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P. 31-32

8. MEANING OF INTENT

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm.[23] Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. The defendant may be liable although he has meant nothing more than a good-natured practical joke,[24] or has honestly believed that he would not injure the plaintiff,[25] or even where he was seeking the plaintiff's own good.[26]

82 U.Pa.L.Rev. 583. See for example the rules applied to innocent and wilful trespassers who remove timber or minerals from land, as to the value of the property converted "in place" or after removal. McCormick, Damages, 1935, 492–496.

23. Baldinger v. Banks, 1960, 26 Misc.2d 1086, 201 N.Y.S.2d 629; Restatement of Torts, § 13, Comment e.

24. Reynolds v. Pierson, 1902, 29 Ind.App. 273, 64 N.E. 484; State v. Monroe, 1897, 121 N.C. 677, 28 S.E. 547.

25. Vosburg v. Putney, 1891, 80 Wis. 523, 50 N.W. 403; Craker v. Chicago & N. W. R. Co., 1875, 36 Wis. 657.

26. Clayton v. New Dreamland Roller Skating Rink, 1951, 14 N.J.Super. 390, 82 A.2d 458 (plaintiff fell and broke her arm; over her protest defendant proceeded to manipulate the arm in order to set it); Johnson v. McConnel, 1878, 15 Hun, N.Y., 293 (defendant intervened in a scuffle to protect plaintiff and broke plaintiff's leg); Maxwell v. Maxwell, 1920, 189 Iowa 7, 177 N.W. 541, (arrest of insane person for his own protection).

To result in liability, the defendant's act must be a voluntary one.[27] But a voluntary act, reduced to its lowest terms, is a contraction of the muscles, and nothing else.[28] The movement of the finger which fires a gun is the same, whether it takes place in a crowded city, or in the solitude of the Mojave Desert. Its legal character must depend upon the actor's surroundings, and his state of mind with respect to them. His state of mind may involve many things: he may intend to move his finger, for the purpose of pulling the trigger, for the purpose of causing the bullet to strike a man, for the purpose of killing the man, for the purpose of revenge, of defending his country, or of protecting himself against attack. "Intent" is the word commonly used to describe the desire to bring about the physical consequences, up to and including the death; the more remote objective which inspires the act is called "motive." [29] The one is merely a step less removed from the muscular contraction than the other. Each has its own importance in the law of torts, and a justifiable motive, such as that of self-defense, may avoid liability for the intent to kill.

Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. An anarchist who throws a bomb into the royal carriage may actually wish to kill no one but the king; but since he knows that the death of others in the carriage is a necessary and almost inevitable incident to that end, and neverthe-

27. Slattery v. Haley, [1923] 3 Dom.L.Rep. 156, 25 Ont.L.Rep. 95; Stokes v. Carlson, 1951, 362 Mo. 93, 240 S.W.2d 132; Wishone v. Yellow Cab Co., 1936, 20 Tenn.App. 229, 97 S.W.2d 452; see infra, p. 140.

28. Holmes, The Common Law, 1881, 91; Cook, Act, Intention and Motive in the Criminal Law, 1917, 26 Yale L.J. 644.

29. Cook, Act, Intention and Motive in the Criminal Law, 1917, 26 Yale L.J. 644; Walton, Motive as an Element in Torts in the Common and in the Civil Law, 1909, 22 Harv.L.Rev. 501.

less goes ahead with the deed, it must be said that he intends to kill them.[30] The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it. The driver who whips up his horses with a loud yell while passing a neighbor's team will not be credited when he denies that he intended to cause a runaway;[31] and the defendant on a bicycle who rides down a man in full view on a sidewalk where there is ample room to pass may find the court unwilling to accept his statement that he did not mean to do it.[32]

On the other hand, the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton,[33] but it is not classed as an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty.[34]

"Transferred" Intent

One definite area in which there is more extensive liability for intent than for negligence is that covered by the curious surviving fiction of "transferred intent." If the defendant shoots or strikes at A, intending to wound or kill him, and unforeseeably hits B instead, he is held liable to B for an intentional tort.[35] The intent to commit a battery upon A is pieced together with the resulting injury to B; it is "transferred" from A to B. "The intention follows the bullet."[36]

This peculiar idea appeared first in criminal cases[37] at a time when tort and crime were still merged in the old trespass form of action. It represents an established rule of the criminal law, in cases in which shooting, striking, throwing a missile or poisoning has resulted in unexpected injury to the wrong man.[38] The criminal cases have been under-

30. Salmond, Jurisprudence, 4th Ed. 1913, 337.

Thus in Garratt v. Dailey, 1955, 46 Wash.2d 197, 279 P.2d 1091, second appeal, 1956, 49 Wash.2d 499, 304 P.2d 681, a boy who pulled away a chair just as plaintiff was about to sit down was held liable for battery because he knew that she was substantially certain to suffer a forcible seating on the ground. Cf. Burr v. Adam Eidemiller, Inc., 1956, 386 Pa. 416, 126 A.2d 403 (contamination of plaintiff's underground water supply by run-off water from slag); Jost v. Dairyland Power Co-op., 1969, 45 Wis.2d 164, 172 N.W.2d 647 (damaging crops by sulphur dioxide).

31. Lambrecht v. Schreyer, 1915, 129 Minn. 271, 152 N.W. 645. See also Land v. Bachman, 1921, 223 Ill. App. 473.

32. Mercer v. Corbin, 1889, 117 Ind. 450, 20 N.E. 132. Cf. Commonwealth v. Raspa, 1939, 138 Pa.Super. 26, 9 A.2d 925.

33. See infra, p. 184.

34. Hackenberger v. Travelers Mut. Cas. Co., 1936, 144 Kan. 607, 62 P.2d 545; Cook v. Kinzua Pine Mills Co., 1956, 207 Or. 34, 293 P.2d 717. See Restatement of Torts, § 13, Comment *d*; Note, 1962, 34 Rock Mt.L.Rev. 268; De Muth, A Comparison of the Conduct Required in Trespass to Chattels and Negligence, 1961, 33 Rocky Mt.L.Rev. 323.

"If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance." Holmes, Privilege, Malice and Intent, 1894, 8 Harv. L.Rev. 1.

AMES, 22 HARV. L. REV. 97 (1908)

LAW AND MORALS.[1]

PRIMITIVE law regards the word and the act of the individual; it searches not his heart. "The thought of man shall not be tried," said Chief Justice Brian, one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man."[2]

As a consequence early law is formal and unmoral. Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases? To answer this question let us consider, first, the rule of liability for damage caused to one person by the act of another. Not quite six hundred years ago an action of trespass was brought in the King's Bench for a battery. The jury found that the plaintiff was beaten, but that this was because of his assailing the defendant who had acted purely in self-defense, and that the action was brought out of malice. It was nevertheless adjudged that the plaintiff should recover his damages according to the jury's verdict, and that the defendant should go to prison. The defendant had committed the act of battery; therefore he must make reparation. He was not permitted to justify his act as done in protecting himself from the attack of the plaintiff. That attack rendered the plaintiff liable to a cross action, but did not take away his own action.

The case we have just considered was an action for compensation for a tort. Suppose, however, that the defendant, instead of merely injuring his assailant, had killed him in self-defense, using no unnecessary force. Did the early English law so completely ignore the moral quality of the act of killing in self-defense as to make it a crime? Strictly speaking, yes. An official reporter of the time of Edward III[3] and Lord Coke[4] were doubtless in error in stating that prior to 1267 a man "was hanged in such a case just as if he had acted feloniously." But such killing was not jus-

[1] From an address delivered at the seventy-fifth anniversary of the Cincinnati Law School, and reprinted by permission of the University of Cincinnati Record.

[2] Y. B. 7 Ed. IV, f. 2, pl. 2.

[3] Y. B. 21 Ed. III, f. 17, pl. 22.

[4] Coke, Second Inst., 148.

tifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison, and must trust to the king's mercy for a pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime. But the moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal, or that he should have to make compensation to his culpable assailant. By 1400 self-defense had become a bar to an action for a battery. Pardons for killing in self-defense became a matter of course; ultimately the jury was allowed to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out.

Let us test the rule of liability by another class of cases. One person may have injured another without fault on either side, by a pure accident. The case against the actor in such a case is obviously stronger than against one who inflicts damage in self-defense. Accordingly we are prepared for this language of the Statute of Gloucester, 6 Ed. I, c. 9, 1278: "If one kills another in defending himself, or by misadventure, he shall be held liable, but the judge shall inform the king, and the king will pardon him, if he pleases."[1] *A fortiori* the actor was bound to make compensation to the victim of the accident. The criminal liability disappeared comparatively early, as in the case of killing in self-defense. But the doctrine of civil liability for accidental damage caused by a morally innocent actor was very persistent. It was stated forcibly by an eminent judge in 1681 as follows: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering. If a man shoot at butts and hurt a man unawares an action lies. . . . If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there '*Actus non facit reum, nisi mens sit rea.*'"[2] As pointed out by Sir Frederick Pollock, in his treatise on torts,[3] a similar opinion was expressed subsequently by Blackstone, Erskine, Mr. Justice Grose, and as late as 1868 by Lord Cranworth. Erskine's statement goes very far: "If a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete an-

[1] See also Y. B. 2 Hen. IV, f. 18, pl. 6, per Thirning, C. J.

[2] Lambert v. Bessey, T. Ray. 421.

[3] 8 ed., 142.

swer to an *indictment* for trespass, but he must answer in an *action* for everything he has broken." There were, however, from time to time certain intimations from the judges that in the absence of negligence, an unintentional injury to another would not render the actor liable, and finally in 1891 a case was brought in the Queen's Bench[1] which required the court to decide whether the old rule of strict liability was still in force or must give way to a rule of liability based upon moral culpability. The defendant, one of a hunting party, fired at a pheasant. The shot, glancing from the bough of an oak tree, penetrated the eye of the plaintiff, destroying his sight. The jury found that the defendant had not acted negligently, and the court decided that the defendant was not liable. The same result was reached in Massachusetts forty years earlier,[2] and this precedent has been followed in other states.

So that today we may say that the old law has been radically transformed. The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril. Nor is the modern ethical doctrine applied even now to all cases logically within its scope. Under this doctrine a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another. The lunatic homicide ceased to forfeit his goods or to require the king's pardon centuries ago. But there is no English decision that a lunatic need not make reparation to one injured by his act. There is, to be sure, no English decision to the contrary; but there are several *dicta* against the lunatic, and an unreasoning respect for these *dicta* has led to several regrettable decisions in this country and in the British Colonies. These decisions must be regarded as survivals of the ancient rule that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that the lunatic, not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English

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[1] Stanley *v.* Powell, [1891] 1 Q. B. 86.
[2] Brown *v.* Kendall, 6 Cush. (Mass.) 292.

courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault. The continental law upon this point is instructive. By the early French and German law the lunatic was liable as in England for damage that he caused to another. In France today the lunatic is absolutely exempt from liability. The new German Code has a general provision to the same effect, but this code, resembling in this respect the law of Switzerland and Portugal, makes this qualification of the rule of non-liability. If compensation cannot be obtained from the person in charge of the lunatic, the court may order the lunatic to pay such compensation as seems equitable under the circumstances, having regard especially to the relative pecuniary situation of the parties, and so that the lunatic shall not in any event be deprived of the means of maintaining himself in accordance with his station in life, or of complying with his legal duties as to the maintenance of others. This compulsory contribution by the rich lunatic to his poor victim with freedom from liability in other cases may well prove to give the best practical results.

We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor. The history of the law of contracts exhibits a similar transformation in the legal significance of the written or spoken word. . . .

G. CALABRESI, THE COST OF ACCIDENTS 20-21 (1970)

RISK DISTRIBUTION IS SELF-EXPLANATORY

The third myth involves the meaning of risk distribution. It has often been suggested that distributing the risk of accidents requires drivers rather than pedestrians to pay for automobile accidents, employers rather than employees to pay for work accidents, and so forth. Yet advocates of such systems of loss allocation often fail to explain or justify this and assume that the term risk distribution is self-explanatory. Actually, they may be using the term to mean three quite different things. The first possible meaning is the accomplishment of the broadest possible spreading of losses, both over people and over time. The second is the placing of losses on those classes of people or activities that are best able to pay, usually the "wealthiest," regardless of whether this involves spreading. The third is the placing of losses on those activities that, in some undefined sense, engender them.

Unfortunately, these meanings, while they represent valid methods for achieving valid aims, are not always consistent with one another. They are, moreover, supported by quite different ethical and economic postulates—postulates that are probably not accepted equally by anyone, and certainly not equally accepted by everyone. The first and second meanings of risk distribution represent two different methods for achieving a common subgoal which may loosely be called compensation. (I shall sometimes use this term, but more often will call the aim "secondary accident cost avoidance".) The first meaning of risk distribution I shall call the "risk spreading" method; the second I shall call the "deep pocket" method. The third meaning of risk distribution has very little in common with the first two except that it has been confused with them. It represents one method for achieving a different subgoal of accident law: the reduction of the immediate costs of accidents. In my locution, it represents a particular approach to achieving "primary accident cost avoidance." I call it the general deterrence or market approach.[4]

PROSSER ON TORTS (4TH ED. 1971) 146-57

Negligence already has been defined as conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm.[79] The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow.[80] A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward "with the wisdom born of the event." [81] The standard must be one of conduct, rather than of consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.[82] The court must put itself in the actor's place. At the same time, the standard imposed must be an external one, based upon what society demands of the individual, rather than upon his own notions of what is proper. An honest blunder, or a mistaken belief that no damage will result, may absolve him from moral blame, but the harm to others is still as great, and the actor's individual standards must give way to those of the public.[83] In other words, society may require of him not to be a fool.

In the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. Nearly all human acts, of course, carry some recognizable but remote possibility of harm to another. No man so much as rides a horse without some chance of a runaway, or drives a car without the risk of a broken steering gear or a heart attack. But these are not unreasonable risks. Those against which the actor is required to take precautions are those which society, in general, considers sufficiently great to demand them. No man can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. An unprecedented frost [84] or flood,[85] an automobile thrown unexpectedly against a pillar on the corner,[86] a child picking up a plank with a nail in it and dropping it on his foot,[87] a pedestrian slipping on a small bit of gravel in the highway,[88] the ricochet of a bullet at an almost impossible angle [89]—all of these things have happened, and will occur again; but they are not so likely to do so on any particular occasion as to make it necessary to burden the freedom of human action with precautions against them.[90] Such events are regarded as "unavoidable accidents," [91] for which there is no liability.

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32. THE REASONABLE MAN

The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court.[13] The standard of conduct which the community demands must be an external and objective one,[14] rather than the individual judgment, good or bad, of the particular actor; [15] and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act.

The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea: the "reasonable man of ordinary prudence." [16]

Sometimes he is described as a reasonable man,[17] or a prudent man,[18] or a man of average prudence,[19] or a man of ordinary sense using ordinary care and skill.[20] It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what such an ideal individual would be supposed to do in his place. A model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion, "this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example." [21]

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Physical Attributes

The conduct of the reasonable man will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what the reasonable man would do "under the same or similar circumstances." [24] Under the latitude of this phrase, the courts have made allowance not only for the external facts, but for many of the characteristics of the actor himself, and have applied, in many respects, a more or less subjective standard. "It would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor—his physical attributes, his intellectual powers, probably, if superior, his knowledge and the knowledge he would have acquired had he exercised standard moral and at least average mental qualities at the time of action or at some connected time." [25]

As to his physical characteristics, the reasonable man may be said to be identical with the actor.[26] The man who is blind [27] or deaf,[28] or lame, or is otherwise physically disabled,[29] is entitled to live in the world and to have allowance made by others for his disability,[30] and he cannot be required to do the impossible by conforming to physical standards which he cannot met. Similar allowance has been made for the weaknesses of age [31] and sex.[32] At the same time, the conduct of the handicapped individual must be reasonable in the light of his knowledge of his infirmity, which is treated merely as one of the circumstances under which he acts. A blind man may be negligent in going into a place of known danger, just as one who knows that he is subject to epileptic fits,[33] or is about to fall asleep,[34] may be negligent in driving a car.

