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RESPONSIBILITY FOR INJURIES: SOME SKETCHES

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The meaning of responsibility in tort, and the dimensions of responsibility for injury generally, present constant challenges to lawyers, judges, and commentators. This Essay undertakes to sketch a few zones of that vast territory.

First I shall identify some competing views about the underlying rationales of tort law. Then I shall examine a number of the basic theories of responsibility for injury, focusing on how courts continue to work out theories of tort liability. I write against the background of the overall jurisprudence of injury that represents the collective view of our society about responsibility for both prevention of injury and for the consequences of injuries, noting the cultural tensions which that jurisprudence embodies.

Observers of injury law from a number of professional perspectives have offered a number of frameworks for analysis of the subject, some asserting that they describe the reality of the law and others frankly proposing normative solutions. I summarize, briefly, some ideas that have been prominent in academic discourse.

ECONOMIC CONCEPTS

Beginning in the 1960s, professional economists began to discover tort law as a fascinating field in which to roam. They have offered several concepts that would, in effect, serve as standards for liability in tort, without particular reference to the terminology of fault or strict liability.

- An academically famous formulation with an economic slant actually was born in a judicial decision. This was the simple algebraic formula, compressed in a famous decision of Judge Learned Hand, that defined the negligence issue as whether the "burden of adequate precautions" against

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injury is less than the cost of the injury multiplied by its probability.[1] A variation appears in an early article by Richard Posner, who discerned from a sample of cases in several states a negligence standard that depended on whether precautions were "cost-justified."[2] We may summarize these ideas as involving a "cost/cost" inquiry.

- Another set of tests, quantitative cousins, if not siblings, are the risk-utility test, employed in the *Restatement (Second) of Torts*;[3] the "risk-benefit test," which is said by a *Restatement (Third)* draft to be "suggest[ed]" as the preferable test;[4] and the "cost-benefit test."[5] Under any of these formulas, there is likely to be considerable argument concerning the calculation of the social benefits or the social utility provided by the actor's conduct. Moreover, under the risk-utility test it may be relatively difficult to determine risk, which may involve probability calculations that are difficult to make with a meaningful level of accuracy. By comparison, the costs of injuries that already have occurred may be reckoned with some degree of exactness. However, the question of what a cost is may itself be controversial. One topic currently in dispute is noneconomic loss. American courts generally allow such damages, but the amounts often will be subject to vigorous argument. Moreover, there are some who contend that there should be no liability at all for such losses.
- One of the most famous economic formulations that has been applied to injury law is the "Coase Theorem." The heart of this idea is that in a situation where there are no "transaction costs," it will make no difference with respect to the efficient use of resources whether the law imposes liability on the party usually thought of as the "injurer" or lets the loss lie with the party usually thought of as the "victim." Coase's premise is that in the absence of transaction costs, the parties will bargain to an efficient result.[6]

Parallel to the thinking reflected in the Coase Theorem is the idea that liability should be imposed on the party in the best position to avoid injury costs. As spelled out by Calabresi and Hirschoff in an article proposing a "strict liability test," this means the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."[7]

In their most stringent form, efficiency-oriented models do not partake of moral considerations. In particular, they do not consider the fairness or

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[1] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[2] *See* Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

[3] *See* RESTATEMENT (SECOND) OF TORTS §§ 291–292 (1965).

[4] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 cmt. e (Proposed Final Draft No. 1, Apr. 6, 2005).

[5] *See id.* (equating "risk-benefit test" and "cost-benefit test").

[6] *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[7] Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

morality of placing a loss on one party or the other; and they do not take into account the disproportionate impact of injuries on individuals.

FAIRNESS AND JUSTICE-CENTERED IDEAS

A quite separate set of ideas appears under headings like fairness and justice.

- The simplest of these is the idea of corrective justice. Traced back to Aristotle,[8] this theory focuses on achieving individual justice between an injurer and an injured party.[9] There is distinguished academic support for the corrective justice rationale. However, a major criticism of the idea is that in the world in which tort law operates, it is not practical to place one's primary emphasis on a theory that focuses only on the legal relationship between two human individuals. In the world as it is, tort law has radiating social consequences. In that world, insurance payments play a dominant role.
- Responsibility in tort may be taken as a community judgment of moral fault, a concept that overlaps with corrective justice. This may have subjective content, although Holmes emphasized that a person's conduct should be judged only by "external phenomena."[10]
- A very different justice-oriented notion—stated more as a rationale than as a standard—is the idea of "spreading"—that is, spreading of risk and spreading of loss. The basic notion is that where many benefit from an activity that injures a few, the cost of those injuries should be imposed on those advantaged by that activity.

THE SPECTRUM OF TORT LIABILITY

There exists in the United States, and in various ways abroad, a continuum of tort liability. At one end of that spectrum is absolute liability, imposed for causation of injury without an opportunity for the injurer to present defenses. Then there is strict liability, another liability without fault, against which an injurer may offer certain kinds of defenses. Common law as well as codal counterparts to strict liability under the headings of contract and commercial law are implied warranty and express warranty. In the center of the spectrum, and quantitatively in the center of tort litigation in the United States, is negligence. Beyond negligence, there are gradations extending to the most culpable kinds of conduct—upwards from gross negligence through reckless conduct, "wanton, willful and reckless" conduct, and finally the "intentional torts." An interesting phenomenon in

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[8] One translation appears in 2 ARISTOTLE, THE COMPLETE WORKS 1786–87 (Jonathan Barnes ed., 1984).

