Chapter Five
Negligent Conduct: The Criteria of Reasonableness

A. INTRODUCTION

Conduct is negligent if it creates an unreasonable foreseeable risk of injury to others or (if it is plaintiff's conduct) to oneself. The vast majority of form jury instructions and judicial opinions do not provide any test or definition of what constitutes unreasonable conduct, other than an often circular reference to the "ordinary care" that would be exercised by the reasonable or prudent person in the same or similar circumstances. See, for example, a commonly used federal jury instruction

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the person or property of others.¹

³ Edward J. Devitt, Charles B. Blackmar & Michael A. Wolff, Federal Jury Practice and Instructions, Civil §§ 80.03-.04 at 133-35 (4th ed. 1987). The first paragraph of the above instruction is a variation of a frequently used formulation that was first articulated in 1856 in the English case of Blyth v. Birmingham Water Works, 156 Eng. Rep. 1047, 1049 (Ex. 1856):

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

¹Compare California Jury Instructions — Civil § 3.10 (1977) ("negligence is the doing of something which a reasonably prudent person would not do"); Illinois Pattern Jury Instructions, Civil § 10.02 at 54 (2d ed. 1971) ("Ordinary care" “mean[s] the care a reasonably careful person would use under [similar circumstances]. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide."). For a survey and analysis of the form jury instructions on negligence in the various states, see Patrick J. Kelley & Laurel A. Wendt, What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions, 77 Chi.-Kent L. Rev. 587 (2002).
Prior to the twentieth century, what little elaboration existed regarding the “ordinary care” of the “prudent person” stated or implied that a defendant's conduct was negligent if it created any significant, foreseeable, avoidable risk to others. For example, one of the best known nineteenth-century cases, Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), stated:

[O]rdinary care . . . means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. . . . To make an . . . inevitable [non-negligent] accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

Id. at 296. However, as was discussed in chapter 3, the courts treated many significant foreseeable risks—for example, the inherent risks involved in operating trains, automobiles, and other motorized vehicles—as “inevitable” or “unavoidable.” Unfortunately, no general criteria were elaborated for determining when foreseeable risks would be deemed avoidable (and thus negligent) or inevitable (and thus not negligent).

It clearly would be useful to have some elaboration of the criteria for determining what constitutes “reasonable,” “prudent,” or “ordinary” care. At the beginning of the twentieth century, legal academics attempted to articulate some general criteria. At the time, utilitarianism was a relatively new and popular moral theory. In an influential article published in 1915, Henry Terry proposed a utilitarian definition of reasonable behavior, according to which conduct is reasonable if and only if the expected utility of the conduct (its expected benefits, including the avoidance of the burden of taking further precautions) outweighs its expected disutility (the expected losses resulting from the conduct), taking into account all foreseeable benefits and costs to anyone who might be affected by the conduct. Henry T. Terry, Negligence, 29 Harv. L. Rev. 40, 42-44 (1915).

Despite an acknowledged lack of support in the case law, Terry's aggregate risk-utility test was adopted, with minor adjustments, in the first Restatement of Torts, which was approved as the first completed project of the fledgling American Law Institute in 1934. Comment c to section 283 (comment e in the Restatement Second), entitled "Weighing Interests," seems to adopt utilitarianism's two basic assumptions: that one must always (1) be impartial between one's own interests and the interests of others and (2) act so as to maximize the aggregate sum of benefits minus costs, without any independent concern for the distribution of those benefits and costs:

A. Introduction

The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires . . . that [the actor] give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.

Section 291 states the basic criterion by which unreasonableness is to be determined:

Where an act is one which a reasonable man would recognize as involving risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Sections 292 & 293 list factors that are relevant in determining the magnitude of the foreseeable risks and the utility of the conduct at issue, which are similar to the factors that Terry articulated. See Patrick J. Kelley, The Carroll Towing Company Case and the Teaching of Tort Law, 45 St. Louis U.L.J. 731, 743-48 (2001). The relevant sections and comments in the first Restatement were carried over virtually intact into the Restatement Second in 1965. Although the Restatement Third’s blackletter formulation does not explicitly describe a utilitarian balancing of aggregate risks and benefits/burdens, the comments to section 3 go even further than the first two Restatements by explicitly adopting an aggregate cost-benefit test.

However, from the beginning, reservations have been expressed about the aggregate risk-utility test. Terry himself, the initial proponent of the test, cautiously stated that, “in some cases, at least,” the relevant factors should include the expected utility of the conduct to the defendant or others. Terry, supra, at 43 (emphasis added) (see note 1 following the Eckert case in section B.2 below). Similarly, Professor Warren Seavey of the Harvard Law School, who was one of the advisers for the first and Second Restatements, warned against “assum[ing] that we can rely upon any formula in regard to 'balancing interests' to solve negligence cases,” and he stated that the utility of the defendant's conduct usually is not considered or is weighted very low when the defendant for her own benefit puts another's property or especially person at risk, or intentionally interferes with the person or property of another. Warren A. Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1, 8 n.7 (1927). The first and second Restatements emphasize the social and legal valuation of the

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3Section 3 states:

Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.

Restatement Third: Physical and Emotional Harm § 3.

4Id. § 3 comment e.
interests at issue (an emphasis that is omitted in the Restatement Third).\(^5\) Professor John Fleming, the late author of the leading Anglo-American treatise on tort law, concluded his discussion of the aggregate risk-utility formula as follows:

> But negligence cannot be reduced to a purely economic equation. . . . [I]n general, judicial opinions do not make much of the cost factor [of eliminating the risk], and for good reasons. For one thing, our legal tradition in torts has strong roots in an individualistic morality with its focus primarily on interpersonal equity rather than broader social policy. . . . [T]he calculus of negligence includes some important non-economic values, like health and life, freedom and privacy, which defy comparison with competing economic values. Negligence is not just a matter of calculating the point at which the cost of injury to victims (that is the damages payable) exceeds that of providing safety precautions. The reasonable man is by no means a caricature cold blooded, calculating Economic Man.


What factors should be taken into account, and how, in evaluating the reasonableness of a person's conduct? What factors are actually taken into account by the courts?

Clearly, the foreseeable risks (expected probability of harm times its expected magnitude) should be and are taken into account. There is no negligence liability, or any form of tort liability, in the absence of foreseeable risks to persons or property. Also clearly, those risks must be justified by expected benefits. But which expected benefits, to whom, should be taken into account, and how? Should all the expected benefits, including purely private benefits to the defendant, always be taken into account, as the utilitarian-efficiency theory requires? When expected benefits are taken into account, should they always (or ever) be taken into account through the aggregate summation that is required by the utilitarian-efficiency theory? Or should it matter who is being put at risk, by whom, and for whose benefit? For example, should it be deemed reasonable for a defendant knowingly to impose a significant risk on a plaintiff for the defendant's sole benefit, merely because the expected gain to the defendant is greater than the expected loss to the plaintiff? Conversely, should it be deemed unreasonable for a person to put herself at significant risk for another's benefit—e.g., in a rescue situation— if the risks to her outweigh the expected benefits to the other person? Should a person be required to put herself at risk to benefit another, as long as the expected benefits to the other outweigh the foreseeable risks to her?

In this chapter, we explore the criteria of reasonableness actually employed by the courts. We examine first, in section B, the criteria that are employed when evaluating plaintiffs' alleged contributory negligence, postponing consideration of defendants' alleged negligence until later sections. We begin this way for two reasons. First, the three cases that we discuss in section B are the best known and most discussed American cases on the criteria of reasonableness, which, although usually employed to discuss defendant's negligence,

\(^5\)Id. § 3 cmts. e & h and reporters' note; Richard W. Wright, Justice and Reasonable Care in Negligence Law, 47 Am. J. Jur. 143, 150-63 (2002).
actually involve the issue of plaintiff’s contributory negligence. Second, it is useful to distinguish situations involving a plaintiff’s alleged contributory negligence in putting himself at risk from situations involving a defendant’s (or plaintiff’s) alleged negligence in putting others at risk, which arguably are morally significantly different but are generally not distinguished in the Restatements or the academic doctrine.

In sections C, D and E we consider the criteria that are employed when evaluating defendants’ alleged negligence. In sections C and D we examine situations involving defendants’ alleged misfeasance (putting others at risk). In section E we explore the difference between misfeasance and nonfeasance (failing to aid those put at risk by persons other than oneself) and defendants’ possible liability for nonfeasance. Some of the situations discussed in sections D and E are often described as “no duty” or “limited duty” situations, and it is often stated or inferred that this means that there is no legal duty or only a limited legal duty to behave reasonably in these types of situations. However, as we will see, in many of these situations the courts are not stating that there is no duty or only a limited duty to behave reasonably, but rather that it was reasonable, given the respective rights positions of the defendant and the plaintiff, for the defendant not to have done any more than she did.

B. PLAINTIFFS’ CONDUCT

1. GUARDING ONESELF AGAINST DEFENDANT’S NEGLIGENCE

LEROY FIBRE CO. V. CHICAGO, MILWAUKEE & ST. PAUL RY.
Supreme Court of the United States
232 U.S. 340 (1914)

... The evidence at the trial showed the following without dispute: “Some years after defendant had constructed and commenced operating its line of railroad through Grand Meadow, Minnesota, the plaintiff established at that village a factory for the manufacture of tow from flax straw. The plaintiff had adjacent to its factory premises, a tract of ground abutting upon the railroad right of way and approximately 250 by 400 feet in dimension upon which it stored flax straw it purchased for use in its manufacturing business. There were about 230 stacks arranged in two rows parallel with the right of way. Each stack contained from three to three and a half tons of straw. The distance from the center of the railroad track to the fence along the line of the right of way, was fifty feet, from the fence to the nearest row of stacks, twenty or twenty-five feet, and from the fence to the second row of stacks, about thirty-five feet. A wagon road ran between the fence and the first row. On April 2, 1907, during a high wind, a fire started upon one of the stacks in the second row, and as a result all were consumed. The fire did not reach the stack through the intervening growth or refuse but first appeared on the side of the stack above the ground. The flax straw was inflammable in character. It was easily ignited and easily burned.

“There was substantial evidence at the trial tending to show that the fire was started by a locomotive engine of defendant which had just passed and that through the negligent operation of defendant’s employés in charge, it emitted large quantities of sparks and live cinders which were carried to the straw stack by a high wind then prevailing. It was contended at the trial by defendant, that plaintiff itself was negligent and that its negligence contributed
to the destruction of its property. There was no evidence that plaintiff was negligent save that it had placed its property of an inflammable character upon its own premises so near the railroad tracks, that is to say, the first row of stacks, seventy or seventy-five feet and the second row in which the fire started about eighty-five feet from the center of the railroad track. In other words, the character of the property and its proximity to an operated railroad for which plaintiff was responsible was the sole evidence of plaintiff's contributory negligence.

"The trial court charged the jury that though the destruction of the straw was caused by defendant's negligence, yet if the plaintiff in placing and maintaining two rows of stacks of flax straw within a hundred feet of the center line of the railroad, failed to exercise that ordinary care to avoid danger of firing its straw from sparks from engines passing on the railroad that a person of ordinary prudence, would have exercised, under like circumstances and that the failure contributed to cause the accident the plaintiff could not recover... [The jury found that the plaintiff was contributorily negligent] and found a general verdict for the defendant..."

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

The questions certified present two facts—(1) The negligence of the railroad was the immediate cause of the destruction of the property. (2) The property was placed by its owner near the right of way of the railroad, but on the owner's own land.

The query is made [on appeal] whether the latter fact constituted evidence of negligence of the owner to be submitted to the jury. It will be observed, the use of the land was of itself a proper use—it did not interfere with nor embarrass the rightful operation of the railroad. It is manifest, therefore, the questions certified, including the third question, are but phases of the broader one, whether one is limited in the use of one's property by its proximity to a railroad; or, to limit the proposition to the case under review, whether one is subject in its use to the careless as well as to the careful operation of the road. We might not doubt that an immediate answer in the negative should be given if it were not for the hesitation of the Circuit Court of Appeals evinced by its questions, and the decisions of some courts in the affirmative. That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law and takes from him the assumption and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and "live cinders" were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the railroad has preceded? Or is that a use which the railroad must have anticipated and to
which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses and that the uses by one owner of his property may be limited by the wrongful use of another owner of his, is a contradiction.

MR. JUSTICE HOLMES partially concurring. . . . I agree, for the purposes of argument, that as a general proposition people are entitled to assume that their neighbors will conform to the law; that a negligent tort is unlawful in as full a sense as a malicious one, and therefore that they are entitled to assume that their neighbors will not be negligent.

[ However] If a man stacked his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the road by the oscillating result of an inquiry by the jury whether the road had used due care. I should say that although of course he had a right to put his flax where he liked upon his own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train. [Justice Holmes would allow, or require, the jury to find that the plaintiff was contributorily negligent and thus barred from recovery if the flax “obviously was likely to be set fire by a well-managed train.”]

I am authorized to say that THE CHIEF JUSTICE concurs in the opinion that I express.

NOTES

1. The test of reasonableness employed by the court. Did the majority opinion in LeRoy Fibre use the aggregate risk-utility test to evaluate the reasonableness of the plaintiff’s failure to take greater precautions against the foreseeable risk of fire due to sparks from the railroad’s negligently operated engines? If not, what test did it use? On what basic principles did it explicitly or implicitly rely? Utilitarian efficiency? Justice (equal freedom)?

2. Guarding against foreseeable negligence by others. The principle affirmed in LeRoy Fibre is well established. Regardless of the balance of risks and utilities, a possessor of land will not be required to forego use of his land or otherwise incur significant burdens in order to prevent injuries to his property caused by the defendant’s foreseeable negligence.
Is a plaintiff never required to take precautions to guard against foreseeable negligence by the defendant? See Restatement Second §§ 466, 473. Should a driver who has the right-of-way approaching an intersection be required to look out for and guard against the foreseeable negligence of a driver or pedestrian who negligently enters the intersection without having the right-of-way? Consider the following statement by the Supreme Court of Utah with respect to a collision between a truck entering a rural highway from an intersecting gravel road and the car being driven by the plaintiff on the highway:

Having observed the defendant stop as he was about to enter the highway, at any time after plaintiff was close enough to constitute an immediate hazard to him, she could assume that he would remain stopped and accord her the right of way. She could continue to rely on that assumption until she observed, or should have observed, something to warn her to the contrary. It may be true that a high degree of caution would have impelled her to apprehend that the defendant might suddenly dart on to the highway in front of her. But she was not obliged to do so. While extraordinary caution is commendable, it is not required as a standard of conduct. The concept of contributory negligence must not be so extended as to require one to drive under the apprehension that the other driver will be guilty of a sudden burst of negligence. If all drivers were required to be that cautious and await upon each other, it would seriously impede the movement of traffic and make driving upon modern high speed arterial highways quite impractical.


What factors or criteria distinguish those situations in which a plaintiff should be required to guard against others' negligence from those in which a plaintiff should not be required to do so? Should it depend on whether the necessary precautions would be a significant burden on the plaintiff's (and similarly situated persons') rights in their persons and property? On whether the plaintiff's failure to take precautions would create or enhance risks to others rather than merely exposing himself to risk?

3. Plaintiff's contributory negligence versus defendant's attributable responsibility. What is the precise nature of the disagreement between Justice Holmes and the majority? Does the majority disagree with Holmes's argument that the plaintiff should not be able to recover if his flax was so close to the tracks that it "was likely to be set fire to by a well-managed train"? Would the majority permit recovery if the flax clearly would have been destroyed even if the defendant had not been negligent? Is there a difference between these two questions? Is Holmes correct that this issue should have been submitted to the jury as an issue of contributory negligence? Could it and should it instead have been raised as part of the evaluation of the prima facie case against the defendant? See the discussion of the no-worse-off limitation on the defendant's attributable responsibility in section C of chapter 7.
L. HAND, Circuit Judge. . . . The facts, as the judge found them, were as follows. On June 20, 1943, the Conners Company chartered the barge, "Anna C," to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two tiers of barges. The Grace Line, which had chartered the tug, "Carroll," sent her down to the locus in quo to "drill" out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the "Carroll" at the time were not only her master [and a deckhand], but a "harbormaster" [longshoreman] employed by the Grace Line. Before throwing off the line between the two tiers, the "Carroll" nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines "slow ahead" against the ebb tide which was making at that time. The captain of the "Carroll" put a deckhand and the "harbormaster" on the barges, told them to throw off the line which barred the entrance to the slip; but, before doing so, to make sure that the tier on Pier 52 was safely moored, as there was a strong northerly wind blowing down the river. The "harbormaster" and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the "Anna C," to the pier.

After doing so, they threw off the line between the two tiers and again boarded the "Carroll," which backed away from the outside barge, preparatory to "drilling" out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the "Anna C," either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the "Anna C" fetched up against a tanker, lying on the north side of the pier below — Pier 51 — whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i.e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, "Grace," owned by the Grace Line, and the "Carroll," came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the "Anna C" afloat, had they learned of her condition; but the bargee had left her on the evening before, and nobody was on board to observe that she was leaking. [The Grace Line and the Carroll Company] wish to charge the "Anna C" with a share of all her damages, or at least with so much as resulted from her sinking. . . .

We cannot . . . excuse the Conners Company for the bargee's failure to care for the barge, and we think that this prevents full recovery. First as to the facts. As we have said, the deckhand and the "harbormaster" jointly undertook to pass upon the "Anna C's" fasts to the
pier; and even though we assume that the bargee was responsible for his fasts after the other barges were added outside, there is not the slightest ground for saying that the deckhand and the "harbormaster" would have paid any attention to any protest which he might have made, had he been there. We do not therefore attribute it as in any degree a fault of the "Anna C" that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the "collision damages." On the other hand, if the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the "Carroll" and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the "sinking damages." Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the "sinking" damages from the Carroll Company and one third from the Grace Line [under the then-existing admiralty rule which allocated damages pro-rata among the multiple responsible parties]. For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it is never ground for liability even to other vessels who may be injured. [The court discussed numerous cases, approximately half of which had found the absence of a bargee or captain to have been negligent.] It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.

Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, . . . and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the
locus in quo — especially during the short January days and in the full tide of war activity — barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold — and it is all that we do hold — that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

NOTES

1. The facts and issues in Carroll Towing. The facts and issues in Carroll Towing should be carefully sorted out before attempting to evaluate Judge Hand's elaboration and application of his now-famous formula. Who is the relevant plaintiff in Carroll Towing, and for what harm is the plaintiff seeking compensation? Who are the defendants and how are they alleged to have contributed to the harms suffered by the plaintiff? What is the relevant legal issue on appeal? Does it involve the alleged negligence of the defendants' employees, or the alleged contributory negligence of the plaintiff's employee? What particular acts or omissions by the defendants or the plaintiff allegedly constituted (causally relevant) negligence? For a more complete discussion of the case (including the bargee's claim, contradicted by others, that he was on board the barge at the time of the accident but did not notice the leak because it was a "kind of dark foggy day"), see Stephen G. Gilles, United States v. Carroll Towing Co.: The Hand Formula's Home Port, in Torts Stories 11, 16 (Robert L. Rabin & Stephen D. Sugarman eds. 2003).

2. The "Hand formula." The Carroll Towing case is the most famous of several cases during the 1940s in which Judge Hand set forth his mathematical formulation of the aggregate risk-utility test of reasonableness or negligence. Although he never cited the Restatement, he was a founding member of the Council of the American Law Institute, and his mathematical formula may have been an attempt to support the Restatement's aggregate risk-utility test, which, as previously noted, had no support in the prior case law. In Judge Hand's formula, a person's conduct is unreasonable, and thus negligent, if and only if $P \times L$ is greater than $B$, taking into account all the foreseeable risks created by the conduct at issue and the burdens required to avoid or eliminate those risks. The foreseeable risk is the product of $P \times L$, where $P$ is the probability of a loss and $L$ is the magnitude of the loss. The burden $B$ of adequate precautions includes any expected benefits that would be foregone by not engaging in the risky conduct at issue. Conversely, $B$ is often described as the expected benefits of the risky activity, which include not having to undertake the burden or cost of the precautions required to eliminate (or reduce) the risk. Burdens and benefits are simply two sides of the same coin, but to avoid missing some burden or benefit it is useful to think of both when evaluating $B$.

3. The application of the Hand formula in Carroll Towing. Did Judge Hand apply his mathematical formula, or any version of the aggregate risk-utility test, to determine whether the plaintiff barge owner (or its employee) was contributorily negligent in Carroll Towing? Did he make any quantitative or even qualitative comparison of risks and burdens or benefits? What were those risks, burdens, and benefits? Judge Hand focused on the bargee's being absent "during the working hours of daylight," the probability of the barge's breaking loose and causing (suffering?) damage, and the burden to the attendant of having to remain on the
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barge (“the barge must not be the bargee's prison”). Were those relevant considerations? Are there other relevant considerations that Judge Hand did not consider?

In the end, what, precisely, was the holding in Carroll Towing and the rationale for that holding? If the plaintiff’s bargee had had some non-fabricated excuse for his absence, would Hand have balanced the utility of the excuse against the risks of damage to or by the plaintiff's barge? From a utilitarian-efficiency viewpoint, should it matter whether the purpose of the bargee's absence was to get some supplies or to cuddle with his girlfriend?

4. Guarding against the defendant’s negligence reconsidered. Is the holding or rationale in Carroll Towing consistent with LeRoy Fibre? Should a barge owner whose employee has properly tied up the barge to prevent it from breaking loose and, if necessary, checked the ties periodically to make sure they will hold fast, be required to guard against the negligence of others who tie up to the barge without ensuring that all the ties are sufficient to prevent the barge from breaking loose? In two Second Circuit cases decided only one year and two years, respectively, after Carroll Towing, with facts very similar to those in Carroll Towing, the court did not refer to Hand’s aggregate risk-utility formula and held that the failure of the plaintiff to have an attendant on board was not negligent. New York Trap Rock Corp. v. Christie Scow Corp., 165 F.2d 314 (2d Cir. 1948) (opinion by Augustus Hand, joined by Learned Hand and Jerome Frank); Burns Bros. v. Long Island Rail Road Co., 176 F.2d 406 (2d Cir. 1949) (opinion by Harrie Chase, who had joined Hand's opinion in Carroll Towing); see Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 St. Louis U.L.J. 731, 750-52 (2001); Richard W. Wright, *Hand, Posner, and The Myth of the “Hand Formula,”* 4 Theoretical Inquiries in Law 145, 159-60 (2003).

5. The practical workability of the Hand formula. As Judge Hand himself noted in other cases, in practice it will be impossible to take into account more than a few options and their expected costs and benefits, and even for these options the expected costs and benefits generally cannot be estimated:

[O]f these factors, care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.

Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949). Hand also noted the difficulties of “applying a quantitative test [of ordinary or gross negligence] to an incommensurable subject-matter.” Id. He had made similar observations earlier in Conway v. O’Brien, 111 F.2d 611 (2d Cir. 1940), rev’d, 312 U.S. 492 (1941). He noted that the formula’s factors

are practically not susceptible of any quantitative estimate, and the second two [L and B] are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between
B. Plaintiffs' Conduct

incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.

Id. at 612; see Restatement Third: Physical and Emotional Harm § 3 comment h.


Despite the statement of the aggregate risk-utility test by Judge Hand and the first Restatement, it was not used or mentioned by other judges, including Hand’s colleagues on the Second Circuit. As demonstrated by Carroll Towing, Hand himself never actually applied the test, and after the 1940s he abandoned it. See Richard W. Wright, Hand, Posner, and The Myth of the “Hand Formula,” 4 Theoretical Inquiries in Law 145, 153-80 (2003). Nevertheless, as a result of its (qualified) adoption in the Restatement, the vast majority of torts treatises, casebooks, and other secondary sources generally assume that the aggregate risk-utility test is the criterion that is employed by the courts to evaluate defendants’ and plaintiffs’ alleged negligence. The most commonly cited sources for this assumption are sections 291-293 of the first and Second Restatements and Hand’s opinion in the Carroll Towing case. See, e.g., Dobbs 340-41; Fleming 7th at 102-08; 3 Harper, James & Gray 467-82; Prosser & Keeton 171-73.

However, as we previously noted, the aggregate risk-utility test does not appear in standard form jury instructions. See Patrick J. Kelley & Laurel A. Wendt, What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions, 77 Chi.-Kent L. Rev. 587 (2002). Moreover, judges infrequently refer to the test, rarely attempt to apply it, and almost never are able actually to employ it to plausibly explain their resolution of the negligence issue. See Ronald J. Allen & Ross M. Rosenberg, Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes, 77 Chi-Kent L. Rev. 683, 699-719 (2002); Stephen G. Gilles, The Invisible Hand Formula, 80 Va. L. Rev. 1015 (1994); Patrick J. Kelley, The Carroll Towing Company Case and the Teaching of Tort Law, 45 St. Louis U.L.J. 731, 750-56 (2001); Barbara Ann White, Risk-Utility Analysis and the Learned Hand
7. The Hand formula and economic efficiency. To identify the efficient levels of precaution, one must focus on marginal increments in costs and benefits attributable to marginal increments in precaution, rather than the total costs and benefits of some particular suggested precaution:

Suppose that while [a risk] $PL$ of $10 would be totally eliminated by the driver's reducing his speed by 25 m.p.h. at a cost to him of $8, it could be reduced to $1 by his reducing his speed by 5 m.p.h. at a cost to him of only $2. This implies that to get $PL$ down from $1 to zero would cost the driver $6 ($8 - $2), for a net social loss of $5 ($6 [cost] - $1 [gain]). Clearly we want him to reduce his speed just by 5 m.p.h., which yields a net social gain of [$7 ($9 gain - $2 cost)]. This example shows that expected accident costs and accident prevention costs must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety. Fortunately the common law method facilitates a marginal approach, simply because it will usually be difficult for courts to get information on other than small changes in the safety precautions taken by the injurer.


Contrary to Posner's assertion, information on marginal costs is rarely available, and courts instead focus on whatever untaken precaution is alleged by the plaintiff. See, e.g., Mark F. Grady, A New Positive Economic Theory of Negligence, 92 Yale L.J. 799, 806-09, 821-29 (1983); Mark F. Grady, Untaken Precautions, 18 J. Legal Stud. 139 (1989). However, attempting to calculate and enforce efficient precaution levels based on incomplete and highly imperfect information may very well lead to greater inefficiency rather than greater efficiency, even assuming that some determinate answer is suggested by the available (imperfect) information. See Brown, supra, at 333-34, 340-41, 343-44; cf. William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 20-21 (1987) ("Rarely will there be enough information about the costs and benefits of alternative safety measures to enable a confident judgment that the court's solution is the efficient one."); id. at 24 (same); Posner, supra, at 178 (discussing the distinction between level of activity and level of care and noting that "courts' inability to determine optimal activity levels except in simple cases is potentially a serious shortcoming of a negligence system").
8. The inefficiency of the Hand formula. Even if information on expected marginal costs and benefits is available, using the Hand formula to assess the reasonableness of the defendant's and plaintiff's conduct generally will result in the parties' engaging in inefficient conduct. Consider an illustration presented by Judge Posner, which was inspired by LeRoy Fibre. In the illustration, a farmer has the choice of placing stacks of flax worth $150 at different distances (zero, 75 or 100 feet) from a railroad track, and the railroad has the choice of using either a super spark arrester (Super S.A.), an ordinary spark arrester (S.A.), or no spark arrester. The different possible combinations of precaution by the farmer and the railroad that will avoid the expected loss of $150 are:

<table>
<thead>
<tr>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Super S.A., 0'</strong></td>
<td><strong>S.A., 75'</strong></td>
<td><strong>No S.A., 200'</strong></td>
</tr>
<tr>
<td>Railroad care</td>
<td>$100</td>
<td>$50</td>
</tr>
<tr>
<td>Farmer care</td>
<td>0</td>
<td>25</td>
</tr>
<tr>
<td>Total cost</td>
<td>100</td>
<td>75</td>
</tr>
</tbody>
</table>

Richard A. Posner, Economic Analysis of Law 169-70 (4th ed. 1992); cf. William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 88-90 (1987) (discussing LeRoy Fibre and a similar hypothetical). As is almost always the case in practice, the most efficient (least total cost) option requires bilateral precaution by both parties (option 2 here), rather than unilateral precaution by one or the other party (option 1 or 3). Yet, applying the Hand formula separately to each party's conduct, the railroad would be deemed negligent if it did not adopt option (1), since the $100 precaution is less than the expected $150 loss, and the farmer would be deemed negligent if he did not adopt option (3), since the $110 precaution also is less than the expected $150 loss. Under the traditional negligence liability rule, according to which the plaintiff cannot recover if he is contributorily negligent, the railroad will not take any precaution, since it knows the farmer either will adopt option (3), in which case there will be no loss and hence no liability, or will not adopt option (3) and be barred from recovering any damages due to his contributory negligence. The farmer, knowing that the railroad has no (economic) reason to take any precaution, therefore will adopt option (3)—i.e., spend $110 to avoid the expected $150 loss. Thus, using the Hand formula to determine the reasonableness of each party's conduct leads to the least efficient option being chosen, rather than the most efficient.

The Hand formula will identify the efficient precaution level for one of the parties only if it is applied using the risks, burdens and benefits that would be expected if the other party were exercising his or her efficient level of precaution, which is the formulation of the issue that is blithely assumed by Judge Posner and other legal economists. See Posner, supra, at 170; Landes & Posner, supra, at 88-89; John Prather Brown, Toward An Economic Theory of Liability, 2 J. Legal Stud. 323, 332-34 (1973). However, this assumption is viciously circular. Using the Hand formula to identify the first party's efficient precaution level requires first knowing the second party's efficient precaution level, but the second party's efficient precaution level can be identified only if the first party's efficient precaution level is known, and so on around the circle.

Efficient levels of care (or activity) cannot be determined by applying the Hand formula separately to each person's conduct. Instead, as in the above example, efficient levels
can only be determined by considering at the same time all the expected costs and benefits to the defendant and the plaintiff (and others) of all the possible combinations of precaution by the defendant and the plaintiff (and others) and then choosing the least cost option.

2. **GUARDING ANOTHER AGAINST DEFENDANT'S NEGLIGENCE**

**ECKERT V. LONG ISLAND R.R. CO.**

Court of Appeals of New York
43 N.Y. 502 (1871)

[Plaintiff's husband, Henry Eckert,] was standing in the afternoon . . . in conversation with another person about fifty feet from the defendant's track, in East New York, as a train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiff's witnesses of from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff, also showed, that a child three or four years old, was sitting or standing upon the track of the defendant's road as the train of cars was approaching, and was liable to be run over, if not removed; and the deceased seeing the danger of the child, ran to it, and seizing it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself, was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night . . .

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself.

Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that he might fail and receive
an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment’s delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless.

The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, Ch. J., PECKHAM and RAPALLO, JJ., concur.

ALLEN, J. (dissenting). The plaintiff’s intestate . . . went upon the track of the defendant’s road in front of an approaching train, voluntarily, in the exercise of his free will, and while in the full possession of all his faculties, and with capacity to judge of the danger. His action was the result of his own choice, and such choice [was] not compulsory. . . . [T]he maxim volunti non fit injuria applies. It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. . . .

Whether the defendant was or was not guilty of negligence, or whatever the character and degree of the culpability of the defendant and its servants is not material. The testator had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act. . . .

It is not the law that the co-operating act of the injured party must be culpable or wrong in intention. It may be merely negligence or the result of the free exercise of the will. The rescue of the child from apparent imminent danger was a praiseworthy act and entitled the plaintiff to the favorable consideration of the court and to a lenient and liberal interpretation and application of the rules of law in her behalf. But the principles of law cannot yield to particular cases.

The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act, the
performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred. . . .

I am of the opinion that the [judgments below] should be reversed and new trial granted, costs to abide event. [FOLGER, J., concurred in the dissenting opinion.]

NOTES

1. *An application of the aggregate risk-utility test?* The proponents of the aggregate risk-utility test claim that it is applied to evaluate the alleged contributory negligence of plaintiffs in cases like *Eckert*. For example, the Restatement states:

Whether a plaintiff is acting reasonably in exposing himself to a particular risk in order to protect a third person from harm depends upon the comparison between the extent of the risk and the gain to be realized by encountering it, which includes two things: first, the likelihood that the rescue will be successful and, second, the gravity of the peril in which the third person has been placed.