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Mental Capacity

As to the mental attributes of the actor, the standard remains of necessity an external one. "The law," says Mr. Justice Holmes in a much quoted passage, "takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason." [37] The fact that the individual is a congenital fool, cursed with inbuilt bad judgment,[38] or that in the particular instance he "did not stop to think," [39] or that he is merely a stupid ox, or of an excitable temperament which causes him to lose his head and get "rattled," obviously cannot be allowed to protect him from liability. Apart from the very obvious difficulties of proof as to what went on in his head, it may be no bad policy to hold a fool according to his folly. The harm to his neighbors is quite as great, and may be greater, than if he had a modicum of brains; [40] and if he is to live in the community, he must learn to conform to its standards or pay for what he breaks. As to all such mental deficiency, no allowance is made; [41] the standard of reasonable conduct is applied, and "it is not enough that the defendant did the best he knew how." [42]

Obviously, however, an extreme is reached at which the mental deficiency has prevented the individual from comprehending the danger, or from taking action to avoid it; and the question then becomes, how can we find the tort of negligence at all? Can a complete imbecile, for example, be negligent? It is a rather mysterious fact that no case can be found involving such a condition on the part of a defendant. There are, however, quite a few cases dealing with contributory negligence of plaintiffs; and in all of them except one,[43] it has been held that the jury could find that there was no negligence.[44] There are even one or two cases making allowance for inability to exercise the judgment of a reasonable man; [45] but in the light of the difficulty of distinguishing, for example, excitable temperament causing the man to lose his head,[46] this appears unworkable as a practical matter.

In cases in which the mental aberration has reached the point of actual insanity, the tendency has been to carry over the standard of the reasonable man, and to apply it even to the negligence of those who are definitely insane.[47] This has not gone without criticism, and there has been much argument that an exception should be made when mental deficiency reaches such an extreme.[48] There are a handful of contributory negligence cases in which the mental state has prevented the individual from comprehending or avoiding the danger, and the jury has been permitted to find that there is no negligence.[49] There are two decisions in Wisconsin and Ontario [50] which have come to the same conclusion as to insane defendants. It seems rather probable that the cases as to lunatics will follow the line of mental deficiency in general.

On the other hand a transitory unconsciousness,[51] or delirium due to illness, commonly is regarded as a "circumstance" depriving the actor of control over his conduct, which will relieve him of liability.

Children

As to one very important group of individuals, it has been necessary, as a practical matter, to depart to a considerable extent from the objective standard of capacity. Children, although they are liable for their torts,[56] obviously cannot be held to the same standard as adults, because they cannot in fact meet it.[57] It is possible to apply a special standard to them, because "their normal condition is one of incapacity and the state of their progress toward maturity is reasonably capable of determination," [58] and because there is a sufficient basis of community experience, on the part of those who have been children or dealt with them, to permit the jury to apply a special standard.

Conceding this, it is nevertheless true that the capacities of children vary greatly, not only with age, but also with individuals of the same age; and it follows that no very definite statement can be made as to just what standard is to be applied to them. To a great extent it must necessarily be a subjective one. The formula which has been worked out, and which is customarily given to the jury, is that of "what it is reasonable to expect of children of like age, intelligence and experience." [59] There is something of an individual standard: the capacity of the particular child to appreciate the risk and form a reasonable judgment must be taken into account. This means that more will be required of a child of superior intelligence for his age,[60] and less of one who is mentally backward,[61] which is precisely what the same courts have refused to do in the case of an adult.[62] But the standard is still not entirely subjective,[63] and if the conclusion is that the conduct of the child was unreasonable in view of his estimated capacity, he may still be found negligent, even as a matter of law.[64]

The great bulk of the decisions in which all these questions have been considered have involved the contributory negligence of child plaintiffs. It has been contended [74] that where the child is a defendant no allowance should be made for his age, and he should in all cases be treated like an adult, for the reason that in practice children do not pay judgments against them for injuries inflicted, and such payment comes, if at all, from an adult, or from insurance paid for by an adult. Whether this is universally true may perhaps be questioned; but however that may be, the existing case law does not at all sustain this point of view.[75] Instead the courts have developed the rule, which is now quite generally accepted, that whenever a child, whether as plaintiff [76] or as defendant, engages in an activity which is normally one for adults only,[77] such as driving an automobile [78] or flying an airplane, the public interest and the public safety require that any consequences due to his own incapacity shall fall upon him rather than the innocent victim, and that he must be held to the adult standard, without any allowance for his age. This position has been rapidly gaining ground in recent years.

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STRICT LIABILITY VERSUS NEGLIGENCE

*STEVEN SHAVELL**

I. Introduction and Discussion

THE aim of this article is to compare strict liability and negligence rules on the basis of the incentives they provide to "appropriately" reduce accident losses. It will therefore be both convenient and clarifying to abstract from other issues in respect to which the rules could be evaluated. In particular, there will be no concern with the bearing of risk—for parties will be presumed risk neutral—nor with the size of "administrative costs"—for the legal system will be assumed to operate free of such costs—nor with distributional equity—for the welfare criterion will be taken to be the following aggregate: the benefits derived by parties from engaging in activities less total accident losses less total accident prevention costs.

Because the analysis of the rules will employ a mathematical model, it seems desirable to consider first in an informal way the points to be made and the logic behind them. Since this discussion will not serve as a complete summary, readers will probably also want to at least look at the statements of the propositions in the later parts of the paper and will almost certainly wish to read the concluding comments (which are not focused on the details of the model).

Accidents will be conceived of as involving two types of parties, "injurers" and "victims," only the latter of which are assumed to suffer direct losses. The category of accidents that will be examined initially are *unilateral* in nature, by which is meant that the actions of injurers but not of victims are assumed to affect the probability or severity of losses. The unilateral case is studied for two reasons. First, it is descriptive of situations in which whatever changes in the behavior of victims that could reasonably be expected to result from changes in liability rules would have only a small influence on accident losses.[1] The second reason is pedagogical; it is easier to understand the general *bilateral* case after having studied the unilateral case.

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[1] Examples of accidents occurring in such situations and which therefore might be considered

Unilateral Case

This case (as well as the bilateral case) will be considered in each of several situations distinguished by the nature of the relationship between injurers and victims.

Accidents between strangers (see Proposition 1): In this subcase it is supposed that injurers and victims are strangers, that neither are sellers of a product, and that injurers may choose to engage in an activity which puts victims at risk.

By definition, under the negligence rule all that an injurer needs to do to avoid the possibility of liability is to make sure to exercise due care if he engages in his activity.[2] Consequently *he will not be motivated to consider the effect on accident losses of his choice of whether to engage in his activity or, more generally, of the level at which to engage in his activity;* he will choose his level of activity in accordance only with the personal benefits so derived. But surely any increase in his level of activity will typically raise expected accident losses (holding constant the level of care). Thus he will be led to choose too high a level of activity;[3] the negligence rule is not "efficient."

Consider by way of illustration the problem of pedestrian-automobile accidents (and, as we are now discussing the unilateral case, let us imagine the behavior of pedestrians to be fixed). Suppose that drivers of automobiles find it in their interest to adhere to the standard of due care but that the possibility of accidents is not thereby eliminated. Then, in deciding how much to drive, they will contemplate only the enjoyment they get from doing so. Because (as they exercise due care) they will not be liable for harm suffered by pedestrians, drivers will not take into account that going more miles will mean a higher expected number of accidents. Hence, there will be too much driving; an individual will, for example, decide to go for a drive on a mere whim despite the imposition of a positive expected cost to pedestrians.

However, under a rule of strict liability, the situation is different. Because

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unilateral are not hard to imagine: a water main breaks and floods the basement of a home; a plane crashes into a house; a surgeon performs the wrong procedure on an anaesthetized patient. Concededly, even in these examples the victim could have taken *some* protective action (the surgeon's patient could have hired another surgeon to watch over the operation), but, we may plausibly assume, not at a cost nearly low enough to make it worthwhile.

[2] It is assumed for ease of exposition that courts have no difficulty in determining if a party did in fact exercise due care; the reader will have no trouble in appropriately modifying the arguments to be made so as to take into account relaxation of such simplifications as this.

[3] Specifically, while he will choose to engage in the activity just up to the level at which the personal benefit from a marginal increase would equal zero, it would be best from society's viewpoint for him to engage in the activity only up to the level at which his benefit from a marginal increase would equal the (positive) social marginal cost in terms of accident losses.

an injurer must pay for losses whenever he is involved in an accident,[4] he will be induced to consider the effect on accident losses of both his level of care *and* his level of activity. His decisions will therefore be efficient. Because drivers will be liable for losses sustained by pedestrians, they will decide not only to exercise due care in driving but also to drive only when the utility gained from it outweighs expected liability payments to pedestrians.

Accidents between sellers and strangers (see Proposition 2): In this subcase it is assumed that injurers are sellers of a product or service and that they conduct their business in a competitive market. (The assumption of competition allows us to ignore monopoly power, which is for the purposes of this article a logically tangential issue.) Moreover, it is assumed that victims are strangers; they have no market relationship with sellers either as their customers or as their employees.

Under the negligence rule the outcome is inefficient, but the reasoning is slightly different from that of the last subcase. While it is still true that all a seller must do to avoid liability is to take due care, why this results in too high a level of activity has to do with market forces. Because the seller will choose to avoid liability, the price of his product will not reflect the accident losses associated with production. This means that buyers of the product will face too low a price and will purchase too much, which is to say that the seller's level of activity will be too high. Imagine that the drivers are engaged in some business activity—let us say that they are taxi drivers. Then, given that they take due care, the taxi drivers will not have liability expenses, will set rates equal to "production" cost (competition among taxi drivers is assumed), will experience a greater demand than if rates were appropriately higher, and will therefore carry too many fares and cause too many accidents.

Under strict liability, the outcome is efficient, and again the reasoning is a little different from that in the last subcase. Since sellers have to pay for accident losses, they will be led to take the right level of care. And since the product price will reflect accident losses, customers will face the "socially correct" price for the product: purchases will therefore be appropriately lower than what they would be if the product price did not reflect accident losses. Taxi drivers will now increase rates by an amount equal to expected accident losses suffered by pedestrians, and the demand for rides in taxis will fall.

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Bilateral Case

In this case, account is taken of the possibility that potential victims as well as injurers may influence the probability or magnitude of accident losses by their choices of both level of care and of level of activity.

Accidents between strangers (see Propositions 4 and 5):[9] Under the negligence rule,[10] the outcome is not efficient. As was true in the unilateral case, since all that an injurer needs to do to avoid liability is to exercise due care, he will choose too high a level of activity. In regard to victims, however, the situation is different. Since a victim bears his accident losses, he will choose an appropriate level of care *and* an appropriate level of his activity, given the (inefficient) behavior of injurers. The drivers will exercise due care but will go too many miles. And the pedestrians, knowing that they must bear accident losses, will exercise due care (in crossing streets and so forth) and they will also reduce the number of miles they walk in accordance with expected accident losses per mile.

Under strict liability with a defense of contributory negligence, the outcome is symmetrical to the last—and again inefficient.[11] Because all that a victim needs to do to avoid bearing accident losses is to take due care, he will have no motive to appropriately reduce *his* level of activity; this is the inefficiency. However, because injurers now bear accident losses, they will take the appropriate amount of care and choose the right level of activity, given the inefficient behavior of victims. Drivers will exercise due care and go the correct number of miles. Pedestrians will also exercise due care but will walk too many miles.

From this discussion it is apparent that the choice between strict liability with a defense of contributory negligence and the negligence rule is a choice between the lesser of two evils. Strict liability with the defense will be superior to the negligence rule when it is more important that injurers be given an incentive through a liability rule to reduce their activity level than that victims be given a similar incentive; that is to say, when it is more important that drivers go fewer miles than that pedestrians walk fewer miles.

Because neither of the familiar liability rules induces efficient behavior, the question arises, *"Is there any conceivable liability rule depending on parties' levels of care and harm done that induces efficient behavior?"* It is proved below (Proposition 5) that the answer is "*No.*" The problem in essence is that for injurers to be induced to choose the correct level of activity, they must bear all accident losses; and for victims to choose the correct level of their activity, they also must bear all accident losses. Yet it is in the nature of a liability rule that both conditions cannot hold simultaneously; clearly, injurers and victims cannot each bear all accident losses.[12]

G. CALABRESI, THE COSTS OF ACCIDENTS
70–75 (1970)

The general deterrence approach treats accident costs as it does any other costs of goods and activities—such as the metal, or the time it takes, to make cars. If all activities reflect the accident costs they "cause," each individual will be able to choose for himself whether an activity is worth the accident costs it "causes." The sum of these choices is, *ex hypothesis*, the best combination available and will determine the degree to which accident-prone activities are engaged in (if at all), how they are engaged in, and who will engage in them.[2] Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident-prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want. Forbidding accident-prone activities *despite* the fact that they can "pay" their costs would, in theory, bring about an equally bad result from the resource allocation point of view. Either way, the postulate that individuals know best for themselves would be violated.

A hypothetical example may help clarify this. In Athens, accident costs are in some way or other charged to the activity that engenders them. Sparta is a society in which all accident costs are borne by the state and come out of general taxes. C. J. Taney, a businessman in Athens, has one car and is considering buying a used car in addition. The cost of owning the second car would come to about $200 a year, plus an addition to his insurance bill of another $200. Alternatively, the cost of train fares, the taxis he would occasionally need to take, and the other expenses incurred to make up for not having a second car come to about $250. Contrasting the $400 expense of owning a second car with the $250 expense of riding in trains and taxis, he decides to forgo the car.

If Taney lived in Sparta, on the other hand, he would have to pay a certain sum in taxes as his share of Sparta's general accident program. Short of moving out of Sparta, he could not avoid this cost whatever he did. As a result, the comparative costs in Sparta would be $200 per year for the car as contrasted with $250 for train and taxi fares. Chances are Taney would buy the car. In purchasing a second car in Sparta, he is not made to pay the full $400 that it costs society. In fact, he must pay *part* of that cost whether or not he buys one. He will, therefore, buy a car. If he had to carry the full burden of a second car, he would use trains and taxis, spending the money saved on something else—television, or perhaps a rowboat.

For the theory to make some sense there is no need to postulate a world made up of economic men who consciously consider the relative costs of each different good and the relative pleasure derived from each. If the cost of all automobile accidents were suddenly to be paid out of a general social insurance fund, the expense of owning a car would be a good deal lower than it is now since people would no longer need to worry about buying insurance. The result would be that some people would buy more cars. Perhaps they would be teen-agers who can afford $100 for an old jalopy but who cannot afford—or whose fathers cannot afford—the insurance.[3] Or they might be people who could only afford a

2. The sum of individual choices will not necessarily be the best combination available, however, if the activities' other costs are not reflected in their prices. Thus if the petroleum industry were subsidized, we might have too much driving as against walking, even though both driving and walking bore their proper share of the costs of accidents. And some economists would contend that once one cost is not reflected properly, the reflection of other costs may even worsen the overall result in terms of proper resource allocation. See infra pp. 86–88.

3. An example of this may be found in New York State where, with the advent of compulsory insurance (see the Motor Vehicle Financial Security

second car so long as no added insurance was involved.[4] In any event, the demand for cars would increase, and so would the number of cars produced. Indeed, the effect on car purchases would be much the same as if the government suddenly chose to pay the cost of the steel used by automobile manufacturers and to raise the money out of general taxes. In each case the objection would be the same. In each, an economist would say, resources are misallocated in that goods are produced that the consumer would not want if he had to pay the full extent of their cost to society, whether in terms of the physical components of the product or in terms of the expense of accidents associated with its production and use.

As I shall show later, I do not believe resource allocation theory in its extreme or pure form can find much acceptance today, especially as applied to accidents. Its inherent limitations, together with those added by its application to accident costs, are simply too great. But this is far from saying that the theory is useless. It has always had, in fact, a remarkable practical appeal and tenacity. It can even stand substantial modification of its basic ethical postulate—that individuals know what is best for themselves by and large—and still play an important role, albeit a more limited one, in highly welfaristic or socialistic societies. Indeed, it is hard to imagine a society where, somewhere along the line, the market deterrence approach to primary accident cost control would not be significant. All that is needed for the approach to have some influence is acceptance of the notion that *sometimes* people know best for themselves, even if for no other reason than that the choices involved arise too frequently for adequate collective decisions. To make the reasons for the appeal of general deterrence even clearer, it may be useful to discuss how it operates to reduce accident costs and how it would do so even in a society not committed to free enterprise.