[9] *See, e.g.*, ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 64 (1995) ("The injustice that corrective justice corrects is essentially bipolar.").

[10] *See* O.W. HOLMES, JR., THE COMMON LAW 110 (Boston, Little, Brown & Co. 1881).

the intentional tort area is a set of cases in which defendants who cannot be shown to have acted with deliberate purpose to injure are held liable for battery in situations that some lay persons, at least, might view as an imposition of liability without fault.[11]

LEGAL FORMULAS FOR NEGLIGENCE

Most tort litigation in the United States centers on negligence doctrine. My sense is that most practicing lawyers do not spend a great deal of time philosophizing on refinements in terminology about what negligence means. However, commentators have devised many formulations of the common law standard for negligence. Indeed, even the most basic element of the negligence case can be chalked up under several headings: negligence, a violation of the standard of care, a breach of duty. Beyond that, the verbal formulas for the negligence standard are several. They include:

(1) The standard articulated in the leading nineteenth-century American case *Brown v. Kendall*,[12] which speaks of the conduct of an ordinary prudent person under the circumstances.

(2) The rule of the famous nineteenth-century English case *Heaven v. Pender*,[13] which frames a standard of ordinary care and skill in a duty perspective.

(3) The language of the *Restatement (Second) of Torts*, which speaks of a standard "established by law for the protection of others against unreasonable risk of harm."[14]

(4) The phrase "knew or should have known," with the "should have known" element predominating in negligence law.

(5) A focus on foreseeability as the touchstone of negligence, which allies itself closely with the "knew or should have known" standard.[15]

The standard of care has been specified for particular activities, often being derived from such specialized sources as standards of trade associations. Generally, industry standards may be used as evidence of due care, but they are not dispositive on the question.[16] The most famous pro-

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[11] *See, e.g.*, Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955) (finding a five-year-old child liable for pulling out a chair from under plaintiff); *cf.* Vosburg v. Putney, 50 N.W. 403 (Wis. 1891) (finding defendant, "a little less than 12 years of age," liable for kicking a classmate during school hours, leading to unexpected crippling injuries).

[12] 60 Mass. 292 (1850).

[13] (1883) 11 Q.B.D. 503, 509.

[14] RESTATEMENT (SECOND) OF TORTS § 282 (1965).

[15] The draft *Restatement (Third)* describes the standard as "reasonable care under all the circumstances," saying that "[p]rimary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, Apr. 6, 2005).

[16] *See, e.g., id.* § 13.

nouncement on the idea that industry standards will not always govern appears in another much-quoted opinion of Learned Hand. In the case of *The T.J. Hooper*, Judge Hand emphasized that an industry "never may set its own tests, however persuasive be its usages," and that "[c]ourts must in the end say what is required."[17]

A quite separate set of standards for determining responsibility in tort refers to positive law—that is, the large collection of commands and edicts that appear in regulatory statutes and the rules and regulations issued by agencies. A variety of legal issues arises when claimants seek to base liability on violations of statutes or regulations in private litigation. I focus here on the question of whether a statute or regulation provides the standard of conduct when the statute makes no specific reference to civil liability:

(1) The violation of a narrowly defined set of statutes may be found to impose liability without any recourse for defendants. These are, typically, statutes that protect specific, vulnerable classes of persons—for example, child labor statutes.[18] Here, courts implement the social concerns embodied in the statute by requiring the defendant to pay without allowing such defenses as contributory negligence or assumption of risk.

(2) An overlapping set of issues focuses on whether the legislature may fairly be said to have intended that a statutory rule would embrace the injury sued upon. Often these issues turn on whether the statute can be taken to have protected the class of which the plaintiff is a member against the sort of harm that occurred.[19]

(3) Some states impose "negligence per se"—a determination that effectively deems violation of a statute to be conclusive on the liability issue, although it may permit defenses based on the plaintiff's conduct. This is a policy determination that can functionally be akin to strict liability, and it is one demonstration of the ways in which tort law as a whole cuts across the traditional doctrinal lines of the conventional spectrum of tort liability.

(4) A linguistically and conceptually difficult set of effects of the violation of regulatory commands is the category of presumptions. Classically, a presumption is a rule of law that one must derive a certain conclusion from specified facts, and it may be rebuttable or irrebuttable. If one cannot rebut a presumption that he has been at fault because he has performed a certain act, it would appear that the question of whether he has been "negligent" is no longer an issue. Thus, irrebuttable presumptions will at least have the effect of a finding of negligence per se and could effectively produce the result of absolute liability where no defenses are allowed.

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[17] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

[18] *See, e.g.*, Strain v. Christians, 483 N.W.2d 783 (S.D. 1992) (holding that under a child labor law, no defense of contributory negligence was available in a suit for the death of fourteen-year-old boy on a tractor).

[19] *See generally* RESTATEMENT (SECOND) OF TORTS §§ 286, 288 (1965).

(5) Many courts prefer the view that violation of a statute or regulation may be taken as evidence of negligence, which may be refuted by a showing, on one ground or another, that the defendant was not negligent.[20]

It should be noted that in practice, the case law has cross-catalogued the various standards for "negligence" or "fault" surveyed here in functional categories. These include applications to such activities as the possession and maintenance of land with respect to dangers inherent in the premises themselves; to landowners' responses to dangers posed by persons who come onto their premises—for example, persons bent on committing crimes; and to the maintenance of workplaces. The law has set up somewhat particularized standards for each of these activities. I shall discuss below the complex set of rules that has evolved to govern the conduct of providers of health care.

