DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES
CALIFORNIA INSTITUTE OF TECHNOLOGY
PASADENA, CALIFORNIA 91125

JUSTICE AND PREDICTABILITY IN TORTS

Randall Curren

HUMANITIES WORKING PAPER 131

January 1988

JUSTICE AND PREDICTABILITY IN TORTS

Randall Curren

ABSTRACT

Recent reexaminations of the principles of tort liability have entertained two possible rationales for the fault principle, one "moral" and the other economic. Neither is satisfactory. I propose here a third rationale and show how it suffices to refute at least some of the challenges to the negligence system. The character of this rationale is causal, and the central thesis of this paper is that in as much as the tort system should aim to place the costs of accidents on the source of those accidents, then we have not yet found an acceptable alternative to the negligence system. This thesis is defended and developed through a reexamination of some recent theories of strict liability and reflection on some of what has been said about the role of causation in torts. A backdrop to the entire discussion is the question of how one might best ensure that potential defendants will be able to predict with reasonable certainty which courses of action will make them liable, should damages ensue.

JUSTICE AND PREDICTABILITY IN TORTS

Randall Curren

Recent reexaminations of the principles of tort liability have entertained two possible rationales for the fault principle, one "moral" and the other economic. The former was given its classic formulation by Oliver Wendell Holmes in *The Common Law* and exerted its greatest influence during the golden age of negligence law, while the latter is the recent invention of Richard Posner.[1] Both of these rationales have been attacked, and indeed neither is satisfactory. There is a third rationale, however, which may well be historically prior to both of these, which captures, I believe, what is correct in the Holmesian view, and which suffices to repulse at least some of the challenges to the negligence system. The character of this rationale is neither moral, nor economic, but rather *causal*. The central thesis of this paper will be that in as much as the tort system should aim to place the costs of accidents on the source of those accidents, then we have not yet found an acceptable alternative to the negligence system. This thesis will be defended and developed through a reexamination of some recent theories of strict liability and reflection on some of what has been said about the role of causation in torts. A backdrop to the entire discussion will be the question of how one might best ensure that potential defendants will be able to predict with reasonable certainty which courses of action will make them liable, should damages ensue.

There is a dilemma concerning justice and rules of law which has it that legal rules can be either rigid or flexible in their application, but on either alternative their application leads inevitably to unjust results in at least some cases. On the one hand, a rule rigidly applied may yield unjust results when novel, unexpected situations arise. On the other hand, greater scope for judicial discretion makes the outcomes of judicial reasoning less predictable, and thus makes it less reasonable to expect defendants to have known what the legal consequences of their conduct would be. The legitimacy of imposing liability is thereby put in question, since defendants will not have been given fair warning of the legal consequences of their conduct.

The former variety of injustice was the concern of the early Realists, the so-called "sociological jurisprudes,"[2] who, contrasting tort principles which had been formulated in the nineteenth century with the social conditions of their own time, denounced "mechanical jurisprudence."[3] Seeking to make jurisprudence scientific, the architects of classical negligence theory had formulated a system of universal principles, and by the early twentieth century those principles had shown signs of needing reformulation, at least, if serious inequities were to be avoided. Industrialization had brought new kinds of cases before courts, and a new background of social problems to which tort actions were relevant. In effect, courts came to be presented much of the time with situations of fact not apprehended by the lawmakers who had "drafted" the law. What was not forseen was, (1) that the rise of

corporate enterprise would make it implausible in many cases to treat plaintiff and defendant as standing on an equal footing with respect to protecting themselves from injury, and (2) that adherence to some of the specific doctrines of classical negligence theory would exacerbate social problems associated with increasing disparities of wealth and power, by limiting recovery for injuries in the workplace and from defective products. The principle of *assumption of risk*, for instance, made it impossible for an employee to recover for injuries owing to a hazard in his workplace that he knew about. The idea was that if someone knowingly and voluntarily exposed himself to a hazardous condition created by someone else, then he implicitly took it upon himself to bear the costs of any injuries arising from that condition. But this involves an exercise in bad faith when applied to the workplace, since leaving a job in order to escape a hazardous condition is, and was, not a live option for many people. It would be fair to say that they expose themselves to those hazards unwillingly, and yet the principle was applied in such a way that recovery for most injuries in the workplace was impossible.[4]

Suggestions for correcting this state of affairs ranged from the (early Realist) modest proposal that principles be modified in light of new social realities, to the (late "radical" Realist) position that rules of substance didn't and couldn't play the role in judicial decision that the architects of negligence had assumed.[5] This radical version of Realism, however, falls victim to the other side of our dilemma. I will comment briefly on just why this is so in order to locate more specifically the problem set for contemporary tort theorists by the history of attempts to confront this dilemma. In light of this background I will then assess some recent arguments for systems of strict liability which, on the face of it, would remedy this problem appreciably.

If any aspect of classical negligence theory made radical Realism seem plausible it was the embarrassing proliferation of unsatisfactory casual formulas from which it suffered.[6] This lack of consensus, and the failure of those formulas to provide clear guidance, suggested that the task of developing a formula for capturing proximate causation might be ill-conceived. That, notoriously, was just what Leon Green argued in *Rationale of Proximate Cause*.[7] His widely acclaimed solution was to simplify the causal question in torts by restricting it solely to matters of fact, and to conceive of the balance of what had pertained to proximate causation as questions concerning the scope of the defendant's duties to the plaintiff. This marked the end of an era in which defendants were held to owe, and should have understood that they owed, a general duty of care to everyone. Obligations were henceforth to be relative to particular individuals and particular kinds of injuries, and were to be identified by courts through a process of "interest-balancing." This focus on balancing interests was consistent with Green's conception of the tort system as sharing with other agencies of government the function of maintaining "a working adjustment between the activities of men."[8]

The upshot of this revamping of theory has been summarized recently by G. Edward White:[9]

> Relational negligence theory introduced questions of "interest balancing," inviting judges to compare the magnitude of the risks to which a plaintiff was exposed, and the social worth of the class of persons a plaintiff represented, with the

> social utility of a defendant's conduct. In the process . . . the capacity of the negligence principle to be predictably applied was lost, because a general heirarchy of social "interests" could not be invariably agreed upon by the judges, and thus even a routinized judicial balancing of interests would not produce predictable results.

