

## Case 1: Specific Performance Remedy Denied on Equity Standard

*Campbell Soup Co. v. Wentz et. al.*

UNITED STATES COURT OF APPEALS THIRD CIRCUIT

172 F.2d 80 (1949)

OPINION BY: GOODRICH The transactions which raise the issues may be briefly summarized. On June 21, 1947, Campbell Soup Company (Campbell), a New Jersey corporation, entered into a written contract with George B. Wentz and Harry T. Wentz, who are Pennsylvania farmers, for delivery by the Wentzes to Campbell of all the Chantenay red cored carrots to be grown on fifteen acres of the Wentz farm during the 1947 season . . . The contract provides . . . for delivery of the carrots at the Campbell plant in Camden, New Jersey. The prices specified in the contract ranged from \$23 to \$30 per ton according to the time of delivery. The contract price for January 1948 was \$30 a ton.

The Wentzes harvested approximately 100 tons of carrots from the fifteen acres covered by the contract. Early in January 1948, they told a Campbell representative that they would not deliver their carrots at the contract price. The market price at that time was at least \$90 per ton, and Chantenay red cored carrots were virtually unobtainable. The Wentzes then sold approximately 62 tons of their carrots to . . . Lojeski, a neighboring farmer. Lojeski resold about 58 tons on the open market, approximately half to Campbell and the balance to other purchasers.

On January 9, 1948, Campbell, suspecting that Lojeski was selling it "contract carrots," refused to purchase any more, and instituted . . . suits against the Wentz brothers and Lojeski to enjoin further sale of the contract carrots to others, and to compel specific performance of the contract. The trial court denied equitable relief. We agree with the result reached, but on a different ground from that relied upon by the District Court.

[The issue is preserved on appeal by an arrangement under which Campbell received all the carrots held by the Wentzes and Lojeski, paying a stipulated market price of \$90 per ton, \$30 to the defendants, and the balance into the registry of the District Court pending the outcome of these appeals.]

. . .

We have said several times in this Circuit that the question of the form of relief is a matter for a federal court to decide. But neither federal decisions nor the law of New Jersey or Pennsylvania as expressed in the Uniform Sales Act differ upon this point. A party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate. Inadequacy of the legal remedy is necessarily a matter to be determined by an examination of the facts in each particular instance.

We think that on the question of adequacy of the legal remedy the case is one appropriate for specific performance. It was expressly found that at the time of the trial it was "virtually impossible to obtain Chantenay carrots in the open market." This Chantenay carrot is one which the plaintiff uses in large quantities, furnishing the seed to the growers with whom it makes contracts. It was not claimed that in nutritive value it is any better than other types of carrots. Its blunt shape makes it easier to handle in processing. And its color and texture differ from other varieties. The color is brighter than other carrots. The trial court found that the plaintiff failed to establish what proportion of its carrots is used for the production of soup stock and what proportion is used as identifiable physical ingredients in its soups. We do not think lack of proof on that point is material. It did appear that the plaintiff uses carrots in fifteen of its twenty-one soups. It also appeared that it uses these Chantenay carrots diced in some of

them and that the appearance is uniform. The preservation of uniformity in appearance in a food article marketed throughout the country and sold under the manufacturer's name is a matter of considerable commercial significance and one which is properly considered in determining whether a substitute ingredient is just as good as the original.

The trial court concluded that the plaintiff had failed to establish that the carrots, "judged by objective standards," are unique goods. This we think is not a pure fact conclusion like a finding that Chantenay carrots are of uniform color. It is either a conclusion of law or of mixed fact and law and we are bound to exercise our independent judgment upon it. That the test for specific performance is not necessarily "objective" is shown by the many cases in which equity has given it to enforce contracts for articles - family heirlooms and the like - the value of which was personal to the plaintiff.

Judged by the general standards applicable to determining the adequacy of the legal remedy we think that on this point the case is a proper one for equitable relief. There is considerable authority, old and new, showing liberality in the granting of an equitable remedy. We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time consuming processes against one who has deliberately broken his agreement. Here the goods of the special type contracted for were unavailable on the open market, the plaintiff had contracted for them long ahead in anticipation of its needs, and had built up a general reputation for its products as part of which reputation uniform appearance was important. We think if this were all that was involved in the case specific performance should have been granted.

The reason that we shall affirm instead of reversing with an order for specific performance is found in the contract itself. We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience. For each individual grower the agreement is made by filling in names and quantity and price on a printed form furnished by the buyer. This form has quite obviously been drawn by skillful draftsmen with the buyer's interests in mind.

Paragraph 2 provides for the manner of delivery. Carrots are to have their stalks cut off and be in clean sanitary bags or other containers approved by Campbell. This paragraph concludes with a statement that Campbell's determination of conformance with specifications shall be conclusive.

The defendants attack this provision as unconscionable. We do not think that it is, standing by itself. We think that the provision is comparable to the promise to perform to the satisfaction of another and that Campbell would be held liable if it refused carrots which did in fact conform to the specifications.

The next paragraph allows Campbell to refuse carrots in excess of twelve tons to the acre. The next contains a covenant by the grower that he will not sell carrots to anyone else except the carrots rejected by Campbell nor will he permit anyone else to grow carrots on his land. Paragraph 10 provides liquidated damages to the extent of \$50 per acre for any breach by the grower. There is no provision for liquidated or any other damages for breach of contract by Campbell.

The provision of the contract which we think is the hardest is paragraph 9, set out in the margin. ("Grower shall not be obligated to deliver any Carrots which he is unable to harvest or deliver, nor shall Campbell be obligated to receive or pay for any Carrots which it is unable to inspect, grade, receive, handle, use or pack at or ship in processed form from its plants in Camden (1) because of any

circumstance beyond the control of Grower or Campbell, as the case may be, or (2) because of any labor disturbance, work stoppage, slowdown, or strike involving any of Campbell's employees. Campbell shall not be liable for any delay in receiving Carrots due to any of the above contingencies. During periods when Campbell is unable to receive Grower's Carrots, Grower may with Campbell's written consent, dispose of his Carrots elsewhere. Grower may not, however, sell or otherwise dispose of any Carrots which he is unable to deliver to Campbell.") It will be noted that Campbell is excused from accepting carrots under certain circumstances. But even under such circumstances the grower, while he cannot say Campbell is liable for failure to take the carrots, is not permitted to sell them elsewhere unless Campbell agrees. This is the kind of provision which the late Francis H. Bohlen would call "carrying a good joke too far." What the grower may do with his product under the circumstances set out is not clear. He has covenanted not to store it anywhere except on his own farm and also not to sell to anybody else.

We are not suggesting that the contract is illegal. Nor are we suggesting any excuse for the grower in this case who has deliberately broken an agreement entered into with Campbell. We do think, however, that a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.

The plaintiff argues that the provisions of the contract are separable. We agree that they are, but do not think that decisions separating out certain provisions from illegal contracts are in point here. As already said, we do not suggest that this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist.

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The judgments will be affirmed.

## COMMENTS AND QUESTIONS

1. Perhaps Campbell foresaw the \$90 price on Chantenays, and the Wentzes did not. This opinion deprives Campbell of the benefit (to which they are entitled, unless the contract truly is illegal) of their foresight.

2. Why do you suppose the Wentzes accepted such an apparently burdensome and one-sided contract? Are they in fact as burdened as the description in the last ten or so paragraphs of the opinion suggests they are?

3. Given that Campbell ended up purchasing the carrots in question (although at a much higher price) they would obviously have been better off to have sued at law rather than equity. What would the dimensions of such a suit have been-- what would have been claimed as damages? Can you think of any reason why they might have wanted to obtain an award of performance from an equity court?

4. Why is this breach-of-contract case included in a folio of tort cases? Because it illustrates an important point that is especially pivotal in tort law: your rights as a plaintiff depend on your tolerable or "proper" behavior in the events that led up to your need to assert those rights in court. The same idea, less explicitly stated, was seen in Contract Case 9 (Williams v. Walker-Thomas).

## Case 2: Duty of Care, Issues of Foreseeability and 'Causality'

*Palsgraf v. Long Island Railroad Company*  
COURT OF APPEALS OF NEW YORK  
248 N.Y. 339 (1928)

OPINION: CARDOZO, Ch. J.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." . . . "Negligence is the absence of care, according to the circumstances." . . . The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." . . . "The ideas of negligence and duty are strictly correlative." . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

. . . The [passenger carrying the explosive] was not injured in his person nor even put in danger. The purpose of the act [of helping him onto the train], as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security . . . Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

. . . [W]rong is defined in terms of the natural or probable, at least when unintentional . . . The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more than there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to medieval law . . . For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal . . . Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth . . . When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case . . . The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime . . . He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary . . . There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e.g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

POUND, LEHMAN and KELLOGG, JJ. , concur with CARDOZO, Ch. J.; ANDREWS, J., dissents in opinion in which CRANE and O'BRIEN, JJ. , concur.

DISSENT: ANDREWS, J. (dissenting). Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents

the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling they injured the plaintiff, an intending passenger.

Upon these facts may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept-- the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis, we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word "unreasonable." For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important . . . In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice-- not on merely reckless conduct. . . .

But we are told that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others." This, I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result . . . As was said by Mr. Justice Holmes many years ago, "the measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." . . . Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone. . . .

Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. . . .

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself -- not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence . . . [W]hen injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. . . .

A cause, but not the proximate cause. What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source. . . .

The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? . . . This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him. If it exploded and injured one in the immediate vicinity, to him also . . . Mrs. Palsgraf was standing some distance away. How far cannot be told from the record-- apparently twenty-five or thirty feet. Perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief "it cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result-- there was here a natural and continuous sequence-- direct connection. The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

## NOTES AND QUESTIONS

1. This case was a close call: a 4-3 majority sustaining Judge Cardozo's curiously nitpicking and unsatisfying opinion over Judge Andrews' view, which did a far better job of indicating the direction to come in the law.

Think of the arrangement between the running passenger and the platform guard who boosted him onto the train as a transaction. Then, the injury to Mrs. Palsgraf is an externality. The decision in this case is involved with the question: In the interest of efficiency, should such externalities be internalized, or should they (simply on the ground of their unforeseeability) be disregarded? Cardozo takes the second view in that question.

2. Palsgraf contains an interesting syllabus on the history of three central tort issues: duty, liability, and negligence. Leading cases up to 1927 can be traced by examining an unedited copy of this opinion.

3. Can you think of another issue of negligence on the part of the defendant that was not mentioned in the opinion? Can a scale on a passenger platform be thought to be safely stowed if it can fall over when a parcel of fireworks explodes thirty feet away?

4. Neither judge has much to say about behavioral incentives. What are the incentive issues involved in this decision, and why does the Andrews dissent do a better job of recognizing them?

5. Partly as a consequence of the Palsgraf case, it is now standard practice everywhere for railway employees to discourage running on platforms. Under the standard procedures of today, the unnamed passenger with the package would have been stopped by the platform conductor, not boosted onto the train.

### Case 3: Foreseeability and Duty of Care

*Edwards v. Honeywell Protection Services*

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT  
50 F. 3d 484 (1995)

OPINION: POSNER, Chief Judge.

A fireman's widow has sued Honeywell, the provider of an alarm system intended to protect the house where her husband was killed in the line of duty. The suit, filed in an Indiana state court, charges that David John Edwards died because of Honeywell's negligence in failing to call the fire department promptly upon receiving a signal from the alarm. As a result of the delay, the floor of the burning house was in a severely weakened condition by the time the firemen entered, and it collapsed beneath Edwards, plunging him to his death. The district court, to which the suit had been removed under the diversity jurisdiction, granted summary judgment for Honeywell. The court held that Honeywell owed no duty of care to fireman Edwards under the common law of Indiana. The widow's appeal requires us to grapple with the elusive concept of "duty" in the law of torts.

In 1982 Honeywell had made a contract with a couple named Baker to install (for \$1,875) and monitor (for \$21 a month) an alarm system in the Bakers' house. The house is a wood-frame house located in a suburb of Indianapolis and ordinary in every respect except that the Bakers conducted an interior-decorating service out of the basement. The contract limited Honeywell's liability to the Bakers for the consequences of any failure of the system to \$250. The validity of this limitation is not questioned . . .

The alarm system was of a type that has become common. If the house was entered while the alarm was turned on, and the alarm was not promptly disarmed, or if someone in the house pushed either a "panic button" or a button on the alarm console labeled fire, police, or emergency medical service, a signal was automatically transmitted over the telephone lines to a central station maintained by Honeywell. The person manning the station (called the "alarm monitor") would call the fire department if the fire or medical-emergency button had been pressed, and otherwise would call the police department. After that the alarm monitor would call a neighbor of the subscriber. The contract required the subscriber to inform Honeywell which police and fire department and which neighbor should be notified, and presumably the Bakers had done this back in 1982, though whether accurately or not we do not know. Honeywell does not make any effort to assure the accuracy of, or keep up to date, the information furnished by the subscriber concerning whom to call.

Six years passed. It was now an afternoon in the winter of 1988, and Mrs. Baker was working in the basement with two of the employees of the decorating service when she heard a sound. She looked up and noticed an orange glow in the furnace room. One of the employees opened the door to the room, revealing a shelving unit in the furnace room already engulfed in flames from floor to ceiling. Mrs. Baker ran upstairs and tried to dial 911 but mis dialed. She gave up on the phone and pushed two buttons on the control panel of the alarm system. One was the fire button, the other the police button. Then she grabbed her dog and ran out the front door. The two people who had been working in the basement with her fled at the same time; they were the only other people in the house. They drove to their home, which was just a couple of blocks away, to call the fire department, while Mrs. Baker, her sandals slipping on

the ice, ran from house to house until she found one that was occupied. The occupant, a babysitter, called the Lawrence Township fire department. The call was placed between one and four minutes after Mrs. Baker triggered the alarm in her house. We must give the plaintiff the benefit of the doubt (her case having been dismissed on a motion for summary judgment) and therefore assume that it was four minutes, in which event, as we are about to see, the township fire department received the babysitter's call no earlier than it received the call from Honeywell's central station. (If the call had been received much earlier, the plaintiff's complaint about Honeywell's delay might be academic.)

The signals from the Bakers' house had come into the central station at 2:54 p.m., triggering an audible alarm. The alarm monitor, hearing it, had pressed a function key, causing the relevant information about the Bakers to flash on the screen of her computer. The display told her to call the Indianapolis Fire Department (Honeywell's policy, if both the police and the fire signals are transmitted by the alarm system, is to call only the fire department). So she pushed the "direct fire button" to the Indianapolis Fire Department, connecting her immediately with the department's dispatcher. She gave the dispatcher the Bakers' address. The dispatcher told her that it was within the jurisdiction of a different fire department, that of the City of Lawrence, to which the dispatcher transferred the call. That was wrong too. It was the fire department of Lawrence Township that had jurisdiction over the Bakers' house. So the dispatcher for the City of Lawrence transferred the call that had been relayed from the Indianapolis Fire Department to the fire department of Lawrence Township.

Had Honeywell's operator called the township's fire department first, rather than reaching that department as it were on the third try, it would have taken no more than 45 seconds for the department to learn of the fire at the Bakers' house. Because of the jurisdictional error, it was not until 2:58 that the department received the call. The 45 seconds had been stretched to four minutes because of the misinformation in Honeywell's computer. The plaintiff claims, and for purposes of this appeal we accept, that Honeywell was careless in not having a procedure for verifying and updating such essential information as which fire department to call in the event of a fire in a subscriber's premises, since the boundaries between fire districts are shifted from time to time.

A Lawrence Township fire chief arrived at the scene at 3:00 p.m. (This was remarkably prompt, the call having come in only two minutes earlier. But the Bakers' residence was only a mile or a mile and a half from the firehouse. This shows by the way the importance of notifying the right fire department.) He saw dark smoke but no flames. Mrs. Baker was there and told him that she thought her furnace had exploded. The chief did not ask her when the fire had started but assumed that, because Mrs. Baker had been at home, she had notified the fire department immediately. This implied that the fire was less than three minutes old. Five minutes later, at 3:05 p.m., two parties of firemen began leading hoses into the house, entering through the front door and the garage (which was on the side of the house) respectively. The floor was hot to the touch (firemen customarily enter a burning building on all fours because smoke and heat rise), and the group that had entered through the front door quickly withdrew, fearing that the floor would collapse. The smoke thickened. Fire was seen darting from the roof. Edwards, an experienced fireman, was one of two men who had entered the house from the garage. Sometime between 3:10 and 3:15, before he could withdraw from the house, the floor collapsed and he fell into the basement and was asphyxiated.

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We may assume that the firemen would have arrived a little more than three minutes earlier (to be exact, four minutes minus 45 seconds earlier) had Honeywell's call gone to the right fire department directly rather than having to be relayed. Whether fireman Edwards' life would have been saved is

obviously a highly speculative question . . . It depends on what the firemen would have done with the extra three minutes and 15 seconds. If they would have brought the fire under control in that time, then the floor might not have collapsed. But if at the end of that period they would still have been laying their hoses (no water had yet been applied to the fire when the firemen withdrew and the floor collapsed), the floor would have collapsed just as it did and Edwards would have been killed just as he was. Absence of evidence that the delay of which the plaintiff complains made any difference to Edwards' fate was not, however, the ground on which the district judge dismissed the suit. Nor does Honeywell urge it as an alternative ground for affirming the judgment.

Honeywell does urge a related alternative ground, that Edwards would have been killed even if the Bakers hadn't had an alarm system at all, since in its absence it would surely have taken Mrs. Baker four minutes to reach the fire department, the time she took (by the plaintiff's own estimate) to reach the neighbor's house and get the babysitter to call. This is not so clear as Honeywell makes out. Before fleeing the house, Mrs. Baker pressed the alarm buttons. Had there been no alarm buttons, she might have redialed 911. (She knew her mistake. She had dialed 1911.) This is the theory on which a rescuer is required to act non-negligently even if he was not obliged to attempt the rescue in the first place: his effort may have deflected alternative attempts at rescue, here a more determined use of the phone . . . The principle is illustrated by the well-known Stewart case, where a railroad by stationing a watchman at a crossing induced reliance on his presence and was held liable for an accident that would have been prevented had he been present, even though due care did not require the railroad to have a watchman at that crossing in the first place. *Erie R.R. v. Stewart*, 40 F.2d 855.

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To bolster its position on causation, Honeywell argues that if it had really screwed up, so that the fire department hadn't arrived on the scene until the fire was visibly raging, none of the firemen would have dared enter the house and so Edwards would have been saved. The argument in effect is that alarm systems endanger firemen, so the provider of a system that works badly or not at all should be rewarded by being excused from liability. It is a strange argument even if its premise is granted, which it should not be. Fire departments want to be summoned as soon, not as long, after a fire has started as possible, because in general though not in every case large fires are more dangerous than small ones and fires are more likely to be large the longer they are allowed to burn out of control, although of course at some point a fire will burn itself out and thus cease to be dangerous. (It would be some fire department that thought the best time to fight fires was after they had burned themselves out.) Honeywell's bad argument was invited by the plaintiff's bad argument--an argument supported by the fire chief's affidavit but still preposterous--that a fire doubles every five minutes. There is no such law of nature. (Which doesn't mean it has never been recited in a judicial opinion . . .) The rate at which a fire grows depends on environmental conditions, such as the flammability of the materials set on fire and of those within reach of the flames, the amount of oxygen in the air, the air temperature, and whether the air is moving or still. It is impossible to say a priori whether if the firemen had arrived several minutes later the fire would have grown to a size that would have deterred them from entering the house.

As the premise of our further discussion, we may assume without having to decide not only that Honeywell breached its duty of care to the Bakers by not updating the information in its computer on which fire department to call if the Bakers' house caught on fire, but also that as a consequence of this breach fireman Edwards died. We are speaking of a tort duty of care founded on the reasoning underlying the rescue cases, not a contractual duty; there is no suggestion that Edwards was a third party beneficiary of the contract between Honeywell and the Browns.

The question we must decide, therefore, is whether Honeywell's duty of care extended to firemen who might be summoned to fight the blaze, for, if not, the plaintiff's suit was properly dismissed. Why duty should be an issue in a negligence case is not altogether clear, however, and the quest for an answer may guide us to a decision.

