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ARTICLES

TORT LAW IN TRANSITION: TRACING THE PATTERNS OF SOCIOLEGAL CHANGE

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I. INTRODUCTION

This has been a time of great turbulence for the tort system. Criticism seems to come from every conceivable direction. Some would dismantle tort law altogether, replacing it with a regime featuring social insurance and administrative regulation.[1] Others would leave the system and its liability rules more or less intact, but promote various forms of alternative dispute resolution.[2] Still others (probably the majority of its critics) would continue to rely on tort law for the reparation of accidental harm. At the same time, however, these critics would tinker with the substantive and remedial rules in order to meet their concerns about excessive claims, administrative costs, and award levels.[3]

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1. *See, e.g.*, Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 559 (1985).
2. *See, e.g.*, J. O'CONNELL & C. KELLY, THE BLAME GAME 128-35 (1986).
3. For two contrasting approaches, *compare*, Report of the ABA Action Commission

In response, beleaguered defenders of the system argue that the critics' main concern is the security of business interests, at the expense of injury victims who are only pursuing—with steadily growing effectiveness—their legitimate claims to individualized justice.[4] In the midst of the fray, if there is any common ground among the disputants, it would be on the proposition that tort liability has evolved dramatically over the past twenty-five years—an evolutionary process that has transformed a relatively dormant area of litigation and doctrine into a dynamic, unsettled field that has aroused considerable public attention.[5]

I will take as my point of departure this shared perception that the stability of the tort system has been dramatically undermined in recent years. But this essay will not be another effort to diagnose the ills of the tort system. I have two other objectives in mind. Initially, I will try to identify with some precision the major changes that have occurred in the tort system over the past twenty-five years in its handling of accidental harm cases. Once these transformations have been identified, I will engage in the more speculative venture of attempting to account for why they have taken place.

Rather than surveying the universe of accidental harm cases, my analysis will focus on four areas where tort law appears to have most notably been transformed since a quarter century ago. I will begin with medical malpractice, where the doctrinal changes are in some ways least striking, and, as a consequence, where the marked growth in litigation activity most clearly requires reference to changes in what is often referred to as the "legal culture."[6] Then, I will turn to products liability, where the doctrinal changes are more apparent on the surface, but nonetheless require reference to exogenous factors to explain the dramatic expansion in litigation claims, administrative costs, and award levels in recent years.

I will next discuss mass tort litigation, a now familiar off-shoot of the products liability cases, where a twenty-five year reference point yields the most pronounced changes in the character of tort liability because of the virtual absence of claims a quarter century ago. Finally, I will address a generic area, the redefinition of the general duty of due care over the past

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to Improve the Tort Liability System (1987) *with* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (1986) (federal inter-agency study sponsored by the Attorney General).

4. *See, e.g.*, Nader, *The Assault on Injured Victims' Rights*, 64 DENVER U.L. REV. 625 (1988); Habush, *The Insurance "Crisis": Reality or Myth? A Plaintiff Lawyers' Perspective*, 64 DENVER U.L. REV. 641 (1988).

5. No one seems to dispute the fact that tort law has been a dynamic field in the past twenty-five years; the disagreement is on the question of whether these developments have been for better or worse.

6. On the concept of "legal culture", see L. FRIEDMAN, TOTAL JUSTICE 30-34 (1985).

twenty-five years—a phenomenon that has, in an important sense, given new meaning to the longstanding conceptual foundation of accident law, the fault principle.

As I have suggested above, in each case my survey of the changing face of tort law will be for the principal purpose of taking a speculative look at the social, economic, and political milieu in which legal development has its wellsprings. We can only begin to decide whether the turmoil in tort law is for better or worse, let alone whether it is an aberration or a continuing process of change, after examining the sources of the current unrest.

II. Four Areas of Change

A. Medical Malpractice

Before 1960, there were a variety of subtle ways in which the traditional framework of liability for accidental harm, the doctrinal law of negligence, promised far more than it delivered. The area of physician liability is a particularly revealing illustration. Superficially, medical malpractice was a "pure" expression of the fault principle: doctors could not claim any of the various existing immunities from suit or exemptions from a duty of due care, nor could they rely upon defenses such as assumed risk, which substantially undercut negligence liability in some other areas. Once a patient established that his or her doctor had deviated from customary standards of reasonable medical practice, a prima facie case of liability was made out.[7]

But as every student of tort law knows, this was only the beginning of the story. Customary practice was ordinarily determined by reference to the "same locality" rule, which meant that a doctor needed to satisfy only the local community standard of due care, and, as a corollary, any alleged deviation from that standard had to be established by testimony from an expert familiar with customary practice in the immediate area.[8] Such experts, willing and able to testify for victims of iatrogenic injury, were virtually impossible to find in most communities.

From the injury victim's perspective, the bleak prospects for success were undoubtedly reinforced by a deep-seated reluctance to sue. Through the middle of this century most Americans took their various maladies to a family physician. The relationship was usually continuing, and, one would surmise, based upon bonds of respect and familiarity that created a strong disincentive to litigate, or even perceive, grievances.[9]

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7. *See* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959).

8. *Id.* at 569-75.

9. *See* P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 3-29 (1982), emphasizing the factors of professional authority and consolidation of economic power

Unfortunately, it is impossible to determine with any degree of precision the extent to which the discouraging prospects for litigation success, as contrasted to a more fundamental non-litigative ethos, accounted for the relative infrequency of malpractice claims. Whatever the case, the statistical evidence clearly supports the proposition that medical malpractice was a stagnant area of tort law. In her recent study of the medical malpractice field, Patricia Danzon recounts the findings in a 1974 study undertaken by the California Medical Association (CMA), which was aimed at determining the feasibility of a no-fault system for medical injuries.[10] Relying on experts in forensic medicine, the CMA evaluated a sample of hospital records in California to determine the incidence of medical negligence in treating patients. Danzon puts together the CMA findings with data on claims against hospitalization insurers during the corresponding period, and she concludes that about one incident in ten of medical negligence identified in the CMA study actually resulted in a claim for compensation.