How Costs Are Reduced by General Deterrence

The general deterrence approach operates in two ways to reduce accident costs. The first and more obvious one is that it creates incentives to engage in safer activities. Some people who would engage in a relatively dangerous activity at prices that did not reflect its accident costs will shift to a safer activity if accident costs *are* reflected in prices. The degree of the shift will depend on the relative difference in accident costs and on how good a substitute the safer activity is. Whatever the shift, however, it will reduce accident costs, since a safer activity will to some degree have been substituted for a dangerous one.

The second and perhaps more important way general deterrence reduces accident costs is that it encourages us to make activities safer. This is no different from the first if every variation in the way an activity is carried out is considered to be a separate activity, but since that is not how the term activity is used in common language, it may be useful to show how general deterrence operates to cause a given activity to become safer. Tancy drives a car. His car causes, on the average, \$200 per year in accident costs.[5] If a different kind of brake were used in the car, this would be reduced to \$100. The new kind of brake costs the equivalent of \$50 per year.[6] If the accident costs Tancy causes are paid either by the state out of general taxes or by those who are injured, he has no financial incentive to put in the new brake. But if Tancy has to pay,

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Act, New York Vehicle and Traffic law §§ 310 et seq.), the bottom fell out of the jalopy market.

4. "Afford" is not the proper economic term, though it is the one we would normally use. Technically the question is not whether the teen-ager or his father has or can get the insurance money, but whether he thinks it worthwhile to spend that much money on a car rather than on other things. "Other things" would include, of course, the leisure the teen-ager would have to give up to earn the money.

5. This, of course, assumes we know the costs precisely. The \$200 accident cost of Tancy's operating an automobile can be viewed as the cost of insuring against the accident costs he causes no matter who pays it.

6. The cost of the brakes must be discounted over their effective life in order to arrive at an annual expense figure.

he will certainly put the new brake in. He will thus bear a new cost of $50 per year, but it will be less than the $100 per year in accident costs he will avoid. As a result, the cost of accidents to society will have been reduced by $50.[7]

This example of how general deterrence operates to reduce costs is, of course, highly simplified. It assumes, for instance, that we know that Taney "causes" the $200 in accident costs. It also assumes that the government or the victims, if they bear the losses, cannot cause the brakes to be installed as readily as Taney. Indeed, the assumptions are so simple that they lead one to ask, why we do not simply make all Taneys install the new brakes. Why, in short, do we not specifically deter the "dangerous conduct" instead of bothering with so cumbersome a method as general deterrence?

Mentioning a few more of the many complications inherent in the situation may make clearer why general deterrence is worthwhile. Suppose that Marshall, who uses old-style brakes, has only $25 worth of accidents per year. It is not worth our while to force him to install the new brakes. Indeed, if he were made to install new brakes and if we can assume our measurements of costs to be accurate (a matter calling for a good deal of discussion later), forcing Marshall to install new brakes would add an unnecessary $25 to our cost burden. Yet we would still wish to have Taney install the brakes in order to get his $50 saving. It will be expensive, if not impossible, to make collective decisions distinguishing the Taneys from the Marshalls. It will, in fact, be much easier if we let the distinction be made by Taney and Marshall themselves by letting them choose between paying for the accidents and paying for the new brakes.

Another complication may be even more significant. Suppose we do not yet have the safe brakes, and requiring such brakes is therefore impossible. Placing the cost on cars may still bring about general deterrence in the form of a continuous pressure to develop something—such as new brakes—that would avoid the accident costs and would be cheaper to make and sell than paying the accident costs. General deterrence creates a market for this cost-saving substitute and, therefore, an incentive for someone to develop it and bring about a cost reduction.[8]

7. Of course, the $50 brake cost is not an *accident* cost. It is an accident *avoidance* cost. But in terms of primary accident cost avoidance the two are equivalent.

G. CALABRESI, THE COSTS OF ACCIDENTS 39–45 (1970)

Secondary Accident Cost Avoidance: The Loss Spreading and Deep Pocket Methods

THEORETICAL BASES

The justification found most often among legal writers today for allocation of accident losses on a nonfault basis is that accident losses will be least burdensome if they are spread broadly among people and over time.

Analogues to these views can be found in economic theory. The advantages of interpersonal loss spreading would probably be stated as a pair of propositions: (1) taking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary or avoidable losses, than taking a series of small sums from many people;[1] (2) even if the total economic dislocation were the same, many small losses would be preferable to one large one simply because people feel less pain if 10,000 of them lose one dollar apiece than if one person loses $10,000.

While the first of these propositions is an empirical generalization not too difficult to accept, the second is a variant of the empirical generalization known as the diminishing marginal utility of money theory. This theory has been in substantial disfavor among modern economists because as an empirical generalization it cannot be proven to be universally true, and because it has been shown to be invalid in certain situations. Studies have indicated, for example, that a loss of a relatively small amount of money, if it results in a drop in social status, may be nearly as significant to an individual as a much larger loss causing no substantial change in his social position. On the other hand, a relatively small loss, if it can be borne without giving up certain symbols of social status—be they a house on the right street or a television set—feels infinitely smaller to people than an only slightly larger loss that does involve a loss in status.[2]

Despite the weaknesses of the strictly utilitarian plain-pleasure analysis underlying the marginal utility of money theory, with its implication that a five-dollar loss divided among five people *necessarily* hurts less than the same loss placed on one person, the basic justification for loss spreading remains strong. We need merely recognize that social dislocations, like economic ones, will occur more frequently if one person bears a heavy loss than if many people bear light ones to find an adequate support for the spreading of losses.[3]

A variant of the notion that secondary losses of accidents can be reduced by spreading them broadly is the deep pocket notion. This holds that secondary losses can be reduced most by placing them on the categories of people least likely to suffer substantial social or economic dislocations as a result of bearing them, usually thought to be the wealthy. One can conceive of societies or situations, however, where social and economic dislocations would be minimized by placing accident losses on other groups, perhaps even on the poor (highly regressive taxes are certainly not unknown). The principal difference between this method and loss spreading is that this method implies that partial spreading can reduce secondary costs better than total spreading if the right people are made to pay.

The bases for this notion are not hard to find in either economics or politics. The theory of the diminishing marginal utility of money implies that a dollar taken from a rich man causes less pain than one taken from a poor man, and that therefore shifting losses from the poor to the rich is a good thing in itself. As noted, this theory is currently out of favor. But even if we cannot say that it has universal validity, we are accustomed to operating under this assumption as voters. Even if the economist refuses to say that the last $10,000 of a millionaire's income is worth less to him than the last $1,000 of a poor man's income is worth to the poor man, the Internal Revenue Service, on instructions from the people, says just that. An argument can be made for letting our system of accident loss allocations work the same way as our tax code does and take from the rich, by and large, to give to the poor, more or less. Needless to say, in order to find the argument at all attractive one must first agree with the voters' choice in favor of highly graduated taxes. If one does, one may well favor systems that, while spreading, differentiate according to ability to pay, rather than systems that merely spread losses evenly among the rich and poor.[4]

The need for interpersonal and intertemporal loss spreading to diminish secondary costs is certainly great. But secondary accident cost avoidance cannot be the only aim of a system of accident law. This should be clear from the fact that loss spreading and deep pocket do nothing to reduce the *primary* costs of accidents, whereas most people seem to want at least some primary accident cost reduction.

If secondary cost avoidance were our sole aim, there would be no justification for limiting compensation to accidents and not giving equal compensation for illness, old age, and all the other troubles of this planet. Of course, we do compensate to some extent in fields other than accidents. But it is the fact that we only do it to some extent that is crucial. Why is compensation for illness, even in highly welfaristic countries, much less complete than compensation for accident victims? Surely if the type of cost reduction with which we are concerned is solely or principally that accomplished by diminishing secondary costs—social and economic dislocations—then a generalized system of social insurance covering all types of severe injuries would be the only practical answer. Payments into the social insurance fund could be spread as widely as possible or allocated to those especially able to pay, depending on whether we preferred the spreading or the deep pocket approach. But either way, secondary cost avoidance could be achieved in an extremely efficient fashion.[9] The answer is, of course, that accidents, unlike most diseases,[10] can easily be reduced in number and severity, and that such primary cost reduction can—indeed must—be an important aim of whatever system of law governs the field. Accordingly, perfect systems of secondary cost avoidance, if they give poor primary cost avoidance, may be totally unacceptable.

Nevertheless, compensation remains a fundamental aim of accident law. If its theoretical basis lies in certain notions about social and economic costs caused by concentrated losses, its practical bases lie in the fact that accidents are a source of some of the most dramatic concentrations of costs in our society. Some writers have attempted to equate the need for compensation of accident losses with the problem of poverty, thus making it essentially an adjunct of the more general problem of improper distribution of income.[11] It is certainly true that some of the direst examples of poverty stem from accident situations. But I suspect that even if poverty were eliminated by a guaranteed minimum income, we would still find too severe those social and economic dislocations resulting from the fact that some unspread accidents costs reduce people from a good to a minimum standard of living. In other words, since the economic and social costs of unspread accident losses result as much from the *change* in social and economic status caused by the accident as from the actual economic condition in which the accident may leave people, no discussion defining the problem in terms of poverty alone is sufficient.[12] In this sense, compensation plans like the Blum and Kalven stopgap plan and the minimum nonpoverty level social insurance plans must be interpreted either as ignoring the change-in-status aspect of secondary accident costs or as having decided for unspecified reasons that this aspect is unimportant.

The previous discussion presupposes that people either cannot or for some reason do not provide on their own for sufficient spreading of the risks of accident costs.

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THE DEGREE OF MORAL FAULT AS AFFECTING DEFENDANT'S LIABILITY

RALPH S. BAUER †

It is our purpose to study the tendency of courts to consider the degree of the defendant's moral fault in the judicial administration of the so-called rules or principles of causation and of proof. At least as early as 1858, a distinguished writer seemed greatly troubled at the possibility that distinctions as to the degree of fault might cause our courts to "lose themselves in the maze of abstract casuistry, as to the different degrees of fault," [1] or, despairing of the attainment of principle, to throw each case to the all but uncontrolled decision of the jury. Although our law does not recognize any such arbitrary classification as that of *dolus* and *culpa* under the civil law, it seems that there is a fairly clear tendency to pay attention to the degree of the defendant's fault, even independently of the theory of exemplary damages.

Perhaps it will be contended that, in undertaking this study of a mere tendency, as contrasted with supposedly fixed "principles" or "rules," we are giving attention to that which is no real part of the law; but is it not both sensible and scientific to bring out into the light of day any important tendency in our law and to study it as a mere tendency, without falling into the nineteenth century error of promptly placing upon it the label of "principle" or "rule"? Is not the study of important judicial tendencies worth while, as a practical matter, in adding to predictability of judicial result, if predictability is as desirable as most lawyers apparently believe it to be? Only by studying the tendency of courts to regard degree of fault can we come to any understanding of the real workings of the supposedly rigid, but really very elastic "rules" of causation and certainty.

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Although causation itself is the same problem in negligence, in reckless misconduct, and in intentional wrongs, the so-called rules of causation, which really cover both causation and the question whether the damage sued for is within the protection of the rule of conduct invoked, are administered in such a manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer.[6] It would shock the feelings of a court to be as lenient with the intentional or even the reckless wrongdoer as with the person merely failing, perhaps by very little, to live up to the standard of care required. The intentional wrongdoer cannot successfully invoke the doctrine of accident in order to relieve himself from paying damages for unintended results of his intended wrong or of his attempt to do a wrong; but the defendant charged with negligence is often able to plead accident with complete success. Courts temper the so-called rules of causation to fit the moral conduct of the defendant.

> "Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results. This is not because the defendant's act was a more immediate cause in one case than in the others, but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault are present. Treating all these cases as turn-

[5] "Upon reflection, it must be clear that, for any case wherein there is a clash of two groups having conflicting interests, two conflicting major premises can always be formulated, one embodying one set of interests, the other embodying the other. Each group has had its advocate to formulate its interests into general propositions and our novel cases all involve some such conflict of interests." Oliphant and Hewitt's Introduction to English translation of RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES (1929) xv-xvi.

[6] See GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 170 *et seq.*

ing upon an issue of immediateness of causation has resulted in much confusion of ideas and made the conflict of decisions appear to be greater than it is. Most of the cases wherein liability to foresee has been held to be an answer to the plaintiff's claim of causation are those where the result is not immediate, but depended largely upon extrinsic and intervening causes. The result was somewhat remote, and a morally innocent party ought not to be held liable, though one morally guilty should be. The decisions do not turn on remoteness of causation alone, but upon such remoteness plus freedom from moral fault." [7]

Courts are so little inclined to limit closely the liability of a defendant for an intentional wrong that, in such cases, they give much less attention to questions of proximate cause than in negligence cases. In negligence cases, courts are inclined to hold down liability and the measure of damages rather closely, by a very strict interpretation of such terms as "proximate result." In doing so, it would seem that, without the Roman theory as to kinds or degrees of fault, they are operating very much as did the ancient Roman courts, which allowed damages for resulting harm more readily in cases of *dolus* than in those of *culpa.*[8]

In allowing damages for physical consequences of fright wilfully caused by defendant, the Supreme Court of Minnesota said: "Cases holding that illness caused by fright is too remote a consequence of a negligent act to permit a recovery, unless there was some immediate physical harm, are not in point, for in such cases there is no element of wilful wrong." [9]

In cases of reckless misconduct, courts, in a number of instances, have held the defendant liable for resulting damage for which he almost certainly would not have been held liable if he had been guilty of negligence only.

In the famous case of *Scott v. Shepherd,*[10] the conduct of the defendant in throwing a firecracker into a crowd in the market place, was obviously not merely negligent, but reckless, and the court proceeds to hold him liable for results directly brought about by the intervening act of a fourth person after another intervening act of a third person. It may be said, in passing, that the court went still farther and stretched the action of trespass in order to hold the defendant liable, over the dissent of Blackstone, *J.*

In *Bremer v. Lake Erie & Western R. Co.*,[11] the court allowed recovery for the death of a trespasser riding on the train of defendant. The death was caused by the reckless misconduct of the train crew in passing a signal. Defendant's servants did not even know of the presence of plaintiff's decedent until about the time of the impact of the crash that caused his death, when it was already too late to exercise any effective care in his behalf.

In an interesting English case,[12] the court holds the defendant liable for damage that has resulted from a rather unexpected type of intervening act of a third person, apparently viewing defendant's act as one of reckless misconduct. Defendant was the occupant of premises abutting on a private road leading to certain other premises as well as to his. The private road consisted of a carriage road and a footway. Defendant used his premises as a place for athletic sports carried on by persons resorting thereto for their amusement. To keep his customers from being annoyed by persons coming along the road in carts and vehicles and stationing themselves opposite his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. Plaintiff, coming rightfully along the footpath at night, came into collision with one of the spikes in such a way that one eye was forced from its socket. The jury expressly found that the use of the spikes in the way was dangerous to persons using it. The defense was that, although if the injury had resulted from the use of the spikes as placed by defendant in the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording him the

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occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Judgment was given for the plaintiff. The court said:

> "If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. . . . It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." [13]

When the court says that the defendant "is not only guilty of negligence, but of negligence of a very reprehensible character," it seems to indicate that the defendant has really been guilty of "gross and wilful negligence" or "reckless misconduct." When the court further says "not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion," it seemingly evinces a tendency to pursue consequences more remote than would be considered in the case of ordinary negligence.

In negligence cases, courts are somewhat careful in administering rules of causation and the rule against excessive damages so as to be rather lenient with the defendant.

In *Ryan v. New York Central R. Co.*,[14] it seems obvious that the court rationalized to save a defendant merely negligent from being liable for results for which a wilful, and perhaps even a reckless wrongdoer would have been held liable. In order to accomplish its end, the court goes so far as to lay down an unusual and arbitrary rule.

In *Castle v. St. Augustine's Links, Limited*,[15] an action brought against the owner of a golf course for damages for the putting out of plaintiff's eye by being struck by a piece of glass from the windshield of the taxicab in which plaintiff was riding, the windshield being struck by a ball driven from a tee on defendant's golf course, the court allowed only £450 and costs. The facts indicated negligence in locating this tee and the green toward which it was directed. The court said: [16]

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"Nothing was so difficult as to assess compensation. No money that he could give would put the plaintiff back into the same state as before the accident, but, on the other hand, he could not make the golf club pay thousands of pounds for the very regrettable occurrence."

