

NELCO
NELCO Legal Scholarship Repository

New York University Law and Economics Working
Papers

New York University School of Law

12-1-2010

Toward a General Theory of Tort Law: Strict Liability in Context

Richard A. Epstein

New York University School of Law, richard.epstein@nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_lewp

 Part of the [Contracts Commons](#), [Law and Economics Commons](#), [Legal History, Theory and Process Commons](#), [Medical Jurisprudence Commons](#), and the [Torts Commons](#)

Recommended Citation

Epstein, Richard A., "Toward a General Theory of Tort Law: Strict Liability in Context" (2010). *New York University Law and Economics Working Papers*. Paper 247.
http://lsr.nellco.org/nyu_lewp/247

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Law and Economics Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

Journal of Tort Law

Volume 3, Issue 1

2010

Article 6

Toward a General Theory of Tort Law: Strict Liability in Context

Richard A. Epstein*

*University of Chicago, repstein@uchicago.edu

Copyright ©2010 Berkeley Electronic Press. All rights reserved.

Toward a General Theory of Tort Law: Strict Liability in Context*

Richard A. Epstein

Abstract

In this extensive article I revisit my earlier writings from the 1970s that deal with tort liability in both stranger and consensual arrangements. On the former, I examine Stephen Perry's 1988 critique of my work, and more recent contributions by Joshua Getzler and Benjamin Zipursky, to defend the view that a rigorous conception of causation under a theory of strict liability is neither logically impossible nor practically unworkable. In so doing, I reexamine the earlier efforts by writers such as Joseph Beale and H.L.A. Hart and Tony Honoré on causation in order to show how some controversial moves within their theories can be clarified without having to resort to the standard views of causation that work off the notion of "but for" causes. In addition, I explain, in connection with the critique of Jill Horwitz, why some form of a negligence system remains appropriate for medical malpractice cases. In these consensual cases, doctrines of charitable immunity for nonprofit institutions often removed the need to investigate the basis of liability. But once those were removed, a contractual system, which in practice would never embrace a strict liability rule, would often turn to some form of negligence, often coupled with institutional changes, such as arbitration and explicit limitations on contractual damages.

*Richard A. Epstein, Laurence A. Tisch Professor of Law, New York University School of Law, Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law, The University of Chicago. This extended paper started out as a brief commentary given in response to the papers delivered at the Torts Section of the Annual Meeting of the American Association of Law Schools held in New Orleans, January 6-10, 2010. It takes little imagination to realize that it grew into a systematic examination of a question that has played a central role in my tort scholarship for nearly forty years. My thanks to Joshua Getzler, John Goldberg, Jill Horwitz, and Benjamin Zipursky for their responses on the draft, and to Isaac Gruber, University of Chicago Law School, Class of 2012 for his heroic research assistance in working through this project, and to Brett Davenport, New York University Law School, Class of 2012 for his exemplary mopping up operation. I should like to dedicate this article to the memory of my former student Richard Nagareda, David Daniels Allen Distinguished Chair in Law at Vanderbilt Law School, who died while this article was in the final stages of preparation. Richard was a kind, generous and learned man. He shall be sorely missed.

INTRODUCTION: HISTORICAL EVOLUTION VERSUS SYSTEMATIC THEORY

In this article, my particular mission is to respond to three papers that were delivered at the Torts Section of the 2010 Annual Meeting of the American Association of Law Schools, all touching upon different aspects of my work as a tort scholar over the past forty years. The first of these papers is by Joshua Getzler,¹ the second by Benjamin C. Zipursky,² and the third by Jill R. Horwitz.³ I put them in this order because there is a much closer linkage between the Getzler and the Zipursky papers, both of which deal with general theories of tort law, than with the Horwitz paper, which concentrates on the important interaction between liability for medical malpractice and doctrines of charitable immunity. In addition, I would like to acknowledge the short tribute to my work by David G. Owen, nicely named *Epstein's Razor*,⁴ which rightly points out the close relationship between my tort views and the world view that I expressed in my book *Simple Rules for a Complex World*.⁵ In light of the critical issues that these papers raise, I shall seize this opportunity to address, once again, many of the larger questions about a general theory of tort law that have preoccupied me for the better part of forty years.

In so doing, it is useful at the outset to situate my own work in the larger body of tort law. Idiosyncratic is one polite way to describe it. Less charitably, the work could be regarded as both antiquated and eclectic because of its willingness, indeed eagerness, to follow the weird historical quirks in the development of tort law. After all, in this modern age of interdisciplinary and formal work, the great temptation is to sanitize any body of law of its historical excrescences. Instead, to many modern scholars, creating some “model” of the optimization of the social welfare though the choice of liability rules often represents the gold standard of analysis. The heavy infusion of economics and game theory into the law of torts—both of which I embrace in principle—now makes it decidedly unconventional for legal scholars to pursue the opposite strategy that begins from the ground up, rather than from the theory down. That is how my work has always proceeded and, at this late stage, how it will continue to develop.

Nor do I think that it is a sign of disrespect for theoretical developments to begin in this fashion. Quite the opposite, the problem at hand should be understood as a sequencing issue. In my view, the better method is to look

¹ Joshua Getzler, *Richard Epstein, Strict Liability, and the History of Tort*, 3 J. TORT L. 3 (2010).

² Benjamin C. Zipursky, *Richard Epstein and the Cold War in Torts*, 3 J. TORT L. 5 (2010).

³ Jill R. Horwitz, *The Multiple Common Law Roots of Charitable Immunity: An Essay in Honor of Richard Epstein's Contributions to Tort Law Scholarship*, 3 J. TORT L. 4 (2010).

⁴ David G. Owen, *Epstein's Razor*, 3 J. TORT L. 2 (2010).

⁵ RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

closely at ongoing doctrinal disputes that highlight key aspects of tort law. Once those issues are identified, it should be possible to bring to bear a variety of analytical techniques to rationalize the system. The first line of attack is to subject a line of cases to the test of internal coherence, from which a grander theory of tort law can then emerge.

One dominant tool for applying this incremental strategy relies on close attention to the law of pleading, which played a critical part in shaping both tort and contract rules from the earliest time. These rules receive, for example, their precise explication in Gaius's *Institutes*, written around 161 A.D.⁶ My own work proceeds in the same fashion, by using the formal device of pleadings to expand tort theory from the simplest case, where A hits B, to a wide variety of other settings for which the liability rules will sometimes conform to—and at other times deviate from—the strict liability legal rules with which the discussion began.

In principle, that point of departure should not matter, so long as the modeler is prepared to vary his account to take into consideration the stubborn facts that appear in particular cases. By the same token, the legal doctrinalist must be prepared to articulate some theory that puts the historical pieces into a single whole. Indeed, ideally a single sound theory should make the convergence so powerful that the choice of starting points becomes a decidedly second-order consideration. In light of these issues *a priori*, it is not possible to decide which of these approaches is likely to produce the necessary degree of completeness. Work has to be done at both ends simultaneously. In my defense, therefore, I claim, and hope to demonstrate anew, that close familiarity with the Roman and early English and American common law cases furnishes a set of examples and tools that help organize legal doctrines which conjoin theoretical rigor with practical application. My objection to much of modern tort theory is quite simple, as long on theory but short on the precise knowledge of the doctrine and case law that makes the system hum.

In looking at these three papers I hope to explain why, ironically, the shortest path to a coherent global and economic approach to the law of tort starts down these strange pathways. Accordingly, I shall begin first with the basic legal choice between negligence and strict liability that is the central focus of both Joshua Getzler⁷ and Benjamin Zipursky.⁸ In so doing, I shall also comment on the insightful critique of my work to which Getzler makes only passing reference,

⁶ See, e.g., GAIUS, *INSTITUTES*, Book IV, ¶¶116, 126-129, discussing the exceptio, the replicatio, the duplicatio, and further pleas. For my systematic development of this position, see Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005).

⁷ Getzler, *supra* note 1.

⁸ Zipursky, *supra* note 2.

but on which Zipursky bases much of his own criticism of my work—Stephen R. Perry’s *The Impossibility of Strict Liability*,⁹ which has stimulated much recent work on the place of corrective justice within tort theory, but to which I have never offered a systematic response indicating my areas of both disagreement and agreement. Only afterwards shall I turn to the Horwitz paper.¹⁰

In dealing with these first three papers, it should be evident that all of us live in the same city, albeit in different neighborhoods. Getzler is, on average, the most sympathetic to my basic conclusions. In some sense, that is no surprise. Although Australian by birth, Getzler has followed an intellectual course of development similar to my own. Raised outside the English system, Getzler took degrees in both history and law in his home country. Since then, he has flourished at Oxford, where he now teaches at St Hugh’s College, where, like me, he has become steeped in both Roman law and English legal history.

Zipursky and Perry have somewhat greater ambivalence about my work. At one level they both think that it sets off down the right path, even as they doubt the viability of any scheme closely tied to a principle of strict liability. Zipursky works within the corrective justice tradition, but is less heavily influenced by Roman and early English materials than either Getzler or myself. Perry, while sympathetic with my views, is closer on many questions to Zipursky than to myself. Along with his coauthor, John C.P. Goldberg of Harvard Law School, Zipursky is a current leader in the defense of the principles of corrective justice in organizing tort theory. He is also a stout critic of the use of economic theory, and the Hand formula in particular, in organizing tort law.¹¹

Yet there are significant differences among those who think and write in terms of corrective justice. Contrary to the received wisdom, I think of corrective justice as operating properly within the larger framework of consequentialist thought. Accordingly, I defend it (at least today) chiefly because of the close correspondence between allowing private rights of action to particular persons and the overall advancement of social welfare. We (as in the royal “We”) allow an action for assault by the victim against the attacker, and we know that the transfer of wealth between these parties will have desirable incentive effects on the ex ante conduct of all parties. The judgment is largely categorical so that we can, for operational purposes, treat this as a hard-edged rule. This approach has the desirable characteristic of allowing decisions in individual cases without

⁹ Stephen R. Perry, *The Impossibility of Strict Liability*, 1 CAN. J. L. & JUR. 147 (1988).

¹⁰ Horwitz, *supra* note 3.

¹¹ See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010). For my reply to Goldberg & Zipursky, see Richard A. Epstein, *The Contextualization of Tort Law*, 88 TEX. L. REV. SEE ALSO 105 (2010). See also Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007). For others who write in this broad tradition, with evident Kantian overtones, see, e.g., ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

forcing the lawyers and judges to recapitulate the arguments that show the positive alignment between private rights of action under a corrective justice theory and overall social welfare. Writers like Goldberg, Perry, and Zipursky share with me the inclination to start with the close reading of individual cases. But they tend to resist my overtly consequentialist way of looking at things, and prefer to write within a decidedly deontological tradition. The difference in approaches is that the deontologist quickly has to rely on a very strong set of personal intuitions about justice that the consequentialist respects, but tries to place it on a firmer foundation.

What is perhaps distinctive, therefore, about my approach is that I do not seek to develop my own approach to tort by spurning either personal intuitions on the one hand, or the learning of ordinary language on the other. Rather, the effort is to incorporate both these strains of argument into an overarching theory. It is perhaps for this reason that, in his critique of my theories of tort law, Zipursky's florid title about the Cold War in torts is offered as a much appreciated compliment to my own work. Within modern law and economics circles, my own casuistic theories have received some passing attention, but far less than the consequentialist theories of Richard Posner¹² and Guido Calabresi.¹³ Posner represents the view of law and economics that postulates global efficiency as the dominant end of tort law, which he then aligns with the negligence theory of torts. Calabresi, for his part, is more sensitive to distributivist and egalitarian issues. Posner as the Midwestern conservative is thus the foil for Calabresi, the Eastern establishment liberal. Zipursky shares with me the view that both of their orientations are profoundly misguided, especially Posner's concern with the Hand Formula, who hence thinks that the better road to understanding tort law is to wean tort law from strict liability principles. But it is significant that Perry concluded his article on the impossibility of strict liability with this conciliatory note:

For now it must suffice simply to point out that, despite the failure of Epstein's project of developing a general theory of truly strict liability, he may nonetheless have anticipated the correct answer to the important question of how the standard of care in negligence law should best be understood. It may yet turn out to be the case, in other words, that once his general theory has been properly interpreted and appropriately modified, it can be shown to be fundamentally right.¹⁴

¹² See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

¹³ See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

¹⁴ Perry, *supra* note 9, at 171.

The phrase “truly strict liability” hints that I believe that strict liability governs all tort cases of property harm and bodily injury. That is, as I hope to show, a misconception of how I think about the problem. Unlike Perry and Zipursky, I put strict liability on the ground floor of a tort system. Yet I fully embrace the view that no complete system can be described exclusively in strict liability terms. When the entire picture is sorted out, my views come quite close to what Perry and Zipursky want a tort system to look like. It is a system that starts with strict liability, but expands to include both negligence and intentional harms in what I hope counts as a coherent and consistent framework.

Once I have examined these works, I shall turn to the article of Jill Horwitz, who comes out of the modern tradition of law and economics scholars, sporting both a J.D. and a Ph.D. Her choice of subject matter—the narrower question of liability for medical harms in the context of charitable immunity—offers a convenient foil to flesh out the entire system because it examines the critical overlap between tort and contract law in dealing with personal injuries and property damage.