Further indirect support for the low level of claiming is found in a series of studies, indicating that over the past two decades the incidence of claims against medical practitioners has risen dramatically.[11] There is no particular reason to think that this substantial growth can be explained by a corresponding recent dramatic increase in careless behavior by doctors.

These data on claims increases serve as our bridge to the present scene. By the late 1980s, medical malpractice had experienced two "crises," a decade apart, and had undergone a complete turnaround from the early 1960s —a time of low-visibility infrequent claims and modest awards.[12] Along with the surface indications of substantial statistical growth in claims and award levels, important doctrinal changes had occurred. The "same locality" rule, inextricably linked to the receding image of isolated rural medical practice, was replaced by a national standard of practice that reflected contemporary urban growth and extended networks of professional communication.[13]

At about the same time, and partly as a consequence of the more expansive standard of due care, the so-called "conspiracy of silence," the in-

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in explaining the traditional doctor-patient relationship.

10. *See* P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 18-29 (1985).

11. *Compare id.* at 59-60 (referring to surveys from 1956 and 1963 that found approximately 1.3 malpractice claims per 100 doctors each year) *with* U.S. Government Accounting Office, Medical Malpractice: Six State Case Studies (1986) (reporting an annual claims rate against St. Paul Fire and Marine Insurance Co., the largest malpractice carrier, of 16.5/100 insured doctors in 1984 and 17.8/100 in 1985). *See also* U.S. Department of Health and Human Services, Report of Its Task Force on Medical Liability and Malpractice (1987).

12. On the initial crisis in the mid-1970s, see DANZON, *supra* note 10, at 97-117.

13. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 188 (5th ed. 1984) [hereinafter PROSSER & KEETON].

jury claimant's inability to secure expert witnesses, began to crumble.[14] These developments, in turn, dovetailed with other movements toward broader liability; in particular, the doctrine of *res ipsa loquitur* was more widely employed and new standards of informed consent were fashioned.[15]

In a sense, these doctrinal moves were subtle: liability continued to turn on negligence, custom remained conclusive, and causation still was a prerequisite to recovery. Nonetheless, although no new paradigm of liability had been announced, by the early 1970s close observers were well aware that medical malpractice litigation was on a substantial upswing. The number of claims and the size of malpractice awards both grew.[16] Doctrinal change was clearly but a surface indicator of deeper undercurrents that were transforming social attitudes toward litigation against physicians.

By the 1970s, the family doctor as depicted in American popular mythology had become an endangered species. The post-World War II trend toward increasing specialization of medical practice threatened both image and reality.[17] On its heels came the rise of clinic practice and the development of health maintenance organizations.[18] The "delivery of medical services" was on a path toward depersonalization—indeed, this new characterization of doctoring was itself revealing of the trend. The physician was one of any number of professionals and skilled tradespersons whose services were available on an *ad hoc* basis, as needed; the concept of a continuing relationship had been seriously eroded.[19]

The depersonalization of medical practice blurred the distinction between service provider and commodity vendor and, as a consequence, left physicians vulnerable to the single most powerful ideological theme in post-1960s tort law, the rise of enterprise liability.[20] The theme, with its dual edge of broad risk-spreading and enhanced accident prevention that reflect, respectively, the tort system goals of compensation and deterrence, can be

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14. *See* discussion and references in M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 105 (4th ed. 1987).

15. *Id.* at 106-16.

16. *See* P. DANZON, *supra* note 10, at 151.

17. P. STARR, *supra* note 9, at 355-59.

18. *Id.* at 370-72, 396-97.

19. During this same period, there was a pervasive loss of faith in expertise—a growing distrust of authority figures—that almost certainly had an impact on social attitudes towards physicians. *See* Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1185-86. The same general phenomenon may well have contributed to the widening scope of enterprise liability discussed *infra* in the text accompanying notes 52-57, and to the erosion of status relationships discussed *infra* in the text accompanying notes 105-07.

20. For a discussion of the rise of enterprise liability in the defective products area beginning in the 1960s, see Priest, *The Invention of Enterprise Liability: A Critical History of the Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

identified at least as far back as the workers' compensation movement.[21] But in the early 1960s, it ripened into the notion, to be discussed below, that product harm is a cost of doing business properly assigned to the manufacturer and others in the distribution chain. These parties were regarded as being in a better position than the injured party to spread the loss and guard against future recurrences.[22]

As medical practice came to appear more like an ordinary business activity, down to the assumption that the doctor was either insured or an effective self-insurer, the depersonalization of medical practice took on this added entrepreneurial/enterprise dimension. To the claimant, trial judge, and juror, medical service came to appear increasingly indistinguishable from a commodity that ought to satisfy consumer expectations—and those expectations were on the rise. Beyond doctrinal considerations, the ideology of enterprise liability served as a generative force to quicken the pace of claims and increase the size of awards.

Still another perspective on the transformation of medical malpractice is revealed by examining a recently established niche in the case law, the "wrongful life" controversy.[23] The cases which have proven most troublesome for the courts raise issues of whether a parent's and/or child's claim for either economic loss or emotional distress should be allowed when a doctor or testing laboratory fails to utilize properly the latest techniques for detecting genetic defects before birth.[24] The cases run the gamut from devastating ailments that invariably claim the life of an infant before maturity (such as Tay-Sachs disease) to congenital handicaps which permanently deprive the child, and later the adult, of the full range of satisfactions available in life (for example, congenital deafness).[25] When recovery has been granted, it seems accurate to say that the frontiers of tort law have been extended—through recognition of a more expansive conception of the duty of due care.

In fact, the courts have been badly split on whether recovery should be granted, particularly for emotional distress.[26] The children's claims present perplexing philosophical issues of measuring the damages from diminished life as compared to no life at all (since the child is claiming, in essence, the

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21. *See generally* Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914) (an early lament for the fault principle).

22. *See* Priest, *supra* note 20.