Restatement Second § 472 comment a. The *Eckert* case was the principal illustration in Henry Terry's 1915 article on negligence, which first proposed the aggregate risk-utility test of reasonableness that was subsequently adopted in the Restatement:

The reasonableness of a given risk may depend upon the following five factors:

1. The magnitude of the risk [the probability of harm]. . . .
2. The value or importance of that which is exposed to the risk, which . . . may be called the principal object. . . .
3. A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.
4. The probability that the collateral object will be attained by the conduct which involves risk to the principal [object]; the utility of the risk.
5. The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk.

The [*Eckert*] case will serve as an illustration:

1. The magnitude of the risk was the probability that he would be killed or hurt. That was very great.
2. The principal object was his own life, which was very valuable.
3. The collateral object was the child's life, which was also very valuable.
B. Plaintiffs' Conduct

(4) The utility of the risk was the probability that he could save the child. That must have been fairly great, since he in fact succeeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.

(5) The necessity of the risk was the probability that the child would not have saved himself by getting off of the track in time.

Here, although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral object and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. . . .


Let us translate the [*Eckert*] court's discussion into economic terms. . . . [W]e may assume—plausibly enough on the facts—[the child] was certain to be killed unless rescued by Eckert. . . . If the child's life and Eckert's life are assumed to have the same value, the question whether Eckert was negligent is reduced to whether the probability of his rescuing the child was less than the probability of his being killed. . . . In asking whether Eckert "could probably save the child without serious injury to himself," the court was comparing these probabilities; if Eckert could have saved the child without serious injury to himself, this implies that the probability of a successful rescue was greater than the probability of his being hit by the train himself.


How do the five elements listed by Terry, each of which is also mentioned by Landes and Posner, fit together within Hand's formula ($P$ times $L$ versus $B$)? Which belong on the risk ($P$ times $L$) side of the formula and which on the utility-burden-benefit ($B$) side? Do you agree with Landes's, Posner's and Terry's applications of the aggregate risk-utility test to the facts in *Eckert*? For example, is it correct, under the utilitarian efficiency theory, to assume that the lives of the child and Eckert were equally valuable? Was the child certain to be killed unless rescued by Eckert? Was the probability of Eckert's rescuing the child less than, equal to, or greater than the probability of Eckert's being hit by the train? Can one properly conclude that the probability that Eckert could save the child was "fairly great, since he in fact succeeded"? Is a "fairly great" probability the same as a "fair chance"? If not, which phrase better describes the chance of rescue in *Eckert*?

Make your own estimates of the probabilities and values in *Eckert* and plug them into Terry's expanded version of the Hand formula. Did the expected utility of Eckert's conduct exceed the expected risks? How would the assessment of Eckert's contributory negligence turn out under the risk-utility formula given the assumptions that (a) the lives of Eckert and the child were equally valuable (as is suggested above, this is doubtful under the utilitarian efficiency theory), (b) the probability of Eckert's being hit by the train was somewhat higher
than the probability of the child’s being hit (since Eckert had to cross the track after shoving, throwing, or carrying the child off the track ahead of him), and (c) there was a nonzero probability of the child’s saving himself? For example, assume the probability of the child’s needing rescue (not saving himself) was 90 percent, the probability of Eckert’s rescuing the child was 50 percent (he just barely succeeded), and the probability of Eckert’s being struck and killed was 60 percent.

2. From a utilitarian-efficiency perspective, is it correct to evaluate the plaintiff’s alleged negligence by an expanded “Hand formula” as was done by Terry, Landes, and Posner? Should one instead compare the expected deaths/lives in the absence of an attempt to rescue with the expected deaths/lives with an attempt to rescue? How would one do so, and what would be the result?

3. The test of reasonableness applied by the courts. Did either the majority or the dissenting judges in Eckert employ, explicitly or implicitly, the aggregate risk-utility test of reasonableness? Did either Terry or Landes and Posner note or consider the implications of the Eckert majority’s statements that, in an emergency rescue situation such as this, the would-be rescuer will be deemed negligent only if his conduct was “rash or reckless,” or the dissent’s assumption that the rescuer’s actions were “praiseworthy” and “meritorious”?

In these emergency rescue situations, the courts generally hold that, no matter how much the risk to the would-be rescuer may seem to exceed the expected benefit to the potential rescuee, the would-be rescuer’s conduct is morally praiseworthy, rather than morally blameworthy or unreasonable, unless it was “foolhardy,” “wanton,” “rash,” or “reckless.” In addition to Eckert, see Rossman v. La Grega, 270 N.E.2d 313 (N.Y. 1971) (“foolhardy”); Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921) (“wanton” or “foolhardy”); Baker v. T.E. Hopkins & Son, Ltd., [1959] 3 All E.R. 225 (C.A.) (“wanton” or “foolhardy”); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085 (4th Cir. 1985) (“wanton or reckless”), cert. denied, 474 U.S. 846 (1985); Bridges v. Bentley, 769 P.2d 635 (Kan. 1989) (“rash, wanton, or foolhardy”); John G. Fleming, The Law of Torts 155-57 (7th ed. 1987) (“utterly foolhardy”). The facts and holdings of these cases indicate that the risk to the plaintiff rescuer is considered foolhardy, wanton, rash, or reckless only if the plaintiff put his own life at serious risk merely to save property rather than the life of another person, or—as Terry states—if there was “no fair chance” of saving the life of the person whom the plaintiff was attempting to rescue. Is this criterion of reasonableness more consistent with the basic premises of the utilitarian-efficiency theory or the basic premises of the justice theory?

4. A duty to rescue? Consider the majority’s comment that Eckert owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself.” Do you agree? If so, what sort of duty did Eckert owe? A moral one? A legal one? The relevant legal rules and underlying moral principles are discussed in section E below.

5. Defendants’ putting others at risk to save themselves. Do you think the same “fair chance of success” criterion of reasonableness that is applied by the courts to a plaintiff rescuer like Eckert, who put his own life at serious risk in an attempt to save the life of another, should be applied to a defendant who puts another’s life at serious risk in an attempt
to save her own life or the life of a third person? Alternatively, do you think the aggregate risk-utility test should be used to assess the reasonableness of the defendant's conduct in such a situation? For example, would it be reasonable to push another person in front of a train to save yourself and several of your friends? To pull another person in front of you, or to jump behind her, so that she will serve as a shield against an aggressor intent on shooting you, assuming that the aggressor would be much less likely to shoot if such an innocent human shield were in his way? See Laidlaw v. Sage, 158 N.Y. 73 (1899). Would it be reasonable to deprive a weak fellow occupant of a life boat of his water, or even to cut his limbs off for food, to increase the chances that you and the other occupants of the life boat would survive? Recall the limitations on the defense of private necessity, in both tort law and criminal law, that were discussed in chapter 2. But cf. Cordass v. Peerless Transp. Co., 27 N.Y.S.2d 198 (N.Y. City Ct. 1941), in which a cab driver who leaped from a slow-moving cab, which subsequently struck nearby pedestrians, after a robber jumped into the cab and pointed a gun at his head, was held not to be negligent: "the expedition of the chauffeur's violent love of his own security outran the pauser, reason, when he was suddenly confronted with [an] unusual emergency which ‘took his reason prisoner’.

6. The defense of plaintiff's consent ("assumption of the risk"). Do you agree with the Eckert dissent's consent argument? Recall that the defense of "assumption of the risk," properly construed, exists only when the plaintiff actually consented to be exposed to the negligently created risk. Were all the elements of actual consent satisfied? Was Eckert aware of the risk of being struck by the train? Did he choose to expose himself to that risk? Did he "freely and willingly" assent or agree to being exposed to that risk, through a choice that was not improperly constrained by the defendant?

C. DEFENDANTS' MISFEASANCE:
SOCIALLY VALUABLE ACTIVITIES

RUTHERFORD v. STATE
Supreme Court of Alaska
605 P.2d 16 (1979)

DIMOND, Senior Justice. Alaska State Trooper Rollie Port was driving on Cushman Street in Fairbanks. He received a radio call regarding an automobile accident located approximately ten miles from Fairbanks. Port turned on his red lights and siren at about Sixth Avenue and Cushman, and increased his speed to about 35 miles an hour. As he approached the intersection of Third Avenue and Cushman, he slowed down to approximately 20 to 25 miles per hour and entered the intersection against a red traffic light.

Appellant Mickey Rutherford was traveling on Third Avenue, and since the light was green, he entered the intersection at Third Avenue and Cushman. His view, and also that of Port, was obstructed by a building located close to the intersection on the corner. Port did not see Rutherford's car until both vehicles were about ten feet from the intersection. There was a collision of the two vehicles and Rutherford was injured. He brought this action for damages against the appellee, State of Alaska. The jury returned a special verdict finding Trooper Port not negligent, but finding Rutherford negligent in the operation of his vehicle. Judgment was entered in favor of the state, and Rutherford has appealed.
During the trial, after all of the evidence had been presented, Rutherford moved for a directed verdict on the issue of Trooper Port’s negligence, leaving for the jury the question of Rutherford’s “contributory negligence,” and appropriate damages. The trial judge denied this motion, as well as subsequent motions for a new trial and for a judgment notwithstanding the verdict.

Port was driving an emergency vehicle, responding to an emergency call. Because of this, he was entitled to “disregard a statute, regulation or ordinance governing the operation of movement of a vehicle.” [13 AAC 02.585(a).] This right, however, is subject to conditions. One of them is that Port was not relieved of his duty “to drive with due regard for the safety of all persons.” [13 AAC 02.585(e).] Nor did this right to disregard traffic laws, ordinances and regulations in these circumstances extend to “protect him from the consequences of his reckless disregard for the safety of others.” [Id.]

Port was thus authorized to proceed through the intersection against a red stop light, but he had the duty to do so with due regard for the safety of other persons. The question presented is what a reasonable, prudent emergency driver would do under all of the circumstances, including that of the emergency.5

Rutherford contends that the court erred in not granting his motion for a directed verdict to the effect that Trooper Port was negligent. We have stated the appropriate standard for review on this point as follows:

It is well established that the proper role of this court, on review of motions for directed verdict or for judgment notwithstanding the verdict, is not to weigh conflicting evidence or judge of the credibility of the witnesses, but is rather to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is such that reasonable men could not differ in their judgment. [Footnote omitted.]

Viewing the facts in the light most favorable to the non-moving party (the state), we have this situation:

(1) Trooper Port went through a red light at a speed of 20 to 25 miles per hour.7

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7The lowest estimate of the trooper’s speed, 20 to 25 miles per hour, was made by Officer Ruebel. However, he made that estimate at a point two blocks from the accident intersection, and Trooper Port testified that he had accelerated to about 30 miles per hour, or even a little more, and then slowed to less than 30 miles per hour at that intersection. Trooper Biesemeyer, who was a passenger in Port’s car, estimated the trooper’s vehicle speed at 25 to 35 miles per hour at the intersection.
C. Defendants' Misfeasance: Socially Valuable Activities

(2) Port's view of cross-traffic entering the intersection was obstructed by a building close to the corner, to the extent that Port himself testified that he might have avoided the accident only by slowing to ten miles an hour or less. The passenger in the car with Port, Trooper Biesemeyer, testified that in order to avoid traffic crossing Cushman Street on a green light, Port's car would have had to slow virtually to a stop at that intersection. Trooper Biesemeyer testified that "you practically have to come to a stop in the downtown intersection when you're when you've got a blind intersection and you're running against a red light before you could proceed through the intersection."

(3) Port was responding to a notice of an accident. Both he and Biesemeyer testified that the time lost in slowing to a safer speed at the intersection where the accident occurred would not have significantly delayed their arrival at the accident scene about ten miles away.

(4) There was no testimony that Rutherford entered the intersection at an excessive rate of speed.

(5) Port had turned on his siren about three blocks from the intersection in question. While the testimony varied somewhat, Rutherford first heard the siren slightly before entering the intersection. He testified that, as he came from behind the corner of the building and entered the intersection, he became aware of the siren. He also stated that he looked in all directions to ascertain the source of the siren and then saw the trooper's car approaching "at a high rate of speed, and bearing sharply to the left, I guess it was an attempt to get around me." At that time the trooper's vehicle was about 30 feet from his vehicle, and a period of "perhaps one and one-half maybe two seconds" had elapsed since he first heard the siren.

(6) At the time of the accident, the temperature was about twenty-seven degrees above zero, and there were patches of snow and ice on the street.

Questions of negligence are ordinarily left to the jury. From the evidence in this case, however, the conclusion is inescapable that Trooper Port entered a "blind," hazardous intersection against a red light, and at a speed which he acknowledged was too great to allow him to avoid oncoming crossing traffic. This was hardly a "reasonable, necessary measure to alleviate the emergency" to which he was responding. See Torres v. City of Los Angeles, 372 P.2d 906, 914 (Cal. 1962). There were no exigencies or other facts presented which justified his actions as a matter of public policy. Viewing the evidence in the light most favorable to the state, we find that reasonable minds could not differ in their judgment and could only conclude that Trooper Port was negligent.9

8In a portion of Rutherford's deposition which was read to the jury, he hypothesized that he might not have heard the siren clearly because "the Saab that I was driving has an extremely noisy heater in it, you know, it's got a side vent that blows air along one end to the window and all."

9 . . . There are cases from other jurisdictions which have found an emergency driver negligent as a matter of law in factual contexts similar to the one presented here. See, e. g., Calvert Fire Ins. Co. v. Hall Funeral Home, 68 So.2d 626 (La. App.1953); City of Kalamazoo v. Priest, 49 N.W.2d 52 (Mich. 1951); Tompkins County v. Day, 29 286 N.Y.S.2d 157 (App. Div. 1968); Parton v. Weilnau, 158 N.E.2d 719 (Ohio 1959); Butler v. Ramsey, 121 N.E.2d 176, 179 (Ohio Mun.1954).
The trial court left for determination by the jury the question of whether there was any negligence on the part of Trooper Port. This was error. The court should have granted Rutherford's motion for directed verdict on the question of Port's negligence and instructed the jury that Port was negligent as a matter of law.

This does not mean, however, that Rutherford should recover the full amount of damages that he established at the trial. Although hardly conclusive, there was sufficient evidence presented to permit the jury to have found that Rutherford heard or should have heard the siren as he approached the intersection, and should have yielded the right-of-way to the oncoming police vehicle by stopping instead of entering the intersection. Thus, there was evidence that there may have been negligence on Rutherford's part, in addition to the evidence of negligence on the part of Trooper Port. The case will have to be remanded for a new trial in order for the jury to determine whether Rutherford was negligent and, if so, to apply comparative negligence principles, apportion the degrees of negligence attributable to Rutherford and to Trooper Port, and assess damages accordingly...

The judgment is REVERSED and the case REMANDED for a new trial.

NOTES

1. Liability of emergency vehicle operators. The liability of operators of emergency vehicles for injuries caused to others generally is governed by statutes similar to the statute in the Rutherford case. When, as is generally the case for police and fire vehicles and often the case for ambulances, the defendant is the state or a state official, liability may be precluded by doctrines of sovereign or official immunity. However, complete immunity is rare. The statutory provision in Rutherford is common. It states that the operator of an emergency vehicle, although privileged (when necessary in an emergency situation) to disregard traffic laws and regulations, is not relieved of the ordinary duty “to drive with due regard for the safety of all persons," and that the privilege does not “protect him from the consequences of his reckless disregard for the safety of others.” The Rutherford court interprets these provisions as allowing liability for ordinary negligence and states that this is the majority position. See also Bouhl v. Smith, 475 N.E.2d 244 (Ill. App. 1985) (same) Other courts, however, have concluded that this language, while making the ordinary duty of reasonable care applicable to operators of emergency vehicles, allows them to be held liable only if they are reckless. See, e.g., Hoffert v. Luze, 578 N.W.2d 681 (Iowa 1998); Saarinen v. Kerr, 644 N.E.2d 988 (N.Y. 1994).

2. The standard of reasonable care for operators of emergency vehicles. As the Rutherford case illustrates, in emergency situations, the operators of emergency vehicles are allowed to disregard the ordinary rules of the road—for example, by driving at high speeds, on the wrong side of the road, and through traffic signals, but only if they implement precautions and warnings (such as slowing down at intersections, sounding sirens, and flashing lights) so that those thereby put at risk can, without significant interference with their legitimate activities, avoid being exposed to a substantial or significant risk. In many jurisdictions, even operators of emergency vehicles are not allowed to depart from the ordinary rules of the road in the absence of explicit statutory authorization, and they must strictly comply with the additional precautions specified in the statute as a minimum requirement for avoiding being
C. Defendants' Misfeasance: Socially Valuable Activities

held negligent. See J.H. Cooper, Annotations, 82 A.L.R.2d 312 (1962) (fire department vehicles), 83 A.L.R.2d 383 (1962) (police vehicles), 84 A.L.R.2d 121 (1962) (ambulances). Operators of emergency vehicles are thus treated similarly to defendants with physical incapacities, who as we have seen are not required to do what they are not capable of doing but are required to take other steps to avoid exceeding the objectively acceptable level of risk.

3. The relevance of purely private utility. For a discussion of attempts to restrict high-speed police chases, which often are motivated by expected significant private utility (excitement of the chase) for the police officers involved in addition to the arguable expected benefits in crime prevention, but also result in a substantial number of fatalities and injuries each year to those being chased and to innocent drivers and bystanders, see Naftalie Bendavid, Police pursue new high-speed policy, Chicago Tribune, Sept. 9, 1997, section 1, at 1, 18. Do you think the purely private utility to police officers of being involved in a high-speed chase is or should be taken into account as justifying the risks thereby created to others? Or do you think, if such purely private utility exists, that it is or should be counted against the reasonableness of their conduct?

Recall, from section A above, the statement by Professor Warren Seavey, an advisor to the reporters for the first and second Restatements, that “the utility of the defendant's conduct is usually not considered or is weighted very low when the defendant for her own benefit puts another's property or especially person at risk.” Warren A. Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1, 8 n.7 (1927). In his review of 19th century California and New Hampshire appellate court decisions on tort liability, which were decided during the period of industrialization, Gary Schwartz reported:

The factor of private profit was seen as a reason for being skeptical, rather than appreciative, of the propriety of risky activity engaged in by enterprise. In general, the California and New Hampshire Courts were reluctant to find that economic factors justified a defendant's risk-taking. Neither court even once held mere monetary costs rendered nonnegligent a defendant's failure to adopt a particular safety precaution.


Defense lawyers generally avoid making arguments to judges or jurors that seek to justify risks imposed on the plaintiff by allegedly greater increases in the defendant's own private utility. Defendants that are thought to have deliberately made such risk-utility decisions are often deemed by juries and judges not only to have been negligent, but also to have behaved so egregiously as to justify a hefty award of punitive damages. See, e.g., Jackson v. Johns-Mansville Sales Corp., 781 F.2d 394, 399-409 & n.12 (5th Cir. 1986) (asbestos); Grishaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. App. 1981) (Ford Pinto); Liebeck v. McDonald's Restaurants, P.T.S., Inc. (in chapter 1) (very hot coffee served from drive-up window). The court in Grishaw, noting that “[f]here was evidence that Ford could have corrected the hazardous design defects at minimal cost [per car] but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against [tens of millions of dollars in] corporate profits, described Ford's conduct as

4. Socially valuable activities: utilitarian efficiency. Efficiency theorists have argued that the following dicta from Osborne v. Montgomery, 234 N.W. 372, 376 (Wis. 1931), adopts the aggregate risk-utility test of reasonableness:

The fundamental idea of liability for wrongful acts is that upon a balancing of the social interests involved in each case, the law determines that under the circumstances of the particular case an actor should or should not become liable for the natural consequences of his conduct. One driving a car in a thickly populated district, on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a fire truck to take his truck through a thickly populated district at a high rate of speed, but if he exercises that degree of care which such drivers ordinarily exercise under the same or similar circumstances, society weighing the benefits against the probabilities of damage, in spite of the fact that as a reasonably prudent and intelligent man he should foresee that harm may result, justifies the risk and holds him not liable.


5. Socially valuable activities: interactive justice. Can the court's illustrations in the Osborne case (quoted in the preceding note) be reconciled with the interactive justice theory? The goal of the justice theory is the maximization of everyone's equal freedom. In any community or society certain risks will be unavoidable aspects of activities which benefit (enhance the freedom of) everyone in the community—e.g., energy generation and transmission facilities, dams, and transportation facilities such as trains, automobiles, and planes. Under the justice theory, the risks to others inherently associated with such socially valuable activities could be deemed reasonable, even if they are significant, if (and only if) they satisfy the qualifications stated or implied in the Osborne court's automobile illustration: (1) the activity is operated in “the most careful manner” to reduce the risks as much as possible without eliminating or substantially reducing the social benefit to all provided by allowing the activity, (2) the risks are not too serious (in the illustration they are de minimis), and (3) the risks are greatly (not merely marginally) outweighed by the activity's social benefit—the enhanced freedom which the activity makes possible for each member of the
C. Defendants' Misfeasance: Socially Valuable Activities


6. The original understanding of the Restatement's risk-utility test. There is reason to believe that the interactive-justice conception of socially valuable activities discussed in the preceding note provided the motivation for the adoption of the risk-utility language in section 291 of the first Restatement, and that the assessment of risks and utilities was meant to be a non-balancing, "prohibitive cost" test, as elaborated in the preceding note, rather than a utilitarian summation of all social and private risks and utilities. The reporter for the first Restatement, Professor Frances Bohlen, believed that some sort of risk-utility comparison language was needed to prevent juries from treating as negligent the inevitable, irreducible risks of activities with substantial social benefits. In an article published in 1924, he complained:

The question as to whether a defendant has been guilty of conduct, which creates an undue probability of harm to others, requires those who judge his conduct to weigh the utility of the act against the probability of harm which it contains; not the utility of the act to the actor alone, but the utility of the act to society . . . because such conduct is on the whole of social value. But the general utility of such conduct is not likely to receive much consideration from a jury who sees before them a plaintiff whose vital interests have been harmed by a particular instance of it. A court might emphasize to the jury ad nauseam the social value of the act, but the jury would only see one man injured by another. And only the most confirmed optimist would dare to hope that they would judge the defendant's conduct by what that ideal creature, the "reasonable man," would do.


Bohlen wanted a definition of negligence that explicitly stated that the social value of such activities should be taken into account, which would be given to juries and used by courts to review juries' decisions. See Stephen G. Gilles, On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and the Jury, 54 Vand. L. Rev. 813, 837-39 (2001). The primary negligence sections in the first and second Restatements emphasize that the interests on both the risk and utility sides of the risk-utility test should be assessed in terms of "what the law regards as the utility of the act" and "the social value which the law attaches to the interest(s)," rather than the subjective value that the interests might have to the affected individuals or in transitory popular opinion. Restatement §§ 283 comment c, 291 and comment d, 292(a) and comments a and b, 293(a) (emphasis added); Restatement Second §§ 283 comment c, 291 and comment d, 292(a) and comments a and b, 293(a) (emphasis added). Although the Restatements acknowledge that social value often attaches to the pursuit of primarily private interests as well as those with a more obvious general public benefit, the relevant comments clearly state that the focus is always on the social value of the interests as recognized by the law rather than the purely private interest. The principal relevant comments, comments a and b to section 292, state:
a. Legal valuation of actor's interests. The most important factor in determining the utility of the actor's conduct is the value which the law attaches to the interest which the conduct is intended and appropriate to advance or protect. The interest may be exclusively public, as [in the case of] the apprehension of an actual or reasonably supposed criminal. It may be a purely private interest of the actor or a third person. It may be an interest which is primarily of private advantage, but the public may none the less be interested, not merely as the protector of the private interest, but also because the general public good is advanced by the protection and advancement of such private interests. Thus, the idea that the interest of the public as a group can best be served by permitting the utmost freedom of individual initiative is inherent in both legal and popular thought. The irreducible minimum of risk both to employees and outsiders which is inherent in manufacture is not regarded as unreasonable, not so much because manufacture is profitable to those who carry it on, but because it is believed that the whole community benefits by it. The operation of railways and other public utilities, no matter how carefully carried on, produces accidents which kill or harm many people but the risk involved in the operation is more than counterbalanced by the service which they render the public.

b. Deviation from popular valuation of interests. It is the value which the law attaches to the interest which is decisive of the utility of conduct which serves it. The value attached by the law to the great majority of interests is identical with the value which popular opinion attaches to them. There are, however, interests to which a persistent course of decisions has, expressly or by implication, attached a value different from that which the jury would ordinarily attach thereto. In such case, it is the legal and not the popular valuation which is controlling.

Restatement § 292 comments a and b (emphasis added); Restatement Second § 292 comments a and b (emphasis added) (the bracketed words appear only in the Restatement Second, which also substitutes “nonetheless” for “none the less”). Similarly, comment e to section 291 states:

The law attaches utility to general types or classes of acts as appropriate to the advancement of certain interests rather than to the purpose for which a particular act is done, except in the case in which the purpose is of itself of such public utility as to justify an otherwise impermissible risk. Thus, the law regards the free use of the highway for travel as of sufficient utility to outweigh the risk of carefully conducted traffic and does not ordinarily concern itself with the good, bad, or indifferent purpose of a particular journey. It may, however, permit a particular method of travel which is normally not permitted if it is necessary to protect some interest to which the law attaches a preeminent value, as where the legal rate of speed is exceeded in the pursuit of a felon or in conveying a desperately wounded patient to a hospital.
The illustrations in these comments involve activities—manufacturing, the operation of railways and other public utilities, and vehicular travel on highways—that are deemed reasonable by the members of the community “not so much because [they are] profitable to those who carry [them] on, but because it is believed that the whole community benefits” from them, the relevant risks are “inherent” in the activities and have been reduced to the “irreducible minimum” consistent with the members of the community obtaining the general public benefit, and the remaining inherent “irreducible” risks are “more than counterbalanced [greatly outweighed] by the service which they render the public.” These illustrations are consistent with Bohlen’s motivation for incorporating risk-utility language in the first Restatement. Gilles reports that “[Bohlen’s] main argument that the courts implicitly balance risk and utility was an inference from the legal proposition that ‘it is not negligence to carry on [risky] activities so long as reasonable care is taken to keep the risk within the irreducible minimum inherent thereto.’” Gilles, supra, at 845 n.104 (quoting Restatement of Torts § 172, Reporter’s Note at 7 (Tentative Draft No. 4, 1929) (emphasis added)).

7. Comparative law. A leading English case is Daborn v. Bath Tramways Motor Co. & T. Smitey, [1946] 2 All E.R. 333 (C.A.), in which the plaintiff was found not to be contributorily negligent for driving an ambulance with a left-side steering wheel and giving hand signals out the left window, contrary to British road rules, since due to wartime shortages it was necessary to use such vehicles and a large notice was posted on the back of the vehicle which stated “Caution—Left hand drive — no signals”). See also Watt v. Hertfordshire County Council, [1954] 2 All E.R. 368 (C.A.), 1 W.L.R. 835, 838, in which the defendant fire brigade was found not to be negligent for carrying unsecured heavy lifting gear in a lorry not properly equipped to carry such gear, which shifted enroute and injured the plaintiff member of fire brigade, given the need to aid a woman trapped under a vehicle and the unavailability of a properly equipped lorry. In Watt, Lord Denning stated: “It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved . . . the saving of life or limb justifies taking considerable risk.” Do you think the judgment in Watt would or should have been the same if the heavy gear had fallen out of the lorry and injured someone other than a member of the fire brigade? Cf. Rigby v. Chief Constable of Northamptonshire, [1985] 1 W.L.R. 1242, in which the police were found to be negligent in firing a CS canister into the plaintiff’s shop to flush out a dangerous psychopath when they did not have fire-fighting equipment on hand despite the substantial risk of causing a fire.

In another leading English case, Bolton v. Stone, 1951 A.C. 850 (H.L.), the plaintiff, Miss Stone, was seriously injured by a cricket ball while standing on the road in front of her house. According to the evidence, balls had previously been hit out of the nearby cricket ground into the road only about six times in twenty-eight years, and there had been no previous accident. The particular hit was said to be altogether exceptional in comparison with anything previously seen on that ground, which had been in existence for over eighty years. The House of Lords upheld the trial judge’s finding that the defendant cricket club was not
negligent. Without any discussion of the judges' opinions, William Landes and Richard Posner claim that Bolton is an example of the efficiency theory's aggregate risk-utility test:

> The probability that a cricket ball would be hit so far and injure someone was remote. Moreover, the cost of avoiding the accident would have been substantial. The cricket grounds would have had to be enlarged or an extremely high fence erected or the players would have had to be instructed to hit the ball with less force—an instruction that would reduce the satisfactions of the game to both participants and spectators and would thus be costly.

William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 99 (1987). However, each of the judges explicitly or implicitly assumed that the defendant cricket club would be liable for negligence if the risk to non-participants like Miss Stone were foreseeable and of a sufficiently high level, regardless of the expected utility to the participants or the burden of eliminating the risk. Each concluded that the risk was foreseeable and could reasonably have held to be negligent, but was not of a sufficiently high level to overrule the trial court by holding that it was unreasonable as a matter of law, given the very low combined probability of, first, a ball's being hit into the road and, second, the ball's striking someone on the little-used residential side street. Lord Reid was the most explicit:

> . . . I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. . . . It is not an easy question and it is one on which opinions may well differ. I can only say that having given the whole matter repeated and anxious consideration I find myself unable to decide this question [as a matter of law] in favor of the [plaintiff]. But I think that this case is not far from the borderline. . . . I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.

Id. at 867-68; see Richard W. Wright, Hand, Posner, and the Myth of the ‘Hand Formula’, 4 Theoretical Inquiries in Law 145, 212-17 (2003); cf. id. at 217-18 n.284 (discussing strict liability factors arguably at play in Bolton).

8. Extrasensitive plaintiffs. As we have noted before, a defendant need not avoid creating risks that would be unacceptable only to an extrasensitive plaintiff, even if the defendant is aware of the plaintiff's extrasensitivity, unless the defendant is acting maliciously for the sole purpose of exploiting the plaintiff's extrasensitivity or (perhaps) could have taken steps to avoid causing injury without any significant interference with the defendant's own rights and legitimate interests. See, e.g., Restatement Second §46 comments d, f and g (1965) (intentional infliction of emotional distress); id. § 524A (abnormally dangerous activities);
D.1. Defendants' Misfeasance: Participatory Plaintiffs

Madsen v. East Jordan Irrig. Co., 125 P.2d 794 (Utah 1942) (extrasensitive mink); Rodgers v. Elliott, 15 N.E. 768 (Mass. 1888) (very ill plaintiff especially sensitive to church's bell ringing, but the court arguably failed to consider whether the defendant's legitimate interests would be significantly burdened by temporary cessation of the bell ringing).

D. DEFENDANTS' MISFEASANCE:
   PARTICIPATORY PLAINTIFFS

1. RELEVANT FACTORS

YATES V. CHICAGO NATIONAL LEAGUE BALL CLUB, INC.
Appellate Court of Illinois, First District, First Division
230 Ill. App. 3d 472; 595 N.E.2d 570 (1992)

JUSTICE CAMPBELL delivered the opinion of the court:

Minor-plaintiff Delbert Yates, Jr., by Delbert Yates, Sr., his father and next friend ("Mr. Yates"), brought suit in the circuit court of Cook County against defendant Chicago National League Ball Club, Inc. (the "Chicago Cubs" or "Cubs") for injuries resulting from being struck by a foul ball while attending a baseball game. Plaintiff alleged that defendant negligently: (1) failed to provide adequate screening in the area behind home plate; and (2) failed to warn him so as to enable him to avoid the harm. Following a jury trial, judgment was entered on a verdict rendered in favor of plaintiff; defendant now appeals.

[The Yates family, including Mr. and Mrs. Yates, four of their daughters, and plaintiff Delbert Yates, Jr. attended a Cubs game at Wrigley Field in Chicago on August 20, 1983. Mr. Yates had purchased eight tickets through Carson, Pirie Scott in Merrillville, Indiana. He testified that he had requested tickets behind home plate. Upon arrival at the stadium, he took the first seat furthest in and the plaintiff took the seventh seat, leaving the eighth seat empty.] During the game, Leon Durham came up to bat and hit a foul ball which struck plaintiff. . . . Plaintiff's injury required surgery and a hospital stay of at least five days.

. . . Although the diagram he was shown at the time of purchasing tickets did not indicate the position of the screen, Mr. Yates assumed that the seats he was shown behind home plate would be behind the screen. . . . Mr. Yates admitted that he had not sat in plaintiff's seat. On redirect, Mr. Yates testified that he was never told by the Chicago Cubs that his seats were not protected by the screen. . . .