Accordingly, the game plan is as follows. Part I addresses the theme of a tort law that rightly begins with a theory of strict liability in cases of harm to the person or property of strangers, only to go beyond it. I then look at the work of Getzler, Perry, and Zipursky, and the progression of the analysis runs as follows. First, in subpart A, I look at the question of incremental reasoning involved in common law pleading to set the stage for particular legal arguments. In subpart B, I explain why the notion of duty in tort law is prior to that of causation, noting that this priority only strengthens the role of causation in the overall system. In subpart C, I reexamine the fundamental choice, once the basic duty of noninterference is established, between strict liability and negligence cases involving bodily injury or property damage in stranger cases. This reaffirms my long-held belief that in this key context, the strict liability system remains preferable to the negligence one. In subpart D, I turn to an examination, within the context of this strict liability theory, of the relationship between the notions of causation and responsibility. Subpart E then examines the limited but vital place that the distinction between active and passive parties plays in the overall analysis of causation. Subpart F carries the inquiry one step further to operationalize the distinction between active forces and dangerous conditions. This corrects the weird overemphasis on the notion of “active force” found in the writings of Joseph Beale. Subpart G concludes the causal inquiry by critiquing the theories of causal intervention developed famously by Hart and Honoré,¹⁵ in order to show how a coherent theory of strict liability can handle remoteness of damage cases involving two or more actors. Once examination of the strict liability case is

¹⁵ See H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

completed, I shall turn to those harms that arise out of consensual arrangements in Part II, by examining the treatment both from a theoretical and historical perspective that Horwitz gives to a cluster of related concepts: medical malpractice, waiver, assumption of risk, negligence, customary care and charitable immunity. A brief conclusion follows.

I. STRICT LIABILITY AND BEYOND: GETZLER, PERRY, AND ZIPURSKY

A. *Moral Incrementalism and Pleading*

Much of the commentary in the Getzler and Zipursky papers builds on my 1973 article *A Theory of Strict Liability*,¹⁶ written, I might add, before my views on tort law had fully solidified. There is much in that article that I still stand by today, but much that I would have phrased in different fashion if I had known then the path of my future intellectual journey. That said, the engagement people continue to have with that article shows that a bit of youthful audacity often outperforms some mature, and overcautious, reflection.

To understand what is right and wrong with that article, it is critical to note that my theoretical statements about, for example, the role of individual autonomy¹⁷—or, query individual self-ownership¹⁸—were tied with what in fact was a much narrower ambition: to articulate the reasons why a strict liability case was appropriate for situations where the defendant caused harm to the person or property of the plaintiff. My view then, like my view now, always inclined to what I have since called moral incrementalism.¹⁹ This basic view is that the entire structure of the common law of torts—and by implication the common law—is too nuanced to be captured by a single broad proposition. It was in this context that I voiced my deep reservations about the ability to capture the entire law of tort in what I still regard as the delusive generalization of the Hand Formula,²⁰ as popularized by Richard Posner's famous article, *A Theory of Negligence*,²¹ which publicized exactly that dangerous and inaccurate overgeneralization.

¹⁶ Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

¹⁷ *Id.* at 197-98.

¹⁸ The late James Harris often regarded the conflation of these two notions as one of the key stumbling blocks in the articulation of tort theory. For a recent restatement see JAMES W. HARRIS, PROPERTY AND JUSTICE (1996); James W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55, 60 (1996). For my response, see Richard A. Epstein, *Weak and Strong Conceptions of Property: An Essay in Memory of Jim Harris*, in PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 97 (Timothy Endicott et al. eds., 2006).

¹⁹ See, e.g., RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM 84-107 (2003).

²⁰ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²¹ Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

The historical origin of my strict liability article²² came out of a vigorous dinner conversation that Posner and I had at his home in mid-December 1971, when I had come to Chicago for the 1971 AALS convention. I chose the title in conscious opposition to his. But the title was a mistake in the sense that it appeared I agreed with Posner that grand generalization was possible in the law of tort. In actuality, as someone who was self-schooled in the Roman casuist tradition, I held the opposite view: generalize slowly, but only after covering all the bases. Our narrower and more focused disagreement was whether negligence set out the appropriate prima facie case in cases of physical harms inflicted by one person onto the person or property of others. The goal here was to get the ball rolling, which is why in short order I published the two other articles in that sequence, *Defenses and Subsequent Pleas in a System of Strict Liability*²³ in 1974 and *Intentional Harms*²⁴ in 1975.

Both these titles were, in a sense, more accurate than the initial title. Both titles tell something about my overall approach. The references to defenses and subsequent pleas in the 1974 article shows the strong reliance on pleading to joinder of issue, and the use of the word *system* intended to show how the incorporation of additional elements beyond the prima facie case drove tort law to a much more complete structure. The title *Intentional Harms* broadcast, I thought, the clearest possible signal that strict liability, which dominated the prima facie case of liability for damage to person and property, could not generalize into an overall theory. Rather, strict liability had to be comprehensive enough to find some scope for a large dose of intentional harms, which remained important in theory, even though they were relatively uncommon in actual litigation. Finally, there is of course the third member of the party, negligence, to which I turned in connection with physical harms arising out of consensual arrangements in my 1976 article, *Medical Malpractice: The Case for Contract*,²⁵ which is cited by neither Getzler, Zipursky, nor Perry in their writings.

In seeking to explain the method of presumptions, it is critical to elucidate the relationship between *harmful* conduct and *wrongful* conduct. Zipursky (and Goldberg) are quite correct to insist that there is no way to understand the distinctive role of tort law without building the notion of wrongfulness into the ground floor of the system.²⁶ But that objective cannot be achieved by offering a simple definition of the notion of wrong. It does little to advance the ball to

²² Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

²³ Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

²⁴ Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

²⁵ Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. BAR FOUND. RES. J. 87 (1976).

²⁶ See, e.g., Goldberg & Zipursky, *supra* note 11.

observe that wrongful conduct is conduct which is unlawful, illegal, or improper. Synonyms are not the same as analysis.

One more muscular substantive approach takes the form of conduct as wrongful if done with bad intention or with negligence, thereby equating wrongfulness with some identifiable features of human conduct. While this formulation avoids the criticism of being otiose, it nonetheless contains two key errors. First, the definition rules out, as a matter of pure logic, the possibility of any theory of strict liability. Just that view has been taken, for example, by the late Glanville Williams, a strong defender of the negligence system, who insisted that there was some deep contradiction between the idea of corrective justice, on the one hand, and a system of strict liability on the other.²⁷ He sees no notion of wrongfulness embedded in the proposition that A killed B. But the doctrine of strict liability has been explained and defended on just the ground this definition of wrongfulness rules out of bounds: *as between* the person who did nothing and the person who acted, the only way to correct the injustice is to have the second compensate the first.²⁸ That notion is captured in many ways in the English language by showing that certain actions create *prima facie* wrong, to which liability attaches unless some excuse or justification is offered. Thus, consider these two sentence pairs:

- (1A) A entered B's land.
- (1B) A trespassed on B's land.
- (2A) A did not perform his promise to B.
- (2B) A breached his contract with B.

Clearly, entry is not a synonym for trespass. But by the same token, the two terms are not unrelated. Similarly, nonperformance is not a synonym for breach, even though the two terms are not unrelated. We can say that the entry is a *prima facie* wrong, which could either be excused or justified. We can do the same thing with the relationship between nonperformance and breach. The best way to put this is to say that entry is a *prima facie* trespass, and nonperformance is a

²⁷ See, e.g., Glanville Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951).

²⁸ See, e.g., *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (Cranworth, L.) (“[W]hen one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 84 (1881) (“Every man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors. In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it.”). Perry rightly refers to this passage as a “very simple but powerful formulation.” Perry, *supra* note 9, at 154.

prima facie breach. In both instances, if there is no justification or excuse, then a duty of rectification follows, allowing for the choice of remedies, including the proper measure of damage. But if there is justification or excuse, then the original premise is defeated. But not absolutely. Thus, if the reason why A did not perform his promise to B is that B did not perform some condition precedent, the defense may be valid, but it need not be absolute. B could argue that he did not perform the condition precedent because A had failed to perform some prior condition of his own. So A does not deliver goods to B, because B did not construct the right platform on which delivery was to take place. But B did not do so, because A failed to provide him with the proper plans or equipment. In the case of land, A may have entered land, to which B gave permission. But B gave permission only because A lied about his purpose for coming on the land.

In working out this system, everything that is put forward as an excuse or a justification need not be accepted. The simple assertion that I wanted to enter someone else's land would not count as a justification. Nor, in most instances, would a claim that I had an honest belief that the land was my own count as a justification. Similarly with the nonperformance of a contractual promise, it will not do for me to say that I changed my mind or (in most instances) that I was mistaken about the cost of my performance. We can argue the scope of these excuses and justifications. But in each case, the acceptance of a plea allows the argument to go forward, while its rejection could be regarded as an informative dead end.

The point of these simple examples is that the cycle of pleas, known at common law as confession and avoidance, goes as far as the parties want to take it. For each valid plea, there is always the possibility of a valid response that either restores (in whole or part) the prima facie case, or, as the case may be, some prior defense. Only when the pleadings are closed can be it determined whether conduct is lawful or wrongful. The sequential nature of these pleadings and the many different doctrines that they embody explain why there is no simple definition of defeasibility. The notion of defeasibility, once made popular by H.L.A. Hart, captures the *meaning* of a term like "contract" and is therefore misguided.²⁹ We can give quite a precise definition of contract as a promise or set of promises in which either or both parties agree to either perform or abstain

²⁹ For just this approach, see H.L.A. Hart, *The Ascription of Responsibility and Rights*, in XLIX PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (NEW SERIES) 171 (1949), *reprinted in* LOGIC AND LANGUAGE (First Series) 151-74 (Antony Flew ed., 1965). For early criticisms, see Peter T. Geach, *Ascriptivism*, 69 PHIL. REV. 221, 224 (1960); George Pitcher, *Hart on Action and Responsibility*, 69 PHIL. REV. 226 (1960). Geach's view is closest to the issue here, and when he notes, in opposition to Hart, that when one says "Smith hit her," he is both stating the fact that Smith hit her and ascribing responsibility to Smith. Note that Geach misses the role of presumptions in the last statement. For my account, see Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005).

from the performance of some action. That definition leaves open the question of which promises are enforceable, and what defenses are available. The way, therefore, to link harms with wrongs is to work it out systematically through the pleading system—each successive determination adds both completion and precision into the legal system.

B. Is Duty Prior to Causation?

It may well be said, in response, that the entire inquiry into causation is misplaced because the central question of the law of tort relates to duty, and not to causation.³⁰ Once again, there is a good deal of sense to the observation that questions of duty always come first. Yet from that proposition it does *not* follow that the doctrine of causation is otiose because it necessarily presupposes this duty of noninterference with respect to the property of others. Duty is indeed critical, but only to explain liability—not causation. (You can always break your own back, or fence.) It is therefore critical to understand the origin of this duty and its relationship to other types of duties that have their origin in contract. On this issue, the older Roman terminology that distinguishes between rights *in rem* and rights *in personam* may not have literary elegance—what is a right “in a thing” and a right “in a person” when all rights have correlative duties? But, inelegance aside, the distinction does offer hidden functional strengths that should not be belittled. The rights *in rem* are universal and negative. These are situations where high transaction costs preclude voluntary arrangements that bind all against all. But given that breadth, the rights have to be simple and robust enough to work for each random pair of individuals, when it is not known in advance who is the putative defendant and who the putative plaintiff.

The structure of these rights intuitively gravitated toward the right solution, for they demand only *forbearance* against physical interference with the person and property of another.³¹ Since these duties are negative, they are easily scalable, so that the same set of duties works as well in a small group of a thousand as it does in a large group of a million. No individual is required to make positive expenditures to honor his or her obligations, so that the content of the universal rights and duties—not their enforcement—is invariant with respect to individual wealth or changes in overall wealth levels. No individual is required to make any positive expenditure, so that the content of this basic duty can remain constant, regardless of shifts in overall wealth levels or differences in relative wealth among individuals over time. In addition, the content of the duty is so

³⁰ See Getzler, *supra* note 1, at note 14 (citing the work of Perry, Joseph Raz, Jane Stapleton, and Tony Honoré, among others).

³¹ I put aside here all discussion of relational interests covered, for example, by the tort of defamation.

well known that individual notice need not be given in advance to bind people to it.

Once this duty is accepted, the theory of strict liability in stranger cases only insists that merely entering into the space of another creates the prima facie case of liability for what happens thereafter. In the simplest case, a request to leave will be sufficient to restore the original balance. In cases of serious harm, however, damages are required for past redress and injunctive relief against future entry may well be appropriate against threats of similar repetitive harm. The theory of liability, in Robert Nozick's terms, for these "boundary crossings"—which the law calls physical invasions—is thus as invariant as the conception of duty that undergirds it.³²

The *in personam* cases have a different tenor entirely, for these duties are not imposed by the cartload, but are radically individualized as individuals choose to enter into particular relationships with one, or a very small number, of other individuals. The kind of care and concern involved here is no pale insistence that people take care to avoid running down others. Rather, it is that they take care of patients, customers, pupils, wards, or visitors by tending to their needs with a wide range of actions, often at great personal expense. What kinds of actions are needed varies from context to context, and are often set by the parties themselves when standard default positions prove insufficient to the task. This high range of variation explains why no single strict liability formula could hope to succeed in all these cases, even if a strict liability standard might turn out to be appropriate in some cases, such as the fabrication of particular goods. The "impossibility of strict liability," as Perry describes it,³³ as a uniform theory follows inexorably in my analysis from this point. Indeed, the matter only gets more complex because once these duties of care (literally understood) are in place, it is no longer possible to draw any hard-and-fast rule on acts and omissions, or misfeasance and nonfeasance, to deal with these cases.

C. *Strict Liability versus Negligence*

My own work has long defended the position that in the prima facie case, any physical invasion triggered by the defendant is sufficient to impose liability, wholly without regard to the defendant's negligence or specific intention. In these contexts, it does not matter whether that supposed wrongful intention is to harm (as in the most common case) or just to touch, or even to offend the plaintiff. The only role that "intention" has in this theory is to demarcate the line

³² For the source of the term, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 75-76, 83-84 (1974). Its great strength derives from the close correlation between Nozick's principles of justice and the standard common law categories of contracts, property, and tort.