Here the court is very evidently rationalizing in support of a small verdict against a defendant merely negligent, and negligent in such a manner as to make only very infrequent injuries foreseeable.

The tendency to temper rules to fit moral conduct is fully as marked in the field of certainty of proof. The rule laying emphasis upon the necessity of certainty of proof is applied chiefly to cases of negligence and of apparently non-wilful breach of contract. The rule laying emphasis upon the necessity of *only reasonable* certainty of proof is applied chiefly to cases of wilful or reckless torts and of wilful breach of contract.[17]

In certain specific types of action, anomalous rules as to measure of damages have developed, in some instances evidently in part beeause of the desire to be more severe with the person seriously at fault in the moral sense. For instance, in cases of fraud and deceit, where the cold logic of the law of torts would dictate that plaintiff should recover only what he is "out of pocket," as many courts do hold, many other courts permit the plaintiff to recover the difference between the represented value and the actual value of the property sold by the defendant to the plaintiff, which is the contract measure of damages and usually gives the plaintiff a much larger sum than he would get if this were treated like other tort cases. Courts have no compassion for defrauders. The application of this anomalous measure of damages is in part a manifestation of the judicial tendency to be more severe with the person morally at fault.[18]

Justice is made more or less roughly to fit the kind and degree of fault in the particular case. Without using such terms as *dolus* and *culpa,* and without anything that approaches exactitude of plan, our courts are recognizing, more or less tacitly, the fact that the person in serious moral fault may well be held to a high degree of accountability. By continually tempering the so-called rules of causation and of certainty of proof to fit ever-varying degrees and kinds of moral fault and by varying the operation of general rules as to measure of damages, the courts have brought about a situation in which degree of fault probably plays a much larger part than is usually supposed.[19]

Cost-Benefit Analysis of Entitlement Problems: A Critique

Duncan Kennedy*

I. Standard Procedure in Cost-Benefit Analysis

A. *Conventional Cost-Benefit Analysis*

The original rationale for cost-benefit analysis was simply that the government should, before undertaking an expensive public project like a missile system, interstate highway network, or dam, try to figure out who will gain and who will lose from the project and by how much. If it looks as though the benefits to the winners are a lot more than the costs to those whose interests are hurt by the project, then it should proceed.[6]

Numerous problems arise in trying to value various kinds of costs and benefits. The normal procedure is to try to imagine how affected parties would value them, generally assuming that they do so under their existing budget constraints. The analyst thus usually accepts the existing distribution of income as a powerful factor in the valuation process. But there is no *logical* reason to avoid valuation based upon some hypothetical budget constraints. Nor is it illogical to consider the project's potential effect on income distribution and evalu-

6. *See generally* R. McKean, Efficiency in Government Through Systems Analysis (1958); E. Mishan, Economics for Social Decisions (1973).

ate the project based on preferences for greater or lesser equality.[7]

Cost-benefit analysis is intended to provide a technique for deciding when market failure has prevented private entrepreneurs from providing a good or service for which people would gladly pay if its price were not exaggerated by transaction costs, freeloader problems, and the like. The analysis generates a picture of what would have happened had these factors not inhibited entrepreneurs. If consumers are willing to pay enough above the cost of the project to outweigh the cost to those who value it negatively, then market forces undistorted by these factors would have brought it into existence, and the government can justify stepping in to repair the market failure.[8]

B. *Extending Cost-Benefit Analysis to the Fixing of Entitlements*

Government decisions about what private law rules to enforce are not obviously analogous to decisions about building dams or highway systems. But the premise of liberal law and economics is that they nonetheless have enough in common so that one can sensibly apply the same decision techniques to each. The choice of a private law rule, say about the liability or non-liability of ranchers to farmers for damage done by straying cattle, is like the decision to build a dam in that it will affect a large number of people. There are farmers and ranchers as groups, but there are also all those who buy from or sell to those groups. Indeed, the whole pattern of distribution and allocation of resources will be affected by every decision about a private law rule. It is perfectly sensible to try to figure out how all the people would value, given their budget constraints, all these changes, and then to add up the pluses and minuses and see which rule—liability or no liability—produces the best result.

It is possible to understand this procedure as analogous to the conventional kind of cost-benefit analysis in that it is an attempt to deal with a form of market failure. To begin with, a private entrepreneur cannot go into the business of providing an enforced rule of liability or no liability for the farmer and the rancher. The reason for this is that the state will not permit the use of force by the entrepreneur. But even if we were to imagine such a private industry, it seems likely that transaction costs, including both problems of large numbers with small stakes and freeloader problems, would prevent

7. *See, e.g.*, E. MISHAN, *supra* note 6, at 21-24.
8. *Id.* at 11-13.

the entrepreneur from getting an accurate reading from the market of all the costs and benefits generated by his activity. The liberal law and economics cost-benefit analysis of entitlements would then be necessary in order to decide whether the failure of the private sector to provide enforcement of any rule at all was something that should be remedied by government action.[9]

As in the case of the dam, the decision to fix a rule one way or another will have distributive effects. It is perfectly permissible, within the liberal conception, for the analyst to "balance" these against the benefits generated by a proposed entitlement. And the analyst can also attempt to correct the impact of income inequality on budget constraints and thus on valuation of cost and benefit. But, as before, there is nothing in the procedure that requires him to do this.

C. *Cost-Benefit Analysis of Entitlements and Efficiency*

While there is no logical obstacle to including these things in a cost-benefit analysis of the fixing of entitlements, the liberal analysts I am talking about don't do it that way. They use the analysis as a way to generate a judgment of efficiency, or, more precisely, of potential Pareto superiority. They include in the calculus the valuations of all the affected parties, with the goal of determining whether moving from one rule to another rule would modify the allocation of resources in such a way that the gains to the gainers from the change would be greater than the losses to the losers. Sometimes (although not always)[10] they express this idea in terms of "compensation." If, in the absence of transaction costs, it would have been possible for the farmers and all those who buy from and sell to the farmers to compensate the ranchers for all losses accruing by the change from a rule of no liability to a rule of liability for crop damage, then the change is "efficient," in the sense of moving us to a position potentially Pareto superior to that we started from.[11]

It is usual for the liberal analyst to assume that he or she is addressing a judge, who has the power to set rules about things like liability or no liability of ranchers to farmers but no power to order farmers to make payments to ranchers if it turns out to be potentially Pareto preferable to impose liability. The liberal analyst then has to

9. *See* R. STEWART & J. KRIER, *supra* note 1, at 107-16.

10. *See* text accompanying notes 68-74 *infra*.

11. *See, e.g.*, R. STEWART & J. KRIER, *supra* note 1, at 99-104, *Cathedral*, *supra* note 1, at 1093-94.

deal with the question of whether the "distributive" effects of making the change amplify, neutralize, or counterbalance the "efficiency gains."[12] As I will be using the term, liberal cost-benefit analysis refers only to the first part of this operation: that in which we generate the efficient or potentially Pareto superior alternative.

It is an accepted part of the theory that the cost-benefit analysis may not yield a determinate result. There may be more than one efficient solution (in the sense of Pareto optimal, rather than merely potentially superior), or the situation may be such that two solutions are mutually Pareto superior (the Scitovsky paradox).[13] In such cases it is not only permissible, but actually necessary to call in nonefficiency considerations to resolve the "deadlock."

D. *Cost-Benefit Analysis and the Coase Theorem*

The Coase Theorem[14] states that if there are no transaction costs (with transaction costs very broadly defined), there will be an efficient allocation of resources no matter how entitlements are set. In other words, in the no transaction cost case, all efficiency analyses of entitlements will be indeterminate because all settings generate Pareto optimal allocations. *What* the allocation is will be different for different entitlement patterns because of wealth effects.[15]

It is implicit in the Coase Theorem that if there *are* transaction costs, it is possible for an entitlement to be set inefficiently—*i.e.*, it is possible for the setting of an entitlement to generate an allocation that is potentially Pareto inferior to the allocation that would have occurred had the entitlement been set differently. Within the liberal paradigm, the notion of efficiency tells us nothing about how to set entitlements so long as there are no transaction costs, since in that situation all entitlement patterns generate Pareto optimal outcomes. But once there are transaction costs on the scene, the situation is quite different, and "the goal of economic efficiency starts to prefer one allocation of entitlements over another."[16]

For example, suppose we have a rule that ranchers are not liable

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12. *See, e.g.*, Calabresi & Hirschoff, *supra* note 1, at 1077-82; *Cathedral*, *supra* note 1, at 1110, 1114-15.

13. *See, e.g.*, E. MISHAN, *supra* note 6, at 16; *Cathedral*, *supra* note 1, at 1094 n.10, 1121.

14. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). *See generally* Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968); Nutter, *The Coase Theorem on Social Cost: A Footnote*, 11 J. LAW & ECON. 503 (1968).

15. Wealth effects are changes in demand caused by income shifts that follow changes in entitlement. *See* text accompanying notes 88-102 *infra*.

16. *Cathedral*, *supra* note 1, at 1096.

for crop damage. Suppose that if there were no transaction costs, farmers would pay ranchers to take measures that would eliminate crop damage altogether. But because of transaction costs, farmers find it would be more expensive to do the bribery than just to accept the crop loss. In this case, if we change the entitlement and make ranchers liable, and there are no costs of bringing suit for damage, the ranchers will be induced to take the measures to eliminate crop losses without there being any negotiation with the farmers. There will be an efficient allocation of resources, in the sense that the allocation that occurs under the new rule of rancher liability is potentially Pareto superior to that generated by the old rule of no liability, operating under transaction costs.[17]

Even assuming that changes in wealth resulting from changing the liability rule have negligible effects on the allocation of resources, they may be considered undesirable from the "equity" perspective. In that case, the liberal cost-benefit analyst has the options already mentioned: He can go ahead, or scrap the change to avoid the bad distributional results.[18] In some cases, he might also be able to arrange some kind of compensation, as in the "purchased injunctions" that have recently begun to appear in some nuisance cases.[19] As always, efficiency is only one of the considerations that are relevant in liberal analysis of entitlement setting.

II. The New Externalities Analysis

A. *Historical Background*[20]

In the initial formulations of the New Welfare Economics, it was said to be a condition of the efficiency of perfectly competitive markets that all factors are private property *and* that there are no externalities.[21] The definition of an externality was imprecise in several ways. The classic example of the phenomenon was pollution damage from a factory. In the early 1960s, as an undergraduate majoring in

17. *See generally* Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972); D. Kennedy & M. Kelman, The Interpretation of Political Dreams: The Search for Efficient Tort Rules (Jan. 1981) (unpublished manuscript draft on file with *Stanford Law Review*).

18. *See* notes 3, 12 *supra*.

19. *See Cathedral*, *supra* note 1, at 1115-21.

20. The view of law and economics as liberal politics put forward in this section emerged in conversations with my colleague, Morton Horwitz. *See* Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

21. *See, e.g.*, W. BAUMOL, WELFARE ECONOMICS AND THE THEORY OF THE STATE 64-76 (2d ed. 1965).

economics, I heard the same basic analysis of the pollution problem in three different courses. It began with the notion of "social cost," which meant the actual resource cost of producing a commodity. It was clear to everyone that the smoke damage was a cost of the commodity produced by the factory. It was also obvious that factories didn't have to take this cost into account in setting their prices. It followed that from the point of view of social cost, the polluting factory's product would be underpriced vis-a-vis commodities that didn't pollute, and would consequently be "overproduced."[22]

The remedy presented by my teachers was clear, at least in theory: The government should impose a system of fines and bounties on industry in order to make sure that both the external costs and the external benefits of production were "internalized" by the firms that generated them.[23] From a student's point of view, this was obviously a left-wing proposal. It was a source of no little satisfaction that it appeared to be dictated by economic science at its purest.

But however appealing, the fines and bounties system seemed obviously impracticable. The lawyers had already come up with something much more politically feasible, for the reason that they avoided one of the ambiguities in the economic theory. The ambiguity concerned the reason why the factory didn't have to pay for smoke damage. In economics class, this was just a given. In law school, it was explained by the absence of any *legal right* of the injured property owner to recover.

Once the absence of a right of recovery was identified as the problem, a distinctly liberal program of law reform based on economic theory became a possibility. The rules of tort law govern myriad forms of interaction between manufacturers and other social groups. In many cases, the manufacturers can perfectly legally do things that injure the interests of these other groups. If efficiency requires that the social costs of production be internalized to the firms generating them, then tort law should be reformed to impose liability wherever manufacturing activity now injures with impunity. Since the rule of tort damages is compensation, the result would be precisely what theory required: The firm would have to pay exactly the amount that the economist would have imposed as a fine. But whereas a fine would go to the state, the damage payment would redistribute in-

22. *See* A. PIGOU, THE ECONOMICS OF WELFARE 172-203 (4th ed. 1932). For a detailed discussion of Pigou's position, see Coase, *supra* note 14, at 28-44.

23. *See* A. PIGOU, *supra* note 22, at 192-96.

come in the egalitarian direction the general liberal program suggested was appropriate.

The argument was developed for non-contractual relationships in which a manufacturing process injures a bystander, as in the pollution case,[24] and the Progressives applied it in the semi-contractual case of industrial accidents.[25] But it applied equally well to injuries to consumers of the manufactured products themselves. The rules of tort law permitted the consumer to recover only where the manufacturer had been negligent; where "the accident was no one's fault," the loss lay where it fell. But if efficiency required that the manufacturer internalize the social costs of his activity, one could argue that his price should include a premium sufficient to build up a fund to cover all the injuries the product caused, whether or not he had done something careless somewhere along the way.[26] Thus efficiency became the mainstay of the liberal reformist argument for products liability.

There are two things to note about this initial revival of law and economics in the form of strict liability. First, the proponents paid very little attention to distributional issues as they affected questions of what rules were efficient. They noted distributional impacts, if at all, only to approve or disapprove of them on grounds of equity. Second, they took it for granted that the question "what is a cost of what" was an easy one not meriting elaborate discussion. This fuzziness made the theory vulnerable. Eventually, Ronald Coase put an end to the liberal honeymoon with efficiency,[27] and, as recent readers of his famous article will recognize, he did so for reasons that were frankly political as well as intellectual.[28] His basic tactic was to bring to the surface, without fully developing, the ambiguities in the conventional economist's formulation of the problem of externalities that had been carried over into the legal case for strict liability.

He began by exposing the naivete or superficiality of the definition of an externality in both the legal and the economic literature. This naivete consisted in believing that the question of imputation, of "what is a cost of what," could be settled by implicit reference to the

24. *See generally* A. PIGOU, *supra* note 22.

25. *See, e.g.*, Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913).

26. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). A further advantage was that a change in legal rights could be implemented on a case by case basis by liberal judges, whereas a system of fines and bounties would have required legislative action in the unfavorable political climate of the 1950's.

27. *See* Coase, *supra* note 14.

28. *See id.* at 17-18, 42-44.

question "what *causes* what."[29] The smoke damage was a cost of manufacturing rather than of residential housing near factories because the smoke hit the houses rather than vice versa. If the factory was not legally liable for the damage, or if the legal right to compensation could not be enforced, then there was a failure of the system to bring private into line with social cost, *i.e.*, an externality. To show that this made no sense economically, it was not necessary to discredit the *meaningfulness* of the idea of causation. It may be that in almost all cases everyone will agree on the proper answer to the question "who caused the damage."[30] But it was only a remnant of natural law thinking to believe that settling the cause issue would also tell us which of the two activities *ought to be discouraged* by being made to absorb the loss.[31]

The language of externalities had suggested that if the factory was not liable, it enjoyed a "subsidy" which would lead to overproduction. But once we see the damage as a "joint cost" of the coexistence of two activities, we lose any basis for deciding who is being subsidized. As long as both activities are "but for" causes in the sense that each must be present for the loss to occur, then the allocation of the "social" as opposed to the private cost to one or the other is arbitrary.