Entangled with all of these concepts—the basic liability doctrines and the various effects of violations of statutes or regulations—is the institution of the jury. As a case proceeds through the hurdles of various preliminary procedural motions, it will be crucial whether a court thinks that the case presents a question of "fact" as distinguished from a question of "law." If the case then reaches the stage of presentation of evidence to a jury, the question becomes sharply focused as to whether the defendant's conduct was reasonable in the circumstances.

STRICT LIABILITY FOR ACTIVITIES

The elements of the doctrine of strict liability for activities overlap with several of the formulas that have been devised for determining whether a party is negligent, but the linguistic difference between the doctrines is sharp. Very simply, strict liability is liability without fault, in the sense that the activity at issue is appraised as one that was permissible, rather than (like speeding on the highway) as conduct that should not have occurred. The great common law ancestor of this doctrine is *Rylands v. Fletcher*,[21] which involved the flooding of a mine by water that came out of a reservoir constructed by the defendant in support of its milling activities. The modern American doctrine that has descended from *Rylands* now is classified under the heading of "abnormally dangerous activity" in section 519 of the *Restatement (Second) of Torts*. Section 520 of the Second Restatement lists a group of six factors for courts to consider in deciding whether an activity is abnormally dangerous.[22] The draft *Restatement (Third)* keeps the "ab-

[20] *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 230–31 (5th ed. 1984).

[21] (1868) 3 L.R.E. & I. App. 330 (H.L.).

[22] These factors are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of another;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;

normally dangerous" label, but with a condensed list of factors.[23] The Principles of European Tort Law, presented in 2005 by the European Group on Tort Law, also employs the terminology of "abnormally dangerous activity" with a shortened catalog of factors.[24]

A recent decision applies the section 520 factors of the Second Restatement in the dramatic environment of a suit for thyroid disease attributed to the release of radioactive iodine in the air from the Hanford, Washington facility that produced plutonium for use in nuclear weapons.[25] The court's application of those factors led to its conclusion that the activity was an "abnormally dangerous" one that "allows the imposition of strict liability under Washington law."[26] Among other things, the court adduced the defendant firms' knowledge that releases of the substance in question—I-131—"could cause damage by the concentration of . . . iodine in the thyroid";[27] it also referred to the defendants' knowledge about the danger of the so-called "milk route"—that is, the ingestion of iodine from the "drinking of milk from cows on contaminated pastures."[28] The court further considered an element of the Restatement catalog that refers to the "inability to eliminate the risk by the exercise of reasonable care" as a ground for imposing strict liability.[29] It noted that although it would have been possible to use longer cooling temperatures in the facility to "reduce the volume of I-131 emitted, . . . that outcome was impossible to achieve given the pressure to produce . . . plutonium for the war effort" and that, therefore, under the circumstances, "the risk of emissions was unavoidable."[30]

Surely, the court found, the activity was not one of "common usage" because it was "an activity in which few people were engaged."[31] With respect to the question of the "inappropriateness of the activity to the place

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(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

[23] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 (Proposed Final Draft No. 1, Apr. 6, 2005) ("An activity is abnormally dangerous if (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage.").

[24] See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW art. 5:101 (2005) [hereinafter EUROPEAN PRINCIPLES], which says that "[a]n activity is abnormally dangerous if (a) it creates a foreseeable and highly significant risk of damage even where all due care is exercised in its management and (b) it is not a matter of common usage." *Id.* at art. 5:101(2). The blackletter further says that "[a] risk of damage may be significant having regard to the seriousness or likelihood of the damage." *Id.* at art. 5:101(3).

[25] *In re* Hanford Nuclear Reservation Litig., 350 F. Supp. 2d 871 (E.D. Wash. 2004)

[26] *Id.* at 883.

[27] *Id.* at 878.

[28] *Id.* at 879 (internal quotations omitted).

[29] *Id.* at 876.

[30] *Id.* at 880.

[31] *Id.* at 881.

where it is carried on,"[32] the court acknowledged that "practically speaking Hanford was likely the best site."[33] But it concluded, simply, that "given the potential risk of I-131 exposure resulting in possible disease to those downwind of the facility, the placement of the chemical separation process at Hanford must be considered an activity conducted in an inappropriate place for the purposes" of determining whether an activity is abnormally dangerous. Finally, the court considered the extent to which the value of the activity "to the community [was] outweighed by its dangerous attributes." It noted that because of the war effort, "Hanford's value to the national community was high," but it remarked that "the risk and the potential harm was endured only by the people downwind of Hanford" and declared that "[t]he innocent people who can prove they suffered harm should be compensated by the entire nation who benefited from the activity."[34] This is unapologetic advocacy for risk-spreading across a broad community.