³³ See Perry, *supra* note 9.

between various actions and those natural events involving the body or property of the defendant, for which the motive force—again taking the term literally—lies in some third person or natural event.

This view of the subject was captured perfectly in *Weaver v. Ward*, with its brief observation that strict liability does not attach unless

[I]t [the harm] may be judged utterly without his fault . . . As if a man by force take my hand and strike you or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.³⁴

Every word in the passage is carefully chosen. The “utterly” is as far removed from the notion of “reasonableness” as language could make the gap. The reference to “running across the piece” introduces the notion of putting one’s self in the dangerous position, quite literally in the line of fire. The reference to negligence that gave “occasion” to the hurt refers to antecedent conduct that excuses the decision to run in the path of fire. Note the idea of “occasion” picks up indirect causation which is wholly consistent with the usual trespassory notions in the prima facie case. The one weakness in this exposition is that there is nothing which requires that this antecedent act be done negligently, so long as it sets up the harm in question. Thus if the defendant, to take a famous case, flies his balloon carefully over the plaintiff’s land, where it lands on the plaintiff’s ground through no fault of his own, it may well be inevitable that he has to harm some portion of the plaintiff’s crop, but he will not be excused from this inevitable accident given that his antecedent decision to fly created the harm in the first place.³⁵ It would be otherwise if a third person dumped him in the field.

It would, however, be a historical mistake to think that this pleading system was uniformly applied with the linguistic precision that its use requires. As Getzler notes in his comments to this article, the term “inevitable accident” was often conflated with the notion of justification.³⁶ Thus, Getzler references the following sentence from *Gibbons v Pepper*: “Serjeant Darnall for the defendant argued, that if the defendant in his justification shews that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment

³⁴ *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616). For further discussion, see Getzler, *supra* note 1; see also Gary T. Schwartz, *Weaver v. Ward*, 74 TEX. L. REV. 1271 (1996).

³⁵ See *Guille v. Swan*, 19 Johns. (N.Y.) 381 (1822).

³⁶ Getzler, *supra* note 1, at 21.

shall be given for him.”³⁷ The passage tracks the language in *Weaver*, but its use of the term “justification” shows how the technical use of the term strays from the ordinary use of the term, precisely because it is only possible to justify an intentional harm, never an accidental one. To be sure, the result in the case is correct insofar as it keeps the original strict liability vision of the world intact.

Nonetheless, the tripartite nature of the case makes it easy to confuse an absolute defense on the one hand with an invalid defense that is coupled with an action against a third party. As Getzler notes, the alternative version of this report indicates that the defendant might have been able to escape liability if he had pleaded the general issue; that is, had he denied the liability in question.³⁸ Thus, a key passage in the *Gibbons* opinion reads:

...for if I ride upon a horse, and J. S. whips the horse, so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty.³⁹

But in all strictness, this dodge is also incorrect. The *prima facie* case against the defendant should be, quite simply, that “your horse ran me over,” which marries a vicarious liability theory for animals with a strict liability theory for their actions. The action of the third party is no denial of that fact. It offers only a sensible way to explain why the owner of the horse should, *prima facie*, have an action against the party who incited the horse to harm the plaintiff. The allegation about “spurring” is, in this instance, superfluous because the owner’s liability is already fixed by the vicarious liability rule. Yet that element would be critical if the spurring were by some third person who was then riding the horse, at which point the question of an action over against the third party would be most salient, and surely allowed if the spurring increased the risk of losing control.⁴⁰ It is, however, a mistake to eliminate the tripartite relationships in all cases where some party other than the owner may be responsible for the wrong in question.

Within this framework, therefore, once this trespassory harm has been done, the strict liability position is quite simple: The defendant, as a purposive agent, seeks to internalize all the gains from his action, so that it is only just and proper that he be required to bear their costs. Even if the defendant’s potential losses are unknown and undisclosed to him, they are presumptively—remember

³⁷ 91 Eng. Rep. 922 (K.B. 1695). For a fuller version, including the pleadings, see J.H. BAKER AND S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750 335-37 (Butterworths 1986).

³⁸ See Getzler, *supra* note 1, at 24, note 55.

³⁹ *Gibbons*, 91 Eng. Rep. at 922.

⁴⁰ See *infra* at Part I.E.

that all we know at this stage is that the defendant has hurt the plaintiff—equally unknown and undisclosed to the plaintiff. Affirmative defenses, like running into the defendant’s right of way, introduce further causal complications, but they do not alter the balance at the close of the prima facie case. To say that simply killing another person does not create liability is, in effect, to say that the defendant is no worse for having killed the plaintiff than if he had not done anything at all. The “innocent” killing is treated for legal purposes as though it were an Act of God. At this point, the supposed moral superiority of the negligence theory becomes suspect. The line between killing and not killing seems a lot more durable and powerful than the line between killing and killing negligently, where the former is not actionable even though the latter is. The reason why the usual notions of “corrective” justice resonate so well under strict liability is that it puts the line between culpable and non-culpable in the right place.

The insistence on strict liability is only strengthened by making reference to the “gains” that the defendant derived from his purposive action. Indeed, once that element is put into the equation, it readily suggests the link between classical tort law and modern theories of economic efficiency. More precisely, there are two different scenarios that have to be taken into account, which were clearly stated by Baron Bramwell—he always comes up—in *Powell v. Fall*,⁴¹ where he writes:

It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage. The plaintiffs are protected by the common law, and nothing adverse to their right to sue can be drawn from the statutes: the statutes do not make it lawful to damage property without paying for the injury.⁴²

This passage gets the issue exactly right. In the first scenario, the defendant engages in activities whose expected gains *cannot* cover the expected costs, so the correct response is that the defendant should not undertake that action at all. The use of strict liability will tend to lead to that result. In the second scenario, the defendant in the ex ante position received enough gains from his endeavors that he *could* pay for the harms caused and still make a profit. This outcome results in no net harm to either party, and the restoration of a sense of equity in that, at the

⁴¹ 5 Q.B. 597 (1880).

⁴² *Id.*

close of litigation, we do not end up with one person who is better off and another worse off as a result of the events that have transpired. In effect, no matter what the ratio of gains to loss, the strict liability rule gives the correct signals to the defendant under modern economic theory.

In modern terms, the Bramwell position conveys an explicit preference for the Pareto standard of social welfare requiring these payments between the parties over the Kaldor-Hicks standard of welfare that only requires (what is satisfied in *Powell v. Fall*) that there be sufficient gains to the actor that he would allow, but need oblige him, make these compensation payments.

In an effort to bring that point home, I examined cases like *Vincent v. Lake Erie Transportation Co.*,⁴³ which I thought were consistent with this tradition insofar as they did not let the defense of private necessity (which allows one person to make use of the property of another to avoid imminent death or serious bodily harm or loss of property) defeat the claim for compensation when the harm was both deliberate and reasonable. In examining my preference for strict liability over negligence, Perry rightly hones in on those passages in *A Theory of Strict Liability* that deal with the role of the single-owner approach to setting liability for harm in tort,⁴⁴ which took the strong view that the defendant should not be allowed to externalize harms on a stranger to protect himself. I wrote:

Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another.⁴⁵

Perry takes this passage to indicate that some element of risk and foresight is needed to make any causation argument work.⁴⁶ But, in fact, its purpose was to

⁴³ 124 N.W. 221 (Minn. 1910).

⁴⁴ Epstein, *supra* note 16, at 157-58.

⁴⁵ Perry, *supra* note 9, at 148, and briefly at 154 (quoting Epstein, *Strict Liability*, *supra* note 16, at 158-60).

⁴⁶ Perry, *supra* note 9, at 148.

show the corrective justice superiority of the strict liability view over the negligence one. That argument does have serious difficulties associated with it when the matter is looked at from the economic perspective. Thus, the formalized view of negligence associated with the Hand formula leads to the conclusion that the defendant can be excused from liability if he would have taken the same action, even if he had owned both the dock in question.⁴⁷ The moral instinct here is that the plaintiff cannot expect the defendant to take greater care of the plaintiff's property than he takes of his own—which is, in effect, the precise standard of liability used in many of the key bailment cases under the rule in *Coggs v. Bernard*.⁴⁸ The difficulty with the strict liability position on this view is that it cannot distance itself from the refined version of the negligence theory because both theories work on a basic premise that no person is entitled to prefer his position to that of a stranger *and* as a first approximation, there is no efficiency differences between the two positions.⁴⁹ There are many ingenious explanations as to how these multiple standards arise in consensual cases,⁵⁰ but in the end, I think that the rich variation in standards in these consensual arrangements just reflects the dominant set of social expectations that arise in these distinctive consensual settings.

The stranger cases, however, are less varied in their content, at least at the stage of the prima facie case. Indeed, one reason why the long and inconclusive debate between those two theories has not reached cloture is the difficulty in finding some large difference between the two in the ex ante state of the world.⁵¹ In effect, that impasse leads to a closer examination of the second-order conditions that surround the choice, including such mundane elements as the clarity of the law and the ease of its administration.⁵² On that score, the strict liability rule wins in the articulation of the prima facie case (and in the elimination of the backdoor misreading of inevitable accident).⁵³ The theory of causation is

⁴⁷ For a longer discussion of the point, see Richard A. Epstein, *Holdouts, Externalities and The Single Owner: Another Tribute to Ronald Coase*, 36 J. LAW & ECON. 553, 576-80 (1993).

⁴⁸ *Coggs v. Bernard*, 92 Eng. Rep. 107 (Q.B. 1703), discussed in Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying*, 107 MICH. L. REV. 1461, 1466-70 (2009).

⁴⁹ For this critique, see Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT. L. REV. 407, 420-29 (1987).

⁵⁰ See Getzler, *supra* note 1, at 30 (suggesting that these developments responded to a notion of reasonableness championed by “Enlightenment-era natural lawyers[.]”).

⁵¹ Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

⁵² As discussed in EPSTEIN, *supra* note 5, at 91.

⁵³ See, e.g., *Harvey v. Dunlop*, (Lalor) 193, 194 (N.Y. 1843) (“All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the

easier because it involves, in the simplest cases, only the use of force, while any theory within a negligence framework requires the plaintiff to show not only that the defendant hit him, but those steps that could have been reasonably taken to avoid the injury in question. In some cases, that could be contemporaneous with the initial action, but in others, it could involve antecedent precautions that take place minutes, hours, days, or even years prior to harmful action. Accordingly, it is now necessary to turn to a more detailed exposition of how the various strands of causation play out within a system of strict liability.

D. *Causation, Strict Liability, and Responsibility*

The inquiry into duty, then, only sets the stage for the detailed causal analysis in stranger cases. What counts as an “invasion” for which one party should be held liable? Surely, that term resonates with cases of entering land and cutting off limbs. But the plasticity of the notion of causation goes beyond that context. In dealing with this issue, Perry notes that under my system of tort law, “[W]henver A causes harm to B then A is liable (or at least prima facie liable) for B’s loss.”⁵⁴ The clear impression from this passage is that the difference between liability and prima facie liability does not in the end loom that large in the construction of any overall tort theory. But in actuality, as I noted before, it is absolutely critical to understanding my views, given the centrality of the pleading rules to my overall mission. In effect, under these rules, the idea of a prima facie case means that the plaintiff has stated just enough, but no more, to switch the initial balance of equipoise. The balance always works in favor of a defendant in any legal regime that respects the equal rights of all individuals who stand as strangers to each other, in what we commonly call the state of nature (or the original position).

In dealing with this question, both Perry and Zipursky take me to task for insisting that the notion of causation on which I rely is parasitic of the notion of responsibility in tort that I am trying to explicate. As Zipursky writes, “Overwhelmingly, the problem is that the paradigms of causation are neither explicable nor defensible nor cogent unless *one person’s causing a loss to another* is understood in terms of *one person’s being responsible for the loss another suffered*.”⁵⁵ This position need not commit either Zipursky or Perry to adopting the conventional form of negligence. But it does lead them to think that any theory of strict liability is more nuanced than my account would have it. In essence, the argument is that drawing inferences from causation to responsibility

sufferer, and lays no foundation for legal responsibility.”). For an English version, see *Stanley v. Powell*, [1891] 1 Q.B. 86.

⁵⁴ Perry, *supra* note 9, at 149 (emphasis removed).

⁵⁵ Zipursky, *supra* note 2, at 16 (emphasis in original).

is reasoning in a circle, from which the—or at least, some—concept of negligence or fault offers the only escape. I think that this criticism is erroneous both as a matter of ordinary language and more technical legal analysis.

Nothing is more common than for ordinary people to ask about causation when there is no issue of personal responsibility to solve under the tort law. Thus, I leave a fragile plate on the edge of my dining room table, and then brush against it in the middle of the night because I have forgotten to turn on the light. Here we can identify three possible causes for the harm in question. The placement of the plate in a precarious position, where a small force (my brushing against the plate) could release a larger force (gravity) which knocks the plate to floor fall, a loss which could have been avoided by taking some routine precaution (turning on the light). Three distinction variations on the protean notion of causation are thus involved in this case: the direct use of force, the creation of a dangerous position, and the failure to avoid loss by taking ordinary care. But in this particular context, we do not have to sort out how these three causal influences interact with each other, because no matter how we sort out those differences, the party who bears the loss is me and me alone. There is, of course, no duty question here, unless individuals are said to owe duties to themselves, which could only happen if A v. A were a viable law suit.

