondent
Plaintiff in Error	Defendant in Error

Figure 4. Terms Used to Designate the Parties to an Appeal

Sometimes the court will refer to the parties by their combined title, such as "plaintiff-respondent," or "defendant-petitioner." The name of the court that hears initial appeals depends upon the jurisdiction's court structure (*see* Figure 5). Many state courts and the federal court system have an intermediate court (a court of appeals) that hears appeals from a trial court decision.[1] Some smaller states have only a Supreme Court that hears appeals directly from the trial court judgment. In jurisdictions with an intermediate court of appeals, the Supreme Court will usually hear only those appeals that it chooses to. The U.S. Supreme Court, for example, agrees to hear only about 5% of the cases for which review is sought.

Type of Court	Federal	Typical State
Trial	District	Superior
Intermediate Appellate	Circuit	Court of Appeals
Highest Appellate	Supreme	Supreme

Figure 5. Structure of Appeals Courts.

[1] The courts in New York are particularly confusing. The trial courts are called a "supreme court," and the intermediate courts are called the "appellate division." The highest court in New York is the Court of Appeals. Other jurisdictions have separate courts for criminal appeals. Some jurisdictions refer to the appellate court as the "court of errors," meaning the court in which losing parties can appeal for the correction of errors by the trial court.

The appeal is commenced by filing a notice of appeal. If the appellate court accepts review, it will then set up a timetable for the parties to submit the trial court record and file briefs. Each party must designate the portions of the trial court record (such as pleadings, transcripts of hearings or of court testimony, etc.) that will be needed by the appellate court to review the case. In his brief the appellant must explain to the appellate court what error he claims was committed by the trial judge. For example, he might cite an incorrect jury instruction, or the improper dismissal of a complaint that should have been allowed to go to trial. The respondent, on the other hand, will argue that the trial judge's decisions were based on a correct interpretation of the law. After the briefs have been received the court will schedule oral argument, at which time the lawyers will come to the appellate court and make brief presentations and answer the appellate judges' questions.

Some time later, the appellate court will deliver its **OPINION**, which announces the appellate court's judgment (who wins or loses) along with the explanation for its judgment. The appellate court can respond to the appeal in several different ways. If the appellate court finds no error by the trial judge, it will **AFFIRM** the judgment, and the losing party will have to pay the **COSTS ON APPEAL**, which are the filing fees, the costs of reproducing the record at trial, and so forth. In older cases the court will sometimes conclude an opinion affirming the trial court's judgment by saying "**EXCEPTIONS OVERRULED**," that is, the objection or exception taken by the appealing party has been denied.

On the other hand, the appellate court may find that the trial judge did make a mistake of sufficient gravity to require fixing, and will therefore **REVERSE** the judgment of the trial court. Reversal actually just means to take away the judgment that has been entered; it does not necessarily mean that the other party has won. The reversal may require that there be a new trial (for example, where the jury instructions were seriously defective), or it may result in a final judgment, either dismissing the plaintiff's claim or reinstating the plaintiff's judgment. The court will then **REMAND** the case (send it back) for further proceedings by the trial court in conformity to the appellate court's ruling. Older cases will sometimes use the terms "**EXCEPTIONS SUSTAINED**" in reversing a case,

meaning that the appealing party properly objected to the trial judge's handling of the case.

Modern opinions usually begin with the name of the judge who wrote the **MAJORITY** opinion, followed by her opinion announcing the judgment of the court along with the facts and reasoning that support it. Then come the **CONCURRING OPINIONS** of any judges who agree with the outcome of the case but disagree with some part of the reasoning used by the majority. Finally come the **DISSENTING OPINIONS** of judges who disagree with the outcome of the case.[2]

Very old cases, particularly British cases, were reported only by private individuals (like news reporters) rather than in a written opinion by the court itself. Thus they contain only abbreviated accounts of the trial court procedure and the opinions delivered orally by the judges. You simply have to do the best you can to figure out the outcome of the case and the reasoning used by the judges.

[2] Occasionally the court will not produce a majority, but instead only a **PLURALITY OPINION**, with which less than a majority of the judges on the court agree. The plurality opinion plus the concurring opinions create a majority for a particular outcome, but do not represent a single view of why the case should come out the way it does. In the U.S. Supreme Court today, plurality opinions are quite common.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	
	)	Action No. 90-12345
v.	)	
Dennis Daniels, Defendant	)	

COURT'S INSTRUCTIONS TO THE JURY

GIVEN: August 23, 1990

BY: THE HONORABLE ROBIN BEAN
JUDGE - DEPARTMENT 14

[*The references in brackets are to the Washington Pattern Instructions (WPI).*]

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the judge, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement, or argument that is not supported by the evidence or the law as given to you by the judge.