Nowadays one tends to think of negligence, even when one is a lawyer or judge thinking about the legal rather than the lay term, as a synonym for carelessness. But originally negligence signified carelessness only in the performance of a duty, whether a duty arising from an undertaking (for example that of a surgeon) or a duty imposed by law, such as an innkeeper's duty to look after his guests' goods. It was not until the nineteenth century that a general principle of liability for the careless infliction of harm was securely established . . . But as liability for negligence expanded, the judges felt a need to place limitations on its scope and to rein in juries, and the concept of duty was revived to name some of these limitations and to exert some control over juries. Negligence was redefined as the breach of a duty running from the injurer to the injurer's victim to exercise due care, and the question whether there was such a duty in the particular case or class of cases was, and remains, a matter for the judge to decide, not the jury . . . The parties to our case do not quarrel with this approach; nor is there any reason to suppose that if federal law governed, the federal rule would be different from the rule that, so far as we are aware, prevails in every state--the rule that makes the issue of duty one of law. There is no occasion to explore the issue further in this case, and we can turn back to the issue of the scope of the tort duty of care under the common law of Indiana.

Should a passerby be liable for failing to warn a person of a danger? The courts thought not, and therefore said there is no tort duty to rescue. Even if the defendant had acted irresponsibly or even maliciously in failing to warn or rescue the passerby--suppose, for example, the defendant had been aware of the danger to the plaintiff and could have warned him at negligible cost--the plaintiff could not obtain damages . . . This limitation on the scope of the duty of care has stood but others have fallen by the wayside in most or all states, such as the non-duty of care of a manufacturer to users of his defective products other than the first purchaser . . .

Of particular relevance to the present case are two lines of precedent. Indeed the present case could be said to lie at their intersection. One concerns the duty of care to an unforeseeable victim. The classic case is *Palsgraf v. Long Island R.R.* . . . The Indiana courts accept *Palsgraf's* exclusion of liability to unforeseeable victims . . . So if fireman Evans was an unforeseeable victim of Honeywell's negligence, this suit must fail.

The other line of cases concerns the duty of care of water companies, telephone companies, and other providers of services of the public utility type--today including alarm services--to the general public as opposed to customers. Again the most famous cases are Judge Cardozo's. *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 . . . , held that a company which had contracted to supply water to a city and its residents was not liable for the consequences of a fire that the fire department was unable to bring under control (with resulting damage to the plaintiff's property) because the water company failed through carelessness to maintain adequate pressure in the water mains. *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284 . . . , held that careless failure to transmit the plaintiff's telegram, a failure that caused the plaintiff to lose a valuable contract, was not a tortious wrong to the plaintiff . . . Telegraph companies have gone by the board. But there have been cases which hold that telephone companies can be liable for fire damage resulting from an operator's failure to transmit a distress call . . . --and an equal number of cases rejecting such liability.

...

The basic criticism of both the Palsgraf and Moch-Kerr lines of decisions, articulated with characteristic force by Judge Friendly in *Petition of Kinsman Transit Co.*, 338 F.2d 708, . . . is that since by assumption the defendant was careless (for the concept of duty would have no liability-limiting function otherwise), why should its carelessness be excused merely because either the particular harm that occurred as a consequence, or the person harmed as a consequence, was unforeseeable? . . .

The arguments on the other side, the arguments in favor of the duty limitation in these cases, are twofold. The first arises from the fact that a corporation or other enterprise does not have complete control over its employees, yet it is strictly liable under the principle of respondeat superior for the consequences of their negligent acts committed in the scope of their employment. It is not enough to say to the enterprise be careful and you have nothing to fear. The carelessness of its employees may result in the imposition of a crushing liability upon it. In order to know how many resources (in screening new hires and in supervising and disciplining workers after they are hired) to invest in preventing its employees from being careless, the employer must have some idea, some foresight, of the harms the employees are likely to inflict. Imposing liability for unforeseeable types of harm is unlikely, therefore, to evoke greater efforts at preventing accidents; it is likely merely to constitute the employer an insurer. The railroad in Palsgraf did not know that conductors who jostle boarding passengers pose a threat of injury by explosion to people standing elsewhere on the platform, and the water company in Moch did not know the likelihood of fires or the value of the property that might be damaged by them.

The second argument in favor of using the concept of duty to limit the scope of liability for careless acts, an argument relevant to Moch and Kerr though not to Palsgraf, is that the defendant may not be in the best position to prevent a particular class of accidents, and placing liability on it may merely dilute the incentives of other potential defendants. In most cases the best way to avert fire damage is to prevent the fire from starting rather than to douse it with water after it has started. The water company represents a second line of defense, and it has no control over the first . . .

How far in general these arguments outweigh the consideration emphasized by Judge Friendly is a matter of fair debate; but they are especially powerful in this case, and remember that Indiana is a jurisdiction that follows Palsgraf. The provider of an alarm service not only has no knowledge of the risk of a fire in its subscribers' premises, and no practical ability to reduce that risk (though we suppose an alarm service like a fire insurer could offer a discount to people who installed smoke detectors in their premises); it also lacks knowledge of the risk of a fire to firemen summoned to extinguish it. That risk depends not only on the characteristics of the particular premises, but also on the particular techniques used by each fire department, the training and qualifications of the firemen, and the quality of the department's leadership. The alarm company knows nothing about these things and has no power to influence them.

The death of a fireman in fighting a residential fire appears to be a rare occurrence. And we have not been referred to a single case in which such a death was blamed on a malfunction, human or mechanical, in an alarm system. The problem of proving causation in such a case is, as we saw, a formidable one, and the plethora of potential defendants makes it difficult (we should think) for an alarm company to estimate its likely liability even if it does foresee the kind of accident that occurred here. If "unforeseeable" is given the practical meaning of too unusual, too uncertain, too unreckonable to make it feasible or worthwhile to take precautions against, then this accident was unforeseeable. . . . Honeywell would have difficulty figuring out how careful it must be in order to satisfy its legal obligations or how

much more it ought to charge its subscribers in order to cover its contingent liability to firemen and to any others who might be injured in a fire of which the alarm company failed to give prompt notice. Similar problems of debilitating legal uncertainty would arise if the person injured were a police officer or a paramedic rather than a firefighter.

The alarm service constitutes, moreover, not a first or second line of defense against fire but a third line of defense-- and in this case possibly a fourth, fifth, or . . . nth. The first is the homeowner. We do not know why the Bakers' furnace exploded--whether it was because of a defect in the furnace or a failure by the Bakers or others to inspect or maintain it properly. The second line of defense is the fire department. Potential defendants in this case included not only the alarm service and the fire department (though presumably the plaintiff's only remedy against the department would be under Indiana's public employees' compensation law), but the Bakers, the manufacturer of the furnace, any service company that inspected or maintained the furnace, possibly even the supplier of the wood for the floor that collapsed or the architect or builder of the house. The plaintiff has chosen to sue only the alarm service. Of course none of the others may be negligent. And if any of the others are, conceivably the alarm service might implead them so that liability could come to rest on the most culpable. Yet it is also possible that the principal attraction of the alarm service as a defendant is that it is a large out-of-state firm with deep and well-lined pockets. We can only speculate. All things considered, however, the creation of a duty of care running from the alarm service to Edwards is likely to make at best a marginal contribution to fire safety and one outweighed by the cost of administering such a duty. That at least is our best guess as to how the Supreme Court of Indiana would evaluate this case were it before that court.

Pointing to the \$50 limitation of the alarm service's liability to the Bakers, the plaintiff argues that if Honeywell prevails in this suit, alarm services will have no incentive to take care. But they will. Honeywell lost the Bakers' business. Our society relies more heavily on competition than on liability to optimize the quality of the goods and services supplied by the private sector of the economy. A case such as this does Honeywell's customer relations no good even if it wins the case--as we think it must.

## COMMENTS

1. Pay careful attention to issues of products liability and malpractice throughout this folio of tort cases. Like *Palsgraf*, this case is one in which a provider of contract services (a train ticket is a contract, as is an alarm rental agreement) takes actions that cause harm to a third party. The *Welge*, *Grimshaw* and *Niles* cases below also embody these issues.

2. Malpractice is in fact a form of products-related injury, where the product is a service, not a good. You can think of *Hawkins* in the contract folio as having closely similar dimensions.

#### Case 4: Strict Liability

*Indiana Harbor Belt Railroad Company v. American Cyanamid Company*  
UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT  
916 F.2d 1174 (1990)

POSNER, Circuit Judge. American Cyanamid Company, the defendant in this diversity tort suit governed by Illinois law, is a major manufacturer of chemicals, including acrylonitrile, a chemical used in large quantities in making acrylic fibers, plastics, dyes, pharmaceutical chemicals, and other intermediate and final goods. On January 2, 1979, at its manufacturing plant in Louisiana, Cyanamid loaded 20,000 gallons of liquid acrylonitrile into a railroad tank car that it had leased from the North American Car Corporation. The next day, a train of the Missouri Pacific railroad picked up the car at Cyanamid's siding. The car's ultimate destination was a Cyanamid plant in New Jersey served by Conrail rather than by Missouri Pacific. The Missouri Pacific train carried the car north to the Blue Island railroad yard of Indiana Harbor Belt Railroad, the plaintiff in this case, a small switching line that has a contract with Conrail to switch cars from other lines to Conrail, in this case for travel east. The Blue Island yard is in the Village of Riverdale, which is just south of Chicago and part of the Chicago metropolitan area.

The car arrived in the Blue Island yard on the morning of January 9, 1979. Several hours after it arrived, employees of the switching line noticed fluid gushing from the bottom outlet of the car. The lid on the outlet was broken. After two hours, the line's supervisor of equipment was able to stop the leak by closing a shut-off valve controlled from the top of the car. No one was sure at the time just how much of the contents of the car had leaked, but it was feared that all 20,000 gallons had, and since acrylonitrile is flammable at a temperature of 30 degrees Fahrenheit or above, highly toxic, and possibly carcinogenic (Acrylonitrile, 9 International Toxicity Update, no. 3, May-June 1989, at 2, 4), the local authorities ordered the homes near the yard evacuated. The evacuation lasted only a few hours, until the car was moved to a remote part of the yard and it was discovered that only about a quarter of the acrylonitrile had leaked. Concerned nevertheless that there had been some contamination of soil and water, the Illinois Department of Environmental Protection ordered the switching line to take decontamination measures that cost the line \$981,022.75, which it sought to recover by this suit.

One count of the two-count complaint charges Cyanamid with having maintained the leased tank car negligently. The other count asserts that the transportation of acrylonitrile in bulk through the Chicago metropolitan area is an abnormally dangerous activity, for the consequences of which the shipper (Cyanamid) is strictly liable to the switching line, which bore the financial brunt of those consequences because of the decontamination measures that it was forced to take. After the district judge denied Cyanamid's motion to dismiss the strict liability count . . . the switching line moved for summary judgment on that count-- and won. The judge directed the entry of judgment for \$981,022.75 under Fed. R. Civ. P. 54(b) to permit Cyanamid to take an immediate appeal even though the negligence count remained pending. We threw out the appeal on the ground that the negligence and strict liability counts were not separate claims but merely separate theories involving the same facts, making Rule 54(b) inapplicable. The district judge then, over the switching line's objection, dismissed the negligence claim with prejudice, thus terminating proceedings in the district court and clearing the way for Cyanamid to file an appeal of which we would have jurisdiction. There is no doubt about our appellate jurisdiction this time. Whether or not the judge was correct to dismiss the negligence claim merely to terminate the lawsuit so that Cyanamid could appeal (the only ground he gave for the dismissal), he did it, and by doing

so produced an incontestably final judgment. The switching line has cross-appealed, challenging the dismissal of the negligence count.

The question whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route is a novel one in Illinois . . .

The parties agree that the question whether placing acrylonitrile in a rail shipment that will pass through a metropolitan area subjects the shipper to strict liability is [the central issue here] . . . Restatement (Second) of Torts Sec. 520, comment I (1977) . . . sets forth six factors to be considered in deciding whether an activity is abnormally dangerous and the actor therefore strictly liable.

The roots of Section 520 are in nineteenth-century cases. The most famous one is *Rylands v. Fletcher*, 1 Ex. 265, aff'd, L.R. 3 H.L. 300 (1868), but a more illuminating one in the present context is *Guille v. Swan*, 19 Johns. (N.Y.) 381 (1822). A man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of ballooning it was impossible to make a pinpoint landing.

*Guille* is a paradigmatic case for strict liability. (a) The risk (probability) of harm was great, and (b) the harm that would ensue if the risk materialized could be, although luckily was not, great (the balloonist could have crashed into the crowd rather than into the vegetables). The confluence of these two factors established the urgency of seeking to prevent such accidents. (c) Yet such accidents could not be prevented by the exercise of due care; the technology of care in ballooning was insufficiently developed. (d) The activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable riskiness. (e) The activity was inappropriate to the place in which it took place-- densely populated New York City. The risk of serious harm to others (other than the balloonist himself, that is) could have been reduced by shifting the activity to the sparsely inhabited areas that surrounded the city in those days. (f) Reinforcing (d), the value to the community of the activity of recreational ballooning did not appear to be great enough to offset its unavoidable risks.

These are, of course, the six factors in Sec. 520. They are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control. The interrelations might be more perspicuous if the six factors were reordered. One might for example start with (c), inability to eliminate the risk of accident by the exercise of due care. The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, non negligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less ((e)), or by reducing the scale of the activity in order to minimize the number of accidents caused by it ((f)). By making the actor strictly liable-- by denying him in other words an excuse based on his inability to avoid accidents by being more careful-- we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident. The greater the risk of an accident ((a)) and the costs of an accident if one occurs ((b)), the more we want the actor to consider the possibility of making accident-reducing activity

changes; the stronger, therefore, is the case for strict liability. Finally, if an activity is extremely common ((d)), like driving an automobile, it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.

The largest class of cases in which strict liability has been imposed under the standard codified in the Second Restatement of Torts involves the use of dynamite and other explosives for demolition in residential or urban areas. Explosives are dangerous even when handled carefully, and we therefore want blasters to choose the location of the activity with care and also to explore the feasibility of using safer substitutes (such as a wrecking ball), as well as to be careful in the blasting itself. Blasting is not a commonplace activity like driving a car, or so superior to substitute methods of demolition that the imposition of liability is unlikely to have any effect except to raise the activity's costs.

Against this background we turn to the particulars of acrylonitrile. Acrylonitrile is one of a large number of chemicals that are hazardous in the sense of being flammable, toxic, or both; acrylonitrile is both, as are many others. A table in the record, drawn from Glickman & Harvey, *Statistical Trends in Railroad Hazardous Material Safety, 1978 to 1984*, at pp. 63-65 (Draft Final Report to the Environmental & Hazardous Material Studies Division of the Association of American Railroads, April 1986) (tab. 4.1), contains a list of the 125 hazardous materials that are shipped in highest volume on the nation's railroads. Acrylonitrile is the fifty-third most hazardous on the list. Number 1 is phosphorus (white or yellow), and among the other materials that rank higher than acrylonitrile on the hazard scale are anhydrous ammonia, liquified petroleum gas, vinyl chloride, gasoline, crude petroleum, motor fuel antiknock compound, methyl and ethyl chloride, sulfuric acid, sodium metal, and chloroform. The plaintiff's lawyer acknowledged at argument that the logic of the district court's opinion dictated strict liability for all 52 materials that rank higher than acrylonitrile on the list, and quite possibly for the 72 that rank lower as well, since all are hazardous if spilled in quantity while being shipped by rail. Every shipper of any of these materials would therefore be strictly liable for the consequences of a spill or other accident that occurred while the material was being shipped through a metropolitan area. The plaintiff's lawyer further acknowledged the irrelevance, on her view of the case, of the fact that Cyanamid had leased and filled the car that spilled the acrylonitrile; all she thought important is that Cyanamid introduced the product into the stream of commerce that happened to pass through the Chicago metropolitan area. Her concession may have been incautious. One might want to distinguish between the shipper who merely places his goods on his loading dock to be picked up by the carrier and the shipper who, as in this case, participates actively in the transportation. But the concession is illustrative of the potential scope of the district court's decision.

No cases recognize so sweeping a liability. . . .

*Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1972), also imposed strict liability on a transporter of hazardous materials, but the circumstances were again rather special. A gasoline truck blew up, obliterating the plaintiff's decedent and her car. The court emphasized that the explosion had destroyed the evidence necessary to establish whether the accident had been due to negligence; so, unless liability was strict, there would be no liability -- and this as the very consequence of the defendant's hazardous activity. . . .

So we can get little help from precedent, and might as well apply Sec. 520 to the acrylonitrile problem from the ground up. To begin with, we have been given no reason, whether the reason in *Siegler* or any other, for believing that a negligence regime is not perfectly adequate to remedy and deter,

at reasonable cost, the accidental spillage of acrylonitrile from rail cars. Acrylonitrile could explode and destroy evidence, but of course did not here, making imposition of strict liability on the theory of the Siegler decision premature. More important, although acrylonitrile is flammable even at relatively low temperatures, and toxic, it is not so corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, with average) care. No one suggests, therefore, that the leak in this case was caused by the inherent properties of acrylonitrile. It was caused by carelessness -- whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can (unlike Siegler) be shown in court, such accidents are adequately deterred by the threat of liability for negligence.

It is true that the district court purported to find as a fact that there is an inevitable risk of derailment or other calamity in transporting "large quantities of anything." This is not a finding of fact, but a truism: anything can happen. The question is, how likely is this type of accident if the actor uses due care? For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well. This also means, however, that the amici curiae who have filed briefs in support of Cyanamid cry wolf in predicting "devastating" effects on the chemical industry if the district court's decision is affirmed. If the vast majority of chemical spills by railroads are preventable by due care, the imposition of strict liability should cause only a slight, not as they argue a substantial, rise in liability insurance rates, because the incremental liability should be slight. The amici have momentarily lost sight of the fact that the feasibility of avoiding accidents simply by being careful is an argument against strict liability. . . .

The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest date for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation. East St. Louis, which is also in Illinois, handled the second highest volume. Office of Technology Assessment, *Transportation of Hazardous Materials* 53 (1986). With most hazardous chemicals (by volume of shipments) being at least as hazardous as acrylonitrile, it is unlikely -- and certainly not demonstrated by the plaintiff -- that they can be rerouted around all the metropolitan areas in the country, except at prohibitive cost. Even if it were feasible to reroute them one would hardly expect shippers, as distinct from carriers, to be the firms best situated to do the rerouting. . . .

The difference between shipper and carrier points to a deep flaw in the plaintiff's case. Unlike Guille, and unlike Siegler, and unlike the storage cases, beginning with *Rylands* itself, here it is not the actors-- that is, the transporters of acrylonitrile and other chemicals-- but the manufacturers, who are sought to be held strictly liable. A shipper can in the bill of lading designate the route of his shipment if

he likes, but is it realistic to suppose that shippers will become students of railroading in order to lay out the safest route by which to ship their goods? Anyway, rerouting is no panacea. Often it will increase the length of the journey, or compel the use of poorer track, or both. When this happens, the probability of an accident is increased, even if the consequences of an accident if one occurs are reduced; so the expected accident cost, being the product of the probability of an accident and the harm if the accident occurs, may rise . . . It is easy to see how the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile. It is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical. This is therefore not an apt case for strict liability . . .

The relevant activity is transportation, not manufacturing and shipping. This essential distinction the plaintiff ignores. But even if the plaintiff is treated as a transporter and not merely a shipper, it has not shown that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create-- perhaps quixotically-- incentives to relocate the activity to non-populated areas, or to reduce the scale of the activity, or to switch to transporting acrylonitrile by road rather than by rail, perhaps to set the stage for a replay of *Siegler v. Kuhlman*. It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic. Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare.

The briefs hew closely to the Restatement, whose approach to the issue of strict liability is mainly allocative rather than distributive. By this we mean that the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there. At argument, however, the plaintiff's lawyer invoked distributive considerations by pointing out that Cyanamid is a huge firm and the Indiana Harbor Belt railroad a fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred. Well, so what? A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability. Tracing the incidence of a cost is a complex undertaking which the plaintiff sensibly has made no effort to assume, since its legal relevance would be dubious. We add only that however small the plaintiff may be, it has mighty parents: it is a jointly owned subsidiary of Conrail and the Soo line.