We thus have a case in which we may inquire into causation for all sorts of collateral safety or legal reasons, including the decision to run a failure analysis to avoid a similar problem in the future. Or some indemnity contract might cover only accidental but not negligent losses. But no matter how we slice it, the notion of causation comes first, which, once established, becomes a tool to explain responsibility. Indeed, whatever may be errors on point of detail, the great strength of Hart and Honoré's treatment of causation is that they never abandon a salutary combination of moral and linguistic realism when it refuses to "despair" over the ability to deal with "stable principles."⁵⁶

On this view, the difficulties that come to the fore in litigation and moral argumentation arise solely because the loss is lodged in a single person, but the potential causal candidates for responsibility are distributed over many people. At this point, the problem of sorting out separate components to a common loss becomes well nigh inescapable, whether or not the property owner of injured person is, or is not, one such actor. I could leave my plate at your house in the dark in a precarious position, for example, where your guest brushes against it after you forget to turn on the light.

The theoretical challenge, then, is to integrate these multiple notions of causation into a coherent whole. One part of the challenge is to set, where appropriate, priorities between different modes of causation. The second is to

⁵⁶ See HART & HONORÉ, *supra* note 15, at 24.

develop an allocation formula in which two or more parties combine in the same way to cause an injury, such as when A and B both strike C simultaneously, when neither blow could injure alone, yet both blows together could, and so on down the line. These simple examples raise questions about causal hierarchies and joint causation rules, which in turn put pressure on the basic question of human responsibility that ordinary language finds it difficult to resolve. Is the plaintiff's misconduct (I do not use contributory negligence) a total or a partial defense? With two or more wrongdoers, do we adopt a no contribution rule or a proration rule?⁵⁷ These related inquiries are only intelligible if the analysis incorporates notions of causation in order to resolve matters of responsibility. At that point, it is neither tautological nor obtuse to say that showing that A broke—the causal verb—B's back or picket fence, creating a prima facie notion of responsibility.

E. *Active and Passive Parties*

Once we are working in the stranger world, we then have to figure out how these multiple counts of causation fit together into a single whole. In dealing with this issue, Perry is right to note that I attach a great importance to the distinction between the “active” and “passive” party, which must be taken in strictly physical terms.⁵⁸ In this context, the term passive means “without motion.” Active means with motion. Things at rest transmit no force. Things in motion do once that motion is stopped, in proportion to their mass and the square of their velocity on impact.

In an effort to undermine this view, Perry stresses all sorts of situations in which the passive party may well have a causal role in the creation of the harm. That claim is absolutely right in insisting that where some stands when struck matters to the overall analysis. But by the same token Perry is wrong to assume that passive parties will *always* play a causal role in the overall inquiry. Here again, it is useful to be very careful about articulating the relevant causal paradigms and how they relate to each other. One most obvious case, for example, is *Bolton v. Stone*,⁵⁹ where the plaintiff was on the public sidewalk when she was hit on the head by a cricket ball struck from a nearby cricket pitch. The trespass by the batsman is not disputable. But the plaintiff was indeed standing still at the time she was struck.

Nonetheless, Perry argues that this case could fall into the paradigm of dangerous conditions, a phrase to which I reserve unstable objects or traps. Thus he writes,

⁵⁷ My general preference is for a proration rule that easily generalizes from two to many persons. For a sympathetic account of this position, see Owen, *Epstein's Razor*, *supra* note 4, at Part II.

⁵⁸ See Perry, *supra* note 9, at 154.

⁵⁹ [1951] A.C. 850 (H.L.) (*rev'g Stone v. Bolton*, [1950] 1 K.B. 201 (C.A.)).

It would therefore be necessary to inquire into whether the plaintiff in *Bolton v. Stone* had created a condition that was dangerous (for herself) by standing where she did when she was hit by the cricket ball. In terms of Epstein's own categorization of dangerous conditions, this would be a potential instance of placing a thing not dangerous in itself in a dangerous position.⁶⁰

The point shows how it is possible to degrade the notion of dangerous conditions so that it becomes totally useless: everyone has to stand somewhere. But it becomes absurd to say that in so doing there is always a viable defense of contributory negligence, or indeed any form of plaintiff's misconduct, which thankfully no one raised at any stage of this case. To be sure, if Miss Stone had been hit while a spectator on the grounds, the assumption of risk defense (to a strict liability claim) would have been viable. That affirmative defense might be overcome, for example, by pleading that the defendant may have failed to take some ordinary precaution, like putting up a net behind the batsman. But in this instance, the case just stops at the second stage. Notions of causation are not so plastic as to allow for their ingenious, but pointless, extension.

The batsman committed trespass, and the plaintiff was on the right of way. But she did not block the right of way of the ball, so that the case had a strong prima face case to which there was no affirmative defense. Note that the emphasis on hitting the ball on her head has a number of clear consequences. First, the correct defendant now becomes the batsman who hit the ball. But thereafter, the principles of vicarious liability could easily reach either the batsman's team or the opposing home team, the former on a principle of employer liability and the latter on a principle of premises liability. Second, gravity, which always helps to shape the arc of the ball, is a constant background condition that never defeats liability on causal grounds. Third, the causal chain here is far shorter than an effort to attribute negligence to the faulty design of the field or the failure to construct a sufficiently high fence. And fourth, the connection on causal grounds looks back from the time of injury, and thus is made wholly without any reference to the ex ante probability of the accident, whether couched in the language of reasonable foresight or of natural and probable consequences. Far from having to enmesh causation questions in matters of negligence and responsibility, the concept becomes far clearer when it is kept consciously separate from them.

This issue received extensive discussion in *Rylands v. Fletcher*,⁶¹ where one of the key issues was why a theory of strict liability applied to water that

⁶⁰ Perry, *supra* note 9, at 159, note 41.

⁶¹ *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

came from the defendant's reservoir onto the plaintiff land should be governed by a strict liability theory while accidents on the highway were said to be covered by a negligence theory only. Before turning to that question, it is necessary to recall one neglected aspect of this case: namely, the terminological battle in the lower court on whether Fletcher's claim should sound in trespass or case. Baron Bramwell insisted that trespass was the proper form of action because, in his view, the defendant's wrong was to "pour or send" water into the plaintiff's mine.⁶² Baron Martin disagreed with that characterization by insisting that what the defendant did was to dig a reservoir, which was a lawful act.⁶³ In fact, neither judge offered a full and complete description of the relevant events. The accident in question arose as water was pouring into the reservoir, and at the time the floor broke, some of the water was at rest, and some of the water was in motion. One real inconvenience, therefore, to using a strict liability theory for trespass and a negligence theory for dangerous conditions, is that it makes it virtually impossible to have a coherent approach to these mixed cases. Judge Blackburn neatly sidestepped this question by treating this as a case of indirect harms, "bringing, keeping, and collecting" something likely to do mischief if it escaped, so as to put the indirect harms (at least with respect to property damage to land, on the strict liability side of the line, when the operation of the force of gravity (implicitly captured in the term "escape") offered no defense.⁶⁴ But the entire enterprise would have been far easier if the law had ultimately respected Holmes's wise injunction in *The Common Law*,⁶⁵ stating that the theory of liability should not turn on the closeness of the causal connection. But the correct parity is strict liability across the board, not negligence.

Within this framework, the role of affirmative defenses in cases of damage to real property is usually easy because of the passive condition of the plaintiff, except perhaps in some exotic cases where there may be some explicit affirmative duty to protect one's property from trespasses, as with cattle on the open range, where the rule may work for the benefit in a community composed entirely of ranchers.⁶⁶ But those cases are rarities. More typically, the passive/active

⁶² Fletcher v. Rylands, 159 Eng. Rep. 737, 743 (Ex. 1865) (Bramwell, B.) ("The defendants had no right to pour or send water on to the plaintiff's works.").

⁶³ *Id.* at 744 (Martin, B.).

⁶⁴ Fletcher v. Rylands, L.R. 1 Ex. 265 (1866) (Blackburn, J.) ("[T]he true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.").

⁶⁵ See HOLMES, *supra* note 28, at 77.

⁶⁶ See Garcia v. Sumrall, 121 P.2d 640 (Ariz. 1942) (Lockwood, C.J.); see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES ch. 1 & 2 (1991); Kenneth Vogel, *The Coase Theorem and California's Animal Trespass Law*, 16 J. LEGAL STUD. 149 (1987).

distinction held for the plaintiff *Bolton v. Stone*, who in no sense blocked the defendant's right of way.⁶⁷ But the situation is more complex in dealing with collisions between two vehicles on the highway. To be sure, in some cases, *e.g.* rear-end collisions at stop lights, the active/passive distinction takes still holds. But does that condition hold when both vehicles are in motion? In dealing with the question, Baron Bramwell, one of my favorite judges,⁶⁸ made in *Fletcher* one of his rare slips. He said, in trying to explain why negligence rules are required for highway accidents, "[w]here two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet."⁶⁹ His argument is that since both carriages were in motion, force is no longer a decider, and it is necessary to resort to negligence to resolve the question of priority between the parties. Perry quotes exactly this passage to support just that point.⁷⁰

But that is not in fact the case. The key difference between the highway cases and the land cases is that some third party, be it the state or a private party, sets the rules of the road with which all parties must comply. Let these rules be internally consistent, and no accidents will occur when both parties act in full compliance. In two-party disputes, accidents can arise only in three permutations: with a single party's deviation from compliance; the other party's deviation; or with both parties in deviation. One simple case has one party blocking the right-of-way of a second carriage which hits it. In this setting, the compliance question can be solved by a strict liability regime under which no excuses are allowed for various parties because of infancy, inexperience, insanity and the like. Indeed, the aggressive use of the doctrine of negligence *per se* in these cases verges on just this solution, by holding all drivers to the same standards as those who are, in principle, always capable of full compliance.⁷¹

Thus, any effort to dumb down the standard of either negligence or contributory negligence for infant drivers⁷² quickly gave way to an objective standard of care tantamount to the strict liability solution.⁷³ In multiple-party interaction games, the only way anyone knows how to behave is to have uniform expectations toward all parties (similar to the forbearance rules for strangers). No

⁶⁷ See *supra* note 59.

⁶⁸ Richard A. Epstein, *Introduction: Baron Bramwell at the End of the Twentieth Century*, 38 AM. J. LEGAL HIST. 241 (1994); Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEGAL HIST. 246 (1994).

⁶⁹ *Fletcher v. Rylands*, 3 H. & C. 774, 790 (Ex. 1865), (Bramwell, B.). That decision was reversed in Judge Blackburn's famous decision. See *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd sub nom.* *Rylands v. Fletcher*, L.R. 3 H.L. 330 (H.L.E. Eng, 1868).

⁷⁰ Perry, *supra* note 9, at 155-56.

⁷¹ See, *e.g.*, *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920).

⁷² See, *e.g.*, *Charbonneau v. MacRury*, 153 A. 457 (N.H. 1931).

⁷³ See, *e.g.*, *Daniels v. Evans*, 224 A.2d 63 (N.H. 1966).

one should be expected to adjust his or her behavior to others, whose behavioral characteristics are not observable at a difference,⁷⁴ even if a lower standard of care is allowed in cases where one person teaches another how to drive.⁷⁵ The rules toward strangers are rightly different, and stress not the subpar abilities of the defendant but the need for uniform standards across all persons.⁷⁶

At this point, we have a clear set of zero/one conclusions that do not require any allocation formula between the parties, which is needed in the cases of joint noncompliance, where the formula will be hard to address in those cases where there is no “like” form of noncompliance between the parties.⁷⁷ In these cases, the simple comparison of the use of force will fail as an allocation device given that the rules often allow driving up to certain speeds in certain places. Thus, the typical joint causation case could involve speeding by party A coupled with an illicit lane crossing by party B. I don’t want to go into the many permutations in these cases. It is quite sufficient to say that no notion of negligence has to intrude in this process, by allowing for example a defendant to plead a sudden instance of epilepsy⁷⁸ or insanity⁷⁹ as a reason to escape liability. Indeed, any resort to these theories vastly lengthens the causal chains and reduces the certainty of outcomes, just as in *Bolton v. Stone*.⁸⁰ One clear advantage of the strict liability system is that, with its emphasis on force, it tends to *shorten* the relevant causal chain.

Matters can get yet more complicated because intersection collisions need not involve only situations where the party blocking the right of way is hit. One obvious question is whether or not the party hit could recover from the party with the right of way. Given the system of presumptions, there are two ways to overcome this presumption, both of which take us further from the original strict liability pattern applicable in stranger cases. Technically speaking, the first two rounds of pleading were:

- (1) Defendant hits plaintiff.
- (2) Plaintiff blocked the defendant’s right of way.

⁷⁴ See, e.g., RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 12, cmt. b (2010).

⁷⁵ *Holland v. Pitocchelli*, 13 N.E.2d 390 (Mass. 1938). For the general proposition, see, e.g., RESTATEMENT (SECOND) OF TORTS, § 299, cmt. d (1965).

⁷⁶ *Pfaffenbach v. White Plains Express Corp.*, 216 N.E.2d 324, 325-26 (N.Y. 1966) (Burke, J., concurring).

⁷⁷ For discussion of this issue, see Epstein, *supra* note 23, at 174.

⁷⁸ See, e.g., *Hammontree v. Jenner*, 97 Cal. Rptr. 739 (Cal. App. 1971).

⁷⁹ See, e.g., *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970).

⁸⁰ *Bolton v. Stone*, [1951] A.C. 850 (H.L.) (*rev’g Stone v. Bolton*, [1950] 1 K.B. 201 (C.A.)).

But now suppose we add one of two additional facts:

- (3A) Defendant deliberately hit the plaintiff.
- (3B) Defendant had an easy opportunity to stop, but was so diverted that he did not see the plaintiff, in plain view.