The loss of predictability, I must emphasize, is specifically with respect to the determination of the scope of the defendant's duties, and is surely even more intractable than White suggests, given the problems involved in "identifying, comparing and weighting interests."[10]

Is all tort law *ex post facto*, then, under relational negligence theory? Green thought so and did not hide his acceptance of this apparent consequence of his views.[11] His gesture notwithstanding, there can be no accepting such a position, and we must ask what viable alternative to it there might be. Let us note first that Ronald Dworkin advanced a line of reasoning some years ago, which offers some prospect for accepting many aspects of Green's views while denying that tort law is *ex post facto*.[12] Dworkin distinguished "weak" discretion, where judgment is exercised but no law created, from "strong", *ex post facto* law-creating discretion, and maintained that only the latter poses a problem for justice. He also held that, in general, policies have just as much claim to being law as rules do. Granted this, it could then be argued that, in adhering to a policy of balancing interests, only "weak" discretion would be exercised and no law created *ex post facto*. The law, in the form of rules of procedure, would have been in effect all along.

This is little help, however, for what is objectionable about *ex post facto* law-making, when it is objectionable, is that fair warning is not given. As we have seen, there is no fair warning of, and no predicting, what the defendant's duties will be held to be under the relational negligence approach, and so whether there is *ex post facto* law-making or not is inconsequential. The defendant cannot have been expected to know the identity of his or her duties before the fact, the law has not made them antecedently knowable, and so the rule that ignorance of the law will not be admitted as an excuse cannot be legitmately invoked. Where liability is assigned on the basis of a duty whose identity could not have been known by the defendant prior to bringing about the injuries for which remedy is sought, standard justifications fail and justice is not served. Broad discretion poses a larger problem for justice than Dworkin suggested, therefore, and we must conclude that the radical Realists merely traded one form of injustice for another in trying to eliminate the injustices associated with classical negligence doctrines. If classical negligence doctrines produced injustice when applied to novel cases, the relational negligence approach entailed a more global variety of injustice.

To maintain that we face here a genuine dilemma is not to suggest, however, that the sum total of injustice is invariable and cannot be reduced. For the trade-off it involves only pertains to that class of exceptional cases in which a regimented (and therefore presumably predictable) application of the law would be intuitively unjust,[13] and there is no *a priori* determinable limit to how small that class can be made. The best strategy, implicit in the notion of keeping principles in step with "conditions of society today," is evidently to make that class as small as possible. By contrast, the generalized lack of predictability connected with the indeterminacies of "interest-balancing" seems clearly gratuitous, and it is sobering to reflect that the compromises out of which post-Realist "consensus" thought emerged produced

not so much an enhancement of predictability as a greater *appearance* of order and predictability.[14]

An element of this consensus has been the preservation of the distinction between *proximate cause* and *cause in fact*, it being assumed by and large that the latter (the factual element in causation) is exhausted by the "but for" relation. Given the role that policy has played in bridging the gap between these two causal notions, it is plain that the "but for" analysis is a sensible point of attack for those wishing to advance the cause of order and predictability. To the extent that a new analysis would enhance the role of a factual determination of causality, there would to that extent be less that could be decided through policies allowing broad discretion. H. L. A. Hart and A. M. Honoré saw this, and the point of their classic, *Causation in The Law*,[15] was to show that there is a common notion of causality more substantial than the "but for" relation, which accounts in large measure for how courts have resolved questions of causality. On a proper understanding of causality, they argued, the gap between cause in fact and proximate cause in which the wedge of policy may be driven is smaller than Green and most tort theorists since him have supposed. Moreover, this remains a sound strategy even if, as some have argued,[16] the idea of a single general duty of care has reemerged, and policy assumed a more limited role, in recent years. But Hart and Honoré's unusually careful analysis has made little difference to the direction of torts scholarship, for the specific rules they formulated for applying that analysis to particular cases were dismissed as prohibitively complex, especially in the context of jury instruction.[17]

More recently, Guido Calabresi has advocated an approach which would apparently make determinations of liability significantly simpler and more predictable through the adoption of a strict liability standard.[18] Instead of grappling with the complexities of fault, courts would simply determine "which of the parties to the accident *is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made*."[19] Categories of "cheap cost-avoiders" (i.e., enterprises which could easily assess and reduce the risks posed by their products or activities) could be identified by courts or legislatures in advance of litigation, thereby providing guidance and giving fair warning to potential litigants. Calabresi and Hirschoff advance this as a test of strict liability, arguing that the trend towards strict liability is explained by its greater efficiency in minimizing the combined costs of accidents and measures intended to prevent accidents, and its greater ease of (correct) application compared with complicated and flexible fault-based tests.[20] This market approach to reducing primary accident costs is qualified in a way calculated to satisfy the goal of compensation ("secondary cost avoidance goals"),[21] and would be "buttressed by an array of non-insurable fines, penalties, and taxes assessed so as to deter or limit further those particular acts and activities we collectively decided to punish or deter beyond what the market could accomplish" (making for a mixed approach).