23. *See* M. FRANKLIN & R. RABIN, *supra* note 14, at 332-46.

24. *See* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (Down's syndrome); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64 (1977) (Tay-Sachs disease).

25. *See* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (deafness); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (Tay-Sachs disease).

26. *See* cases cited in M. FRANKLIN & R. RABIN, *supra* note 14, at 332-46.

right to have never been born, and, as a consequence, to have avoided the damage suffered). The parents' claims, in turn, raise the specter of an unbounded duty to compensate for various types of emotional distress triggered by the consciousness of a loved one's negligently caused pain and suffering.

Almost certainly, these cases will remain a relatively minor sub-category of malpractice litigation. In a sense, however, the controversies raise symbolic and social issues more interesting than the question of whether the courts can establish satisfying limitations on damages. The wrongful life cases present visible evidence of what can be regarded as a revolution of rising expectations. If a prospective genetic profile can be developed before birth; if deformities can be identified *in utero*; if organs can be transplanted from one infant to another; in short, if scientific wonders appear to be virtually unlimited, then why—the prospective tort claimant in effect asks—should not *any* failure of diagnosis or treatment be regarded as substandard conduct? This glimmer of a rising public attitude—namely, that medical science and technology have advanced to the point where any departure from the expected outcome bespeaks carelessness—may have crystallized in the wrongful life claims. If so, these cases add yet another dimension to our understanding of the more general phenomenon of rising claims and awards in malpractice cases.

B. Products Liability

Tort liability for defective products has been twice transformed in this century—the second major shift coming in the present tort revival of the past twenty-five years. Before 1900, however, product harm was an area hardly worth mentioning. Under the nineteenth century approach, the requirement that the victim of a product injury be in contractual privity with the defendant served as an effective damper on litigation against product manufacturers.[27] Although the privity bar was undermined by judicially-created exceptions during the latter part of the century, particularly for a category of "imminently dangerous" products, there was no generally recognized duty of due care until the landmark case of *MacPherson v. Buick Motor Co.*,[28] decided in 1916.

MacPherson represented the initial transformation of products liability law. Defective products were brought into the mainstream of doctrinal liability for accidental harm under the fault principle. But there is nothing to suggest that product injuries were, as a consequence, singled out as a particularly critical social problem. On this score, a comparative look at some

27. *See* PROSSER & KEETON, *supra* note 13, at 681-82.
28. 217 N.Y. 382, 111 N.E. 1050 (1916).

of the other roughly contemporaneous leading sources of accidental harm is revealing. Study commission reports and legislative activity were devoted to workers' injuries, auto accidents, and grade-crossing collisions.[29] By contrast, product defect claims, even after *MacPherson*, seem to have made modest demands on the legal system and to have gone unnoticed in the political forum.[30]

Perhaps this low-visibility phenomenon is the principal explanation for the remarkable fact that for more than forty years after *MacPherson* was decided the theory of enterprise liability, which had served as the ideological foundation for the demise of common law negligence in cases of workers' injuries, made virtually no headway in the consumer injury setting.[31] This state of affairs came to pass despite the clearly apparent argument that product injuries, like industrial accidents, could be viewed as a cost of production properly assigned to the manufacturing enterprise in order to better achieve both injury prevention and risk spreading objectives.

Indeed, when the frontal assault on the established law of negligence in products cases (*MacPherson*) began, it appeared for the moment that enterprise liability theory—and tort law, more generally—would be left by the wayside. In *Henningsen v. Bloomfield Motors*,[32] the New Jersey Supreme Court took the major step of enunciating a strict liability approach in product injury cases on a theory of implied warranty of merchantable quality. Instead of relying on a tort/enterprise liability nexus, the court adopted a contract/inequality of bargaining power perspective to displace negligence.[33]

But even this false start (as it turned out) did not occur until 1960. The post-*MacPherson* decades had been consonant with the generally tranquil world of tort in which the risk-generating behavior of professionals, business establishments, homeowners, and government officials, let alone product manufacturers, was taken seriously only when it constituted a departure from ordinary standards of conduct. At the time, there was no disposition to view such behavior as an inevitable consequence of routine

29. On workers' injuries, see W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 18-26 (1936); on auto accidents, see Committee to Study Compensation for Auto Accidents, Report to the Columbia University Council for Research in the Social Sciences (1932); on grade crossing collisions, see the classic article, Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151-82 (1946).

30. The first comprehensive effort to gather data on the magnitude of the product defect problem resulted in a multivolume report summarized in U.S. Department of Commerce, Interagency Task Force on Product Liability: Final Report (1976).

31. *But see* the landmark concurring opinion of Justice Traynor in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944).

32. 32 N.J. 358, 161 A.2d 69 (1960).

33. For elaboration, see Priest, *supra* note 20, at 507-11.

activities.[34]

Then, in the early 1960s, a notable doctrinal development took place. In *Greenman v. Yuba Power Products, Inc.*,[35] the California Supreme Court adopted strict liability for defective products, and, shortly thereafter, the American Law Institute took a similar position by adding Section 402A to the Restatement Second of Torts.[36] These developments triggered a nationwide movement in which a second paradigm shift in liability for defective products, rejection of negligence in favor of strict liability, was widely adopted. In fact, paralleling the malpractice experience, a turbulent era in products law was ushered in that continues to the present. Since the mid-1960s, judicial ingenuity has been stretched to the limit by the necessity of articulating intelligible standards for design defect cases, establishing judicial guidelines for failure to warn controversies, and defining meaningful defenses and causal limitations in a wide variety of product cases.[37] The movement to strict liability brought products law to center stage, initially as a focal point of scholarly analysis, but before long as the lightning rod for criticism and debate over the efficacy of tort law.

Before exploring the roots of change, however, it is essential to get a clearer image of precisely how wide the reverberations have been in the tort system at large. As in the medical malpractice context, this inquiry has both doctrinal and behavioral dimensions. From the doctrinal standpoint, there is—although, at first blush, it might not appear so—something of a parallel to the incremental adjustments that characterize the revised version of fault liability for doctors. On the surface, the departure in the products area appears more radical; after all, strict liability replaced negligence as the dominant theory of liability. But the tale is more complex.