Many of the court's conclusions in the *Hanford* case are arguable from a legal point of view, but the decision illustrates the complex set of considerations—including considerations that overlap with the risk or utility elements and the benefit element of some negligence standards—that courts must take into account in determining whether to impose strict liability for activities. I note, only in passing, that a theory that cuts across both strict liability and negligence with respect to the activities of landowners is the doctrine of private nuisance, which itself has a very elastic set of definitions. Indeed, nuisance is a chameleon that has colorations of intentional tort, negligence, and strict liability.[35] Within the flexible general definition of that tort, courts deciding nuisance cases may refer to a list of factors that parallel those under the *Restatement* formula for abnormally dangerous activities—such factors as the nature of the activity, the gravity of the harm to the plaintiff, the normalcy of that type of activity in the neighborhood, and the comparative economic interests of the parties.[36]

DEFENSES

A cluster of doctrines provide defenses in tort actions. These include, at their simplest, the defenses that the defendant has not behaved below the standard of care, or acted in an abnormally dangerous way, or sold an unreasonably dangerous product. A central group of defenses, related to the plaintiff's conduct, focus on the idea that the plaintiff has behaved unrea-

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[32] *Id.*

[33] *Id.* at 882.

[34] *Id.* at 882–83.

[35] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 822 (1979) (saying that liability may exist for private nuisance if the defendant's invasion "is either (a) intentional and unreasonable or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities").

[36] *See, e.g.*, MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 36.02(D) (2d ed. 2003).

sonably. A related set of defenses focuses on the plaintiff's choice to encounter a known danger, with subcategories of rules that depend on the plaintiff's reasonableness in doing so. Some of the most difficult cases fall in the category in which the plaintiff's conduct was objectively unreasonable, and indeed the plaintiff knew of the hazard, but in which because of the circumstances—for example, the conditions of employment—the plaintiff cannot meaningfully be said to have acted voluntarily. The recently presented European Principles offer a very concise, if vaguely worded, solution to the problem of "contributory conduct or activity," saying simply that "[l]iability can be excluded or reduced to the extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor."[37]

Decisions that apply defenses based on the plaintiff's conduct often draw heavily on notions of personal responsibility. It is perhaps natural that one does not find that tone so much in decisions finding ordinary negligence on the part of institutional or enterprise defendants—natural because those defendants are, unlike most tort plaintiffs, not human beings. Yet there is also a certain irony there. By definition, the initial responsibility is that of the defendant; the irony lies in the fact that, putting aside cases of egregious conduct on the part of defendants, courts often expend more emotive power with respect to the responsibility of the victim than that of the injurer.

THE LAW RELATED TO MEDICAL INJURIES

The basic liability doctrines with respect to medical liability fall under the heading of negligence. As is so with tort cases generally, plaintiffs must jump a series of hurdles to get themselves to the judgment of a jury. Judges must decide, in assessing a number of potential motions, whether the jury should be allowed to hear a claim that a physician was negligent. An important threshold question is whether the plaintiff must offer an expert to testify that the defendant fell below the professional standard of care. On the whole, courts are inclined to require the testimony of an expert. There is an exception, called the "common knowledge" exception, that may apply where "the matter under investigation is *so simple*, and the lack of skill or want of care *so obvious*, as to be within the range of ordinary experience and comprehension of even non-professional persons."[38] Where the exception does not apply, though, the general rule presents a significant obstacle to plaintiffs. Particularly in small communities, experts may have both social and professional connections that make them reluctant to testify against other members of their profession. However, it has become somewhat eas-

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[37] EUROPEAN PRINCIPLES, *supra* note 24, at art. 8:101(1).

[38] Demchuk v. Bralow, 170 A.2d 868, 870 (Pa. 1961).

ier over the years to secure experts, including academic experts, in specialized disciplines.

Courts have adopted a variety of rules with respect to the influence of geography on the standard of care. Over time, courts have tended toward the idea that the standard of care is a "national" one, but they also have emphasized that the limited availability of resources in small communities requires some flexibility in the standard. For example, the Arkansas Supreme Court has opined that although ideally doctors in small communities should send some patients to major medical centers, "when this is not practicable, the small-town doctor should not be penalized for not using means or facilities not reasonably available to him."[39] In general, as I have written elsewhere, "[w]hat courts struggle for is a way to encourage the provision of care as good as possible in medical communities with limited resources, while holding specialists to standards matched to their training and their advertised expertise."[40]

A difficult set of problems in the law of medical liability arises with respect to the circumstantial proof doctrine known as res ipsa loquitur. Courts apply that doctrine when it can be shown that an injury is of a kind that ordinarily does not occur in the absence of negligence, and—according to the law of many states—when the plaintiff is able to negate "other responsible causes" for the injury. Because medical treatment usually involves specialized knowledge, courts will often require that plaintiffs provide an expert in cases brought under res ipsa. Even so, critics have said that the application of the doctrine in medical cases may permit an inference that it was more likely than not that an injury occurred when the statistical probabilities do not support a finding. An Illinois judge argued, in a dissenting opinion in a case in which the majority applied res ipsa to a medical injury, that the effect of that decision was to hold the defendant liable without fault. He declared that "[t]o impose liability for fault, when in a vast number of cases where liability is imposed there is no fault, seems . . . intellectually dishonest."[41]

A relatively new entry in the law of medical liability is the doctrine of "informed consent," which has developed in different versions in different states. The decisions differ even on the basic theory of liability based on lack of informed consent. Sometimes that theory is battery, but probably more often it is negligence. A plaintiff mounting an informed consent case on negligence asserts that the defendant has fallen below the professional standard of care in advising patients about the nature of a treatment, its risks and benefits, and possible alternatives. Typically, courts applying the doctrine require that patients be advised of "material" risks, but the question of

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[39] Gambill v. Stroud, 531 S.W.2d 945, 950 (Ark. 1976).

[40] SHAPO, *supra* note 36, ¶ 23.04.