The case for strict liability has not been made. Not in this suit in any event. We need not speculate on the possibility of imposing strict liability on shippers of more hazardous materials . . . any more than we need differentiate (given how the plaintiff has shaped its case) between active and passive shippers. We noted earlier that acrylonitrile is far from being the most hazardous among hazardous materials shipped by rail in highest volume. Or among materials shipped, period. The Department of Transportation has classified transported materials into sixteen separate classes by the degree to which transporting them is hazardous. Class number 1 is radioactive material. Class number 2 is poisons. Class 3 is flammable gas and 4 is nonflammable gas. Acrylonitrile is in Class 5. 49 C.F.R. Sections 172.101, Table; 173.2(a).

Ordinarily when summary judgment is denied, the movant's rights are not extinguished; the case is simply set down for trial. If this approach were followed here, it would require remanding the case for

a trial on whether Cyanamid should be held strictly liable. Yet that would be a mistake. The parties have agreed that the question whether the transportation of acrylonitrile through densely populated areas is abnormally dangerous is one of law rather than of fact; and trials are to determine facts, not law. More precisely --for there is no sharp line between "law" and "fact" -- trials are to determine adjudicative facts rather than legislative facts. The distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which, as the discussion in this opinion illustrates, more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires. Again the line should not be viewed as hard and fast. If facts critical to a decision on whether a particular activity should be subjected to a regime of strict liability cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held, though we can find no reported case where this was done. . . .

Other issues are raised, but need not be decided. The plaintiff's claim that it is entitled to prejudgment interest is premature, since the judgment it obtained must be set aside. The defendant's alternative ground for reversal, that the switching yard assumed the risk of the abnormally dangerous activity by voluntarily participating (through its contract with Conrail) in the transportation of the tank car filled with acrylonitrile . . . is academic. (The argument is that the switching line was a participant in the activity -- even a joint tortfeasor -- that has become transmogrified into a victim only because it incurred costs to prevent harm to the real potential victims of the accident.) . . .

[W]ith damages having been fixed at a relatively modest level by the district court and not challenged by the plaintiff, and a voluminous record having been compiled in the summary judgment proceedings, we trust the parties will find it possible now to settle the case. Even the Trojan War lasted only ten years.

The judgment is reversed (with no award of costs in this court) and the case remanded for further proceedings, consistent with this opinion, on the plaintiff's claim for negligence.

**REVERSED AND REMANDED, WITH DIRECTIONS.**

## COMMENTS AND QUESTIONS

1. It is probably true that no judge has ever been as ruthlessly and gloriously economic in his reasoning as Judge Posner, a founder of the study of law and economics. Noteworthy in this opinion are (1) a cost-benefit analysis of strict liability which brilliantly describes when that doctrine is best to apply; (2) echo of *Sturges v. Bridgman* in his comment on the suitability of Blue Island as a residential neighborhood; (3) comments on the relative efficiency of shippers and carriers in planning the transportation routing of hazardous chemicals.

2. By inspection of the tank car, the valve problem might have been found and the spill prevented. If true, that could be sufficient as a basis for a claim of negligence. But negligence in transportation is not limited to the railroads. Every time you see an exploded truck tire littering the pavement on an interstate highway (and have you ever driven on an interstate without seeing several in a hundred miles?) you are seeing evidence of failure to maintain proper inflation, usually in the inner tires of doubled wheels-- the tires go flat, and are beaten to pieces against the pavement. The frequency with which trucks are involved in serious highway accidents may be evidence of a failure to maintain standards of intelligence, judgment and alertness among drivers.

## Case 5: Strict Liability with Explosives

*Foster v. Preston Mill Company*  
SUPREME COURT OF WASHINGTON  
44 Wash. 2d 440 (954)

OPINION BY: HAMLEY. Blasting operations conducted by Preston Mill Company frightened mother mink owned by B. W. Foster, and caused the mink to kill their kittens. Foster brought this action against the company to recover damages. His second amended complaint, upon which the case was tried, sets forth a cause of action on the theory of absolute liability, and, in the alternative, a cause of action on the theory of nuisance.

After a trial to the court without a jury, judgment was rendered for plaintiff in the sum of \$1,953.68. The theory adopted by the court was that, after defendant received notice of the effect which its blasting operations were having upon the mink, it was absolutely liable for all damages of that nature thereafter sustained. The trial court concluded that defendant's blasting did not constitute a public nuisance, but did not expressly rule on the question of private nuisance. Plaintiff concedes, however, that, in effect, the trial court decided in defendant's favor on the question of nuisance. Defendant appeals.

Respondent's mink ranch is located . . . about two blocks from U. S. highway No. 10, which is a main east-west thoroughfare across the state. Northern Pacific Railway Company tracks are located between the ranch and the highway, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company tracks are located on the other side of the highway about fifteen hundred feet from the ranch.

The period of each year during which mink kittens are born, known as the whelping season, begins about May 1st. The kittens are born during a period of about two and one-half weeks, and are left with their mothers until they are six weeks old. During this period, the mothers are very excitable. If disturbed by noises, smoke, or dogs and cats, they run back and forth in their cages and frequently destroy their young. However, mink become accustomed to disturbances of this kind, if continued over a period of time. This explains why the mink in question were apparently not bothered, even during the whelping season, by the heavy traffic on U. S. highway No. 10, and by the noise and vibration caused by passing trains . . .

Early in May, 1951, appellant began the construction of a road to gain access to certain timber which it desired to cut. The road was located about two and one-quarter miles southwest of the mink ranch, and about twenty-five hundred feet above the ranch, along the side of what is known as Rattlesnake Ledge.

It was necessary to use explosives to build the road. The customary types of explosives were used, and the customary methods of blasting were followed. The most powder used in one shooting was one hundred pounds, and usually the charge was limited to fifty pounds. The procedure used was to set off blasts twice a day -- at noon and at the end of the work day.

Roy A. Peterson, the manager of the ranch in 1951, testified that the blasting resulted in "a tremendous vibration, is all. Boxes would rattle on the cages." The mother mink would then run back

and forth in their cages, and many of them would kill their kittens. Peterson also testified that on two occasions the blasts had broken windows.

Appellant's expert, Professor Drury Augustus Pfeiffer, of the University of Washington, testified as to tests made with a pin seismometer, using blasts as large as those used by appellant. He reported that no effect on the delicate apparatus was shown at distances comparable to those involved in this case. He said that it would be impossible to break a window at two and one-fourth miles with a hundred-pound shot, but that it could cause vibration of a lightly-supported cage. It would also be audible. Charles E. Erickson, who had charge of the road construction for appellant in 1951, testified that there was no glass breakage in the portable storage and filing shed which the company kept within a thousand feet of where the blasting was done. There were windows on the roof as well as on the sides of this shed.

Before the 1951 whelping season had far progressed, the mink mothers, according to Peterson's estimate, had killed thirty-five or forty of their kittens. He then told the manager of appellant company what had happened. He did not request that the blasting be stopped. After some discussion, however, appellant's manager indicated that the shots would be made as light as possible. The amount of explosives used in a normal shot was then reduced from nineteen or twenty sticks to fourteen sticks.

Officials of appellant company testified that it would have been impractical to entirely cease road-building during the several weeks required for the mink to whelp and wean their young. Such a delay would have made it necessary to run the logging operation another season, with attendant expense. It would also have disrupted the company's log production schedule and consequently the operation of its lumber mill.

In this action, respondent sought and recovered judgment only for such damages as were claimed to have been sustained as a result of blasting operations conducted after appellant received notice that its activity was causing loss of mink kittens.

The primary question presented by appellant's assignments of error is whether, on these facts, the judgment against appellant is sustainable on the theory of absolute liability.

[1] The modern doctrine of strict liability for dangerous substances and activities stems from Justice Blackburn's decision in *Rylands v. Fletcher*, . . . As applied to blasting operations, the doctrine has quite uniformly been held to establish liability, irrespective of negligence, for property damage sustained as a result of casting rocks or other debris on adjoining or neighboring premises . . .

There is a division of judicial opinion as to whether the doctrine of absolute liability should apply where the damage from blasting is caused, not by the casting of rocks and debris, but by concussion, vibration, or jarring . . . This court has adopted the view that the doctrine applies in such cases. In *Patrick v. Smith*. . . it was held that contractors who set off an exceedingly large blast of powder, causing the earth for a considerable distance to shake violently, were liable to an adjoining owner whose well was damaged and water supply lost, without regard to their negligence in setting off the blast, although there was no physical invasion of the property . . .

[2] However the authorities may be divided on the point just discussed, they appear to be agreed that strict liability should be confined to consequences which lie within the extraordinary risk whose

existence calls for such responsibility . . . This limitation on the doctrine is indicated in . . . Restatement of Torts, . . .

" . . . one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

This restriction which has been placed upon the application of the doctrine of absolute liability is based upon considerations of policy. As Professor Prosser has said:

"It is one thing to say that a dangerous enterprise must pay its way within reasonable limits, and quite another to say that it must bear responsibility for every extreme of harm that it may cause. The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of 'proximate cause' in negligence cases, demands here that some limit be set . . . This limitation has been expressed by saying that the defendant's duty to insure safety extends only to certain consequences. More commonly, it is said that the defendant's conduct is not the 'proximate cause' of the damage. But ordinarily in such cases no question of causation is involved, and the limitation is one of the policy underlying liability." . . .

Applying this principle to the case before us, the question comes down to this: Is the risk that any unusual vibration or noise may cause wild animals, which are being raised for commercial purposes, to kill their young, one of the things which make the activity of blasting ultrahazardous?

We have found nothing in the decisional law which would support an affirmative answer to this question. The decided cases, as well as common experience, indicate that the thing which makes blasting ultrahazardous is the risk that property or persons may be damaged or injured by coming into direct contact with flying debris, or by being directly affected by vibrations of the earth or concussions of the air.

. . .

The relatively moderate vibration and noise which appellant's blasting produced at a distance of two and a quarter miles was no more than a usual incident of the ordinary life of the community. . . .

The trial court specifically found that the blasting did not unreasonably interfere with the enjoyment of their property by nearby landowners, except in the case of respondent's mink ranch.

[3] It is the exceedingly nervous disposition of mink, rather than the normal risks inherent in blasting operations, which therefore must, as a matter of sound policy, bear the responsibility for the loss here sustained. We subscribe to the view . . . that the policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual use of land. This is perhaps but an application of the principle that the extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests . . .

. . .

It is our conclusion that the risk of causing harm of the kind here experienced, as a result of the relatively minor vibration, concussion, and noise from distant blasting, is not the kind of risk which makes the activity of blasting ultrahazardous. The doctrine of absolute liability is therefore inapplicable under the facts of this case, and respondent is not entitled to recover damages.

The judgment is reversed.

#### COMMENTS AND QUESTIONS

1. Evaluate this opinion in light of Judge Posner's review of when strict liability is appropriate (contained in *Indiana Harbor Belt v. Cyanamid*, Case 4. Which of the conditions fails to hold in *Foster v. Preston Mill*?

## Case 6: Assumption of Risk

*LaFrenz v. Lake County Fair Board*  
COURT OF APPEALS OF INDIANA  
172 Ind. App. 389 (1977)

OPINION BY: HOFFMAN

On August 19, 1972, Linda Lafrenz was fatally injured when an automobile participating in a demolition derby jumped a barrier striking her. At the time of the occurrence, the decedent was standing in the pit area. Before entering the pit area, decedent had executed an instrument entitled, "WAIVER AND RELEASE FROM LIABILITY AND INDEMNITY AGREEMENT." Appellant David LaFrenz, Administrator of the Estate of Linda Lafrenz, filed a complaint to recover damages from the various defendants. Defendants-appellees Lake County Fair Board and Variety Attractions, Inc. moved for summary judgment based on the release. Such motions were sustained by the trial court on October 24, 1974.

Appellant brings this appeal contending that there are genuine issues of material fact which preclude the entry of summary judgment. Appellant asserts that these fact issues involve the decedent's state of mind as to whether she knowingly and willingly assumed the risk and as to whether she knowingly and willingly signed the release.

In reviewing the propriety of a summary judgment, the materials on file are to be liberally construed in favor of the opponent of the motion, and any doubt as to the existence of a genuine issue of material fact must be resolved against the proponent of the motion . . .

Appellant David LaFrenz testified in his deposition that a demolition derby was to be held at the Lake County Fair on August 19, 1972. Approximately four to six weeks prior to August 19, 1972, Linda LaFrenz signed an entry blank to participate in the demolition derby. She had attended demolition derbies previously. In 1970 she observed a demolition derby from the grandstand, and in 1971 she worked in a booth selling tickets. She was aware of the nature of a demolition derby in that the cars would crash into each other.

On August 19, 1972, the demolition derby was scheduled for two sessions --one in the afternoon and another in the evening. Linda LaFrenz was in the pit area during both sessions. She signed documents to be in the pit area as opposed to the grandstand area. She executed a document entitled, "WAIVER AND RELEASE FROM LIABILITY AND INDEMNITY AGREEMENT" which stated that in consideration of being permitted in the "RESTRICTED AREA" she agreed to release the appellees "from all liability to the Undersigned, his personal representatives, assigns, heirs and next of kin for all loss or damage, and any claim or demands therefor, on account of injury to the person or property or resulting in death to the Undersigned, whether caused by the negligence of Releases or otherwise while the Undersigned is upon the Restricted Area." The agreement also contained a provision in which Linda LaFrenz agreed to indemnify and hold the Releases harmless for "any loss, liability, damage or cost they may incur due to the presence of the Undersigned in or about the Restricted Area and whether caused by the negligence of the Releases or otherwise." [The "RESTRICTED AREA" was defined as being "the

area to which admission for the general public is prohibited, including but not limited to the pit area, racing surface and infield, including walkways, concessions and other appurtenances therein."]

Linda LaFrenz was issued a pit pass for the evening session after signing in. She obtained the pit pass to assist her husband, David LaFrenz, as a helper or mechanic.

Later that evening, while standing in the pit area, an automobile participating in the demolition derby jumped the arena barrier striking Linda LaFrenz. She subsequently died from these injuries.

At the time of the occurrence, Linda LaFrenz was twenty-six years of age, had graduated from high school, and had attended two years as a part-time student at Indiana University Northwest.

Before considering whether the release bars recovery in the immediate case, the public policy ramifications of exculpatory agreements should be examined. In this respect, parties are generally permitted to agree in advance that one is under no obligation of care for the benefit of the other, and shall not be liable for the consequences of conduct which would otherwise be negligent . . .

Thus, in the absence of legislation to the contrary, there is ordinarily no public policy which prevents parties from contracting as they see fit. Consequently, it is not against public policy to enter into an agreement which exculpates one from the consequences of his own negligence . . .

Other jurisdictions which have addressed the question in the context of race track release forms have upheld the validity of the releases as against challenges that such were against public policy . . .

However, there are several exceptions to the general rule that exculpatory clauses are not against public policy. For example, the Legislature has recently enacted a statute declaring all agreements in construction or design contracts (Except highway contracts), which purport to indemnify the promisee against liability arising from the sole negligence or wilful misconduct of the promisee, void as against public policy . . .

Prosser, in his work on torts, notes several other exceptions to the general rule. One proviso is that the relationship of the parties must be such that their bargaining be free and open. Thus where one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence, the contract is void as against public policy. This proviso is applicable on this basis between employer and employee . . .

A second exception noted by Prosser arises in transactions affecting the public interest, such as public utilities, common carriers, innkeepers, and public warehousemen . . . Likewise, it is against public policy in Indiana for a railway company, acting as a common carrier, to contract for indemnity against its own tort liability when it is performing either a public or quasi public duty such as that owing to a shipper, passenger, or servant . . .

This exception has been extended to other professional bailees who are under no public duty but who deal with the public, such as garagemen, owners of parking lots, and of parcel checkrooms, on the ground that the indispensable need for their services deprives the customer of all real equal bargaining power . . .

Prosser finally notes that exculpatory agreements are not construed to cover the more extreme forms of negligence or any conduct which constitutes an intentional tort . . . The leading case in Indiana on exculpatory provisions is *Weaver v. American Oil Co.*, supra (1971) . . . wherein our Supreme Court struck down an exculpatory clause in a commercial lease arrangement. The court . . . stated:

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

The court went on to explain that it did not mean to infer [sic] that parties may not make contracts exculpating one of his negligence, but that it must be done "knowingly and willingly."

In the case at bar, there was no unequal bargaining power between the parties. The decedent was under no compulsion, economic or otherwise, to be in the restricted pit area . . .

Likewise, the activity did not exhibit any of the characteristics of one affected with the public interest . . . *Tinkle v. Regents of University of California* (1963) . . . [lists] the criteria for determining whether particular contracts are affected with the public interest, as follows:

"Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party involving exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

*Winterstein v. Wilcom* notes a further refinement in instances where a safety statute enacted for the protection of the public is violated. The rationale is that the obligation and the right created by the statute are public ones which are not within the power of any private individual to waive.

We must therefore turn to an examination of the release to determine whether such was "knowingly and willingly" made. The "WAIVER AND RELEASE FROM LIABILITY AND INDEMNITY AGREEMENT" clearly reveals that its sole purpose was to relieve the appellees of liability which may arise from permitting appellant's decedent to be in the restricted pit area. The release was to include all liability which may arise on account of injury to person or property whether caused by the

negligence of appellees or otherwise. This situation is different from that which arose in Weaver in which the clause there in question "was in fine print and contained no title heading which would have identified it as an indemnity clause." . . . Moreover, in the case at bar, each and every signature line contains printing in bold, black print approximately 3/16th inch, stating "THIS IS A RELEASE." Such printing is placed upon the signature line in such a manner that one who signs the instrument is superimposing his signature over such printing. Thus, the uncontroverted facts indicate that the decedent did execute the "WAIVER AND RELEASE FROM LIABILITY AND INDEMNITY AGREEMENT"; the form and language of the agreement explicitly refers to the appellees' negligence; and the decedent could not have signed the instrument without seeing the wording "THIS IS A RELEASE." Thus the form and language is so conspicuous that reasonable men could not reach different conclusions on the question whether the deceased "knowingly and willingly" signed the document . . .

Appellant asserts that decedent may have been misinformed concerning the nature of the agreement. In his deposition, Ronald Halcomb, Sr., the driver of the automobile which struck decedent, testified that someone, whom he assumed to be an official, stated that the form was an insurance form.

Appellant, however, was with decedent when she signed in for the evening session. He did not assert that such a representation was made.

Thus, we are faced with a situation in which appellant is attempting to raise an inference that such representations were made to the decedent by showing that similar representations were made to others.

However, this assertion alone would not be sufficient to establish a genuine issue of material fact involving misrepresentation. Generally proof of representations made by appellees to persons other than the decedent does not tend to establish that such representations were made to decedent . . .

Halcomb's statement does not raise a genuine issue of material fact which would preclude a summary judgment. The trial court therefore did not err in granting the appellees' respective motions for summary judgment. Affirmed.

## COMMENTS AND QUESTIONS

1. Unlike the case that follows, LaFrenz illustrates the pivotal element of a waiver of liability in assumption of risk cases. Many activities, including skiing, skydiving, and white water rafting contain similar contractual provisions.

2. In the absence of an explicit waiver of liability, what patterns of control can defendants like Lake County Fair Board exercise over the threat of ruinous accident costs? Certainly in retrospect, Ms. LaFrenz would have been better off had she been denied admission to the pit area. Would she have been better off in prospect if that denial had been made? If so how do we interpret her decision to go into the pit area?

## Case 7: Assumption of Risk

*Herod v. Grant*  
SUPREME COURT OF MISSISSIPPI  
262 So. 2d 781 (1972)

OPINION: PATTERSON, Justice:

This is an appeal from a judgment of the Circuit Court of Montgomery County wherein the appellee was awarded \$15,000 in damages for injuries received by him in falling from the appellant's truck. We reverse.