At an early stage, it was realized that by establishing an "unreasonably dangerous" limitation on liability for product defects, Section 402A itself potentially undermined strict liability as a meaningful alternative to negligence. Alert to this possibility, the California Supreme Court—maintaining its influential role in the products area—forthrightly rejected any such limitation in *Cronin v. J.B.E. Olson Corp.*,[38] holding that "the necessity of proving that there was a defect in the manufacture or design" was a sufficient protection against making the manufacturer "the insurer of its products."[39]

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34. There was limited strict liability in some states for food products, but on warranty grounds associated with the notion of merchantable quality. *See, e.g.*, Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

35. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

36. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

37. *See generally* PROSSER & KEETON, *supra* note 13, at 694-715.

38. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

39. *Id.* at 133.

But this only served to obfuscate the developing law. Any sign of reversion to a "reasonableness" standard might well be rejected in *manufacturing* defect cases, where liability could be premised exclusively on an injury due to a unit of the product that deviated from the norm. What was to be done, however, in *design* defect cases, where liability was based on the intrinsically dangerous character of the entire product line? Unless the manufacturer was to be treated as an insurer against every product-related harm, some constraining definition of "defect" was essential. In another opinion, *Barker v. Lull Engineering Co.*,[40] involving an injury attributed to the design features of a fork-lift loader that overturned, the California Supreme Court adopted a "risk-utility" test, which is virtually indistinguishable, on its face, from the negligence standard.

Thus, to the extent that a *Barker* or Restatement-type test is followed, design defect cases are governed by a rule of strict liability which seems nearly tantamount to the classic Learned Hand test for negligence.[41] Similarly, in dealing with the claims of failure to warn, the courts have been explicit about their adherence to a standard of *reasonable* notice.[42]

Manufacturing defect cases, by contrast, can be regarded as an area of "true" strict liability—in the sense that product-related harm is actionable without reference to risk-utility analysis.[43] But even here certain qualifications soften the contrast. By the early 1960s, negligence law had adopted what many viewed as a *de facto* strict liability standard in a growing number of manufacturing defect cases, through extensions of the *res ipsa loquitur* doctrine. Indeed, two decades earlier it had been argued that *res ipsa* made the movement to strict liability for product harm a matter of small consequence.[44]

If the earlier treatment of manufacturing defects constituted less than a pure version of fault, the new approach likewise falls short of pristine adherence to strict liability. Even after the adoption of strict liability, many courts (and the Restatement) recognized an exception for a category of unavoidably unsafe products regarded as socially beneficial.[45] The limits of this category, where reasonable care remains the standard, has never been very well defined. But drug and vaccine cases, in particular, have proven

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40. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

41. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). But there is an important distinction. In *Barker*, the court shifted the burden of proof to the defendant to establish non-liability under the risk-utility calculus, after a threshold showing of defective design.

42. *See* PROSSER & KEETON, *supra* note 13, at 697.

43. *Id.* at 695.

44. *See* Traynor, concurring in *Escola*, *supra* note 31.

45. *See* RESTATEMENT (SECOND) OF TORTS, § 402A comment k (1965).

resistant to strict liability treatment.[46] In sum, a strong case can be made for the proposition that meaningful doctrinal change in the products area has been far more modest than initially meets the eye—essentially limited to manufacturing defect cases, and even then, requiring some qualifications.

Nonetheless, it would be a serious error to reach the conclusion that the triumph of strict liability has been a hollow victory for plaintiffs' interests. Under the traditional pre-1960s law, there was a fundamental difference in consumer understanding of the concept of reasonable standards of product manufacture. The point is most clearly evident in design defect cases, where the superficial fact that "reasonableness" remains the guiding standard of liability is quite misleading. To put it simply, prior to the new era a standardized product as found in the market was taken as the norm of safety. Whatever the harm suffered, no thought was given to raising questions about whether the basic design of a product in general use might be flawed. It was only the unit that malfunctioned when compared with its product line—the exploding coke bottle was a classic example—that triggered a products claim.

The point is vividly illustrated by the "crashworthiness" doctrine. Initially, the courts were apprehensive about allowing recovery for post-impact consequences of an auto accident due to allegedly unsafe design features.[47] After all, automobiles were made to be driven—not to be involved in accidents. The buyer took the standard product as he or she found it. Unless a car went out of control, deviating from the performance norms of the product line, courts were inclined to invoke a foreseeability limitation. This limitation was invoked even though common sense suggested that post-accident injuries were surely a regularly occurring consequence of road collisions and that some makes of cars were less crash-resistant than others.

Strict liability altered this perspective on responsibility for harm. The guideline of unreasonableness remained salient, but it became more expansive, incorporating the notion that products—even standardized products performing in accordance with producer expectations—might be intrinsically harmful, and consequently, could be regarded as "defective."

Thus, the parameters marking out what constituted a colorable claim were widened by the advent of strict liability. This landmark development, and the concomitant across-the-board rise in product claims and award levels, call for some sort of explanation. Just as highway accidents have been decided for two centuries by reference to the fault principle, product injuries might have remained under the sway of *MacPherson* through the end of the twentieth century and beyond. There was nothing inevitable

46. *See, e.g.*, Johnson v. American Cyanamid Co., 239 Kan. 279, 718 P.2d 1318 (1986) (polio vaccine).

47. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

about the liberalization of defective products law, not to speak of the corresponding growth in claims and award levels.