Note how each of these two third-stage replies (in the technical sense of Gaius) advance the argument. The first of these shows that intention to harm, in the strong sense of that term, has a role in torts, but only in the replication, which in turn requires that the defendant had, first, to plead a valid affirmative defense. Note, too, that both of these incremental pleas are perfectly consistent with the two earlier stages of the case. The *prima facie* case only alleges a strict liability offense, in which there is an intention to act, but not to harm. The causal element is the direct use of force. The defense only refers to the plaintiff's conduct. In effect, we can expand the universe and add further that perhaps the only harms compensable were those that the defendant intended to bring about, which, in the usual crash, would be the entire fix (just as with the interpretations of *mens rea* in criminal law).

The second replication is, of course, the last clear chance exception, which requires a greater deviation from accepted conduct than ordinary negligence, and raises a new causal question: whether keeping an eye on the road would have allowed sufficient time to stop.⁸¹ Here we are speaking about elements of avoidance, and not elements of physical causation, so that the counterfactual is necessarily more difficult to piece together. But again, note the internal consistency in which the causal element at this stage supplements the argument, without contradicting any thing in the pleadings that preceded this.

Of these two lines of authority, the one with the greater scope for growth is the former, which invites a discussion of potential justifications such as self-defense for intentional wrongs, which in turn are hemmed in by concerns with excessive or disproportionate force. I have examined these elements elsewhere,⁸² and will not rehash them again. My only point to make here is that indeed both Perry and Zipursky are correct to note that the idea of tort requires that we develop some sense of wrong. But they are wrong to associate a sense of wrong with the notion of negligence. Rather, it is best dealt with by looking at the entire structure of the argument, which is capable of systematic expansion from its modest strict liability base.

⁸¹ In most cases, this is fairly easy to determine. For the earliest account of this defense, see *Davies v. Mann*, 152 Eng. Rep. 588 (Ex. 1842).

⁸² Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 409 (1975).

F. *Beale, Corrected: Active Forces versus Dangerous Conditions*

The import of the previous section was to show that the line between active force and passive party holds as a conceptual matter. Unfortunately, in many cases, the use of the term “force” is so overlapped that can easily be used to discredit its application those cases where the terms make perfectly good sense. In this regard, it is instructive to revisit the tortured role that active forces play in Joseph Beale’s early account of proximate causation, which, if suitably corrected, is not as far-fetched as Perry and Zipursky think.⁸³

It is easy to ridicule Beale’s formulation, which holds: “where the defendant’s active force has come to rest in a position of apparent safety the court will follow it no longer; if some new force later combines with this condition to create harm the result is remote from the defendant’s act.”⁸⁴ The use of the term “active force” both draws on physical injury while subtly seeking to distance itself from its core meaning. But for all the ease by which fun can be poked at this language, the most obvious way to make a first-cut differentiation between the roles of two parties is to rely on the literal definition of force (as in $F = ma$). Who was in motion? Who hit whom? In all cases there are three permutations, either A, or B, or both, for which the presumptive allocations of loss are to A, to B, and to both.

The catch in this analysis is that force, as defined in physics, is, as should now be evident, not the only relevant feature to causal analysis. Indeed in the tripartite example of the plate brushed off the table in the dark, the only force administered by a human being was that by the fellow who brushed against the plate, and even that force only released gravity, which in fact supplied the sole downward motive force. A theory of forces thus explains only part of the system, but it is a huge part of any world with body blows, gunshot wounds, and car collisions. That said, there is a serious danger in putting the word “force” in scare quotes, as do Hart and Honoré, because it makes it appear that the term has no punch in any cases, just because it is strained in some.⁸⁵ That tactic is, ironically, a tacit repudiation of their own nonrelativistic views on linguistic realism.

It is telling, therefore, that Hart and Honoré seek to expose the folly of the Bealean definition by referring to the somewhat tortured logic of the decision in *Henningsen v. Markowitz*.⁸⁶ There, the infant plaintiff, age 13, purchased a gun from the defendant in violation of the statutory duty not to sell guns to minors. The boy’s mother told the boy to return the gun to the store, only to discover that the seller refused to take it back. The boy’s mother then hid the gun on his return,

⁸³ See Joseph Beale, *The Proximate Consequences of An Act*, 33 HARV. L. REV. 633 (1920).

⁸⁴ *Id.* at 651.

⁸⁵ See HART & HONORÉ, *supra* note 15, at 449 (listing “forces” in Index).

⁸⁶ 230 N.Y.S. 313 (1928).

which the boy found. He was injured when one his friends shot him with the gun, using ammunition purchased from the seller, by accident in the eye. The question was whether the breach of the seller's statutory duty was the proximate cause of the plaintiff's bodily injury. Here is the conscious Bealean application of the basic rule, which began just after the quoted passage:

Here in my judgment the active force did not in legal contemplation come to rest. Defendant's wrongdoing continued to be potentially active so long and whenever the infant purchaser obtained access to the dangerous implement, constituting in itself a force which defendant had set in motion. The two elements were the boy's eagerness to possess and use the dangerous weapon, and the defendant's wrongful act which made that desire an effective source of danger to others. Both have persisted. An ineffectual check did not bring them to rest. The force continued operative and capable of producing damage without the necessity of any other new force combining therewith. In *Pittsburg Reduction Co. v. Horton*,⁸⁷ the dynamite caps were carried by the boy with his mother's permission. A new agency was then established and the boy's possession of the explosive was referable to that permission and not to the original taking. This marks the distinction; for here the possession, use and damage are consequent upon the original sale.⁸⁸

All the signs of linguistic decay are present. The only proximate cause (i.e., the nearest cause) was the shooting of the gun, which would be the only cause of harm under the "last wrongdoer" account of proximate cause.⁸⁹ "Active force did not in legal contemplation" is an obvious signal that fiction has crept into the definition of force. The defendant sold a gun, he did not "set in motion any force." This force, in turn, was said to remain "operative" without "the necessity of any other new force combining therewith." The use of the terms "operative" and "persisted" both work well with the creation of dangerous conditions that remain uncorrected until the time of accident. But in connection with force, it only suggests that the force continues to press on the plaintiff throughout the incident. In the end, this clumsy effort to treat every relevant factor as a form of physical force does not represent a faithful application of Newtonian mechanics.

The analysis changes once we wean the Bealean test from its overreliance on the term "force" and rework it to cover dangerous conditions. Here, there was a breach of a statutory duty that created the dangerous condition that surely persisted so long as the gun was in the hands of the minor. That state of affairs

⁸⁷ 113 S.W. 647 (Ark. 1908).

⁸⁸ *Henningsen*, 230 N.Y.S. at 316.

⁸⁹ For a defense, see THOMAS BEVEN, *NEGLIGENCE IN LAW* 45 (3d ed. 1908).

continued through the time that the boy tried to return the gun. The hard question is whether that condition persisted once the mother had gained full control over the weapon. It is surely possible to argue that any future use of the gun is attributable not to the original sale, but to the mother's loss of control. But by the same token, the argument could be that the level of safety needed must be equal to that of the gun in the possession of the defendant, a state which was never achieved. Hence, the condition persisted until the gun was fired because it never was returned to its original safe niche or one identical to it. In making this argument, it is important to note that the direct application of force is attributable to the friend who shot the plaintiff, and that the mother herself may well have been under a duty to her son for safe storage, which could easily have been breached. So that the full analysis requires all three levels of causation to be taken into account, which is a harder task to sort out. The best guess is that the shooter would be put low on the priority list, since he was of the age to which the statutory duty applied. The division of responsibility of the mother is much closer, but could easily be divided under a regime of joint and several liability.

The same analysis carries over to *Horton*,⁹⁰ which *Henningsen* glibly sought to distinguish, without bothering to explain why. *Horton* involved a dynamite cap that the plaintiff's 10-year old friend Charlie Copple found by the railroad tracks close to where his father worked. The cap had been left there by a servant of the defendant. Charlie kept the cap in plain view and, from time to time, his mother stored the cap. She claimed throughout that she did not know that it was a dynamite cap. In ignorance of its dangerous condition, Charlie traded the cap to the 13-year old plaintiff who mistook it for the spent cartridge of a .22 shell, only to have it explode in his hand in trying to clean it. Recovery was *denied* in this case on the ground that once his mother and father took possession of the cap, anything that happened thereafter "was referable to the permission of his parents, and not to the original taking," even if the parents did not know (a disputed point) that this object was a dynamite cap.

Much is amiss. Clearly if there is any credible distinction between *Henningsen* and *Horton*, it should come out the opposite way, given that the mother had clear knowledge that the gun was a gun in *Henningsen*, while the persistent danger from the dynamite cap may well have not known in to the parents in *Horton*. No wonder the law of proximate causation got so bad a name. Matters are not made any better because Beale opined that "if the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it."⁹¹ The outcome in *Horton* was also defended by Mark Grady, who wrote:

⁹⁰ *Pittsburg Reduction Co. v. Horton*, 113 S.W. 647 (Ark. 1908).

⁹¹ Beale, *supra* note 83, at 656.

In situations when the last wrongdoer would feel especially disposed to remain at a low level of precaution because of an expectation that the original wrongdoer would be held liable for a lion's share of the expected harm that would result from their joint omissions, the direct-consequences doctrine cuts off the liability of the original wrongdoer and makes the last wrongdoer solely responsible for the damage. This was the result in the *Horton* case.⁹²

It looks as though modern economics converges with traditional proximate cause language to reach the same result.

Neither Beale's nor Grady's analysis of *Horton* stands, however, once we do the right drill. Clearly, the dangerous physical condition persisted until the dynamite cap was exploded, so that the issue of joint responsibility covers all three actors. Perhaps the infant plaintiff should be excused, although that is far from clear in a regime of comparative negligence, because he is the object of statutory protection. And perhaps the Reduction Company should recover partly from Charlie's parents because of her control. But the one thing that does not appear is exclusive agency in them, given that the dangerous condition was created by the company in the first place. To put the point in more modern terms, the flaw in Grady's argument is to assume that once the proximate cause arguments allow the suit against remote actor, all incentives on the intermediate party vanish. This is not the case, however, if the action for contribution or indemnity is allowed for the remote party against the party nearer in control.

Nobody can be sure if that allocation gets the risks exactly right, but it surely makes matters more credible. But the correct analysis also does give clear cases where the damages are too remote. Get Beale right in the explicit treatment of dangerous conditions, and the outcomes are more sensible and the limitations clearer. After all, in both cases, we can now identify the actions that break causation. Return the gun to the original seller, or disarm the cap. Proximate causation need not be that hard after all.

G. *Hart and Honoré on Causation*

At this point, the stage is set for a consideration of what is perhaps the most influential account of proximate causation, insofar as it addresses the status of human interventions, whether by act or omission. In dealing with these issues, the famous formulation of Hart and Honoré reads as follows: "The general principle of the traditional doctrine is that the free, deliberate and informed act or omission

⁹² Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 420 (1984).

of a human being, intended to exploit the situation created by the defendant, negatives any causal connection.”⁹³ There follows immediately this simple illustration: “A defendant who negligently allowed a pit to remain in a road was not liable to the plaintiff, a sheriff, when an escaping prisoner threw the sheriff into the pit; the decision is otherwise if the intervening actor pushed plaintiff in accidentally or negligently.”⁹⁴ In line with the earlier account of Beale, these intervening acts or omissions could fall into three categories: they could be wholly innocent behavior, without knowledge of circumstances; they could be behavior undertaken with negligence, when there was an opportunity, not taken, to avoid turning a dangerous condition into an actual harm; or there could be deliberate acts or omissions, which were intended to bring about the very conditions in question.

In fact, the Hart and Honoré position is incorrect for a number of technical reasons. The most obvious of the criticisms is that in many cases the antecedent conduct of the defendant is (in cases where as an owner of property it has a duty of care to tenants, for example) to guard them against various forms of deliberate misconduct. In dealing with these cases, both the English cases⁹⁵ and the American cases⁹⁶ never treat that deliberate action by a third party as sufficient to “negative” causal connection. The Restatement (Second) of Torts takes the same position.⁹⁷

Hart and Honoré acknowledge the presence of these cases, but do not address the nub of the difficulty in imposing liability, which is that most contracts, including most leases, in voluntary markets, have clauses that limit the amount of “consequential damages”—the term oozes causal connotations—recoverable by an injured party in exchange for the consideration rendered.⁹⁸

But this problem of causal intervention arises also in stranger contexts as well, as the second sentence quoted above acknowledges. For example, the first defendant shoots an arrow at the plaintiff, which hits him only because the second defendant deliberately chooses not to raise a shield that could have intercepted it before it struck the plaintiff. Under the stated test of Hart and Honoré, the second act or omission could be said to sever causal connection. Yet once the multiple

⁹³ HART & HONORÉ, *supra* note 15, at 136.

⁹⁴ *See id.*

⁹⁵ *See, e.g.*, *Stansbie v. Troman*, [1948] 2 K.B. 48.

⁹⁶ *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

⁹⁷ RESTATEMENT (SECOND) OF TORTS § 449, TORTIOUS OR CRIMINAL ACTS THE PROBABILITY OF WHICH MAKES ACTOR’S CONDUCT NEGLIGENT (1965) (“If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.”).

⁹⁸ The treatment of contract losses in Hart and Honoré is less subtle and comprehensive than their treatment of the tort issues. *See* HART & HONORÉ, *supra* note 15, at chapter 11.

levels of causation are taken into account, this account looks far more shaky. The points of criticism of their view are as follows.