But Coase's goal was to vindicate the new welfare economics rather than to undermine it. He had a solution to the problem he had raised. So long as the legal system allocated the joint cost to one activity or the other, and so long as there were no transaction costs and perfect competition, free bargaining between the parties would lead them to maximize the joint profits of the two activities. Since the placement of liability for the loss *within* a joint enterprise had no necessary effect on the pricing of either commodity, the question of what joint output would maximize profit could proceed as though the joint cost were an overhead item. There would be a single optimum solution. And this single solution would reflect the proper "social" allocation of the joint cost between the two commodities.[32]

The impact of this analysis on the law and economics movement was profound, but it seems also to have been quite different from what Coase intended. He appears to have been mainly concerned

29. *Id.* at 2, 27-28.

30. *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-89 (1973). For example, here, if the residential housing preceded the building of the factory, we may all agree that the smoke hits the house rather than vice versa.

31. *See* Coase, *supra* note 14, at 2.

32. *See id.* at 2-8.

with the leftist implications of the theory of fines and subsidies to bring private into line with social costs. And he appeared to have demonstrated two things. First, in the absence of transaction costs, the whole externalities analysis was superfluous. There would be an efficient allocation regardless of how the legal system chose to solve the problem of imputation. It followed that reformers could not use the goal of efficiency to support any particular program of private law rules. If the reformers liked the distributive implications of increasing business liability, then they would have to argue on distributive—*i.e.*, political—grounds, eschewing any claims that economic science was on their side.[33]

But Coase also offered an analysis of what to do about transaction costs, and it was equally bleak for the liberals. He pointed out that where the bargaining process is blocked, it *might* be feasible for the state to intervene to make the actual allocation correspond to the one that bargaining would have produced.[34] But he emphasized that this would have to be done on a case-by-case basis, with the state agencies obliged to carry out factual investigations of mind-boggling complexity, followed by a series of regulatory measures that would be both hard to enforce and valid only for a particular, brief constellation of economic forces. The conclusion seemed to follow that state interference was unnecessary without transaction costs, and technically impracticable with them.[35]

The historical irony of the Coase Theorem has been that it turned out to be the fountain of exactly the kind of elaborate law and economics theorizing it purported to show was impractical. The reason for this is that it was taken up not by the liberal economists interested in fines and subsidies, but by liberal and conservative *lawyers* interested in solving the crisis of legitimacy of the judicial process. Coase seems to have been unaware of the existence of this group. He addressed himself to Pigou, to English nuisance law, and to public law measures to deal with externalities. He never mentioned the strict liability movement, Traynor's *Escola* concurrence,[36] or the tort meditations of Holmes, Cardozo, Learned Hand, W.O. Douglas, Fleming James, or Prosser. Yet it was to the intellectual heirs of those writers that his theorem had greatest appeal: It suggested a radical revision of the liberal lawyer orthodoxy about cost internalization, and created a new set of opportunities, both for those who wanted to extend the liberal victories within private law and for those who wanted to cut them back or eliminate them.

PROSSER ON TORTS (4th ED. 1971) 492-96

75. BASIS OF LIABILITY

As we have seen,[1] the early law of torts was not concerned primarily with the moral responsibility, or "fault" of the wrongdoer. It occupied itself chiefly with keeping the peace between individuals, by providing a remedy which would be accepted in lieu of private vengeance.[2] While it is probable that even from the beginning the idea of moral guilt never was entirely absent from the minds of the judges,[3] it was not the most important consideration. Originally the man who hurt another by pure accident,[4] or in self-defense,[5] was required to make good the damage inflicted. "In all civil acts," it was said, "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."[6] There was, in other words, a rule, undoubtedly supported by the general feeling in the community, that "he who breaks must pay."

Until about the close of the nineteenth century, the history of the law of torts was that of a slow, and somewhat unsteady,[7] progress toward the recognition of "fault" or moral responsibility as the basis of the remedy.[8] With a growing moral consciousness in the community, there was a general movement in the direction of identifying legal liability with conduct which would not be expected of a good citizen.[9] This tendency was so marked that efforts were made by noted writers to construct a consistent theory of tort law upon the basic principle that there should be no liability without fault.[10]

But "fault," in this sense never has become quite synonymous with moral blame. Not only is a great deal of morally reprehensible conduct vested with complete legal immunity—as where the expert swimmer who sees another drowning before his eyes is permitted to stand on the dock and watch him drown—[11] but at the same time the law finds "fault" in much that is morally innocent. "Fault" is a failure to live up to an ideal of conduct to which no one conforms always and which may be beyond the capacity of the individual. It may consist of sheer ignorance [12] lack of intelligence [13] or an honest mistake.[14] It may consist even in acts which are the normal and usual thing in the community.[15] Even the infant and the lunatic[16] who cannot help what they do are held liable for their torts.

So much can be collected in the way of cases imposing liability without any vestige of moral blame that a number of writers [17] have maintained that negligence is rapidly losing, if it has not entirely lost, its character as a branch of "fault" liability, so that those who are entirely innocent are now required to pay for the damage they do, and that negligence should therefore largely be jettisoned. This perhaps begs the question, by assigning to "fault" a criminal law connotation of moral blame which it seldom has been given in the law of torts. There is a broader sense in which "fault" means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; [18] and if the departure is an innocent one, and the defendant cannot help it, it is none the less a departure, and a social wrong. The distinction still remains between the man who has deviated from the standard, and the man who has not. The defendant may not be to blame for being out of line with what society requires of him, but he is none the less out of line.

In this broader sense there is "fault" in much innocent conduct. Tort liability never has been inconsistent with the ignorance which is bliss, or the good intentions with which hell is said to be paved. A trespasser is not excused by the honest, reasonable belief that the land is his own; [19] a bona fide purchaser of stolen goods is held liable for conversion; [20] the publisher of a libel commits a tort, although he has no means of knowing the defamatory nature of his words.[21] There are many situations in which a careful person is held liable for an entirely reasonable mistake.[22] In all this there is nothing new. Socially, and legally, these defendants are at fault; whether they are individually so, in spite of the fact that they are blameless, appears to be entirely a matter of definition, rather than substance, and the argument leads only to a pointless dispute over the meaning of a word.[23]

Strict Liability

But even beyond all this, the last hundred years have witnessed the overthrow of the doctrine of "never any liability without fault," even in the legal sense of a departure from reasonable standards of conduct. It has seen a general acceptance of the principle that in 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. In some instances, as where liability is imposed upon the keepers of animals,[24] new reasons of social policy have been found for the continuance of an older rule of strict liability. In others, involving abnormally dangerous conditions or activities,[25] the courts have in effect recognized a new doctrine, that the defendant's enterprise, while it will be tolerated by the law, must pay its way.[26] 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." [27] An entire field of legislation, illustrated by the workmen's compensation acts,[28] has been based upon the same principle.

This new policy frequently has found expression where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great—and particularly where the danger will be great even though the enterprise is conducted with every possible precaution. The basis of the liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk. The conduct which is dealt with here occupies something of a middle ground. It is conduct which does not so far depart from social standards as to fall within the traditional boundaries of negligence—usually because the advantages which it offers to the defendant and to the community outweigh even the abnormal risk; but which is still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does to his neighbors.

The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit of his own from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be his. This modern attitude, which is largely a thing of the last four decades, is of course a far cry from the individualistic viewpoint of the common law courts.

While such strict liability often is said to be imposed "without fault," it can scarcely be said that there is less of a moral point of view involved in the rule that one who innocently causes harm should make it good. The traditional analysis regards such a result as something of an exception to more or less well established rules, and says that the defendant is not at "fault" because he has only done a reasonable thing in a reasonable way, and that he is liable notwithstanding.[29] But it may be questioned whether "fault," with its popular connotation of personal guilt and moral blame, and its more or less arbitrary legal meaning, which will vary with the requirements of social conduct imposed by the law,[30] is of any real assistance in dealing with such questions, except perhaps as a descriptive term. It might be quite as easy to say that one who conducts blasting operations which may injure his neighbor is at "fault" in conducting them at all,[31] and is privileged to do so only in so far as he insures that no harm shall result, as to say that he is not at fault, but is liable nevertheless. If he is not "at fault" because the social desirability of the blasting justifies the risk,[32] his conduct is still so far socially questionable that it does not justify immunity. The basis of his liability in either case is the creation of an undue risk of harm to other members of the community.[33] It has been said [34] that there is "conditional fault," meaning that the defendant is not to be regarded as at fault unless or until his conduct causes some harm to others, but he is then at fault, and to be held responsible. If this analysis helps anyone, it is certainly as permissible as another.[35]

Once the legal concept of "fault" is divorced, as it has been, from the personal standard of moral wrongdoing, there is a sense in which liability with or without "fault" must beg its own conclusion. The term requires such extensive definition, that it seems better not to make use of it at all, and to refer instead to strict liability, apart from either wrongful intent or negligence.

TERRY, 12 YALE L.J. 185 (1903)

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LEGAL DUTIES AND RIGHTS.

Every student and practitioner of our law will doubtless assent to the statement that it is extremely desirable that the amorphous bulk of which it now consists, which is becoming continually more and more unmanageable as each year's contribution of reports and text-books is poured out, should be reduced to a logical and scientific arrangement. Whether that should be embodied in a code is a question on which opinions differ, and which need not be discussed here. A code is not necessary. What is needed is some arrangement which shall be generally accepted by the bench and the bar and followed by legislators and the writers of treatises and digests. It might be prepared and put forth without a code by such a body as the Inns of Court in England, or the American Bar Association in the United States. In that case it could be fully discussed, tested in practice and modified, if necessary, before being authoritatively promulgated in a statute. Indeed, considering how important it would be that the arrangement once adopted in a code should be a final one and how largely the systematic study of the law has been neglected among us, it might be very plausibly argued that no body of codifiers at present would be likely to strike out a satisfactory arrangement, and that it would be better that the arrangement to be followed should be known and generally accepted before the work of codification was begun.

Such an arrangement must rest on an exhaustive analysis of legal conceptions, the results of which must be expressed in a systematized terminology. The purpose of this article is to make a small contribution towards a scheme of arrangement by analysing the fundamental legal notions of duty, right and wrong.

A legal duty is the legal condition of a person whom the law commands or forbids to do an act. The act may be called the content of the duty; it is what must be described in defining any particular duty. The act itself is a fact, which might exist if there were no law and no duty. The law does not create it, but merely recognizes its actual or possible existence. The duty is a legal condition, the mere creature of the law. The acts which form the contents of legal duties are defined by reference to some of their actual or possible consequences. An act *per se*, a mere bodily movement, is never either commanded or forbidden by the law. There is no conceivable bodily movement which a person in some circumstances might not lawfully do or omit. The movements of the arm and hand which take place in firing a pistol might be performed exactly by a person who had nothing in his hand, and would generally in such a case be lawful, because no harmful consequence could be apprehended from them. If he held an unloaded pistol, no physical injury could follow to any person at whom the pistol was aimed, and so far as the act might be prohibited with reference to such consequences, the prohibition would not apply. But if the latter person believed the weapon to be loaded, the act might create in him an apprehension of injury, and that psychical consequence might suffice to make the act unlawful as amounting to an assault.

The consequences by reference to which the act is defined, which may be called its definitional consequences and also the definitional consequences of the duty, are either actual, probable or intended consequences. This gives rise to a three-fold division of duties, as follows. 1. Peremptory duties: the definitional consequences are actual. The person must or must not act in such a way as actually to produce a certain consequence. The law does not specify the acts any farther than to point out the result which must be attained. But the requirement to attain that result is usually peremptory; it is not enough that the person subject to the duty has done all in his power to attain it and has failed by no fault of his own. The duty to pay a debt is of this sort. The debtor must peremptorily do such acts as are necessary to put the creditor into the possession of the money. He may choose his own means, but chooses them at his peril. The duty of a person who voluntarily keeps a dog known to him to be ferocious and inclined to bite mankind to prevent it from doing so, is of this class. He is not merely bound to keep it carefully, or even with extreme care; he must absolutely prevent that result. In a few cases where the act is defined by actual consequences and the duty is negative, not to cause a certain result, it may be that the duty is not strictly peremptory, but is conditioned on intention or negligence. Duties not to commit trespasses are duties defined by actual consequences, but it is still a mooted point whether intention or negligence is necessary to a trespass.

2. Duties of reasonableness: the act is defined by reference to its probable consequences. The person must not do any act that is unreasonably likely to cause a certain consequence or must do such acts as are reasonably necessary to prevent its happening. If he does so much as this, he has done his whole duty and is not responsible for what actually happens; if he acts so as to incur an unreasonably great risk of the consequence happening, he has broken his duty, though in fact by good luck it never actually does happen. Thus a person who drives in a crowded street necessarily takes some risk of running over some one. As his speed increases that risk increases likewise. At last a point may be reached at which the risk becomes unreasonably great, and his conduct in driving so fast a breach of duty, even though he does not actually run over any one. So a bailee must not so act or omit to act as to expose the chattel to an unreasonably great risk of loss or injury, what is unreasonable varying according to the circumstances of the case, especially the value of the thing and the nature of the bailment. If the chattel is lost or injured without such conduct on his part, he is not guilty of any breach of duty; the duty is not peremptory to keep it safe. All duties to use due care belong to this class. Negligence, which is the opposite of due care, consists essentially in conduct which involves an unreasonably great risk of causing harm.

3. Duties of intention: the act is defined by reference to its intended consequences. The person must not act with an intention to produce a certain consequence. Making a false representation to another person with an intent to defraud him by leading him to act upon it to his injury is a breach of this sort of duty, and so are all injuries in which malice—that is, actual malice or malice in fact—is an ingredient, all the meanings of actual malice having the common element of an intention to produce some consequence.

There is no general rule for determining what legal duties exist, what acts are commanded or forbidden by law. Much labor and ingenuity have been expended in the attempt to find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none. Various acts are commanded or forbidden for various reasons, generally on grounds of expediency; and they are different in different places and periods. In this respect the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned.

Calamari & Perillo, Contracts, 3d ed. (1987)

B. DURESS

Table of Sections

§ 9-2. The History and Elements of Duress

Few areas of the law of contracts have undergone such radical changes[1] in the nineteenth and twentieth centuries as has the law governing duress. In Blackstone's time relief from an agreement on grounds of duress was a possibility only if it was coerced by actual (not threatened) imprisonment or fear of loss of life or limb. "A fear of

1. So characterized in Tallmadge v. Robinson, 158 Ohio St. 333, 338-340, 109 N.E.2d 496, 499 (1952). For the history of duress, see 13 Williston §§ 1601-1602.

battery • • • is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed;" he wrote, "because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life, or limb." [2]

Today the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.[3] This simple statement of the law conceals a number of questions, particularly as to the meaning of "free will" and "wrongful". Also, as in the case of all contractual rules which make reference to mental processes, we must ask whether the test is objective or subjective. This last is the easiest of the questions posed. The overwhelming weight of modern authority is to the effect that the issue is whether the will of the particular person has been overcome,[4] and not, as the earlier cases had held, whether a brave man would be put in fear or whether the will of a person of ordinary firmness would be overcome.[5] Evidence showing whether a reasonable person would be put in fear is relevant, however, as circumstantial evidence of whether the person's free will was overcome.[6] Where the coercion involves economic pressure rather than threat of physical injury, however, an objective element continues to be demanded by the court. In the face of a threat of "either • • • or," did the person threatened have some reasonable third alternative? For example, was there a judicial proceeding that could have produced prompt and adequate relief? If so, a case for duress would not be made out.[7]

2. 1 Blackstone's Commentaries * 131. The rule in England seems to have been relaxed but slightly. On the other hand, the doctrine of undue influence has been expanded to fill part of the void. See Cheshire, Fifoot & Furmston, The Law of Contract 280–84 (8th ed. 1972). Blackstone was not strictly correct, for the doctrine of duress of goods already had been originated when he wrote. See § 9-5 infra. In the United States the defense of duress to a criminal charge has remained close to the Blackstonian rule. See Newman & Weitzer, Duress, Free Will and the Criminal Law, 30 So.Cal.L.Rev. 313 (1957).

3. Kaplan v. Kaplan, 25 Ill.2d 181, 185, 182 N.E.2d 706, 709 (1962); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 25, 272 N.E.2d 533, 535 (1971), reargument denied 29 N.Y.2d 749, 326 N.Y.S.2d 1027, 276 N.E.2d 238 (1971). See 2 Palmer on Restitution § 9.2 (1978).