Reduction of the immediate costs of accidents ("primary accident costs") through the market or "general deterrence" approach is to be achieved through both "creat[ing] incentives to engage in safer activities," and "encourag[ing] us to make activities safer."[22] And these incentives are to be created, using the strict liability test, through "the placing of losses on those activities that, in some undefined sense, engender them."[23] As is the case in other economic theories, the sense of "engender" is, if not causal, put forward as a substitute for

causal notions.[24] In effect, the prominent role of breach of duty in establishing proximate causation is acknowledged, and an economic test provided for determining who has what duties. But identifying the duty and establishing a breach of it are two different things, and it is noteworthy that the latter has no counterpart in Calabresi's scheme. This in itself is some reason to think that he has not provided an adequate analysis of, or replacement for, the idea of proximate causation.

On Calabresi's approach the only decision to be made concerns who was in the best position to make and act on a relevant cost-benefit analysis. The test "does not require that a governmental institution make a cost-benefit analysis,"[25] a feature of it which makes for easier and surer application than the Learned Hand test,[26] and other tests of fault, but which also underscores the irrelevance on this approach of what the parties involved *actually did*. No cost-benefit analysis will be made pursuant to determining liability, and evidently no distinctions made between those cheaper cost-avoiders who invested optimally in accident prevention measures, and those who didn't.[27] Of course, what is reasonable, indeed clever, in this approach is that it does seem to create an incentive for every enterprise to invest optimally in accident prevention measures (since prevention will reduce the number of accidents, and so will reduce the sum cost of accidents to be borne by the enterprise), and it does this without creating, as the fault standard does, incentives for litigants to misrepresent the state of their knowledge. But plainly there are many accidents that occur despite optimal investment in preventive measures, and where it would be absurd to claim that the party who had made those investments *engendered* the accident, whether or not on some test that party could be counted the cheapest cost-avoider. The relevant cases include ones in which the cheapest cost-avoider is not alone in engaging in relevantly risky activities and makes a greater effort than the others to prevent accidents, and also cases in which no relevantly risky activities are engaged in knowingly or negligently by anyone. This is not to say that *no* justification for imposing liability could be given to a defendant who is involved in an accident despite his investing adequately in preventive measures, but it does imply that Calabresi has not provided a suitable justification, inasmuch as the test he offers is at variance with his intention to construct a "general deterrence" approach that places "losses on those activities that ... engender them."

Into the first category fall cases in which the cheapest cost-avoider made optimal investments, but a costlier cost-avoider, the plaintiff let us say, did not take reasonable precautions. In many such cases there is good reason to say that the negligent costlier cost-avoider has caused the injuries, and not the careful cheaper cost-avoider. It is easier and cheaper, for instance, for the firm that designs and markets a complicated electrical device for home use to assess and reduce the risks involved in using that device, than it is is for consumers to do so; the firm is the cheaper cost-avoider of the two. And yet, if a consumer is injured through his own gross contributory negligence in the use of some such device, and there is no argument that the firm has failed to take appropriate safety measures, then the reasonable causal diagnosis would seem to be that the consumer has caused his own injuries. This recognition that contributory negligence can provide a basis, when there is no fault on the defendant's part, for regarding the injured party as having caused (or engendered) his own injuries, is at least as old as the Athenian law of the fifth century.[28] In such cases as these, at least, Calabresi's test would not place the losses on the party who had engendered

them. This being the case, it is apparent that an adequate test, one that could well seve the needs of the general deterrence approach, would be considerably more complex.

Calabresi speaks, moreover, of losses being placed on the *activities* that engender them, but it is agents, and not activities, of course, that must bear losses, and the appropriate agents cannot be identified simply by reference to the general categories of activities they are engaged in. We have just seen one reason why this is so. But neither, it must be observed, can the factors that engender injuries be restricted to activities, for this too implies an unrealistic degree of control by agents over what they do. Many injuries must surely arise through agents running risks that they are not aware of running and have no reason to think they are running; not only do the *injuries* arise accidentally, but the very fact that the agent's conduct displays a relevantly *risky character* arises accidentally (i.e., through some factor external and unknown to the agent). In some cases no one will have been in any position to do a *relevant* cost-benefit analysis (i.e., one embracing the kind of cost involved in the accident), and so there *can be no* cheapest "cost-avoider." There won't be *any* "cost-avoider." Economic goals and the economic analysis of causation become irrelevant here in this zone beyond the effective range of incentives to reduce costs, but the need to place accident losses somewhere remains. Are they to be shifted or not? If so, to whom? Causal inquiries into the factors responsible for the accidents also continue to be relevant, though their usefulness will be restricted to future prevention, including perhaps the identification of new categories of accidents and cost-avoiders. This is another reason then, why diagnostic and prescriptive machinery beyond what Calabresi makes available will be required to allocate losses and conduct causal inquests, and this will not merely duplicate what I have already argued will be needed.

But even this will not be enough, for further complications arise when circumstances are such as to render the cheapest cost-avoider's advantage in prevention unusable. Calabresi recognizes this in insisting that "the cheapest cost-avoider must *be able to* make the required analysis and act upon it,"[29] and he admits, *apropos* of this, that "a fair degree of case by case analysis is worthwhile."[30] Given this acknowledged role for ability or the absence of ability, a categorically costlier cost-avoider may turn out to be a cheaper cost-avoider in the circumstances. Consider nighttime waterway collisions, for instance. The cheapest cost-avoider for an accident involving a ship colliding with a shoreline structure at a river bend is almost certainly the owner of the structure, who can easily determine that lights should be installed, maintained, and lit at night. Let us suppose that the owner of a waterfront warehouse has in fact invested optimally in lighting, but that these measures come to be thwarted through no fault of his own for a brief but critical span of time. A power outage occurs, for instance, during a freak snow storm, which also reduces visibility. The night watchman and the owner, who could make his way to the scene only slowly given road conditions, are not equipped and are in no position to do anything further for the moment. The status of cheapest cost-avoider may be said to shift then to the captain, pilot, or owner of the ship already approaching the darkened bend in the river, unless it is judged that port authorities, for instance, were in the best position to provide in advance for such a situation. Once again, however, this choice of a cheapest cost-avoider does not settle the causal questions that present themselves as relevant.