[41] Spidle v. Steward, 402 N.E.2d 216, 227 (Ill. 1980) (Ryan, J., concurring in part and dissenting in part).

what kind of risk is material will generate disputes. In general, materiality depends on a combination of factors that include the severity of a risk and how often an injury will occur from a particular procedure.

The doctrine of informed consent depends on a philosophical premise articulated in 1914 by Cardozo, who said that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[42] Classical economic theory would posit that patients making those choices will behave rationally, but the question of what rational behavior is can be a difficult one. One such problem arises when a physician believes that to impart a particular kind of risk information will cause a patient to refuse treatment that he or she should "rationally" accept. A further confounding factor is that statistical studies indicate that patients who sign consent forms for even major medical procedures often do not retain even the most crucial information about risk that appears on those forms.[43]

This brief summary of the law of medical liability exhibits the understandably controversial nature of a jurisprudence at the vortex of a whirlpool in which there swirl elements of personal dignity, scientific uncertainty, and a need for general standards where each patient yet presents an individualized problem. This whirlpool spins inside a social and economic environment in which the cost of medical care is rising and practitioners exhibit fear and resentment about the threat of liability. On the whole, the reigning doctrines of medical liability are fault doctrines, but criticism of the law includes the charge that it sometimes imposes liability on what amounts to a no-fault basis.

PRODUCTS LIABILITY

Arguments over doctrine and, only somewhat less overtly, ideology, are intense in the ongoing legal battles about the law of products liability.

The law of products liability evolved through the first half of the twentieth century under contract labels as well as the general doctrine of negligence. In the early 1960s, some landmark judicial decisions, as well as pathbreaking scholarship, advanced a theory of strict liability for product defects. A focal point of this theory was section 402A of the *Restatement (Second) of Torts*, which articulated a theory of liability against the sellers of products "in a defective condition unreasonably dangerous to the user or consumer or to his property," applicable even though "the seller has exercised all possible care in the preparation and sale of his product" and even though there is no contractual privity between the user or consumer and the seller.[44]

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[42] Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

[43] *See, e.g.*, Barrie R. Cassileth et al., *Informed Consent—Why Are Its Goals Imperfectly Realized?*, 302 N. ENG. J. MED. 896, 897 (1980).

[44] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

The defect issue.—At the heart of the ensuing debates over products liability has been the definition of defect. There is general agreement that there should be strict liability for so-called manufacturing defects—flaws in products that were unintended by their sellers. There is a great deal of argument over the question of what constitutes a litigable "design defect"—that is, when liability should be imposed for a feature of a product that the manufacturer intended it to have.

As is so at many of the critical junctures in American tort law, a crucial question in litigation is whether a design defect case should go to the jury. Plaintiffs want to have the jury decide whether a product is unreasonably dangerous, and defendants press for standards that will keep cases from the jury. Major points of argument in this regard are a blackletter section and some comments in the *Restatement (Third) of Torts: Products Liability*. Section 2(b) of that Products Restatement generally requires plaintiffs claiming a design defect to show that the risks of a product "could have been reduced or avoided by the adoption of a reasonable alternative design."[45] A comment to that section stresses that the requirement of a reasonable alternative design "applies in most instances even though the plaintiff alleges that the category of products sold by the defendant is so dangerous that it should not have been marketed at all"—a notion that the comment specifically applies to alcoholic beverages, firearms, and aboveground swimming pools.[46] The comment originally included tobacco, but after debate on the floor of the American Law Institute, that reference was removed.

The requirement that plaintiffs show a reasonable alternative design has inspired much argument among both courts and commentators. Another point of heated dispute has been whether the exclusive test for defect should be a risk-utility test—advocated by a comment in the Products Restatement[47]—or a consumer expectations test, or a mixture of both. There has been considerable argument over the actual state of the law. In an illustrative case supporting the risk-utility test, the First Circuit noted that "[m]any products, like airbags, involve a 'tradeoff' between the benefits offered to the consumer and the risk created by the product."[48] Saying that the risk-utility test was "designed to avoid converting the manufacturer into the insurer of every harm that arises out of a product from which the consumer derives utility," the court declared that a plaintiff could win a design defect case "only if the challenged design aspect does more harm than good, overall, for the consumer."[49]

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[45] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

[46] *Id.* §2(b) cmt. d.

[47] *Id.*

[48] Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 71 (1st Cir. 2002).

[49] *Id.*

A much-cited articulation of the competing consumer expectations test appears in comment i to Section 402A, which says that to justify liability, "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[50] A basic argument for a test of this kind applies common sense to the rich background of product portrayals that are fashioned through many means of advertising and promotion. A good example of the linkage of the strict liability doctrine to the way products are presented to the public is an Oregon case involving a vehicle rollover. The state appellate court, which was affirmed by the supreme court, noted that the manufacturer of the vehicle at issue had not "explicitly represent[ed]" that its vehicle "would not roll over under the exact circumstances" of the case involved.[51] However, the appellate court referred to print and television advertising "containing specific representations" of the vehicle "engaged in sharp steering maneuvers" and concluded that there was sufficient evidence that the defendant had "specifically marketed" the vehicle as "an appropriate vehicle for highway driving and specifically depicted [it] engaging in sharp turns and evasive maneuvers."[52] On the specific facts of the case, the court said that a jury "could conclude that given [the manufacturer's] representations, an ordinary consumer would reasonably expect a 1994 4Runner traveling at legal speed *not* to roll over following foreseeable evasive maneuvers, such as three sharp turns on a flat, dry, paved highway."[53]