On the evening of October 24, 1969, Joseph Grant, [appellee and] plaintiff below, and Eddie Earl Herod, [appellant and] defendant below, engaged in a common enterprise to rid Grant's bean field of predatory wild animals. Each equipped himself with a headlight and a rifle and at approximately 10:00 p.m. ventured into the bean field Herod's pickup truck. In scanning the field they observed a deer and Grant seated himself in a cross-legged position upon a tool box situated in the bed of the truck immediately to the rear of the cab. Herod then drove the truck not more than fifteen to twenty miles per hour along the rows of the field which had been combined that afternoon . . . The deer, when it became illuminated by the lights of the truck and the headlights of the occupants, was twice fired upon by Grant to no avail when the weapon jammed. Grant then obtained Herod's rifle in furtherance of his defense of the field when the deer, which had been running parallel to the truck, veered toward the vehicle, motivating Herod, according to Grant, to suddenly increase the speed of the truck in an attempt to run over the deer. This action, as well as a slight turn of the vehicle. . . caused Grant to fall from the tool box to the ground, seriously injuring him.

Herod's testimony is substantially the same with the exception that he denies the truck was rapidly accelerated or sharply turned from its path.

The sole issue before the Court is whether the appellee Grant, by engaging in this activity, assumed the attendant risk attached to the endeavor.

In *Elias v. New Laurel Radio Station, Inc.*, . . . we quoted with approval the rule relative to the necessary elements of assumption of risk as set forth in 19 Mississippi Law Journal. . .

The elements which must be found in order to constitute a defense of assumption of risk are generally stated in some such terms as the following: (1) Knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition . . .

The critical question for this Court to answer is whether the plaintiff comprehended a knowledge of the risk involved in riding in the rear of the truck. We have stated that the assumption of risk is governed by the subjective standard of the plaintiff himself whereas contributory negligence is measured by the objective standard of a reasonable man, and that the assumption of risk is a jury question in all but the clearest cases . . .

In considering subjective knowledge, 1 Blashfield Automobile Law and Practice, . . . stated that:

Subjective knowledge is more difficult to prove. Plaintiff may always claim he did not know of the facts creating the risk, or that he did not comprehend the risk involved. Evidence contradicting this is difficult to secure. The jury, having no external standard by which to judge his knowledge, must determine whether he is telling the truth. However, the courts have indicated a willingness to override such contentions of plaintiff where they find that any person of ordinary intelligence must, as a matter of law, have known and appreciated the risk. . . .

In discussing knowledge and appreciation of the risk, the text-writer in 57 Am.Jur.2d, . . . Negligence, section 282 (1971) indicates that:

Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge and there may be assumption of the risk. In some cases the circumstances may show as a matter of law that the risk was understood and appreciated, and often they may present in that particular a question of fact for the jury. Also, the plaintiff may not close his eyes to obvious dangers, and cannot recover where he was in possession of facts from which he would be legally charged with appreciation of the danger.

In cases involving the issue of assumption of risk, an understanding of the danger involved and consent to assume the risk may be shown by circumstances. However, in the absence of evidence that the injured person knew of the danger, or that the danger was so obvious that he must be taken to have known of it, it cannot be held that he assumed the risk of injury therefrom. . . .

The case of *De Winne v. Waldrep* . . . presents a fact situation remarkably similar to that of the case at bar. In *De Winne* a party fell or was thrown from the back of a pickup while driving through open fields and hunting deer. The Georgia Court of Appeals held that one who knowingly and voluntarily takes a risk of injury to his person, the danger of which is so obvious that the act of taking such risk is and of itself amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages for injuries thus occasioned. The case at bar clearly presents a stronger fact situation for application of the assumption of risk doctrine than *De Winne* for the reason the parties here were defending, or hunting, at night and traveling through a cultivated field traversed by plowed rows.

We are of the opinion that Joseph Grant, by hunting deer from a seated position upon a tool box in the bed of the truck in the late evening hours in a cultivated field, assumed the risk that the vehicle might either pass over rough ground or that it might be accelerated or swerved in the excitement of the chase, or a combination thereof, none lending itself to safety, but rather all pointing directly to a precarious position from which injury could very easily flow. There being no relationship of master and servant, the appellee, a mature and reasonable man, assumed the risk of the endeavor for which no liability extends to the defendant.

We are of the opinion the trial court should have sustained the defendant's motion for a directed verdict at the conclusion of the plaintiff's testimony.

Reversed and rendered.

## COMMENTS AND QUESTIONS

1. Compare the listed conditions for assumption of risk to the conditions that define strict liability as described in *Indiana Harbor Belt* (Case 5 above). The two doctrines are in an important way symmetric, but run in opposite directions, one protecting the injuree, the other protecting the injurer.

2. A name for assumption of risk that applies in instances where it is the routine doctrine for hearing tort claims (rock climbing, sky diving, whitewater rafting etc.) is 'no liability.'

## Case 8: Standard of Due Care

*United States v. Carroll Towing Co.*  
UNITED STATES COURT OF APPEALS,  
SECOND CIRCUIT  
159 F.2d 169 (1947)

OPINION: L. HAND, Circuit Judge.

The facts, as the [lower court] judge found them, were as follows. On June 20, 1943, the Conners Company chartered the barge, "Anna C," to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee [a person who stands in attendance of barges that are docked], apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two tiers of barges. The Grace Line, which had chartered the tug, "Carroll," sent her down to the locus in quo to "drill" out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the "Carroll" at the time were not only her master, but a "harbor master" employed by the Grace Line. Before throwing off the line between the two tiers, the "Carroll" nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines "slow ahead" against the ebb tide which was making at that time. The captain of the "Carroll" put a deckhand and the "harbor master" on the barges, told them to throw off the line which barred the entrance to the slip; but, before doing so, to make sure that the tier on Pier 52 was safely moored, as there was a strong northerly wind blowing down the river. The "harbor master" and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the "Anna C," to the pier.

After doing so, they threw off the line between the two tiers and again boarded the "Carroll," which backed away from the outside barge, preparatory to "drilling" out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the "Anna C," either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the "Anna C" fetched up against a tanker, lying on the north side of the pier below - Pier 51 - whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i.e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, "Grace," owned by the Grace Line, and the "Carroll," came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the "Anna C" afloat, had they learned of her condition; but the bargee had left her on the evening before, and nobody was on board to observe that she was leaking. The Grace Line wishes to exonerate itself from all liability because the "harbor master" was not authorized to pass on the sufficiency of the fasts of the "Anna C" which held the tier to Pier 52; the Carroll Company wishes to charge the Grace Line with the entire liability because the "harbor master" was given an over-all authority. Both wish to charge the "Anna C" with a share of all her damages, or at least with so much as resulted from her sinking. The Pennsylvania Railroad Company also wishes to hold the barge liable . . .

The first question is whether the Grace Line should be held liable at all for any part of the damages. The answer depends first upon how far the "harbor master's" authority went, for concededly he was an employee of some sort. Although the judge made no other finding of fact than that he was an "employee," in his second conclusion of law he held that the Grace Line was "responsible for his negligence." Since the facts on which he based this liability do not appear, we cannot give that weight to the conclusion which we should to a finding of fact; but it so happens that on cross-examination the "harbor master" showed that he was authorized to pass on the sufficiency of the fasts of the "Anna C." He said that it was part of his job to tie up barges; that when he came "to tie up a barge" he had "to go in and look at the barges that are inside the barge" he was "handling"; that in such cases "most of the time" he went in "to see that the lines to the inside barges are strong enough to hold these barges"; and that "if they are not" he "put out sufficient other lines as are necessary." That does not, however, determine the other question: i.e., whether, when the master of the "Carroll" told him and the deckhand to go aboard the tier and look at the fasts, preparatory to casting off the line between the tiers, the tug master meant the "harbor master" to exercise a joint authority with the deckhand. As to this the judge in his tenth finding said: "The captain of the Carroll then put the deckhand of the tug and the harbor master aboard the boats at the end of Pier 52 to throw off the line between the two tiers of boats after first ascertaining if it would be safe to do so." Whatever doubts the testimony of the "harbor master" might raise, this finding settles it for us that the master of the "Carroll" deputed the deckhand and the "harbor-master," jointly to pass upon the sufficiency of the "Anna C's" fasts to the pier . . . [T]he "harbor master" was not instructed what he should do about the fasts, but was allowed to use his own judgment. The fact that the deckhand shared in this decision, did not exonerate him, and there is no reason why both should not be held equally liable, as the judge held them.

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

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it is never ground for liability even to other vessels who may be injured. . . .

[T]here is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his

damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ . Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, . . . and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo-- especially during the short January days and in the full tide of war activity-- barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold-- and it is all that we do hold-- that it was a fair requirement that the Connors Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight. . . .

## NOTES AND QUESTIONS

1. This case presents the most famous and successful effort on the part of a jurist to quantify or formalize the definition of negligence. We see the effort thus: negligence is the failure to take cost-effective precaution. That idea has gone far to replace earlier doctrines of "custom" or "reasonable man" standards as a basis for judging the presence of negligence. (But note, however, that Judge Hand insists that "custom should rule" in judging whether a bargee should be present at night; that assertion is a softening, and perhaps even an undermining, of cost effectiveness as the salient determining factor.)
2. The decision is to be commended for its separate allocation of "collision costs" and "sinking costs." The Connors Company is held responsible for a share of the latter because it was in controlling those costs that the bargee's presence would have been helpful; Connors thus was denied full recovery on the loss of the Anna C.
3. In the apportionment of collision damages among those suffering and causing damages, the decision follows maritime law, which holds that loss should be apportioned according to fault. There is no recognition of degrees of fault in maritime: either a party exercised due care or did not. If neither party to a collision is found to have exercised due care, they split the damages. If both are found to have exercised due care, they bear their own losses. If one exercised due care, while the other did not, all burden of loss by both parties falls on the latter.

## Case 9: Duty of Care to Invitees, Licensees, and Trespassers

*Rowlands v. Christian*  
SUPREME COURT OF CALIFORNIA  
69 Cal. 2d 108 (1968)

OPINION: PETERS, J.

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action.

In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses. He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and \$100,000 general damages. It does not appear from the complaint whether the crack in the faucet handle was obvious to an ordinary inspection or was concealed.

Miss Christian filed an answer containing a general denial except that she alleged that plaintiff was a social guest and admitted the allegations that she had told the lessors that the faucet was defective and that it should be replaced. Miss Christian also alleged contributory negligence and assumption of the risk. In connection with the defenses, she alleged that plaintiff had failed to use his "eyesight" and knew of the condition of the premises. Apart from these allegations, Miss Christian did not allege whether the crack in the faucet handle was obvious or concealed.

Miss Christian's affidavit in support of the motion for summary judgment alleged facts showing that plaintiff was a social guest in her apartment when, as he was using the bathroom, the porcelain handle of one of the water faucets broke in his hand causing injuries to his hand and that plaintiff had used the bathroom on a prior occasion. In opposition to the motion for summary judgment, plaintiff filed an affidavit stating that immediately prior to the accident he told Miss Christian that he was going to use the bathroom facilities, that she had known for two weeks prior to the accident that the faucet handle that caused injury was cracked, that she warned the manager of the building of the condition, that nothing was done to repair the condition of the handle, that she did not say anything to plaintiff as to the condition of the handle, and that when plaintiff turned off the faucet the handle broke in his hands severing the tendons and medial nerve in his right hand . . .

In the instant case, Miss Christian's affidavit and admissions made by plaintiff show that plaintiff was a social guest and that he suffered injury when the faucet handle broke; they do not show that the faucet handle crack was obvious or even nonconcealed. Without in any way contradicting her affidavit or his own admissions, plaintiff at trial could establish that she was aware of the condition and realized or should have realized that it involved an unreasonable risk of harm to him, that defendant should have expected that he would not discover the danger, that she did not exercise reasonable care to eliminate the

danger or warn him of it, and that he did not know or have reason to know of the danger. Plaintiff also could establish, without contradicting Miss Christian's affidavit or his admissions, that the crack was not obvious and was concealed. Under the circumstances, a summary judgment is proper in this case only if, after proof of such facts, a judgment would be required as a matter of law for Miss Christian. The record supports no such conclusion.

Section 1714 of the Civil Code provides: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . ." This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle . . .

Nevertheless, some common law judges and commentators have urged that the principle embodied in this code section serves as the foundation of our negligence law . . .

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved . . .

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

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

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

An increasing regard for human safety has led to a retreat from this position, and an exception to the general rule limiting liability has been made as to active operations where an obligation to exercise reasonable care for the protection of the licensee has been imposed on the occupier of land . . . In an apparent attempt to avoid the general rule limiting liability, courts have broadly defined active operations, sometimes giving the term a strained construction in cases involving dangers known to the occupier.

Thus in *Hansen v. Richey*, . . . an action for wrongful death of a drowned youth, the court held that liability could be predicated not upon the maintenance of a dangerous swimming pool but upon negligence "in the active conduct of a party for a large number of youthful guests in the light of knowledge of the dangerous pool." In *Howard v. Howard*, . . . where plaintiff was injured by slipping on spilled grease, active negligence was found on the ground that the defendant requested the plaintiff to enter the kitchen by a route which he knew would be dangerous and defective and that the defendant failed to warn her of the dangerous condition . . . In *Newman v. Fox West Coast Theatres* . . . the plaintiff suffered injuries when she slipped and fell on a dirty washroom floor, and active negligence was found on the ground that there was no water or foreign substances on the washroom floor when plaintiff entered the theater, that the manager of the theater was aware that a dangerous condition was created after plaintiff's entry, that the manager had time to clean up the condition after learning of it, and that he did not do so or warn plaintiff of the condition. . . .

Another exception to the general rule limiting liability has been recognized for cases where the occupier is aware of the dangerous condition, the condition amounts to a concealed trap, and the guest is unaware of the trap . . . In none of these cases, however, did the court impose liability on the basis of a concealed trap; in some liability was found on another theory, and in others the court concluded that there was no trap. A trap has been defined as a "concealed" danger, a danger with a deceptive appearance of safety . . . It has also been defined as something akin to a spring gun or steel trap . . . In the latter case it is pointed out that the lack of definiteness in the application of the term "trap" to any other situation makes its use argumentative and unsatisfactory.

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

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

Without attempting to labor all of the rules relating to the possessor's liability, it is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the

moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.

Although in general there may be a relationship between the remaining factors and the classifications of trespasser, licensee, and invitee, there are many cases in which no such relationship may exist. Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, i.e., the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers. The last of the major factors, the cost of insurance, will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

Considerations such as these have led some courts in particular situations to reject the rigid common law classifications and to approach the issue of the duty of the occupier on the basis of ordinary principles of negligence . . .

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

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

The judgment is reversed.

## COMMENTS AND QUESTIONS

1. It appears in this opinion that the appellate court is uneasy with the idea of not holding Ms. Christian responsible in this episode. It is easy to see why: she could simply have said: "watch out for the cold water faucet; the handle is cracked and might break." On the Hand Formula test (no pun intended) she should have done at least that. It is also possible that there is strong presumption that Ms. Christian or the landlord that she had notified of the broken faucet is insured, and Fletcher's settlement can be charged to an insurance company.

2. The case only in passing mentions or notes what an invitee is as the term is used in tort law. Had Fletcher been an invitee and not a mere guest, he would have more likely recovered in the lower court under the standard that governs duty owed to invitees, licensees and trespassers.

3. The opinion probably errs in failing to distinguish trespassers from licensees or invitees in describing the duty of due care. It is, after all, more difficult to anticipate the presence of trespassers, and hence much more expensive or difficult to warn them against dangers on the property. We saw in Property Case 14 (Ploof v. Putnam) that trespass should under some circumstances be permitted; and for this reason subtle hazards or "traps" should be fenced or eliminated (a shrubbery-obscured mine shaft or abandoned well being a good example) even if invitees or licensees are never present. But trespassers should be expected to be on their guard for hazards against which a word of warning would be sufficient protection for licensees and invitees. What emphatically makes no sense is the distinction drawn between licensees and invitees. That distinction fails because there is no substantial difference between them in the cost of providing warnings of possible danger.

## Case 10: Gross Negligence or Wanton Misconduct

*Derenberger v. Lutey*  
SUPREME COURT OF MONTANA  
207 Mont. 1 (1983)

OPINION: Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

Appellant Hurbert Lutey appeals a Deer Lodge County jury verdict awarding Raymond Derenberger, respondent, \$110,000 in damages he suffered in an automobile accident. Respondent was riding as a passenger in his own vehicle which the appellant was driving. We reverse and remand.

On November 5, 1979, Ray Derenberger, Hurb Lutey and their girlfriends went to a movie in Anaconda. They drove in Ray's vehicle. Prior to and during the movie, Ray, Hurb and one of the girls consumed approximately eighteen beers. At about 10:00 p.m., before the movie was over, Ray and Hurb left the theater to purchase more beer. Initially, Ray drove; however, upon Hurb's request, he relinquished control of the vehicle to Hurb. There was testimony indicating that Ray told Hurb to "see what it [the car] would do." Hurb testified that they were going quite fast through town.

The vehicle was traveling down Park Street, through a 25 m.p.h. zone, at approximately 55 to 60 miles per hour. The car crossed some railroad tracks that were laid on a grade higher than Park Street, causing the car to raise somewhat, possibly even leave the ground. Hurb lost control of the vehicle, and it struck a house on 1100 East Park. At the time of the accident, the road was dry and the record indicates that the car was in good condition. As a result of the accident, Ray suffered a severe brain concussion which caused organic brain damage, broken facial bones, a broken arm, a broken leg and several scrapes and lacerations. Hurb pleaded guilty to driving while intoxicated and was fined \$300. At the time of the accident Ray was sixteen years old and Hurb was nineteen.

Ray's mother brought an action for Ray as his guardian ad litem. She alleged that Hurb's reckless, gross, willful and wanton negligence in driving the vehicle caused Ray's injuries.

At trial, Ray's lawyer introduced evidence that Hurb had pleaded guilty to two separate charges of "endangering the welfare of children" by supplying them with intoxicating beverages. Hurb's counsel made a motion in limine to prevent admission of this evidence on the grounds of irrelevance and prejudice. In response to the motion, Ray's counsel stated:

"Your Honor, we are asking for punitive damages in this case. The two incidents I wish to put in evidence through cross-examination if he admits independently that the Defendant one month earlier had been arrested for buying intoxicating beverages for an underage girl, some 16 years of age, and in an automobile. He plead guilty to that offense and was fined \$75.00. Approximately one month after this accident, when obviously he purchased intoxicating beverages for a minor, he again was charged with, convicted and plead guilty to the same offense. I submit to the Court that under the criteria which relate to and the material facts which relate to the issue of punitive damages, that the actions of the Defendant on both the occasion in question and like conduct are close enough in time to show in effect a total disregard for the type of conduct he engaged in that evening, i.e., purchasing intoxicating beverages for a minor, is relevant on that issue as going to the amount of damages and the willfulness and wantonness of that conduct on that particular evening."

The motion was denied and the evidence was admitted.

By special verdict the jury found that Hurb was guilty of willful or wanton misconduct. They also found that Ray was contributorily negligent in the amount of 25 percent. However, the court instructed the jury that if Hurb's misconduct was willful or wanton, ordinary contributory negligence would not reduce Ray's recovery (Instruction No. 14). Thus, the jury awarded \$100,000 in total damages and \$10,000 in punitive damages.

Hurb Lutey brings this appeal and raises two issues for our consideration:

1. Was it error for the District Court to instruct the jury that respondent's recovery should not be reduced by his contributory negligence if the appellant is guilty of willful or wanton misconduct?
2. Was it error for the District Court to allow the admission of evidence regarding the appellant's guilty pleas to charges of supplying liquor to minors?

Lutey first argues that the District Court erred by instructing the jury that Derenberger's recovery could not be reduced by his own contributory negligence if they found Lutey guilty of willful or wanton misconduct. He contends that the legislative enactment of the comparative negligence doctrine abolished this rule; thus, Derenberger's own contributory negligence should reduce his recovery. Support for this is found in the fact that the harshness of the all-or-nothing rule has been eliminated by comparative negligence. Further, plaintiffs can recover punitive damages, which cannot be reduced by their own negligence.

Derenberger asserts that Montana has always distinguished ordinary or gross negligence from willful or wanton misconduct. Hence, the use of the word "negligence" in the comparative negligence statute indicates that the legislature did not intend a comparison between plaintiff's negligence and defendant's willful misconduct to reduce plaintiff's recovery.