The tidy picture of an uncluttered appeal to previously identified and ranked categories

of cost-avoiders is certainly too simple, given these considerations, and we must now ask just how cumbersome and subject to misapplication Calabresi's approach would become when modified appropriately. We must ask this, recall, because our overarching interest here is in the potential Calabresi's recommendations have for regimenting the basis of tort decisions in a way that will make them more predictable.

The answer to this question, I think, is that the reconstructed test could scarcely be simpler or more certain in application than the fault system. Why this is so is clear. The first kind of case cited here (which combines plaintiff's negligence with the defendant's own exercise of due care) shows that the tactic of merely deciding who should make the cost-benefit analysis will not suffice. It will be necessary to *carry out* some such analyses in disposing of cases, and it is preferable that these analyses should better reflect what is socially valuable than purely economic analyses do. The other considerations I have adduced show that factors like unforseeability and inability, which have the status of excuses within the negligence system, must be considered. So something akin to, if not identical with, the negligence system's reasonable man standard and system of excuses must be used. This argument can be laid out more perspicuously, however, as follows. Calabresi's approach, like other systems of strict liability, is designed to place the costs of accidents on those who have engendered or caused them, but without making the further requirement that these costs will be transferred only when fault is present. The assumption is that the unwieldly machinery of the fault system can be eliminated, thereby, making for a more cheaply, simply, and predictably administered tort system. This strategy fails, however, because though the casual and fault conditions for liability under the fault system are logically distinct, those conditions often cannot be satisfied independently of one another. That is, *it is often impossible to determine whether the causal requirement is satisfied without already knowing whether or not the requirement of fault is satisfied.*

In determining whether contributory negligence is present, for instance, it is clear that a judgment as to whether the plaintiff has contributed causally to her own injuries hangs directly, though not solely, on whether she was negligent. It is less obvious, perhaps, that the availability or unavailability of a good excuse can make a decisive difference to whether an agent has caused, or been merely a background condition in the genesis of, an event or state of affairs. Unobvious as it might be, however, the idea that faultlessness entails that the harm has a source outside the agent has had some influence in the law, and not only in Athenian law. In an opinion of the late nineteenth century that reflected the views of Holmes, for instance, it was argued, by one Judge Charles Doe that imposing liability without a showing of fault was tantamount to maintaining that "everyone is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence."[31] It is worth reexamining this claim, especially now when the momentum behind strict liability has been growing for some time. The character of the negligence standard, so well understood by Aristotle, for instance,[32] does not seem to be well understood now, if the arguments of the strict liability theorists are any indication. This is a circumstance we would to well to remedy, and it will be instructive along the way to consider another recent attempt to produce a streamlined reformulation of tort principles through eliminating determinations of fault.

Richard Epstein, like Calabresi, has argued for the universalization of strict liability,[33]

though by contrast with the economic basis for Calabresi's argument, he characterizes his own case for it as based on principles of corrective justice. The notion of a "causal paradigm", derived from Hart and Honoré but much simpler in application than their rules, also plays a central role in Epstein's account. Thus Epstein seems to have derived inspiration from both Calabresi, and Hart and Honoré, and to have aimed to produce an approach that would deliver the regimentation and economies of decision procedure promised by both, while avoiding the charge of moral bankruptcy often levelled against the economic theories. Given this orientation, it is not surprising that the theory has been praised for according central positions to both justice and certainty.[34] Unfortunately, however, it suffers from serious defects which seem to have gone undiagnosed in the literature, despite the promising leads provided by John Borgo and Jules Coleman.[35]

Epstein conceives of tort law as "a system of corrective justice appropriate for the redress of private harms,"[36] by contrast with conceptions of torts as an instrument of public policy. As a system of corrective justice it rests, he maintains, on common notions of *moral responsibility* for harm. He offers two fundamental principles that are meant to capture these shared notions of responsibility. The first of these, which I'll call the "Unfair Gain Principle," holds that it is not "fair to let one party gain an advantage at the expense of another."[37] Thus he conceives of torts as a system of corrective justice designed to simultaneously eliminate wrongful gains *and* wrongful losses by compelling compensation.

A second fundamental principle he appeals to, which I'll call the "Source of Harm Principle," holds that when defendant and plaintiff face each other in court, "proof of the nonreciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose."[38] Another way to put this is to say that *D*'s having caused harm to *P* constitutes prima facie grounds for shifting the cost of *P*'s injuries to *D*. This principle is grounded he says in the "deep sense of common law morality that one who hurts another should compensate him,"[39] and it is to be understood as a repudiation of the notion that a showing of fault is required to overcome the initial presumption in favor of letting the costs of injuries lie where they fall.

On the basis of this Source of Harm Principle Epstein holds that all a plaintiff, *P*, must do to make out a prima facie case against a defendant, *D*, is show that *D* caused *P*'s injuries. The defenses and pleas that may be admitted subsequently are, in accordance with the Unfair Gain Principle, "designed to eliminate benefits gained at the plaintiff's expense."[40] A number of defenses belonging to the negligence system are excluded in this way, thereby providing Epstein with an argument for imposing a strict standard of liability in all tort cases. The argument, in effect, is that people gain at the expense of others in the course of causing injuries to them, and so they should compensate them, *even when* the defenses they offer show that they were not at fault. Consequently, a just standard of liability is one that does not recognize such defenses or otherwise make liability depend on fault. This could hardly be more sharply at odds with the position of Doe's cited above. On his view one could not turn out to have caused injuries unless one was at fault, whereas on Epstein's view the absence of fault could never overturn a judgment that one had caused someone else's injuries.