How is the expansion of products law to be explained then? George Priest has argued that the erosion of *MacPherson* was a consequence of the convergence of two schools of influential legal scholarship in the 1950s and early 1960s: the work of Friedrich Kessler, on the contracts side, emphasizing the inequality of bargaining power between manufacturers and consumers, and the writings of Fleming James, on the tort side, highlighting the risk-spreading potential of liability insurance.[48] Eventually, in Priest's view, James' enterprise liability theory prevailed in the form of strict liability for defective products. Witness the rejection of *Henningsen* in favor of *Greenman*, mentioned above.[49]

Without denigrating the influence of legal scholarship, I would suggest that the transformation of products liability law over the past quarter century, and particularly the rapid growth in claims and award levels in recent years, requires a broader focus. In terms of tort doctrine, the enduring contribution of *MacPherson* was to substitute a *generalized* duty of due care for the traditional status-based paradigm of responsibility for tortious harm. In doing so, Cardozo had the breadth of vision to weave products liability deftly into the dynamic pattern of tort law development generally over the past two centuries.

However, as far as the *moral basis* of tort responsibility was concerned, Judge Cardozo's approach in *MacPherson* remained firmly rooted in the nineteenth century. Product manufacturers might owe a general duty of care to consumers in Cardozo's view, but his vision of tort liability remained grounded in an individualized determination of carelessness. Cardozo was a creature of his time. Accident law retained its two-party focus.

The significance of *Greenman* and its progeny was in rejecting wrongful behavior as an adequate guide to liability for accidental harm. The central thrust of enterprise liability—the underpinning for strict liability doctrine—is its singular indifference to conventional moral-based, corrective justice notions of assigning responsibility for harm. The constant (albeit rather misleading) litany that these cases focus "upon the safety of the product, rather than the reasonableness of the manufacturer's conduct"[50] is precisely the expression of this point: strict liability for products abandons the search for careless behavior in favor of an impersonal mechanism for distributing and responding to risk.

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48. *See* Priest, *supra* note 20, at 461, 462.

49. *See supra* text accompanying notes 32-36.

50. *See* discussion in Feldman v. Lederle Laboratories, 97 N.J. 429, 449-58, 479 A.2d 374, 375-85 (1984).

Insurance was surely a factor; it highlighted the risk-spreading potential of enterprise liability and almost certainly was the dominant influence in the initial adoption of strict liability. But from all appearances, the real growth in products cases did not begin until almost a decade after *Greenman.* Indeed, like medical malpractice, there appears to have been a period of turbulence in products cases in the early 1970s followed by an even sharper disturbance in the mid-1980s.[51] While doctrinal development, as discussed, preceded the growing demands on the tort system, it offers only a partial explanation of the groundswell that developed in the succeeding two decades.

Throughout the 1960s, the consequences of post-World War II economic growth became more apparent. An increasingly affluent society created a market for a wide array of technologically sophisticated new products, ranging from drugs and medications to power tools and lawnmowers—products that generated significant risks to health and safety along with their readily apparent utility. Similarly, new affluence, suburban life styles, and the network of interstate highways promoted new levels of use of the automobile—and soon exacerbated longstanding concerns about auto safety.

Still, a catalyst was necessary to alter the climate of claims and award levels in product cases. The Interagency Task Force on Product Liability, established in 1976 as a response to the first wave of concern about products claims, documented, as best it could with limited data, rapid growth in claims and award levels in the period between 1970 and 1975.[52] But the explanatory mechanism remained uncertain.

Like medical malpractice, a satisfying explanation necessitates reference to exogenous circumstances, rather than excessive preoccupation with internal developments in the tort system. The growing turbulence in tort law was only a single aspect of deeper stirrings in the surrounding legal environment. Health and safety concerns had become paramount in the public mind by the early 1970s. Just a few year earlier, Ralph Nader's campaign for auto safety had ignited long latent consumerist impulses that soon spilled over into regulatory reform on a wide variety of fronts in the name of product safety.[53] The Consumer Product Safety Commission was established, amidst considerable media attention, and a well-publicized sys-

51. On the early 1970s, see the data on jury trials and awards analyzed in Priest, *Product Liability Law and the Accident Rate,* in LIABILITY PERSPECTIVES AND POLICY 188 (R. Litan & C. Winston eds. 1988). On the mid 1980s, see Attorney General's Task Force Report, *supra* note 3.

52. *See* Department of Commerce Study, *supra* note 30, at II-43 to -82.

53. *See* Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189, 1283-84 (1986).

tem of monitoring and "prioritizing" consumer injuries was soon in place.[54] The Federal Trade Commission was revitalized.[55] Congress adopted a bevy of product-specific regulatory schemes, and local consumer complaints offices flourished.[56]

For present purposes, it is especially important to note that Nader's prominence in the early 1970s rested not just on consumer safety issues, but on a broader questioning of the legitimacy and responsibility of existing institutions, particularly the responsibilities of corporate America to the ordinary citizen.[57] These sentiments were reflected, in my view, in the removal of intangible barriers to claims consciousness—not unlike the erosion of the professional mystique of physicians. The technological prowess that yielded a steadily growing output of consumer products was no longer viewed as an unmixed blessing. Moreover, the contemporaneous public concern about the environment, focused initially on air and water pollution, and soon afterwards on toxic harms, almost certainly contributed to the erosion of deference.[58] Here the public's ambivalence was manifest. Everything that corporate America promised seemed to bear a hidden cost—unseen risks to health and safety that necessitated accountability. In tandem, the demand for regulation and compensation expanded, and the characterization and valuation of personal harms took on a more expansive aspect.

In sum, doctrinal changes in the products area were the surface indications of a new social vision of the functions of tort law. The ideology of enterprise liability was the driving force that initiated these changes. But even deeper stirrings were taking place. There came to be a radical loss of faith in the old view that personal injury was the result of isolated failures on the assembly line. In its stead, a heightened sensitivity arose to the latent risks in standardized products that appeared to be the ubiquitous consequence of technological and material progress.

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54. An early discussion can be found in Kelman, *Regulation by the Numbers—A Report on the Consumer Product Safety Commission*, THE PUBLIC INTEREST, Summer 1974, at 83-102.

55. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702 (discussing Consumer Products Warranties—Federal Trade Commission Improvement Act).