. . . Mrs. Yates testified that she was aware that foul balls went into the stands at baseball games, which was why they bought the seats at issue. Mrs. Yates stated that she had not gone to plaintiff's seat to see whether the seat was protected. [¶] Mrs. Yates was then shown Defendant's Exhibits 3, 4, 5, 6, 7, and 8, a series of photographs taken at Wrigley Field from a number of perspectives. Mrs. Yates agreed that whether the seats Mr. Yates bought appeared to be protected by the screen depended on the angle from which they were photographed. . . . On redirect, Mrs. Yates testified that the Cubs never told her that the seats her family was going to sit in were protected by the screen from some angles and not from
others. Mrs. Yates also stated that she would not have sat in her seat if she had known they were not protected from foul balls.

... Plaintiff saw only a white blur before he was struck. ... Plaintiff admitted that he was aware that foul balls would leave the field. Plaintiff also admitted that from his experience as a baseball player, he knew that the ball could travel in many different directions after being hit. ...  

... [Plaintiff's expert witness] Caskey opined that the seats in the “area behind home plate” should be protected at Wrigley Field. Caskey defined the “area behind home plate” as the area between the first and third base lines as if those baselines were extended into the stands. Caskey opined that this area was the most dangerous area of the ballpark because it has the highest probability of line drive foul balls which would have a short reaction time on the part of spectators. ... Caskey also opined that plaintiff's seat on August 20, 1983, was in the area behind home plate, but was also in an unprotected area of the ballpark. Caskey opined that screening could be extended down the first and third baselines, but a minimal amount of screening would be that which would cover the area behind home plate. ...  

... Plaintiff called Paul Rathje as an adverse witness. [Rathje] was the Cubs' Assistant Director of Stadium Operations, a position he had held since 1983. ... Rathje testified that the screen in place in August 1983 had been installed in 1982. Rathje stated that the purpose of the screen was to protect “those sitting directly behind home plate.” Rathje admitted that in a prior deposition, he had stated that the purpose was to protect “those sitting in the home plate area.” Rathje defined the “home plate area” as the area between the extended first and third base lines. He considered the “area behind home plate” to be the most dangerous area of the ballpark, involving the majority of high-velocity foul balls. Rathje distinguished the “area behind home plate” from the “home plate area.” He noted that foul balls could be hit directly into any unscreened area of the ballpark.

Rathje also testified that he was unaware of any materials indicating which seats were to be protected and of any safety analysis undertaken prior to erecting the screen in 1982. Rathje stated that there were no warning signs in the home plate area and that children were not barred from the home plate area. Rathje further testified that he had previously gone to the ballpark with a seating chart in an attempt to determine which seats were protected by the screen. Rathje opined that plaintiff's seat was not in the protected area and was not protected by the screen. ... In later questioning, Rathje denied that 62 persons had been hit by foul balls between the first and third base lines and behind home plate in 1982. Rathje admitted that he had previously signed a sworn interrogatory which read to the contrary, but later testified that the number 62 represented the number of spectator accident reports for the entire ballpark in 1982. Rathje stated that there were 10 foul ball injuries in the “home plate area,” as defined by Caskey, in 1982.

Defendant called Richard de Flon, senior vice president and architect with the firm of Hellmuth, Kassabaum & Obata, to testify as an expert witness. ... Since the 1970s, de Flon limited his work to the area of sports facility design; his work includes the Hoosier Dome in Indianapolis, Indiana and the suites erected at Comiskey Park and Soldier Field in Chicago. Since joining the Hellmuth firm in 1983, he was involved in the design of between 10 and 15
minor and major league stadiums. . . . de Flon testified that he had been retained by the Cubs to evaluate the screen at Wrigley Field. He visited the ballpark, viewed the backstop, sat in plaintiff's seat and measured the angle from the seat to the backstop. de Flon also indicated that the screen at issue was 73 feet wide and 30 feet tall.

de Flon then testified that an architect uses three criteria to determine the appropriate size for a screen: (1) the needs of the team; (2) the needs and desires of the fans; and (3) the physical configuration and constraints of the stadium. Based on a reasonable degree of architectural certainty and on his years of dealing with baseball teams and stadiums, de Flon testified that the screen at issue fell within major league standards of safety and adequacy. de Flon determined the standards of major league baseball by conducting a survey of the screens erected in each of the major league ballparks. These screens ranged in length from slightly less than 40 feet to over 120 feet. de Flon testified that the norm ranged between 65 and 75 feet, placing the screen at issue within the norm. He also stated that architects used historical data for the design process and that he was unaware of any codified standard for major league screens. de Flon opined that plaintiff's seat was unprotected.

On cross-examination, de Flon testified that he did not have a firm definition of the “area behind home plate,” explaining that this area varies depending on the physical configuration of each stadium. He noted that different people define the term differently. de Flon admitted that other stadiums he visited had warning signs, but that Wrigley Field did not. . . . de Flon stated that he did not believe any of the major league screens were inadequate. He further stated that it was not within his expertise to factor the trajectory and angle of balls in designing a protective screen.

The Cubs then called Thomas Cooper, who was employed as the Director of Stadium Operations. Cooper testified that over 36,000 people attended the game at which plaintiff was injured; this number would have been close to Wrigley Field's 1983 capacity. . . . Cooper stated that a review of incident reports for 1982 did not indicate any incidents in the section where plaintiff was struck. Cooper also stated that there were two incidents in the immediate vicinity of that section. He further stated that many times, a spectator struck by a foul ball would not fill out an incident report. . . .

At the conclusion of the trial, the jury returned a verdict for plaintiff in the amount of $67,500. Defendant filed a post-trial motion, which was denied. Defendant now appeals.

Defendant first contends that the trial court should have granted its motion for judgment notwithstanding the verdict. Such a motion should be entered only in those cases in which all of the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could ever stand. . . .

We first address the Cubs' contention that the trial court erred in submitting the inadequate screening issue to the jury. We begin by taking notice of the position which the sport of baseball, particularly major league baseball, occupies in our nation's culture. Indeed, baseball sometimes appears to occupy an anomalous position in American law as well. [Flood v. Kuhn, 407 U.S. 258, 282-83 (1972)] (upholding the long-standing yet anomalous exemption of major league baseball—as opposed to other sports—from federal antitrust laws);
see Riley v. Chicago Cougars Hockey Club, Inc. (1981), 100 Ill. App. 3d 664, 666, 427 N.E.2d 290, 292-93 (noting the historical rule of non-liability for spectator injuries at baseball games as opposed to hockey matches).

In the context of negligence law, this court has held that while a ballpark owner-occupier does not absolutely insure the safety of invitees on its premises, the owner-occupier does owe a duty of reasonable care to such invitees. This duty is usually satisfied if the owner-occupier "provides screen for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats" for a typical game. This standard appears to be the majority rule.

The Cubs argue that they are entitled to judgment n.o.v. because the record showed there was a screen behind home plate, but plaintiff failed to introduce evidence regarding the average demand for screened seats. [1] The Cubs' formulation of the duty owed in this case is misconceived . . . . [The majority rule measures] the owner-occupier's duty by whether the screen placed in the most dangerous area of the ballpark was adequate without reference to requests for screened seats. . . . [T]here is a difference between the majority rule quoted above and one that states that ballpark owners are not liable "if they provide [a] screen [in] the most dangerous part of the grandstand . . . for those who may be reasonably anticipated to desire protected seats" for a typical game. Thus, plaintiff was not required to produce evidence on the average demand for screened seats.

Accordingly, viewing the evidence most favorably to plaintiff, judgment n.o.v. was not warranted. The record indicates that Caskey and Rathje agreed on a definition of "the area behind home plate," though Rathje called it the "home plate area" and stated that only the area directly behind home plate was "the most dangerous area of the ballpark." de Flon's testified that the definition of terms such as "the area behind home plate" may vary from stadium to stadium. The jury may have agreed with Caskey that defendant's failure to screen the area between the extended first and third base lines behind home plate was a breach of the duty of reasonable care in this case. . . .

Defendant [objects] that the trial court erred in precluding defendant from presenting evidence of plaintiff's alleged contractual assumption of the risk. Defendant based this defense on a disclaimer of liability printed on the back of plaintiff's ticket.

An express agreement to assume a risk will not be effective unless it appears that the plaintiff has given his or her assent to the terms of the agreement. . . . In this case, the trial court ruled that the disclaimer on the back of plaintiff's ticket could not form the basis of defense because the print was so small that it was not legibly reproduced on the photocopy submitted to the trial court. Plaintiff's acceptance of a ticket containing a disclaimer in fine print on the back is not binding for the purposes of asserting express assumption of the risk. (Restatement (Second) of Torts, § 496B, comment c, Illustration 1 (1977).) The cases relied upon by defendant involve signed agreements and are distinguishable on that basis. Consequently, the trial court did not err in barring the defense.

Finally, the Cubs argue that the trial court erred in giving certain jury instructions, resulting in an unfair trial. . . . Defendant's brief attacks the instruction [on plaintiff's theories
of liability] solely on the ground that "there is no basis in law for the imposition of a duty to warn" in this case; we have limited our review of the instruction accordingly.

In most jurisdictions, a ballpark owner-occupier owes no duty to warn of the risk of being hit by a batted ball while attending a baseball game due to the obvious nature of the risk. In this jurisdiction, a ballpark owner is not always absolved of liability once he or she provides adequate screening. Indeed, [Coronel v. Chicago White Sox, Ltd., 595 N.E.2d 45 (Ill. App. 1992)] rejects the sort of per se rule of non-liability urged upon us by defendant, stating that:

"the inquiry is whether the defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted, * * *, or forgetful of the condition after having momentarily encountered it. If in fact the entrant was also guilty of negligence contributing to his injury, then that is a proper consideration under comparative negligence principles."

Here, the record indicated that plaintiff was engaged in a discussion about the game with his sister, which could be construed as momentary distraction or forgetfulness. The trial court may have determined, in its discretion, that this evidence warranted an instruction on plaintiff’s duty to warn theory. . . .

For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

NOTES

1. Reprise: defendant's negligence versus plaintiff’s consent ("assumption of the risk"). Yates is an example of situations in which the plaintiff sought to benefit from the defendant's risky activity as a customer, spectator, or other type of participant. As we previously discussed in chapter 3 (recall the Flopper case), such situations raise two very different issues that unfortunately are often confused. One issue is the defense of plaintiff's consent ("assumption of the risk")—that is, whether the plaintiff knowingly and willingly agreed or assented to being exposed to the specific risk that was negligently created by the defendant. The other issue, which is part of the prima facie case against the defendant and thus comes first analytically, is whether the defendant negligently exposed the plaintiff to the specific risk. To resolve the issue of defendant's negligence, we focus on the objective reasonableness of the defendant's conduct in the light of the objectively foreseeable risks to others. In cases like the Flopper case and Yates, in which the others who were foreseeably put at risk were willing participants in the risk-creating activity, a highly relevant (but not necessarily conclusive) consideration in assessing the reasonableness of the defendant's conduct is whether the defendant reasonably expected that the foreseeable risks would be acceptable to the foreseeable participants in the activity. This is a very different issue than the issue of whether a particular plaintiff actually consented to being exposed to the risk, which is the relevant issue for the defense of plaintiff's consent ("assumption of the risk").
2. Defendant's negligence: the design of the screen. What factors and criteria were proposed by the defendant's expert in *Yates* for determining whether the design of the screen behind home plate was reasonable in the light of the foreseeable risks to spectators? What factors and criteria were considered by the court? Are they the same as those proposed by the defendant's expert? If not, how do they differ, and why? In a recent case, the New Jersey Supreme Court described the two-pronged criterion for reasonable screening that is elaborated in *Yates* and many other cases as a "limited duty" rule that applies only to the spectator stand areas but not to areas of the stadium such as food concourses outside of the stands, where spectators are not usually aware of or willing to be exposed to the risk of being hit by errant balls or hockey pucks, for which the general duty of reasonable care owed to business invitees applies. *Maisonave v. Newark Bears Professional Baseball Club, Inc.*, 881 A.2d 700 (N.J. 2005). The "limited duty" rule does not represent a departure from the general duty of reasonable care owed to business invitees, but rather is a judicial application of the general duty, as a matter of law, to the specific context of invitees in the stand areas. See, e.g., *Bellezzo v. Arizona*, 851 P.2d 847 (Ariz. App. 1992); *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219 (Mich. App. 2001); *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572 (Tex. Civ. App. 1987).

3. Underlying principles. Are the criteria employed by the *Yates* court to assess the reasonableness of the screen's design more consistent with the utilitarian efficiency theory or the interactive justice theory? What factors and criteria would be relevant under each theory?

4. Application of the criteria of reasonableness in *Yates*. How persuasive was the defendant's evidence on the reasonableness of the design of the screen in *Yates*? Do you agree with the court's conclusion that a jury could reasonably agree with the plaintiff's expert that the screen should extend at a minimum to protect all of the "area behind home plate," defined as "the area between the first and third base lines as if those baselines were extended into the stands" (through the home plate)? Given the recommended 60 feet minimum distance from home plate to the backstop, the screen protecting the area behind home plate would be at least 94.25 feet long: one-quarter of the circumference of a circle with a radius of 60 feet. The actual screen was 73 feet long, and the plaintiff was sitting at one end of it.

5. Statutory immunity. The "limited duty" rule has been widely adopted by the courts, but it has been superseded by immunity statutes in some states. Subsequent to *Yates* and *Coronel*, the Illinois legislature enacted the Baseball Facility Liability Act, 745 ILCS 38-10, which states:

Liability limited. The owner or operator of a baseball facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of baseball, of the owner or operator or any baseball player, coach or manager employed by the owner or operator.
The statute was upheld against a claim of unconstitutionality in Jasper v. Chicago Nat. League Ball Club, Inc., 309 Ill. App. 3d 124 (1999). Thus, recovery in Illinois for being hit by a ball or bat in an unscreened portion of the stands requires proof of “willful and wanton” failure to install adequate screening. In 2014, Bloomberg Businessweek reported that about 1,750 spectators are injured each year by baseballs that go into the stands. In 2015 Major League Baseball, after the institution of a federal class action lawsuit against it (which ultimately failed), recommended that ballparks have protective netting between the team dugouts for any field-level seats within 70 feet of home plate. The Cubs extended their netting. Before the 2016 season, the Chicago White Sox extended their netting to the home-plate end of each dugout, but not over the dugouts as other clubs had done. Elva Malegon, Schaumburg man hit, blinded by foul ball at Wrigley Field suing Cubs, MLB, http://www.chicagotribune.com/news/local/breaking/ct-met-cubs-lawsuit-foul-ball-netting-20171009-story.html. In September 2017, a young girl was injured at Yankee Stadium by a foul ball with an estimated speed of 105 mph. Almost all of the major league clubs extended their screening in 2018. The Cubs extended their screening to the outfield end of the dugouts, which were pushed 20-30 feet further toward the outfield. https://www.mlb.com/news/chicago-cubs-extend-netting-at-wrigley-field/c-266398882.

6. *Another example.* In Hauser v. Chicago, R.I. & P. Ry., 219 N.W. 60 (Iowa 1928), the plaintiff, a passenger on the defendant's train, apparently fainted in a washroom and received severe burns on her face when it came into contact with an exposed heating pipe under a water cooler, which pipe could only be reached by persons kneeling or lying down on the floor. Assuming that failing to guard against such an occurrence would be unreasonable if it were "reasonably foreseeable," the court held that it was not reasonably foreseeable. Id. at 62. The risk conceded was foreseeable and perhaps could have been deemed significant ("reasonably" foreseeable). If it were significant, would it necessarily be unreasonable?

7. *Comparative law.* In Wooldridge v. Sumner, [1963] 2 Q.B. 43, [1962] 2 All E.R. 978, the English Court of Appeal allowed the private utility to the defendant (or the supposed social utility of upperclass horse riding?) to outweigh the (presumably unaccepted) significant risk to a spectator. The defendant, who was described by the Court of Appeal as a competitor of “great skill and experience” riding a horse “of the highest quality” while “exercising every endeavour to win the event,” was found by the trial judge to have ridden the horse into a corner much too fast so that it swerved outside the competition area. Rather than letting the horse continue safely off course, the rider pulled it back toward the course and ran over the plaintiff spectator (a professional photographer). The Court of Appeal, noting that the rider (who had been thrown off the horse) returned to run the course later in the day and that the horse was “adjudged supreme champion in its class,” held that the rider could not be deemed negligent unless he had acted with a reckless disregard of the safety of the spectators. Wooldridge has been persuasively criticized and has not been followed in similar cases. See, e.g., Wilks v. The Cheltenham Home Guard Motorcycle and Light Car Club, [1971] 2 All E.R. 369, 374 (C.A.) (Edmund Davies, L.J.), citing A.L. Goodhart, 78 Law Q. Rev. 490 (1962).

8. *Defendant's negligence: failure to warn.* As the Yates court states, there is no duty to provide a warning about risks that the defendant reasonably (using an objective perspective) assumes are already known to and understood by those who foreseeably might be
put at risk. Yet the court states that the defendant baseball club might be required to warn a spectator, who is already aware of the (general) risk of being hit by a ball, if it is foreseeable that the spectator might become momentarily distracted or forgetful. How might such a warning be delivered, and how effective is it likely to be in avoiding or overcoming such momentary distraction or forgetfulness? Was there a different (better?) basis for upholding an instruction on the defendant’s duty to warn in Yates? For a useful discussion of the baseball situation, see the case cited in Yates, Coronel v. Chicago White Sox, Ltd., 595 N.E.2d 45 (Ill. App. 1992).

9. The defense of plaintiff’s consent (“assumption of the risk”). If the print on the back of the ticket stub in Yates had been legible, would there have been express “assumption of the risk”? Why or why not? Why did the court distinguish the cases involving signed agreements? Were there any other facts that might support an argument of actual consent?

2. **MEDICAL MALPRACTICE**

**CANTERBURY V. SPENCE**  
U.S. Court of Appeals for the District of Columbia Circuit  
464 F.2d 772 (D.C. 1972)

SPOTTSWOOD W. ROBINSON, III, Circuit Judge. This appeal is from a judgment entered in the District Court on verdicts directed for the two appellees at the conclusion of plaintiff-appellant Canterbury’s case in chief. His action sought damages for personal injuries allegedly sustained as a result of an operation negligently performed by appellee Spence [a neurosurgeon], a negligent failure by Dr. Spence to disclose a risk of serious disability inherent in the operation, and negligent post-operative care by appellee Washington Hospital Center. On close examination of the record, we find evidence which required submission of these issues to the jury. We accordingly reverse the judgment as to each appellee and remand the case to the District Court for a new trial.

The record we review tells a depressing tale. A youth [19 years old] troubled only by back pain submitted to an operation [a laminectomy — the excision of the posterior arch of the vertebra] without being informed of a risk of paralysis incidental thereto. A day after the operation he fell from his hospital bed after having been left without assistance while voiding. A few hours after the fall, the lower half of his body was paralyzed, and he had to be operated on again. Despite extensive medical care, he has never been what he was before. Instead of the back pain, even years later, he hobbled about on crutches, a victim of paralysis of the bowels and urinary incontinence. In a very real sense this lawsuit is an understandable search for reasons. . . .

. . . The complaint stated several causes of action against each defendant. Against Dr. Spence it alleged, among other things, negligence in the performance of the laminectomy and failure to inform him beforehand of the risk involved. Against the hospital the complaint charged negligent post-operative care in permitting appellant to remain unattended after the laminectomy, in failing to provide a nurse or orderly to assist him at the time of his fall, and in failing to maintain a side rail on his bed. The answers denied the allegations of negligence . . .
Appellant introduced no evidence to show medical and hospital practices, if any, customarily pursued in regard to the critical aspects of the case, and only Dr. Spence, called as an adverse witness, testified on the issue of causality. Dr. Spence described the surgical procedures he utilized in the two operations and expressed his opinion that appellant's disabilities stemmed from his pre-operative condition as symptomatized by the swollen, non-pulsating spinal cord. He stated, however, that neither he nor any of the other physicians with whom he consulted was certain as to what that condition was, and he admitted that trauma can be a cause of paralysis. Dr. Spence further testified that even without trauma paralysis can be anticipated “somewhere in the nature of one percent” of the laminectomies performed, a risk he termed “a very slight possibility.” He felt that communication of that risk to the patient is not good medical practice because it might deter patients from undergoing needed surgery and might produce adverse psychological reactions which could preclude the success of the operation.

At the close of appellant's case in chief, each defendant moved for a directed verdict and the trial judge granted both motions. The basis of the ruling, he explained, was that appellant had failed to produce any medical evidence indicating negligence on Dr. Spence's part in diagnosing appellant's malady or in performing the laminectomy; that there was no proof that Dr. Spence's treatment was responsible for appellant's disabilities; and that notwithstanding some evidence to show negligent post-operative care, an absence of medical testimony to show causality precluded submission of the case against the hospital to the jury. The judge did not allude specifically to the alleged breach of duty by Dr. Spence to divulge the possible consequences of the laminectomy.

We reverse. The testimony of appellant and his mother that Dr. Spence did not reveal the risk of paralysis from the laminectomy made out a prima facie case of violation of the physician's duty to disclose which Dr. Spence's explanation did not negate as a matter of law. There was also testimony from which the jury could have found that the laminectomy was negligently performed by Dr. Spence, and that appellant's fall was the consequence of negligence on the part of the hospital. The record, moreover, contains evidence of sufficient quantity and quality to tender jury issues as to whether and to what extent any such negligence was causally related to appellant's post-laminectomy condition. These considerations entitled appellant to a new trial.

. . . For the tools enabling resolution of the issues on this appeal, we are forced to begin at first principles. [¶] The root premise is the concept, fundamental in American jurisprudence, that “every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .” True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.\textsuperscript{15} . . .

\textsuperscript{15} . . . In duty-to-disclose cases, the focus of attention is more properly upon the nature and content
... To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential. . . .

This disclosure requirement, on analysis, reflects much more of a change in doctrinal emphasis than a substantive addition to malpractice law. It is well established that the physician must seek and secure his patient's consent before commencing an operation or other course of treatment. It is also clear that the consent, to be efficacious, must be free from imposition upon the patient. It is the settled rule that therapy not authorized by the patient may amount to a tort — a common law battery — by the physician. And it is evident that it is normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient's edification. Thus the physician has long borne a duty, on pain of liability for unauthorized treatment, to make adequate disclosure to the patient.36 . . .

Duty to disclose has gained recognition in a large number of American jurisdictions, but more largely on a different rationale. The majority of courts dealing with the problem have made the duty depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient.

There are, in our view, formidable obstacles to acceptance of the notion that the physician's obligation to disclose is either germinated or limited by medical practice. To begin with, the reality of any discernible custom reflecting a professional consensus on communication of option and risk information to patients is open to serious doubt. We sense the danger that what in fact is no custom at all may be taken as an affirmative custom to maintain silence, and that physician-witnesses to the so-called custom may state merely their personal opinions as to what they or others would do under given conditions. We cannot gloss over the inconsistency between reliance on a general practice respecting divulgence and, on the other hand, realization that the myriad of variables among patients makes each case so different that its omission can rationally be justified only by the effect of its individual circumstances. Nor can we ignore the fact that to bind the disclosure obligation to medical usage is to arrogate the decision on revelation to the physician alone. Respect for the patient's of the physician's divulgence than the patient's understanding or consent. Adequate disclosure and informed consent are, of course, two sides of the same coin — the former a sine qua non of the latter. But the vital inquiry on duty to disclose relates to the physician's performance of an obligation, while one of the difficulties with analysis in terms of "informed consent" is its tendency to imply that what is decisive is the degree of the patient's comprehension. As we later emphasize, the physician discharges the duty when he makes a reasonable effort to convey sufficient information although the patient, without fault of the physician, may not fully grasp it. . . . [W]hile the factual conclusion on adequacy of the revelation will vary as between patients — as, for example, between a lay patient and a physician-patient — the fluctuations are attributable to the kind of divulgence which may be reasonable under the circumstances.

36We discard the thought that the patient should ask for information before the physician is required to disclose. Caveat emptor is not the norm for the consumer of medical services. . . .
right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves. . . .

Once the circumstances give rise to a duty on the physician's part to inform his patient, the next inquiry is the scope of the disclosure the physician is legally obliged to make. The courts have frequently confronted this problem but no uniform standard defining the adequacy of the divulgence emerges from the decisions. Some have said "full" disclosure, a norm we are unwilling to adopt literally. It seems obviously prohibitive and unrealistic to expect physicians to discuss with their patients every risk of proposed treatment — no matter how small or remote — and generally unnecessary from the patient's viewpoint as well. . . .

The larger number of courts, as might be expected, have applied tests framed with reference to prevailing fashion within the medical profession. Some have measured the disclosure by "good medical practice," others by what a reasonable practitioner would have bared under the circumstances, and still others by what medical custom in the community would demand. We have explored this rather considerable body of law but are unprepared to follow it. . . . Any definition of scope in terms purely of a professional standard is at odds with the patient's prerogative to decide on projected therapy himself. . . .

In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure.

Optimally for the patient, exposure of a risk would be mandatory whenever the patient would deem it significant to his decision, either singly or in combination with other risks. Such a requirement, however, would summon the physician to second-guess the patient, whose ideas on materiality could hardly be known to the physician. . . . Consonantly with orthodox negligence doctrine, the physician's liability for nondisclosure is to be determined on the basis of foresight, not hindsight; . . . the issue on nondisclosure must be approached from the viewpoint of the reasonableness of the physician's divulgence in terms of what he knows or should know to be the patient's informational needs. . . .

From these considerations we derive the breadth of the disclosure of risks legally to be required. The scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation. In broad outline, we agree that "[a] risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy." . . .

Two exceptions to the general rule of disclosure have been noted by the courts. . . . The first comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened
by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it. Even in situations of that character the physician should, as current law requires, attempt to secure a relative's consent if possible. But if time is too short to accommodate discussion, obviously the physician should proceed with the treatment.

The second exception obtains when risk-disclosure poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view. It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient. Where that is so, the cases have generally held that the physician is armed with a privilege to keep the information from the patient, and we think it clear that portents of that type may justify the physician in action he deems medically warranted. The critical inquiry is whether the physician responded to a sound medical judgment that communication of the risk information would present a threat to the patient's well-being.

The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed, however, for otherwise it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs. That attitude presumes instability or perversity for even the normal patient, and runs counter to the foundation principle that the patient should and ordinarily can make the choice for himself. Nor does the privilege contemplate operation save where the patient's reaction to risk information, as reasonably foreseen by the physician, is menacing. And even in a situation of that kind, disclosure to a close relative with a view to securing consent to the proposed treatment may be the only alternative open to the physician.

No more than breach of any other legal duty does nonfulfillment of the physician's obligation to disclose alone establish liability to the patient. ... [A]s in malpractice actions generally, there must be a causal relationship between the physician's failure to adequately divulge and damage to the patient.

A causal connection exists when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against it. The patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils. ... The more difficult question is whether the factual issue on causality calls for an objective or a subjective determination.

It has been assumed that the issue is to be resolved according to whether the fact-finder believes the patient's testimony that he would not have agreed to the treatment if he had known of the danger which later ripened into injury. We think a technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory. To be sure, the objective of risk-disclosure is preservation of the patient's interest in intelligent self-choice on proposed treatment, a matter the patient is free to decide for any reason that appeals to him. When, prior to commencement of therapy, the patient is sufficiently informed on risks and he exercises his choice, it may truly be said that he did
exactly what he wanted to do. But when causality is explored at a postinjury trial with a
professedly uninformed patient, the question whether he actually would have turned the
treatment down if he had known the risks is purely hypothetical: “Viewed from the point at
which he had to decide, would the patient have decided differently had he known something
he did not know?” And the answer which the patient supplies hardly represents more than a
guess, perhaps tinged by the circumstance that the uncommunicated hazard has in fact
materialized. 

Better it is, we believe, to resolve the causality issue on an objective basis: in terms of
what a prudent person in the patient's position would have decided if suitably informed of all
perils bearing significance. . . . The patient’s testimony is relevant on that score of course but
it would not threaten to dominate the findings. And since that testimony would probably be
appraised congruently with the fact-finder's belief in its reasonableness, the case for a wholly
objective standard for passing on causation is strengthened. Such a standard would in any
event ease the fact-finding process and better assure the truth as its product.

. . . We now delineate our view on the need for expert testimony in nondisclosure
cases. There are obviously important roles for medical testimony in such cases, and some
roles which only medical evidence can fill. Experts are ordinarily indispensable to identify
and elucidate for the fact-finder the risks of therapy and the consequences of leaving existing
maladies untreated. They are normally needed on issues as to the cause of any injury or
disability suffered by the patient and, where privileges are asserted, as to the existence of any
emergency claimed and the nature and seriousness of any impact upon the patient from
risk-disclosure. Save for relative[ly] infrequent instances where questions of this type are
resolvable wholly within the realm of ordinary human knowledge and experience, the need for
the expert is clear.

The guiding consideration our decisions distill, however, is that medical facts are for
medical experts and other facts are for any witnesses — expert or not — having sufficient
knowledge and capacity to testify to them. It is evident that many of the issues typically
involved in nondisclosure cases do not reside peculiarly within the medical domain. Lay
witness testimony can competently establish a physician's failure to disclose particular risk
information, the patient's lack of knowledge of the risk, and the adverse consequences
following the treatment. Experts are unnecessary to a showing of the materiality of a risk to a
patient’s decision on treatment, or to the reasonably, expectable effect of risk disclosure on the
decision. These conspicuous examples of permissible uses of nonexpert testimony illustrate
the relative freedom of broad areas of the legal problem of risk nondisclosure from the
demands for expert testimony that shackle plaintiffs’ other types of medical malpractice
litigation.124 . . .

This brings us to the remaining question, common to all three causes of action:
whether appellant’s evidence was of such caliber as to require a submission to the jury. On the
first, the evidence was clearly sufficient to raise an issue as to whether Dr. Spence's obligation

124One of the chief obstacles facing plaintiffs in malpractice cases has been the difficulty, and all
too frequently the apparent impossibility, of securing testimony from the medical profession.
to disclose information on risks was reasonably met or was excused by the surrounding circumstances. . . .

We realize that, when appellant rested his case in chief, the evidence scarcely served to put the blame for appellant's disabilities squarely on one appellee or the other. But this does not mean that either could escape liability at the hand of the jury simply because appellant was unable to do more. As ever so recently we ruled, "a showing of negligence by each of two (or more) defendants with uncertainty as to which caused the harm does not defeat recovery but passes the burden to the tortfeasor for each to prove, if he can, that he did not cause the harm." In the case before us, appellant's evidentiary presentation on negligence survived the claims of legal insufficiency, and appellees should have been put to their proof.

NOTES

1. Lack of consent: battery. Lack of informed consent: negligence. All jurisdictions hold that, no matter how strongly the physician (or others) believe that some medical procedure or treatment would be in the best interests of the patient (or others), the physician's performing the procedure or treatment without the plaintiff's (actual, apparent, or implied) consent is a battery, for which the physician will be liable for nominal damages in the absence of any actual damage, and for which punitive damages should and likely would be imposed if the physician knowingly proceeded without the plaintiff's actual, apparent, or implied consent. See chapter 2, section B.3.

Although the Canterbury opinion seems willing to entertain both a battery action and a negligence action on its facts, most jurisdictions hold that either one or the other action, but not both, is appropriate in any given case. If there was no consent at all to the medical procedure or treatment (or if the consent was invalid because it was procured through duress, fraud or misrepresentation concerning the nature of the procedure or treatment), a battery action is appropriate. However, if the plaintiff was aware of the nature of the procedure or treatment and freely consented to it, but was not informed of attendant material risks, the proper action is a negligence action. See, e.g., Sidaway v. Board of Gov'rs of Bethlem Royal Hosp. & Maudsley Hosp., [1985] 1 A.C. 871, 883, 885, 892, 894 (H.L.); Reible v. Hughes, 114 D.L.R.3d 1, 10-11 (Canada 1980); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978) (applying Illinois law and holding that the intentional tort of battery rather than negligence was the appropriate cause of action for women who, as unwitting participants in a "double blind" medical experiment, were administered pills as part of their pre-natal care that, unknown to them, contained the experimental drug DES).