Epstein's central argument against making liability dependant on fault, his answer in effect to Doe, is presented persuasively in examining Vincent v. Lake Erie Transport Co.[41],

which he recounts as follows:[42]

> During a violent storm, defendant ordered his men to continue to make the ship fast to the dock during the course of the storm in order to protect it from the elements. The wind and waves repeatedly drove it into the dock, damaging it to the extent of $500. . . . Moreover, it was accepted without question that the conduct of the defendant was reasonable in that there was no possible course of action open to the captain of the ship that would have enabled him to reduce the aggregate damage suffered by the ship and the dock. On these facts the court concluded that the defendant had to pay the plaintiff for the $500 damage.

This case is well chosen for Epstein's purposes, for clearly the defendant *has* caused the damage to the plaintiff's dock through intentionally adopting a policy whose results, including the damage to the dock, he anticipates and accepts. His choice was *constrained*; nevertheless he *could have* adopted another policy which would have left the dock unharmed. Moreover, the kind of direct tradeoff between plaintiff's and defendant's interests, which must be present for the Unfair Gain Principle to apply, is at work here.

Epstein errs, however, in taking Vincent to be a suitable model for all accidents. In this he follows the lead of Coase, whose economic analysis he explicitly endorses,[43] and whom he quotes at length in arguing for his own view of causality:[44]

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.

The illustrations Coase provides are all consistent with the central claim here that a harm to one party can only be prevented at the expense of another: the damage of crops by the cattle on the adjoining property that inevitably stray; the disruption of a doctor's practice by the sounds of the confectioner's machinery next door; the killing of fish by pollution which compels us to weigh the value of the fish against "the value of the product which the contamination of the stream *makes possible*."[45] In these cases costs arise through the ongoing, repetitive practices of business enterprises whose behavior is already efficiently managed with respect to actual costs, including, under some subjective weighting, those of harms of the kind at issue. Routine harms such as these occur with the frequency they do because cost-benefit analyses based on some estimation of their importance have been made and acted on. They occur, that is, because some agent, some economic entity, has *chosen* to run the risk of their occurring. To run a lesser risk would involve expense: either investing more in preventive measures (anti-pollution devices, e.g.) or ceasing to engage in the presumably profitable activity which creates the risks in the first place.

One aspect of this economic analysis, the notion that there are always direct tradeoffs of costs between the parties to an accident, underlies Epstein's assumption that his Unfair Gain Principle may be applied without restriction to the field of torts. Since it would always cost

the defendant something to prevent the occurrence of the harm, then apparently it is always the case that he or she gained something at the other's expense in not doing so.

The farther from the realm of routine business practices we direct our attention, however, the more obvious it becomes that not all accidents fall within the scope of the plans laid by potential defendants. There really are accidents that are not only unforeseen, but also unforseeable in the circumstances. The cases that Coase marshals are ones in which the potential for appealing to excuses has run out through sheer force of repetition; increasing familiarity with how the harms come about rules out appeals to unforseeability, while the availability of time and resources with which to take corrective action rules out appeals to inability or lack of opportunity. The risks being taken come increasingly to be ones intentionally taken. By contrast, the conduct of individuals is necessarily more disparate and, in a sense, random than that of businesses, which fact alone suggests that it will turn out to be excusable more often. We simply cannot avoid running risks of which we are unaware, and sometimes injuries will result from these risks. In these cases there is no reason at all to think that the one who has run the risk has gained or saved anything thereby. The running of that risk will have played no role at all in any maximizing strategy. So in this event a loss will have been suffered without any correlative gain.[46]

It should be clear now that while the Unfair Gain Principle can be applied in cases where, as in Vincent, a self-serving but adequate justification for the defendant's action (the defense of "private necessity") is available,[47] it cannot be invoked in those cases where other standard excuses are available. Consequently, it cannot provide Epstein with an argument for not admitting these excuses as effective defenses. I will turn now to his account of causation in order to show that a large class of excuses *must* be admitted, so long as the basis for assigning liability is to be the defendant's having caused injuries.

Epstein builds his account of causation on the idea of a "causal paradigm," a strategy inspired perhaps by the following passage from Hart and Honoré:[48]

> . . . we cause one thing to move by striking it with another, glass to break by throwing stones, injuries by blows, things to get hot by putting them on fires. Here the notions of cause and effect come together with the notion of *means to ends*. . . . Cases of this exceedingly simple type are not only those where the expressions cause and effect have their most obvious application; they are also *paradigms* for the understanding of the causal language used in very different types of cases. . . .

Before considering Epstein's use of this, I would like to draw attention to the role of purpose and intention in these paradigmatic cases of causation, the status of bodily movements and primary changes (e.g. the movement of the stone) as *means* for bringing about a desired result (e.g. the breaking of the glass). The clearest cases in which *interventions* in courses of events take place are ones in which these intentions "to bring about what in fact happens, and in the manner in which it happens," are present.[49] More broadly, Hart and Honoré observe that in distinguishing between "the" cause of an event and mere background conditions for its occurrence, we look for an *abnormal* element in the sequence of events leading up to the one to be accounted for. In the normal case accidents do not occur, so in the abnormal case where they do we try to determine what else is different on

the assumption that *something* must have been different for the accident to have occurred. We take that something to be what explains the occurrence of the accident. The other factors, they say, "are, of course, just those which are present alike in both the case where such accidents occur and in the normal cases where they do not; and it is this consideration that leads . . . to reject[ing] them as the cause of the accident, even though it is true that without them the accident would not have occurred."[50]

Now it turns out that the causal paradigms Epstein offers as capturing ordinary causal language are on a par with the paradigms Hart and Honoré cite *only given the same faulty assumptions* that made it appear that his Unfair Gain Principle had universal application. The four paradigms he offers are the "application of force to a person or thing,"[51] as in hitting; frightening someone; compelling someone to do something; creating a dangerous condition that results in harm. To the outward forms of behavior belonging to these paradigms Epstein adds what he calls the "act requirement," the condition that volition be present, "to distinguish between 'I raised my arm,' and 'my arm went up.'"[52] In effect he requires that *some* intention lie behind the behavior, but unlike Hart and Honoré he doesn't care *what* the intention is. The reason for this indifference, I take it, is that given the economic model's assumption of practical omniscience, all risks taken would be regarded as taken intentionally and pursuant to whatever aims the agent is intentionally pursuing, and so any injuries that occur when the agent's behavior fits one of the four paradigms would necessarily fall within the scope of risks intentionally run. This would be adequate grounds for seeing the agent as having intervened in the normal course of events so as to bring about the injuries. In Hart and Honoré's paradigmatic cases the intervention is intentional (i.e., it aims to bring about the result in question), whereas here it is reckless; the risks are run intentionally, but no intention to bring about the injuries is present.