In another case, which involved allergies claimed to be caused by latex gloves, the Wisconsin Supreme Court rejected the contention that it was inappropriate to use a consumer expectations test in "cases involving complex products" in which consumers did "not know of or fully understand the technical or mechanical design aspects of the product at issue."[54] The Wisconsin court said that the consumer expectations test does "not inevitably require any degree of scientific understanding about the product itself," but rather "requires understanding of how safely the ordinary consumer would expect the product to serve its intended purpose."[55] A quite contrasting position appears in a California appellate decision, also involving latex gloves, in which the court emphasized that the "alleged circumstances of the . . . failure" of the product "involve[d] technical and mechanical details about the operation of the manufacturing process, and then the effect of the product upon an individual plaintiff's health."[56] The court said that

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[50] RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

[51] McCathern v. Toyota Motor Corp., 985 P.2d 804, 818 (Or. Ct. App. 1999), *aff'd*, 323 P.3d 320 (Or. 2001).

[52] *Id.* at 819.

[53] *Id.*

[54] Green v. Smith & Nephew AHP, 629 N.W.2d 727, 742 (Wis. 2001).

[55] *Id.*

[56] Morson v. Super. Ct., 109 Cal. Rptr. 2d 343, 356 (Ct. App. 2001).

"[u]nderstanding and assessing responsibility" for allergic reactions was "a matter that is driven by the science of the manufacturing and preparation procedures, as well as the medical aspects of [an] individual's allergic reactions to various substances."[57]

Failures to warn.—Another major category of products liability law involves alleged failures to warn of product hazards. The law here is often quite fact-specific, with factual issues frequently arising concerning the adequacy of warnings. However, courts have developed a number of subdoctrines that in some cases amount to rules of law that keep plaintiffs from taking cases to juries. A quantitatively significant rule of this kind is the so-called learned intermediary doctrine, the effect of which is that manufacturers of prescription drugs need provide product warnings only to prescribing physicians rather than to patients. The rationale for the theory emphasizes the physician's specialized knowledge about medicines as well as the physician's personal knowledge of the individual patient. However, there have been some challenges to the doctrine, for example in cases involving advertising directed at consumers. In one such case involving an implanted contraceptive, the New Jersey Supreme Court said that "[w]hen a patient is the target of direct marketing, one would think, at a minimum, that the law would require that the patient not be misinformed about the product."[58]

Most of the case law on products warnings falls into the negligence category. However, there have been a few interesting judicial excursions into the application of strict liability to failure to warn. The leading case expounding this view is a New Jersey decision, which solves the conundrum of failure to warn about a danger that could not be known by insisting that the question is not one of culpability but simply of whether a product was "not reasonably safe because [it] did not have a warning."[59]

Defenses.—A battery of defenses, typically focused on the personal responsibility of consumers, has evolved in products liability cases. The basic defenses replicate those used throughout the area of negligence law—that is, the doctrines of contributory negligence and assumption of risk. Contributory negligence and some types of assumption of risk are now often chalked up under comparative negligence. There is some variation among the states as to whether this set of defenses is available, and how it should be applied, against strict liability claims as distinguished from negligence claims.[60]

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[57] *Id.* at 357.

[58] Perez v. Wyeth Lab. Inc., 734 A.2d 1245, 1257 (N.J. 1999).

[59] Beshada v. Johns-Manville Corp., 447 A.2d 539, 549 (N.J. 1982).

[60] The *Restatement (Second)* took the position that only assumption of risk type contributory fault would be a defense to strict products liability claims. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). The *Restatement of Products Liability* largely meshes all defenses based on plaintiff fault. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 & cmts. a–d (1998).

Another defense, which also borrows from basic negligence law, depends on proof that a product danger was "open and obvious" to the plaintiff. I have noted that in the products liability context, "[t]he notion of 'obviousness' has become increasingly a surrogate for many things, including the concept of defect and its relationship to consumer psychology, and some very general ideas about the nature of obligation in consumer markets."[61]

A particularly interesting Michigan Supreme Court case features arguments, spread over two full sets of opinions by that court, on the question of what dangers were obvious to claimants who were rendered quadriplegic when they dived into shallow water in above-ground swimming pools. The flexibility of doctrine in this area is evident in the majority opinion in the first decision, which supported the defendant. A single paragraph from that opinion mixes concepts of contributory negligence, assumption of risk, obviousness, and "no duty," and further implies a "no defect" defense:

> Since the dangers associated with diving into visibly shallow water in an above-ground pool are open and obvious to the reasonably prudent user, plaintiff . . . must, as a matter of law, be held to the knowledge and appreciation of the risk likely to be encountered in his head-first dive. . . . [T]he defendant manufacturer owed no duty to warn the plaintiff . . . .[62]

A dissenter focused on specific questions about obviousness: "Exactly what was obvious in this case? Injury in general? Danger in general? What is it that must be obvious before a court can properly decide that a risk associated with the use of a product is obvious as a matter of law?"[63]

On a rehearing of the case, a differently constituted majority again ruled for the defendant, saying that "[t]he fact that all plaintiffs acknowledged the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious."[64]

In addition to the doctrines mentioned above, a defense mostly peculiar to products liability is the defense of misuse. The heart of the misuse idea is that the plaintiff has employed a product in a way that was not intended by the manufacturer, and often at the center of the arguments about the doctrine is the question of whether a misuse was "foreseeable." The Montana Supreme Court has said that when a manufacturer "expects or . . . reasonably foresees, that its product is or will be subject to misuse in a certain fashion, then the fact that the user of the product actually does use—or . . . misuse—the product in that fashion can hardly be said to be 'unreason-

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[61] 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 19.11[1][a], at 10,638 (4th ed. 2001).