2. The criterion of reasonableness. What criterion of reasonableness does the Canterbury court apply in evaluating the doctor's alleged negligent failure adequately to inform the patient about the risks of and alternatives to the proposed treatment? What factors govern the doctor's obligation to warn or inform? Almost all courts that have considered the issue since 1972, when the Canterbury case was decided, prefer the patient autonomy standard that was adopted in Canterbury to the older medical practice standard. Two other leading cases that adopted the patient autonomy standard in 1972 are Cobbs v. Grant, 502 P.2d 1 (Cal. 1972), and Wilkinson v. Vesey, 295 A.2d 676 (R.I. 1972). A few courts, and many state statutes, continue to leave to medical practice the judgment as to what risks and
options should be disclosed to the patient. Professor Dobbs states that "a little more than half the states, many under the command of a statute, appear to adopt the medical [practice] standard of disclosure rather than the patient [autonomy] or materiality standard as a general rule." Dobbs § 250 at 655. However, even in these states the standard for disclosure is patient-centered rather than doctor-centered. Although medical practice is usually determinative, the doctor is supposed to disclose to the patient any risks that would be material to the patient in making an informed choice about whether to undergo the proposed procedure or treatment, must respond fully to any specific query by the patient, and may be held liable for failing to disclose a serious risk that is obviously necessary for an informed choice even if the failure to do so is not contrary to accepted medical practice. See, e.g., Bly v. Rhoades, 222 S.E.2d 783, 787 (Va. 1976) (so stating while rejecting the patient-autonomy standard on the ground that it "would cause further proliferation of medical malpractice actions in a situation already approaching a national crisis").

3. Underlying principles. The patient-autonomy standard for doctors' disclosure of medical information to patients is explicitly based on the autonomy (equal freedom) of the patient. What about the medical-practice standard? Under either standard, it is universally recognized that the patient has the right, regardless of the doctor's opinion, to decide whether or not to undergo some medical procedure or treatment (see note 1 above) and that the doctor has a correlative duty to disclose material risks and options to the patient (see note 2 above). The plaintiff's right and the doctor's duty, which seem obvious under the interactive justice theory, are difficult to explain under the utilitarian efficiency theory. The legal economist might argue that the medical treatment cases are low transaction-cost situations in which the doctor should be precluded from bypassing fully informed market transactions by failing to disclose risk information that is foreseeably material to the patient. (Fully informed market transactions are assumed to be the best method for determining how much value the parties place on various outcomes.) But a patient's refusal to undergo some treatment—e.g., a refusal to accept blood transfusions because of religious beliefs or other reasons—may greatly endanger his health and life, thereby creating substantial expected disutility not only to himself but also to others economically or emotionally dependent on him. The transaction costs of bargaining with each potentially affected person in such situations will generally be very high, yet the competent patient's right to refuse treatment remains clear, even though under the utilitarian-efficiency theory the aggregate benefits to the patient and others of going ahead with the treatment might be thought to greatly outweigh the psychic and/or religious costs to the patient.

4. Objective versus subjective materiality. According to the Canterbury court, is a doctor only required to disclose risks and options that would be material to the "typical," "average," or "reasonable" patient, or must she disclose any risk or option that she knows or should know would be material to the particular plaintiff? If such known or reasonably foreseeable subjective patient attitudes about risk need not be taken into account, has the principle of patient autonomy been seriously (and needlessly) compromised?

5. Comparative law. The patient-autonomy standard has been adopted by the High Court of Australia in Rogers v. Whitaker, 109 A.L.R. 625 (1992), the Supreme Court of Canada in Reible v. Hughes, 114 D.L.R.3d 1, 12-13 (1980), and the Supreme Court of the

6. Actual causation: objective versus subjective perspective. The Canterbury court acknowledges that the autonomy norm which it embraces would support using the subjective perspective of the plaintiff to analyze the actual-causation issue, which turns on whether the plaintiff's decision to undergo or forego the medical procedure would have been different if he had been properly informed about the risks and options. However, noting the speculative nature of the subjective perspective, which "places the physician in jeopardy of the patient's hindsight and bitterness" (a problem which exists for the causation issue in almost all failure to warn cases), the court decides instead to base the causation analysis on the objective perspective of "what a prudent person in the plaintiff's position would have decided if suitably informed of all perils bearing significance." Would the court's concerns about speculative hindsight apply to statements by the plaintiff, or other indicia of the plaintiff's subjective attitudes, that occurred prior to the plaintiff's undergoing the procedure—e.g., pre-treatment statements to others that demonstrated the plaintiff's significant albeit abnormal aversion to the relevant risk? Does anything in the court's statement of the objective perspective (which was quoted earlier in this note) leave possible room for the use of such pre-treatment indicia of the plaintiff's subjective attitudes?

The Oregon Supreme Court has mandated a completely subjective perspective on the actual causation issue. In Arena v. Gingrich, 748 P.2d 547 (Ore. 1988), a physician, without previously informing or obtaining consent from his patient, implanted an artificial device to correct a hiatal hernia rather than employing one of two alternative wrapping and suturing techniques he had discussed with the patient. The court held that, in addition to a battery action, the plaintiff could maintain a negligence action based on failure to disclose, with a subjective rather than objective perspective being applied on the actual causation issue:

... What the patient in fact would have done after a full explanation is a question about that patient's behavior, not about some other "reasonable" patient's, a question of cause and effect that one might ask in contexts unrelated to any legal consequences.

In contrast, what a physician should explain in the course of obtaining a patient's consent to a procedure or treatment is a norm of professional conduct, a duty. Before ORS 677.097 defined the duty in statutory terms, it could be defined by reference to the "objective" standard of a hypothetical reasonable person in the patient's position, at least in negligence cases, unless the physician knew that the actual patient would withhold consent if informed, reasonably or not. . . .

... If omitted information would have led a particular patient to reject treatment for some idiosyncratic and unpredictable reason, this fact may bear on the reasonableness of the omission, but it has no bearing on cause and effect. . . . [¶] . . . If a jury finds that the omitted information would have been immaterial to a prudent patient's decision, the physician (in a negligence case without ORS 677.097) would not be negligent in omitting
it. The statute having defined the standard of disclosure without requiring reference to what a prudent patient reasonably would want to know, we shall not reintroduce that hypothetical prudent patient by the back door of "causation." As for the risk that the patient will be moved by "bitterness or disillusionment" or otherwise to claim that, properly informed, she would have declined what proved to be an unsatisfactory procedure, this possibility doubtless will not be permitted to escape a jury's attention. Factfinders are not bound to take the patient's word on that question but may decide it themselves on the available evidence. . . .

Id. at 548-50.

7. Empirical data. Both the majority of the British House of Lords in Sidaway (subsequently overruled: see note 5 above) and the Supreme Court of Virginia in Bly placed great weight on supposed out-of-control medical malpractice liability in the United States to justify their failure to adopt the patient-autonomy standard for disclosure of the risks of medical treatment. Doctors in the United States have obtained enactment of many "tort reform" measures that have made it very difficult for patients to sue them unless they have very strong cases with very high damages. However, there is substantial evidence that the recurrent liability insurance crises in the United States are not due to tort liability but rather to cyclical "soft" and "hard" cycles in the liability insurance market, which is not subject to antitrust laws and is essentially unregulated by both the federal and state governments. See chapter 1 section D; chapter 4 section B.3 note 7 following Helling v. Carey; U.S. General Accounting Office, Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms (Dec. 1986).

The effects of medical malpractice liability on health care costs are widely debated and often greatly exaggerated. See, e.g., C. Silver, D. Hyman & B. Black, "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB4," Texas Tech L. Rev. (forthcoming 2019), http://ssrn.com/abstract=3309785. Doctors claim that medical malpractice liability imposes substantial wasted costs due to unnecessary "defensive medicine" that is engaged in due to fear of being held liable for negligent diagnosis or treatment. A recent study, using indirect measures and broad assumptions, estimated that such "defensive medicine" accounts for less than 2 percent of annual healthcare costs and that the total cost of medical malpractice litigation (including liability insurance premiums and defensive medicine) is only 2.4 percent of annual healthcare costs. Michelle Mello et al, “National Costs of the Medical Liability System”, 29 Health Affairs 1569 (2010). See also D.A. Waxman et al., “The Effect of Malpractice Reform on Emergency Department Care,” New England J. Medicine (Oct. 16, 2014) (legislation that changed the malpractice standard from ordinary negligence to gross negligence for emergency physicians in Georgia, South Carolina and Texas had little effect on the intensity of practice, as measured by imaging rates, average charges, or hospital admission rates); J.W. Thomas, E.C. Ziller, D.A. Thayer, “Low Costs of Defensive Medicine, Small Savings from Tort Reform,” Health Affairs (Sept. 2010) (a study of 37 clinical specialties, concluding that defensive medicine practices exist and are widespread, but their impact on medical care costs is small). It is difficult to disentangle fear of liability from another strong, indeed perhaps stronger, motive—enhanced income—for engaging in unnecessary costly medical treatments,

3. PRODUCT LIABILITY

a. HISTORY AND RATIONALES

The law of product liability is sufficiently complex in history and structure to be the subject of distinct courses, casebooks, and texts. When it is included in the introductory torts course, it is usually discussed, in abbreviated yet excessive length, in a separate chapter. Such separate treatment usually fails to note or sufficiently reveal the general congruence of the rules and principles of product liability with the ordinary rules and principles of tort liability applied in analogous situations. The topic is included at this point in this chapter as a means of better revealing the congruence.

ESCOLA V. COCA COLA BOTTLING CO. OF FRESNO
Supreme Court of California
24 Cal. 2d 453, 150 P.2d 436 (1944)

[Chief Justice Gibson's opinion for the court, which describes the facts in the case and upholds the verdict for the plaintiff based on the res ipsa loquitur doctrine, appears in section C of chapter 4.]

TRAYNOR, Justice. I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way
into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of res ipsa loquitur cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is “clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.” [Citation omitted.] An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code, St.1939, p. 989, prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470, St.1941, p. 2857, declares that food is adulterated when "it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health." The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (§ 26451, St.1939, p. 983), has any deleterious substance (§ 26470(6), or renders the product injurious to health (§ 26470(4). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. See cases cited in Prosser, Torts, p. 693, note 69.

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute imposes criminal liability without fault, reflecting the public policy of protecting the public from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.
The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product. This warranty is not necessarily a contractual one, for public policy requires that the buyer be insured at the seller's expense against injury. The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty.

The liability of the manufacturer to an immediate buyer injured by a defective product follows without proof of negligence from the implied warranty of safety attending the sale. Ordinarily, however, the immediate buyer is a dealer who does not intend to use the product himself, and if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the dealer. In the words of Judge Cardozo in the *MacPherson* case [111 N.E. 1053]: “The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.” While the defendant's negligence in the *MacPherson* case made it unnecessary for the court to base liability on warranty, Judge Cardozo's reasoning recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.

This court and many others have extended protection according to such a standard to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend “upon the intricacies of the law of sales” and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy. Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products.

In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They have also held the manufacturer liable on a mere fiction of negligence: “Practically he must know it [the product] is fit, or take the consequences, if it proves destructive.” [Citation omitted.] Such fictions are not necessary to fix the manufacturer's liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer and based on the law of torts as a strict liability. Warranties are not necessarily rights arising under a contract. An action on a warranty “was, in its origin, a pure action of tort,” and only late in the historical development of warranties was an action in assumpsit [contract] allowed. Ames, *The History of Assumpsit, 2 Harv.L.rev. 1, 8; 4 Williston on Contracts (1936) § 970. “And it is still generally possible where a distinction of procedure is observed between actions of tort and of
contract to frame the declaration for breach of warranty in tort." \(\text{Williston, loc. cit.; see Prosser, Warranty On Merchantable Quality, 27 Minn.L.Rev. 117, 118. . . .}\)

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

NOTES

1. \textit{Early 20th century tort liability for defective products.} In a landmark opinion written by Chief Justice Cardozo in \textit{McPherson v. Buick Motor Co.,} 111 N.E. 1050 (N.Y. 1916), the New York Court of Appeals eliminated as inappropriate in tort law the previously applied privity-of-contract limitation on negligence liability for injuries caused by a defective product, which precluded liability by the manufacturer or any other supplier of the product liable unless the plaintiff had a relevant contractual relationship with the manufacturer or supplier. The court's opinion in \textit{McPherson} was rapidly adopted by other state courts.

2. \textit{The sales law background.} In contrast to the earlier law of \textit{caveat emptor} ("let the buyer beware"), modern sales law, which in the United States is based on the Uniform Commercial Code [UCC], recognizes not only express warranties regarding a product's quality (UCC § 2-313), but also two different implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose:

Implied Warranty of Merchantability (UCC § 2-314). In every contract for the sale of a good by a merchant in such goods, there is (unless expressly excluded or modified) an implied warranty that the good is "merchantable," i.e., that it "will pass without objection in the trade," is "of fair average quality" for such goods, and is "fit for the ordinary purposes for which such goods are used."
Implied Warranty of Fitness for a Particular Purpose (UCC § 2-315): “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose."

As with contractual promises generally, there is strict liability for the breach of any express or implied warranty, without any need to establish the defendant's negligent causation of the breach. However, at least with respect to the implied warranty of merchantability (the most commonly applicable warranty in product liability actions), liability generally depends on the plaintiff's demonstrating some "defect" or deviation from the norm that prevents the good from being merchantable. A good can be less than perfect and still be merchantable. For example, in most jurisdictions, fish chowder is still merchantable even if it contains (small) fish bones.

Although, as Justice Traynor noted in Escola, warranty doctrine initially arose as a part of tort law, it is now generally treated as part of sales law. Sales warranties, like contractual promises in general, are usually thought of as applying to economic expectations regarding the utility of the good, and discussions of contractual remedies usually focus on losses to such economic expectations. Nevertheless, there also is liability under modern sales warranty law for physical injuries to person and property as an element of consequential damages, unless the defect that caused the injury was discovered or should have been discovered by inspection prior to use of the product (UCC § 2-715(2)(b) and comment 5).

Yet recovery for such physical injuries under sales warranty law was hampered, and in some respects continues to be hampered, by numerous restrictions and limitations. As Justice Traynor discusses in his concurring opinion in Escola, one of the biggest restrictions was the privity limitation, which only allowed a warranty action to be brought by an immediate purchaser from the defendant. Those further up the chain of distribution of the product could only be held liable to those with whom they were in direct privity of contract. The original manufacturer of the product might ultimately be held liable (but not to the injured consumer or user) through a succession of indemnification lawsuits back up the chain of distribution. However, besides being expensive and tedious, these indemnification actions would fail at any point in the chain of distribution if that link in the chain was no longer around or solvent, or if there was a disclaimer or exclusion of the warranty at that point, and product sellers and distributors could expressly exclude implied as well as express warranties.

The privity limitation in sales law initially was rejected during the early part of the 20th century to allow recovery for physical injuries suffered by the ultimate consumer of foodstuffs and medicines. In the 1950s, courts began to reject the privity limitation for physical injuries resulting from defective animal food and products for intimate bodily use (e.g., soap, hair dye, permanent wave solution). Finally, in the 1960s, following the landmark decisions in Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960), in which the New Jersey Supreme Court rejected the privity limitation in sales law for physical injuries caused by defective automobiles, and Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963), in which the California Supreme Court—in a unanimous opinion written by
Justice Traynor—abandoned sales law in favor of strict liability in tort, the UCC was modified to extend warranty protection (under a third-party beneficiary rationale) to any person "who may reasonably be expected to use, consume, or be affected by the goods and is injured in person by breach of the warranty" (UCC § 2-318). Under Alternative A, the warranty was only extended to the family, household, and guests of the original warrantee; under Alternative B, it was extended to any natural person; under Alternative C, it was extended to any person (including corporations, etc.) and encompassed all losses, rather than only injury to the person.

All three alternatives made extension of the warranty to these third-party beneficiaries nondisclaimable and nonlimitable with respect to personal injuries (only). However, as a comment noted, the seller could still exclude, disclaim, or limit the original warranty as provided in UCC §§ 2-316, 2-718, and 2-719. According to UCC § 2-719(3), limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable (and hence not allowed unless the presumption of unconscionability is rebutted) but limitation of damages where the loss is commercial is not. However, a comment notes, "The seller in all cases is free to disclaim warranties" under UCC § 2-316, subject only to the general unconscionability provision in UCC § 2-302.

Moreover, the implied warranties are inapplicable if the plaintiff had sufficient opportunity to inspect the good prior to the injurious use (UCC §§ 2-316, 2-715 comment 5). The plaintiff generally had to prove detrimental reliance on the defendant's warranty and to provide prompt notice of injury to the defendant, and the foreseeability limitations on consequential damages in contract law arguably are much stricter than the attributable responsibility ("proximate cause") limitations in tort law.

Thus, even with the abolition or relaxation of the privity limitation, recovery of damages for tort-like injuries under the warranty provisions of sales law remained subject to significant limitations. While these limitations may be appropriate for commercial claims based on economic expectations regarding the utility of the product, which is the focus of sales law, they seem overly restrictive for tort-like injuries. Moreover, conceptually, it is hard to extend recovery on a warranty-representation theory (although UCC § 2-318 does so) beyond purchasers and the initial group of users (the true intended beneficiaries of the warranty) to more distant users and, especially, bystanders. Thus, as Justice Traynor noted in *Escola* and *Greenman*, it seemed to be necessary to dislodge recovery for tort-like injuries from the inappropriate sales law setting and to put it where it belonged, directly in the law of tort. However, Traynor and others also wanted to retain sales law's strict liability for breach of warranty. The fundamental issue in tort product liability law has been whether, and to what extent, this transposition of strict liability to the tort setting is justifiable.

Conversely, some have suggested that, given the developments in tort liability beginning with *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), which eliminated as inappropriate the privity-of-contract limitation on liability in tort law, it is no longer necessary or desirable to permit recovery for such injuries under the sales law, which is designed to focus on, and should be limited to, losses to economic expectations. Yet no such cutting back has occurred in sales law, so plaintiffs often have both tort law and sales law options for product-related injury.
3. The move to strict product liability in tort law. Justice Traynor's concurring opinion in *Escola* was the opening salvo in a general (but not unanimous) move toward a rule of strict liability for defective products in tort law, which however was not adopted by any court until 1963, when Justice Traynor, referring to his arguments in *Escola*, wrote for a unanimous California Supreme Court in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). The *Greenman* decision, together with the New Jersey Supreme Court's opinion in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), which expanded strict liability for defective products under sales law, provided the impetus for the adoption of a general principle of strict tort liability for defective products in section 402A of the Restatement Second in 1965, which in turn led to the rapid adoption of strict tort liability for defective products in the great majority of states in the United States and in many other countries. Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment m emphasizes that the strict liability under this section is not subject to the various limitations on strict liability under sales law, such as the ability to disclaim any warranty and the reliance and notice requirements. A "caveat" states that no position is taken for or against liability to bystanders.

4. Strict liability rationales. Justice Traynor's famous concurring opinion in *Escola* sets forth the principal arguments that have been made in support of holding commercial sellers or distributors of products strictly liable in tort law for physical injuries caused by defects in those products, rather than requiring proof of the seller's or distributor's negligence. Identify and evaluate the various rationales set forth by Justice Traynor, which are repeated in Restatement Second § 402A comment c and Restatement Third: Products Liability § 2 comment a. Do any of these rationales seem to be based on efficient deterrence? Efficient compensation? Distributive justice? Interactive justice? How extensive or limited should strict liability be if each rationale were extended to its logical limit? For example, should liability be limited to products that are defective or to injuries that result from foreseeable risks? See Mark A. Geistfeld, Principles of Products Liability (2006); Richard W. Wright, *The Principles of Product Liability*, 26 Rev. Litig. 1067 (2007).

5. Defendants included: non-manufacturer product sellers and distributors. Primarily for historical reasons—the initial development of strict liability of product sellers under sales
D.3. Product Liability

law's implied warranties that is discussed in note 1 above—wholesalers, retailers, bailors, and others in the chain of distribution of a product are strictly liable for selling or distributing a defective product even if the relevant definition of defect requires negligence on the part of the manufacturer. A few jurisdictions limit strict liability to manufacturers, and many subject non-manufacturer sellers and distributors to strict liability only if the manufacturer is unavailable, insolvent, or likely to become insolvent. Restatement Third: Product Liability § 1 & comments b, c & e, § 2 comment o, § 5, § 20. Are these liability rules for non-manufacturer sellers justifiable or explainable by any of the rationales stated by Justice Traynor?

6. Plaintiffs included: bystanders and other non-participatory plaintiffs. Although Restatement Second § 402A explicitly left the issue open, id. caveat & comment o, the cases since have clearly established that bystanders, as well as purchasers and users of the product, are proper plaintiffs in a product liability action, whether based on negligence or strict liability. Thus, the Restatement Third extends liability to all “persons.” Restatement Third: Products Liability § 1. The Uniform Commercial Code also extends protection of a warranty (if it exists) to bystanders. U.C.C. § 2-318 (1977). Do Justice Traynor’s arguments for strict liability apply equally to each of these types of plaintiffs? Should the tests of negligence or defectiveness that are applied to manufacturers and sellers of products in suits against them by users of their products also be applied in suits against them by non-users, who are injured as a result of someone else’s use of the product? Might there be significant differences between the relevant factors in the two types of situations? Significant similarities?

7. Activities included: providers of products versus services. If strict product liability exists, it applies to sellers of products but not services, who, however, like everyone else are subject to negligence liability. Restatement Third: Products Liability § 9 & comment f. Is exclusion of strict liability for services justifiable or explainable by any of the rationales stated by Judge Traynor in Escola?

8. Injuries included: exclusion of pure economic loss. As is discussed in chapter 9, in the great majority of jurisdictions there is no or very limited tort liability for unintentional causation of pure economic loss— injury to the plaintiff’s economic expectations that does not result from actual (or threatened) physical injury to the plaintiff’s person or property. This general principle is applied in product liability cases. In most jurisdictions, injury to the product itself is treated as pure economic loss, on the ground that such injury merely results in a non-working product and thus a failure of the plaintiff’s economic expectations regarding the utility of the product itself, which is an issue more properly dealt with by contract law than tort law. Some jurisdictions treat injury to the product itself as being recoverable physical injury, rather than non-recoverable pure economic loss, if it occurs suddenly rather than gradually. Restatement Third: Products Liability § 21 and comments a & d. Is exclusion of liability for pure economic loss justifiable or explainable by any of the rationales stated by Judge Traynor in Escola?

9. Defenses included. Tort liability for physical injuries to person and property caused by defective products generally is not subject to contractual disclaimer, limitation, or waiver, except perhaps when there has been a fully informed, freely negotiated bargain for an adequate quid pro quo by consumers with sufficient bargaining power. Restatement Third: Products Liability § 18 and comment d. Similarly, a product user is contributorily negligent
only when she behaves unreasonably in the light of risks posed to her by a defect in the product of which she was aware or, due to its obvious or patent nature, should have been aware. She generally has no obligation to inspect products for defects but rather is entitled to assume that they are fit for the ordinary purposes for which they were made. Restatement Second § 402A comment n; cf. Restatement Third, Products Liability § 17 and comment a. In almost all jurisdictions, the plaintiff’s contributory negligence is a partial rather than a complete defense, subject to the applicable (pure or modified) version of comparative responsibility. Are these liability rules justifiable or explainable by any of the rationales stated by Justice Traynor?

10. *Defining defectiveness.* Did Justice Traynor provide any definition of “defective”? Section 402A states that strict liability exists for physical harm to the person or property of a user or consumer caused by “any product in a defective condition unreasonably dangerous to the user or consumer.” Comment g states that a product is defective if it is “in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” While “unreasonably dangerous” might seem to imply negligence, such an interpretation would be contrary to subsection (2)(a) of section 402A. Comment i states that a product is “unreasonably dangerous” if it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” This has become known as the basic “consumer expectations” test for defectiveness. The reference to “unreasonably dangerous” was inserted to exclude liability for “unavoidably unsafe” products with inherent unavoidable but reasonable risks, such as health risks due to consumption or use of alcohol, tobacco or butter (see comment i), the sharpness of the edge of a knife, or the unavoidable side effects of drugs (see comment k). As was argued at the time, less misleading language than “unreasonably dangerous” could and should have been used to make this point. Due to its misleading nature, the reference to “unreasonably dangerous” was dropped by some courts, yet retained by others, with sometimes resulting confusion.

11. *The types of product defect.* There are three different ways in which a product might be defective: defective construction (e.g., a missing or cracked bolt), defective design, or defective warning. See Restatement Third: Products Liability § 2. Construction defects are “nongeneric”; being deviations from the intended design, they usually occur in only some instances of the product. Design defects and warning defects are “generic”; if they exist, they occur in every instance of the product. Neither Justice Traynor’s *Escola* opinion (which involved a construction defect), his *Greenman* opinion (which involved a defectively designed power tool), nor section 402A of the Restatement Second explicitly distinguished among the different types of defects, although (contrary to what is sometimes stated) both *Greenman* and the Restatement Second clearly recognized and meant to encompass all three types. However, as the case law developed, it became clear that strict liability is more difficult to define, limit and justify for product designs and warnings than it is for construction defects. Do Justice Traynor’s arguments for strict liability apply equally to each of these three types of defect?

**b. Construction Defects**

Almost all states agree that a person or entity engaged in the business of selling or distributing products is strictly liable for physical injuries to person or property caused by a
construction defect that existed at the time the product left the defendant seller or distributor. A negligence action can still be brought, but need not be. A construction defect is a departure in the makeup of the product from the intended design of that product—for example, a missing, broken or cracked part:

A product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.

Restatement Third: Products Liability § 2(a). The Restatement Third uses the term “manufacturing defect” rather than “construction defect,” but the defect can arise as the product passes through the chain of commercial distribution after its manufacture, and strict liability will attach to any defendant in that chain who passed the product along in a defective condition. See id. § 1:

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

Was there a construction defect in the grenade fuse manufactured by Gearhart Industries in the McGonigal case discussed in chapter 4 section C?

c. WARNING DEFECTS

A few courts, invoking the efficient loss-spreading and efficient risk-reduction rationales for strict product liability, flirted for a brief period with strict liability for defective warnings, which was implemented by using hindsight rather than foresight to evaluate the reasonableness of a warning or the failure to give a warning. Under the hindsight approach, a product warning (or lack thereof) is defective if, assuming (contrary to fact) that the product seller knew at the time that it sold the product what is known at the time of trial about the risks of the product, a (better) warning should have been provided about those risks. See, e.g., Beshada v. Johns-Mansville Prods. Corp., 447 A.2d 539 (N.J. 1982), which involved asbestos (for which no hindsight was needed!) and, after widespread major criticism, was almost immediately limited to its facts by Feldman v. Lederle Labs, 479 A.2d 374 (N.J. 1984). This hindsight approach to warnings, which never had much support, has virtually none now, although some courts, including the Feldman court, shift the burden on proving the "state of the art" (the state of scientific and technical knowledge) at the time the product was sold to the defendant product seller and (erroneously) describe this as a strict liability approach. See Feldman, supra, at 387–88.

Liability for missing or allegedly inadequate product warnings is generally governed by negligence liability rules. (However, as is discussed in note 5 in section D.3.a above, non-manufacturer distributors and sellers of products may be strictly liable for a product that is defective due to the manufacturer's negligent failure to provide an adequate warning.) As is generally true with respect to warnings or other types of information disclosure, “a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users.”
Restatement Third: Products Liability § 2 comment j. When there is a duty to warn, the risk-utility test is rarely mentioned as a criterion for evaluating the reasonableness of alleged negligent failures to warn. Instead,

[a product] is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id. § 2 (b). The criterion of reasonableness is the same plaintiff-centered standard as the previously discussed patient-centered criterion (under both the patient-autonomy and medical-practice standards) for doctors' reasonable provision of risk information to their patients and the participant-centered criterion for sports facilities' reasonable provision of risk information to players and spectators:

[W]arnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of risks and benefits, decline product use or consumption.

Id. § 2 comment i. The duty to warn extends to any substantial subgroup of foreseeable plaintiffs:

The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic. The degree of substantiality is not precisely quantifiable. . . . The more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered "substantial" so as to require a warning.

Id. § 10 comment k. The assessment of the adequacy of the warning is based entirely on its feasibility and expected effectiveness:

It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. . . . In some cases, excessive detail may detract from the ability of typical users and consumers to focus on important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users. . . . No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.
Id. § 2 comment i. The Restatement takes the costs to the defendant of providing a warning into account only for post-sale product warnings:

Compared with the costs of providing warnings attendant upon the original sale of a product, the costs of providing post-sale warnings are typically greater. In the post-sale context, identifying those who should receive a warning and communicating the warning to them can require large expenditures. Courts recognize these burdens and hold that a post-sale warning is required only when the risk of harm is sufficiently great to justify undertaking a post-sale warning program . . . even for a substantial risk . . . .

The test defining unreasonable conduct is that which governs negligence generally.

Id. § 10 comment i. As initially drafted, comment i would have required a post-sale product warning “only if the risk of harm outweighs the costs of providing a post-sale warning.” However, after objections were raised to this balancing language, the comment was modified to conform to section 10(d), which merely requires that “the risk of harm is sufficiently great to justify the burden of providing a warning.” See American Law Institute, 73rd Annual Meeting, Proceedings 1996 at 223 (1997).

Given the difficult, speculative nature of the causation issue in failure-to-warn cases, which was previously discussed with respect to physicians' negligent failures to warn, many courts create a rebuttable “heeding” presumption that product users would have read and heeded product warnings if proper warnings had been given; the remaining courts employ a subjective perspective based on what the particular plaintiff claims he would have done if warned. See Mark Geistfeld, Scientific Uncertainty and Causation in Tort Law, 54 Vand. L. Rev. 1011, 1020-21, 1023 n.36 (2001). Thus, the causation issue is treated significantly differently than in medical-malpractice cases, in which, as was discussed in section D.2, most courts employ an objective perspective unless there is pre-injury evidence of what the plaintiff's decision would have been. In which situation are the “heeding” presumption and the subjective perspective more defensible: when the failure to warn allegedly affected the plaintiff's care in using the product, or when it allegedly affected the plaintiff's decision to buy or use the product?

d. DESIGN DEFECTS

The primary area of continuing debate regarding liability for product-related injury is whether there should be strict liability, in addition to negligence liability, for design-related injuries. The Potter case immediately below provides a good summary of the history of design defect litigation and the existing alternative approaches.
KATZ, Associate Justice. This appeal arises from a products liability action brought by the plaintiffs against the defendants, Chicago Pneumatic Tool Company (Chicago Pneumatic), Stanley Works and Dresser Industries, Inc. (Dresser). The plaintiffs claim that they were injured in the course of their employment as shipyard workers at the General Dynamics Corporation Electric Boat facility (Electric Boat) in Groton as a result of using pneumatic hand tools manufactured by the defendants. Specifically, the plaintiffs allege that the tools were defectively designed because they exposed the plaintiffs to excessive vibration, and because the defendants failed to provide adequate warnings with respect to the potential danger presented by excessive vibration. The defendants appeal from the judgment rendered on jury verdicts in favor of the plaintiffs.

I

We first address the defendants’ argument that the trial court improperly failed to render judgment for the defendants notwithstanding the verdicts because there was insufficient evidence for the jury to have found that the tools had been defectively designed. Specifically, the defendants claim that, in order to establish a prima facie design defect case, the plaintiffs were required to prove that there was a feasible alternative design available at the time that the defendants put their tools into the stream of commerce. We disagree.

In order properly to evaluate the parties’ arguments, we begin our analysis with a review of the development of strict tort liability, focusing specifically on design defect liability. [The court’s discussion of the history of product liability up to and including the adoption of section 402A in the Restatement Second is omitted.]

Although courts have widely accepted the concept of strict tort liability, some of the specifics of strict tort liability remain in question. In particular, courts have sharply disagreed over the appropriate definition of defectiveness in design cases. As the Alaska Supreme Court has stated: “Design defects present the most perplexing problems in the field of strict products liability because there is no readily ascertainable external measure of defectiveness. While manufacturing flaws can be evaluated against the intended design of the product, no such objective standard exists in the design defect context.” Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 880 (Alaska 1979).

Section 402A imposes liability only for those defective products that are “unreasonably dangerous” to “the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” 2 Restatement (Second), supra, § 402A, comment (i). Under this formulation, known as the “consumer expectation” test, a manufacturer is strictly liable for any condition not contemplated by the ultimate consumer that will be unreasonably dangerous to the consumer.
In Barker v. Lull Engineering Co., 573 P.2d 443 (Cal. 1978), the California Supreme Court established two alternative tests for determining design defect liability: (1) the consumer expectation analysis; and (2) a balancing test that inquires whether a product's risks outweigh its benefits. Under the latter, otherwise known as the "risk-utility" test, the manufacturer bears the burden of proving that the product's utility is not outweighed by its risks in light of various factors. Three other jurisdictions have subsequently adopted California's two-pronged test, including the burden-shifting risk-utility inquiry. Other jurisdictions apply only a risk-utility test in determining whether a manufacturer is liable for a design defect. To assist the jury in evaluating the product's risks and utility, these courts have set forth a list of nonexclusive factors to consider when deciding whether a product has been defectively designed.