The possibility of the still weaker form of intervention, that which occurs when risks are run not intentionally, but through culpable ignorance or inability, does not even arise given the economic assumptions. So if those assumptions were true, strict liability would not be so very strict. Since they are not true, Epstein's form of strict liability must be too strict, that is to say, too permissive in who it assigns liability to; it shares this defect with Calabresi's version of strict liability, and is defective for essentially the same reasons that Calabresi's is. If the basic conception of causation that Hart and Honoré advance, and Epstein endorses,[53] is correct, then one must have run the relevant risk at least negligently, if not intentionally, for one to have been the cause of the injuries that ensue, *unless* the injuries can be traced to an abnormal feature of one *other than* defective preferences or intentions. That is, unless one has run the risk knowingly and as part of some policy, then one can only be counted as having been the source and cause the injuries if one fails to count as having acted reasonably under the reasonable man standard. This is so because the "reasonable man" conforms not only to moral and legal norms, but also to common objective standards of skill, knowledge, intelligence, sanity, and so on.[54] So when conduct is judged unreasonable under this standard, it will have arisen through the abnormality of *some* feature of the agent, and not necessarily through what we might call the agent's will. But this is enough to confer causal status on the agent, given Hart and Honoré's conception of causality. On the other hand, when conduct is reasonable under this test and an excuse available -- when one comes to run a risk through innocent ignorance of the circumstances, for instance -- a better candidate for

causal status will often be the external source of the ignorance (e.g., the absence of a warning label) or the unsuspected factor that lends danger to an action that would ordinarily be innocuous (e.g., the cyanide in the apparently tamper-proof pain remedy offered to one's guest). So we may fairly characterize the apparatus of the negligence system, the reasonable man standard and system of excuses, as designed to determine whether given injuries have their source in *any* fault in the agent; this is a test of the agent's status as the source and cause of the injuries, and not as *morally* responsible for them, despite what the word "fault" might suggest. Once again, however, it must be added that acting unreasonably, on this test, is not *necessary* to establishing causal responsibility for injuries, *if* there is an intentional, if reasonable, adoption of a policy known to bring about such injuries.

We can see now that there is a lot of truth in the view that imposing liability without fault would be like imposing it for "damage done by superior force over-powering" the defendant, except that the force will often "outsmart" rather than overpower, and it may be superior only in the sense that in the cirsumstances the agent has no opportunity to overcome it. The point, at root, is that the force or factor most saliently responsible for the injuries will be something *other than* the agent; the agent will not have been the source and cause of the injuries (that which *engendered* the injuries, to use Calabresi's expression). What is mistaken in Doe's view is that he overlooks the fact that (as in Vincent) an agent can cause injuries through intentionally running a risk, even when not negligent on the whole. Given what is right in Doe's view, we can conclude that *it is not the case*, as often thought,[55] that *a notion of fairness, as distinct from the requirement that the defendant have caused the plaintiff's injuries, is needed to defend the presence of excuses in the system of liability principles.*

The unacceptability of assigning liability when the results of conduct do not reflect rational calculations has been argued before, but rather differently from how I have here.[56] My concern is not to argue against strict liability for agents who are not rational, who do not fit the economist's model at all or very often. Rather my concern is to point out that even for the most rational of us, there are always aspects of our conduct that do not reflect our preferences or any other salient facts about us. Because this is true, the mere fact that a defendant's conduct is causally implicated in the occurrence of the plaintiff's injuries is not enough to establish that the defendant caused those injuries. So if liability is to depend on showing that the defendant has caused the plaintiff's injuries, then it will not be enough to require that the defendant's conduct, considered only as outward behavior, conform to some pattern. Indeed, as I have argued, something akin to, if not identical with, the reasonable man standard and the system of excuses of the negligence system will be required. Thus, as I concluded in assessing Calabresi's approach, the economies of judicial decision procedure that are to be bought through adopting strict liability are an illusion.

These criticisms of Epstein's approach to causation are confirmed by the fact that an agent's doing something which fits one of Epstein's paradigms does not guarantee that the agent caused the ensuing injuries any more than having the status of cheapest cost-avoider does. John Borgo, arguing quite rightly that Epstein's account of "human causal agency" is inadequate because it "focuses on conduct isolated from context,"[57] produces cases in which the paradigm of fright is satisfied, but the defendant has not caused the fright. These cases are all variations on a peculiar situation involving grossly abnormal susceptibility to fright,

however, a fact which muddies the waters unnecessarily, since counterexamples to the paradigms of force and creation of dangerous conditions are easily produced. The mountain climber who falls through the snow covering a hidden fissure into which a skier has already fallen, for instance, and in falling strikes that skier in a way that inflicts injuries, fits the paradigm of force, but has not caused the injuries. The injuries are explained by the climber's falling on the skier, but the falling is in turn explained not so much by facts about the climber as by facts about the landscape.