[62] Glittenberg v. Doughboy Recreational Indus., 462 N.W.2d 348, 359 (Mich. 1990).

[63] *Id.* at 363 (Archer, J., dissenting).

[64] Glittenberg v. Doughboy Recreational Indus. 491 N.W.2d 208, 218 (Mich. 1992), *aff'g* 462 N.W.2d 348.

able.'"[65] However, the limits of foreseeability are evident in a case in which a one-year-old child was playing with a soda bottle which exploded on impact with the floor. The Iowa Supreme Court rejected the plaintiff's claim that the trial court should have given instructions on "reasonable misuse," saying that "[a]lmost any kind of misuse is foreseeable; a soda bottle will be used for a hammer, someone will attempt to drive a land vehicle on water, or someone will pour perfume over a lit candle in order to scent it."[66]

SCIENTIFIC EVIDENCE

A Supreme Court decision that sought to rationalize the principles governing presentation of scientific evidence in court, *Daubert v. Merrell Dow Pharmaceuticals*,[67] has given birth to a long chain of decisions that seek to apply the philosophy of the Court's opinion. In form, the *Daubert* decision modified a restrictive rule that previously had been applied by federal courts, the *Frye* rule,[68] which required claimants to show that their scientific evidence had earned "general acceptance in the particular field" concerning which their experts testified. In *Daubert* the Court set out a more varied list of factors, which it said were not exclusive, that would "bear on the inquiry" of the admissibility of expert testimony. These factors included the question of whether a "theory or technique . . . can be (and has been) tested," and also the question of whether the "theory or technique has been subjected to peer review and publication."[69]

Many decisions in the products area have applied *Daubert*, and a Federal Rule of Evidence that now incorporates it, to a variety of products, especially drugs and toxic substances, but also mechanical products. The case has led to the institution of so-called *Daubert* hearings in federal courts, which serve as screening devices for the reliability of expert testimony, including the methodology used by experts. Properly applied, both *Daubert* and the *Frye* rule will tend to minimize the chances that a strict form of liability will erroneously be applied, not only in products cases but in tort cases generally.

ECONOMIC LOSS

A corner of products liability law that has given rise to a significant body of case law centers on the "economic loss rule," which as generally stated bars the application of tort liability to economic loss. In another incursion into the products liability area, the Supreme Court applied the general rule to a case in which defective components on turbines on a

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[65] Lutz v. Nat'l Crane Corp., 884 P.2d 455, 460 (Mont. 1994).

[66] Henkel v. R & S Bottling Co., 323 N.W.2d 185, 191 (Iowa 1982).

[67] 509 U.S. 579 (1993).

[68] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[69] *Daubert*, 509 U.S. at 593.

supertanker allegedly were associated with malfunctions and damage to the turbines themselves. The Court posited that "since by definition no person or other property is damaged, the resulting loss is purely economic."[70] It thus denied a tort claim because this damage "only to the product itself" meant "simply that the product has not met the customer's expectations, or, in other words that the customer has received insufficient product value."[71] Later, however, the Court did open a zone of recovery for "other property" in a case involving a skiff, a fishing net, and spare parts that had been added to a vessel that sank.[72]

THE RESTATEMENT PROCESS

A word is in order about the process of drafting Restatements of the Law, particularly the Restatements of Tort, and even more particularly the Restatement of Products Liability. It should be noted that the current Restatement process, as conducted by the American Law Institute ("ALI"), has avowedly come to take into consideration questions of public policy—and indeed the alignments of political forces—that surround the most controversial issues in tort law. In an explanation of the philosophy governing the process for the Products Restatement, the director of the ALI spoke of "seek[ing] an appropriate balance" between "consumer and worker interests" and "reasonably viable standards for conduct for producers." He viewed the task of the reporters as being "to express elementary legal concepts in language that appropriately balances severely conflicting social concerns."[73]

PRODUCTS LAW AND CULTURE

Products liability law, in particular, is an outstanding example of how law reflects culture. Products law rather faithfully mirrors many social attitudes, including ambivalences as well as generally accepted attitudes about responsibility, and also reflecting strongly held competing views on that topic. A case described above, involving a crippling accident in an aboveground swimming pool, is illustrative of the intense disagreements one finds in the products area. I have noted that the majority in that case appeared implicitly to hold a vision of life as "a rough and tumble business in which departures from the general run of self-caring behavior will be severely judged." By contrast, the dissent exhibited "a viewpoint that emphasizes the particulars of the mental life of specific individuals and the

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[70] E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870–72 (1986).

[71] *Id.* at 871–72 (internal quotation omitted).

[72] *See* Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875 (1996).