This court has long held that in order to prevail in a design defect claim, "the plaintiff must prove that the product is unreasonably dangerous." We have derived our definition of "unreasonably dangerous" from comment (i) to § 402A, which provides that "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." 2 Restatement (Second), supra, § 402A, comment (i). This "consumer expectation" standard is now well established in Connecticut strict products liability decisions.

The defendants propose that it is time for this court to abandon the consumer expectation standard and adopt the requirement that the plaintiff must prove the existence of a

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8 In evaluating the adequacy of a product's design, the Barker court stated that "a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." Barker v. Lull Engineering Co., supra, 573 P.2d at ___.

9 Additionally, other states have adopted Barker-type alternative tests, but have declined to shift the burden of proving the product's risks and utility to the manufacturer. See, e.g., Dart v. Wiebe Mfg., Inc., 709 P.2d 876, ___ (Ariz. 1985); Knitz v. Minster Machine Co., 432 N.E.2d 814, ___ (Ohio 1982), cert. denied, 459 U.S. 857 (1982).

10 These factors are typically derived from an influential article by Dean John Wade, in which he suggested consideration of the following factors:

1. The usefulness and desirability of the product--its utility to the user and to the public as a whole.
2. The safety aspects of the product--the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product which would meet the same need and not be as unsafe.
4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user's ability to avoid danger by the exercise of care in the use of the product.
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
reasonable alternative design in order to prevail on a design defect claim. We decline to accept the defendants’ invitation.

In support of their position, the defendants point to the second tentative draft of the Restatement (Third) of Torts: Products Liability (1995) (Draft Restatement [Third]), which provides that, as part of a plaintiff’s prima facie case, the plaintiff must establish the availability of a reasonable alternative design. Specifically, § 2(b) of the Draft Restatement (Third) provides: “[A] product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.” . . .

We point out that this provision of the Draft Restatement (Third) has been a source of substantial controversy among commentators. [Citations omitted.] Contrary to the rule promulgated in the Draft Restatement (Third), our independent review of the prevailing common law reveals that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design.11

In our view, the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration. Such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence. Connecticut courts, however, have consistently stated that a jury may, under appropriate circumstances, infer a defect from the evidence without the necessity of expert testimony.

Moreover, in some instances, a product may be in a defective condition unreasonably dangerous to the user even though no feasible alternative design is available. In such instances, the manufacturer may be strictly liable for a design defect notwithstanding the fact that there are no safer alternative designs in existence. Accordingly, we decline to adopt the requirement that a plaintiff must prove a feasible alternative design as a sine qua non to establishing a prima facie case of design defect.

Although today we continue to adhere to our long-standing rule that a product’s defectiveness is to be determined by the expectations of an ordinary consumer, we nevertheless recognize that there may be instances involving complex product designs in which an ordinary consumer may not be able to form expectations of safety. [Citations omitted.] In such cases, a consumer’s expectations may be viewed in light of various factors that balance the utility of the product’s design with the magnitude of its risks. We find persuasive the reasoning of those

11Our research reveals that, of the jurisdictions that have considered the role of feasible alternative designs in design defect cases: (1) six jurisdictions affirmatively state that a plaintiff need not show a feasible alternative design in order to establish a manufacturer’s liability for design defect [citations omitted]; (2) sixteen jurisdictions hold that a feasible alternative design is merely one of several factors that the jury may consider in determining whether a product design is defective [citations omitted]; (3) three jurisdictions require the defendant, not the plaintiff, to prove that the product was not defective [citations omitted]; and (4) eight jurisdictions require that the plaintiff prove a feasible alternative design in order to establish a prima facie case of design defect [citations omitted].
jurisdictions that have modified their formulation of the consumer expectation test by incorporating risk-utility factors into the ordinary consumer expectation analysis. Thus, the modified consumer expectation test provides the jury with the product's risks and utility and then inquires whether a reasonable consumer would consider the product unreasonably dangerous. . . . Accordingly, under this modified formulation, the consumer expectation test would establish the product's risks and utility, and the inquiry would then be whether a reasonable consumer would consider the product design unreasonably dangerous.

In our view, the relevant factors that a jury may consider include, but are not limited to, the usefulness of the product, the likelihood and severity of the danger posed by the design, the feasibility of an alternative design, the financial cost of an improved design, the ability to reduce the product's danger without impairing its usefulness or making it too expensive, and the feasibility of spreading the loss by increasing the product's price [or by purchasing insurance]. The availability of a feasible alternative design is a factor that the plaintiff may, rather than must, prove in order to establish that a product's risks outweigh its utility.

Furthermore, we emphasize that our adoption of a risk-utility balancing component to our consumer expectation test does not signal a retreat from strict tort liability. In weighing a product's risks against its utility, the focus of the jury should be on the product itself, and not on the conduct of the manufacturer.

Although today we adopt a modified formulation of the consumer expectation test, we emphasize that we do not require a plaintiff to present evidence relating to the product's risks and utility in every case. As the California Court of Appeals has stated: “There are certain kinds of accidents—even where fairly complex machinery is involved—that are so bizarre that the average juror, upon hearing the particulars, might reasonably think: ‘Whatever the user may have expected from that contraption, it certainly wasn't that.'” 


Conversely, the jury should engage in the risk-utility balancing required by our modified consumer expectation test when the particular facts do not reasonably permit the inference that the product did not meet the safety expectations of the ordinary consumer. See id., at ___. Furthermore, instructions based on the ordinary consumer expectation test would not be appropriate when, as a matter of law, there is insufficient evidence to support a jury verdict under that test. See id. In such circumstances, the jury should be instructed solely on the modified consumer expectation test we have articulated today. . . .

With these principles in mind, we now consider whether, in the present case, the trial court properly instructed the jury with respect to the definition of design defect for the purposes of strict tort liability. The trial court instructed the jury that a manufacturer may be strictly liable if the plaintiffs prove, among other elements, that the product in question was in a defective condition, unreasonably dangerous to the ultimate user. The court further instructed the jury that, in determining whether the tools were unreasonably dangerous, it may draw its conclusions based on the reasonable expectations of an ordinary user of the defendants' tools.
Because there was sufficient evidence as a matter of law to support the determination that the tools were unreasonably dangerous based on the ordinary consumer expectation test, we conclude that this instruction was appropriately given to the jury. . . .

. . . The jury heard testimony that Guarneri, Electric Boat's industrial hygienist, had performed extensive testing of tools used at the shipyard, which tests revealed that a large number of the defendants' tools violated the [American National Standards Institute's] limits for vibration exposure and exceeded the [American Conference of Governmental and Industrial Hygienists's] threshold limit. The jury also heard substantial testimony with respect to various methods, including isolation, dampening and balancing, available to reduce the deleterious effects of vibration caused by the defendants' tools. Moreover, there was expert testimony that exposure to vibration is a significant contributing factor to the development of hand arm vibration syndrome and that a clear relationship exists between the level of vibration exposure and the risk of developing the syndrome. Viewing the evidence in a light favorable to supporting the jury's verdicts, as we must, we conclude that the jury properly determined that the defendants' tools had been defectively designed.

[In Part II of its opinion, the court held that the trial court had erroneously placed on the defendant the burden of disproving an element of the plaintiff's prima facie case—that the product that caused the plaintiff's injury had reached the plaintiff without a substantial and unforeseeable change in its condition. The court therefore reversed the trial court's judgment and remanded for a new trial.]

III

Although we have concluded that a new trial is necessary, we address the defendants' final claim because it is likely to arise on retrial. The defendants argue that the trial court improperly instructed the jury that the “state-of-the-art defense” was restricted to the plaintiffs' failure to warn claim. Specifically, the defendants assert that the trial court improperly prevented the jury from considering the state-of-the-art defense in the context of the plaintiffs' claim of defective design. . . .

In Tomer v. American Home Products Corp., 368 A.2d 35 (1976), this court recognized the applicability of state-of-the-art evidence to failure to warn claims, stating that "[s]ince the defendants could not be held to standards which exceeded the limits of scientific advances existing at the time of their allegedly tortious conduct, expert testimony tending to show the scope of duties owed could have been properly limited to scientific knowledge existing at that time." The question of whether state-of-the-art evidence similarly applies to design defect claims, however, is a matter of first impression for this court.

We begin our analysis of this issue by recognizing that the term “state of the art” has been the source of substantial confusion. Several courts have defined state-of-the-art evidence in terms of industry custom; or in terms of compliance with then existing statutes or governmental regulations. [¶] The majority of courts, however, have defined state-of-the-art evidence as the level of relevant scientific, technological and safety knowledge existing and reasonably feasible at the time of design. . . .
The plaintiffs assert that state-of-the-art evidence has no place in a strict products liability action because it improperly focuses the jury's attention on the manufacturer's conduct. We disagree. We adopt the majority view and hold that such evidence is relevant and assists the jury in determining whether a product is defective and unreasonably dangerous. In other words, "state of the art relates to the condition of the product and the possibility that it could have been made safer." 1 M. Madden, supra, § 8.3, p. 301. Accordingly, we conclude that state of the art is a relevant factor in considering the adequacy of the design of a product and whether it is in a defective condition unreasonably dangerous to the ordinary consumer. In defining the term state of the art, we adhere to . . . the majority view, which characterize[s] state of the art as the level of relevant scientific, technological and safety knowledge existing and reasonably feasible at the time of design.

We now apply these principles to the standards for determining design defectiveness that we have addressed in part I of this opinion. Under the ordinary consumer expectation standard, state-of-the-art evidence "helps to determine the expectation of the ordinary consumer." For example, in approving the trial court's admission of state-of-the-art evidence, [a court] stated: "A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today. . . ." [Citation omitted.]. . .

Furthermore, under the modified consumer expectations standard we have set forth today, such evidence would be admissible as a factor properly to be considered as part of the risk-utility calculus. Because state-of-the-art evidence is relevant to set "the parameters of feasibility"; the jury is provided with an objective standard by which to gauge the product's risks and utility. In this respect, such evidence is a relevant factor on both sides of the risk-utility equation: the risks that the product presents to consumers in light of the availability of other safety measures, and the utility of the product in comparison to feasible design alternatives. Accordingly, state-of-the-art evidence constitutes one of several relevant factors to assist the jury in determining whether a reasonable consumer would consider the product design unreasonably dangerous.

In summary, we agree with the defendants insofar as they argue that the trial court improperly limited the applicability of state-of-the-art evidence to the plaintiffs' failure to warn claims. In our view, state-of-the-art evidence is relevant to the determination of whether a particular product design is unreasonably dangerous. We disagree with the defendants' contention, however, that proof of compliance with the state of the art constitutes an affirmative defense to a design defect claim.

BERDON, J., concurring. I write separately with respect to part I of the court's opinion regarding the test for determining whether a manufacturer is liable for a design defect. I would not depart from our long-standing rule that the consumer expectation test must be employed—that is, the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." 2 Restatement (Second), Torts § 402A, comment (i) (1965). Although the court today agrees that this test is to be applied to cases such as the present case, it adopts, by way of dicta, another test for "complex product designs."
I am concerned about the court adopting a risk-utility test for complex product designs—that is, a test where the trier of fact considers “the product’s risks and utility and then inquires whether a reasonable consumer would consider the product unreasonably dangerous.” . . . Adopting such a risk-utility test for “complex product designs” sounds dangerously close to requiring proof of the existence of “a reasonable alternative design,” a standard of proof that the court properly rejects today.4

Finally, because the court insists on addressing this issue that is not before us, I would at least sort out the burden of proof for the risk-utility test by adopting “a presumption that danger outweighs utility if the product fails under circumstances when the ordinary purchaser or user would not have so expected.” W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 99, p. 702. Adoption of this presumption would lessen the concern that the risk-utility test undermines one of the reasons that strict tort liability was adopted—“the difficulty of discovering evidence necessary to show that danger outweighs benefits.” Id.

NOTES

1. The unelaborated consumer expectations test. The consumer expectation test for design defect has its roots in warranty law. As the Potter court notes, section 402A of the Restatement Second made the consumer expectations test the basic test for strict product liability, without distinguishing among the various types of product defects. Section 402A states that strict liability exists for physical harm caused by “any product in a defective condition unreasonably dangerous to the consumer,” and comment i to section 402A states that a product is “unreasonably dangerous” if it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” Most states initially adopted the unelaborated consumer expectations test in section 402A comment i as the sole test for strict product liability. However, as problems arose in attempting to apply the test to product designs in various types of situations, many legislatures and courts supplemented or replaced it with other tests, primarily the risk-utility test. See note 2 below. But see, e.g., Aubin v. Union Carbide Corp., 177 So. 3d 489 (Fla. 2015) (rejecting the Restatement Third's risk-utility test and required proof of a reasonable alternative design and retaining the consumer expectations test as “best vindicat[ing] the purposes underlying the doctrine of strict liability”).

2. The consumer-oriented risk-utility test. The risk-utility test for design defects was first developed as an alternative to the consumer expectations test, to expand rather than restrict plaintiffs’ ability to recover damages. Under the consumer expectations test, if the risks posed by a product are “open and obvious,” the consumer could not reasonably have an expectation of safety and would not be able to recover, and some courts have so held. The risk-utility test was designed to allow recovery in some such situations, as well as to handle situations in which “the consumer would not know what to expect, because he would have no idea how safe the product could be made.” Barker v. Lull Engineering Co., 573 P.2d 443, ___ (Cal.1978)

4For example, as the court points out, one of the factors to be weighed in the risk-utility test is “the cost and feasibility of eliminating or minimizing the risk [that] may be relevant in a particular case.”
The *Barker* court stated that “a product may be found defective in design even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." Id. at ___. The "through hindsight" language is critical if the risk-utility test is to be a strict liability test rather than a negligence test. Do you understand why? In practice, the handful of jurisdictions supposedly using the hindsight version of the risk-utility test for design defects rarely actually do so, and there are few if any cases in which a defendant was held liable for a risk that was actually unknown and unforeseeable at the time the product was sold or distributed.

As the *Potter* court states, a growing number of states, including initially California in the *Soule* case, that have continued to use the consumer expectations test have restricted its use to situations in which, due to the bizarre nature of the accident or otherwise, "the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations." See, e.g., Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329 (Ill. 2008); Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014). Otherwise, the default primary standard, as confirmed by the Connecticut Supreme Court in Izzarelli v. R. J. Reynolds Tobacco Company, 136 A.3d 1232 (Conn. 2016), and Bifolck v. Philip Morris, Inc., 152 A.3d 1183 (2016), is the consumer-oriented risk-utility test (the *Potter* court's "modified consumer expectations" test), which "provides the jury with the product's risks and utility and then inquires whether a reasonable consumer would consider the product unreasonably dangerous." (In *Bifolk*, the court stated that the usual "risk-utility" and "consumer expectations" labels should be used instead of the "modified" and "ordinary" consumer expectations labels, respectively.). According to the *Potter* court, which test was appropriate for the situation in *Potter*? Which test was actually applied?

3. *Inferring a defect based on consumer expectations*. The Restatement Third, while treating consumer expectations as a relevant factor in its risk-utility analysis of design defects, rejects the consumer expectations test as a distinct test for design defect except in the case of food products and used products. See Restatement Third: Products Liability § 2 comments f, g and h, § 7 and § 8. However, section 3 of the Restatement Third allows a res-ipsa-loquitur type of inference of a product defect, without proof of a specific construction or design defect or negligence, "when the incident that harmed the plaintiff (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of the sale or distribution." Section 3 was formulated in response to objections about the complete elimination of the consumer expectations test. The reporters describe its appropriate use as follows:

Section 3 frees the plaintiff from the strictures of § 2 in circumstances in which common experience teaches that an inference of defect may be warranted under the specific facts, including the failure of a product to perform its manifestly intended function. When the defect established under § 3 may involve product design, some courts recognize consumer expectations as an adequate test for defect, in apparent conflict with the reasonable alternative design requirement in § 2(b). But when the claims involve a
product's failure to perform its manifestly intended function and the other requisites of § 3 are met, the apparent conflict disappears.

Id. § 2 comment b. What situations might involve a product's failure to perform its manifestly intended function? The Restatement Third gives as an example wings falling off of an airplane “in new condition and while flying within its intended parameters.” Are these the same sorts of situations that are meant to be covered by the Potter court’s “ordinary consumer expectations” test? Apparently so. In Izzarelli v. R. J. Reynolds Tobacco Company, 136 A.3d 1232 (Conn. 2016), the Connecticut court stated that the “[ordinary] consumer expectations” test applies only where a product “failed to meet the consumer’s minimum safety expectations, such as res ipsa cases.” Id. ___.

4. The nature of the risk-utility test. Is Potter's “modified consumer expectations” (risk-utility) test the same as the Hand formula's aggregate risk-utility test? Consider the factors that the Potter court lists as being relevant. Consider the factors mentioned by the Barker court (in note 8 of the Potter opinion). Consider the factors listed by Dean John Wade (in note 10 of the Potter opinion) and which have often been cited by the courts. (The loss-spreading factor, which is the last factor in Dean John Wade's often-quoted list of factors and is mentioned by the Potter court, has never been determinative and rarely been relied upon in an actual case.) Consider the factors included in the risk-utility test for design defects in the Restatement Third:

A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. . . . [T]he likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. . . . [E]vidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and utility of the product. . . . On the other hand, it is not a factor under Subsection (b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry.

Restatement Third: Products Liability § 2 comment f. Why should the effect on production costs be taken into account, if it is not relevant “that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry”? Consider id. § 2 illustration 7: “Although the increase in cost to consumers is a relevant consideration, the impact of a finding of defectiveness on the general economy or on the profitability of the [product] manufacturer is not a factor to be considered in deciding whether the alternative safer design is reasonable.”

5. Negligence or strict liability? The relevance of “the state of the art.” The Potter court claims that its “modified consumer expectations” (risk-utility) test results in strict liability
rather than negligence liability. Are the plaintiffs correct when they state that the court's resolution of the state-of-the-art evidence issue, at the end of its opinion, makes the test a test of negligence rather than strict liability?

6. The "reasonable alternative design" requirement. The principal definition of a defective design in the Restatement Third states:

[A product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design... and the omission of the alternative design renders the product not reasonably safe.

Restatement Third: Products Liability § 2(b). The words "reasonable" and "reasonably" in this definition are elaborated through the consumer-oriented "risk-utility balancing" test. Id. § 2 comments d and f; see note 4 above. As the Potter court makes clear, the major source of controversy in the drafting of the Restatement Third was its requirement that the plaintiff prove the availability of a reasonable alternative design that would have reduced or avoided the foreseeable risks of harm posed by the product. The plaintiff must prove that the alternative design was technologically feasible, practical and reasonable. See id. § 2 comment f. In an attempt to lessen plaintiffs' concerns over the difficulty and costs of proving a reasonable alternative design, the Restatement states that (i) for some products no expert testimony would be needed, given the obvious availability of safer, reasonable alternatives, (ii) when expert testimony is required, the expert need not produce a prototype of the alternative design, and (iii) "the plaintiff is not required to establish with particularity the costs and benefits associated with adoption of the suggested design." Id. Recall also § 3, discussed in note 3 above, which states that an inference of defect “may be warranted under the specific facts, including the failure of a product to perform its manifestly intended function.”

Nevertheless, as the Potter court states, many states have rejected the Restatement Third's treating the existence of a reasonable alternative design as something the plaintiff must prove in addition to unreasonableness under the consumer-oriented risk-utility test, rather than merely as one of many factors to be considered under that test. See, e.g., Aubin v. Union Carbide Corp., 177 So.3d 489 (Fla 2015); Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329 (Ill. 2008); Tincher v. Omega Flex, 104 A.3d 328 (Pa. 2014); Dobbs 1001-02; Mark A. Geistfeld, Principles of Product Liability 27-29 (2006). John F. Vargo, The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States in a Different Weave, 26 U. Memphis L. Rev. 493 (1996). Apart from concerns over the difficulty and costs of proving a reasonable alternative design, which might justify shifting the burden of proof or at least the burden of production of evidence on that issue to the defendant, is there any other reason to object to the reasonable alternative design requirement? Is it any different than the usual requirement, in a negligence case, that the plaintiff allege specific ways in which the defendant could and should have behaved differently and then prove that the defendant's failure to behave differently, in the ways specified, was unreasonable?

7. Categorically unsafe products. What if the only feasible and practical alternative design that would sufficiently reduce or eliminate the risk is the elimination of the product?
Would a plaintiff be able to make an argument that that should be done under ordinary negligence rules, using a risk-utility analysis? The reporters for the Restatement Third, who were strongly opposed to liability for such allegedly categorically unsafe products, ultimately included a comment to permit liability without proof of a feasible alternative design in cases in which “the extremely high degree of danger posed by [the product’s] use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow [others] to use, the product.” Restatement Third: Products Liability § 2 comment e; see id. § 2 comment d. Is this formulated too narrowly?

8. Other exceptions. The Restatement Third states that a defective design can be proven, without having to allege and prove a “reasonable alternative design,” by use of the negligence per se doctrine (noncompliance with an applicable product safety statute or administrative regulation), Restatement Third: Products Liability § 4, and through the res-ipsa-like inference of defect for a product that “fails to perform its manifestly intended function,” id. § 3, which is discussed in note 3 above. See id. § 2 comment b.

9. Defendants’ misfeasance with respect to participatory plaintiffs. Is there any significant difference in the tests of liability, including the criteria of reasonableness, that are applied in the different types of participatory plaintiff situations, including sporting activities, medical counseling and treatment, and the sale of products?

4. Land Occupiers’ Premises Liability

**Rowland v. Christian**  
Supreme Court of California  
69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968)

PETERS, Justice. Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action. In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses. He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and $100,000 general damages.

In the instant case, Miss Christian's affidavit and admissions made by plaintiff show that plaintiff was a social guest and that he suffered injury when the faucet handle broke; they do not show that the faucet handle crack was obvious or even nonconcealed. Without in any way contradicting her affidavit or his own admissions, plaintiff at trial could establish that she was aware of the condition and realized or should have realized that it involved an unreasonable risk of harm to him, that defendant should have expected that he would not discover the danger, that she did not exercise reasonable care to eliminate the danger or warn
wished to it, and that he did not know or have reason to know of the danger. Plaintiff also could establish, without contradicting Miss Christian’s affidavit or his admissions, that the crack was not obvious and was concealed. Under the circumstances, a summary judgment is proper in this case only if, after proof of such facts, a judgment would be required as a matter of law for Miss Christian. The record supports no such conclusion.

Section 1714 of the Civil Code provides: “Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . .” . . . Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

One of the areas where this court and other courts have departed from the fundamental concept that a man is liable for injuries caused by his carelessness is with regard to the liability of a possessor of land for injuries to persons who have entered upon that land. It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor’s liability, and the heritage of feudalism.

The departure from the fundamental rule of liability for negligence has been accomplished by classifying the plaintiff either as a trespasser, licensee, or invitee and then adopting special rules as to the duty owed by the possessor to each of the classifications. Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them.

Although the invitor owes the [business] invitee a duty to exercise ordinary care to avoid injuring him, the general rule is that a trespasser and licensee or social guest are obliged to take the premises as they find them insofar as any alleged defective condition thereon may exist, and that the possessor of the land owes them only the duty of refraining from wanton or willful injury. The ordinary justification for the general rule severely restricting the occupier's liability to social guests is based on the theory that the guest should not expect special precautions to be made on his account and that if the host does not inspect and maintain his property the guest should not expect this to be done on his account.

An increasing regard for human safety has led to a retreat from this position, and an exception to the general rule limiting liability has been made as to active operations where an obligation to exercise reasonable care for the protection of the licensee has been imposed on the occupier of land. (see Rest.2d Torts, § 341; . . .) In an apparent attempt to avoid the
Another exception to the general rule limiting liability has been recognized for cases where the occupier is aware of the dangerous condition, the condition amounts to a concealed trap, and the guest is unaware of the trap. In none of these cases, however, did the court impose liability on the basis of a concealed trap; in some liability was found on another theory, and in others the court concluded that there was no trap. A trap has been defined as a "concealed" danger, a danger with a deceptive appearance of safety. It has also been defined as something akin to a spring gun or steel trap. [It has been] pointed out that the lack of definiteness in the application of the term "trap" to any other situation makes its use argumentative and unsatisfactory.

The cases dealing with the active negligence and the trap exceptions are indicative of the subtleties and confusion which have resulted from application of the common law principles governing the liability of the possessor of land. Similar confusion and complexity exist as to the definitions of trespasser, licensee, and invitee.

In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated: "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances." (Footnotes omitted.) (Kermarec v. Compagnie Generale, 358 U.S. 625, 630-631.) . . .

There is another fundamental objection to the approach to the question of the possessor's liability on the basis of the common law distinctions based upon the status of the injured party as a trespasser, licensee, or invitee. Complexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations. Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology. . . .

. . . The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every
case. In many situations, the burden will be the same, i.e., the conduct necessary upon the
defendant’s part to meet the burden of exercising due care as to invitees will also meet his
burden with respect to licensees and trespassers. . . .

Considerations such as these have led some courts in particular situations to reject the
rigid common law classifications and to approach the issue of the duty of the occupier on the
basis of ordinary principles of negligence. And the common law distinctions after thorough
study have been repudiated by the jurisdiction of their birth. (Occupiers’ Liability Act, 1957, 5
and 6 Eliz. 2, ch. 31.)

A man’s life or limb does not become less worthy of protection by the law nor a loss
less worthy of compensation under the law because he has come upon the land of another
without permission or with permission but without a business purpose. Reasonable people do
not ordinarily vary their conduct depending upon such matters, and to focus upon the status of
the injured party as a trespasser, licensee, or invitee in order to determine the question whether
the landowner has a duty of care, is contrary to our modern social mores and humanitarian
values. The common law rules obscure rather than illuminate the proper considerations which
should govern determination of the question of duty.

It bears repetition that the basic policy of this state set forth by the Legislature in
section 1714 of the Civil Code is that everyone is responsible for an injury caused to another
by his want of ordinary care or skill in the management of his property. The factors which may
in particular cases warrant departure from this fundamental principle do not warrant the
wholesale immunities resulting from the common law classifications, and we are satisfied that
continued adherence to the common law distinctions can only lead to injustice or, if we are to
avoid injustice, further fictions with the resulting complexity and confusion. We decline to
follow and perpetuate such rigid classifications. The proper test to be applied to the liability of
the possessor of land in accordance with section 1714 of the Civil Code is whether in the
management of his property he has acted as a reasonable man in view of the probability of
injury to others, and, although the plaintiff’s status as a trespasser, licensee, or invitee may in
the light of the facts giving rise to such status have some bearing on the question of liability,
the status is not determinative.

Once the ancient concepts as to the liability of the occupier of land are stripped away,
the status of the plaintiff relegated to its proper place in determining such liability, and
ordinary principles of negligence applied, the result in the instant case presents no substantial
difficulties. As we have seen, when we view the matters presented on the motion for summary
judgment as we must, we must assume defendant Miss Christian was aware that the faucet
handle was defective and dangerous, that the defect was not obvious, and that plaintiff was
about to come in contact with the defective condition, and under the undisputed facts she
neither remedied the condition nor warned plaintiff of it. Where the occupier of land is aware
of a concealed condition involving in the absence of precautions an unreasonable risk of harm
to those coming in contact with it and is aware that a person on the premises is about to come
in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the
condition constitutes negligence. Whether or not a guest has a right to expect that his host will
remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a
warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it. . . .

The judgment is reversed.

BURKE, Justice. I dissent. In determining the liability of the occupier or owner of land for injuries, the distinctions between trespassers, licensees and invitees have been developed and applied by the courts over a period of many years. They supply a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law. The unfortunate alternative, it appears to me, is the route taken by the majority in their opinion in this case; that such issues are to be decided on a case by case basis under the application of the basic law of negligence, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another.

Liability for negligence turns upon whether a duty of care is owed, and if so, the extent thereof. Who can doubt that the corner grocery, the large department store, or the financial institution owes a greater duty of care to one whom it has invited to enter its premises as a prospective customer of its wares or services than it owes to a trespasser seeking to enter after the close of business hours and for a nonbusiness or even an antagonistic purpose? I do not think it unreasonable or unfair that a social guest (classified by the law as a licensee, as was plaintiff here) should be obliged to take the premises in the same condition as his host finds them or permits them to be. Surely a homeowner should not be obliged to hover over his guests with warnings of possible dangers to be found in the condition of the home (e.g., waxed floors, slipping rugs, toys in unexpected places, etc., etc.). Yet today's decision appears to open the door to potentially unlimited liability despite the purpose and circumstances motivating the plaintiff in entering the premises of another, and despite the caveat of the majority that the status of the parties may "have some bearing on the question of liability . . .," whatever the future may show that language to mean.

In my view, it is not a proper function of this court to overturn the learning, wisdom and experience of the past in this field. Sweeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future.

I would affirm the judgment for defendant. [McComb, J., concurred.]

NOTES

1. Occupiers versus owners. Liability for dangerous conditions on a property generally rests on whoever is occupying the property with an intent to control it or, if there is no occupier, whoever has the right to occupy the property, or, if neither of these situations exist, whoever last occupied the land and controlled it. See Restatement Third: Physical and Emotional Harm § 49. In the usual landlord-tenant situation, this will be the tenant rather than the landlord-owner with respect to the leased premises, but the landlord-owner with respect to common areas. The landlord-owner may also be liable if she rents out the property in a
dangerous condition and the tenant is unaware of the dangerous condition or if the lease or an ordinance or other regulation requires the owner to repair certain conditions.

2. The traditional categorical rules. As the Rowland opinion indicates, under the traditional common law rules, a land owner's or occupier's duty toward other persons on the premises varies considerably depending on the status of the plaintiff, and the rules are often complex and vary in detail from jurisdiction to jurisdiction. (In the remainder of these notes, “land occupier” should be interpreted as including land owners.) Plaintiffs generally are classified as either trespassers (those who enter or remain on land in the possession of another without a privilege to do so created by the possessor's consent or otherwise), licensees (those who enter or remain on land only by virtue of the possessor's explicit or implicit consent or acquiescence), or invitees, who originally included only business invitees (those invited to enter or remain on the land for a purpose directly or indirectly connected with the business of the land) but currently in most jurisdictions also include public invitees (those invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public). Restatement Second §§ 329-32. Although also literally "invitees," social guests (those invited to enter or remain on the land for social, nonbusiness purposes) were treated as mere licensees, and thus were lumped together with those licensees whom the land occupier did not affirmatively invite or welcome onto the property but rather merely tolerated through explicit or implicit consent or acquiescence—e.g., neighborhood children in one's front yard. Id. § 330 comment h.

Trespassers. The general rule is that a land occupier owes no duty to exercise any care to protect trespassers from on-premises risks of injury. See Restatement Second § 333. However, she cannot injure trespassers intentionally, willfully, or wantonly, or perhaps through reckless disregard of a substantial possibility of their being injured. Moreover, most jurisdictions have recognized limited duties to trespassers in the following situations.

(a) Trespassers on the edges of one's land that border a public way. A land owner must take reasonable care to avoid foreseeable injury to travelers on a public way who, in the ordinary course of their travel along the public way, foreseeably wander from the public way onto the edges of her land that borders the public way. See id. §§ 368 & 369.

(b) Current trespassers of whom the possessor is aware or has reason to be aware or constant or frequent trespassers on a limited area of whom the possessor is aware or, from facts actually within her knowledge, should be aware. A land occupier must take reasonable care to protect such trespassers against risks created by active operations or by concealed artificial conditions which the possessor knows are (highly) dangerous. Reasonable care generally will only require a warning, unless there is insufficient time for an effective warning or the possessor is aware that the trespasser is unaware of or intends to disregard the warning. Id. §§ 334-37.

Note the subjective nature of these criteria, which focus on the defendant's actual knowledge or awareness or on what she “has reason to know” or “from facts actually within her knowledge should know.” There are significant distinctions between “from facts within her knowledge should know [without any further inquiry]” (least demanding), “has reason to know [after further inquiry in light of the known facts]” (intermediately demanding), and “should
know" (most demanding). See id. § 334 comment c. Only "should know" employs an objective perspective and may require the defendant to inspect for possible dangers, in the absence of knowledge of facts indicating such a possibility.

(c) Child trespassers (the "attractive nuisance" doctrine). A land occupier must take reasonable care to protect children from artificial conditions which the possessor knows or has reason to know will involve a significant risk of death or serious bodily harm to children in places where the possessor knows or has reason to know children are likely to trespass, if the children because of their youth do not discover the condition or realize the risk involved, and if the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children. Id. § 339. Note the subjective perspective.