4. Kaplan v. Kaplan, 25 Ill.2d 181, 186, 182 N.E.2d 706, 709 (1962); Silsbee v. Webber, 171 Mass. 378, 50 N.E. 555 (1898) (classic exposition by Holmes); Rubenstein v. Rubenstein, 20 N.J. 359, 120 A.2d 11 (1956); 13 Williston § 1605; but see Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir.1975).

5. Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654 (1931). At times the "mind of a person of ordinary firmness" rule is routinely stated, but usually in a case where the precise test is not really in issue. See, e.g., Bata v. Central-Penn Nat'l Bank of Philadelphia, 423 Pa. 373, 224 A.2d 174 (1966), certiorari denied 386 U.S. 1007, 87 S.Ct. 1348, 18 L.Ed.2d 433 (1967) where the old rule is stated but in a context where "we find it inconceivable that appellant was subject to any degree of restraint or danger." 224 A.2d at 180.

6. Restatement, Contracts § 492, Comment b; Restatement, Second, Contracts § 175, Comment b.

7. Leeper v. Beltrami, 53 Cal.2d 195, 1 Cal.Rptr. 12, 347 P.2d 12, 77 A.L.R.2d 803 (1959); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 324 N.Y.S.2d 22, 272 N.E.2d 533 (1971), reargument denied 29 N.Y.2d 749, 326 N.Y.S.2d 1027, 276 N.E.2d 238 (1971); see Dalzell, Duress by Economic Pressure II, 20 N.C.L.Rev. 341, 367–82 (1942).

The idea of "free will" requires some elaboration. This, of course, is not the place to deal with the millenia old concern of philosophers as to whether free will exists. It is quite obvious, however, that contract law is very much premised on its existence.[8] Older doctrine was often premised on the idea that an agreement made under duress lacks "real" consent and produces only apparent assent. However, as has been pointed out, when a parent pays a kidnapper because he wishes to save his daughter's life, his choice may be the "expression of the most genuine, heartfelt consent."[9] The consent is real enough, the vice of it is that it was coerced in a manner that society brands as wrongful and is therefore not deemed the product of free will. Consequently, in determining whether a transaction may be avoided for duress the main inquiry is to ascertain what acts or threats are branded as wrongful. It is, of course, important in every case to inquire not only whether the act or threat was wrongful but also whether the transaction was in fact induced by the wrong.[10] In addition, another factor, not generally articulated as a rationale in the cases or treatises, is often emphasized in the court's review of the facts; that is, the degree of economic imbalance in the transaction.[11] Duress will generally not be found to exist unless the party exercising the coercion has been unjustly enriched.[12] Remedies for duress are primarily aimed at the cancellation of unjust gain.[13] Of course, where the coercion is extreme the legal system's interest in the protection of individual freedom will prevail regardless of any inquiry into the unfairness of the transaction itself.[14]

8. See for an introduction, Macneil, The Many Futures of Contracts, 47 S.Cal.L.Rev. 691, 701–06 (1974).

9. Dalzell, Duress by Economic Pressure I, 20 N.C.L.Rev. 237, 237–238 (1942); see also 13 Williston § 1627A; Sharp, The Ethics of Breach of Contract, 45 Int'l J. of Ethics, 27, 30–31 (1934); Note, Restitution—Duress—The Law in Oregon, 38 Or. L.Rev. 246, 248 (1959); Note, The Nature and Effect of Duress, 26 Harv.L.Rev. 255 (1912). The classic statement of this analysis is by Justice Holmes in Union Pac. R.R. Co. v. Public Service Comm'n of Missouri, 248 U.S. 67, 39 S.Ct. 24, 63 L.Ed. 131 (1918). Similar analysis in a broader discussion of the idea of liberty, is found in Hale, Bargaining, Duress and Economic Liberty, 43 Colum.L.Rev. 603 (1943).

10. United States v. Bethlehem Steel Corp., 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855 (1942); Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753 (2d Cir.1967). The fear must induce the contract, but need not be the sole cause. Restatement, Contracts § 492, Comment f.

11. This is the primary thrust of the analysis in Dawson, Economic Duress—An Essay in Perspective, 45 Mich.L.Rev. 253 (1947); see also Dawson, Unconscionable Coercion: The German Version, 89 Harv.L. Rev. 1041 (1976); Dawson, Duress through Civil Litigation I, II, 45 Mich.L.Rev. 571, 679 (1947); Dawson, Economic Duress and Fair Exchange in French and German Law, 11 Tul.L.Rev. 345 (1937). Another commentator argues that lack of balance is merely evidence of coercion and not a substantive basis for a finding of duress. Dalzell, Duress by Economic Pressure I, 20 N.C.L.Rev. 237, 263 (1942); compare Note, Unbalanced Transactions under Common and Civil Law, 43 Colum.L.Rev. 1066 (1943) (focusing on consideration doctrine).

12. First Data Resources, Inc. v. Omaha Steaks Int'l, Inc., 209 Neb. 327, 307 N.W.2d 790 (1981) (coercion must result in a contract that is illegal, unjust or unconscionable).

13. 2 Palmer on Restitution § 9.4 (1978); Dawson, Economic Duress—An Essay in Perspective, 45 Mich.L.Rev. 253, 283–285 (1947); Restatement, Second, Contracts § 176, see § 9–8 infra.

14. Dawson, supra note 13, at 284–285; Restatement, Second, Contracts § 176(1); cf. Pound, Interests of Personality, 28 Harv.L.Rev. 343, 357–359 (1915) (duress doctrine is designed to protect freedom of will).

One commentator, focusing on the means of coercion, rather than its result, has argued that the law of duress has developed to control the bargaining process. Inasmuch as the democratic state has allowed the exchange process to be handled through the mechanism of contracts, the state has an interest in regulating that mechanism of exchange.[15]

The two possible vantage points—(1) the end result of the coercion and (2) the means of coercion—help explain some of the confusion surrounding differing views concerning coerced modifications of contracts, discussed in § 9-6 below.

WESTLAW REFERENCES

duress /s actual /s imprison! (fear /s life limb)
agreement contract*** /s duress /s coerc! /s fear!
di duress
"doctrine of duress"
duress /s wrong! /s "free will"
to(95) /p duress /p "free will" coerc! fear!
duress /s "free will" /s overc*m!
"economic duress" /s "reasonable alternative"
duress /s consent! /s assent!
duress /s induc! /s wrong!
di(duress /p "unjust! enrich!")
duress /s subjectiv!

§ 9-3. What Acts or Threats Are Wrongful—Abuse of Rights

Violence and threats of violence are wrongful and, although not as rare as one would hope,[16] such threats no longer make up the bulk of duress cases. The law has evolved so as to permit relief for duress in a vast variety of situations. These roughly may be categorized into four principal classes: [17]

1. Violence or threats of violence.
2. Imprisonment or threats of imprisonment.
3. Wrongful seizing or withholding, or threats wrongfully to seize or withhold, goods or lands.

15. Carlston, Restitution—The Search for a Philosophy, 6 J.Leg.Ed. 330, 336-38 (1954). For a similar discussion to the effect that "moralistic" arguments "prevent serious analysis." By "serious analysis" is meant analysis in terms of the functioning of the market. Dobbs, Remedies 654-55 (1973). For such an analysis, see Eisenberg, The Bargain Principle and its Limits, 95 Harv.L.Rev. 741 (1982).

A release executed by a person under arrest in exchange for a prosecutor's agreement to dismiss charges has been held against public policy because of the inherently coercive nature of the bargaining context. Boyd v. Adams, 513 F.2d 83 (7th Cir.1975). See Annot., 86 A.L.R.3d 1230.

16. Williams v. Macchio, 69 Misc.2d 94, 329 N.Y.S.2d 405 (1972); Rubenstein v. Rubenstein, 20 N.J. 359, 120 A.2d 11 (1956).

17. See, e.g., Restatement of Contracts § 493 (Restatement categories (a) and (c) are merged in our category No. 1). Restatement, Second, Contracts § 176 contains a longer list of categories.

4. Other wrongful acts.

It will be helpful to the discussion if the miscellaneous category of "other wrongful acts" is discussed first. Within this category of course comes such criminal conduct as blackmail.[18] The evolving case law, however, has for the most part dealt with threats to exercise legal rights in oppressive or abusive ways. For example, a threat to bring a law suit is a legitimate form of coercion protected by law and the Constitution. However, where a husband threatens his wife with a suit demanding custody of their children on grounds of her adultery unless she assigns certain securities to him, it is at least a jury question whether the assignment is voidable for duress. In the words of the court:

> "The weight of modern authority supports the rule, which we here adopt, that the act done or threatened may be wrongful even though not unlawful, per se; and that the threat to instigate legal proceedings, criminal or civil, which might be justifiable, per se, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." [19]

Similarly, an employee under a hiring at will may be fired without cause. However, a threat to fire him unless he agrees to sell his shares of stock in the employing corporation back to the employer constitutes an abuse of the employer's rights and the employee who succumbs to the threat may recover his shares if the trier of fact finds that the employee had been coerced by the threat.[20] To summarize, in the context of duress, an act or threat is wrongful if it is "an abuse of the powers of the party making the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given." [21] Looked at from the point of view of the coerced party, he may ethically protect himself by making a contract he has no intent to keep in order to save himself from the abusive invasion or threatened invasion of his rights.[22]

18. This would include also lesser tortious threats such as a threat to use one's influence to cause a lender to refuse to consummate a loan agreement. Criterion Holding Co. v. Cerussi, 140 Misc. 855, 250 N.Y.S. 735 (1931), and a threat to induce a person's employer to fire him. Wise v. Midtown Motors, 231 Minn. 46, 42 N.W.2d 404, 20 A.L.R.2d 735 (1950).

19. Link v. Link, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971).

20. Laemmar v. J. Walter Thompson Co., 435 F.2d 680 (7th Cir.1970); but see Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir.1948); see also Mitchell v. C.C. Sanitation Co., 430 S.W.2d 933 (Tex.Civ.App.1968), error refused n.r.e. (release void for duress where employer threatens to fire employee unless he signed release); Annots., 20 A.L.R.2d 743 (1951); 30 A.L.R.4th 294 (1984).

What of the situation where, when threatened with being fired, the employee accedes to the employer's threats by agreeing to the employer's terms and is soon thereafter fired? See McCubbin v. Buss, 180 Neb. 624, 144 N.W.2d 175 (1966) (coerced agreement may be rescinded).

21. Dalzell, Duress by Economic Pressure II, 20 N.C.L.Rev. 341, 364 (1942); see also 13 Williston § 1607; Restatement, Contracts § 492, Comment g.

22. Sharp, supra note 9, at 34.

It should be noted, however, that where there is a good faith dispute, a refusal to pay under a contract until a dispute is settled or adjudicated, does not constitute duress.[23] A party's refusal to settle does not constitute a wrongful threat.[24] When an employee is offered the chance of being fired for cause or resigning, it will usually be held that the resignation cannot be avoided,[25] unless the threat to fire is made for bad faith reasons or is accompanied by threats to ruin the reputation of the employee.[26] In short, absent a *wrongful* threat, the driving of a hard bargain is not duress.[27] This is true even if one party benefits from the financial distress of the other.[28]

§ 9-40. What Is Unconscionable?

"Unconscionable" is a word that defies lawyer-like definition.[76] It is a term borrowed from moral philosophy and ethics. As close to a definition as we are likely to get is "that which 'affronts the sense of decency.'"[77] The purpose of the doctrine is twofold: *"prevention of oppression and unfair surprise."*[78] This twofold purpose has led to a distinction between "substantive" (oppression) and "nonsubstantive" (unfair surprise) unconscionability.[79] The cases do not, however, neatly fall into these two divisions. More frequently elements of both are present. Nonetheless, the courts have clearly ruled that gross excessiveness of price is itself unconscionable.[80] Significantly, however, in these cases it was clear that the purchaser was not aware that the price was exorbitant. Consequently they may be viewed as examples of oppressive terms combined with unfair surprise. A number of scholars have suggested several analytic frameworks for analyzing unconscionability cases.[81] These theories appear to have had little impact on the courts. Jeffrey Fort, whose essay is most thoroughly grounded in what the courts have done, has isolated what may be the present content of the unconscionability cases.[82] Certain cases involve exchanges that are unconscionable per se. These include cases where the exchanges are grossly unequal.[83] Holdings along this line are extremely rare because contracts involving grossly unequal exchanges almost always involve some impropriety in the negotiating process or disability of a party. Outside of the unconscionable *per se* cases are cases "[W]here an aggrieved party is ignorant of the risk involved, ignorant of the contract terms which transfer or allocate that risk and/or lacks alternative terms for that risk allocation, the contract or clause may be unconscionable and unenforceable. • • • Stated simply, contract terms which transfer risks or the burdens of a transaction from that which might be expected in an exchange, absent a written agreement, are unenforce-

76. The great 17th century lawyer, John Selden, was as troubled by this in his day as some lawyers are troubled today. "One Chancellor has a long foot, another, a short foot, a third an indifferent foot: 'tis the same thing in the Chancellor's conscience." Selden, Table Talk, under the heading "Equity." See also id., under the heading "Conscience."

77. Gimbel Bros., Inc. v. Swift, 62 Misc. 2d 156, 307 N.Y.S.2d 952 (Civ.Ct.1970). The dictionary has little to add: "• • • lying outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust • • •." Webster's Third Unabridged. Other judicial definitions include "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C.Cir.1965). See also text at note 34 supra.

78. U.C.C. § 2-302, Comment 1 (emphasis supplied).

79. Leff, supra note 18, at 487.

80. American Home Imp., Inc. v. McIver, 105 N.H. 435, 201 A.2d 886, 14 A.L.R.3d 324 (1964); Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Central Budget Corp. v. Sanchez, 53 Misc.2d 620, 279 N.Y.S.2d 391 (Civ.Ct.1967); but see, Morris v. Capitol Furniture & Appliance Co., Inc., 280 A.2d 775 (D.C.App.1971); Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C.App.1971).

81. See notes 18, 47 supra.

82. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy.U. Chi.L.J. 765 (1978).

83. Fort, note 82 supra, at 771-75.

able unless intelligently, knowingly and voluntarily assumed."[84] The term "voluntarily" must be broadly construed. For example, where an experienced promoter knowingly signs a contract with a musician containing a substantively unconscionable term, he will be relieved from it where it is shown that all professional musicians are forbidden by their union to use any contract form other than that prepared by the union and containing the unconscionable term.[85]

Typically the cases in which unconscionability is found involve gross overall one-sidedness or gross one-sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages. In these cases one-sidedness is often coupled with the fact that the imbalance is buried in small print and often couched in language unintelligible to even a person of moderate education. Often the seller deals with a particularly susceptible clientele.[86] In what may prove to be a leading case the court indicated that if a clause places great hardship or risk upon the party in the weaker bargaining position it must be shown that "the provisions were explained to the other party and came to his knowledge and there was in fact *a real and voluntary meeting of the minds and not merely an objective meeting.*"[87] A Code comment states that U.C.C. § 2-302 is not intended to cause a "disturbance of allocation of risks because of superior bargaining power,"[88] but cases such as the one just quoted make it clear that inequality of bargaining power is an important element in an unconscionability determination. Superior bargaining power is not in itself a ground for striking down a resultant contract as unconscionable. There must be additional elements, as for example, a lack of meaningful choice as in the case of an industry wide form contract heavily weighted in favor of one party and offered on a take it or leave it basis,[89] or a situation where freedom of contract is exploited by a stronger party who has control of the negotiations due to the weaker party's ignorance, feebleness, unsophistication as to interest rates or similar business concepts or general naivete.[90]

84. Fort, note 82 supra, at 798.

85. Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981) (arbitration clause whereby executive board of union would arbitrate); see Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L.Rev. 279, 306-309 (1984).

86. See Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971) ("sales solicitations were consciously directed toward minority group consumers and consumers of limited economic means * * *. Sales among these people were thought to be "easier.")

87. Weaver v. American Oil Co., 257 Ind. 458, 464, 276 N.E.2d 144, 49 A.L.R.3d 306 (1971) (emphasis in original).

88. U.C.C. § 2-302, Comment 1. For an argument that inequality of bargaining power should never be a consideration in an unconscionability determination, see Schwartz, Seller Unequal Bargaining Power and the Judicial Process, 49 Ind.L.J. 367 (1974).