The lawyers have the right and the duty to make any objections that they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way, and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard the comment.

Jurors have a duty to consult with one another and to deliberate with a view to reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. You should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence you. [WPI 1.02]

INSTRUCTION NO. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence consists of proof of facts or circumstances which, according to common experience, permit a reasonable inference that other facts existed or did not exist. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other. [WPI 1.03]

INSTRUCTION NO. 3

A witness who has special training, education, or experience in a particular science, profession, or calling may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that

witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness. [WPI 2.10]

INSTRUCTION NO. 4

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. [WPI 10.02]

INSTRUCTION NO. 5

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. [WPI 10.01]

INSTRUCTION NO. 6

Contributory negligence is negligence on the part of a person claiming injury or damage which is a proximate cause of the injury or damage complained of.

If you find contributory negligence, you must determine the degree of such negligence, expressed as a percentage, attributable to the person claiming such injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will reduce the amount of any damages you find to have been sustained by a party who was contributorily negligent, by the percentage of such contributory negligence. [WPI 11.01]

INSTRUCTION NO. 7

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road, and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary. [WPI 70.06]

INSTRUCTION NO. 8

Every person has a duty to see what would be seen by a person exercising ordinary care. [WPI 12.06]

INSTRUCTION NO. 9

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

There may be one or more proximate causes to an injury. [WPI 15.01]

INSTRUCTION NO. 10

1) The plaintiff claims that the defendant was negligent in one or more of the following respects:

(a) Failing to keep a proper lookout.

(b) Entering an intersection before it was safe to do so.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

2) In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in traveling too fast. The defendant claims that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damages. The plaintiff denies these claims.

3) The defendant further denies the nature and extent of the claimed injuries and damage. [WPI 20.01]

INSTRUCTION NO. 11

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question that the proposition on which that party has the burden of proof is more probably true than not true. [WPI 21.01]

INSTRUCTION NO. 12

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving that the plaintiff was contributorily negligent. [WPI 21.02]

INSTRUCTION NO. 13

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money which will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff, your verdict should include the following past economic damages elements:

The reasonable value of necessary medical care, treatment, and services received to the present time.

The reasonable value of earnings lost to the present time. [WPI 30.08.01]

The lesser of the following:

(1) The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired; or

(2) The difference between the fair cash market value of the property immediately before the occurrence and the fair cash market value of the unrepaired property immediately after the occurrence. [WPI 30.10]

In addition, you should consider the following future economic damages elements:

The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future. [WPI 30.07.02]

The reasonable value of earnings with reasonable probability to be lost in the future. [WPI 30.08.02]

In addition, you should consider the following noneconomic damages elements:

The nature and extent of the injuries. [WPI 30.04]

The disability [and disfigurement] experienced and with reasonable probability to be experienced in the future. [WPI 30.05]

The pain and suffering both mental and physical plaintiff experienced and with reasonable probability to be experienced in the future. [WPI 30.06]

The burden of proving damages rests with the plaintiff and it is for you to determine whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions. [WPI 30.01.01]

INSTRUCTION NO. 14

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman to act as chairman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and a special verdict form which consists of several questions for you to answer. It is necessary that you answer each of these questions unless the questions themselves specifically provide otherwise. You should answer the questions in the order in which they are asked as your answers to some of them will determine whether you are to answer all, or only some, or none of the others. Accordingly, it is important that you read the questions carefully and that you follow the directions set forth.

This being a civil case, ten of your number may agree upon a verdict. When ten of you have so agreed, fill in the verdict form to express the results of your determination. Whether the foreman is one of the ten or not, the foreman will sign the verdict and announce your agreement to the bailiff who will conduct you into court to declare your verdict.

_____

[WPI 1.11] JUDGE ROBIN BEAN

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	
	)	Action No. 90-12345
v.	)	
	)	SPECIAL VERDICT FORM
Dennis Daniels, Defendant	)	

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1: Was the defendant negligent?

Answer: _____ (Yes or No)

QUESTION NO. 2: If your answer to Question No. 1 is "yes," then answer both of the following: Was the negligence of the defendant a proximate cause of injury or damage to the plaintiff?

Answer: _____ (Yes or No)

QUESTION NO. 3: Was the plaintiff negligent?

Answer: _____ (Yes or No)

QUESTION NO. 4: If your answer to Question No. 3 is "yes," then answer the following: What is the total amount of the damages to the plaintiff?