Licensees. A land occupier must take reasonable care to protect a licensee from on-premises risks of dangerous activities or (natural or artificial) conditions on the land, of which the possessor but not the licensee knows or has reason to know. Reasonable care generally will only require a warning, unless there is insufficient time for an effective warning or the possessor is aware that the licensee is unaware of or intends to disregard the warning, in which case only moderate precautions may be required, taking into account the defendant's resources. See Restatement Second §§ 341 & 342. A child licensee is also owed the same care as is owed to a child trespasser. Id. § 343B. Again note the subjective perspective.

(Business and public) invitees. A land occupier owes the broadest, general duty of care to (business and public) invitees, who are treated as rightful participatory plaintiffs and are protected by the previously discussed criteria of reasonableness for defendants putting participatory plaintiffs at risk. A land occupier must not only warn invitees of dangers of which the occupier knows or has reason to know (the primary duty owed to licensees and some trespassers), but also must inspect for and warn of unknown but foreseeable dangers and exercise reasonable care to see that the premises are safe if a warning would foreseeably be insufficient to protect the invitee from physical harm. See Restatement Second §§ 341A, 343 and 343A. What is the required reasonable care for invitees? Have we already discussed any case in which an invitee was suing the defendant for an injury suffered while on the defendant's land as a result of some activity or condition on the land? If so, what criterion of reasonable care was employed?

Note that, as the status of the entrant shifts from invitee to licensee to trespasser, the perspective employed becomes more subjective and the required care decreases.

3. Exceptions to, or elaborations of, the general duty of reasonable care? The traditional categorical rules regarding land occupiers' duties with respect to on-premises risks are often described, as by the Rowland court, as "departures from" or "exceptions to" or "limitations on" the defendant's general duty to exercise reasonable care in the light of foreseeable risks to others, that is, as situations in which the land occupier escapes liability despite a failure to exercise reasonable care in the light of foreseeable risks to others. Might it be more accurate to regard the different standards of care owed to the different categories of land entrants in this context as elaborations of the general duty of reasonable care, in the light of relevant distinctions in the defendant-plaintiff relationship, rather than as departures from it?
For examples of courts articulating this view, see Depue v. Flatau, 111 N.W. 1 (Minn. 1907); Dillon v. Twin States Gas & Elec. Co., 163 A. 111 (N.H. 1932).

4. The traditional categorical duties versus a general duty of reasonable care. Should Rowland have been able to avoid summary judgment for the defendant under the traditional categorical rules? If so, why did the court reach out to abrogate those rules and to replace them by a general duty of reasonable care, regardless of the status of the entrant as an invitee, licensee, or trespasser? Does the status of the entrant still matter under Rowland's general duty of reasonable care? Should it?

A significant number of jurisdictions followed Rowland in replacing some or all of the categorical duties with an overall duty of reasonable care. While the Rowland opinion merged all the categories together under a single general duty of reasonable care, more commonly only the entrant categories of invitees and licensees, or, less broadly, only the categories of (business and public) invitees and social guests, have been merged together, with trespassers (and sometimes non-guest licensees) still being treated as being covered by a distinct and more limited duty or standard of care. The Restatement Third states a distinct and more limited duty, “not to act in an intentional, willful, or wanton manner to cause physical harm,” only for “flagrant” (“egregious or atrocious”) trespassers. See Restatement Third: Physical and Emotional Harm § 52 and comment a. It states a duty of reasonable care by lessors for those portions of the leased premises over which the lessor retains control and for any risks created by the lessor in the condition of the leased premises, as well as for numerous other risks subject to certain conditions. Id. § 53. A substantial majority of jurisdictions still adhere to the traditional categorical duties. See id. § 51 comment a; Dobbs § 237.

As the Rowland court notes, the distinctions between trespassers, licensees, and invitees remain relevant even in those jurisdictions in which some or all of the distinct categorical duties have been replaced by a single general standard of reasonable care. What may be reasonably required of an occupier with respect to protecting others against on-premises risks may still vary depending on the status of the plaintiff as a business invitee, a public invitee, a social guest, a “mere” licensee (whom one tolerates but does not invite on for one’s own benefit), a child trespasser, an adult “mere” trespasser (e.g., a person taking a shortcut), or a criminal trespasser (e.g., a burglar). Is Justice Burke correct, in his dissent in Rowland, that, given the apparent relevance of these different categories of plaintiffs, we should adhere to the distinct duties and rules of the traditional common law based on these distinctions, as providing clearer and more consistent guidelines than a general undifferentiated standard of reasonable care?

5. Comparative law. In England, the traditional categorical rules have been replaced by two Acts of Parliament. Contrary to the Rowland court’s discussion, these Acts still treat trespassers as a distinct category subject to a much more limited standard of care. The Occupiers’ Liability Act of 1957, 5 & 6 Eliz. 2, ch. 31, cited by the Rowland court, only applies to invitees and licensees, who are owed the same “common duty of care’ . . . except in so far as [the occupier] is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise.” The common duty of care is “a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be
reasonably safe in using the premises for the purposes for which he is invited or permitted by
the occupier to be there," and a "warning is not to be treated without more as absolving the
occupier from liability, unless in all the circumstances it was enough to enable the visitor to be
reasonably safe." The Occupiers' Liability Act of 1984 applies to trespassers. The occupier
owes a duty to take reasonable care to avoid injury to trespassers if he is "aware or has
reasonable grounds to believe" that the trespasser is within or may come within the vicinity of
some dangerous risk and "the risk is one against which, in all the circumstances of the case, he
may reasonably be expected to offer the [trespasser] some protection." In an appropriate case,
this duty may be discharged "by taking such steps as are reasonable in all the circumstances of
the case to give warning of the danger concerned or to discourage persons from incurring the
risk." No duty is owed "by virtue of this [Act]" to persons using the highway. Under both acts,
no duty is owed to any person "in respect of risks willingly accepted as his by that person."
Other British Commonwealth countries have adopted similar legislation, or achieved similar

6. Underlying principles: interactive justice. What accounts for the variations in the
standards of care that are applied to defendant occupiers regarding on-premises risks to
entrants on the property, which become more subjective and less onerous as the entrant's status
shifts from invitee to trespasser? Consider Lord Reid's explanation in the House of Lords'
decision in British Railways Board v. Herrington:

Normally the common law applies an objective test [to defendants]. If a
person chooses to assume a relationship with members of the public, say by
setting out to drive a car or to erect a building fronting a highway, the law
requires him to conduct himself as a reasonable man with adequate skill,
knowledge and resources would do. He will not be heard to say that in fact he
could not attain that standard. If he cannot attain that standard he ought not to
assume the responsibility which that relationship involves. But an occupier
does not voluntarily assume a relationship with trespassers. By trespassing
they force a "neighbour" relationship on him. When they do so he must act in
a humane manner—that is not asking too much of him—but I do not see why
he should be required to do more.

So it appears to me that an occupier's duty to trespassers must vary
according to his knowledge, ability, and resources. It has often been said that
trespassers must take the land as they find it. I would rather say that they must
take the occupier as they find him.

... [The occupier] might often reasonably think, weighing the
seriousness of the danger and the degree of likelihood of trespassers coming
against the burden he would have to incur in preventing their entry or making
his premises safe, or curtailing his own activities on his land, that he could not
fairly be expected to do anything. But if he could at small trouble and expense
take some effective action, ... I think most people would think it inhumane
and culpable not to do that. ...
It would follow that an impecunious occupier with little assistance at hand would often be excused from doing something which a large organization with ample staff would be expected to do. [1972] A.C. 877, 898-99; see id. at 936-37 (Lord Diplock). More succinctly, Lord Pearson stated:

There is also a moral aspect. . . . [T]respassing is a form of misbehaviour, showing lack of consideration for the rights of others. It would be unfair if trespassers could by their misbehaviour impose onerous obligations on others.

As the entrant’s status shifts from invitee to trespasser, it is the rights of the occupier of the land rather than those of the entrant which become paramount. The occupier should not be required to significantly sacrifice her own interests to protect from on-premises risks those (especially adults) who have wrongfully trespassed on her property, or, arguably, to go beyond providing warnings and moderate safeguards to make the premises safer for licensees and social invitees than she is willing and able to make it for herself. This rights-based reasoning appears often in the comments to the relevant provisions of the Restatement and in the cases. See, e.g., Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1766-67 & nn.366 & 367 (1981) (noting the American courts’ attention to such considerations in 19th and 20th century premises liability cases).

7. Underlying principles: utilitarian efficiency. Under the utilitarian efficiency theory, it would seem that defendant land occupiers should be at least as concerned about on-premises risks as off-premises risks, regardless of the status of the plaintiff, and indeed arguably should be subject to greater (strict or absolute) liability for on-premises risks as the usual cheapest cost avoider. The legal economists’ attempts to explain the defendant land occupier’s greatly relaxed duty of care to trespassers as plaintiffs and, conversely, the related strict (sometimes punitive) liability of trespassers as defendants, rely on an “encouraging market transactions” rationale:

Another rule of victim responsibility, although one in decline and subject to many exceptions, is that a landowner is not liable for negligent injuries to trespassers. This rule can be reconciled with the Hand Formula by noting that in the usual case such an injury can be prevented at lower cost by the trespasser, simply by not trespassing, than by the landowner. If the cost of avoidance by the trespasser is higher, he can purchase the land (or an easement in it) and so cease to be a trespasser. The rule thus serves the function—by now familiar to the reader—of encouraging market rather than legal transactions where feasible. . . .
A trespasser beds down for the night in a newly constructed but unoccupied house in a real estate development and is asphyxiated because the developer had accidentally spliced a gas main and a water pipe to the house. There is an economic basis for refusing to permit the developer to interpose the defense of no duty to trespassers. Sometimes the value of trespassing to the trespasser is greater than the expected accident cost (plus any damage to the owner) and transaction costs are prohibitively high. In these cases trespassing will increase value. Therefore we want prospective trespassers to weigh the relevant values and costs. But they cannot weigh costs that are unforeseeable. A newly constructed residential building is normally a safe place. The trespasser has no reason to foresee being asphyxiated. He may have made a perfectly rational judgment that the value of his trespass exceeded all expected costs, including accident costs. . . . The land developer . . . could foresee the consequences of a failure to take precautions and should either have taken precautions himself or, if the other party could do so more cheaply, have communicated the danger to the other party. [This argument] is imperfect, however, because the developer was merely negligent, and could not have communicated a risk of which he was unaware. But there is another reason for liability in this trespass case: that the trespass did not in fact increase the probability of injury. Whoever slept in the house was going to be asphyxiated, and it is happenstance that it was the trespasser. The trespasser may have “saved” the legitimate owner from being asphyxiated, and thereby rescued the developer from liability!

Richard A. Posner, Economic Analysis of Law 173-74, 185-86 (4th ed. 1992). Is trespass allowed if the trespasser will gain more from the trespass than the land occupier will lose and obtaining consent beforehand is impossible or too costly? Is it true that the trespass in Posner’s hypothetical “did not in fact increase the probability of injury”?

8. Distinguish off-premises risks. The special rules and considerations which govern land occupiers’ duties of reasonable care with respect to on-premises risks to non-invitee entrants on their land do not apply to off-premises risks to persons not on their land—e.g., risks to those on adjoining roads or properties from activities or non-natural conditions on the defendant’s land. The general duty of reasonable care applies to such off-premises risks. Except with respect to trees, land owners and occupiers generally do not have a duty to protect persons or things off their premises from risks created by natural conditions on their property—for example, landslides from uphill properties in a natural (not man-made) condition. There are a few rare and exceptional cases to the contrary. See, e.g., Sprecher v. Adamson Companies, 636 P.2d 1121 (Cal. 1981) (abrogating the distinction between natural and artificial conditions, and holding that the defendant might be held negligent for failing to remedy the natural landslide-prone condition of his seaside property) (overruled?). If the landowner is aware of the dangerous condition of a tree, whether naturally grown or planted, she must take reasonable care to avoid having the tree fall and cause injury to persons or things or adjacent property. If she is not aware of the tree’s dangerous condition, she will be liable for having failed to properly inspect and maintain the tree, if it was naturally grown rather than planted, only if it borders a road, and in many jurisdictions only if the road is in an urban rather than rural area. See Dobbs § 231.
9. Distinguish non-occupiers' obligations regarding on-premises risks. Non-occupier defendants, including trespassers, may be held liable to other non-occupier entrants on the same land, including other trespassers, under the general duty of reasonable care. They are not subject to the special rules applicable to occupiers, unless they “stand in the shoes” of the occupier, as, for example, a contractor may be considered when working on the occupier's premises.

10. A general formulation of the standard of reasonable care applicable to defendant's alleged misfeasance? Looking back on the various types of situations that we have discussed involving defendants' alleged misfeasance, is it possible to articulate a generally applicable criterion of reasonableness? Consider the following formulation:

Except for situations involving
   (1) medical and, to a lesser extent, other professionals' compliance with an accepted professional practice (and sometimes in these situations) or
   (2) on-premises risks to non-invitees,
the creation of a significant foreseeable risk to others is unreasonable (negligent) unless:
   (1) the risk is acceptable from the viewpoint of those being put at risk because it is inevitable (necessary) in order for them to obtain certain desired benefits (including any direct benefits to them as participants in the defendant's risky activity and indirect benefits to them as members of society), has been reduced to the maximum extent feasible without significantly impairing the desired benefits, is significantly outweighed by the desired benefits, and (usually) is not too serious, and
   (2) if feasible, those being put at risk were adequately warned about non-obvious risks that the defendant should know would be significant or material to those being put at risk.

E. DEFENDANTS' NONFEASANCE

1. MISFEASANCE VERSUS NONFEASANCE

YANIA V. BIGAN
Supreme Court of Pennsylvania
397 Pa. 316, 155 A.2d 343 (1959)

MR. JUSTICE BENJAMIN R. JONES. A bizarre and most unusual circumstance provides the background of this appeal.

On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.
At approximately 4 p.m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall—a height of 16 to 18 feet—into the water and was drowned.

Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. Preliminary objections, in the nature of demurrers, to the complaint were filed on behalf of Bigan. The court below sustained the preliminary objections; from the entry of that order this appeal was taken.

Since Bigan has chosen to file preliminary objections, in the nature of demurrers, every material and relevant fact well pleaded in the complaint and every inference fairly deductible therefore are to be taken as true [although Bigan claimed he had tried to rescue Yania]. . . .

Appellant initially contends that Yania's descent from the high embankment into the water and the resulting death were caused "entirely" by the spoken words and blandishments of Bigan delivered at a distance from Yania. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any physical impact upon Yania. On the contrary, the only inference deductible from the facts alleged in the complaint is that Bigan, by the employment of cajolery and inveiglement, caused such a mental impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit.

Appellant next urges that Bigan, as the possessor of the land, violated a duty owed to Yania in that his land contained a dangerous condition, i.e., the water-filled cut or trench, and he failed to warn Yania of such condition. Yania was a business visitor in that he entered upon the land for a common business purpose for the mutual benefit of Bigan and himself (Restatements, Torts, § 332). As possessor of the land, Bigan would become subject to liability to Yania for any physical harm caused by any artificial or natural condition upon the land (1) if, but only if, Bigan knew or could have discovered the condition which, if known to him he should have realized involved an unreasonable risk of harm to Yania, (2) if Bigan had no reason to believe Yania would discover the condition or realize the risk of harm and (3) if he invited or permitted Yania to enter upon the land without exercising reasonable care to make the condition reasonably safe or give adequate warning to enable him to avoid the harm. [Id. § 343.] The inapplicability of this rule of liability to the instant facts is readily apparent.

The only condition on Bigan's land which could possibly have contributed in any manner to Yania's death was the water-filled cut with its high embankment. Of this condition there was neither concealment nor failure to warn, but, on the contrary, the complaint
specifically avers that Bigan not only requested Yania and Boyd to assist him in starting the pump to remove the water from the cut but "led" them to the cut itself. If this cut possessed any potentiality of danger, such a condition was as obvious and apparent to Yania as to Bigan, both coal strip-mine operators. Under the circumstances herein depicted Bigan could not be held liable in this respect.

Lastly, it is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position: Restatement, Torts, § 314. Cf: Restatement, Torts, § 322. The language of this Court in Brown v. French, 104 Pa. 604, 607, 608, is apt: "If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. . . . He voluntarily placed himself in the way of danger, and his death was the result of his own act . . . . That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself—and cannot be charged to the defendants". The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

Recognizing that the deceased Yania is entitled to the benefit of the presumption that he was exercising due care and extending to appellant the benefit of every well pleaded fact in this complaint and the fair inferences arising therefrom, yet we can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

Order affirmed.

NOTES

1. The lack of a general duty to aid or rescue. In the absence of a recognized special relationship, it remains generally true today that there is no duty to aid or rescue a person who was not put at risk by you or by any person or thing for which you are responsible. Restatement Second § 214 and comment a; Restatement Third: Physical and Emotional Harm § 37. The Restatement Second notes that this no-duty rule is not consistent with the Restatement's general aggregate risk-utility definition of negligent conduct:

Misfeasance and non-feasance. An act is negligent if the risk involved in it outweighs its utility. On the other hand, it is not enough to create a duty to take positive action for the protection of another that the burden of giving the
protection is out of all proportion small as compared to the other's need thereof. (See § 314, Comment c.) Some relationship between the parties or some precedent action is necessary to create such a duty.

Id. § 291 comment f; see id. § 314 comment c ("The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.").

2. Misfeasance, feasance and nonfeasance. The general duty to exercise reasonable care in the light of foreseeable risks to others extends to instances of misfeasance, but not (in general) to instances of nonfeasance. Literally, "misfeasance" means "wrongful or erroneous doing," while "nonfeasance" means "not doing." It is often (incorrectly) stated that the distinction between misfeasance and nonfeasance is that between action and inaction—i.e. between acts and omissions. Yet, as we have frequently seen, omissions (volitional failures to act) as well as acts are generally treated as conduct ("doings") which may be tortious. Similarly and relatedly, it is sometimes (incorrectly) stated that the difference is between causation and lack of causation. Yet, as we have also seen, omissions as well as acts can be causes of injury. Under the traditional "but for" (necessary condition) test of causation the defendant's failure to render aid often would be a "but for" cause of the plaintiff's ultimate injury—but for the failure to aid, the plaintiff would not have suffered that injury. Misfeasance rather involves, at a minimum, "feasance": the creation or enhancement by the defendant, or by some person or thing for whom or which the defendant is responsible, of a risk of injury to the plaintiff, while nonfeasance involves the defendant's failure to act to avert or reduce some risk to which the plaintiff is subject but that was not created or worsened by the defendant or by any person or thing for whom or which the defendant is responsible. See Prosser & Keeton § 56 at 373-75; Restatement Third: Physical and Emotional Harm § 37 and comment c.

3. Nonfeasance in Yania v Bigan? The court in Yania treated the defendant Bigan's conduct as non-actionable nonfeasance rather than as actionable misfeasance. Is this correct? What about Yania's widow's claim that Bigan negligently, through "cajolery and inveiglement", enticed, encouraged or even compelled Yania to jump into the pit? Do you agree with the court that treating such conduct as "actionable negligence" if it results in harm is "completely without merit"? Would Bigan necessarily be liable if such conduct were found to be negligent?

4. Dangerous conditions on the defendant's land. As the Yania court noted, Restatement § 343 allowed the possessor of land containing a dangerous condition merely to warn of the dangerous condition of which the invitee was unaware, rather than to make the condition reasonably safe. Restatement Second §§ 343 & 343A take a broader view of the possessor's duty to invitees. If a warning would foreseeably be insufficient to protect the invitee from being injured by the dangerous condition, the possessor must take reasonable care to protect the invitee. See section D.4 above. Was reasonable care taken in Yania with respect to the dangerous condition created by the pit (assuming, contrary to the court, that reasonable care was required with respect to the danger created by the pit)?

5. The duty to aid one who has been endangered by the defendant or a person or thing for whom the defendant is responsible. The Yania court, citing sections 314 and 322 of the first
Restatement, stated that Bigan had no legal duty to aid another in peril unless Bigan “was legally responsible, in whole or in part, for placing Yania in the perilous position.” Restatement § 322 treated a defendant as legally responsible for an injured plaintiff’s helpless and perilous condition only if the injury was caused by the defendant’s tortious conduct. An appended caveat stated: “The Institute expresses no opinion as to the existence or nonexistence of a similar duty to aid or protect one whom the actor’s non-tortious conduct has rendered helpless to aid or protect himself.” Restatement Second § 322 states that the duty applies if the defendant “knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm” (emphasis added). Comment a to section 322 states that the duty to render aid to the injured and helpless plaintiff applies if the injury was caused by the defendant’s conduct “or an instrumentality within his control.” Restatement Third: Physical and Emotional Harm § 39 states: “When an actor’s prior conduct, although not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent the harm.” Would Bigan have had a duty to render aid to Yania under the Second or Third Restatements?

The duty described in Restatement Second § 322 was originally created to encompass situations in which the defendant negligently injured the plaintiff but was not liable for that injury due to some defense. See, e.g., Summers v. Dominguez, 84 P.2d 237 (Cal. App. 1938), a case in which the plaintiff pedestrian’s negligence action against the defendant driver who struck him on the highway was barred by the plaintiff’s own contributory negligence, but in which the court held that the driver’s known causation of the plaintiff’s injury gave rise to a duty to stop to render aid. A driver’s duty to stop and render reasonable aid to a person whom she has injured, even if she was not negligent, generally is incorporated in criminal statutes, which often have been held also to support civil (tort) liability.

The duty to aid extends to situations in which no injury has yet occurred but an unreasonable risk of harm has been created by the defendant’s original non-tortious conduct. See Restatement Second § 321. For example, in Montgomery v. National Convoy & Trucking Co., 195 S.E. 247 (S.C. 1937), the court noted that “[o]ne may be negligent by acts of omission as well as commission” and held that a defendant whose truck non-tortiously stalled and blocked an icy highway below the crest of a hill had a duty to place a warning signal at the top of the hill to warn approaching drivers. Recall, however, that whether risks to entrants on defendant’s land due to conditions on the land are unreasonable depends, among other factors, on the status of the entrant. See Restatement Second § 314 comment f.

When the plaintiff’s situation of peril was caused by the defendant’s innocent, nontortious conduct, the duty to render aid is based on “feasance” rather than “misfeasance.” In such situations, the criteria of reasonable care are generally less demanding than the criteria that are applied when the plaintiff’s situation of peril was due to the defendant’s tortious conduct. A more subjective perspective is applied and less of a burden is imposed in terms of the required care. Moreover, in such situations the duty will arise only when the causal connection to the plaintiff’s perilous situation is direct rather than attenuated.

6. Land occupiers’ duty to aid entrants on their land. In most (almost all?) jurisdictions today, contrary to Yania, the special relationship between a land occupier and
invitees or licensees on her land would be deemed to place a duty on the land occupier to take reasonable steps to aid a person on her property whom she knows to be injured or endangered and in need of such aid, even if the person’s predicament was not caused by any condition on the defendant’s land. The Restatements declare that there is such a duty, at the least, for innkeepers with respect to their guests and any other business or other possessor of land who holds it open to the public with respect to those lawfully on the premises. Restatement Second § 314A; Restatement Third: Physical and Emotional Harm § 40(b)(3). The duty actually extends more broadly. It is most likely to exist with respect to business and public invitees, but generally also extends to social invitees and licensees. See Prosser & Keeton § 46 at 374, 376. The Restatement Third extends the duty to aid those who are helpless and in need of aid to all, including “flagrant” trespassers who reasonably appear to be imperiled and are helpless or unable to protect themselves. Restatement Third: Physical and Emotional Harm § 52(b).

SOLDANO V. O’DANIELS
Court of Appeals of California, Fifth Appellate District
141 Cal. App. 3d 443, 190 Cal. Rptr. 310 (1983)

ANDREEN, J. Does a business establishment incur liability for wrongful death if it denies use of its telephone to a good samaritan who explains an emergency situation occurring without and wishes to call the police?

This appeal follows a judgment of dismissal of . . . a complaint for wrongful death upon a motion for summary judgment. The motion was supported only by a declaration of defense counsel. Both briefs on appeal adopt the defense averments:

“This action arises out of a shooting death occurring on August 9, 1977. Plaintiff’s father [Darrell Soldano] was shot and killed by one Rudolph Villanueva on that date at defendant’s Happy Jack's Saloon. This defendant owns and operates the Circle Inn which is an eating establishment located across the street from Happy Jack's . . .

“Plaintiff alleges that on the date of the shooting, a patron of Happy Jack's Saloon came into the Circle Inn and informed a Circle Inn employee that a man had been threatened at Happy Jack's. He requested the employee either call the police or allow him to use the Circle Inn phone to call the police. That employee allegedly refused to call the police and allegedly refused to allow the patron to use the phone to make his own call. Plaintiff alleges that the actions of the Circle Inn employee were a breach of the legal duty that the Circle Inn owed to the decedent.” We were advised at oral argument that the employee was the defendant's bartender. The state of the record is unsatisfactory in that it does not disclose the physical location of the telephone—whether on the bar, in a private office behind a closed door or elsewhere. The only factual matter before the trial court was a verified statement of the defense attorney which set forth those facts quoted above. Following normal rules applicable to motions for summary judgment, we strictly construe the defense affidavit. Accordingly, we assume the telephone was not in a private office but in a position where it could be used by a patron without inconvenience to the defendant or his guests. We also assume the call was a local one and would not result in expense to defendant.
E.1. Misfeasance versus Nonfeasance 457

There is a distinction, well rooted in the common law, between action and nonaction. It has found its way into the prestigious Restatement Second of Torts (hereafter cited as Restatement), which provides in section 314: “The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.” Comment c of section 314 is instructive on the basis and limits of the rule and is set forth in the footnote.† The distinction between malfeasance and nonfeasance, between active misconduct working positive injury and failure to act to prevent mischief not brought on by the defendant, is founded on “that attitude of extreme individualism so typical of anglo-saxon legal thought.” (Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability (pt. I), 56 U. Pa. L. Rev. 217, 219-220 (1908).)

Defendant argues that the request that its employee call the police is a request that it do something. He points to the established rule that one who has not created a peril ordinarily does not have a duty to take affirmative action to assist an imperiled person. It is urged that the alternative request of the patron from Happy Jack’s Saloon that he be allowed to use defendant’s telephone so that he personally could make the call is again a request that the defendant do something—assist another to give aid. Defendant points out that the Restatement sections which impose liability for negligent interference with a third person giving aid to another do not impose the additional duty to aid the good samaritan.5

The refusal of the law to recognize the moral obligation of one to aid another when he is in peril and when such aid may be given without danger and at little cost in effort has been roundly criticized. Prosser describes the case law sanctioning such inaction as a “[refusal] to recognize the moral obligation of common decency and common humanity” and characterizes some of these decisions as “shocking in the extreme . . . [¶] Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers.” (Prosser, Law of Torts (4th ed. 1971) § 56, pp. 340-341, fn. omitted.) A similar rule has been termed “morally questionable” by our Supreme Court. (Tarasoff v. Regents of University of California, 551 P.2d 334, ___ n.5 (Cal. 1976).) . . .

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4† . . . The origin of the rule lay in the early common law distinction between action and inaction, or ‘misfeasance’ and ‘non-feasance.’ In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

“The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.” (Rest. 2d Torts, supra, § 314, com. c.)

5One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.” (Rest. 2d Torts, § 327.)
As noted in Tarasoff, supra, the courts have increased the instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule. . . .

Here there was no special relationship between the defendant and the deceased. It would be stretching the concept beyond recognition to assert there was a relationship between the defendant and the patron from Happy Jack’s Saloon who wished to summon aid. But this does not end the matter.

It is time to reexamine the common law rule of nonliability for nonfeasance in the special circumstances of the instant case.

Besides well-publicized actions taken to increase the severity of punishments for criminal offenses, the Legislature has expressed a societal imperative to diminish criminal activity. Thus, in 1965, it enacted a provision for indemnification of citizens for injuries or damages sustained in crime suppression efforts. (Former Pen. Code, § 13600.) In that section the Legislature declared that “[d]irect action on the part of private citizens in preventing the commission of crimes against the person or property of others, or in apprehending criminals, benefits the entire public.” The section does not require direct action by a private citizen; it merely recognizes the societal benefit if one does so. It was designed to stimulate active public involvement in crime control. . . .

The Legislature has recognized the importance of the telephone system in reporting crime and in summoning emergency aid. Penal Code section 384 makes it a misdemeanor to refuse to relinquish a party line when informed that it is needed to call a police department or obtain other specified emergency services. This requirement, which the Legislature has mandated to be printed in virtually every telephone book in this state, may have wider printed distribution in this state than even the Ten Commandments. It creates an affirmative duty to do something—to clear the line for another user of the party line—in certain circumstances. . . .

The above statutes are cited without the suggestion that the defendant violated a statute which would result in a presumption of a failure to use due care under Evidence Code section 669. Instead, they . . . demonstrate that “that attitude of extreme individualism so typical of anglo-saxon legal thought” may need limited reexamination in the light of current societal conditions and the facts of this case to determine whether the defendant owed a duty to the deceased to permit the use of the telephone.

[The court discussed the applicability in this case of the factors listed in Rowland v Christian, discussed in section D.4 above, as being relevant to the recognition of a duty of care, including “the moral blame attached to the defendant's conduct”.

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9The moral right of plaintiff’s decedent to have the defendant’s bartender permit the telephone call is so apparent that legal philosophers treat such rights as given and requiring no supporting argument. (See Dworkin, Taking Rights Seriously 99 (1978).) The concept flows from the principle that each member of a community has a right to have each other member treat him with the minimal respect due a fellow human being. (Id. at 98.)
As the Supreme Court has noted, the reluctance of the law to impose liability for nonfeasance, as distinguished from misfeasance, is in part due to the difficulties in setting standards and of making rules workable. (Tarasoff, supra.)

Many citizens simply “don't want to get involved.” No rule should be adopted which would require a citizen to open up his or her house to a stranger so that the latter may use the telephone to call for emergency assistance. As Mrs. Alexander in Anthony Burgess' A Clockwork Orange learned to her horror, such an action may be fraught with danger. It does not follow, however, that use of a telephone in a public portion of a business should be refused for a legitimate emergency call. Imposing liability for such a refusal would not subject innocent citizens to possible attack by the "good samaritan," for it would be limited to an establishment open to the public during times when it is open to business, and to places within the establishment ordinarily accessible to the public. Nor would a stranger's mere assertion that an "emergency" situation is occurring create the duty to utilize an accessible telephone because the duty would arise if and only if it were clearly conveyed that there exists an imminent danger of physical harm. (See Rest. 2d Torts, supra, § 327.)

Such a holding would not involve difficulties in proof, overburden the courts or unduly hamper self-determination or enterprise.

A business establishment such as the Circle Inn is open for profit. The owner encourages the public to enter, for his earnings depend on it. A telephone is a necessary adjunct to such a place. It is not unusual in such circumstances for patrons to use the telephone to call a taxicab or family member.

We acknowledge that defendant contracted for the use of his telephone, and its use is a species of property. But if it exists in a public place as defined above, there is no privacy or ownership interest in it such that the owner should be permitted to interfere with a good faith attempt to use it by a third person to come to the aid of another.

The facts of this case come very nearly within section 327 of the Restatement (see fn. 5, ante) which provides that if one knows that a third person is ready to give aid to another and negligently prevents the third person from doing so, he is subject to liability for harm caused by the absence of the aid. The scope note for [the topic containing this section] provides that the "actor can prevent a third person from rendering aid to another in many ways including the following: . . . second, by interfering with his efforts to give aid; third, by injuring or destroying the usefulness of a thing which the third person is using to give aid or by otherwise preventing him from using it . . . ." (italics added.)

We conclude that the bartender owed a duty to the plaintiff's decedent to permit the patron from Happy Jack's to place a call to the police or to place the call himself.

It bears emphasizing that the duty in this case does not require that one must go to the aid of another. That is not the issue here. The employee was not the good samaritan intent on aiding another. The patron was.
It would not be appropriate to await legislative action in this area. The rule was fashioned in the common law tradition, as were the exceptions to the rule. To the extent this opinion expands the reach of section 327 of the Restatement, it represents logical and needed growth, the hallmark of the common law. It does not involve the sacrifice of other respectable interests. . . .

The possible imposition of liability on the defendant in this case is not a global change in the law. It is but a slight departure from the “morally questionable” rule of nonliability for inaction absent a special relationship. It is one of the predicted “inroads upon the older rule.” (Rest. 2d Torts, supra, § 314, com. c.) It is a logical extension of Restatement section 327 which imposes liability for negligent interference with a third person who the defendant knows is attempting to render necessary aid. However small it may be, it is a step which should be taken.