89. See, e.g., Campbell Soup v. Wentz, 172 F.2d 80 (3d Cir.1948); Graham v. Scissor-Tail, Inc., supra note 85; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

90. See note 84 supra; see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 18 A.L.R.3d 1297 (D.C.Cir.1965), 51 Cornell L.Q. 768 (1966), in which the Court of Appeals for the District of Columbia indicated that relief might be owing to a consumer who had entered into an extremely harsh installment sales contract with a furniture company. The contract had a tie-in clause which the company hoped would permit it to repossess all

It is clear, however, that unconscionability may exist even where the parties are on "about equal footing" or even where the oppressor is inexperienced compared to the oppressed.[91]

Section 2-302 should be considered in conjunction with the obligation of good faith imposed at several places in the Code. For example § 1-203 of the Code provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[92] Despite the fact that § 1-203 relates specifically to the performance of a contract rather than its formulation it has been suggested that good faith should be considered in determining unconscionability.[93]

The Uniform Consumer Sales Practices Act, released in 1970, and as yet not widely adopted, also condemns unconscionable contracts. In addition, it provides six illustrative circumstances which the court should consider in an unconscionability determination. Certainly, these circumstances should be considered in an unconscionability determination under the Uniform Commercial Code. These circumstances are that the supplier has reason to know:[94]

"(1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;

"(2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers;

items purchased over a number of years on default in payment of the price of any one of them.

In Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist.Ct.1966) reversed in part 54 Misc.2d 119, 281 N.Y.S.2d 964 (App.Term 2d Dep't 1967), a poor Spanish speaking person was persuaded into promising to pay $1145 for a $348 appliance.

See also State by Lefkowitz v. ITM, Inc., 52 Misc.2d 39, 275 N.Y.S.2d 303 (1966), in which the defendant company, which received up to $658 for $80 broilers by selling them on time, was warned to tell consumers of the contract terms "in language the least educated person can understand." Compare Lundstrom v. Radio Corp. of America, 17 Utah 2d 114, 405 P.2d 339, 14 A.L.R.3d 1058 (1965).

91. Miller v. Coffeen, 365 Mo. 204, 280 S.W.2d 100 (1955); see also Pope Mfg. Co. v. Gormully, 144 U.S. 224, 12 S.Ct. 632, 36 L.Ed.2d 414 (1892).

92. § 1-201(19) defines good faith as "honesty in fact in the conduct or transaction concerned." In the case of a merchant it "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § 2-103(1)(b).

93. Llewellyn, The Common Law Tradition 369 (1960); cf. 1955 N.Y.Law Rev. Comm'n, vol. 1, 658; see Standard Oil Co. of Texas v. Lopeno Gas Co., 240 F.2d 504 (5th Cir.1957); Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Flash v. Powers, 99 N.Y.S.2d 765 (1950), which in attempting to define unconscionability have dwelled upon the element of lack of good faith.

94. Uniform Consumer Sales Practices Act § 4. A similar listing appears in McKinney's N.Y. Administrative Code § 2203d-2.0(b), which adds: "the degree to which terms of the transaction require consumers to waive legal rights."

"(3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;

"(4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer;

"(5) that the transaction he induced the consumer to enter was excessively one-sided in favor of the supplier; or

"(6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment."

Another guide is found in the Uniform Consumer Credit Code of 1974 which states: "The competence of the buyer, leasee, or debtor, any deception or coercion practiced upon him, the nature and extent of the legal advice received by him, and the value of the consideration are relevant to the issue of unconscionability." [85] In addition, this Code lists a series of factors that must be considered in consumer credit transactions. These are similar to those found in the Uniform Consumer Sales Practices Act.[86]

§ 9-44. The Modern View—Contracts of Adhesion

There has been a tendency, particularly in recent years, to treat contracts of adhesion or standard form contracts differently from other contracts.[55] This is particularly true with respect to the duty to read.[56] There is a growing body of case law which subverts the traditional duty to read concept either upon a theory that there was not true assent to a particular term, or that, even if there was assent, the term is to be excised from the contract because it contravenes public policy or is unconscionable.[57] At times, the same decision may employ all three rationales. This modern approach to the problem and the meaning of true assent may be shown best by a brief examination of three of the leading cases on the subject.

Perhaps the most significant case is Weaver v. American Oil Co.,[58] which considered a lease by an oil company to an individual. The lessee signed without reading the lease under which he agreed, inter alia, to indemnify the lessor as a result of damages caused by the lessor's negligence. The majority opinion first stated that the duty to read rule had no application to the case because "the clause was in fine print and contained no title heading * * *."[59] This conclusion would have ended the matter under the rules discussed above, but the court seemed anxious to break new ground for it hastened to add:

> "When a party show[s] that the contract, which is * * * to be enforced, was * * * an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting."[60]

55. Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum.L.Rev. 629 (1943). In the Kessler article, as here, the terms "contract of adhesion" and "standardized contract" are used interchangeably, but the two concepts are not always treated as coextensive. See Sheldon, Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control, 22 Am.J.Comp.L. 17, 18 (1974).

56. Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum.L.Rev. 1072 (1953); Note, Contract Clauses in Fine Print, 63 Harv.L.Rev. 494 (1950); see Wilson, Freedom of Contract and Adhesion Contracts, 14 Int'l & Comp.L.Q. 172 (1965).

57. The notion of condemning clauses as illegal or contrary to public policy is hardly new. However, it is being used today more often and in a wider variety of circumstances. See, e.g., von Hippel, The Control of Exemption Clauses—A Comparative Study, 16 Int'l & Comp.L.Q. 591 (1967). Unconscionability is discussed in §§ 9-37 to 9-40 supra.

58. 257 Ind. 458, 276 N.E.2d 144 (1971); Annot., 49 A.L.R.3d 306 (1973). See also Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal.App.3d 668, 97 Cal.Rptr. 811 (1st Dist.1971).

59. 257 Ind. at 462, 276 N.E.2d at 147.

60. Id. at 464, 276 N.E.2d at 148.

Although the above quotation combines three different concepts (unconscionability, violation of public policy, and lack of true assent),[61] the court's ultimate approach appears to be that the contract is unconscionable because an objective assent which flows from a duty to read is not sufficient (despite the objective theory of contracts) to bind a party to clauses which are unusual or unfair unless the clauses are at least brought to his attention and explained.[62] The theory is that since such clauses impose a great hardship or risk on the weaker party, who is otherwise unable to protect himself, an informed and voluntary consent should be required.[63] A party might be considered to be otherwise able to protect himself if he has a bargaining power relatively equal to that of the other party, or if he were able to obtain insurance at a reasonable rate to protect against a known risk being imposed upon him.

The same approach was employed by the court in the well known case of Henningsen v. Bloomfield Motors, Inc.,[64] which arose under the Uniform Sales Act rather than the Uniform Commercial Code.[65] In

61. The Weaver opinion also proceeded upon a warranty analogy when it stated: "The burden should be on the party submitting such 'a package' in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. The principle should be the same as that applicable to implied warranties, namely, that a package of goods sold to a purchaser is fit for the purposes intended and contains no harmful materials other than that represented." Id., 276 N.E.2d at 147–48. See also C. & J. Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975).

62. See § 9–40. Under this approach a party who carefully reads the proposed contract is in a worse position than one who does not. Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind.1982).

63. See, e.g., Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799–800 (3d Cir. 1967); Johnston, The Control of Exemption Clauses: A Comment, 17 Int'l & Comp.L.Q. 232 (1968).

64. 32 N.J. 358, 161 A.2d 69 (1960); Annot., 75 A.L.R.2d 39 (1961).

65. If the case had arisen under the U.C.C., the court could have noted the Code provision that, in the case of a disclaimer of the warranty of merchantability, the word merchantability must be used and the disclaimer must be conspicuous. U.C.C. § 2–316(2). The term "conspicuous" is defined in id. § 1–201(10). What is or is not conspicuous still appears to be a matter of controversy. A disclaimer in the smallest type preceded by the word "NOTE" printed in the largest type was held to be conspicuous in Velez v. Craine & Clark Lumber Corp., 41 A.D.2d 747, 341 N.Y.S.2d 248 (2d Dep't 1973), reversed on other grounds 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 67 (1973). But see Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973), appeal after remand 286 N.C. 235, 210 S.E.2d 181 (1974). Even more to the point is U.C.C. § 2–719(3) which provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." See also U.C.C. §§ 2–316(1), 2–718, 2–719(1) & (2).

Professor Murray takes the position that even if the disclaimer is conspicuous it must, in addition, be negotiated, and comprehensible to the buyer. See Murray, Unconscionability: Unconscionability, 31 U.Pitt.L.Rev. 1, 48–49 (1969). Contra, Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U.Pa.L.Rev. 485, 523–24 (1967). There are, as usual, cases which support each position. Compare Belden-Stark Brick Corp. v. Morris Rosen & Sons, Inc., 39 A.D.2d 534, 331 N.Y.S.2d 59 (1st Dep't 1972), affirmed 31 N.Y.2d 884, 292 N.E.2d 321, 340 N.Y.S.2d 186 (1972) (mem.) with Dobias v. Western Farmers Ass'n, 6 Wn.App. 194, 491 P.2d 1346 (1971). Professor Broude suggests that under §§ 2-202 and 2–316 printed form disclaimers of warranties, even though they are contained in an integration, should not be considered to be part of the agreement because they are not truly assented to. Broude, The Consumer and the Parol Evi-

Henningsen, a consumer brought an action for personal injuries against both the vendor and manufacturer of his automobile. Relying upon a provision in the contract of sale that an express warranty contained therein was in lieu of all other warranties express or implied, the defendants argued that the plaintiff's action should be limited to a claim for defective parts. The heart of the Henningsen decision appears in a paragraph near the end of the opinion:

> "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." [66]

Although there was some discussion about mutual assent, the ultimate holding was based upon the conclusion that such a clause, under the circumstances of the case (clause on reverse side, small print, disparity of bargaining power, clause on a take-it-or-leave-it basis and included by all major car manufacturers), was invalid as being contrary to public policy. This was made clear when the court further stated that it was not required to consider whether a particular charge which related to mutual assent was correct because "the disclaimer is void as a matter of law." [67]

Another leading case illustrating the same approach is Williams v. Walker-Thomas Furniture Co.[68] There, an installment sales agreement had a provision which resulted in "a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated." [69] As a result, in the event of a default on any one item, all items could be repossessed. The court in concluding that the fairness of the clause needed to be tested at trial stated:

dence Rule: Section 2–202 of the Uniform Commercial Code, 1970 Duke L.J. 881. Professor Rakoff goes further, arguing that all non-dickered terms in an adhesion contract be treated as presumptively invalid. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv.L.Rev. 1173 (1983).

66. 32 N.J. at 404, 161 A.2d at 95.

67. Id. at 405, 161 A.2d at 95.

68. 350 F.2d 445 (D.C.Cir.1965), noted in 79 Harv.L.Rev. 1299 (1966).

69. 350 F.2d at 447. See also Uniform Consumer Credit Code § 3.302; U.C.C. § 9–204.

"Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[70]

The three cases discussed above do not expunge the duty to read rule, but create an exception if the terms (or a term) of the contract are unfair under the circumstances. In such a case, the ordinary manifestation of assent implicit in a signature or acceptance of a document is insufficient because the assent is not reasoned and knowing. Such consent involves an understanding of the clause in question [71] and a reasonable opportunity to accept or decline.[72] Even then, if the clause is sufficiently odious, it will be struck down as unconscionable or contrary to public policy.

Having established the nature of the new approach the question becomes how it has been applied. A discussion of cases relating to promises to indemnify a person against the consequences of his own negligence, and to exculpate another for his own negligence, serve as excellent illustrations.

While Weaver [73] holds that a promise to indemnify was not binding under the circumstances of the case it can hardly be said that there is a general rule that promises to indemnify are objectionable.[74] On a similar set of facts, a New York case, Levine v. Shell Oil Co.,[75] seems to have reached a conclusion directly opposite to that of Weaver.[76] The court paid lip service to the rules announced in the cases discussed above when it stated:

"Lastly, there has been no showing that the agreement involved herein is either a contract of adhesion or an unconscionable agreement and we need not now pass upon the question whether an

70. 350 F.2d at 449–50 (footnotes omitted).

71. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 399–400, 161 A.2d 69, 92 (1960).

72. Id. at 390, 161 A.2d at 87. But what is the choice being discussed? In the Henningsen case it was clear that a person could not buy a new car from a major manufacturer without submitting to the clause in question. But in Weaver there was no evidence that the lessee could not have obtained a similar lease from another oil company without the offending clause. How important should this be on the issue of true assent?

By now it should be clear that the assent discussed in § 9–42 hereof is not the same type of assent being discussed here under the label "true assent."

73. See notes 58 to 63 supra and accompanying text.

74. Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432 (1921); Annot., 19 A.L.R. 879 (1921); Corbin §§ 1471, 1472; Restatement, Contracts § 572.

75. 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971).

76. A reading of the briefs tends to reinforce this conclusion.

indemnification clause in a contract of that nature would be void for those reasons. * * * In this arm's length transaction the indemnification provision was a part of [sic] business relationship between the parties. If Visconti [the lessee] had reservations as to the scope of the agreement, he should have insisted on a different indemnification clause or refused to give his assent to the contract. * * * Since he apparently elected not to do so and has not demonstrated to this court that Shell was guilty of fraud or overreaching conduct, he is bound by the expression of intent in the lease."[77]

Notice, however, that while the Levine court emphasized that it was not dealing with a contract of adhesion, the dissenting opinion in Weaver criticized the majority for incorrectly relying upon cases involving adhesion contracts instead of following the more traditional rule.[78] One has the feeling that the facts in Weaver and Levine are not dissimilar but an opposite result is being reached.

The intermediate appellate court in Weaver held that a provision in a contract by which one party agreed not to hold the other liable for his negligence is contrary to public policy in the absence of an understanding of the provision and true assent to it.[79] Although, this cannot be considered to be the traditional view,[80] that view does recognize an

77. 28 N.Y.2d at 213, 321 N.Y.S.2d at 86–87, 269 N.E.2d at 803, (citation omitted).

78. This raises the problem of what is a contract of adhesion. A standardized agreement has been described as one which is dictated by a predominant party to cover transactions with many people rather than with an individual, and which resembles an ultimatum or law rather than a mutually negotiated contract. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 206 (2d Cir.1955). It is characterized by a lack of negotiation. Cohen, The Basis of Contract, 46 Harv.L.Rev. 553, 588–90 (1933); Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 731–34 (1931); Meyer, Contracts of Adhesion and the Doctrine of Fundamental Breach, 50 Va.L.Rev. 1178, 1179–86 (1964); Oldfather, Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking, 16 U.Kan.L.Rev. 303, 305–07 (1968); Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv.L.Rev. 529, 531 (1971); Note, The Form 50 Lease: Judicial Treatment of an Adhesion Contract, 111 U.Pa.L.Rev. 1197, 1205–06 (1963). See also K & C, Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, 308–09, 263 A.2d 390, 393 (1970).

The New York court in Levine assumed that the lessee had a choice and could bargain with respect to the clause. Would the Weaver court agree? See notes 58–63 supra. It should also be noted that the plaintiffs in the Henningsen and Williams cases are consumers in the accepted sense of the word while the lessee in Weaver probably is not. See, e.g., 15 U.S.C.A. § 1602(a)–(h); Uniform Consumer Credit Code § 1.301(11); Model Consumer Credit Act § 1.410. How important this factor should be is still unclear. Certainly as a matter of fact, it may usually be assumed that a consumer has little or no bargaining power. In any event, there are other cases which have taken the Weaver approach even though consumers were not involved. See, e.g., Chandler v. Aero Mayflower Transit Co., 374 F.2d 129 (4th Cir.1967); Standard Oil Co. of Cal. v. Perkins, 347 F.2d 379 (9th Cir.1965).

79. Weaver v. American Oil Co., 261 N.E.2d 99, 104 (Ind.App.1970), modified 262 N.E.2d 663 (1970), modified 257 Ind. 458, 276 N.E.2d 144 (1971).

Exculpatory clauses are often circumvented by a process of interpretation. See e.g., Willard Van Dyke Productions, Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963).