Answer: $_____

QUESTION NO. 5: Answer the following only if you answered "yes" to both Question 1 and Question 3. If you answered "no" to either of those questions, do not answer this Question No. 5: Using 100 percent as the total combined negligence of the parties which contributed to the injuries or damages to the plaintiff, what percentage of such negligence is attributable to plaintiff?

Answer: _____ percent

QUESTION NO. 6: Answer the following only if you answered "yes" to both Question 1 and Question 3. If you answered "no" to either of those questions, do not answer this Question No. 6: Using 100 percent as the total combined negligence of the parties which contributed to the injuries or damages to the plaintiff, what percentage of such negligence is attributable to the defendant?

Answer: _____ percent

_____
PRESIDING JUROR

[WPI 45.03]

APPENDIX B
INSURANCE

The relationship between tort law and insurance is quite complex, and scholars (and in the age of tort reform, legislatures) debate vigorously over what is the proper function of each.[1] A separate course on insurance law is available in the law school curriculum, and this short treatment is not intended as a substitute for it. However, some understanding of the insurance mechanism is useful for the first-year law student.

1. First-Party and Third-Party Insurance

The term "insurance" describes two different kinds of arrangements. Of greatest importance in tort law is *liability* (also called *casualty* or *indemnity*[2] insurance), which protects the defendant in case he is sued by someone. This form of insurance is sometimes called *third-party* insurance as distinguished from *first-party* insurance, which compensates the insured directly from some kind of peril. Take automobile insurance as a typical example. One part of the automobile insurance consists of *liability* coverage.[3] If you get into an accident, liability coverage provides you with a defense in case you are sued, and will pay damages to the injured party up to the limits specified in the policy (typically $50,000 or $100,000). In addition to liability coverage, you may choose *property* or *comprehensive* coverage, which will reimburse you (minus a deductible[4]) if a tree falls on your car, or if you lose control of your car and strike a tree. The difference between liability (third-party) coverage and property (first-party) coverage is that in the latter you have the claim directly against the insurance company for your own damage; in the case of third-party coverage, on the other hand, you are simply protected against claims (damages suffered) by other individuals.

First-party coverage becomes relevant to tort law where the claimant is asking the defendant to pay for his injury, but already has his own insurance. For example, suppose *A*'s house burns down and *A* collects compensation from his fire insurance company. That is his first-party coverage. In the insurance policy there is usually an agreement that if the insurance company has to pay out on a claim, they have the right of *subrogation* against any party who might be responsible for the loss. For example, suppose the house was burned down by the faulty wiring in a toaster. The fire insurance company might sue the toaster manufacturer to recover the money they had to pay out on the claim. Similarly, if *A* was injured in an automobile accident by *B*, and *A*'s medical bills are paid by his health insurance company, the health insurance company may assert the right of *subrogation* to seek reimbursement from the person who caused the

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[1] Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

[2] To *indemnify* means to make the other person whole; many insurance companies incorporate the word "indemnity" into their company name, signifying the fact that they are promising to make a person whole if they have an accident or suffer a loss.

[3] More than 40 states require liability insurance for autos.

[4] To reduce their claims handling costs, most insurance companies offer substantial discounts if you will agree to claim only the amount above a certain "deductible" (typically $100 or $200), so that the insurance company won't have to pay for minor claims. You still have coverage for larger claims, but it saves the insurance company the cost of administering small claims—for which your insurance dollar is not as well spent.

accident; thus *A* and his health insurance company will have a claim against the defendant.

2. The Scope of Coverage

In the case of first-party coverage, there is usually a financial ceiling that is set in the policy. Health insurance policies typically cover only certain kinds of diseases, and contain exclusions for various kinds of ailments (dental work, for example). Life insurance policies have a "face value" ($50,000, for example) which specifies how much will be paid in the event of death. Third-party coverage policies vary considerably, not only in the amount of coverage (the dollar limits), but also in terms of what is insured against. A homeowner's policy, for example, will provide coverage if someone slips and falls on your porch, but doesn't cover you for automobile accidents. An automobile policy will protect you on your family vacation, but won't insure you if you provide a taxicab service. Business insurance policies are tailored to the kind of business, and can include or exclude such things as products liability coverage, malpractice, etc.

One thing that all insurance policies share in common is that they only apply to "occurrences," which include not only the typical accident such as an auto collision, but also gradual processes such as leakage, earth movement, etc. Note that a person can be negligent and still receive insurance coverage; in fact, one of the key features of insurance coverage is that it will provides coverage for mistakes that a person makes in driving his car, manufacturing a defective product, etc.