56. Some of the most significant legislation of this period included the Federal Cigarette Labeling and Advertising Act of 1966, the Child Protection Act of 1966, the Fair Packaging and Labeling Act of 1966, the Wholesome Poultry Products Act of 1967, the Flammable Fabrics Act of 1967, the Natural Gas Pipeline Safety Act of 1968, the Federal Consumer Credit Protection Act of 1968, the Radiation Control for Health and Safety Act of 1968, the Coal Mine Health and Safety Act of 1969, the Child Protection and Safety Toy Act of 1969, the Fire Research and Safety Act of 1969, and the Fair Credit Reporting Act of 1970.

57. For a contemporaneous account, see R. BUCKHORN, NADER: THE PEOPLE'S LAWYER 279-82 (1972).

58. For discussion, see Rabin, *supra* note 53, at 1278-84.

C. *Mass Tort*

From one perspective, judicial concern about the consequences of a harmful act that causes multiple claims can be traced back to the era of *Winterbottom v. Wright.*[59] In that celebrated case Lord Abinger, never a great friend of tort claimants, drew back in horror from the prospect of awarding damages to a coachman injured by the capsizing of his vehicle; recovery against the supplier of the coach might lead to "the most absurd and outrageous consequences"—in the next such accident every passenger might enter a claim for damages!

As we have just seen, the privity limitation on recovery for product injuries, enunciated in *Winterbottom*, eventually passed into tort history as a consequence of *MacPherson.* But whether courts have relied on privity, proximate cause, or lack of duty as the limiting principle, there has been a longstanding unease over the prospect of tort recovery for multiple claims arising out of a single course of conduct.[60] Only in the modern era, as courts have come to terms with the fact that mass transport—and particularly airline travel—foreseeably poses collective risks on passengers, has the mass tort action attained general acceptability.

Once the courts came to terms with the sheer magnitude of catastrophic loss, the substantive law applicable to the traditional claims usually presented no particular problems. Indeed, twenty-five years ago multiple claims cases fell so neatly within established doctrinal categories of negligence and strict liability, and seemed so clearly to be an occasional disturbance on the landscape of accident law, that no observer of the tort scene would have characterized the cases as a distinct category of liability.[61]

In recent years, all of that has changed dramatically. Asbestos, Agent Orange, Dalkon Shield, DES, and Bendectin, among other highly-publicized mass tort controversies, conjure up images of the dark side of the chemical and pharmaceutical revolution that has occurred since 1960. The toxics and drug cases have not just stimulated a dormant area of accidental harm, as in the cases of medical malpractice and products liability; rather, they have given rise to an entirely new and distinct set of demands on the tort system.[62]

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59. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

60. *See* Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

61. The two leading torts texts of the period, F. HARPER & F. JAMES, THE LAW OF TORTS (1956) and W. PROSSER, HANDBOOK OF THE LAW OF TORTS (2d ed. 1955), bear no index or table of contents listing for mass or multiple injury torts as distinguished from the traditional concern over "a flood of litigation."

62. *See* D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 1-11 (1987).

Consider, on this score, the emerging empirical data on mass tort cases. In an effort to disaggregate accidental harm claims, a recent publication of the Rand Institute for Civil Justice (ICJ) provides a breakdown of its accumulating body of data into three categories: "routine" personal injury torts (auto suits), "high-stakes" personal injury litigation (such as products and medical malpractice suits), and "mass latent injury" cases (including asbestos, Dalkon Shield, and the like).[63]

By far, the most substantial growth in claims and administrative costs is found in the latter category. Regarding administrative costs, the ICJ finds that net compensation to victims as a percentage of total litigation expenditures falls from 52% in routine cases, to 43% in high stakes and 37% in mass latent injury cases.[64] A similar pattern emerges from the available trend data on claims growth during the early 1980s. The rise in auto cases appears to be modest, the increase in products cases considerable (as noted earlier), and the growth in mass tort truly dramatic:

> There is little ambiguity about the trends in the third category of cases—mass latent injuries. Data from asbestos and Dalkon Shield claims demonstrate truly explosive growth for these types of cases. For example, most experts estimate that there were about 16,000 asbestos worker injury claims in 1981; five years later, there were more than 30,000 asbestos cases in state and federal courts. In 1981, there were an estimated 7,500 lawsuits pending over injuries from Dalkon Shields. By 1986, after A.H. Robins, the manufacturer, had sought protection under Chapter 11, more than 325,000 claims had been submitted to the bankruptcy court.[65]

By inference, if the number of claims in the most highly publicized mass tort cases has grown exponentially in the past few years, the aggregate damages in these cases would describe a similar pattern, as long as average awards remain at least constant. The omnipresent threat of insolvency complicates any such projections. Clearly, however, the overall picture of claims, awards, and costs indicates increasingly severe strains on the tort system as a consequence of the phenomenal growth in the mass tort area.

Once again, doctrinal change has been the least significant chapter in this saga of explosive growth. In recent years, the prospects for establishing a *prima facie* case of liability have closely tracked the development of strict liability for defective products and the natural evolution of strict liability

63. *Id.* at 2-3.
64. *Id.* at 27-28.
65. *Id.* at 10.

for ultrahazardous activities. But the propensity to litigate and the prospect of success have been powerfully influenced by factors extraneous to the network of tort rules.

To understand the seismic dimensions of the mass tort phenomenon, as well as the doctrinal accommodations that have occurred, it is initially essential to identify the distinctive characteristics of the kinds of cases that have emerged in recent years. In an earlier essay on environmental tort liability, I referred to these traits as problems of *identification*, *boundaries*, and *source*.[66] For present purposes, I will briefly recapitulate that earlier discussion, highlighting the doctrinal innovations that have been fashioned as part of the larger effort (mostly unsuccessful, in my view) to domesticate these cases within the confines of the tort system.

By problems of *identification*, I have in mind the causal determination that the victim in fact has suffered an injury that can be attributed to tort-type circumstances rather than the ordinary risks of life. Traditionally, this determination posed no problem because mass torts fell within the everyday conception of accidental harm. Thus, the type of injury suffered by a group of accident victims in an airplane crash or the collapse of a public building was no different in kind from the broken bones and lacerations experienced by an individual victim of an exploding soda bottle or a car crash.