We hold that the comparative negligence statute does not contemplate a comparison between ordinary negligence and willful or wanton misconduct. . . .

Prior to the enactment of comparative negligence, Montana clearly followed the rule that contributory negligence of the plaintiff is no bar to his recovery for injuries caused by willful or wanton misconduct of the defendant . . . . Since comparative negligence was established to ameliorate the harshness of the contributory negligence defense, we believe that allowing assertion of the defense under the statute when it would be no defense prior to enactment of comparative negligence would thwart this legislative purpose . . . . This same rationale prevents reduction of plaintiff's recovery when the defendant's acts are willful. . . .

Lutey next contends that the evidence of guilty pleas to contributing to the delinquency of minors is irrelevant. . . .

We hold that the evidence of Lutey's prior guilty pleas is irrelevant with respect to (1) proving that his misconduct on the night of the accident was willful or wanton, and (2) establishing a basis for punitive damages. . . .

The law is clear that to award punitive damages oppression, fraud or malice must be associated with the act complained of. Here, the act complained of was appellant's operation of the vehicle in a reckless fashion. The fact that appellant has purchased alcoholic beverages for minors is irrelevant to the act complained of and thereby irrelevant to establishing a basis for punitive damages. It did not have a tendency to make any requisite factors for punitive damages more or less probable.

Reversed and remanded for a new trial.

Mr. Justice John C. Sheehy, dissenting: I dissent from the foregoing decision.

The majority returned this case to the District Court for further trial solely upon the grounds that the District Court erred in admitting evidence of prior instances when Lutey supplied minors with drinks, going to the issue of punitive damages. The effect of the majority view here is to adopt a strict rule as to the kinds of evidence that may be admitted to show the character, malice or disposition of a defendant and his willful disregard for the rights of others.

In my opinion, Lutey's supplying of beer to minors, particularly to Ray Derenberger, was part and parcel of the whole transaction that led to the grievous injuries that Ray Derenberger sustained. On the evening in question here, he had purchased beer with which to ply Ray Derenberger, and undoubtedly Raymond's senses were dulled by this criminal act of Lutey. It is relevant, therefore, in showing his malice and willful disregard for the rights of Derenberger, that he plied minors with liquor a month before the accident or the month after the accident without any showing of remorse by those acts for what he had done to Raymond Derenberger.

Punitive damages may be awarded by the jury against the defendant where he has been guilty of oppression, fraud or malice, such damages to be for the sake of example and by way of punishing the defendant. Section 27-1-221, MCA. Here, the majority limits the fact issues in this case to whether Lutey was driving the vehicle recklessly, at a high rate of speed and whether that action was willful and wanton misconduct. The majority ignores, however, a concomitant fact issue, that Derenberger's senses may have been dulled when this sixteen-year-old was unlawfully plied with liquor in such a manner that he did not appreciate the danger of driving with Lutey. It was most certainly relevant to this issue that Lutey had acted in the same way on prior and succeeding occasions to show his wanton disregard for any minors that came within his influence. Certainly the jury was entitled to consider such evidence in determining the punitive damages.

This Court has usually held that it will leave the admission of evidence to the sound discretion of the trial court subject to review only in cases of manifest abuse . . .

I would affirm the judgment of the District Court.

## COMMENTS AND QUESTIONS

1. An interesting aspect of this case is that it reveals an earlier effort by courts to get rid of the "all or nothing" character of contributory negligence doctrines. Before the introduction of comparative negligence, courts were permitted to rule out evidence of plaintiff's contributory negligence in instances where defendants were found to be grossly negligent, or in the Montana code, willful or wanton in their

misconduct. Evidence of wanton misconduct in this case was introduced by plaintiff in the lower court as a basis for claim of punitive or exemplary damages.

2. From a perspective that sees an important value of tort law as being its power to hold up examples of bad behavior to society and to show that bad things can happen to people who behave badly, what is the "correct" finding in this case? Should the legal system be permitted to punish the act of providing underage minors with liquor in conjunction with damages for personal injury inflicted in the same episode?

3. An opinion like the one just read leaves the non-lawyer somewhat impatient, especially in light of the issue raised in question 2. Is it not the case that Lutey was virtually a criminal in his behavior toward Derenberger? That being clear, is it not the case that courts should punish him as warning to others of similar inclination? That may all be well and good, but if it is done, it must be done within the law; and the law should not be so elastic as to be stretched to accommodate the prejudices and concerns of anyone who might wear a black robe. Hence, the preoccupation hinted at in the foregoing summary (and evident at much greater length in the whole opinion): what does the governing law permit us to do, and what not to do?

4. This is another example of a case like *Palsgraf* in which (I think) a dissenting opinion better responds to the facts and governing law than does the majority opinion. The plaintiff's attorneys either failed to make, or failed to make sufficiently strongly, the points raised in the dissent about the effects of alcohol on the sixteen year old Derenberger's judgment.

## Case 11: Last Clear Chance

*Kumkumian v. City of New York*  
COURT OF APPEALS OF NEW YORK  
305 N.Y. 167 (1953)

OPINION: FROESSEL, J.

. . . At about 9:00 A.M. of January 26th, a local subway train, en route to Coney Island from Manhattan on the B.M.T. line in Brooklyn, was being operated between the Prospect Avenue and 25th Street stations. The train was composed of five cars, one a freight car. The only employees thereon were a motorman and a conductor, the latter being stationed in the fourth car. The tunnel between the two stations is about 2,000 feet long and is straight, with a slight downgrade from Prospect Avenue to 25th Street. A "bench walk" forming a narrow (two feet) continuation of the station platforms runs along the tunnel wall between the stations with a handrail next to the wall. Below and adjoining the bench walk are the third rail, then the running rails, and finally a wall separating the local from the express tracks.

The motorman was coasting on the slight grade at a speed of about 12 or 15 miles per hour, when at a point about 1,400 feet from the Prospect Avenue station and 600 feet from the 25th Street station his train came to an emergency stop. This was a "surprise" to him, as it was caused by the automatic emergency equipment, which he testified may be actuated in one of three ways: (1) by the blowing of an electric pneumatic valve; (2) by a passenger pulling the emergency strap, or (3) by the operation of a tripping device under each car indicating that some object or body had come in contact therewith.

When the train had stopped, the motorman made no effort to investigate, but merely reset the brakes by pressing a button in his cab two or three times and proceeded, a matter of a few seconds. He must then have known that the valves were functioning. After proceeding "About a car length" - 67 feet - the train again went into emergency, and again the motorman reset the brakes, and started the train without making any attempt whatsoever to find out what was wrong. The conductor also did nothing, although he knew the first two stops were emergency stops. Again in approximately a car length - the distance between the tripping devices - the emergency brake stopped the train for the third time.

Both motorman and conductor then inspected the valves and found them in order. There was no evidence that anyone had pulled the emergency strap. They thereupon walked through the train, and when they opened the door of the third car they found decedent's body "wedged" between the third rail and the running rail on the right side of the fourth car. Evidence of blood, flesh and clothing was found on the brake rigging of the third and fourth cars on the right side of the wheel trucks. Nowhere else was found any physical evidence of the accident. The motorman stated the body was then "actually steaming."

An inspection of the train disclosed that the tripcock mechanism was in proper order. This is a device which hangs down outside the left front and right rear wheels of each car, about two inches above the track. It is so designed that it will move upon striking any object or body in the roadway and so open a contact causing the brakes to operate. It is returned to the normal operating position when the motorman resets the brakes. It may be noted that apparently there is no prescribed procedure when an emergency stop occurs, for the rule book was produced at the trial but not referred to by either side. The

cause of death, according to the medical examiner, was "multiple extreme injuries," the external injuries being multiple amputations and fractures. No alcohol was found in the liver.

The jury and the courts below were clearly right in declining to fasten liability on the theory of ordinary negligence. There is no evidence as to how decedent came into the subway tunnel. Plaintiff's speculation as to how he came into the subway, and from which station he had traveled the long distance into the tunnel, is based wholly on conjecture, or, as the Appellate Division put it, "upon inference heaped upon inference" (280 App. Div. 32, 35). Any recovery, if at all sustainable, could not be based on ordinary negligence. The indisputable fact remains, even if we accept plaintiff's theory, that decedent left the lighted platform, and walked 1,400 feet (about six or seven city blocks) into the dimly lit tunnel on a narrow walk, the tunnel wall on one side of him and the tracks just below. It is inconceivable that the least perceptive of men would fail to realize the danger of such a course. He had no right to be there. No reasonable man could classify such conduct as anything but negligence, and so we conclude, as the jury must have by failing to find for plaintiff on the theory of ordinary negligence, and as did the Appellate Division in holding that decedent was guilty of contributory negligence as a matter of law.

That leaves for consideration the last clear chance theory upon which the jury rendered its verdict for plaintiff. We have noted that this doctrine does not apply unless there is present an issue of contributory negligence . . . There must be a time sequence - an interval in which plaintiff's act of negligence is complete and in which defendant has an opportunity to avert the disaster . . . Where defendant thus had a last clear chance to avoid the accident, it may be said that plaintiff's negligence is not the proximate cause of his injury. (*Bragg v. Central N.E. Ry. Co.*, 228 N.Y. 54).

In the last-cited case, a railroad employee fell asleep close to the rails and was struck by a train. We noted that the railroad could not be held liable merely because the engineer failed to see him in time, or even because he assumed Bragg would get off the tracks when a warning signal was given (cf. *Klein v. Long Island R.R. Co.*, 303 N.Y. 807). . . : "Only, when he discovered that Bragg was inert or unconscious, or for some reason would not or could not safeguard himself had the engineer any reason to anticipate an accident. Only then should he have sought to avoid it."

Later, in *Woloszynowski v. New York Central R.R. Co.* (254 N.Y. 206, 208-209), Chief Judge Cardozo, speaking for the court, summarized the now familiar rule thus: "The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences . . . Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance . . . but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge." In that case the engineer and fireman were absolved of liability for a mere error of judgment in the emergency presented when they learned of decedent's plight, for they "did not stand by inert and callous, unwilling to do anything."

We have recently applied the doctrine in a factual context somewhat different from previously decided cases (*Chadwick v. City of New York*, 301 N.Y. 176, 181). A truck driver was attracted by a hand rapping at his window, an attempt, by one of two boys who had "hitched" a ride, to stop the truck because the other was in danger of falling off. We there noted that the doctrine is not limited to "situations where a defendant has precise knowledge of both the exact nature of the danger and of the particular individual threatened so long as there is proof to support an inference that someone is in peril,"

and that it was clearly the import of our later decisions "that when the defendant first became conscious of the impending danger and whether he then did all a reasonable man would under the circumstances to prevent disaster were questions of fact for the jury."

The case at bar comes within the principles enunciated in the foregoing authorities. It is important to keep in mind, moreover, that this is not the ordinary case of a man being run down by a train in a tunnel, where there is nothing a motorman could have foreseen or done to prevent the accident, as, e.g., *McGoey v. City of New York* (304 N.Y. 584). Such cases have been properly disposed of upon the ground that mere failure to see the victim is ordinarily insufficient to support a recovery. Here the jury had the right to find that the automatic equipment stopped the train in time to have saved decedent's life, and we are concerned only with what happened after that, not with the motorman's initial failure to see decedent.

Manifestly the purpose of the emergency equipment is to stop the train when danger threatens, unknown to the operating personnel, thus giving them opportunity to take measures appropriate to the situation. The tripcock mechanism is not placed on the cars as an ornament, nor does it serve as a fender; it is a warning device that operates the brakes-- to save human life and prevent injury. It is not installed to function when the motorman sees an object on the tracks, for then he stops the train. Nor is it present to obviate serious collisions, for then it could not function in time. It must have at least as one of its primary purposes the protection of life, in the light of the possibility that employees or others will at times be in dangerous proximity to the tracks . . .

In the case before us, the brakes were tripped, not once or twice, but thrice. The motorman and conductor, both experienced men, made no investigation and took no corrective action until after the third stop, although there was ample time to have done so. The motorman did not so much as open the door and glance the length of his own car, but, "Without any lapse of time, except the time necessary to perform the operations," he reset the brakes immediately after each of the first two stops, an act which in itself could be found to have been sufficient to apprise him that the emergency system was in good working order.

The evidence in this record would support an inference that decedent was struck successively by the tripcocks of the first, second and third cars, thus actuating the brakes. Moreover, the inference is permissible that the fatal injuries were not incurred until after the second stop and were received under the third and fourth cars of the train. In view of the medical examiner's opinion, and the evidence that the most serious injuries were incurred upon contact with the wheel trucks of those cars, such evidence was sufficient to support that inference . . .

Surely we cannot say, as a matter of law, under the last clear chance doctrine, that the motorman and conductor were not negligent in twice disregarding the emergency equipment, which is not placed in service to be ignored, and were merely chargeable with an error of judgment. At least it became a question of fact as to whether such conduct constitutes "negligence so reckless as to betoken indifference to knowledge" (*Woloszynowski v. New York Central R.R. Co.*), and whether they "ignored the warning," like the driver in the *Chadwick* case, while there was still opportunity to avoid the accident. It matters not that they received the warning through a faultless mechanical instrumentality rather than a human agency, so long as they had, as we said in the last-cited case, "the requisite knowledge upon which a reasonably prudent man would act." The jury was entitled to find that lack of knowledge on the part of defendant's employees as to decedent's position of danger did not come about through mere lack of

vigilance in observing the tracks, but rather as the result of their own willful indifference to the emergency called to their attention by the automatic equipment, to which clear warning they paid no heed. When they did belatedly carry out their plain duty to investigate, they found decedent, and it may be inferred that they would have seen him had they carried out that duty after the second stop - still belatedly, yet in time to have saved his life. We are of the opinion that plaintiff made out at least a prima facie case under the doctrine of last clear chance.

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

## COMMENTS AND QUESTIONS

1. Both of the foregoing cases (and Case 13 below) represent serious efforts in the law to take liability doctrines out of what economists would call a "static" framework. Under static analysis, with a doctrine of contributory negligence, a plaintiff found to be negligent is barred recovery. Last clear chance recognizes that defendant might have taken actions which, despite plaintiff's negligence, would have mitigated loss.

2. The doctrine of unforeseeable superseding cause, as applied in Caraballo, on the other hand, excuses a negligent defendant on the ground that plaintiff's loss was (a) due to an action by plaintiff (or perhaps also by a third party or by "nature"), and (b) that action could not have been foreseen, nor protected against in a cost effective way, even by the most scrupulously careful defendant.

3. The two comments here can be viewed as reasonable answers to obvious relevant questions, and you should explicitly think about how those questions are worded.

## Case 12. Contributory or Comparative Negligence?

*Hoffman v. Jones*  
SUPREME COURT OF FLORIDA  
280 So. 2d. 431 (1973)

Opinion by: Adkins.

This cause is here on petition for writ of certiorari supported by certificate of the District Court of Appeal, Fourth District, that its decision (*Jones v. Hoffman*, 272 So.2d 529) is one which involves a question of great public interest . . . The question certified by the District Court of Appeal is: "Whether or not the Court should replace the contributory negligence rule with the principles of comparative negligence?"

The District Court of Appeal answered the certified question in the affirmative and reversed the trial court in the case sub judice for following the precedent set down by this Court in *Louisville and Nashville Railroad Co. v. Yniestra* . . . This early case specifically held the contributory negligence rule to be the law of Florida, and it has uniformly been followed by the courts of the State ever since. The District Court of Appeal attempted, therefore, to overrule all precedent of this Court in the area of contributory negligence and to establish comparative negligence as the proper test. In so doing, the District Court has exceeded its authority.

In a dissenting opinion, Judge Owen stated well the position of the District Courts of Appeal when in disagreement with controlling precedent set down by this Court:

"If and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal . . . The majority decision would appear to flatly overrule a multitude of prior decisions of our Supreme Court, a prerogative which we do not enjoy." . . .

Prior to answering the question certified, we must also consider our own power and authority to replace the rule of contributory negligence with that of comparative negligence. It has been suggested that such a change in the common law of Florida is properly within the province only of the Legislature, and not of the courts. We cannot agree.

The rule that contributory negligence is an absolute bar to recovery was-- as most tort law-- a judicial creation, and it was specifically judicially adopted in Florida in *Louisville and Nashville Railroad Co. v. Yniestra*, . . . Most scholars attribute the origin of this rule to the English case of *Butterfield v. Forrester*, . . . although as much as thirty years later - in *Raisin v. Mitchell*, . . . contributory negligence was held not to be a complete bar to recovery. Although "contributory negligence" itself had been mentioned in some earlier cases, our research reveals that prior to 1809 (as well as for a time after that date) there was no clear-cut, common law rule that contributory negligence was a complete defense to an action based on negligence. Most probably, the common law was the same in this regard as English maritime law and the civil law - i.e., damages were apportioned when both plaintiff and defendant were at fault. See *Maloney*, supra, page 152. Many authorities declare that early references to "contributory negligence" did not concern contributory negligence as we are familiar with it-- .e., lack of due care by

the plaintiff which contributes to his injuries-- but that it originally meant a plaintiff's own negligent act which was the effective, direct cause of the accident in which he was injured . . .

Even if it be said that the present bar of contributory negligence is a part of our common law by virtue of prior judicial decision, it is also true from Duval that this Court may change the rule where great social upheaval dictates. It has been modified in many instances by judicial decision, such as those establishing the doctrines of "last clear chance," "appreciable degree" and others . . . In a large measure the rule has been transfigured from any "statutory creation" by virtue of our adoption of the common law (if such it were) into decisional law by virtue of various court refinements. We have in the past, with hesitation, modified the common law in justified instances, and this is as it should be . . .

All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile. Our society must be concerned with accident prevention and compensation of victims of accidents. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.

The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken in regard to contributory negligence and to alter the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice."

Use of the terms "contributory negligence" and "comparative negligence" is slightly confusing. The two theories now commonly known by these terms both recognize that negligence of a plaintiff may play a part in causing his injuries and that the damages he is allowed to recover should, therefore, be diminished to some extent. The "contributory negligence" theory, of course, completely bars recovery, while the "comparative negligence" theory is that a plaintiff is prevented from recovering only that proportion of his damages for which he is responsible.

The demise of the absolute-bar theory of contributory negligence has been urged by many American scholars in the law of torts. It has been abolished in almost every common law nation in the world, including England - its country of origin - and every one of the Canadian Provinces. Some form

of comparative negligence now exists in Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Persia, Poland, Russia, Siam and Turkey . . .

In an effort to ameliorate the harshness of contributory negligence, other doctrines have evolved in tort law such as "gross, willful, and wanton" negligence, "last clear chance" and the application of absolute liability in certain instances. Those who defend the doctrine of contributory negligence argue that the rule is also not as harsh in its practical effect as it is in theory. This is so, they say, because juries tend to disregard the instructions given by the trial judge in an effort to afford some measure of rough justice to the injured party . . .

. . . The Legislature did enact a statute in 1887 which applied the principle of comparative negligence to railroad accidents. We held the statute unconstitutional under the due process and equal protection clauses of the Federal and State constitutions because it was of limited scope and not of general application . . . Our Legislature again addressed the problem in 1943, when a comparative negligence statute of general application was passed by both houses. This bill was vetoed by the Governor and the Legislature would not override the veto . . . One man thus prevented this State from now operating under a much more equitable system of recovery for negligent personal injuries and property damage. Since that "defeat," the Legislature has done little to discard the harsh and inequitable contributory negligence rule, perhaps because it considers the problem to be a judicial one.

Since we definitely consider the problem to be a judicial one, we feel the time has come for this Court to join what seems to be a trend toward almost universal adoption of comparative negligence. A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.

Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence. If it appears from the evidence that both plaintiff and defendant were guilty of negligence which was, in some degree, a legal cause of the injury to the plaintiff, this does not defeat the plaintiff's recovery entirely. The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judgment the negligence of the defendant caused to the plaintiff. In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant . . .

The doctrine of last clear chance would, of course, no longer have any application in these cases . . .

We recognize the thousands of pending negligence cases affected by this decision. In fact, the prospect of a general upheaval in pending tort litigation has always been a deterring influence in considering the adoption of a comparative negligence rule . . . We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.