We conclude there are sufficient justiciable issues to permit the case to go to trial and therefore reverse.

NOTES

1. Soldano: major or minor change in doctrine? Did the bartender's conduct in Soldano constitute misfeasance or nonfeasance? Was it the sort of conduct addressed by Restatement Second § 327? What result if the bartender had physically blocked an actual physical attempt to use the phone? How large an exception, if any, is the court's holding in Soldano to the no-duty rule in nonfeasance situations where there is no special relationship?

2. MISFEASANCE THROUGH Misperformance of a Voluntary Undertaking to Aid

Bell v Hutsell
Supreme Court of Illinois
955 N.E.2d 1099 (2011)

Justice KARMEIER delivered the judgment of the court, with opinion. . . .

¶ 3 This case arises out of the death of Daniel Bell, age 18, who died in a single-car accident after he had allegedly consumed alcoholic beverages at the residence of defendants in the course of a party organized and hosted by the defendants' son, Jonathan. Plaintiff's second amended complaint implicitly acknowledges that the defendants did not provide alcohol for underage consumption, and in fact alleges that defendants informed Jonathan both that alcohol consumption would not be tolerated and that they would monitor the party to see that underage partygoers did not possess or imbibe alcoholic beverages. Plaintiff alleges, however, that the Hutsells were aware of underage consumption on their premises at prior parties; that their son, Jonathan, had previously pled guilty to underage consumption; that alcohol was brought to the party in question and underage guests drank, excessively, with the Hutsells' knowledge—in some instances in their presence—without objection or consequence; and that Jerry Hutsell 'on multiple occasions spoke to a number of underage partygoers who had been drinking alcohol.
and requested that if they had been drinking at the party not to drive a vehicle when leaving. The complaint states that Daniel Bell drank alcohol "in full and open view of the defendants," and that he later walked to his car, "began driving," and "crashed his car into a tree," resulting in his death.

¶ 4 With respect to plaintiff's theory of a voluntary undertaking, advanced in counts I through III of the complaint, it was alleged generally, without additional factual reference, that defendants "voluntarily undertook the duty" to prohibit underage drinking and possession of alcoholic beverages on their premises and to inspect, monitor, and supervise partygoers under the age of 21 to those ends.

¶ 5 The complaint then recites various respects in which defendants were "negligent," most of which mirror the general allegations of the complaint, without additional factual elaboration, with the exception of a statement in paragraph 50(I) of the complaint, which includes an allegation that defendants were negligent in "failing to comply with their own verbal directions to the party guests to ensure that underage drinking and driving thereafter from their home not occur." (Emphasis added.) Language with respect to the preclusion of driving after the party does not appear in any statements attributed to defendants when the alleged voluntary undertaking was communicated to their son. If the allegation is a reference to the complaint's recitation that Jerry Hutsell on multiple occasions spoke to a number of underage partygoers who had been drinking alcohol and requested that if they had been drinking at the party not to drive a vehicle when leaving," then it inappropriately equates a "request" with "verbal directions" aimed at ensuring compliance.

¶ 6 . . . Pertinent to this appeal, defendants moved to dismiss counts I, II, and III, the voluntary undertaking counts, on the basis that defendants owed Daniel no duty because there is no social host liability in Illinois and the voluntary undertaking theory was simply a way of trying to circumvent the rule against social host liability. The trial court granted the motion to dismiss with prejudice, dismissing plaintiff's nine-count complaint in its entirety. . . .

¶ 12 Under a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking. The theory is narrowly construed. We have looked to the Restatement (Second) of Torts (Restatement (Second) of Torts §§ 323 through 324A (1965)) in defining the parameters of liability pursuant to this theory.

¶ 13 The relevant sections of the Restatement, as identified by the plaintiff, provide as follow:

§ 323. Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.
§ 324A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts §§ 323, 324A (1965).

¶ 14 Plaintiff contends that section 323 or 324A of the Restatement could reasonably apply to these facts. Plaintiff argues that the allegations of her complaint, "[r]easonably construed, * * * show that defendants did not only voluntary [sic] undertake to monitor, inspect and supervise their son, but also the party guests, including Daniel. Daniel and other party guests were 'another' within the meaning of Section 323." Alternatively, plaintiff submits: "[I]f the undertaking was to render services to their son as defendants argue, defendants should have recognized that the undertaking was necessary for the protection of third persons, the party guests, including Daniel." . . .

¶ 17 We acknowledge—and reject—defendants' persistent argument that plaintiff's attempt to state a cause of action based on a voluntary undertaking is foreclosed by the rule against social host liability. It is clear enough, from even a casual reading of this court's decision in [Wakulich v. Mraz, 785 N.E.2d 843 (Ill. 2003)] that such a contention is meritless. In Wakulich, the plaintiff alleged that a pair of brothers, social hosts, provided alcohol to the plaintiff's 16-year-old daughter, Elizabeth, who became intoxicated as a result and lost consciousness. She began "vomiting profusely and making gurgling sounds." The hosts removed her soiled blouse and provided a pillow under her head to prevent aspiration, but they did not drive her home or contact her parents, and they prevented others at the home from calling 911 or seeking medical attention. Elizabeth died the following day, after the brothers' father allegedly ordered them to remove her from the house. . . .

¶ 18 What the court found significant in Wakulich were allegations that defendants, after Elizabeth had lost consciousness and become helpless, had "placed [Elizabeth] in the family room; checked on her periodically; took measures to prevent aspiration; removed her soiled blouse; and prevented other persons present in the home from intervening in Elizabeth's behalf." What was critical to this court's disposition in Wakulich were allegations that "defendants effectively took complete and exclusive charge of Elizabeth's care after she became unconscious." In Wakulich, this court agreed with the "general proposition" that "where * * * a host merely permits an intoxicated guest to 'sleep it off' on the host's floor, the host does not thereby assume an open-ended duty to care for the guest and assess the guest's medical condition"; however, the court found that defendants had done more, assuming a duty to the
helpless Elizabeth, pursuant to section 324 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 324 (1965)), by their affirmative actions, taking “complete and exclusive charge of [her] care after she became unconscious.”

22 According to plaintiff's complaint, on the date of the party the defendants "voluntarily undertook a duty to prohibit their son and his party guests who were under the age of 21 from drinking alcoholic beverages of any kind at their residence" and to that end also undertook to “monitor and supervise * * * to ensure that none of the party guests who were under the age of 21 would consume alcoholic beverages.” The complaint recites that the alleged undertaking was communicated to defendants' son Jonathan, but there is no claim that the defendants' intent was communicated to anyone else. It is alleged that defendants were present, at times, in the portion of their residence where the party was ongoing, and where plaintiff alleges that underage consumption of alcohol was obviously taking place, that defendants witnessed underage possession and consumption of alcohol; yet, they took no actions to prohibit it in furtherance of the aim of their alleged undertaking.

23 . . . Comment a to [Restatement Second] section 323 references comment d thereof. There, the distinction between “misfeasance” (negligent performance of a voluntary undertaking, as alleged in *Wakulich*) and “nonfeasance” (omission to perform a voluntary undertaking) is discussed as it pertains to tort liability. The commentators observe that the “modern law has * * * witnessed a considerable weakening and blurring of the distinction, in situations where the plaintiff's reliance upon the defendant's promise has resulted in harm to him." (Emphasis added.) Decisions of our appellate court have also underscored the necessity of reliance if a defendant is to be held responsible for nonfeasance . . . .

24 The alleged recipient's change of position, or lack thereof, may also be a factor affecting duty and liability when an actor terminates services voluntarily undertaken. Comment c of [Restatement Second] section 323 addresses an actor's ability to terminate services voluntarily undertaken:

The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him.

25 With these principles in mind, we first look to the factual allegations of plaintiff's complaint to ascertain the scope of the duty plaintiff may reasonably claim defendants intended to undertake, and to determine whether performance was commenced.

26 The facts alleged by plaintiff in this case suggest that defendants expressed an intention to prohibit underage possession and consumption of alcoholic beverages at the party hosted by their son at their residence. Although plaintiff states that monitoring the possession and consumption of alcohol at the party was part of the duty voluntarily undertaken by defendants, monitoring alone obviously did nothing to ensure “the protection of the other's person,” or “the protection of a third person,” pursuant to the requisites of sections 323 and
324A of the Restatement. . . . Plaintiff alleges that defendants were aware of underage drinking, and took no action. Given these facts, for there to be a substantial step in pursuit of the alleged undertaking, there must have been some affirmative action taken in an attempt to prohibit possession and consumption of alcohol, the ultimate objective of the undertaking. No affirmative action is alleged here. Defendants did not attempt to confiscate alcoholic beverages in the possession of underage partygoers; they did not ask offenders to leave; they did not call a halt to the party—they did nothing. In our view, the facts alleged do not support an inference that defendants commenced substantive performance of their intended undertaking; however, even if we were to assume, arguendo, such an inference could be reasonably drawn, the alleged circumstances indicate the intent to perform was abandoned.

¶ 27 Moreover, even if we were to find sufficient allegations of a duty voluntarily assumed, pursuant to which performance was commenced, the facts alleged do not provide a basis for liability. The factual allegations of plaintiff's complaint do not support an inference that defendants' stated intent and subsequent inaction increased the risk of harm to Daniel or other partygoers, nor does it evince reliance or change of position on the basis of defendants' expressed intent. According to the facts set forth in plaintiff's complaint, defendants' intention to prohibit underage possession and consumption of alcoholic beverages was expressed only to their son, Jonathan. There is no allegation that Jonathan communicated defendants' intention to anyone else. Thus, there are no facts alleged in the complaint that would support an inference of reliance or change of position on the part of any guests attending the party or, for that matter, any "other" person owing them some unarticulated, undefined duty. Plaintiff's undeveloped suggestion that Jonathan might be the "other" for purposes of section 324(b) liability fails to account for the fact that the extent of Jonathan's innate liability to the guests—having undertaken no additional duty—is no greater than any other host in this situation. He owed Daniel no duty to prevent Daniel's possession or consumption of alcohol.

¶ 28 Because defendants in this case took no affirmative acts to effect the aim of their expressed intention, i.e., prohibition, and no one changed position as a result of their statement, relied upon it, or was put at "increase[d] * * * risk of * * * harm" or "in a worse position" because of it (see Restatement (Second) of Torts § 323 (1965)), the factual allegations of this case do not support a basis for finding a duty undertaken or liability for violation of any such duty. Indeed, under these circumstances, it would be illogical, and unsound policy, to hold that defendants could be liable: illogical, because defendants' failure to act on their stated intention did not in any way affect the events as they would have unfolded had the intent to act not been verbalized; unsound policy, because the imposition of a duty and liability in this situation would only serve as a deterrent to those who would consider volunteering assistance to others, in effect punishing people for thinking out loud. At most, the allegations of plaintiff's complaint suggest that defendants failed to follow through on an expressed intent to act that might have protected Daniel—who was legally underage for the consumption of alcohol, but an adult for most other purposes—against his own volitional acts, or that defendants simply

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1We note, plaintiff's complaint contains summary allegations that defendants were "negligent" in inspecting and monitoring the activities on the premises; however, the factual recitations of plaintiff's complaint would actually refute that allegation as plaintiff repeatedly states in her complaint that defendants witnessed and were aware of underage possession and consumption of alcoholic beverages on the premises.
abandoned their original undertaking, whether it was intended for their own protection from the perceived potential of liability, or a genuine concern for the safety of Daniel and other partygoers. We conclude the allegations of plaintiff's complaint are insufficient to state a legal duty and a basis for liability on the part of defendants under either section 323 or 324A of the Restatement.

¶ 29 We note that the facts alleged in this case bear little similarity to those this court addressed in *Wakulich* and *Simmons v. Homatas*, 925 N.E.2d 1089 (Ill. 2010) (employees of club ejected highly intoxicated individual, placed him in his vehicle, and directed him to drive away), both of which were discussed in the parties' briefs to a greater or lesser extent for diverse reasons. In those cases, this court applied Restatement principles, as we have done here. However, in each of those cases defendants' affirmative conduct, amounting to an assertion of control over an inebriated and significantly impaired person, increased the risk of harm to that person and/or created a risk of harm to others. Thus, different considerations applied. Here, where defendants owed Daniel no duty to prohibit his voluntary possession or consumption of alcohol, and took no action to do so pursuant to their verbalized intent, which was communicated only to their son, we have a case of true nonfeasance. We think the facts and analysis of this case point up the continuing significance of a distinction between misfeasance and nonfeasance.

NOTES

1. *Subsequent legislation*. Reacting to the *Bell* decision, the Illinois state legislature in 2012 enacted a law, effective January 1, 2013, which makes subject to liability for a Class A misdemeanor anyone who knowingly authorizes or permits underage possession or drinking of alcohol in a residence that he or she occupies, regardless of whether he or she is present, and subject to liability for a Class 4 felony if the drinking results in great bodily harm or death to any person. 235 ILCS 5/6-16(c). Many but not all states have similar social host liability.

2. *Defendant's failure to carry through on a voluntary undertaking to aid*. A defendant's initial nonobligatory undertaking to aid another becomes misfeasance when there is foreseeable, reasonable and detrimental reliance on the continuation of the undertaking by the plaintiff or a third party (potential rescuer). See Restatement Third: Physical and Emotional Harm § 42(b) and comment f, § 43. As the *Bell* court notes, such reasonable detrimental reliance does not exist when the defendant provides adequate notice of her discontinuation of the undertaking. Moreover, even in the absence of such notice, it often may be unreasonable to rely on the defendant's continuing the undertaking—e.g., because the defendant is known to be unreliable, or because the plaintiff is not an intended beneficiary of the defendant's conduct. The plaintiff also must demonstrate that he was made worse off than he otherwise would have been absent such reasonable reliance. If he had no alternative means of protecting himself, detrimental reliance does not exist. However, the courts sometimes fail to ensure that each of these requirements has been satisfied. See, e.g., *Marsallis v. La Salle*, 94 So. 2d 120 (La. App. 1957) (defendants held liable for letting cat, which had scratched plaintiff, escape before it had been determined whether cat was rabid, despite promise to keep cat in, thus causing plaintiff to undergo painful rabies treatment ultimately determined to have been unnecessary; it does not appear that plaintiff was required to prove that, had she not relied on the defendants' promise, she would have had other means of securing the cat for observation). Which of the
requirements for establishing liability for breach of a voluntary undertaking to aid were missing in Bell?

3. Defendant’s voluntary undertaking to aid which worsens plaintiff’s situation other than through plaintiff’s detrimental reliance. See the Simmons case discussed and distinguished in the Bell case and Black v. New York, N.H. & H.R.R., 79 N.E. 797 (Mass. 1907), in which the defendant was held liable for serious injuries suffered by the very intoxicated plaintiff when he fell down a flight of stairs. Defendant's employees had removed the plaintiff from the commuter train at his stop and carried him halfway up the flight of stairs before leaving him. The court stated:

They were under no obligation to remove him from the car, or to provide for his safety after he left the car [on his own]. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition.

Id. at 798. See Restatement Second § 324; Restatement Third: Physical and Emotional Harm § 42(a), § 43(a), § 44; Zelenko v. Gimbel Bros., 287 N.Y.S. 134 (N.Y. Sup. 1935) (defendant store owner moved plaintiff customer who fell ill into back room without providing further aid, thereby depriving plaintiff of likely aid by other customers); and the Simmons case discussed by the court in Bell.

4. Negligent performance of voluntary undertaking which did not make plaintiff worse off than if there had been no voluntary undertaking. The negligent performance of a voluntary undertaking which results in harm to another is misfeasance, for which the negligent party is liable even if the injured party is no worse off, and perhaps even better off, than he would have been absent the voluntary undertaking. For example, unless immunized by a “Good Samaritan” statute, a good samaritan who picks up an injured person on the side of the road and causes further injury to the injured person by negligent driving on the way to the hospital, is liable for such further injury even if the injured person would have died if he had not been picked up by the good samaritan. Restatement Third: Physical and Emotional Harm § 44(a).

FARWELL v. KEATON
Supreme Court of Michigan
396 Mich. 281, 240 N.W.2d 217 (1976)

LEVIN, J. There is ample evidence to support the jury determination that David Siegrist failed to exercise reasonable care after voluntarily coming to the aid of Richard Farwell and that his negligence was the proximate cause of Farwell's death. . . .

On the evening of August 26, 1966, Siegrist and Farwell drove to a trailer rental lot to return an automobile which Siegrist had borrowed from a friend who worked there. While waiting for the friend to finish work, Siegrist and Farwell consumed some beer.
Two girls walked by the entrance to the lot. Siegrist and Farwell attempted to engage them in conversation; they left Farwell's car and followed the girls to a drive-in restaurant down the street.

The girls complained to their friends in the restaurant that they were being followed. Six boys chased Siegrist and Farwell back to the lot. Siegrist escaped unharmed, but Farwell was severely beaten. Siegrist found Farwell underneath his automobile in the lot. Ice was applied to Farwell's head. Siegrist then drove Farwell around for approximately two hours, stopping at a number of drive-in restaurants. Farwell went to sleep in the back seat of his car. Around midnight Siegrist drove the car to the home of Farwell's grandparents, parked it in the driveway, unsuccessfully attempted to rouse Farwell, and left. Farwell's grandparents discovered him in the car the next morning and took him to the hospital. He died three days later of an epidural hematoma.

At trial, plaintiff [Farwell's father] contended that had Siegrist taken Farwell to the hospital, or had he notified someone of Farwell's condition and whereabouts, Farwell would not have died. A neurosurgeon testified that if a person in Farwell's condition is taken to a doctor before, or within half an hour after, consciousness is lost, there is an 85 to 88 per cent chance of survival. Plaintiff testified that Siegrist told him that he knew Farwell was badly injured and that he should have done something.

The jury returned a verdict for plaintiff and awarded $15,000 in damages. The Court of Appeals reversed, finding that Siegrist had not assumed the duty of obtaining aid for Farwell and that he neither knew nor should have known of the need for medical treatment. . . .

Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse. "[I]f the defendant does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility. * * * Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests." Prosser, supra, § 56, pp 343-344. "Where performance clearly has been begun, there is no doubt that there is a duty of care." Id 346.

In a case such as the one at bar, the jury must determine, after considering all the evidence, whether the defendant attempted to aid the victim. If he did, a duty arose which required defendant to act as a reasonable person. . . .

There was ample evidence to show that Siegrist breached a legal duty owed Farwell. Siegrist knew that Farwell had been in a fight, and he attempted to relieve Farwell's pain by applying an ice pack to his head. While Farwell and Siegrist were riding around, Farwell crawled into the back seat and laid down. The testimony showed that Siegrist attempted to rouse Farwell after driving him home but was unable to do so.

In addition, Farwell's father testified to admissions made to him by Siegrist:

"Q: Witness, just before the jury was excused, I asked whether you had any conversation with Mr. Siegrist after this event occurred. You answered, 'Yes, the day after in
the living room of Mrs. Grenier's [the deceased's mother's] home. Then, the jury was excused, and we made a special record, and now I would like to ask you some questions that I asked and that you answered out of the presence of the jury.

"A: Yes.
"Q: What did Mr. Siegrist say, how did the conversation go?
"A: I asked him why he left Ricky [the deceased] in the driveway of his grandfather's home.
"Q: What did he say?
"A: He said, 'Ricky was hurt bad, I was scared.' I said, 'Why didn't you tell somebody, tell his grandparents?' He said, 'I know I should have, I don't know.'" (Emphasis added.)

The question at trial came down to whether Siegrist acted reasonably under all the circumstances. "The law of negligence is that an actor is held to the standard of a reasonable man. The determination of the facts upon which the judgment of reasonableness is based is admittedly for the jury." [Citation omitted.]

The jury in this case found that Siegrist did not act reasonably, and that his negligence was the proximate cause of Farwell's death.

"In considering the question whether defendant was entitled to a directed verdict, the testimony must be construed as strongly as possible in favor of the plaintiff. *** The specific inquiry is whether this Court can say, as a matter of law, giving to plaintiff's proofs the strongest probative force to which they are entitled, that the evidence was not sufficient to justify submitting to the jury the questions of defendant's negligence and its knowledge or notice of the situation." [Citation omitted.]

The Court of Appeals is reversed and the verdict of the jury reinstated.

FITZGERALD, J. [dissenting] The unfortunate death of Richard Farwell prompted this wrongful death action brought by his father against defendant, David Siegrist, a friend who had accompanied Farwell during the evening in which the decedent received injuries which ultimately caused his death three days later. The question before us is whether the defendant, considering his relationship with the decedent and the activity they jointly experienced on the evening of August 26-27, 1966, by his conduct voluntarily or otherwise assumed . . . the duty of rendering medical or other assistance to the deceased. We find that defendant [did not assume] such a duty.

The facts of the case are accurately set forth in the Court of Appeals opinion.

"Factually, it appears that, on August 26, 1966, Richard Murray Farwell, deceased 18-year-old son of the plaintiff, visited the home of his friend, David Siegrist, a 16-year-old; that evening they drove to a trailer rental lot, where Siegrist was returning an automobile he had borrowed from a friend who was employed by the rental agency. 

"Siegrist and Farwell planned to wait in the car until the friend had finished work and then 'drive around,' stopping at various restaurants and drive-ins. While they were waiting, Siegrist estimated that they consumed 'four or five' beers each."
“Shortly before nine o’clock p.m., two teenage girls walked past the car. After an unsuccessful attempt to engage them in conversation, Farwell left the car and followed the girls; Siegrist got out of the car and followed Farwell.

“When the girls reached a restaurant a short distance down the street, they apparently complained to those present that they were being followed. Defendants Ingland, Brock, Donald Keaton, Daniel Keaton, and at least two others in the restaurant began to chase Farwell and Siegrist, both of whom ran back to the trailer lot.

“Siegrist escaped by ducking into the trailer rental office, where he requested those inside to assist Farwell. They stepped out of the office and were confronted by the group which had been chasing Siegrist and Farwell. The two groups faced each other, but no violence ensued, and the two groups scattered.

“It was then discovered for the first time that Farwell had been caught and beaten by those who had been pursuing him and Siegrist; Farwell was found underneath his automobile in the lot.

“Farwell was taken to the trailer rental office, where Siegrist gave him a plastic bag full of ice for his injuries. Shortly thereafter, Farwell and Siegrist left the rental office and, between ten o’clock p.m. and midnight, they visited four different drive-in restaurants. While enroute from the third to the fourth restaurant, Farwell stated that he wanted to lie down, climbed into the back seat, and went to sleep. Around midnight, Siegrist drove the car to the home of Farwell’s grandparents, parked it in the driveway, and attempted to rouse Farwell. When the latter merely made a sound as if ‘in a deep sleep’, Siegrist left with a friend who had followed him to the grandparents’ house. The next morning, Farwell was found by his grandparents, apparently taken to a hospital, and died of an epidural hematoma.

“At the close of plaintiff’s proofs, defendant Siegrist moved for a directed verdict on the grounds that he had no duty to obtain medical assistance for Farwell as a matter of law. In the alternative, the motion was based upon the proposition that plaintiff failed to establish that any conduct on the part of Siegrist proximately caused Farwell’s death. The motion was denied.” 51 Mich App 585, 587-588.

Following the jury verdict of $15,000 in favor of the plaintiff, defendant, arguing that the verdict was inconsistent with the weight of the evidence, moved for and was denied a judgment notwithstanding the verdict. The decision of the trial court was reversed by the Court of Appeals which found that the defendant never assumed, voluntarily or otherwise, the duty of obtaining medical assistance for the deceased. The Court stated that the facts in no way indicated that defendant knew, or should have known, that immediate medical attention was required. Consequently, as a matter of law the Court determined that defendant was under no duty to obtain medical treatment for the decedent.

Plaintiff argues that once having voluntarily undertaken the duty of caring for decedent, defendant could not discontinue such assistance if, in so doing, he left the decedent in a worse position than when such duty was assumed. Defendant’s knowledge of the seriousness of decedent’s injury and the failure to advise decedent’s grandparents, the close personal relationship that existed between defendant and the decedent, and the supposition that the decedent relied upon defendant for assistance leads plaintiff to conclude that defendant did not act “with the reasonable prudence and care of a reasonable man in the same or like circumstances”. Defendant’s position is that there was no volunteered assumption of duty to care for the safety of the decedent. He argues that the facts within his knowledge on the
evening of August 26, 1966, and the evidence introduced at trial failed to establish that defendant should have seen that Richard Farwell had suffered a potentially fatal injury requiring immediate attention.

Defendant did not voluntarily assume the duty of caring for the decedent's safety. Nor did the circumstances which existed on the evening of August 26, 1966, impose such a duty. Testimony revealed that only a qualified physician would have reason to suspect that Farwell had suffered an injury which required immediate medical attention. The decedent never complained of pain and, in fact, had expressed a desire to retaliate against his attackers. Defendant's inability to arouse the decedent upon arriving at his grandparents' home does not permit us to infer, as does plaintiff, that defendant knew or should have known that the deceased was seriously injured. While it might have been more prudent for the defendant to insure that the decedent was safely in the house prior to leaving, we cannot say that defendant acted unreasonably in permitting Farwell to spend the night asleep in the back seat of his car.

The Court of Appeals properly decided as a matter of law that defendant owed no duty to the deceased.

COLEMAN, J., concurred with FITZGERALD, J.

NOTES

1. A voluntary undertaking to aid? Did Siegrist voluntarily undertake to aid Farwell? If so, when? Can someone voluntarily undertake to protect or aid another with respect to some risk if she is not aware that the other is or will be subject to that risk? At what point was Siegrist aware that Farwell was in very bad shape and in need of (further) medical attention? Assuming that Siegrist at some point(s) did voluntarily undertake to aid Farwell, what did he undertake to do, did he fail to carry through on the undertaking, and did such failure make Farwell worse off? Did he otherwise behave negligently in the course of his voluntary undertaking, with resultant injury or increased risk to Farwell?

2. The duty to aid a person whom you non-tortiously put at risk. If there was no voluntary undertaking to aid Farwell by Siegrist, no negligent performance of any voluntary undertaking, and no other conduct of his that tortiously made Farwell worse off, might he still be liable using a different theory of liability? Did Siegrist, albeit non-tortiously, contribute in

2 It is at this point—plaintiff's unsuccessful attempt to arouse the decedent in the driveway—that counsel, during oral argument, believes that defendant volunteered to aid the decedent. Yet no affirmative act by defendant indicated that he assumed the responsibility of rendering assistance to the decedent. Consequently, there could be no discontinuance of aid or protection which left decedent in a worse position than when the alleged "volunteering" occurred. This would make operative the concession of plaintiff that where no duty is owed, the refusal to act cannot form the basis for an action in negligence.

3 Defendant had no way of knowing that it was the severity of the head injury suffered by the decedent which caused him to crawl in the back seat and apparently fall asleep. The altercation combined with the consumption of several beers could easily permit defendant to conclude that decedent was simply weary and desired to rest.
any way to Farwell’s risky, helpless situation? If so, would that be enough to hold him liable for failing to inform Farwell’s grandparents of Farwell’s condition or taking other steps to aid Farwell? Should the plaintiffs also have to prove that Siegrist was aware of the severity of Farwell’s condition, or knew facts which should have made him aware of that condition, or should it be enough for them to prove that the ordinary (adult?) person would have been aware of Siegrist’s condition? (Was Siegrist an adult? Should it matter?) Was there sufficient proof on any of these matters?

3. NONFEASANCE: SPECIAL RELATIONSHIPS

Rather than eliminating or modifying the general rule that there is no duty to aid one whom you did not put at risk, the courts have created a growing list of exceptions to that general rule based on “special relationships” between the defendant and the plaintiff. Such special relationships have been found to exist between, e.g., spouses, parents and their minor children, those acting “in loco parentis” for minors (guardians, schools, babysitters, etc.), employers and their employees, innkeepers and their guests, common carriers and their passengers, those with custody of others (e.g., prisons and their inmates, hospitals and mental institutions and their patients), owners and possessors of land and entrants on their land, and co-adventurers in dangerous activities. See Restatement Second § 314A and caveat, § 314B; Restatement Third: Physical and Emotional Harm § 40. Except for the first and last mentioned categories, the duty based on the special relationship runs in only one direction: a duty by the first party to exercise reasonable care to protect and/or aid the second party. The extent of the duty (nature and degree of care) varies depending on the nature and strength of the relationship.

NOTE

1. Special relationship duties. Is there a general principle or set of principles that explains and justifies which relationships will give rise to a duty to aid the other party in the relationship? Consider the court’s attempt to state such a principle in Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, ___ (D.C. Cir. 1970), in which the court held that a landlord had an obligation to take reasonable care to protect its tenants from criminal assaults in common areas of the building:

In all, the theory of liability is essentially the same: that since the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated.

Does this rationale explain all of the duty-imposing special relationships described above?
LEVIN, J. [The facts in this case and the judges' discussions of the voluntary-undertaking issue are presented in section E.2 above.] We are also of the opinion that Siegrist, who was with Farwell the evening he was fatally injured and, as the jury found, knew or should have known of his peril, had an affirmative duty to come to Farwell's aid.1

... Courts have been slow to recognize a duty to render aid to a person in peril. Where such a duty has been found, it has been predicated upon the existence of a special relationship between the parties;4 in such a case, if defendant knew or should have known of the other person's peril, he is required to render reasonable care under all the circumstances.

... The Sixth Circuit Court of Appeals, in Hutchinson v Dickie, 162 F.2d 103, 106 (CA 6, 1947), said that a host had an affirmative duty to attempt to rescue a guest who had fallen off his yacht. The host controlled the only instrumentality of rescue. The Court declared that to ask of the host anything less than that he attempt to rescue his guest would be "so shocking to humanitarian considerations and the commonly accepted code of social conduct that the courts in similar situations have had no difficulty in pronouncing it to be a legal obligation".

Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning. Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell's condition and whereabouts would be "shocking to humanitarian considerations" and fly in the face of "the commonly accepted code of social conduct". "[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists." [Citations omitted.]

Farwell and Siegrist were companions engaged in a common undertaking; there was a special relationship between the parties. Because Siegrist knew or should have known of the peril Farwell was in and could render assistance without endangering himself he had an affirmative duty to come to Farwell's aid.

The Court of Appeals is reversed and the verdict of the jury reinstated.

1The trial judge instructed the jury to determine whether Siegrist had voluntarily undertaken to render aid and, if he had, whether he acted reasonably in discharging that duty. Whether Siegrist be charged with the duty of a voluntary rescuer or the duty of a companion, the standard of care—whether he acted reasonably under all the circumstances—is the same and the instruction given was adequate.

4Carriers have a duty to aid passengers who are known to be in peril; employers similarly are required to render aid to employees; innkeepers to their guests; a jailer to his prisoner. [¶] Maritime law has imposed a duty upon masters to rescue crewmen who fall overboard. [¶] See Prosser, Torts, supra; 2 Harper & James, supra, pp 1048-1049.
FITZGERALD, J. [dissenting] [Review the portions of Justice Fitzgerald's dissent extracted in section E.2 above.] The close relationship between defendant and the decedent is said to establish a legal duty upon defendant to obtain assistance for the decedent. No authority is cited for this proposition other than the public policy observation that the interest of society would be benefited if its members were required to assist one another. This is not the appropriate case to establish a standard of conduct requiring one to legally assume the duty of insuring the safety of another. Recognizing that legal commentaries have expressed moral outrage at those decisions which permit one to refuse aid to another whose life may be in peril, we cannot say that, considering the relationship between these two parties and the existing circumstances, defendant acted in an unreasonable manner.  

Plaintiff believes that a legal duty to aid others should exist where such assistance greatly benefits society and only a reasonable burden is imposed upon those in a position to help. He contends further that the determination of the existence of a duty must rest with the jury where questions of foreseeability and the relationship of the parties are primary considerations.

It is clear that defendant's nonfeasance, or the "passive inaction or a failure to take steps to protect [the decedent] from harm" is urged as being the proximate cause of Farwell's death. We must reject plaintiff's proposition which elevates a moral obligation to the level of a legal duty where, as here, the facts within defendant's knowledge in no way indicated that immediate medical attention was necessary and the relationship between the parties imposes no affirmative duty to render assistance. See Steckman v Silver Moon, Inc, 90 N.W.2d 170, 64 A.L.R.2d 1171 (S.D. 1958). The posture of this case does not permit us to create a legal duty upon one to render assistance to another injured or imperiled party where the initial injury was not caused by the person upon whom the duty is sought to be imposed.