By contrast, the new mass torts ordinarily result from pathologies that ripen into conditions of disease over a lengthy period of time. The etiology of the illness is frequently in question: Was the malady caused by a particular toxic substance, or is it simply a consequence of one among the many background risks of everyday life (or a genetic predisposition) that we remain at a loss to identify with certainty?

The main doctrinal response to the problem of identification has been to remove a traditional handicap the injury victim otherwise experiences. Although the tort system has been helpless to redirect the causation inquiry away from novel epidemiological questions, some courts have adopted the strategy of shifting the burden of uncertainty about the source of harm from the victim to the allegedly responsible party.[67] Traditionally, of course, that burden fell on the claimant as part of his or her *prima facie* case. But in recognition of the product manufacturer's generally superior access to information about risk, some courts have been disposed, in recent years, to alter the rule.

The strong version of this tendency is illustrated by the widely-noted

66. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27, 29-33 (1987).

67. Note that this strategy was adopted for design defect cases generally as early as *Barker*, *supra* notes 40-41.

case of *Beshada v. Johns-Manville Products Corp.*,[68] in which the New Jersey Supreme Court held that information about the health risks of asbestos arising after the time of product distribution was to be attributed to the producer in determining whether adequate warnings had been given. But the decision led to such a critical uproar that within two years the same court recanted, limiting the case to its facts. In *Feldman v. Lederle Laboratories*,[69] involving after-acquired information about the side-effects of a prescription drug, the same court held that the maker of a product generally would be responsible only for reasonably attainable knowledge about prospective harmful consequences.

Beshada, in fact, has not been widely followed elsewhere.[70] Thus, although an *ex post* approach to product risk—a "true" version of strict liability—has seen the light of day, it is probably on the wane. Like other aspects of products liability law discussed earlier, the fault standard of reasonable diligence remains the test of responsibility for identification of risk in mass tort cases.

Nonetheless, even though identification in these cases remains grounded in reasonable care, a more robust version of the fault principle is applicable than existed prior to the 1960s—once again mirroring trends elsewhere in products liability doctrine. Although *Beshada* was quickly limited to its facts, the New Jersey court adopted the strategy mentioned above, shifting to the defendant the burden of establishing that adequate care had been taken to identify risks of harm associated with a marketed product.[71]

A second distinctive feature of the new mass tort cases is the problem of *boundaries*. I have in mind the singular array of damage claims in the cases, based on psychological distress about victimization or physical manifestations that show up in later-born generations.[72] The broad range of toxic and environmental cases *systematically* generate these types of harm, which have only occasionally triggered injury claims in the past.

Once again, the dimensions of the problem can be highlighted by treating the traditional mass tort case as a point of reference. Falling airplanes and collapsing skylights result in broken bones and smashed skulls—an assortment of harms that is translated into money damages in essentially the

68. 90 N.J. 191, 447 A.2d 539 (1982).

69. 97 N.J. 429, 479 A.2d 374 (1984).

70. *See* cases cited in Brown v. Superior Court (Abbott Laboratories), 44 Cal. 3d 1049, 1060, 245 Cal. Rptr. 412, 421-22, 751 P.2d 470, 480 (1988), in which the California Supreme Court rejected a strict liability test for prescription drugs.

71. Feldman v. Lederle Laboratories, 97 N.J. 429, 458, 479 A.2d 374 (1984).

72. The DES cases are a representative example. *See, e.g.*, Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982).

same way that accidental injury cases have been evaluated for centuries. The new mass tort cases are quite another matter. Many of the most publicized cases such as DES, Bendectin, and the atomic testing controversies, involve a significant number of claims by injury victims who were either *in utero* at the time of exposure/ingestion or born at a much later date with alleged genetic defects.[73] Other claims, by the initially exposed victim or the later-born child, are for the trauma of fearing that they will join the ranks of presently identified victims of the same exposure, or for medical monitoring to detect early warning signs of pathological disorder.[74]

These cases raise "boundary" problems of one sort or another in the sense that the *range* of damage claims associated with a given mass tort incident is far less easily determined than in traditional multiple injury situations.[75] The resulting demands on the tort system pose a fresh dilemma. If the claims are allowed, still another form of intangible loss—subject to the conflicting expert testimony of mental health professionals—is introduced into the system.[76] Further subtleties abound. Will phobic reactions become a self-fulfilling prophecy once the legitimacy of such claims is acknowledged? Can the magnitude of *tangible* harm claims—let alone the tidal wave of singular emotional distress claims—be assessed before the fact, given the bizarre pathologies associated with toxic and drug-related injuries?

Until now, the judicial response to boundary issues has been on the cautious side. While some courts have been willing to entertain documented claims of economic loss for medical monitoring, the courts have been less receptive to affirmations of pure emotional distress.[77] By far, the dominant claims growth in this area remains linked to injuries grounded in the physical consequences of exposure to drug and toxics. Still, the pervasive uncertainty discernible in these *boundary* cases—uncertainty about acknowledging psychological distress as well as assessing the likelihood of future physical harm—highlights from yet another angle the novelty of the demands placed on the tort system by the new variety of mass tort cases.

The third distinctive characteristic of the new mass tort cases can be

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73. For a further discussion of the Nevada test site cases, see H. BALL, JUSTICE DOWNWIND (1986). *See also* P. SCHUCK, AGENT ORANGE ON TRIAL (enlarged ed. 1988).

74. *See generally* Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 35 DEFENSE L.J. 443 (1986). *Compare* Dartez v. Fiberboard Corp., 765 F.2d 456 (5th Cir. 1985) *with* Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986).

75. Punitive damage issues have also contributed to the uncertainty over boundaries. For discussion of the punitive damage problem, see Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985-86).

76. Earlier, a similar concern about expanding the boundaries of intangible loss in cases of negligently caused emotional harm was reflected in a no-duty rule that prevailed until the 1960s. *See* discussion in text, *infra* at notes 109-14.