. . .

The certified question having now been answered in full, this cause is remanded to the District Court of Appeal, Fourth District, to be further remanded to the Circuit Court for a new trial.

In order to finalize the determination of the question in this case as expeditiously as possible, this decision is made effective immediately and a petition for rehearing will not be allowed.

It is so ordered.

#### QUESTIONS AND COMMENTS.

1. Notice that the opinion in *Hoffman v. Jones* makes no mention of economic efficiency. For several years after the question was initially investigated, it was widely and erroneously believed that contributory negligence is equivalent or superior to comparative negligence in its efficiency implications.

**Case 13: Comparative Negligence  
(Unforeseeable Superseding Cause)**

*Caraballo v. United States*  
UNITED STATES COURT OF APPEALS, SECOND CIRCUIT  
830 F.2d 19 (1987)

OPINION: CARDAMONE, Circuit Judge. Six years ago on a hot July 25th Saturday afternoon what began as a clamming expedition for a group of friends at Gateway National Recreation Area in Brooklyn, New York, ended in tragic consequences for one of the group, the plaintiff, Gregory Caraballo. On that day Caraballo, who was then 39 years old, and three friends drove to Gateway Park, parked Caraballo's auto in a parking area just off the eastbound side of the Belt Parkway, and walked a quarter of a mile along a footpath to the beach. The party arrived in mid-afternoon when the tide was up. While waiting for it to go down, plaintiff decided to go swimming. Just offshore, about 10 feet from the beach, stood the remnant of an old pier. This wood piling consisted of two vertical boards, the left of which-- facing the water from the beach-- was two feet, four inches high. The vertical board on the right was four feet, five inches high. These two vertical pieces were connected by a horizontal beam, 22 feet long and one foot wide.

Plaintiff testified that others were wading, swimming and diving off this wood piling, so he decided to go in. It was then five o'clock in the afternoon. He said that he walked out to the left side of the piling in water up to his knees; the water was about two feet deep. After climbing onto the horizontal beam, which was just about awash at its left end, plaintiff stated that he walked along its 22 foot length to the right end. Caraballo dove head first into the shallow water, struck his head on the sandy bottom, and suffered the most serious kind of injury-- permanent quadriplegic paralysis.

As a result of this accident, Caraballo sued the government for negligence pursuant to the Federal Tort Claims Act. The trial court calculated his damages at \$ 3.9 million, and having found plaintiff 70 percent negligent and the government 30 percent negligent, awarded plaintiff \$ 1,170,808.50. In determining that the government was 30 percent negligent, the district judge concluded that the government had failed adequately to warn that swimming and diving were prohibited. He found that whatever signs were present in the area were insufficient to warn the public-- particularly the Hispanics who were heavy users of the area. The district court also credited plaintiff's witnesses who testified that there were inadequate patrols on the beach and found the wood piling to be an "attractive nuisance."

In its appeal from the judgment, the government contends that plaintiff's reckless conduct was the sole proximate cause of his injury, that it had no duty to warn the plaintiff about the wood piling, and that the "discretionary function exception," 28 U.S.C. Sec. 2680(a) (1982), bars this suit.

In considering the government's arguments, we begin by observing that in waiving its sovereign immunity under the Federal Tort Claims Act, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. Sec. 2674 (1982). Under the Act, the law of the state where the tort occurred applies. 28 U.S.C. Sec. 1346(b) . . . Because this incident occurred in New York, the law of that State controls.

A landowner in New York, such as the United States Park Service, must maintain its property in a reasonably safe condition under the circumstances . . . To prove that the government was negligent in maintaining the beach where plaintiff was injured in Gateway Park, plaintiff was required to prove the existence of a duty toward him, a breach of that duty, and injury resulting as a proximate cause of defendant's breach of its duty . . .

#### A. Government's Negligence

The district court concluded that the government was negligent because whatever signs existed were not in Spanish in an area heavily used by Hispanics, and because the beach was inadequately patrolled, as indicated by the fact that for some time on the day of the accident no one had stopped people from swimming and using the beach. The signage requirement appears troublingly overly-broad to us and, as will be seen in a moment, is a conclusion that we need not rule on in this case. In response to the adequacy of its patrol, the government claims it is absolved of such negligence under the "discretionary function" exception to the Federal Tort Claims Act . . . The discretionary function may not save the government from liability in this case because once it decides to act, it is responsible for its actions that are negligently carried out . . .

Having decided to patrol, the Park Service is not absolved of liability on a claim of discretionary function for the manner in which it executed that decision. Whether or not the beach area where plaintiff was injured should be patrolled plainly was a discretionary decision for the Park Service to make, and the record supports the district court's finding that a patrol was instituted. A United States Park Police officer testified that to insure that the public does not swim in non-swimming areas at Gateway Park, the park service employs boat, canine and dirt-bike patrols. Having undertaken such all inclusive -- by land, by sea and by dog -- patrols, the government had a discretionary duty to carry them out in a non-negligent manner.

#### B. Proximate Cause

Yet assuming, without deciding, that the government may have been negligent in some respect, we agree with its contention that plaintiff's reckless conduct was, as a matter of law, the sole proximate cause of his injury. Proximate or legal cause is defined as that "which in a natural sequence, unbroken by any new cause, produces that event and without which that event would not have occurred." . . . Where the actual cause of the injury is undisputed, the question of whether the defendant's negligence was the proximate cause of plaintiff's injury is a question of law for the court . . . Under New York law when the actions of a third person or the plaintiff intervene between the defendant's conduct and the injury, the defendant is liable in negligence only when the intervening acts are a normal and foreseeable consequence of defendant's conduct . . . Conversely, where the plaintiff's intervening actions are not a normal and foreseeable consequence of the defendant's conduct, the plaintiff's conduct becomes a superseding cause which absolves the defendant of liability. Plaintiff's conduct in this case was such a superseding cause.

In *Boltax v. Joy Day Camp*, . . . New York's highest court assumed that the landowner's alleged negligence in allowing trespassers to gain entry to a swimming pool area, dangerously maintaining an inadequate level of water in the pool, and placing a lifeguard's chair at its shallow end was negligence that was a causative factor in plaintiff's injuries. The New York Court of Appeals nonetheless affirmed an order granting summary judgment to the defendant pool owner on the grounds that the plaintiff's reckless conduct was an unforeseeable superseding event that absolved the landowner of liability . . . Focusing

on facts that parallel those of the instant case, the court stated that plaintiff was "an adult experienced in swimming and knowledgeable about the general dangers of diving, who admitted his familiarity with . . . the water level. . . , yet chose to dive head first . . . into [the] shallow water . . . "

At the time of the accident, plaintiff was a 39-year old adult who had been swimming many times before. The district court stated that the depth of the water where plaintiff dove "was two-and-a-half or three feet. The shallowness was clearly visible from the point at which [plaintiff] was diving and people were wading and swimming in the area. It should have been observed from their own height what the depth of the water was." Under these circumstances, it was not the government's failure to post signs or its failure adequately to patrol that caused plaintiff's injury. The proximate cause of plaintiff's injury was his own act -- which was unhappily so harmful to him-- of diving head first into water that was observably shallow. That unfortunate error judgment was an unforeseeable superseding cause which bars liability from the attaching against the United States.

Accordingly, the judgment is reversed and the complaint dismissed.

## QUESTIONS AND COMMENTS

1. This is not an ordinary case of contributory negligence as bar to recovery, because New York had adopted a comparative negligence statute at the time of the accident. Instead, the doctrine of "unforeseeable superseding cause" was invoked to overrule the judgment against the National Park Service in this case. Carefully trace the resemblance of this doctrine to the doctrine of last clear chance in the next case.

2. In effect, the appeals court has ruled here that under the circumstances outlined, especially those noted in the last paragraph of the opinion, plaintiff's contribution to the accident was 100 percent and not seventy percent as found in the lower court. Thus, unforeseeable superseding cause protects an injurer by a criterion of foreseeability, which is very much like the way last clear chance protected the plaintiff under the contributory negligence defense, on grounds of cost effectiveness. (The national park service must provide a railing on a cliff edge near an established footpath, but not on cliff edges in remote areas inaccessible by trails.) Should unforeseeable superseding cause become commonplace in defense, arguments based on something like the Hand Formula might become a useful way to argue its applicability. Last clear chance, on the other hand, is an interesting analogy to the Clark-Marsiglia doctrine of contract law, where plaintiff has a duty to mitigate defendant's loss.

## Case 14: Products Liability

*Welge v. Planters Lifesavers Co. et. al.*  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT  
17 F.3d 209 (1994)

OPINION: POSNER, Chief Judge. Richard Welge, forty-something but young in spirit, loves to sprinkle peanuts on his ice cream sundaes. On January 18, 1991, Karen Godfrey, with whom Welge boards, bought a 24-ounce vacuum-sealed plastic-capped jar of Planters peanuts for him at a K-Mart store in Chicago. To obtain a \$2 rebate that the maker of Alka-Seltzer was offering to anyone who bought a "party" item, such as peanuts, Godfrey needed proof of her purchase of the jar of peanuts; so, using an Exacto knife (basically a razor blade with a handle), she removed the part of the label that contained the bar code. She then placed the jar on top of the refrigerator, where Welge could get at it without rooting about in her cupboards. About a week later, Welge removed the plastic seal from the jar, uncapped it, took some peanuts, replaced the cap, and returned the jar to the top of the refrigerator, all without incident. A week after that, on February 3, the accident occurred. Welge took down the jar, removed the plastic cap, spilled some peanuts into his left hand to put on his sundae, and replaced the cap with his right hand--but as he pushed the cap down on the open jar the jar shattered. His hand, continuing in its downward motion, was severely cut, and is now, he claims, permanently impaired.

Welge brought this products liability suit in federal district court under the diversity jurisdiction; Illinois law governs the substantive issues. Welge named three defendants (plus the corporate parent of one--why we don't know). They are K-Mart, which sold the jar of peanuts to Karen Godfrey; Planters, which manufactured the product--that is to say, filled the glass jar with peanuts and sealed and capped it; and Brockway, which manufactured the glass jar itself and sold it to Planters. After pretrial discovery was complete the defendants moved for summary judgment. The district judge granted the motion on the ground that the plaintiff had failed to exclude possible causes of the accident other than a defect introduced during the manufacturing process.

No doubt there are men strong enough to shatter a thick glass jar with one blow. But Welge's testimony stands uncontradicted that he used no more than the normal force that one exerts in snapping a plastic lid onto a jar. So the jar must have been defective. No expert testimony and no fancy doctrine are required for such a conclusion. A nondefective jar does not shatter when normal force is used to clamp its plastic lid on. The question is when the defect was introduced. It could have been at any time from the manufacture of the glass jar by Brockway (for no one suggests that the defect might have been caused by something in the raw materials out of which the jar was made) to moments before the accident. But testimony by Welge and Karen Godfrey, if believed--and at this stage in the proceedings we are required to believe it--excludes all reasonable possibility that the defect was introduced into the jar after Godfrey plucked it from a shelf in the K-Mart store. From the shelf she put it in her shopping cart. The checker at the check-out counter scanned the bar code without banging the jar. She then placed the jar in a plastic bag. Godfrey carried the bag to her car and put it on the floor. She drove directly home, without incident. After the bar-code portion of the label was removed, the jar sat on top of the refrigerator except for the two times Welge removed it to take peanuts out of it. Throughout this process it was not, so far as anyone knows, jostled, dropped, bumped, or otherwise subjected to stress beyond what is to be expected in the ordinary use of the product. Chicago is not Los Angeles; there were no earthquakes.

Chicago is not Amityville either; no supernatural interventions are alleged. So the defect must have been introduced earlier, when the jar was in the hands of the defendants.

But, they argue, this overlooks two things. One is that Karen Godfrey took a knife to the jar. And no doubt one can weaken a glass jar with a knife. But nothing is more common or, we should have thought, more harmless than to use a knife or a razor blade to remove a label from a jar or bottle. People do this all the time with the price labels on bottles of wine. Even though mishandling or misuse, by the consumer or by anyone else (other than the defendant itself), is a defense, though a limited and (subject to a qualification noted later) partial defense, to a products liability suit in Illinois as elsewhere, . . . and even if, as we greatly doubt, such normal mutilation as occurred in this case could be thought a species of mishandling or misuse, a defendant cannot defend against a products liability suit on the basis of a misuse that he invited. The Alka-Seltzer promotion to which Karen Godfrey was responding when she removed a portion of the label of the jar of Planters peanuts was in the K-Mart store. It was there, obviously, with K-Mart's permission. By the promotion K-Mart invited its peanut customers to remove a part of the label on each peanut jar bought, in order to be able to furnish the maker of Alka-Seltzer with proof of purchase. If one just wants to efface a label one can usually do that by scraping it off with a fingernail, but to remove the label intact requires the use of a knife or a razor blade. Invited misuse is no defense to a products liability claim. Invited misuse is not misuse.

The invitation, it is true, was issued by K-Mart, not by the other defendants; and we do not know their involvement, if any, in the promotion. As to them, the defense of misuse must fail, at this stage of the proceedings, for two other reasons. The evidence does not establish with the certitude required for summary judgment that the use of an Exacto knife to remove a label from a jar is a misuse of the jar. And in a regime of comparative negligence misuse is not a defense to liability but merely reduces the plaintiff's damages, unless the misuse is the sole cause of the accident.

Even so, the defendants point out, it is always possible that the jar was damaged while it was sitting unattended on the top of the refrigerator, in which event they are not responsible. Only if it had been securely under lock and key when not being used could the plaintiff and Karen Godfrey be certain that nothing happened to damage it after she brought it home. That is true--there are no meta-physical certainties--but it leads nowhere. Elves may have played ninepins with the jar of peanuts while Welge and Godfrey were sleeping; but elves could remove a jar of peanuts from a locked cupboard. The plaintiff in a products liability suit is not required to exclude every possibility, however fantastic or remote, that the defect which led to the accident was caused by someone other than one of the defendants. The doctrine of *res ipsa loquitur* teaches that an accident that is unlikely to occur unless the defendant was negligent is itself circumstantial evidence that the defendant was negligent. The doctrine is not strictly applicable to a products liability case because unlike an ordinary accident case the defendant in a products case has parted with possession and control of the harmful object before the accident occurs . . . . But the doctrine merely instantiates the broader principle, which is as applicable to a products case as to any other tort case, that an accident can itself be evidence of liability . . . . If it is the kind of accident that would not have occurred but for a defect in the product, and if it is reasonably plain that the defect was not introduced after the product was sold, the accident is evidence of the defect. The second condition (as well as the first) has been established here, at least to a probability sufficient to defeat a motion for summary judgment. Normal people do not lock up their jars and cans lest something happen to damage these containers while no one is looking. The probability of such damage is too remote. It is not only too remote to make a rational person take measures to prevent it; it is too remote to defeat a products liability suit should a container prove dangerously defective.

Of course, unlikely as it may seem that the defect was introduced into the jar after Karen Godfrey bought it if the plaintiffs' testimony is believed, other evidence might make their testimony unworthy of belief--might even show, contrary to all the probabilities, that the knife or some mysterious night visitor caused the defect after all. The fragments of glass into which the jar shattered were preserved and were examined by experts for both sides. The experts agreed that the jar must have contained a defect but they could not find the fracture that had precipitated the shattering of the jar and they could not figure out when the defect that caused the fracture that caused the collapse of the jar had come into being. The defendants' experts could neither rule out, nor rule in, the possibility that the defect had been introduced at some stage of the manufacturing process. The plaintiff's expert noticed what he thought was a preexisting crack in one of the fragments, and he speculated that a similar crack might have caused the fracture that shattered the jar. This, the district judge ruled, was not enough.

But if the probability that the defect which caused the accident arose after Karen Godfrey bought the jar of Planters peanuts is very small--and on the present state of the record we are required to assume that it is--then the probability that the defect was introduced by one of the defendants is very high. In principle there is a third possibility--mishandling by a carrier hired to transport the jar from Brockway to Planters or Planters to K-Mart--but we do not even know whether a carrier was used for any of these shipments, rather than the shipper's own trucks. Apart from that possibility, which has not been mentioned in the litigation so far and which in any event, as we are about to see, would not affect K-Mart's liability, the jar was in the control of one of the defendants at all times until Karen Godfrey bought it.

Which one? It does not matter. The strict-liability element in modern products liability law comes precisely from the fact that a seller subject to that law is liable for defects in his product even if those defects were introduced, without the slightest fault of his own for failing to discover them, at some anterior stage of production . . . So the fact that K-Mart sold a defective jar of peanuts to Karen Godfrey would be conclusive of K-Mart's liability, and since it is a large and solvent firm there would be no need for the plaintiff to look further for a tortfeasor. This point seems to have been more or less conceded by the defendants in the district court--the thrust of their defense was that the plaintiff had failed to show that the defect had been caused by any of them--though this leaves us mystified as to why the plaintiff bothered to name additional defendants.

And even if, as we doubt, the plaintiff took on the unnecessary burden of proving that it is more likely than not that a given defendant introduced the defect into the jar, he might be able to avail himself of the rule of *Ybarra v. Spangard*, 25 Cal. 2d 486, and force each defendant to produce some exculpatory evidence . . . In fact K-Mart put in some evidence on the precautions it takes to protect containers of food from being damaged by jarring or bumping. A jury convinced by such evidence, impressed by the sturdiness of jars of peanuts (familiar to every consumer), and perhaps perplexed at how the process of filling a jar with peanuts and vacuum-sealing it could render a normal jar vulnerable to collapsing at a touch, might decide that the probability that the defect had been introduced by either K-Mart or Planters was remote. So what? Evidence of K-Mart's care in handling peanut jars would be relevant only to whether the defect was introduced after sale; if it was introduced at any time before sale--if the jar was defective when K-Mart sold it--the source of the defect would be irrelevant to K-Mart's liability. In exactly the same way, Planters' liability would be unaffected by the fact, if it is a fact, that the defect was due to Brockway rather than to itself. To repeat an earlier and fundamental point, a seller who is subject to strict products liability is responsible for the consequences of selling a defective product even if the defect was introduced without any fault on his part by his supplier or by his supplier's supplier.

In reaching the result she did the district judge relied heavily on *Erzrumly v. Dominick's Finer Foods, Inc.*, 50 Ill. App. 3d 359. A six-year-old was injured by a Coke bottle that she was carrying up a flight of stairs to her family's apartment shortly after its purchase. The court held that the plaintiff had failed to eliminate the possibility that the Coke bottle had failed because of something that had happened after it left the store. If, as the defendants in our case represent, the bottle in *Erzrumly* "exploded," that case would be very close to this one. A nondefective Coke bottle is unlikely to explode without very rough handling. The contents are under pressure, it is true, but the glass is strengthened accordingly. But it was unclear in *Erzrumly* what had happened to the bottle. There was testimony that the accident had been preceded by the sound of a bottle exploding but there was other evidence that the bottle may simply have been dropped and have broken--the latter being the sort of accident that happens commonly after purchase. Although the opinion contains some broad language helpful to the defendants in the present case, the holding was simply that murky facts required the plaintiff to make a greater effort to determine whether the product was defective when it left the store. Here we know to a virtual certainty (always assuming that the plaintiff's evidence is believed, which is a matter for the jury) that the accident was not due to mishandling after purchase but to a defect that had been introduced earlier.

Even the narrow holding of *Erzrumly* is probably wrong, in light of bottle and other container cases decided by Illinois courts both before and after. . . , *Fullreide v. Midstates Beverage Co.*, 70 Ill. App. 3d 758, . . . as well as by courts of other states . . . Right or wrong, *Erzrumly* is plainly contrary to *Fullreide*; and obviously when state courts of the same level reach opposite conclusions, a federal court in a diversity case is not bound to follow either.

REVERSED AND REMANDED.