[73] Geoffrey C. Hazard, *Foreword* to RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY xiii–xiv (Tentative Draft No. 1, 1994).

concreteness, or lack of concreteness, of their understanding of particular risks."[74]

Cases involving such diverse products as cigarettes, bullet-resistant vests, and mini-buses all reflect social attitudes. Illustratively, opposed lines of decision on issues involving risks that consumers take with products represent competing cultures; for labeling purposes, I have referred to these as "a justice culture and a market culture."[75] Advocates on both sides will argue that it is their position that vindicates the notion of individual responsibility. For example, in cases involving product hazards in the workplace, plaintiffs will argue that makers of products with known tendencies to cause injury should not be able to immunize themselves because a worker's employer continued to use the product, asserting that in such situations the manufacturers bear moral responsibility for exposure of the worker to risk. Manufacturers' lawyers will contend that one element of a worker's human individuality lies in "his responsibility for accepting the danger in a job that put bread on his table."[76] These arguments only symbolize ongoing disagreements about what we mean by fault, and ultimately what we mean by responsibility.

NO-FAULT COMPENSATION

Running parallel to the body of tens of thousands of decisions that make up the corpus of American tort law is the no-fault system of workers' compensation. That system provides, on the whole, less generous benefits to injured workers than would tort law, but it also erases from consideration—and thus from time-consuming litigation—questions of fault on the part of both employers and workers. This is the principal area in which no-fault compensation has taken hold in the United States. For a time, the idea of no-fault compensation for victims of traffic accidents was in vogue. However, fewer than half the states have adopted such a plan, and only a very few have done so in a way that significantly replaces the tort action. Many proposals have been made for the institution of no-fault plans in the area of medical injuries, which some statistics indicate cause more deaths each year than traffic accidents. However, despite the intellectual ambition of these plans, the writer knows of no state that has adopted a no-fault plan of compensation for medical injuries, except in very narrow areas like those of severe neurological injuries to newborn children. The extraordinary federal legislation creating a no-fault Victims Compensation Fund for injuries and deaths in the September 11th attacks is just that—extraordinary.[77] Even

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[74] MARSHALL SHAPO, TORT LAW & CULTURE 230 (2003).

[75] *See, e.g., id.* at 10, 293–300.

[76] *See id.* at 293.

[77] *See, e.g.*, MARSHALL S. SHAPO, COMPENSATION FOR VICTIMS OF TERRORISM 241, 248, 260 (2005).

if a more general scheme should be adopted to compensate future victims of terrorism, it would be one patch in a patchwork of injury law.

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I have written over the years of a "jurisprudence of injury," a loose confederation of statutes, regulations, and judicial decisions that embody the response of the people of the United States to a wide variety of injuries.[78] The subcategory of that jurisprudence called tort law includes common law doctrines across a spectrum ranging from intentional tort to strict and absolute liability. In practice, the predominant ground of doctrinal battle in tort is negligence. However, there are pockets of liability for activities that have openly been recognized as strict; there are doctrines that apply a form of liability under the negligence label to conduct that is not necessarily negligent "in fact"; and there are doctrines, based in form on fault, that have been criticized as in effect applying a strict form of liability. In the products area, the courts have developed explicitly a theory of strict liability. It applies, by consensus, to manufacturing defects, and there is controversy about its application in the area of design defects. Although negligence appears to be dominant in the area of the duty to warn of product hazards, there are a few interesting theoretical applications of strict liability even in that area.

In Europe, too, one finds articulations—some narrow, and some broad—of liabilities that go beyond fault. This is clear in the rather sweeping formulation of a strict liability principle in the European Products Liability Directive.[79] We have observed that the European Principles of Tort Liability adopt the terminology, and some of the factors, employed by the *Restatement (Second)* on strict liability for abnormally dangerous activities.[80] The European Principles also include burden-shifting features that reduce claimants' burdens of showing fault. One section declares that "[t]he burden of proving fault may be reversed in light of the gravity of the danger presented by the activity."[81] Another section says that "[a] person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a

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[78] *See generally* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (M. Shapo rptr., 1984).

[79] *See* Council Directive 85/374/EEC, art. 4, 1985 O.J. (L 210) 29 (EU). For commentary, see Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279, 289–91 (1993).

[80] *See supra* note 24 and accompanying text.

[81] EUROPEAN PRINCIPLES, *supra* note 24, at art. 4:201(1).

defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct."[82]

It is not surprising, given the broad range of injuries caused by multifarious activities and products in society, that American courts and legislatures continue to fashion a variety of concepts of responsibility. In doing so, they thread their way through underbrush with conceptual shrubs and bushes sometimes rooted in ideas of fault and sometimes in ideas frankly labeled strict liability or that achieve the effect of liability without fault. As those developments go on, courts continue to apply conventional notions of personal responsibility to tort claimants who have been careless or who have voluntarily encountered certain types of risk. But legislatures in passing workers' compensation statutes have rejected consideration of the personal responsibility of workers as well as employers, with some exceptions for blatantly irresponsible conduct.

Our representatives in legislatures and our arbiters on the bench thus have not settled on an integrated conception of responsibility. Surely we can observe that after a century and a half of development of the fault principle, a substantial amount of money changes hands for injuries without a showing of culpability in the sense of negligence or intentional infliction of harm. Beyond that, we must accept that the jurisprudence of injury is constantly in a process of unruly development. It is not probable that it will become more philosophically or administratively integrated. As I have suggested before, that would require a Tsar, and Americans have an antipathy to Tsars.[83] To a large extent, then, we define responsibility pragmatically, our law forever burdened with jagged edges though reason drives us to desire smoother structures.[84]

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[82] *Id.* § 4:202(1).

[83] *See* Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185 (1990).

[84] *See, e.g.*, SHAPO, *supra* note 77, at 235–39.