The relationship of the parties and the question of foreseeability does not require that the jury, rather than the court, determine whether a legal duty exists. We are in agreement with the general principle advanced by plaintiff that the question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion. However, this principle becomes operative only after the court establishes that a legal duty is owed by one party to another. . . .

The Court of Appeals properly decided as a matter of law that defendant owed no duty to the deceased. . . .

COLEMAN, J., concurred with FITZGERALD, J.

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4Were a special relationship to be the basis of imposing a legal duty upon one to insure the safety of another, it would most probably take the form of "co-adventurers" who embark upon a hazardous undertaking with the understanding that each is mutually dependent upon the other for his own safety. There is no evidence to support plaintiff's position that decedent relied upon defendant to provide any assistance whatsoever. A situation where two persons are involved in an altercation provoked by the party ultimately injured, the extent of which was unknown to the other, whose subsequent conduct included drinking beer and a desire to retaliate against his attackers would not fall within this category.

NOTES

1. A special relationship? Did Siegrist have a duty to aid Farwell based on a special relationship between them? If so, what was the nature of the special relationship, and how much aid or protection is or should be required based on that special relationship?

2. Remedies. What damages were awarded in Farwell? Do you think the damage award would or should have been the same if Siegrist had negligently killed Farwell by, e.g., running him over? Should the damages available in a nonfeasance case be the same as those in a misfeasance case?

TARASOFF v. REGENTS OF THE UNIV. OF CALIFORNIA
Supreme Court of California
17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)

TOBRINER, J.—On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. Plaintiffs, Tatiana’s parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore’s request [for aid in having Poddar involuntarily committed for observation in a mental hospital], the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore’s superior, then [asked the police to return Moore’s letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed and] that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana’s peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants’ demurrers to plaintiffs’ second amended complaints without leave to amend. This appeal ensued. . . .

Plaintiffs’ first cause of action [alleged] “Failure to Detain a Dangerous Patient.” . . . Plaintiffs’ second cause of action, entitled “Failure to Warn On a Dangerous Patient,” incorporates the allegations of the first cause of action, but adds the assertion that defendants negligently permitted Poddar to be released from police custody without “notifying the parents of Tatiana Tarasoff that their daughter was in grave danger from Posenjit Poddar.” Poddar persuaded Tatiana’s brother to share an apartment with him near Tatiana’s residence; shortly after her return from Brazil, Poddar went to her residence and killed her. . . . Plaintiffs’ third cause of action, entitled “Abandonment of a Dangerous Patient,” seeks $10,000 punitive damages against defendant Powelson. . . . Plaintiffs’ fourth cause of action, for “Breach of Primary Duty to Patient and the Public,” states essentially the same allegations as the first cause of action . . . .

[P]laintiffs’ first and fourth causes of action, which seek to predicate liability upon the defendants’ failure to bring about Poddar’s confinement, are barred by governmental immunity. Plaintiffs’ third cause of action succumbs to the decisions precluding exemplary damages in a
wrongful death action. We direct our attention, therefore, to the issue of whether plaintiffs' second cause of action can be amended to state a basis for recovery.

... Defendants ... contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana's life and safety.

... As a general principle, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (Citations omitted.) As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. . . .

Although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons.7 A doctor must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others.

Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship both to the victim and to the person whose conduct created the danger,9 we do not think that the duty should logically be constricted to such situations. Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease or, having diagnosed the illness, fails to warn members of the patient's family. [Citations omitted].

Since it involved a dangerous mental patient, the decision in Merchants Nat. Bank & Trust Co. of Fargo v. United States, 272 F.Supp. 409 (D.N.D. 1967), comes closer to the issue.

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7When a “hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm.” Vistica v. Presbyterian Hospital, 432 P.2d 193 (Cal. 1967) (italics added). A mental hospital may be liable if it negligently permits the escape or release of a dangerous patient. (Citations omitted.) Greenberg v. Barbour, 322 F.Supp. 745 (E.D. Pa. 1971), upheld a cause of action against a hospital staff doctor whose negligent failure to admit a mental patient resulted in that patient assaulting the plaintiff.

8Ellis v. D'Angelo, 253 P.2d 675 (Cal. App. 1953), upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; Johnson v. State of California, 447 P.2d 352 (Cal. 1968), upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward. Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Cal. App. 1964), sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.
The Veterans Administration arranged for the patient to work on a local farm, but did not inform the farmer of the man's background. The farmer consequently permitted the patient to come and go freely during nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife. . . .

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right. Since predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

. . . [T]he judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances." (Citations omitted.) Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn.

Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. . . .

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would
not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.

Defendants further argue that free and open communication is essential to psychotherapy; that "Unless a patient . . . is assured that . . . information [revealed by him] can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends." (Sen. Com. on Judiciary, comment on Evid. Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.12

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."

We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the

12Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients. This contention was examined in Fleming and Maximov, The Patient or His Victim: The Therapist's Dilemma, 62 Cal. L. Rev. 1025, 1038-1044 (1974); they conclude that such predictions are entirely speculative. In In re Lifschutz, supra, 2 Cal.3d 415, 426, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy could no longer be practiced successfully. We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsels' forecast of harm in the present case strikes us as equally dubious. . .
community." (Italics added.) We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana.

... Turning now to the police defendants, we conclude that they do not have any such special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions.

MOSK, J., Concurring and Dissenting.—I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, should have predicted potential violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.

Whether plaintiffs can ultimately prevail is problematical at best. As the complaints admit, the therapists did notify the police that Poddar was planning to kill a girl identifiable as Tatiana. While I doubt that more should be required, this issue may be raised in defense and its determination is a question of fact.

I cannot concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. The question is, what standards? Defendants and a responsible amicus curiae, supported by an impressive body of literature discussed at length in our recent opinion in People v. Burnick, 535 P.2d 352 (Cal. 1975), demonstrate that psychiatric predictions of violence are inherently unreliable.

CLARK, J. [dissenting]—Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society's safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

Assurance of confidentiality is important for three reasons. First, without substantial assurance of confidentiality, those requiring treatment will be deterred from seeking assistance. Second, the guarantee of confidentiality is essential in eliciting the full disclosure necessary for effective treatment. Third, even if the patient fully discloses his

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1One survey indicated that five of every seven people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality. See, Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged
thoughts, assurance that the confidential relationship will not be breached is necessary to maintain his trust in his psychiatrist—the very means by which treatment is effected. . . .

By imposing a duty to warn, the majority contributes to the danger to society of violence by the mentally ill and greatly increases the risk of civil commitment—the total deprivation of liberty—of those who should not be confined. The impairment of treatment and risk of improper commitment resulting from the new duty to warn will not be limited to a few patients but will extend to a large number of the mentally ill. Although under existing psychiatric procedures only a relatively few receiving treatment will ever present a risk of violence, the number making threats is huge, and it is the latter group—not just the former—whose treatment will be impaired and whose risk of commitment will be increased. . . .

The judgment should be affirmed. [McComb, J., concurred.]

NOTES

1. The special relationship. Is the special relationship relied upon by the majority in Tarasoff significantly different than the sort of special relationships we have previously discussed? What was the nature of the relationship between the defendants and Tatiana? Between the defendants and her assailant, Poddar? Which relationship is relevant, and why? See Restatement Third: Physical and Emotional Harm § 41, Duty to Third Parties Based on Special Relationship with Person Posing Risks:

(a) An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.
(b) Special relationships giving rise to the duty provided in Subsection (a) include:
(1) a parent with dependent children,
(2) a custodian with those in its custody,
(3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and
(4) a mental-health professional with patients.

Comment i notes that this list is not exclusive, and that courts might include other relationships with third parties in certain situations, as has happened with mental-health professionals Comment h discusses in particular duties of non-mental-health physicians to third parties.

2. The nature of the duty. If psychiatrists and psychologists should have a duty to protect others from their patients, what is the nature of the duty? What constitutes reasonable conduct in compliance with that duty? Should an objective or subjective perspective be applied in assessing the reasonableness of their conduct? See Restatement Third: Physical and Emotional Harm § 41 comment g, which states in part:

Communications Doctrine, 71 Yale L.J. 1226, 1255 (1962).
A mental-health professional has a duty to use customary care in determining whether a patient poses a risk of harm. Once such a patient is identified, the duty imposed by reasonable care depends on the circumstances: reasonable care may require providing appropriate treatment, warning others of the risks posed by the patient, seeking the patient’s agreement to a voluntary commitment, making efforts to commit the plaintiff involuntarily, or taking other steps to ameliorate the risk posed by the patient. In some cases, reasonable care may require a warning to someone other than the potential victim, such as parents, law-enforcement officials, or other appropriate government officials. . . . In addition, some deference to the judgment of a psychotherapist acting in good faith is appropriate. . . . The rule stated in this Section sets no limits on those to whom the duty is owed. Many courts and legislatures have limited the duty to warning third parties who are reasonably identifiable.

4. The Tarasoff duty in some form has been accepted in the great majority of jurisdictions and is widely taught to therapist students. See Restatement Third: Physical and Emotional Harm § 41 comment g reporters’ note. It has been rejected by only a handful of courts, including Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. Appeal 1991) (en banc); Tedrick v. Community Resources Center, Inc., 920 N.E.2d 220 (Ill. 2009); Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999); Nasser v. Parker, 455 S.E.2d 502 (Va. 1995).

4. NONFEASANCE: STATUTORY DUTIES TO AID

Perhaps the most striking apparent substantive difference between the common law and modern civil law is the absence in almost all common law jurisdictions, including the English Commonwealth countries and the great majority of states in the United States, of a general duty to aid others suffering from or threatened with grave physical injury not contributed to by the defendant or persons or things for whom the defendant is responsible.

In the early common law, there was a crime of misprision of a felony, which was committed when a person failed to report a crime of which she was aware despite a reasonable opportunity to do so without significant risk of harm. However, substantial doubt has been expressed about the recognition and employment of this criminal offense in America; it apparently exists today only in federal criminal law and only if there is active concealment of the crime rather than a mere failure to report it. Daniel B. Yeeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U.L.Q. 1, 30-32 (1993). In any event, misprision of felony only encompassed failure to report a crime. There was no duty to put oneself at risk to prevent a crime, and no duty to render any aid to another subject to a non-criminal threat.

Most civil law countries have enacted criminal statutes requiring persons to render aid to others at risk of serious physical harm if they can do so without significant risk to themselves or interference with duties owed to others: a so-called duty of “easy” (non-burdensome) rescue. See note 4 below. The first and for a long time the only state in the United States to enact legislation modeled on the civil law statutes was Vermont. Vermont Statute, title 12, § 519 provides:
(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

(b) A person who provides reasonable assistance in compliance with subsection (a) of this section shall not be liable in civil damages unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration. Nothing contained in this subsection shall alter existing law with respect to tort liability of a practitioner of the healing arts for acts committed in the ordinary course of his practice.

(c) A person who willfully violates subsection (a) of this section shall be fined not more than $100.00.

Subsection (b) of the Vermont statute is an immunity provision similar to ones in existence in the great majority of states, which provide complete or partial immunity from civil liability for persons, especially doctors, who undertake to aid a person suffering from or threatened with serious physical harm, unless the person providing the aid expects to be compensated for his or her aid. The Vermont Supreme Court resolved the apparent inconsistency in subsection (b), which provides immunity only for those who provide “reasonable assistance,” by construing the “reasonable assistance” as referring to the effort to comply with the legal duty to aid rather than the care taken in providing that aid. Hardingham v. United Counseling Service, 667 A.2d 289 (Vt. 1995).

Public outrage flowing from inaccurate press reports of incidents such as the 3:00 am rape and murder in 1964 of Kitty Genovese as she returned to her apartment building in New York City and the gang-rape in 1983 of a woman in a tavern in New Bedford, Massachusetts have led other states to enact criminal statutes imposing duties to aid. Minnesota and Rhode Island enacted statutes similar to Vermont’s, which create a general duty of “easy” rescue enforceable in criminal law. Other states, including Florida, Massachusetts, Ohio, Rhode Island, Washington, and Wisconsin, have enacted more limited statutes that apply only in situations involving criminal attacks. The Florida and Rhode Island statutes apply only to

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4The initial account of Kitty Genovese's rape and murder stated that 38 people witnessed her being attacked three different times over a half hour but no one intervened or called the police, “not wanting to get involved.” Martin Gansberg, Thirty-Eight Who Saw Murder Didn't Call the Police, New York Times, Mar. 27, 1964. There were actually two attacks, the first a stabbing on the street which ended quickly when Genovese screamed and someone yelled “Let that girl alone!” and scared off her attacker, after which she stumbled around the corner into a stairwell of the apartment building and collapsed. The attacker returned, found her, stabbed her again and raped her. It is not clear how many people witnessed or heard either of the attacks, especially the second, or understood what was going on; several called the police, whose response is not clear. See Jim Rasenberger, Kitty, 40 Years Later, New York Times, Feb. 8, 2004, section 14, page 1; “Kitty Genovese,” Wikipedia. The still circulated account of the New Bedford rape states that no one attempted to help the victim and that, instead, a crowd stood around and cheered. Subsequently, prosecutors said that only three people were in the bar other than the victim and the six defendants and that the bartender and a customer sought to call the police, but were prevented from doing so by one of the defendants. Time, Mar. 5, 1984.
sexual assaults. All of the statutes state that the duty to aid does not apply if compliance would place the person giving the aid in danger or interfere with duties owed to others. See Steven J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev. 673, 689 n.66 (1994). The provisions in the Wisconsin statute, Wisconsin Stat. § 940.34, which differs slightly from the others by requiring that the witness to the crime call for assistance or directly provide assistance, are typical:

Duty to aid endangered crime victim.
(1) Whoever violates sub. (2) is guilty of a Class C misdemeanor [for which the penalty is a fine not to exceed $500 or imprisonment not to exceed 30 days, or both—Wisc. Stat. §939.51(3)(c)]. . . .
(2)(a) Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim. . . .
(d) A person need not comply with this subsection if any of the following apply:
   (1) Compliance would place him or her in danger.
   (2) Compliance would interfere with duties the person owes to others.
   (3) Assistance is being summoned or provided by others. . . .
(3) If a person renders emergency care for a victim, § 895.48(1) [which immunizes good faith care by one other than a compensated, trained health care provider] applies. Any person who provides other reasonable assistance under this section is immune from civil liability for his or her acts or omissions in providing the assistance. This immunity does not apply if the person receives or expects to receive compensation for providing the assistance.

NOTES
1. Criminal liability => tort liability? Does a breach of one of these criminal statutes provide a basis for tort liability? Should it? See Restatement Third: Physical and Emotional Harm § 38. In the only case involving the Vermont statute, Hardingham v. United Counseling Service, 667 A.2d 289 (Vt. 1995), the issue was the immunity provision in subsection (b) of the statute rather than civil or criminal liability for a failure to aid. The alcoholic plaintiff brought a tort negligence action against his rescuers who brought him to an emergency room without mentioning to the emergency room doctors that they had seen him drink windshield wiper fluid. He brought a negligence action against his rescuers when he went blind as a result of the methanol in the wiper fluid. The court stated that “[a] person who willfully fails to make a reasonable effort to provide assistance is subject to a $100 fine, but is not subject to civil liability unless the person's actions are grossly negligent or unless the person receives or expects remuneration." Id. at 292 (citation to statute omitted). In a subsequent opinion, the court affirmed the trial court's ruling that, as a matter of law, the defendants were not grossly negligent. 672 A.2d 480.

2. Practical experience. Even criminal prosecutions under these statutes are rare. In 1993 a questionnaire was sent to the 387 prosecutors in the eight states that then had criminal statutes specifying duties to aid or to report serious crimes. Of the prosecutors who responded
none could recall filing a complaint under the relevant statute. Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U.L.Q. 1, 8 n. 37 (1993); cf. id. at 32-38 (stating that in a few cases prosecutors have employed duty-to-report-crimes statutes when the defendant was suspected of involvement in the crime but it was difficult to prove such involvement or the involvement was minor enough that the penalty attached to the crime seemed too severe).

3. The standard of care and remedies for breach. What are or should be the criteria of reasonable care under these duty-to-aid statutes? Is a subjective or an objective perspective applied? Which should be applied? How much care or aid is or should be required? What constitutes “interference with (important) duties to others”? Does “reasonable assistance” include having to expend significant resources or time? Would or should there be any limit on the usual amount of damages? Note the limited penalties for breach of the criminal statutes imposing a duty to aid, which are higher in some civil law countries than in the United States statutes but still much less than in cases of misfeasance. See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash. U.L.Q. 1, 6 n.28, 23 (1993).

4. Comparative law. Although there is no general duty to aid, even if the burden of doing so would be minimal, in common law countries (e.g. the United States, the United Kingdom, and British Commonwealth countries such as Canada, Australia and New Zealand), there is now such a duty in most civil law countries (e.g., France, Germany and Russia, but not China (PRC)). Portugal, the Netherlands and Italy were the first European countries to enact legislation imposing a duty to aid. See A.W. Rudzinski, The Duty to Rescue: A Comparative Analysis, in The Good Samaritan and the Law 91 (J.M. Ratcliffe ed. 1966). The initial source of the duty in France was legislation during World War II by the Vichy government enacted at the behest of the occupying Nazi forces, which required persons to report criminal activity and to call for or render aid to persons seriously injured if such intervention would not put the prospective rescuer at risk. See Martin Vranken, Duty to Rescue in Civil Law and Common Law: Les Extrêmes Se Touchent?, 47 Int'l Comp. L.Q. 934, 937 (1988). As with the Vermont and Wisconsin statutes, the duty to render aid usually is specified as a duty under criminal law. Tort liability for breach of a criminal statute is common in the civil law, and there have been some tort as well as criminal actions for failing to aid. However, such actions are not frequent, and they seem generally if not always to be situations in which there also would be a duty (and some actual cases) in the United States, due to a special relationship or the (tortious or non-tortious) contribution by the defendant to the plaintiff’s helpless and perilous situation.

5. NONFEASANCE: BASIC PRINCIPLES

What principles or policies, if any, justify or explain the common law no-duty rule in situations involving pure nonfeasance? Should there at least be a duty of easy (non-burdensome) rescue, as in most civil law and some common law jurisdictions? Should there be a duty of non-easy (burdensome) rescue? Consider the following readings.
I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation. There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow-creature's life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception. In all things which regard the external relations of the individual, he is de jure amenable to those whose interests are concerned, and if need be, to society as their protector. There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expediencies of the case: either because it is a kind of case in which he is on the whole likely to act better, when left to his own discretion, than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent.

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed. . . .

It remains to be considered whether the law should ever go so far as to give compensation or to inflict punishment for damage which would not have happened but for the wilful inaction of another. I exclude cases in which, by reason of some relation between the parties like that of father and child, nurse and invalid, master and servant and others, there is a recognized legal duty to act. In the case supposed the only relation between the parties is that both are human beings. As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime, and must I make...
compensation to the widow and children of the man drowned and to the wounded child? Macaulay, in commenting upon his Indian Criminal Code, puts the case of a surgeon refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that, if it were not performed, the person who required it would die. . . .

. . . [H]owever revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, but simply failed to confer a benefit upon a stranger. As the law stands today there would be no legal liability, either civilly or criminally, in any of these cases. The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not.

But ought the law to remain in this condition? Of course any statutory duty to be benevolent would have to be exceptional. The practical difficulty in such legislation would be in drawing the line. But that difficulty has continually to be faced in the law. We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad track could be punished and be made to compensate the widow of the man drowned and the wounded child. We should not think it advisable to penalize the surgeon who refused to make the journey. These illustrations suggest a possible working rule. One who fails to intervene to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death. . . .

NOTES

1. The utilitarian era. Ames was dean of the Harvard Law School. His article reflects the academic popularity of utilitarian theory during the end of the 19th and the beginning of the 20th century. As was previously noted, the initial Restatement of Torts was drafted during the first third of the 20th century, yet it rejected any duty to aid or rescue.

2. Utilitarianism: a duty of only “easy” rescue? A duty to attempt rescue that is limited, as Ames proposes, to emergency situations involving imminent danger of death or serious bodily harm and to required aid by the rescuer that would not constitute a significant burden on the rescuer is often referred to as a duty of “easy” rescue. If, as Ames assumes, the law is or should be utilitarian, can he justify stopping with such a limited duty, rather than a duty to render whatever aid is needed as long as the benefit of such aid exceeds the disutility to the rescuer? Would Mill agree that the duty should be so limited?

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW
Pages 189-90 (4th ed. 1992)

While walking down the street I see a flowerpot fall out of a window, threatening another pedestrian, and although I could save him simply by shouting a warning I keep silent. The expected accident cost is high and the cost of my taking the precaution that would avert it is trivial, yet I am not liable. The result seems inconsistent with the Hand Formula, since if
transaction costs had not been prohibitive the endangered pedestrian would surely have paid me enough money to overcome my reluctance to utter a warning cry. To make me liable, therefore, would seem to increase value. This point holds even if the attempt to warn or rescue might endanger the rescuer, provided that the danger to the rescuer (and hence the expected cost of precautions) is less than the danger to the person in distress (and hence expected accident cost) and that the victim's life is at least as valuable as the rescuer's. Although the bystander did not "cause" the accident, causal concepts play only an incidental role in the economic analysis of torts. But they are relevant in the following sense. Causation defines the pool of potential defendants: those who in some sense caused the plaintiff's injury. Since the universe of those who might have prevented the injury is not so circumscribed, there would be practical difficulties in limiting good Samaritan liability to those who really could have prevented the injury at reasonable cost.

Another economic objection to good Samaritan liability is that it would make it more costly to be in a situation where one might be called upon to attempt a rescue, and the added cost would presumably reduce the number of potential rescuers—the strong swimmer would avoid the crowded beach. . . .

NOTES

1. *Efficiency: no (even easy) duty to rescue?* Posner attempts to provide a utilitarian efficiency justification for the lack of any duty to rescue in the common law. (He ignores the civil law.) Does he succeed in providing a plausible argument?

2. *The causation argument.* As Posner indicates, efficiency theorists have had a difficult time explaining and justifying the causation requirement in tort law, and indeed have denied that the concept of factual causation is meaningful. See chapter 6. Posner nevertheless relies on an assumed lack of causation in the failure-to-rescue cases to justify the lack of liability for failing to rescue. But is it true that a bystander's omission to aid or rescue the plaintiff, when she could have intervened and such intervention would have saved the plaintiff from the injury at issue, was not a cause of (did not contribute to) the plaintiff's injury? As for the supposed need to limit the number of potential defendants, is the number of people who could have prevented the injury at reasonable (efficient) cost usually very large? Even if, in a particular case, there were a large number of such persons, why not hold them all liable under the applicable rule of joint-and-several or proportionate-several liability, as is done for defendants whose conduct constituted misfeasance rather than nonfeasance?

3. *The deterrence of rescuers argument.* Would imposing a duty to rescue whenever the expected benefits to the rescuee exceeded the expected costs to the rescuer cause people to (inefficiently) avoid situations where they might be called upon to rescue someone? What sorts of situations would one need to avoid in order to eliminate the possibility of having to rescue someone? How often might one expect to be in such a situation? To what extent would your activities and life change if such a general duty were imposed? What if the duty were only a duty of easy rescue? Does Posner consider the latter possibility?

4. *The encouragement of victims argument.* Posner has also argued that “if the victim is fully compensated, too many persons who cannot swim will be induced to board ships.”
5. The excessive rescue activity argument. Already sufficient incentive for "easy" rescues?

RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY
2 J. Legal Stud. 151, 198 (1973)

The common law position on the good Samaritan question does not appeal to our highest sense of benevolence and charity, and it is not at all surprising that there have been many proposals for its alteration or abolition. Let us here examine but one of these proposals [Ames']. . . . The general use of the cost-benefit analysis required under the economic interpretation of negligence does not permit a person to act on the assumption that he may as of right attach special weight and importance to his own welfare. Under Ames' good Samaritan rule, a defendant in cases of affirmative acts would be required to take only those steps that can be done "with little or no inconvenience." But if the distinction between causing harm and not preventing harm is to be disregarded, why should the difference in standards between the two cases survive the reform of the law? The only explanation is that the two situations are regarded at bottom as raising totally different issues, even for those who insist upon the immateriality of this distinction. Even those who argue, as Ames does, that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth. . . . [E]ven freedom has its costs: costs revealed in the acceptance of the good Samaritan doctrine.

But are the alternatives more attractive? Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty. Suppose one claims, as Ames does, that his proposed rule applies only in the "obvious" cases where everyone (or almost everyone) would admit that the duty was appropriate; to the case of the man upon the bridge who refuses to throw a rope to a stranger drowning in the waters below. Even if the rule starts out with such modest ambitions, it is difficult to confine it to those limits. Take a simple case first. X a representative of a private charity asks you for $10 in order to save the life of some starving child in a country ravaged by war. There are other donors available but the number of needy children exceeds that number. The money means "nothing" to you. Are you under a legal obligation to give the $10? . . . Does $10 amount to a substantial cost or inconvenience within the meaning of Ames' rule? It is true that the relationship between the gift to charity and the survival of an unidentified child is not so apparent as is the relationship between the man upon the bridge and the swimmer caught in the swirling seas. But lest the physical imagery govern, it is clear that someone will die as a consequence of your inaction in both cases. Is there a duty to give, or is the contribution a matter of charity?

Consider yet another example where services, not cash, are in issue. Ames insists that his rule would not require the only surgeon in India capable of saving the life of a person with a given affliction to travel across the subcontinent to perform an operation, presumably because
the inconvenience and cost would be substantial. But how would he treat the case if some third person was willing to pay him for all of his efforts? If the payment is sufficient to induce the surgeon to act, then there is no need for the good Samaritan doctrine at all. But if it is not, then it is again necessary to compare the costs of the physician with the benefits to his prospective patient. It is hard to know whether Ames would require the forced exchange under those circumstances. But it is at least arguable that under his theory forced exchanges should be required, since the payment might reduce the surgeon's net inconvenience to the point where it was trivial.

Once forced exchanges, regardless of the levels of payment, are accepted, it will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right. Where tests of "reasonableness"—stated with such confidence, and applied with such difficulty—dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins. In each case it will be possible for some judge or jury to decide that there was something else which the defendant should have done, and he will decide that on the strength of some cost-benefit formula that is difficult indeed to apply. These remarks are conclusive, I think, against the adoption of Ames' rule by judicial innovation, and they bear heavily on the desirability of the abandonment of the good Samaritan rule by legislation as well. It is not surprising that the law has, in the midst of all the clamor for reform, remained unmoved in the end, given the inability to form alternatives to the current position.

NOTES

1. Duties to aid: libertarian autonomy. Epstein's argument, which focuses on individual autonomy and criticizes the economic interpretation of negligence, is often thought to be based on the classical liberal theory of equal freedom, in apparent opposition to the utilitarian efficiency theories of law and liability. However, as is indicated by his equation of individual autonomy with individual liberty and is made clear by his subsequent writings, Epstein is a libertarian rather than a proponent of the classical liberal theory of equal freedom. Libertarians focus on the liberty to do as one pleases with minimal governmental interference. They recognize the need to have a minimal government that is limited to securing one's person and property against interference by others, that is, interactive justice, but they reject distributive justice. See, e.g., Robert Nozick, Anarchy, State, and Utopia (1974). Epstein's libertarian beliefs underlie his primary focus, in the article from which the above extract is taken, on arguing for a restricted version of strict liability for harmful interactions caused by force, fraud, or dangerous conditions, rather than negligence with its vague and hence liberty-endangering focus on "reasonableness." Like other libertarians, Epstein is a proponent of unregulated voluntary arrangements and free markets. He has been a proponent rather than an opponent of utilitarian efficiency, in its conservative, minimal government, free-market version. See, e.g., Richard A. Epstein, Simple Rules for a Complex World (1995); Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49, 74-98 (1979); Richard A. Epstein, Causation—In Context: An Afterword, 63 Chi.-Kent L. Rev. 653 (1987).
Nevertheless, in the extract above Epstein does not make a hardline libertarian argument against any duty to aid others, even in exigent circumstances. He professes to be open to the creation of a legal duty of easy, non-burdensome rescue, if such situations exist and a clear line can be drawn and implemented in practice to limit the legal duty to such situations. Although libertarian theory would not support such a limited duty (or any duty), would some other theory?

2. Classical liberalism (equal freedom). As we noted in chapter 1, classical liberalism has its roots in Aristotle's moral and political theory and was most rigorously elaborated by Kant. Kant's moral theory encompasses not only a doctrine of Right (justice) but also a doctrine of virtue, which is distinguished from the doctrine of Right by the former's focus on internal freedom (one's discernment and adoption of the proper morally obligatory ends) and the latter's focus on external freedom. Recall our diagram of the equal freedom theory in chapter 1:

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Equal Freedom
/     \
External: Justice (Law) Internal: Virtue
/     \
Positive (Needs): Negative (Security):
Distributive Justice Interactive Justice
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Both Aristotle and Kant emphasize that the proper purpose of the law is to promote equal external freedom, which includes distributive justice as well as interactive justice. Thus, unlike libertarianism, classical liberalism supports and indeed requires governmental measures, such as taxation and redistribution, to promote to the extent feasible everyone's equal external freedom by ensuring that they have the resources needed for pursuing a meaningful life.

However, emergency rescue situations do not give rise to issues of distributive justice: such situations may as readily involve a rich person needing rescue by a poor person as the other way around. Even if the specific situation involves a poor person needing rescue by a rich person, the rich person may have already satisfied his distributive justice obligations through payment of distributively just taxes and, even if this is not true, the usual objection to treating the one-to-one obligation as a distributive justice obligation exists: as a matter of distributive justice, why obligate this particular rich person rather than another (wealthier) one, and why is the obligation to help this specific poor person rather than another (poorer) one?

What about a one-to-one interactive justice duty? Kant insisted that one has a moral, ethical duty to promote not only one's own perfection through the cultivation of one's physical, mental, and moral capacities but also the happiness of others through beneficence, respect, friendship, etc. (There is no moral duty to promote one's own happiness, Kant argued, since this is an end that everyone naturally has and hence for which the concept of duty is inapplicable, nor a duty to promote the perfection of others, since this is an end that others can only set and pursue themselves.) See IMMANUEL KANT, THE METAPHYSICS OF MORALS *311-18, 379-83, 385-88, 391-93, 448-73 (1797).
However, Kant argued, the moral duty to promote others’ happiness and well-being is only a “wide” or “broad” ethical duty (a duty of virtue), rather than also a “narrow” or “strict” legal duty (a duty of Right), because it can only be specified as an indeterminate duty that varies depending on each would-be benefactor’s own resources and needs. To make it a legal duty would undermine personal autonomy:

How far [the duty] should extend depends, in large part, on what each person’s true needs are in view of his sensibilities, and it must be left to each to decide this for himself. For a maxim of promoting others’ happiness at the sacrifice of one’s own happiness, one’s true needs, would conflict with itself if it were made a universal law. Hence this duty is only a wide one; the duty has in it a latitude for doing more or less, and no specific limits can be assigned to what should be done.

Id. at *393; see id. at *390, 452-54. Under the equal freedom principle, no person can be used solely as a means for the benefit of others. Thus, just as a person can be held liable for adversely affecting others’ persons or property through conduct that fails to respect those others’ right to equal freedom (“misfeasance”) by using them solely as means to her ends, it would be contrary to the same basic right to equal external freedom to require a person to sacrifice his own interests, beyond the extent required by interactive or distributive justice, to promote the greater good of others whom they have not put at risk (“nonfeasance”).

However, Kant was discussing a general legal duty of charity or beneficence. He did not consider a duty of easy, non-burdensome aid in exigent circumstances, that is, when such aid is critical in an emergency situation for the preservation and promotion of the equal freedom of the person in urgent need of the aid and provision of the aid would not sacrifice the interests or equal freedom of the person providing the aid. It would seem that the equal freedom theory would support and indeed require such a legal duty, as a duty of one-to-one interactive justice, if it could be determinately specified and practicably enforced without significantly interfering with the potential rescuer’s equal freedom.

3. Is a carefully limited legal duty of easy rescue feasible? Do Epstein’s hypotheticals involving charitable contributions and the Indian surgeon demonstrate the difficulty of distinguishing cases of easy rescue from cases of burdensome rescue? If not, are there nevertheless reasons to worry about errors in making this distinction? Was there a significant possibility of such an error in the Farwell v. Keaton case? Could such errors be avoided or sufficiently minimized by appropriate procedural and substantive requirements for holding someone liable for failure to attempt an easy rescue? What procedural and substantive requirements would you suggest?