## Case 15: Punitive Damages

*Grimshaw v. Ford Motor Co.*

COURT OF APPEALS OF CALIFORNIA,  
FOURTH DISTRICT, DIVISION TWO  
119 Cal. App. 3d 757 (1981)

OPINION BY: Tamura. A 1972 Ford Pinto hatchback automobile unexpectedly stalled on a freeway, erupting into flames when it was rear ended by a car proceeding in the same direction. Mrs. Lilly Gray, the driver of the Pinto, suffered fatal burns and 13-year-old Richard Grimshaw, a passenger in the Pinto, suffered severe and permanently disfiguring burns on his face and entire body. Grimshaw and the heirs of Mrs. Gray (Grays) sued Ford Motor Company and others. Following a six-month jury trial, verdicts were returned in favor of plaintiffs against Ford Motor Company. Grimshaw was awarded \$2,516,000 compensatory damages and \$125 million punitive damages; the Grays were awarded \$ 559,680 in compensatory damages. [The jury actually awarded Grimshaw \$ 2,841,000 compensatory damages and \$ 125 million punitive damages and the Grays \$659,680 compensatory damages. Pursuant to stipulation that sums previously received by plaintiffs from others should be deducted from the amounts awarded by the jury, the judgment was modified to reflect compensatory damages in favor of Grimshaw for \$2,516,000 and in favor of the Grays for \$ 559,680.] On Ford's motion for a new trial, Grimshaw was required to remit all but \$3.5 million of the punitive award as a condition of denial of the motion.

Ford appeals from the judgment and from an order denying its motion for a judgment notwithstanding the verdict as to punitive damages. Grimshaw appeals from the order granting the conditional new trial and from the amended judgment entered pursuant to the order. The Grays have cross-appealed from the judgment and from an order denying leave to amend their complaint to seek punitive damages.

Ford assails the judgment as a whole, assigning a multitude of errors and irregularities, including misconduct of counsel, but the primary thrust of its appeal is directed against the punitive damage award. Ford contends that the punitive award was statutorily unauthorized and constitutionally invalid. In addition, it maintains that the evidence was insufficient to support a finding of malice or corporate responsibility for malice. Grimshaw's cross-appeal challenges the validity of the new trial order and the conditional reduction of the punitive damage award. The Grays' cross-appeal goes to the validity of an order denying them leave to amend their wrongful death complaint to seek punitive damages.

Since sufficiency of the evidence is in issue only regarding the punitive damage award, we make no attempt to review the evidence bearing on all of the litigated issues. Subject to amplification when we deal with specific issues, we shall set out the basic facts pertinent to these appeals in accordance with established principles of appellate review: we will view the evidence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor, and indulging all reasonable inferences favorable to them . . .

The Accident: In November 1971, the Grays purchased a new 1972 Pinto hatchback manufactured by Ford in October 1971. The Grays had trouble with the car from the outset. During the first few months of ownership, they had to return the car to the dealer for repairs a number of times.

Their car problems included excessive gas and oil consumption, down shifting of the automatic transmission, lack of power, and occasional stalling. It was later learned that the stalling and excessive fuel consumption were caused by a heavy carburetor float.

On May 28, 1972, Mrs. Gray, accompanied by 13-year-old Richard Grimshaw, set out in the Pinto from Anaheim for Barstow to meet Mr. Gray. The Pinto was then 6 months old and had been driven approximately 3,000 miles. Mrs. Gray stopped in San Bernardino for gasoline, got back onto the freeway (Interstate 15) and proceeded toward her destination at 60-65 miles per hour. As she approached the Route 30 off-ramp where traffic was congested, she moved from the outer fast lane to the middle lane of the freeway. Shortly after this lane change, the Pinto suddenly stalled and coasted to a halt in the middle lane. It was later established that the carburetor float had become so saturated with gasoline that it suddenly sank, opening the float chamber and causing the engine to flood and stall. A car traveling immediately behind the Pinto was able to swerve and pass it but the driver of a 1962 Ford Galaxie was unable to avoid colliding with the Pinto. The Galaxie had been traveling from 50 to 55 miles per hour but before the impact had been braked to a speed of from 28 to 37 miles per hour.

At the moment of impact, the Pinto caught fire and its interior was engulfed in flames. According to plaintiffs' expert, the impact of the Galaxie had driven the Pinto's gas tank forward and caused it to be punctured by the flange or one of the bolts on the differential housing so that fuel sprayed from the punctured tank and entered the passenger compartment through gaps resulting from the separation of the rear wheel well sections from the floor pan. By the time the Pinto came to rest after the collision, both occupants had sustained serious burns. When they emerged from the vehicle, their clothing was almost completely burned off. Mrs. Gray died a few days later of congestive heart failure as a result of the burns. Grimshaw managed to survive but only through heroic medical measures. He has undergone numerous and extensive surgeries and skin grafts and must undergo additional surgeries over the next 10 years. He lost portions of several fingers on his left hand and portions of his left ear, while his face required many skin grafts from various portions of his body. Because Ford does not contest the amount of compensatory damages awarded to Grimshaw and the Grays, no purpose would be served by further description of the injuries suffered by Grimshaw or the damages sustained by the Grays.

#### Design of the Pinto Fuel System:

In 1968, Ford began designing a new subcompact automobile which ultimately became the Pinto. Mr. Iacocca, then a Ford vice president, conceived the project and was its moving force. Ford's objective was to build a car at or below 2,000 pounds to sell for no more than \$ 2,000.

Ordinarily marketing surveys and preliminary engineering studies precede the styling of a new automobile line. Pinto, however, was a rush project, so that styling preceded engineering and dictated engineering design to a greater degree than usual. Among the engineering decisions dictated by styling was the placement of the fuel tank. It was then the preferred practice in Europe and Japan to locate the gas tank over the rear axle in subcompacts because a small vehicle has less "crush space" between the rear axle and the bumper than larger cars. The Pinto's styling, however, required the tank to be placed behind the rear axle leaving only 9 or 10 inches of "crush space" -- far less than in any other American automobile or Ford overseas subcompact. In addition, the Pinto was designed so that its bumper was little more than a chrome strip, less substantial than the bumper of any other American car produced then or later. The Pinto's rear structure also lacked reinforcing members known as "hat sections" (two longitudinal side members) and horizontal cross-members running between them such as were found in

cars of larger unitized construction and in all automobiles produced by Ford's overseas operations. The absence of the reinforcing members rendered the Pinto less crush resistant than other vehicles. Finally, the differential housing selected for the Pinto had an exposed flange and a line of exposed bolt heads. These protrusions were sufficient to puncture a gas tank driven forward against the differential upon rear impact.

#### Crash Tests:

During the development of the Pinto, prototypes were built and tested. Some were "mechanical prototypes" which duplicated mechanical features of the design but not its appearance while others, referred to as "engineering prototypes," were true duplicates of the design car. These prototypes as well as two production Pintos were crash tested by Ford to determine, among other things, the integrity of the fuel system in rear-end accidents. Ford also conducted the tests to see if the Pinto as designed would meet a proposed federal regulation requiring all automobiles manufactured in 1972 to be able to withstand a 20-mile-per-hour fixed barrier impact without significant fuel spillage and all automobiles manufactured after January 1, 1973, to withstand a 30-mile-per-hour fixed barrier impact without significant fuel spillage.

The crash tests revealed that the Pinto's fuel system as designed could not meet the 20-mile-per-hour proposed standard. Mechanical prototypes struck from the rear with a moving barrier at 21 miles per hour caused the fuel tank to be driven forward and to be punctured, causing fuel leakage in excess of the standard prescribed by the proposed regulation. A production Pinto crash tested at 21 miles per hour into a fixed barrier caused the fuel neck to be torn from the gas tank and the tank to be punctured by a bolt head on the differential housing. In at least one test, spilled fuel entered the driver's compartment through gaps resulting from the separation of the seams joining the rear wheel wells to the floor pan. The seam separation was occasioned by the lack of reinforcement in the rear structure and insufficient welds of the wheel wells to the floor pan.

Tests conducted by Ford on other vehicles, including modified or reinforced mechanical Pinto prototypes, proved safe at speeds at which the Pinto failed. Where rubber bladders had been installed in the tank, crash tests into fixed barriers at 21 miles per hour withstood leakage from punctures in the gas tank. Vehicles with fuel tanks installed above rather than behind the rear axle passed the fuel system integrity test at 31-miles-per-hour fixed barrier. A Pinto with two longitudinal hat sections added to firm up the rear structure passed a 20-mile-per-hour rear impact fixed barrier test with no fuel leakage.

**The Cost to Remedy Design Deficiencies:** When a prototype failed the fuel system integrity test, the standard of care for engineers in the industry was to redesign and retest it. The vulnerability of the production Pinto's fuel tank at speeds of 20 and 30-miles-per-hour fixed barrier tests could have been remedied by inexpensive "fixes," but Ford produced and sold the Pinto to the public without doing anything to remedy the defects. Design changes that would have enhanced the integrity of the fuel tank system at relatively little cost per car included the following: longitudinal side members and cross members at \$2.40 and \$1.80, respectively; a single shock absorbent "flak suit" to protect the tank at \$4; a tank within a tank and placement of the tank over the axle at \$5.08 to \$5.79; a nylon bladder within the tank at \$5.25 to \$8; placement of the tank over the axle surrounded with a protective barrier at a cost of \$9.95 per car; substitution of a rear axle with a smooth differential housing at a cost of \$2.10; imposition of a protective shield between the differential housing and the tank at \$2.35; improvement and reenforcement of the bumper at \$2.60; addition of eight inches of crush space a cost of \$6.40. Equipping

the car with a reinforced rear structure, smooth axle, improved bumper and additional crush space at a total cost of \$15.30 would have made the fuel tank safe in a 34 to 38-mile-per-hour rear-end collision by a vehicle the size of the Ford Galaxie. If, in addition to the foregoing, a bladder or tank within a tank were used or if the tank were protected with a shield, it would have been safe in a 40 to 45-mile-per-hour rear impact. If the tank had been located over the rear axle, it would have been safe in a rear impact at 50 miles per hour or more.

#### Management's Decision to Go Forward With Knowledge of Defects:

The idea for the Pinto, as has been noted, was conceived by Mr. Iacocca, then executive vice president of Ford. The feasibility study was conducted under the supervision of Mr. Robert Alexander, vice president of car engineering. Ford's Product Planning Committee, whose members included Mr. Iacocca, Mr. Robert Alexander, and Mr. Harold MacDonald, Ford's group vice president of car engineering, approved the Pinto's concept and made the decision to go forward with the project. During the course of the project, regular product review meetings were held which were chaired by Mr. MacDonald and attended by Mr. Alexander. As the project approached actual production, the engineers responsible for the components of the project "signed off" to their immediate supervisors who in turn "signed off" to their superiors and so on up the chain of command until the entire project was approved for public release by Vice Presidents Alexander and MacDonald and ultimately by Mr. Iacocca. The Pinto crash tests results had been forwarded up the chain of command to the ultimate decision-makers and were known to the Ford officials who decided to go forward with production.

Harley Copp, a former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford's management made the decision to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that "fixes" were feasible at nominal cost. He testified that management's decision was based on the cost savings which would inure from omitting or delaying the "fixes."

...

The fact that two of the crash tests were run at the request of the Ford chassis and vehicle engineering department for the specific purpose of demonstrating the advisability of moving the fuel tank over the axle as a possible "fix" further corroborated Mr. Copp's testimony that management knew the results of the crash tests. Mr. Kennedy, who succeeded Mr. Copp as the engineer in charge of Ford's crash testing program, admitted that the test results had been forwarded up the chain of command to his superiors.

The Action: Grimshaw (by his guardian ad litem) and the Grays sued Ford and others. Grimshaw was permitted to amend his complaint to seek punitive damages but the Grays' motion to amend their complaint for a like purpose was denied. The cases were thereafter consolidated for trial . . . Grimshaw's case was submitted to the jury on theories of negligence and strict liability; the Grays' case went to the jury only on the strict liability theory.

Ford's Appeal: Ford seeks reversal of the judgment as a whole on the following grounds: (1) Erroneous rulings relating to Mr. Copp's testimony; (2) other erroneous evidentiary rulings; (3) prejudicial misconduct by plaintiffs' counsel; (4) instructional errors; and (5) jury misconduct. On the issue of punitive damages, Ford contends that its motion for judgment notwithstanding the verdict should have

been granted because the punitive award was statutorily unauthorized and constitutionally invalid and on the further ground that the evidence was insufficient to support a finding of malice or corporate responsibility for malice. Ford also seeks reversal of the punitive award for claimed instructional errors on malice and proof of malice as well as on the numerous grounds addressed to the judgment as a whole. Finally, Ford maintains that even if punitive damages were appropriate in this case, the amount of the award was so excessive as to require a new trial or further remittitur of the award.

In the ensuing analysis (ad nauseam) of Ford's wide-ranging assault on the judgment, we have concluded that Ford has failed to demonstrate that any errors or irregularities occurred during the trial which resulted in a miscarriage of justice requiring reversal.

...

[FIVE CATEGORIES OF COMPLAINT (AD NAUSEAM) OMITTED IN THIS EDITION]

## **VI. Punitive Damages.**

Ford contends that it was entitled to a judgment notwithstanding the verdict on the issue of punitive damages on two grounds: First, punitive damages are statutorily and constitutionally impermissible in a design defect case; second, there was no evidentiary support for a finding of malice or of corporate responsibility for malice. In any event, Ford maintains that the punitive damage award must be reversed because of erroneous instructions and excessiveness of the award. (1) "Malice" Under Civil Code Section 3294: The concept of punitive damages is rooted in the English common law and is a settled principle of the common law of this country . . . The doctrine was a part of the common law of this state long before the Civil Code was adopted . . . When our laws were codified in 1872, the doctrine was incorporated in Civil Code section 3294, which at the time of trial read: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." . . . Ford argues that "malice" . . . requires animus malus or evil motive-- an intention to injure the person harmed-- and that the term is therefore conceptually incompatible with an unintentional tort such as the manufacture and marketing of a defectively designed product. This contention runs counter to our decisional law. As this court recently noted, numerous California cases after *Davis v. Hearst* have interpreted the term "malice" as used in section 3294 to include, not only a malicious intention to injure the specific person harmed, but conduct evincing "a conscious disregard of the probability that the actor's conduct will result in injury to others." . . .

(3) Sufficiency of the Evidence to Support the Finding of Malice and Corporate Responsibility: Ford contends that its motion for judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support a finding of malice or corporate responsibility for such malice. The record fails to support the contention.

"The rules circumscribing the power of a trial judge to grant a motion for judgment notwithstanding the verdict are well established. The power to grant such a motion is identical to the power to grant a directed verdict; the judge cannot weigh the evidence or assess the credibility of witnesses; if the evidence is conflicting or if several reasonable inferences may be drawn, the motion should be denied; the motion may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict . . . There was ample evidence to support a finding of malice and Ford's responsibility for malice.

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20- to 30-mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.

Ford's argument that there can be no liability for punitive damages because there was no evidence of corporate ratification of malicious misconduct is equally without merit. California follows the Restatement rule that punitive damages can be awarded against a principal because of an action of an agent if, but only if, '(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.' . . . The present case comes within one or both of the categories described in subdivisions (c) and (d).

There is substantial evidence that management was aware of the crash tests showing the vulnerability of the Pinto's fuel tank to rupture at low speed rear impacts with consequent significant risk of injury or death of the occupants by fire. There was testimony from several sources that the test results were forwarded up the chain of command; vice president Robert Alexander admitted to Mr. Copp that he was aware of the test results; vice president Harold MacDonald, who chaired the product review meetings, was present at one of those meetings at which a report on the crash tests was considered and a decision was made to defer corrective action; and it may be inferred that Mr. Alexander, a regular attendee of the product review meetings, was also present at that meeting. McDonald and Alexander were manifestly managerial employees possessing the discretion to make "decisions that will ultimately determine corporate policy." . . . There was also evidence that Harold Johnson, an assistant chief engineer of research, and Mr. Max Jurosek, chief chassis engineer, were aware of the results of the crash tests and the defects in the Pinto's fuel tank system. Ford contends those two individuals did not occupy managerial positions because Mr. Copp testified that they admitted awareness of the defects but told him they were powerless to change the rear-end design of the Pinto. It may be inferred from the testimony, however, that the two engineers had approached management about redesigning the Pinto or that, being aware of management's attitude, they decided to do nothing. In either case the decision not to take corrective action was made by persons exercising managerial authority. Whether an employee acts in a "managerial capacity" does not necessarily depend on his "level" in the corporate hierarchy . . . As the Egan court said: "Defendant should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions." . . .

While much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice . . .

(6) Amount of Punitive Damage Award: Ford's final contention is that the amount of punitive damages awarded, even as reduced by the trial court, was so excessive that a new trial on that issue must be granted. Ford argues that its conduct was less reprehensible than those for which punitive damages

have been awarded in California in the past; that the \$3.5 million award is many times over the highest award for such damages ever upheld in California; and that the award exceeds maximum civil penalties that may be enforced under federal or state statutes against a manufacturer for marketing a defective automobile. We are unpersuaded.

In determining whether an award of punitive damages is excessive, comparison of the amount awarded with other awards in other cases is not a valid consideration . . . Nor does "[the] fact that an award may set a precedent by its size" in and of itself render it suspect; whether the award was excessive must be assessed by examining the circumstances of the particular case . . . In deciding whether an award is excessive as a matter of law or was so grossly disproportionate as to raise the presumption that it was the product of passion or prejudice, the following factors should be weighed: The degree of reprehensibility of defendant's conduct, the wealth of the defendant, the amount of compensatory damages, and an amount which would serve as a deterrent effect on like conduct by defendant and others who may be so inclined . . . Applying the foregoing criteria to the instant case, the punitive damage award as reduced by the trial court was well within reason . . . [A quantitative formula whereby the amount of punitive damages can be determined in a given case with mathematical certainty is manifestly impossible as well as undesirable . . . [but] courts [should] balance society's interest against defendant's interest by focusing on the following factors: Severity of threatened harm; degree of reprehensibility of defendant's conduct, profitability of the conduct, wealth of defendant, amount of compensatory damages (whether it was high in relation to injury), cost of litigation, potential criminal sanctions and other civil actions against defendant based on same conduct . . . In the present case, the amount of the award as reduced by the judge was reasonable under the suggested factors, including the factor of any other potential liability, civil or criminal.]

In assessing the propriety of a punitive damage award, as in assessing the propriety of any other judicial ruling based upon factual determinations, the evidence must be viewed in the light most favorable to the judgment . . . Viewing the record thusly in the instant case, the conduct of Ford's management was reprehensible in the extreme. It exhibited a conscious and callous disregard of public safety in order to maximize corporate profits. Ford's self-evaluation of its conduct is based on a review of the evidence most favorable to it instead of on the basis of the evidence most favorable to the judgment. Unlike malicious conduct directed toward a single specific individual, Ford's tortious conduct endangered the lives of thousands of Pinto purchasers. Weighed against the factor of reprehensibility, the punitive damage award as reduced by the trial judge was not excessive.

Nor was the reduced award excessive taking into account defendant's wealth and the size of the compensatory award. Ford's net worth was \$ 7.7 billion and its income after taxes for 1976 was over \$983 million. The punitive award was approximately .005 percent of Ford's net worth and approximately .03 percent of its 1976 net income. The ratio of the punitive damages to compensatory damages was approximately 1.4 to 1. Significantly, Ford does not quarrel with the amount of the compensatory award to Grimshaw.

Nor was the size of the award excessive in light of its deterrent purpose. An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent . . . The award in question was far from excessive as a deterrent against future wrongful conduct by Ford and others.

Ford complains that the punitive award is far greater than the maximum penalty that may be imposed under California or federal law prohibiting the sale of defective automobiles or other products. For example, Ford notes that California statutes provide a maximum fine of only \$50 for the first offense and \$100 for a second offense for a dealer who sells an automobile that fails to conform to federal safety laws or is not equipped with required lights or brakes . . . ; that a manufacturer who sells brake fluid in this state failing to meet statutory standards is subject to a maximum of only \$50 . . . ; and that the maximum penalty that may be imposed under federal law for violation of automobile safety standards is \$1,000 per vehicle up to a maximum of \$800,000 for any related series of offenses . . . It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

### **Grimshaw's Appeal**

Grimshaw has appealed from the order conditionally granting Ford a new trial on the issue of punitive damages and from the amended judgment entered pursuant to that order . . . [A consent to a reduction in the judgment does not preclude a plaintiff from filing a cross-appeal where the opposing party appeals despite the consent to a remittitur.]