80. Johnston, The Control of Exemption Clauses: A Comment, 17 Int'l & Comp.L.Q. 232 (1968); von Hipple, The Control of Exemption Clauses: A Compara-

exception in the case of public servants involved in the performance of their public duties for compensation.[81] The primary illustration of such public servants is a common carrier.[82]

Cases involving private voluntary transactions, however, are not harmonious. While the lower court in the Weaver case held an exculpation clause invalid,[83] a number of recent cases have indicated the contrary.[84] Here again, the problem is discussed not only from the perspective of public policy, but also from the point of view of mutual assent.[85] For example, in Ciofalo v. Vic Tanny Gyms, Inc.,[86] a patron of a gymnasium operated by the defendant agreed in a membership contract to assume the risk of injuries arising out of the defendant's negligence. The court did not find the clause in opposition to public policy, adding: "Here there is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffectual." [87] Although the court stated that the plaintiff had voluntarily assented, the facts here were not sufficiently delineated to allow

tive Study, 16 Int'l & Comp.L.Q. 591 (1967); Note, 42 Chi.-Kent L.Rev. 82 (1965). However there is a different rule for willful, wanton, reckless, gross or intentional negligence. Winterstein v. Wilcom, 16 Md. App. 130, 136, 293 A.2d 821, 824 (1972). It might be observed that the courts have shown a greater hostility to exculpatory clauses than to indemnification agreements. See Jamison v. Ellwood Consol. Water Co., 420 F.2d 787, 789 (3d Cir.1970); Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 65 (5th Cir.1968); Haynes v. County of Missoula, 163 Mont. 270, 280-282, 517 P.2d 370, 377 (1973).

81. Tunkl v. Regents of the Univ. of Calif., 60 Cal.2d 92, 98-102, 383 P.2d 441, 445, 447, 32 Cal.Rptr. 33, 37-39 (1963).

82. There also have been a number of statutes dealing with the topic of exculpation. See e.g., 6 Del.Code § 2704; Ill.—Smith-Hurd Ann. ch. 80, ¶ 91; McKinney's N.Y.Gen.Obli.Law §§ 5-321 to 5-325 (concerning leases; caterers; building service and maintenance contracts; architects; engineers; surveyors; garages and parking lots).

83. See 261 N.E.2d at 101; accord, Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963), on remand 324 F.2d 272 (5th Cir.1963); Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955); Kansas City Power & Light Co. v. United Tel. Co., 458 F.2d 177, 179 (10th Cir.1972); Fitzgerald v. Newark Morning Ledger Co., 111 N.J.Super. 104, 267 A.2d 557 (1970) (such a clause not favored but question is one of public policy and answer depends upon position of the parties). See also Rogers v. Dorchester Associates, 32 N.Y.2d 553, 564, 347 N.Y.S.2d 22, 30, 300 N.E.2d 403, 409 (1973).

84. Royal Typewriter Co., Division Litton Business Systems, Inc. v. M/V Kulmerland, 346 F.Supp. 1019 (S.D.N.Y.1972), affirmed 483 F.2d 645 (2d Cir.1973); Cree Coaches, Inc. v. Panel Suppliers, Inc., 384 Mich. 646, 186 N.W.2d 335 (1971); Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co., 291 Minn. 97, 189 N.W.2d 404 (1971); Stamp v. Windsor Power House Coal Co., 154 W.Va. 578, 177 S.E.2d 146 (1970). See also Restatement, Contracts § 574. These authorities do not necessarily conflict with the cases cited in note 83 supra, since the underlying rationale of all these cases is that the question is one of assent and public policy.

85. The leading case is probably Tunkl v. Regents of Univ. of Calif., 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963).

86. 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961). See also Empress Health & Beauty Spa, Inc. v. Turner, 503 S.W.2d 188 (Tenn.1973).

87. 10 N.Y.2d at 297-98, 177 N.E.2d at 927, 220 N.Y.S.2d at 965. There has been much discussion concerning the language required for an exculpatory clause to be effective irrespective of any question of public policy. See Levine v. Shell Oil Co., 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971); Cason v. Geis Irrigation Co. of Kansas, Inc., 211 Kan. 406, 507 P.2d 295 (1973).

a determination of whether there was the true, voluntary, understanding assent required by Weaver and a number of other cases.[88]

The indemnity and exculpation cases are in a process of development. A gradual but perceptible change is occurring.[89] Freedom of contract, laissez-faire, and black letter law are giving way to notions of what is fair under the particular circumstances of the case, even if the result is not strictly in compliance with the objective theory of contract.[90] These cases also illustrate the modern attack on the duty to read rule—(1) a finding of a lack of true mutual assent; or (2) a conclusion that even if there were true assent, the challenged clause should be stricken as unconscionable or contrary to a rule of public policy that a party should not be permitted to shift the burden of his wrongdoing to a weaker party or to deprive the injured party of his right to recover for the wrong done to him.[91]

A Minnesota court has summarized the recent trend as follows:

> An examination of the cases demonstrates the emergence of a two-prong test used by the courts in analyzing the policy considerations. Before enforcing an exculpatory clause, both prongs of the test are examined, to-wit: (1) whether there was a disparity of bargaining power between the parties (in terms of a compulsion to sign a contract containing an unacceptable provision and the lack of ability to negotiate elimination of the unacceptable provision) and (2) the types of services being offered or provided (taking into consideration whether it is a public or essential service).[92] (Citations omitted)

The summary is largely accurate but fails to take into account more radical cases that emphasize the presence or absence of true assent.[93]

§ 9-45. Duty to Read and Restatement Second

Somewhat curiously the Restatement Second does not state a general rule with respect to the duty to read as did the original Restatement.[94] Rather it sets forth a rule primarily for standardized

88. Winterstein v. Wilcom, 16 Md.App. 130, 293 A.2d 821 (1972); Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921); Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583, 40 A.L.R.2d 742 (1953); Dodge v. Nashville, C. & St. L.R.R. Co., 142 Tenn. 20, 215 S.W. 274 (1919).

89. See, e.g., Smith v. Kennedy, 43 Ala. App. 554, 195 So.2d 820 (1966), certiorari denied 280 Ala. 718, 195 So.2d 829 (1967), which according to the casenote in 19 Ala. L.Rev. 484, 486 (1967) makes a substantial change in the law of Alabama. See also 4 Duq.U.L.Rev. 475 (1966).

90. W. Friedmann, Law in a Changing Society 93-94 (1959).

91. See notes 55 to 72 supra and accompanying text.

92. Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn.1982).

93. See Krohnert v. Yacht Systems Hawaii, Inc., ___ Hawaii App. ___, 664 P.2d 738 (1983) where true assent is made a third prong.

94. The rule of the original Restatement is set forth in § 70 which is in basic conformity with the general rule discussed in § 9-41 supra. The Restatement, Second, Contracts § 211, Comment b, suggests some recognition of the general rule and Comment d covers to some extent the same ground as § 9-42 hereof.

agreements in the chapter on interpretation.[95] Section 211 provides as follows:

> "(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> "(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> "(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

The rule obviously has a dual thrust. First, it recognizes that standardized agreements serve a useful purpose because most contracts are concluded between a party who bargains, if at all, only with respect to certain limited terms, and by an agent of a business who has limited understanding of the terms and limited authority to vary them.[96] Secondly, it follows the lead of cases such as Weaver v. American Oil Co.[97] by stating that parties "are not bound to unknown terms which are beyond the range of reasonable expectation."[98] The rationale is that if the drafter of the form knows or has reason to know that "the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term" then the adhering party should not be deemed to assent.[99]

Although the Restatement Second speaks of assent it seems that it is not using the word assent in its ordinary connotation for it indicates that all persons who sign a standardized agreement should be treated alike, even though a more sophisticated individual customer might give the type of informed assent required by some of the cases discussed above. Thus what the Restatement appears to be saying is that if the ordinary reasonable man would not expect such a clause it should be read out of the contract.[1] The Restatement in essence is talking about unconscionability based upon "unfair surprise."[2] It recognizes this

95. There is no definition of standardized agreement. See note 78 supra; see also Restatement, Second, Contracts § 157, Comment b.

96. Restatement, Second, Contracts § 211, Comments a & b.

97. 257 Ind. 458, 276 N.E.2d 144 (1971); see notes 17–19 supra and accompanying text.

98. Restatement, Second, Contracts § 211, Comment f.

99. Id.

1. Id. at § 211(2). However, in Comment f it is stated that one of the factors to be considered is whether the adhering party ever had an opportunity to read the term.

2. U.C.C. § 2–302, Comment 1. Professor Leff treats unfair surprise as procedural unconscionability. See § 9–40 supra; cf. Clark, Equity 247 (1954).

when it states that the rule set forth in Section 211 "is closely related to the policy against unconscionable terms."[3]

Two of the factors to be considered in determining whether a reasonable man would expect a particular provision in the agreement are: (1) whether "the term is bizarre or oppressive,"[4] and (2) whether "it eviscerates the non-standard terms explicitly agreed to, or * * * eliminates the dominant purpose of the transaction."[5]

The Restatement Second thus recognizes the utility of standard agreements but refuses to allow them to be used unfairly. This seems a reasonable resolution of the problem and is in general accord with the rule of some of the cases discussed above that even an objective manifestation of assent stemming from a failure to read should not preclude consideration of whether there is true assent to unfair or unexpected terms.

WESTLAW REFERENCES

"restatement second" /p "standard! agreement" (duty fail! +2 read)

§ 9-46. Conclusion

The underlying philosophy of the objective theory of contracts is to enshrine a writing as sacrosanct and inviolate. This result is achieved by rules that exclude or minimize the true subjective intention of the parties. The policy is that a party to a written agreement may safely rely upon the written document.[6] These results are achieved, for example, under the traditional parol evidence rule and traditional rules of interpretation including the plain meaning rule. It might be noted that all of these rules are presently under serious attack.[7]

The duty to read rule is yet another fortification thrown up by the objective theory of contracts to make a writing impregnable.[8] It is based on the realities of the bargaining practices of the past, when the

3. Restatement, Second, Contracts § 211, Comment f; see § 9-40 supra.

4. Restatement, Second, Contracts § 211, Comment f.

5. Id.; see Meyer, Contracts of Adhesion and the Doctrine of Fundamental Breach, 50 Va.L.Rev. 1178 (1964). See also Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir.1951); Weisz v. Parke-Bernet Galleries, Inc., 67 Misc.2d 1077, 325 N.Y.S.2d 576 (N.Y.C.Civ. Ct.1971); reversed 77 Misc.2d 80, 351 N.Y.S.2d 911 (App.Term 1974); Karsales (Harrow), Ltd. v. Wallis [1956] 2 All E.R. 866 (C.A.).

6. D. Hume, A Treatise of Human Nature 523-26 (Silby-Bigge ed. 1888); Whittier, The Restatement of Contracts and Mutual Assent, 17 Calif.L.Rev. 441 (1929); cf. 1 Williston §§ 21 & 35.

7. See, e.g., Restatement, Second, Contracts ch. 9.

8. The Weaver case recognized the relationship between the objective theory of contracts and the duty to read when it stated: "The parole evidence rule states that an agreement or contract, signed by the parties, is conclusively presumed to represent an integration or meeting of the minds of the parties. This is an archaic rule from the old common law. The objectivity of the rule has as its only merit its simplicity of application which is far outweighed by its failure in many cases to represent the actual agreement, particularly where a printed form prepared by one party contains [sic] hidden clauses unknown to the other party is submitted and signed. The law should seek the truth or the subjective understanding of the parties in this more enlightened age. The burden

self-reliance ethic was strong and standardized agreements were rare. Under such circumstances, it may have been realistic to expect each party to read and understand his agreement. However, in the current era of mass marketing, a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did. In such circumstances an imputation that he assents to all of the terms in the document is dubious law. An assertion that he is bound by them would place a premium upon an artful draftsman who is able to put asunder what the salesman and the customer have joined together.[9]

Thus, some of the more modern cases search not only for apparent objective assent but also for a true assent. Under this view true assent does not exist unless there is a genuine opportunity to read the clause in question and its impact is explained by the dominant party and understood by the other party who has a reasonable choice, under the circumstances, of accepting or rejecting the clause.[10] Thus the printed form which implicitly suggests that it should not be challenged or even read loses some of its apparent authority.[11] The Restatement Second goes one step further when it indicates that what is important, at least in contracts of adhesion, is whether a reasonable man would have expected to find such a clause in the contract. If not, the clause is considered to be oppressive, unfair or indecent.[12] This, of course, carries one into the doctrine of substantive unconscionability which in turn is related to the question of whether a particular clause should be struck down as contrary to public policy.[13] The Restatement Second seems to be suggesting a new kind of objective approach to standardized agreements. Rather than seeking out true assent on a case by case basis it places the duty upon the courts to consider the essential fairness of the printed terms, both from the viewpoint of surprise and inherent one-sidedness.

Not only is there inconsistency in the authorities regarding which theory should be applied, but apparently opposite results are being reached in cases with substantially similar fact patterns.[14] This should not come as a surprise to any student of the law. The plain fact is that

should be on the party submitting such 'a package' in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein," 257 Ind. at 463-64, 276 N.E.2d at 147 (emphasis deleted).

It also has been suggested that the party who prepared the standardized form should shoulder the burden of proving that an opportunity for bargaining existed. Wilson, Freedom of Contract and Adhesion Contracts, 14 Int'l & Comp.L.Q. 172, 186 (1965).

9. See generally Dauer, Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction, 5 Akron L.Rev. 1 (1972); Mellinkoff, How to Make Contracts Illegible, 5 Stan.L.Rev. 418 (1953); Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv.L.Rev. 529 (1971).

10. See § 9-44 supra.

11. Shuchman, Consumer Credit by Adhesion Contracts, 35 Temp.L.Q. 125 (1962).

12. K. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960).

13. See § 9-44 supra.

14. See § 9-44 supra.

new law is evolving in this area and it will be many years, if ever, before any semblance of uniformity will be achieved.[15]

The ultimate result may be a radically different set of rules for transactions in which all major aspects of the agreement are negotiated and those in which standard forms are used. If the industries that employ standard forms do not police themselves so as to insure inherent fairness of forms, it is likely that the courts will increasingly refuse legal effect to non-negotiated terms of a contract and that standardized forms, as in the case of insurance policies, will be dictated by legislatures or administrative agencies.

15. Perhaps what is called for is an administrative approach to the problem.

See, e.g., Sales, Standard Form Contracts, 16 Mod.L.Rev. 318, 337–38 (1953); Sheldon, Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control, 22 Am.J.Comp. L. 17 (1974); Comment, Administrative Regulation of Adhesion Contracts in Israel, 66 Colum.L.Rev. 1340 (1966). See also Speidel, Unconscionability, Assent and Consumer Protection, 31 U.Pitt.L.Rev. 359 (1970).

Kessler and Gilmore, Contracts
(2nd. ed. 1970) p. 70

The inclusion of a chapter on torts, although not customary, hardly needs justification. To be sure, tort and contract are traditionally distinguished in that "the duties in the former are primarily fixed by the law, while in the latter they are fixed by the parties themselves."[1] It should be remembered, however, that just as the action on the case of old was used to pave the way for the expansion of contractual liability, more recently tort law has been called upon to provide remedies in areas not yet covered by contract law, frequently with subsequent gradual absorption of these remedies into the body of contractual remedies.

[1] Winfield, The Province of the Law of Tort 40 (1931); for a criticism, see Seavey, 45 Harv. L. Rev. 209 (1931): "All legal obligations are imposed by law, contract as well as tort obligations. But it is said that one is liable upon a contract only because he has agreed to be. Not at all. He is liable because he has voluntarily made a manifestation to which the law attaches, with or without his intent, certain consequences. The older conception of contracts involved a meeting of minds: the new objective theory of legal consequences, following a manifestation, brings it back very closely to the original tort conception from which it sprang. Tort liability is ordinarily the consequence of voluntary action: it is difficult to think of situations where duties are imposed upon one who has not so acted. It is probable that if one is placed in the middle of a road while asleep, he is under a duty, upon awakening, to use care to remove himself lest he cause injury to others; liability may be imposed upon an heir for damage caused by his realty before he is aware of ownership. But, excepting such rare cases, tort obligations are assumed in the same sense that contractual obligations are assumed." See further Prosser on Torts 45 (3d ed. 1964); Patterson, Compulsory Contracts in the Crystal Ball, 43 Colum. L. Rev. 731, 737 et seq. (1943).

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