First, the easy equation of acts and omissions misses some fundamental difference between the two problems, since the middle party neither used force nor created a dangerous condition. Thus, as an example, imagine A shoots B when C fails to raise some guard. The omission of C does not deny the direct trespass to the person of A. Once A is held (strictly liable), the next question is whether there is an action against C. In this contest, the use of the term “omission” must be clarified. If C were under some explicit legal duty to protect B, the deliberate omission may well shift the balance, at least if the shooting of A were accidental, and probably if it were also negligent. The intentionality of the wrong seems to dominate. But if the omission stemmed only from carelessness, the case surely looks closer, and under modern rules of joint causation some apportionment might be appropriate. If it were an unavoidable omission, perhaps by someone who was disabled from performance by some third party, the action over by A against C would seem to fail. The complexities in the three-party situation have nothing to do with the remoteness of damage question. They all come in the second round of litigation, where both the ordinary instincts and the economic consequences are less clear.

Second, in the examples of the hole given by Hart and Honoré, the initial descriptor of “negligently” before the term “allowed” is superfluous in a strict liability system. Nor is the problem limited to cases where the defendant allowed some condition to be created; the same result would apply against someone who “dug” the hole in the road in the first place. The case of *allowing* presupposes some public duty to correct the situation. The case of *creating* does not, and thus could apply to any private person. Once these minor adjustments are made, the correct analysis says that the initial digger is responsible to the plaintiff for the loss in all three cases. The correct test of remoteness of damage is far simpler. If the hole is filled, the initial defendant is in the clear. There are no endless complications with “but for” causation or any of its endless variations, such as *causa sine qua non*.

The question of the hierarchy of causal contributions remains. Thus, so long as the hole remains unfilled, the only hard question goes to the allocation of causal priority in a three-party chain. In the case of an innocent push that would not cause any harm if the hole had been filled, it looks as though the creator of the plaintiff’s condition would have to indemnify the party who pushed for the loss in question in either whole or part, and probably the former if the tap was wholly accidentally. Some terms of the split responsibility would remain even if the middle actor were negligent, at which time it might be appropriate to ask whether the initial defendant had been careless in its failure to discharge its statutory duty. In these cases, it is an open question whether there should be an even division of

the loss, or indeed any right of contribution at all. But so long as the two successive actions are of the same moral quality, it is hard to come up with any clear conclusion.⁹⁹

At this point, it is possible to offer a different explanation as to why Hart and Honoré are right to single out the deliberate actions of third persons for special treatment. These are the only clear cases in which the remote defendant who dug the hole should be able to obtain a full indemnity against the party who deliberately pushed the sheriff into the hole. Stated otherwise, the knotty causation question at this juncture reduces to making some judgment between the party who created the dangerous condition and the party who was hurt by it. The risk of being unable to recover from a deliberate wrongdoer should lie with the first, and not the second.

This basic analysis of sequential behavior helps to explain, moreover, many key cases in which the dominant judicial attitude is one of skepticism about the ability of courts to generate any formal theory of causation with a theory of either negligence or strict liability. Two famous cases illustrate this basic pattern, and show how the correct adjustments of the traditional theories of causation yield results that comport with both ordinary language and economic efficiency. In *Marshall v. Nugent*,¹⁰⁰ the plaintiff Marshall had gone up on the side of the road to warn oncoming traffic of danger after the car in which he was driving was forced off the road by a truck for the defendant oil company, Socony-Vacuum, as it was coming around the bend of a windy New Hampshire road. Shortly thereafter, Nugent, while coming around the corner, was late in catching sight of the blockage on road the road created by the stalled car and the oil truck. In his successful effort to avoid hitting the car and oil truck, Nugent veered off the road and struck the plaintiff. The jury let Nugent escape liability, but rejected Socony-Vacuum's argument that even though admittedly negligent, the damages caused were, nonetheless, too remote. That jury decision was affirmed by Chief Judge Calvert Magruder, who was, in a previous incarnation, a distinguished torts professor at Harvard Law School.

Consistent with the dominant realist tradition, Magruder begins by trashing the old standby accounts of proximate causation:

To say that the situation created by the defendant's culpable acts constituted 'merely a condition', not a cause of plaintiff's harm, is to indulge in mere verbiage, which does not solve the question at issue, but is simply a way of stating the conclusion, arrived at from other

⁹⁹ For the unwillingness to allow any indemnity in cases of "like negligence," in this instance two failures to inspect for a hazard created by neither party, see *Union Stock Yards Co. of Omaha v. Chicago, Burlington, & Quincy R.R.*, 196 U.S. 217 (1905).

¹⁰⁰ 222 F.2d 604 (1st Cir. 1955).

considerations, that the causal relation between the defendant's act and the plaintiff's injury is not strong enough to warrant holding the defendant legally responsible for the injury.¹⁰¹

But that negative, of course, does not explain what “considerations” are relevant or, when all is said and done, how the case should be decided. So, here is the drill: First, the plaintiff has a strict liability tort action against Nugent on the principle of “he hit me,” a valid prima facie case. Magruder is right that so long as the plaintiff does not block the defendant’s right of way, contributory negligence is not an issue. But why then have the jury exonerate Nugent? Only because he has, in fact, an action for full damages against Socony-Vacuum for blocking his right of way, the quintessential creation of a dangerous condition—which is all the more so because it was hidden from Nugent’s view, thereby eliminating any last clear chance to avoid injury. So the 100/0 split is achieved by letting Nugent off in this context, and putting all of the loss on Socony-Vacuum. In my own view, if Socony-Vacuum were insolvent, the action against Nugent should hold true unless some portion of the initial tie-up could be attributable to Harriman, Marshall’s son-in-law and driver.

But does this account of dangerous condition lead to the endless confusions associated with “but for” causation? No, in fact, and Magruder resorts to the very cause/condition distinction that he trashed a few pages earlier to explain why this has to be the case. He thus writes:

If the Chevrolet had been pulled back onto the highway, and Harriman and Marshall, having got in it again, had resumed their journey and had had a collision with another car five miles down the road, in which Marshall suffered bodily injuries, it could truly be said that such subsequent injury to Marshall was a consequence in fact of the earlier delay caused by the defendant's negligence, in the sense that but for such delay the Chevrolet car would not have been at the fatal intersection at the moment the other car ran into it. But on such assumed state of facts, the courts would no doubt conclude, 'as a matter of law', that Prince's earlier negligence in cutting the corner was not the 'proximate cause' of this later injury received by the plaintiff.¹⁰²

The point is, of course, correct in most respects because once the drive resumes, the initial set of dangerous conditions has been eliminated, and Marshall and Harriman are at no greater risk than they had been before the onset of the collision. At this point, the only loss they experience is delay, quite a different

¹⁰¹ *Id.* at 610.

¹⁰² *Id.* at 612.

matter, for which the damages are normally so inconsequential that they fall beneath the radar. In one sentence, Magruder explains why “but for” causation does not work in cases that can be, by his own admission, fully resolved by a resort to the paradigm of dangerous conditions. So, in the end, he makes only one implicit mistake: he assumed that the jury was entitled to find that the behavior of the defendant was the proximate cause of the plaintiff’s injury. This is incorrect. The theory of causation is now robust enough that once the basic facts are found, the plaintiff is entitled to a directed verdict against Socony-Vacuum on the issue of proximate causation. The strong theory offers sufficient guidance and the ordinary deference afforded to juries on matters of causation is no longer appropriate.

The same approach of systematic decomposition of a complex sequence of events is the key to the problem in *Wagon Mound No. 1*,¹⁰³ which is notable for its emphatic recognition of the “directness” test, in favor of a view that ties liability to the reasonable foreseeability of the harm in question. Viscount Simonds cautioned that on matters of this sort, judges should not let themselves be “led astray by scholastic theories of causation and their ugly and barely intelligible jargon,” which includes claims that “the actor seeks to escape liability on the ground that the ‘chain of causation, is broken by a *nova causa* or *novus actus interveniens*,”¹⁰⁴ where the last two words lose something of their mystery when translated into English—“new cause” or “new intervening action.”

Right off the bat, it is clear that there is something incomplete about the traditional theories of causation that rely on a translated version of these instructive terms, because no matter how applied they do not allow for a systematic examination of cases of *sequential* activity that results in some large harm.¹⁰⁵ But by the same token, the test of reasonable foresight does not solve this problem. In order to tell whether a consequence is “foreseeable” or not, it has to be first determined whether it counts as a consequence at all. That inquiry, in turn, will force the analysis back to the prior issue of causation, to which it adds one further and unnecessary complication. Now, it must also be asked whether the chain of events (which is embedded in the idea of “consequences”) was sufficiently likely at the time of the defendant’s act that caused the harm, or, in a negligence theory, the careless action that caused the harm. This probabilistic inquiry is in all cases more complex and less relevant than the simple “directness”

¹⁰³ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co., Ltd. (Wagon Mound (No. 1))*, [1961] A.C. 388 (P.C. Aust.).

¹⁰⁴ *Id.*

¹⁰⁵ On which, see Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J.L. & ECON. 589 (1983); Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65 (1981).

test requirement that starts from the harm and works backward through the chain of events to see whether the defendant's action rates as a cause.

The foresight test has to decide about the level of probability that any given chain would manifest itself, in light of what the defendant knew when he undertook his action. There are a variety of ways to express this point, by either raising or lowering the degree of probability. Instead of foresight, it could be asked whether the consequences were "natural and probable,"¹⁰⁵ or whether they were "necessary" or "usual."¹⁰⁶ Unfortunately, this inquiry is a pointless diversion to the question of whether A should be responsible for the harms caused by B. If the probabilities are high, B will have to pay the price by responding in damages to many lawsuits. If they are low, there will be few instances in which those damages could be protected. The defendant internalizes the benefits of all precautions even if held liable for each instance of harm caused. The legal system escapes the burden of building in questions of degree into every issue of tort liability, only to mitigate that burden by finding that exceedingly low probabilities of future harms for "freakish" events do not exonerate the defendant from liability. The only place for dealing with probabilities of future harms is with ordering injunctive relief before some threatened harm has taken place. And usually, with damages as a viable alternative, this remedy will require a high showing of likelihood, which is most easily done in nuisance contexts with continuing or imminently threatened harms.

Rather than overload the notion of causation with irrelevant baggage, it is best simply to attack the issue head on. The *Wagon Mound* case offers a textbook illustration how that might be done. The defendants had carelessly (not that it matters) discharged oil from their ship while it was berthed in Sydney harbor. After their ship set sail, the oil was carried by the wind and tide to the plaintiff's wharf, which was used for repair work on other ships in the harbor. The plaintiff's foreman ordered his workmen to do no welding or burning on the pier until he was convinced the oil was not flammable. After consulting with the manager of the CalTex Oil Company, where the *Wagon Mound* was berthed, the foreman instructed his men to resume their welding operations, taking care that no flammable material should fall off the wharf into the oil. Dumb decision. Some two or three days later, the oil caught fire when molten metal from the dock fell into the oil, where it ignited some cotton waste or rags beneath the surface, setting

¹⁰⁵ See, e.g., *Brower v. New York Cent. & H.R.R.*, 103 A. 166 (N.J. 1918); for criticism of the phrase, see *In Re Polemis*, [1921] 3 K.B. 560 (Scrutton, L.J.) ("I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined.").

¹⁰⁶ *Ryan v. New York Cent. R.R.*, 35 N.Y. 210, 212 (1866).

fire to the oil, consuming the wharf. It was not known whether this material had fallen off the dock or had fallen into the water in some other way.

I go into these facts in some detail because a complete time motion study has to take them into account. Viewed from the *ex ante* perspective, the odds of this particular sequence of actions happening seems small indeed. But where exactly is the break in the chain of causation? One way to think about this is to ask about the state of affairs once the discharged oil reached the dock. That is, of course, a completed tort of trespass for which a damage remedy lies, especially under a strict liability theory. At this point, the correct rule is one that gives the plaintiff the cost of clean up, the cost of the business interruption, and compensation for any further damage that the oil does before its prompt removal.¹⁰⁷ But what if the plaintiff decides not to spend the money on the cleanup in question, but pockets the damages and uses the dock after satisfying himself that the work was safe? At this point, the correct result is that the damages the plaintiff receives are the same no matter which course of action he chooses to follow. Put otherwise, having been made whole by the correct measure of tort damage, any further gamble the plaintiff takes is at his own expense. He may have been prudent to order that no one throw material off the dock, or foolish. But in the tradition of strict liability the wisdom of that choice is his concern only. What matters are outcomes. If the new operations work out well, he pockets the profit. But if the new operations fail, he bears the full *incremental* loss associated with the destruction of the dock.

This analysis at no point relies on any notion of foresight. Nor does it explicitly rely on any economic theory. But what it does do is get exactly right the incentives on both parties in the causal chain. The defendant has to pay for the unmixed consequences of the original spill. The plaintiff, then, has to bear the costs (having received compensation for those initial losses) of its own decision against which it could, if it wished, take out insurance. Because the situation involves only these two parties, the limited damage award sets the accounts straight. But what happens if these two parties combine to cause harm to a third party? In *Wagon Mound No. 2*,¹⁰⁸ of course, just that action was brought by a third party. In dealing with this issue, the common law approach is to allow the plaintiff to pick whichever defendant he chooses, so long as the strictures of causation are satisfied. On the assumption that all parties are solvent, however, the plaintiff's original choice does not matter, so long as an action over against the codefendant is allowed by a party lower in the chain of responsibility is allowed against a party higher in the chain. For resolving these disputes between

¹⁰⁷ For analysis, see Susan Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25 (1989).

¹⁰⁸ *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound (No. 2))*, [1967] 1 A.C. 617.

co-defendants, it is critical to track the original causal analysis used in *Wagon Mound No. 1*. The original defendant, having paid the original plaintiff for the initial losses, has no control over the marginal decision, so that all the losses from the decision to continue operations fall on the owner of the wharf. If that party were insolvent, the question would be whether this action severs causation to the remote actor, so that it could escape liability, to which the answer is negative. The causal analysis, of course, does not depend on the notion of insolvency. But, in practice, the hierarchical arrangement of these different causal notions matters only when that insolvency occurs.