On the other hand, insurance does not cover intentional acts, or acts so reckless that it would be offensive to public policy to indemnify the insured. Insurance policies vary on whether they cover punitive damages; some states prohibit coverage for punitive damages on the ground that it would run counter to the purpose for which punishment is sought.

With regard to professional liability (malpractice) insurance, there is a trend away from providing coverage based upon when the injury was incurred or when the defendant committed the negligent act. These are so-called "occurrence" policies. Occurrence policies are still written to cover injuries like premises liability or auto accidents, for which the date of the occurrence is easy to identify. By contrast, the typical malpractice policy offers only "claims-made" coverage. Such policies cover claims that are made during the policy period. Thus, if you sell your only car, you can cancel your auto insurance, since it only covers you for accidents that occur during the policy period. On the other hand, if you stop practicing medicine (or law), you still have to buy malpractice insurance as long as there could be a claim made against you for something you did while you were practicing. The reason for the switch in the type of coverage is the bad experience that insurance companies had with claims that came years after they had collected the premiums for the insurance. Of course, the risk has now been shifted to the insured, who must maintain coverage even after they are no longer in practice.

3. The Interaction of Insurance and Tort Law

In theory, tort law is independent of insurance, since it is because of tort law that most people purchase insurance.[5] In a typical tort suit, the word insurance is never mentioned. In fact, lawyers are forbidden from even mentioning insurance (except in limited circumstances[6]) in the course of their presentation of evidence or argument to the jury. Nonetheless, the ubiquity of auto insurance has led some scholars to conclude that juries, without being instructed to do so, often include the assumption of coverage in their deliberations. *See* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L. J. 158 (1958).

The availability of insurance has also affected courts' willingness to impose liability upon the defendant. Since insurance permits the spreading of the cost of an injury to all defendants within the insurance pool, not just the individual defendant, it is easier to base the decision on which party in the abstract is better situated to bear the loss. See, for example, Justice Traynor's concurrence in *Escola v.*

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5 Of course, people also purchase first-party insurance (health insurance, fire insurance, life insurance, etc.). However, automobile liability and property damage accounted for 42 percent ($73.4 billion) of the total premiums written. (Fire insurance premiums, for example, totaled only $7 billion and homeowners liability insurance was set at $15 billion.)

6 For example, in some cases statutes permit the introduction of evidence that the plaintiff's damages have already been compensated, for example through disability insurance.

Coca Cola Bottling, Chapter Nine (suggesting that strict liability for product defects would be desirable in view of the availability of insurance as a mechanism for transferring the cost of injury from the innocent purchaser to the manufacturer). But as Prosser points out, surprisingly little reference has been made to the impact of insurance on tort law and awards in court opinions. PROSSER & KEETON, § 82, at 593. The most noticeable effect of insurance has been to abrogate various immunities that once provided a defense from liability. Family and charity immunity are two such examples cited that have, in effect, been replaced by insurance. *Id.*, at 595.

Finally, much has been made in recent years of the so-called insurance crisis of the mid-1980s. Many scholars (and legislators) were convinced that rising insurance rates were attributable to a tort system which had expanded liability beyond sensible boundaries. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521 (1987) (suggesting that the desire to compensate plaintiffs has backfired, driving insurance costs beyond the means of most low-income people and reducing the amount of coverage available to society as a whole). A contrary view suggests that the steep rise in insurance rates in the early 1980s were more a function of investment cycles, and that rising rates were mostly attributable to the softening demand for investment money than to changes in tort liability rules.[7]

4. Practice Considerations Regarding Insurance

For tort lawyers, insurance coverage is of critical importance to both to the plaintiff and to the defendant. From the perspective of the plaintiff's lawyer, the availability of insurance may make the difference between a case that is worth taking and one that is not. If the plaintiff is injured in an automobile collision by an uninsured driver, there may be no point in suing the driver.[8] Similarly, if the other driver's policy has limits of $20,000, there may be little to recover. Remember that a plaintiff is not limited to the defendant's available insurance - the defendant is still obligated to pay, even if his insurance doesn't cover the accident - but in most cases the uninsured defendant doesn't have much to pay in damages. Typically the bankruptcy statutes will permit the defendant to declare bankruptcy and protect his personal possessions and even some equity in his home from the reach of creditors, including the tort plaintiff.