Grimshaw contends that the new trial order is erroneous because (1) the punitive damages awarded by the jury were not excessive as a matter of law, (2) the specification of reasons was inadequate; and (3) the court abused its discretion in cutting the award so drastically. For reasons to be stated, we have concluded that the contentions lack merit.

The court prefaced its specification of reasons with a recitation of the judicially established guidelines for determining whether a punitive award is excessive. [The court stated that "the principles by which the propriety of the amount of punitive damages awarded will be judged are threefold: (1) Is the sum so large as to raise a presumption that the award was the result of passion and prejudice and therefore excessive as a matter of law; (2) Does the award bear a reasonable relationship to the net assets of the defendant; and (3) Does the award bear a reasonable relationship to the compensatory damages awarded." ] The court then observed that there was evidence in the record (referring to exhibit 125) which might provide a possible rational basis for the \$ 125 million jury verdict which would dispel any presumption of passion or prejudice, adding, however, that the court was not suggesting that the amount was warranted "or that the jury did utilize Exhibit 125, or any other exhibits, and if they did, that they were justified in so doing." [Exhibit 125 was the report by Ford engineers showing savings which would be realized by deferring design changes to the fuel system of Ford automobiles to meet the proposed governmental standards on the integrity of the fuel systems.] The court then noted, based on the fact that Ford's net worth was \$ 7.7 billion and its profits during the last quarter of the year referred to in the financial statement introduced into evidence were more than twice the punitive award, that the award was not disproportionate to Ford's net assets or to its profit generating capacity. The court noted, however, that the amount of the punitive award was 44 times the compensatory award, the court stated that while it did not consider that ratio alone to be controlling because aggravating circumstances may justify a ratio as high as the one represented by the jury verdict, it reasoned that the ratio coupled with the amount by

which the punitive exceeded the compensatory damages (over \$ 122 million) rendered the jury's punitive award excessive as a matter of law.

[T]he trial judge may not have taken into account Ford's potential liability for punitive damages in other cases involving the same tortious conduct in reducing the award, it is a factor we may consider in passing on the request to increase the award. Considering such potential liability, we find the amount as reduced by the trial judge to be reasonable and just. We therefore decline the invitation to modify the judgment by reducing the amount of the remittitur.

## **Disposition**

In *Grimshaw v. Ford Motor Co.*, the judgment, the conditional new trial order, and the order denying Ford's motion for judgment notwithstanding the verdict on the issue of punitive damages are affirmed.

## **COMMENTS AND QUESTIONS**

1. This is a very long but very rich case. (In unedited form it runs to more than sixty typewritten pages.) It contains a clear statement of the reasons for strict liability and punitive damages when accidents result from the failure of mass produced products. (Find the paragraphs in which this is spelled out.) It contains a statement of a standard, similar to the Hand formula, whereby adequacy of product design can be judged. (Find the paragraphs in which this is spelled out.) Both of these contributions are at the core economic. It also (especially in unedited form) teaches much about the standards of legal presentation and argument that are insisted upon in California courts-- and in more than one place accuses Ford's attorneys of sleeping through presentations by plaintiff that should have been challenged by objection, or ignoring charges to the jury that should have elicited protest.

2. Form a judgment as to whether the damages actually awarded to Richard Grimshaw were adequate to cover the physical damage he suffered in the accident. Use the class notes on medical malpractice in which *Niles v. City of San Rafael* (Case 16) is discussed, to determine whether there is an economic basis for so large an award.

3. Should wrongful death be exempt from punitive damages? That is an issue that occupies the court in its finding on the Gray family litigation against Ford, omitted here. See if you can think of any reason why they should be so exempt (as they are in California).

4. Given what is testified about the way that decisions were made about Pinto's fuel tank, do you think there is basis for criminal action against Ford?

5. What would the incentive consequences be if the decisionmakers at Ford: Iaccoca, MacDonald, Alexander-- were held personally liable for the consequences of their decision? Who is most affected by that damages settlement--Ford's management or Ford's stockholders? Who is most responsible?

## Case 16: Medical Malpractice Damages

*Niles v. City of San Rafael and Mt. Zion Hospital*  
COURT OF APPEALS OF CALIFORNIA,  
FIRST APPELLATE DISTRICT, DIVISION FOUR  
42 Cal. App. 3d 230 (1974)

OPINION (Christian, J.): Suing for himself and as guardian ad litem for his minor son, Kelly Niles, David F. Niles has taken judgment in the amount of \$4,025,000 against the City of San Rafael, the San Rafael City School District, Mt. Zion Hospital, and Dr. David Haskins. The judgment was entered on a jury verdict in that amount establishing defendants' liability for injuries which have totally and permanently incapacitated Kelly Niles. On the two public entities' cross-complaint for indemnity it was determined that they should bear \$ 25,000 of the award; the remaining \$ 4,000,000 was assessed against the medical defendants.

The medical defendants have paid \$ 2,000,000 in partial satisfaction of the judgment, and attorneys' fees were fixed on the basis of that payment, the court reserving jurisdiction to determine additional fees upon subsequent payments on the judgment. The public entities and the medical defendants have all appealed, but only the medical defendants (hereinafter "appellants") persist in attacking the judgment.

The facts necessary to consideration of the damage and indemnity issues are summarized. On June 26, 1970, 11-year-old Kelly Niles was playing softball at a school playground in a recreation program operated jointly by the City of San Rafael and the San Rafael City School District. The game was being supervised by an employee of the city's park and recreation department. During the game a fist fight broke out between Kelly and another player over who was next at bat. The supervisor, who was inside the school building when the fight began, ran back to the playground when he learned of the fight and separated the two boys. Kelly had been hit in the head and was bleeding slightly from his lip. The supervisor tried to talk to the two boys, but Kelly ran to his bicycle and rode home; he was crying and appeared hurt and upset.

Kelly sustained in the fight a small fracture of the skull which tore an artery under the fracture. The resulting bleeding between the dura and the skull caused an accumulation of clotted blood that caused severe pressure on the brain; if untreated, this type of injury results in death.

Kelly arrived home from the playground at about 4:15 p.m., but his mother was away; his father (hereinafter "Niles") arrived about 5. Niles saw that Kelly had been crying but Kelly would not explain why. The other participant in the fight, who arrived shortly after Niles, explained to Niles what had happened. Then Niles, who was divorced from Kelly's mother, drove Kelly to his apartment in San Francisco where Kelly was to spend the weekend. Kelly had cried throughout the trip from San Rafael to San Francisco and was in great distress on arrival at the apartment. Niles therefore took Kelly to the emergency room at Mt. Zion Hospital.

When Kelly arrived at the emergency room at approximately 5:45 p.m., he was examined by two nurses, an intern physician, and a pediatric resident. On the basis of his observations, the intern concluded that Kelly should be admitted to the hospital for observation of a head injury. The nurses and

the resident physician agreed; the resident physician -- who was the intern's supervisor -- marked Kelly's chart "Admit."

The emergency room personnel had observed several signs suggesting that Kelly had suffered a head injury and that there was intracranial bleeding. Common symptoms of that type of injury include the following: (a) A history of trauma to the head; (b) A bruise, bump or welt on the head; (c) Headache; (d) Pallor; (e) Perspiring; (f) Repeated or forceful vomiting; (g) Irritability and a desire to be left alone; (h) Lethargy, grogginess, and lack of responsiveness; (i) Slowing of pulse and rising of blood pressure; (j) Stumbling gait and stiffening of limbs; (k) Purposeless movement of limbs; and (l) Dilation of pupils of the eyes.

The emergency room personnel knew that Kelly had been hit on the head; a large bump was readily apparent on Kelly's right temple; X-rays showed swollen tissue but failed to indicate a skull fracture. Kelly complained of a headache and said that he did not want to answer questions; he appeared irritable and lethargic and wanted to be left alone. Kelly became sleepier and more unresponsive; the intern wrote on his chart, "Patient extremely groggy." Kelly was pale and perspiring and vomited forcefully twice while he was in the emergency room. Kelly's pulse had been recorded at 62 when he was first examined, but it was noted on Kelly's chart that his pulse had dropped to 48. (A normal pulse rate for an 11-year-old child varies between 60 and 100.)

After the resident had concurred in the intern's recommendation that Kelly be admitted to the hospital, someone in the admitting office incorrectly told the intern that Kelly could not be admitted because he was not being treated by a private physician enjoying staff privileges at the hospital.

Dr. Haskins, director of the pediatric out-patient clinic at Mt. Zion Hospital, was in the emergency room attending another patient; the resident sought his help in getting Kelly admitted to the hospital. After questioning the intern and the resident, Haskins talked with Kelly's father to determine whether he seemed capable of observing Kelly if hospital admission were refused. Haskins talked to Kelly in the emergency room, but he did not examine Kelly or look at his chart. Then Haskins talked to Kelly's father, concluded he was a responsible person, and told him Kelly could go home. Haskins advised Niles to watch for dilation of the pupils in Kelly's eyes, and to be sure that Kelly could be aroused from sleep.

When a child with a possible head injury is released from the emergency room, it is the usual practice of the hospital to give the parent a sheet listing symptoms that call for return of the child to the hospital. The head injury sheet used in the emergency room of Mt. Zion Hospital listed seven symptoms, five of which were present when Kelly was released from the hospital. The sheet was not given to Kelly's father.

At approximately 7 p.m., Niles took Kelly back to his apartment. Niles continued to observe Kelly for about an hour and a half, and learned from a first aid book that a slowing pulse rate is indicative of bleeding within the skull. When Kelly's pulse rate fell from 44 to 40 within a period of five minutes, and one pupil dilated, Niles rushed him back to the emergency room at Mt. Zion Hospital at approximately 8:30 p.m.

It was then determined that Kelly had intracranial bleeding; a neurosurgeon was called and Kelly was prepared for surgery. The neurosurgeon was delayed in traffic and surgery did not begin until some time between 9:20 and 9:50 p.m. A blood clot was removed and the bleeding was stopped.

There was some doubt during the first few days following surgery that Kelly would survive; he remained in a coma for 46 days before gradually regaining consciousness. He is now totally disabled: except for slight movements of the right hand and foot, he is paralyzed from the neck down. Kelly is mute although he communicates by eye movements; he hears and sees well. Although his body is paralyzed, Kelly's mental capacities appear to be unaffected by his accident. He responds well to special education. Kelly's condition can never be improved by medical or surgical treatment; the brain damage is irreparable.

Here . . . there were two distinct acts of negligence . . . Both the public entities and appellants were active tortfeasors. The public entities were actively negligent in failing to provide proper supervision at the school playground. Appellants were actively negligent in treating Kelly improperly when he arrived at the hospital. Appellants did not merely fail to attend to Kelly; they actively caused injury to him. Haskins sent Kelly home and told his father that the boy would be all right by morning; he gave Niles incomplete instructions about watching Kelly's condition, and failed to give him the sheet of written instructions. Niles' reliance on the advice he received at the hospital caused delay in seeking proper medical attention. Appellants' negligent acts were separate and distinct from the public entities' neglect.

Appellants emphasize that without medical treatment, the outcome of the injury to Kelly's head would have been death; hence, it is argued that there was only one injury and that appellants and the public entities are joint tortfeasors with respect to that injury. But whether there was one injury or two, there were two separate torts. . .

The jury determined that the negligent acts of appellants and the public entities caused separate and identifiable damages; the evidence supports that determination. There was expert testimony that Kelly had an excellent chance of complete recovery if he had been properly treated when he first arrived at the hospital, and that Kelly's condition did not deteriorate to the point of permanent disability until after Kelly had been sent away and had spent some time at his father's apartment.

Appellants contend that neither the court nor the jury properly considered the issues raised by the cross-complaint. Because the indemnity issues were factual it is argued that they should have been submitted to the jury under proper instructions instead of being decided by the court. Indemnity usually depends on the resolution of a factual question, such as whether a tortfeasor's negligence was active or passive . . . Therefore, the trial court acted correctly in submitting the issue of indemnity to the jury . . . The rule of *Herrero* applies if there were separate and distinct negligent acts, the original tortfeasor had no control over the second negligent act, and the liability of the original tortfeasor for the second act is imputed by law . . . Since *Herrero* allows indemnification for only the damage caused by the second negligent act, a determination must be made of the damages caused by the later act . . . The jury returned a unanimous special verdict, apportioning liability . . .

The general verdict in favor of respondents determined that appellants and the public entities were negligent. The special verdict determining the amount of damages caused by the two groups of defendants indicated that the jury considered the two torts to be separate and distinct. That determination, and the court's consistent action in awarding judgment on the cross-complaint, are well supported by the evidence. Moreover, appellants waived any defects in the form of verdict and in the procedures used in connection with the cross-complaint. Subject to their objection to the denial of their motion for nonsuit, appellants agreed to the form of the special verdict and to the methods used in

adjudicating the indemnity issues. Appellants cannot be heard to complain about these matters for the first time on appeal . . .

The court's instructions to the jury were correct and sufficient. The court instructed that the public entities were liable to the plaintiff for all damages flowing from the initial tort, including damages caused by malpractice, and that appellants were liable only for damages caused by their own neglect. The court properly defined proximate cause and directed the jury not to compare the negligence of the defendants. With respect to the special verdict, it was correctly explained that the jurors should determine the damages proximately caused by appellants and by the public entities; the court explained that those damages were the ones "caused by the reasonable and probable consequence of their own negligent conduct." These instructions were adequate to explain the issues and concepts necessary to deal with the special verdict.

Appellants attack the judgment of \$ 4,025,000 as excessive, and urge this court to reduce the award or order a new trial on the issue of damages. It is contended that the discount rate used by respondents' expert witness is too low and the rates of inflation too high, that the testimony of respondents' expert witness does not support the verdict, that the projected cost of attendant care is excessive, that the award for pain and suffering is too high, that the fees awarded to plaintiffs' counsel are excessive, and that respondents should be required to purchase an annuity contract instead of obtaining a lump sum award.

The determination of damages is primarily a factual matter on which the inevitable wide differences of opinion do not call for the intervention of appellate courts . . . An appellate court, in reviewing the amount of damages, must determine every conflict in the evidence in respondent's favor and give him the benefit of every reasonable inference . . . An appellate court may not interfere with an award unless "the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." . . .

Respondents point to evidence supporting the following composition of the verdict:

Lost earnings	\$ 503,570.
Past medical expenses	86,240.
Future medical expenses	196,902.
Cost of medical supplies and equipment	41,637.
Medical emergency fund	50,000.
Tutoring and instruction	242,643.
Attendant care	1,299,637
Total economic loss	\$ 2,420,629.
General damages	1,604,371.
Total	\$ 4,025,000.

The future expenses were reduced to a present value by using a 5 percent discount rate.

Substantial evidence supports the damages awarded for Kelly's total economic loss. Kelly's life expectancy of approximately 69.6 years is, according to the evidence, unaffected or, at the most, decreased by 10 percent as a result of the accident if Kelly receives proper medical care. The discounted present value of his lost future earnings from age 18 to age 65, based on a study on national average

lifetime income made by the United States Department of Labor, is \$ 503,570. As stipulated by the parties, the medical and related expenses incurred to the time of trial were \$ 86,240.

The discounted cost of \$ 196,902 for future medical care is derived as follows: Monthly visits to a pediatrician or general family physician and yearly visits to an orthopedist for examinations would cost \$ 350 per year. Two visits per year to a psychiatrist and one annual visit to a urologist would be \$ 100 per year, while four visits to a psychiatrist each year would cost \$ 200 per year. Regular physical therapy costs \$ 60 per week, dental care necessary to correct overgrowth of the gums caused by drugs used to control epilepsy costs \$ 100 per year, and regular medical tests and X-rays cost \$ 245 per year. The total cost for the expected 56 years remaining in Kelly's life was derived by using an increase factor of 6 percent for physicians' services and 4 1/2 percent for laboratory tests and X-rays, discounted by 5 percent.

Medical supplies and equipment cost a total of \$ 41,637. The supplies include drugs and vitamins; the equipment includes lumbar corset, leg braces, electric wheelchair, hospital bed, waterbed, quadriplegic gurney for showering, hydraulic lift, and a van for transportation. A 2 1/2 percent increase factor for special equipment and a 1 percent increase factor for transportation equipment were used in deriving the total; no inflation rate was used for medical supplies.

The total economic loss includes \$ 50,000 for a fund to protect Kelly against medical emergencies, such as bladder and skin infections, broken bones, and clogging of blood vessels. It also includes \$ 242,643 for tutoring and special instruction, which is necessary to provide the mental stimulation that is essential to Kelly's life. The cost of tutoring is derived as follows: the present rate is \$ 10 per hour; the total cost assumes 2 hours' tutoring a day, 5 days a week, and an increase factor of 5 1/2 percent.

The largest expense is \$ 1,299,637 provided for attendant care. Kelly needs attendants to care for him constantly. At the time of trial, three attendants were employed to care for Kelly; they lived with Kelly and were provided room and board plus a wage of \$ 400 per month. The attendants' expenses for workmen's compensation and social security were not being paid. The total cost for attendant care was derived as follows: The present annual cost for one attendant is \$ 10,175 based on \$ 2.50 per hour; this cost includes his wage, social security, workmen's compensation, and other fringe benefits. Board is provided at \$ 3 per day and room at \$ 100 per month. Attendants' lodging was estimated to increase at a 5 percent rate, whereas wages were estimated to increase at a 5 1/2 percent rate; again a 5 percent discount rate was used. The total was determined for two attendants until Kelly leaves school at age 18 and three thereafter for the rest of his expected life.

Appellants assert that the amount allocated for attendant care is excessive because an increase rate of 5 1/2 percent was used in calculating the total cost; they also claim that the expert testimony presented by respondents on this rate is not substantial evidence because the expert's testimony was based on widely held knowledge common to a layman. But it was for the jury to assess the evidence, including the expert testimony. We are not able to say that any of the economic data presented to the jury were incorrect.

Anticipated future increases of medical costs may be presented to the jury . . . Expert testimony may be used with regard to a "subject that is sufficiently beyond common experience that the opinion of

an expert would assist the trier of fact; . . . " Future medical expenses are such a subject. Testimony by actuaries is frequently used to show discount rates and the present value of future benefits . . .

The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants and amicus curiae might better have been presented to the jury in opposition to respondents' expert testimony.

Appellants claim that the 5 percent discount rate presented by the expert was too low. A discount rate, similar to an interest rate, is used to determine the present value of future expenses. The expert, in arriving at a 5 percent rate, used commercial investment studies pertaining to the riskiness of corporate bonds, charts compiled by the Federal Reserve System showing interest yields on various bonds since 1920, and tables published by the United States Savings and Loan League showing interest rates on savings accounts since 1929. He took into account the need for reasonable security of investment over the period of Kelly's life. All of this was apparently within the competence of the expert.

Appellants assert that the general damages awarded by the jury are excessive. There is evidence supporting respondents' theory that \$ 1,604,371 was awarded for general damages. General damages are awarded as compensation "not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal." . . . Although these terms translate into monetary loss with great difficulty, the issue is primarily for the jury to resolve . . . Frequently, mental suffering constitutes the principal element of tort damages . . .

Kelly's mental and emotional capacities are intact while his body is useless; this situation is predicted by life expectancy to continue for 59 years from the time of trial. The boy has suffered dire grief and anxiety -- unhappy feelings that will perhaps recur again and again. Considering Kelly's condition, we cannot say that the general damages are excessive.

Because Kelly is a minor, payment of attorneys' fees must be approved by the trial court . . . After appellants' payment of \$2,151,954.42, the court approved payment of \$ 508,075.91 as attorneys' fees for respondents' counsel; this is 25 percent of Kelly's net recovery to the present. The court retained jurisdiction to determine attorneys' fees upon further payments on the judgment. Appellants claim that the award is excessive. But appellants do not have standing to contest the amount of attorneys' fees. If the amount of attorneys' fees were decreased, respondents would receive more money but appellants would not pay less . . . A party who is not aggrieved by an order or judgment has no standing to attack it on appeal . . . Since the amount of attorneys' fees does not affect appellants' interest, they cannot contest the amount on appeal . . .

Affirmed.

**COMMENTS AND QUESTIONS:** In light of economic events (specifically, inflation, especially inflation in the cost of medical care) what do you think about the adequacy of Kelly's award?