Moreover, it is easily shown that the "act" requirement does not even explain why no liability is assigned in the very case Epstein uses in defending the need for the requirement. In Smith v. Stone[58] no recovery in trespass was allowed because the defendant had come to be on plaintiff's land unwillingly, through having been carried onto it by a band of armed men. That the "act requirement" does not account for this decision is shown by the fact that parallel cases may be constructed in which damages might well be awarded. When hurricanes threaten, for instance, common standards of care demand that moveable objects be secured or brought inside, lest they become dangerous projectiles in the wind. A person foolishly caught by the winds and thrown through a neighbor's sliding glass door satisfies the "act requirement" no more nor less than Stone did, for all we are told, yet *has* caused damage to the door through negligent creation of a dangerous condition (or application of force, alternatively). It is negligence or lack of it that must be cited as the decisive difference between the two cases, since in both the defendant is, at the time of entering plaintiff's property, no more than unwilling baggage carried along by superior force.

In conclusion, I should say that although the proposals reviewed here do not deliver what they promise in the way of simplifying and regimenting judicial decision in torts, it is nevertheless reasonable to adopt the strategy that Epstein, following Hart and Honoré, does, of attempting to enhance the role of factual determinations of causation. Similarly it is reasonable to aim as both Epstein and Calabresi do, for reforms that will ensure fair warning of what one's duties will be held by courts to be, although the line of argument I have pressed would commend not a scheme for ranking cheap cost-avoiders, but, unless a better substitute can be found, a full return to the notion of a single universal duty of care with respect to foreseeable harm. This would be highly preferable to a situation in which determinations of the extent of duties are often made only as a result of, and in the course of, litigation.

I should also again emphasize that although concerns about certainty or predictability of outcomes in torts have usually revolved around issues of minimizing the costs of litigation and giving tort *theory* predictive power (this being construed as an index of how scientifically respectable its explanations of decisions are[59]), my concern here has been with predictability insofar as fair warning plays a role in justifying the imposition of liability. But since reformulations of tort doctrine have rarely enjoyed the status of purely detached theories that could be true to their subject without recreating it, there is a perpetual interplay between the vicissitudes of theoretical predictive power and the ability of ordinary people to determine the status of their conduct under the law. In the end it is a vexing irony that no progress can be made without reforms, but, at the same time, so long as reforms are proposed and gain less than universal acceptance, a state of confusion will reign that is more troublesome than what we would experience were no reforms being attempted.

NOTES

1. "A Theory of Negligence," *Journal of Legal Studies* 1 (1972), pp 29-34, 36-48.

2. This label derives from Roscoe Pound's "The Need of a Sociological Jurisprudence," *Green Bag* 19 (1907), pp. 607-629, and "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911), pp. 519-619.

3. E.g., Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908), pp. 605-623, and "Law in Books and Law in Action," *American Law Review* 44 (1910), pp. 12-36.

4. An overview of the evolution of this and other doctrines can be found in G. Edward White's *Tort Law in America*, Oxford 1980, at pp. 37-75.

5. See e.g., Karl Llewellyn, "A Realistic Jurisprudence -- The Next Step," *Columbia Law Review* 30 (1930), pp. 431-465.

6. Smith, in "Legal Cause in Actions of Tort," *Harvard Law Review* 25 (1911-12), pp. 103-128, 223-252, and 303-327, reviewed the various causal "tests" advanced ("proximate cause"; "last (or nearest) wrongdoer"; and "probable (and natural) consequence"), rejected them all, and proposed the "substantial factor" test later adopted by Bohlen in the *Restatement of Torts*. Joseph Beale, rejecting this as giving too little guidance, proposed his own rather perplexing test in "The Proximate Consequences of an Act," *Harvard Law Review* 33 (1920), pp. 633-658.

7. Kansas City, MO. 1927.

8. Gregory, "Leon Green's Contribution to a Better Understanding of the Law of Torts," *Illinois Law Review* 43 (1948), pp. 5-27.

9. *Tort Law in America*, p. 107.

10. George C. Christie, "The Perils of Writing an Intellectual History of Torts," *Michigan Law Review* 79 (1981), pp. 947-966. A diagnosis of the inadequacies of relational negligence theory's decision-making procedure begins at p. 960.

11. See Green, "Tort Law: Public Law in Disguise, "*Texas Law Review* 38 (1960), pp. 257-269, and "The Duty Problem in Negligence Cases," *Columbia Law Review* 28 (1928), pp. 1014-1045.

12. "The Model of Rules," *Univ. of Chicago Law Review* 35 (1967), pp. 14-46.

13. A standard example of such a case is Riggs v. Palmer, N.Y. Court of Appeals, 22 N.E. 188 (1889). In this case a strict application of the law would have allowed Palmer to inherit his grandfather's property, *per* the terms of the grandfather's will, but the court ruled against his taking possession of it. He had murdered the deceased in order to prevent a revision of the terms of the will.

14. The role of classification in the work of William Prosser, a prominent representative of "consensus" thought, epitomizes the way in which a sense of order was restored without giving up the policy orientation and other elements of Realism. The classifications appearing throughout the successive editions of his *Law of Torts*, and for that matter the guidelines for determining proximate causation, are notoriously useless as predictive rules.

15. Oxford 1959.

16. See Christie, e.g., *supra* note 10, at p. 959.

17. See e.g., Leon Green, "The Causal Relation Issue in Negligence Law, " *Michigan Law Review* LX (1962), pp. 249-282.

18. *The Costs of Accidents*, New Haven, 1970 and with Hirschoff, "Toward a Test For Strict Liability in Torts," *Yale Law Journal* 81 (1972), pp. 1055-1083.

19. Calabresi and Hirschoff, at p. 1060.

20. *Ibid.*, at pp. 1075, 76.

21. *The Costs of Accidents*, at p. 312: costs would be allocated to "categories that can avoid accidents most cheaply but are sufficiently broad to spread the costs adequately enough to meet our secondary cost avoidance goals."