At this point, the overall picture is clear. The remoteness-of-damage test does not turn on whether the action of the intermediate party is innocent, negligent, or deliberate. It turns on the question of whether the state of affairs was brought back to its original condition of safety, which it was not. The situation thus resembles *Wagon Mound No. 1*, where the correct analysis holds the remote party responsible with, in this instance, a full action against the owner of the wharf. The terms *directness* and *foresight* never enter the equation. The former is imprecise because the term can be used in opposition to indirect consequences, that is, those which were allowed under the old action on the case, and remote consequences, an oxymoron that covers results for which no liability attaches. And foresight ignores the precise sequence of events by asking the wrong question about ex ante probabilities when the right question is incremental damages for sequential harms. A full theory of causation moored in a theory of strict liability gets these issues right for stranger cases, and does in a way that responds to the concerns of both Zipursky and Perry, chiefly by playing out the full consequences of a theory of causation that incorporates, as one of its key elements, the prima facie case of strict liability.

Strict liability is no impossibility. It is the bedrock from which the rest of the system, in stages, emerges. It remains, of course, to figure out just where negligence works itself into the grand scheme. I turn next to a critique of the Horwitz paper to show how this can be done, especially in the context of medical malpractice.

II. TORTS IN CONSENSUAL INTERACTIONS

The last of these three papers, by Jill Horwitz,¹⁰⁹ addresses the relationships that, first, charitable immunity and second, contractual arrangements have to the liability rules for medical malpractice. Although this topic looks far narrower than the previous broad discussion, it in fact supplies the last piece of the general puzzle, by showing how a system of tort liability that starts with strict liability in

¹⁰⁹ See Horwitz, *supra* note 3.

stranger cases can expand—chiefly through the use of an assumption of risk defense, and the creation of affirmative duties of care—to deal with medical malpractice cases. In order to organize this portion of the discussion, I shall first consider, in subpart A, the theoretical way in which a system of medical malpractice should be incorporated into law. Subpart B considers the historical role of charitable immunity in the overall synthesis.

The functional conclusion is that, in principle, it should be possible to contract out of whatever legal standard is devised for medical malpractice cases, and that the failure to allow for this corrective device has locked the legal system into a set of medical liability rules imposing a chronic burden on the operation of the overall tort system relative to some optimal contractual solution.¹¹⁰ It would be a mistake to think that this burden is the single largest challenge that faces health care, for it most definitely it is not. But the best estimates of the problem put the burden of medical liability at around \$100 billion per year, or four percent of current health expenditures.¹¹¹ An issue of that size is still worth some serious evaluation, even if it is not health care's defining issue.

A. *Theoretical Foundations*

As noted earlier,¹¹² the distinction between torts to strangers and injuries that arise in the context of a consensual arrangement has a powerful impact on the organization of substantive tort law. A negligence regime conceals all the operational difficulties between relying on one benign generalization—all individuals are required to exercise reasonable care under the circumstances—to cover the waterfront. That case-by-case approach dominates any effort to articulate broad, sensible categories that could generate reliable default rules that could decide the overwhelming number of cases. That insistence on individualized judgment increases the rule for juries to decide individual disputes on a case-by-case basis. Such is the case in the law of occupier's liability when a

¹¹⁰ I have stressed this theme through many years of unsuccessful reform. See, e.g., Richard A. Epstein, *Medical Malpractice: The Case for Contract*, [1976] AM. BAR. FOUND. RES. J. 87; Richard A. Epstein, *Medical Malpractice, Imperfect Information and the Contractual Foundation for Medical Services*, 49 LAW & CONTEMP. PROB. 201 (1986); Richard A. Epstein, Symposium, *Contractual Principle versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503 (2005).

¹¹¹ The United States Department of Health and Human Services estimates the range at between \$70-\$126 billion; a Stanford research team puts the range at between \$84-\$151 billion, and National Center for Policy Research has it somewhat lower at \$50-\$110 billion. See James A. Comodeca et al., Symposium, *Killing the Golden Goose by Evaluating Medical Care Through the Retroscope: Tort Reform From the Defense Perspective*, 31 U. DAYTON L. REV. 207, 214-15 (2006).

¹¹² See *supra* Part I.

generalized reasonable care standard displaced the older view that divides entrants onto the land into invitees, licensees and trespassers.¹¹³ The same approach tends to reject the traditional six-fold classification of bailments in *Coggs v. Bernard*.¹¹⁴

For these purposes, one key element in both these classifications is that paid and gratuitous relationships require different care levels. Those who receive compensation are normally required to exercise ordinary care of individuals in that line of business. Those who perform gratuitous services are required to act to the best of their individual ability, even if it does not reach the standards of the reasonable man. I have already addressed these first two categories in some detail, in an effort to explain the latent efficiency justifications of these distinctions.¹¹⁵ Here, I shall confine my attention to a medical malpractice, which does not fall within the traditional category of bailment because the physician is not charged with the management of any personal property. Nonetheless, like bailments, medical malpractice could involve services rendered either for a fee or for free, which in turn raises the question of whether different standards of care ought to be required, and if so, what those different standards should be.

In dealing with this problem, the conventional analysis, embraced by Horwitz, starts by thinking of medical malpractice as part of tort as defined by the nature of the injuries.¹¹⁶ The introduction of contract comes mainly at the margins of the analysis, as in setting up the relationship to begin with. Historically, this is surely the dominant position. Starting in Roman times, the plaintiff had the option to think of a medical malpractice case as sounding in tort or (as in most cases) governed by the consensual contract of hire, subject to a standard of reasonable or customary care. Normatively, however, I think that this conventional view is clearly wrong. The relationship between doctor and patient does not start when the injury occurs; it begins when the treatment is first proffered. The relationship is personal and unique, and there should be, as a matter of legal principle, no reason why two parties in setting up their private relationship cannot deviate from any standard set of terms that the tort law might set up. Put otherwise, it is best to think of the current set of tort rules as setting default contractual provisions.

¹¹³ See, e.g., *Rowland v. Christian*, 443 P.2d 561, 566-67 (Cal. 1968). For an endorsement, see Owen, *Epstein's Razor*, *supra* note 4, at 4.

¹¹⁴ 92 Eng. Rep. 107, 109 (Q.B. 1704) (Holt, C.J.). The categories are: (1) depositum (gratuitous bailment for safekeeping); (2) commodatum (bailment for the bailee's use); (3) locatio rei (bailment for hire); (4) vadium (a simple pawn); (5) locatio operis faciendi (paid management of bailed property); (6) mandatam (gratuitous management). For discussion, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990).

¹¹⁵ See Epstein, *supra* note 48.

¹¹⁶ See Horwitz, *supra* note 3, at 28-34.

How, then, should the analysis proceed? One way is to ask whether or not a tort action could, in principle, lie in medical malpractice-type situations, which come up, as Horwitz notes, in thinking of the surgeon's action on the body as a physical battery, because quite literally it does involve the application of force by one person against another.¹¹⁷ I have no doubt that this allegation creates a prima facie case. But it is equally clear that within physician-patient relationships the defense of *assumption of risk* will, and should, defeat this strict liability cause of action, in virtually all cases. Note that in standard pleading style, the defense of assumption of risk applies only to the allegation that preceded it; namely, the strict liability cause of action, which makes no reference to the physician/patient relationship.

At this juncture, the jurisprudential question concerns the status of the assumption of risk defense to the initial strict liability complaint. It is, of course, the case that assumption of risk is regarded as the quintessential defense to a tort action. There are many cases where that makes sense. A plaintiff comes closer to a dangerous activity of the defendant in order to get a better view. There is no agreement between the parties, but there is a separate willingness for someone to place themselves in harm's way.¹¹⁸ But all forms of assumption of risk do not have that unilateral character. In other cases, interactions between the parties should be able to supply a contractual defense to a lawsuit whose prima facie case rests on a strict liability theory. To see why, just assume, somewhat bizarrely, that the physician asks the plaintiff to sign a waiver that provides only that the patient will not bring a suit against the doctor for purely accidental harms under a strict liability theory. That explicit waiver or disclaimer would be regarded as contractual. The best way, therefore, in these cooperative contexts, to think of the assumption of risk defense in the absence of a waiver, is as an implied release of the cause of action, which needs no further explication because it is the bedrock assumption of the entire relationship.

Why then, at this stage in the argument, is this assumption of risk defense so powerful? Because, wholly apart from any specific agreement, a wide set of shared background expectations ground this particular defense. The patient has asked for the care in question, and to treat as actionable the inevitable byproduct of the physician's intervention as tortious ignores powerful social conventions in ways that would lead physicians to refuse to offer care – even when it was to the net benefit of the patient to take the risk of harm, in order to secure a better long-term outcome. Indeed, the logic of mutual gain is so overwhelming that it is very hard for parties to contract into a strict liability regime even if they wanted to, as for example, by the simple statement that the physician “guarantees” that the

¹¹⁷ *Id.* at 29-30.

¹¹⁸ *See, e.g.,* *Brown v. Kendall*, 60 Mass. 292 (1850) (fitting this description precisely).

patient will just come out of surgery fine.¹¹⁹ Why? Because the efficient solution to the contracting problem lies manifestly in the opposite direction; in the social context, these words should be treated as “mere” assurances, or predictions designed to alleviate patient worries, and not as strict guarantees. Better that result than a constant barrage of reminders to the afflicted patients as to the legal nature of the relationship, which serve as a constant and unwelcome reminder of all the adverse events that could arise even with proper care. The familiar explanation for that practice runs as follows. In all consensual arrangements, any future damage payments owing from the defendant will have to come from fees previously gained from the plaintiff, for otherwise the practice will shut down, given that other patients will flee if the beleaguered physician seeks to offload the expenses of treating another patient on them. The whole argument is so powerful that it passes under the radar without further note.

At this stage in the argument, the key question is what additional allegation must a plaintiff make in order to overcome the latent, all-purpose assumption of risk defense to the initial battery. The answer: some notion of physician negligence works itself into (at the third stage of argument) a general strict liability system. But in its simplest form, the patient who truly does assume the risk of an accidental harm (or a deliberate harm intended to produce long-term patient benefits) does not thereby necessarily assume the risk of harm that is attributable to the bad practice of the physician. We know that this view tracks ordinary social expectations because the term malpractice itself means “bad practice,” which just hones in on the hard question: What distinguishes good from bad medical practice? One obvious candidate is that following the accepted treatment norms within the profession is a form of good practice; at this point customary care becomes the implicit standard. Once the case has reached that state, it becomes far harder case to assume that any patient has impliedly assumed the risk of bad practice. And so “negligence” of some type becomes the implicit standard of care in the battery branch of medical malpractice.

The argument, however, is still incomplete. It is wrong to think that medical malpractice cases originate only from trespass to the person. Once the physician decides to treat a patient, the same customary care standard applies to simple omissions as it does to affirmative actions. Quite simply, the creation of the physician/patient relationship imposes obligations for the physician to act. “So the surgeon who operates without pay is liable though his negligence is in the omission to sterilize his instruments...”¹²⁰ The question then arises as to what standard should govern these omissions. The obvious answer is that it is the same level of customary medical care that applies to direct actions. Any other standard would thwart the ordinary expectations of the parties, and would create all sorts of

¹¹⁹ See, e.g., *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

¹²⁰ *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928).

avoidable issues when in the course of a particular surgery, the physician omits to take some standard precaution.¹²¹ The creation of the consensual arrangement thus reduces the act/omission distinction to puny insignificance, despite its substantial role in stranger cases.

Once the parity between acts and omissions is established, the next question is whether the customary care standard is sufficient to bring the parties back into some long-term stable equilibrium in which the fees collected for service are sufficient to cover the payouts for bad practice plus the other ordinary expenses of running the business. On this question, a lot depends on how the applicable standard of care is construed and applied. Speaking of customary standards is one way of announcing a rule to which all physicians, in principle, can comply, so that uniform care could lead to no liability at all. The use, in contrast, of an aggressive negligence standard, aided perhaps by a tough presumption of *res ipsa loquitur*, will not reduce expected liability to a sufficient degree to keep the practice of medicine on an even keel.

To avoid those risks, the calibration of the customary care standard in medical malpractice quickly gravitates to customary standards of care for physicians in *like* specialties or categories. The whole point was to erect a standard to which all physicians could comply. It was just too costly to have a standard which is sure to generate failure: it is not viable to insist that all interns must perform as specialists, or that all physicians in a community hospital have the same level of expertise as those of eminent physicians at work in the Mayo Clinic. In essence, for each identifiable medical subgroup, the customary standard has to be set with the view that uniform compliance is possible. This is not the case if trainees are judged as eminent physicians. At this point, the spur to higher levels of care lies in market competition and professional innovation. The improvements of medical care before, say, 1960, show that this model is perfectly viable.

The effort to control the potential exposure of physicians through the contraction of liability to some cross between customary care and bad faith, however, is subject to one serious limitation. It does not address two other key dimensions of the physician/patient contract: first, the damage rules and second, the cost of adjudication. Just these issues were key in setting out the nineteenth century rules on workers' compensation where the original *contractual* solution imposed limited damages awarded by arbitration or some other inexpensive non-judicial process.¹²² The compensation rules were offset by the broader coverage

¹²¹ For an early recognition of the point, see Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1165 (1942) ("The reasonably prudent man 'test' would enable the ambulance chaser to make a law suit out of any protracted illness.").