On the other hand, a defendant often depends upon insurance to protect him from the devastating effects of a lawsuit. Often the defendant's lawyer is initially hired by the insurance company when the insured reports the claim to his insurance company. Prior to hiring a lawyer, the company will often employ a claims adjuster to attempt to settle with the plaintiff. If there is no settlement and a lawsuit is filed, a lawyer will be hired to defend the claim. This often creates something of a conflict of interest, since the insurance company pays the lawyer's fees, and usually represents an ongoing source of business. On the other hand, the insured who is actually being represented may have interests contrary to those of the company. The defendant may want to settle for any amount within his insurance company, even if the company would like to gamble on a trial outcome that could exceed the insurance coverage but might also result in a defeat for the plaintiff or a very modest recovery. The law is clear that where a lawyer is hired pursuant to an insurance contract that requires the company to provide the insured with a defense, the lawyer's loyalty is *solely to the insured*, and that the lawyer must resolve any conflict in favor of protecting the insured. If the insurance company fails to live up to their obligations in the insurance contract, the insured may sue the company for "bad faith." Claims based upon the breach of the covenant of good faith and fair dealing are a major growth industry in law in the last fifteen years. Recent cases in California have cut back on bad faith in both insurance and employment cases. *See Moradi-Shalal v. Firemen's Fund Ins. Cos.*, 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988) (insurance); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988) (employment).

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[7] *See The Manufactured Crisis, Liability-Insurance Companies Have Created a Crisis and Dumped It On You*, CONSUMER REPORTS (August 1986); *Mazzagatti v. Everingham*, 512 Pa. 266, 516 A.2d 672 (1986) (LARSEN, J., dissenting).

[8] However, many automobile policies provide *uninsured motorist insurance*, which obligates the policyholder's insurance company to pay damages on behalf of the uninsured driver, if he cannot pay.

APPENDIX C
FORMS OF ACTION

Forms of action are ancient common law procedural devices which have had a great impact on the development of substantive tort law. At common law, pleading rules were much less flexible than they are today. Instead of pleading facts and then deciding what legal doctrine(s) would allow recovery on those facts, a plaintiff had to choose the "form of action" that fit his case, and then prove facts constituting that particular form. In torts, a plaintiff was relegated to bringing suit either for trespass or trespass on the case. In general, a writ for trespass required some harm to be caused by the defendant's use of force on the plaintiff's person or property. Trespass on the case was used in situations where the defendant's actions caused more indirect harms.

A classic example of the differences between the two writs was formulated in *Reynolds v. Clarke*, 1 Str. 634, 92 Eng. Rep. 410 (1726). If the defendant threw a log onto a highway and hit the plaintiff, the plaintiff could sue for trespass. If the log instead was negligently dropped on the highway and later the plaintiff tripped over it, the plaintiff could only sue for trespass on the case.

The procedural differences between the two writs were very important in bringing a plaintiff's case. Under trespass the plaintiff was allowed to seize the defendant's property to force the defendant into court. Under a writ of trespass on the case, however, the plaintiff had to use a summons and complaint. Another difference was that in some actions for trespass the plaintiff was entitled only to damages. Under trespass on the case damages and costs were available - the modern English rule today. *See*, *Savignac v. Roome*, 6 D.& E. (6 T.R.) 129, 101 Eng. Rep. 470 (1794). Other differences, such as differing statutes of limitations, were not resolved until much later. *See*, *Letang v. Cooper*, 1 Q.B. 232 (1965).

Since the plaintiff had to choose which writ to use, choosing incorrectly could be fatal to his action. At a minimum the differences created some confusion. In *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773), the justices could not agree as to whether a squib (firecracker) thrown into a covered market by the defendant constituted trespass or trespass on the case. A merchant had picked up the lighted squib and threw it across the room. Another merchant then picked it up and threw it again, striking the plaintiff as it exploded and putting out his eye. Was the defendant's initial action the immediate cause of the plaintiff's injury, and trespass, or only a consequential result and trespass on the case? (All justices agreed the merchants were allowed to protect themselves and their wares by tossing the squib.) Two of three justices ruled in favor of the plaintiff, who had brought the suit in trespass.

Another complication caused by the division in forms of action concerned negligent employees. Their masters could only be sued on the case, as being indirectly liable for the injuries occasioned by their employees. Pity the plaintiff who sued on the case only to find out it was not an employee who actually injured him but the employer. *See*, *McManus v. Crickett*, 1 East 106, 102 Eng. Rep. 580 (1800). Much confusion was eliminated by *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (1833), when the Court of Common Pleas ruled a plaintiff could sue on the case so long as the defendant's negligence caused the harm complained of. For a history of trespass and case, see M. J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 CAMB. L.J. 234.