22. *Ibid.*, at p. 73.

23. *Ibid.*, at. p. 21.

24. Calabresi declares (*ibid.*, at p. 6) that "I am using 'cause' here and throughout this book as a 'weasel' word." More recently, Landes and Posner, "Causation in Tort Law: An Economic Approach," *Journal of Legal Studies* 12 (1983), pp. 109-134, suggest that, "The idea of causation becomes a result rather than a premise of the economic analysis of accidents."

25. *Supra* note 19.

26. Under this test negligence occurs when an agent has failed to take preventive measures which are cheaper than the accident costs they would be expected to save.

27. It is interesting to note that Landes and Posner (*supra* note 24) do make *this* distinction, but neglect to distinguish between those who have invested too little in prevention and those who have invested *too much*. On their formula someone who could have escaped liablity by investing optimally may nevertheless be liable through having invested somewhat more than was optimal. The lessons here are that cost avoidance goals diverge more sharply from others than may first be apparent, and -- as I am presently arguing with regard to Calabresi and Hirschoff -- the economic analysis of causation is inadequate.

28. The *Tetralogies* attributed to Antiphon cite the case of a boy who is struck by a javelin when he runs out from among the spectators into the practice area. The defense argues successfully that through his own fault the boy has caused his own death, that the defendant in merely throwing the javelin in the way that was expected did not cause the death, for the other throwers threw similarly and when they threw no injuries occurred. The difference in this case that accounts for the injury is the boy's negligently running into the practice area, it is argued. See J. W. Jones's, *The Law And Legal Theory of The Greeks* (Oxford: Clarendon Press, 1956), for an interesting discussion of the role of causation, and its relationship to fault, in the Athenian courts.

29. *Supra* note 19, at p. 1063; emphasis added.

30. *Ibid.*, at p. 1068.

31. Brown v. Collins, 53 N.H. 442 (1873), at 451. This echoes Holmes's description of the non-negligent defendant as an "instrument of misfortune," and as lacking "an opportunity of choice with reference to the consequence complained of" (*The Common Law*, Boston 1881, p. 76). Holmes adds (p. 77) that (since in trespass it is required that the defendant have committed some act) it is required "that the defendant should have made a choice." This is false, and even if it were not it would be hard to accept his conclusion that it introduces a "moral element" into the conditions of liability. Where Holmes is on safer ground his language is suggestively *causal* rather than *moral*.

32. I have developed an account of Aristotle's theory of responsibility and the role of negligence in that theory in "The Contribution of *Nicomachean Ethics* iii 5 To Aristotle's Theory of Responsibility" (forthcoming). On my account, responsibility is for Aristotle a kind of causal relationship between an agent and a harm, and he regards determinations of fault as relevant to establishing the presence of that relationship in at least some, if not all, cases.

33. In the articles later collected under the title, *A Theory of Strict Liability*, San Francisco 1980, and in "Nuisance Law: Corrective Justice And Its Utilitarian Constraints," *Journal of Legal Studies* 8 (1979), pp. 49-102.

34. By Mario Rizzo, e.g., in his forward to *A Theory of Strict Liability*, though he seems to understand the value of certainty strictly in terms of reducing the costs of litigation. My view, already set out here, is that this is not the only reason why certainty (or predictability of outcome) should be preferred.

35. Borgo, in "Causal Paradigms in Tort Law," *Journal of Legal Studies* 8 (1979), pp. 419-455; Coleman, in "Corrective Justice and Wrongful Gain," *Journal of Legal Studies* 11 (1982), pp. 421-440.

36. *A Theory of Strict Liability*, at p. 71.

37. *Ibid.*, at p. 133.

38. *Ibid.*, at p. 25.

39. Epstein attributes this, without citation, to Leon Green.

40. *A Theory of Strict Liability*, at p. 133.

41. 109 Minn. 456, 125 N.W. 221 (1910).

42. *A Theory of Strict Liability*, at p. 11.

43. *Ibid.*, at p. 20.

44. From "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960), pp. 1-29, at p. 2.

45. *Ibid.*, emphasis added.

46. Coleman (*supra* note 35, at p. 426) observes that losses may be imposed without any gain, but does not exploit this fact in his critique of Epstein's theory that follows.

47. Suppose the justification is *not* self-serving. If *A* makes reasonable but unauthorized use of *B*'s property in rescuing *C* from threat of serious harm, has *A* gained anything at *B*'s expense?

48. *Causation In The Law*, at p. 27; emphasis added.

49. *Ibid.*, at p. 30 ff.

50. *Ibid.*, at p. 32. This is the same pattern of causal reasoning that occurs in Athenian law, as represented in the *Tetralogies*. See note 28.

51. *A Theory of Strict Liability*, at p. 22.

52. *Ibid.*

53. *Ibid.*, at p. 17.

54. See W. Seavey, "Negligence -- Subjective or Objective?" *Harvard Law Review* 41 (1927), pp 1-28; Fleming James, "The Qualities of The Reasonable Man in Negligence Cases," *Missouri Law Review* 16 (1951), pp. 1-26; and O. M. Reynolds, "The Reasonable Man of Negligence Law: a Health Report on The 'Odious Creature'" *Oklahoma Law Review* 23 (1970), pp. 410-430.

55. See e.g., Calabresi and A. D. Malamed, "Property Rules, Liability Rules, and Inalienability: One View of The Cathedral," *Harvard Law Review* 85 (1972), pp. 1089-1128, at p. 1102-5.

56. See W. Rodgers, "Negligence Reconsidered: The Role of Rationality in Tort Theory," *Southern California Law Review* 54 (1980), pp. 1-31.

57. *Supra* note 35, at p. 432.

58. Sytle 65, 82 Eng. Rep. 533 (1947).

59. See White, *supra* note 4, Ch. 2.