¹²² For a discussion of the contractual origins, see Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation*, 16 GA. L. REV. 775 (1982).

rule—harms arising out of and in the course of employment, not negligence. That outcome was complemented by narrower defenses—willful misconduct, and not contributory negligence or assumption of risk. So long as the pieces fit together, the system could survive. The contract solution for malpractice could never involve a shift to a strict liability rule, so that in equilibrium, the voluntary liability regime is likely to key tied to some form of both limited liability and limited damages, often in an arbitral setting. In effect, if contract solutions were allowed, that is what I suspect would happen.

B. Historical Evolution

The situation in the nineteenth century, which is where Horwitz begins her paper, was quite different from what it is today. The law of medical malpractice was in its infancy.¹²³ Oliver Wendell Holmes, for example, does not consider it (or industrial accidents) in his flawed 1881 masterpiece, *The Common Law*.¹²⁴ In what little law there was, the applicable substantive standard, to the extent that there was any liability at all, was closer to gross negligence, or even reckless disregard, than it was to any objective negligence standard. In many cases, there was no real liability at all.

In my book *Mortal Peril: Our Inalienable Right to Health Care?*¹²⁵ I offered the view that the early doctrine of charitable immunity, as it applied to charitable hospitals, functioned in practice much like a default norm that *in effect* insulated hospitals from any liability to their unpaid patients, and in most cases to their paying patients as well. That immunity was not based on any explicit theory of disclaimer from contractual liability. In its inception, it was a status defense, based on the nature of the institution: charities were subject to special protection for the same reason that their donors receive charitable deductions under the tax laws. That immunity, however, never protected the charitable institution from liability in tort for strangers who did not make any deal go get service on more

¹²³ See Horwitz, *supra* note 3, at 33. See also her key reference, KENNETH ALLEN DE VILLE, *MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY* 161 (1990). As Horwitz reports, *supra* note 3, at 33, note 120, “malpractice was properly pleaded as trespass on the case ‘as the result of breach of duty, negligence, or carelessness.’” (citing DE VILLE, *supra* at 156). That result follows from the rise of the action on the case as a uniform action in negligence, see *Williams v. Holland*, 131 Eng. Rep. 848 (C.P. 1833). On that evolution, see M.J. Prichard, *Trespass, Case and The Rule in Williams v. Holland*, 22 *CAMBRIDGE L.J.* 234 (1964). As Horwitz also notes, Blackstone placed medical malpractice with torts. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 122 (1768) (noting that he did not theorize about its foundations, given its relative unimportance at the time).

¹²⁴ HOLMES, *supra* note 28.

¹²⁵ RICHARD A. EPSTEIN, *MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE?* 369-76 (1997).

favorable terms.¹²⁶ By the same token, for the most part this form of immunity was extended awkwardly to those individuals who paid for their medical care. The stated ground was that the money paid should not be regarded as “compensation in the sense of the law,” but as a charitable contribution.¹²⁷ Rather than indulge in the system, it is easier to say that a uniform standard of care makes the operation of a charitable hospital more efficient. The dominant feature of the charitable immunity system was that it created a status-based defense that gave notice to any and all patients that they entered at their own risk. In some instances, when the immunity was limited by judicial decision, it was then reestablished in limited form by statute.¹²⁸ The immunity, of course, did not extend to for-profit institutions, which were presumably exposed to the modest medical malpractice law of the time, against which the higher fees might have provided some protection.

All in all, however, the modest scope of liability kept this problem from reaching fever pitch. One piece of evidence in that direction was that for all sorts of potential torts, a charitable institution could, and often did, waive that defense. By the beginning of the twentieth century, it was often understood that any decision to buy malpractice insurance should be treated as an implicit waiver, at least to the extent of the insurance so provided.¹²⁹ By the mid-twentieth century, as the underlying tort liability for medical malpractice began to expand, the immunity also fell into decay, chiefly on the grounds that it was not proper to think that an impoverished patient could be held to have waived his rights to the protection of the medical malpractice law. The most influential decision in this line was *President and Directors of Georgetown College v. Hughes*,¹³⁰ demonstrating the relationship between charitable immunity and contractual freedom—or the lack of it.

The notion that there is any [waiver by patient] is entirely fictional. In some instances the fiction is based upon impossibility, as when a patient is unconscious from whatever cause when he enters. So, also, when he is received not by arrangement of his own but of others and has no voice or choice in the terms. Infants of tender years, if not those more mature, and insane persons have no legal capacity so to will away their rights. Nor

¹²⁶ See, e.g., *Powers v. Mass. Homeopathic Hosp.*, 101 F. 896, 899 (C.C.D. Mass. 1899), *aff'd*, 109 F. 294 (1st Cir. 1901) (quoted in Horwitz, *supra* note 3, at 31).

¹²⁷ *Powers*, 101 F. at 899 (C.C.D. Mass. 1899), *aff'd*, 109 F. 294 (1st Cir. 1901).

¹²⁸ See, e.g., *Glavin v. Rhode Island Hosp.*, 12 R.I. 411 (1879), after which was passed, 17 years later, R.I. Gen. Laws 1896 c. 177 § 38. See Horwitz, *supra* note 3, at 16.

¹²⁹ See, e.g., *Wendt v. Servite Fathers*, 76 N.E.2d 342 (Ill. App. 1947) (holding that an insurance company could plead the defense only if authorized by its client).

¹³⁰ See *President & Dirs. of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942) (Rutledge, J.).

does the ordinary conscious adult intend to do so. Usually he is ill or hurt. He does not haggle about terms. He expects care, not carelessness. Few hospitals would announce a policy of requiring such a waiver as a condition of entrance, and few patients would enter under such a condition unless forced to do so by poverty...The idea of waiver, therefore, as implied from reception of benefit amounts merely to imposing immunity as a rule of law in the guise of assumed contract or renunciation of right, when all other reasons are found insufficient to support distinction.¹³¹

Horwitz relies on this passage to illustrate the judicial reluctance with contractual waivers on the grounds of patient incompetence and desperation.¹³² There are, of course, answers to these particular charges. Full notice and adequate disclosure could be supplied in advance. The disclaimers in these cases could be calibrated to those obtained from paying patients with great economic sophistication. Nonetheless, Wiley Rutledge (later a Roosevelt appointee to the United States Supreme Court) expressed then, in *Hughes*, what remains now, a deeply hostile attitude toward contractual freedom – notwithstanding the strong economic logic, set out above – for constraints on the scope of liability between physicians and their patients. The erosion of the charitable immunity defense presaged a general hostility that manifested itself a generation later when hospitals flirted with explicit contractual disclaimers, which courts struck down in the end as against public policy, on grounds scarcely distinguishable from those used in *Hughes*.¹³³ As judges lost sight of the powerful constraints on this system, liability began to expand first in one direction and then in another until the overburden was large enough to generate the first medical malpractice crises in the early 1970s. The want of the ability to correct allocative errors brought about by judges was the source of the difficulty.

In critiquing my account of this situation, Horwitz divides her paper into two halves. Her first part goes into great detail the many and varied justifications offered for the creation of the doctrine of charitable immunity both in England and the United States. The key point to note here is that the doctrine, of course, has applications far beyond the question of medical malpractice, involving the application of many rules that deal with the ability of various parties to obtain remedies in a court of equity against the charitable trustees. My sense is that she has done a great service in pulling together all these complex strands of law, and that her account will prove of real value in years to come.

At the same time, however, the complex nature of the doctrine does not falsify the basic proposition that the use of the sovereign immunity doctrine, to

¹³¹ *Id.* at 826.

¹³² Horwitz, *supra* note 3, at 21, note 73.

¹³³ *See, e.g.*, *Tunkl v. Regents of Univ. of Calif.*, 383 P.2d 441 (Cal. 1963).

the extent that it applied in medical malpractice cases, provided a shield against liability that, before its demise, could be waived by hospitals and their physicians to the extent that they wish. Horwitz goes to great lengths to show that treated as a matter of tort and trust law, these doctrines have an inner logic that explains why they make more sense than is commonly allowed. But on this issue I remain an essentialist: no system of legal characterization, however robust, can alter the simple proposition that there are two, and only two, ways that outside the family, with its status relationships, all human beings can interact: through cooperation or coercion. No matter how far judges-as-commentators go to distance certain relationships from this dichotomy, in the end, it has to control. Although it was not part of the intention of judges who crafted the doctrine to have it operate as a protected shield, it amounted in practice to a default position in contract. This charitable immunity can be waived, just as the doctrine of sovereign immunity can be waived, either in the individual case or by a general statute that waives the doctrine in advance for broad classes of cases. This is precisely how the Federal Tort Claims Act waives immunity in ordinary intersection collisions, but not in the broad (and elusive) class of cases that remains subject to the discretionary function exception to the basic liability rules.¹³⁴ I do not think that it contradicts the complex interaction between stranger cases, consensual cases, waiver, and insurance.

In the second portion of her paper, Horwitz moves beyond that historical critique to offer a more theoretical defense of the proposition that the medical malpractice relationship should not be regarded as contractual at heart, largely because the doctrine of waiver (on which it rests) is itself not a contractual doctrine. On this point, she mistakes, I think, the law of waiver and its relationship to general contractual theory.

The word “waiver” is usually defined as the willing or voluntary relinquishment of a known right,¹³⁵ which certainly does not look like the kinds of forces and dangerous situations that lie at the heart of the tort law. In fact, this scaled-down definition conceals the two different ways in which waivers can be raised. The first way in which the concept is used refers to the waiver of conditions during the course of contractual performance. To give an example, suppose that a valid insurance contract requires that a payment of claims will be made only after the insured has filed a written claim with the company at its home office. The company is free to waive that condition, and to let the claim be filed with an examiner in the field, or not be filed at all. In the usual case, these

¹³⁴ See, e.g., Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (2006).

¹³⁵ See, e.g., *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969) (“Waiver [is the] . . . intentional relinquishment of a known right, claim, or privilege . . . [a] voluntary and intentional relinquishment of a known and existing right, or such conduct as warrants an inference of the relinquishment of such right.”).

midcourse corrections are so common that once the waiver had been acted on, it will be regarded as valid, even if it were not supported by consideration. It is, in effect, treated as a completed gift. Midcourse corrections in general require fewer formalities than does the formation of the contract, and it could easily be for the advantage of the insurance company to give prompt service with a minimum of fuss and bother. Waivers of this sort are not likely to play a large role in medical malpractice contexts.

Instead, the key role for waiver arises in connection with the formation of an original contract. In Anglo-American (but not Roman) law, consideration is said to be a uniform requirement of a contract. The law worries, crudely speaking, about promises that are parts of bargains, and not those which are bare promises to make a gift. In dealing with the waiver of charitable immunities that hospitals provide, this notion works itself into the deal in a simple matter. The original agreement now has consideration on both sides, just as it does when there is a charitable immunity, only now one of the undertakings by the institution is the unwillingness to let itself be sued. With immunity, the promise for service becomes part of a binding contract. Without the immunity, the same point is true. But the whole point does not matter very much because the distinctive function of consideration—rendering enforceable fully executory promises—is not in play in the usual malpractice case, which hones in on defective performance of an undertaking, be it by act or omission. So long as it is clear that the liability is limited by the terms of the agreement, there is, in the most unproblematic sense, a waiver of the claim—so long as the waiver itself meets the applicable substantive standards, which once again returns the discussion as to whether the waiver is consistent with or against sound public policy.

A similar response suffices, I think, to the old observation that it is dangerous to treat medicine as the provision of a mere commodity.¹³⁶ And so it is, which is why the entire structure of medical relationships differs from those which are found on check-out lines at the supermarket. The right response to this charge is that the variation in contractual settings can, and does, lead to very different business responses, including the development of extensive professional codes of conduct, which extend to issues far beyond medical malpractice as such, to offset the real vulnerability that all patients have in dealing with professionals whose knowledge base is far greater than their own. Indeed, the rise of the doctrine of informed consent was one response to this problem, among others.

At this point, however, the entire weight of the discussion of medical malpractice is so embedded in the physician-patient relationship that it is hard to think of it as a tort doctrine in isolation from its larger setting. We can continue to debate the relevance of regulatory versus contractual solutions, but in so doing we

¹³⁶ Horwitz, *supra* note 3, at 30.

should never make the mistake of thinking that any understanding about the torts between strangers will inform the debate over medical malpractice reform, which strays far beyond its original tort origins.

CONCLUSION: A GENERAL THEORY OF TORT LAW?

At this point, it is now possible to see how a general theory of tort law can arise by piecing together various strands of doctrine into a comprehensive whole. As a technical matter, the system of pleading allows for the orderly introduction of new material in accordance with a basic system of presumptions that is captured by the alternating pleading system that was first pioneered to great effect in Roman times. In modern terms, the pleading system should be regarded as a method to reach an optimal systematic outcome through a series of successive approximations, each one of which is intended to bring some new element into the legal system, or (when the plea is rejected) to explain why a given element should not be introduced at a specific point in the overall system. The use of this method allows, I think, for a precise articulation of the various rules of causation that should apply in stranger cases. Its further extension through the defense of assumption of risk shows how it can incorporate, where appropriate, key contractual elements that allow for more nuanced and sophisticated default rules than any system of strict liability can supply. On this logic, Zipursky and Perry are right to insist that it is “impossible” to defend a system of strict liability. But they are wrong to think that it does not supply a workable prima facie case in suits involving harms to strangers. The medical malpractice cases that Horwitz examines are ample proof of that proposition. Yet by the same token, we should be cautious to insist that it is unwise, and impossible, to apply consensual solutions to medical malpractice cases. Horwitz accurately documents the widespread legal resistance to that approach, which explains why today’s system of medical malpractice liability has fallen into such disrepair. In sum, we can link the pieces together into a coherent whole, but only if we take a series of careful incremental steps, avoiding the allure and confusion of dangerous overgeneralizations.