77. *See* sources *supra* note 74.

referred to as problems of *source*. I have in mind the question of whether the party responsible for manufacture, release, or handling of the supposedly harmful substance can be identified. This issue is distinct from and presupposes an affirmative answer to the question of whether a tort-type injury can be discerned (the problem of *identification*). Once again, the problem can be highlighted by reference to traditional mass tort cases.

In those earlier cases, the question of identifying the source of a mass tort injury virtually never arose. If a railroad boxcar exploded, leveling a town, everyone knew who to blame. So, too, did the survivors of a falling airplane or a collapsing coliseum roof. Occasionally, there might be an issue whether the accident could properly be attributed to faulty construction on the one hand, or improper maintenance, on the other. For the most part, however, assignment of responsibility was no problem—assuming liability could be otherwise established. Indeed, the leading precedents memorialized in tort case books on problems of source have nothing to do with multiple claims controversies—they are quaint fact situations involving the luckless victims of trigger-happy members of a hunting party and such.[78]

Toxics and drug cases are quite another matter. The hazardous waste scenario is especially illuminating. Any number of generators, transporters, and operators may have contributed, over a period of time, to the groundwater or surface pollution that results in multiple injury claims. The tort system faces the responsibility of determining which, among the parties, should be held liable. Similarly, a particular drug or substance that results in multiple injury claims may be a generic product that was produced by a large number of pharmaceutical houses. The claims may arise long after the product has been marketed, so that the problems of attribution are overwhelming. Once more, the tort system confronts the challenge of providing a just mechanism for assigning responsibility.[79]

The courts, ever-engaged in fashioning doctrine for the problem at hand, have not been indifferent to these claims. In the leading case of *Sindell v. Abbott Laboratories*,[80] involving the personal injury claim of a DES daughter who could not identify the precise source of the miscarriage preventative her mother had taken a generation earlier, the California Supreme Court advocated an innovative approach to liability. The court held that an injury victim could establish cause in fact by identifying the producers of a "substantial market share" of the harmful product—with responsibility allocated on a market share basis among those defendants iden-

78. The classic case is Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

79. *See generally* Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

80. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

tified as manufacturers of the product. In such a case, featuring a generic product manufactured by a number of sources, precise identification of the maker of the particular units or doses that actually harmed the injured party would no longer be required.

The creativity of the *Sindell* approach has been duly noted, and its expansive possibilities discussed by commentators.[81] No one denies that the case is yet another indication of the dynamic character of tort law in the present era. Whatever one's reaction to the court's approach, however, the reality is that very few mass tort cases have *Sindell* characteristics. By contrast, most multiple claims cases involve an allegedly responsible party that can be identified in the traditional way. Market share liability has not, in itself, dramatically altered the rules of the game for most players.

Indeed, for all the hue-and-cry over the inequitable consequences of recent application of the joint and several liability doctrine, it too, can only be cast as a minor villain in the piece.[82] Whatever the future holds, the fact is that virtually all the multiple claims cases that have proven so disruptive to the tort system until now have involved injuries based on the side-effects of drugs or toxic substances—such as Dalkon Shield, asbestos, atomic radiation, Bendectin, and the like—where the responsible party is well-known; cases where the defendant is indeterminate are the exception.[83]

In sum, problems of *identification*, *boundaries*, and *source* have generated new judicial strategies as courts have struggled to fashion doctrinal responses to the perplexing issues raised by mass tort claims. But *Beshada*, *Sindell*, and the other benchmarks of this effort have neither triggered nor, on the other hand, have they done much to constrain the enormous demands on the system. The controversies seem almost to have taken on a life of their own, assuming proportions that were not foreseen and wreaking havoc on the ordinary institutional mechanisms for resolving claims of accidental harm.

What has happened in the recent past to trigger these extraordinary demands? At one level, the answer is transparently clear. Through inadvertence, heedlessness, and perhaps a strong measure of corporate indifference,

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81. *See, e.g.*, Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); Delgado, *Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982).

82. Recent legislative initiatives revising the rule of joint and several liability are cited in Tort Policy Working Group, An Update on the Liability Crisis 68 (1987).

83. Consider, however, the perplexing problems created by joint and several liability in clean-up cases under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), discussed in *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1459, 1527-33 (1986). A similar set of difficulties would be faced if widespread personal injury and property damage claims in these cases come to fruition.

we have been overwhelmed by the massive tragedy of asbestos exposure.[84] In turn, the asbestos phenomenon offers the key to understanding other mass tort episodes. Countless victims are claimed by the unanticipated health risks, latent and long developing, that reside in a variety of drugs and synthetic products which appeared to offer either surcease from pain or, in some cases, simply a richer tapestry of life's comforts. As an initial cut, then, the mass tort phenomenon can be attributed to the post-World War II revolution in scientific and technological growth—yet another instance of the truism that progress has its costs.[85]

But the emergence of chemical products as a singular source of risk cannot explain, in itself, the unprecedented new demands on the tort system. Always, there must be the added element of an affirmative disposition to litigate, a concrete sense of wrongful injury overcoming the presumption that accidental harm is but a normal risk of life—a presumption, it should be added, that might be particularly likely in cases of toxic and drug-related harm where causation is obscured.

In fact, the asbestos claims are a strong case in point because the synergistic phenomenon—the presence of more than one possible explanatory factor—is pronounced. Many asbestos victims have been long-term cigarette smokers, and all of the claims arise after many years of exposure to virtually limitless health risks of various kinds.[86] There is no bright-line indicator of where responsibility should fall. Moreover, the asbestos victims have almost invariably received injury-related benefits from the workers' compensation system, satisfying one set of expectations for redress.[87] Apart from recent changes in the climate of tort litigation, then, the deluge of asbestos claims that has occurred would be anything but a foregone conclusion.

The missing link in the explanatory chain, as I see it, is the heightened sensitivity to the unseen dangers of pollution and toxics that emerged around 1970, as an integral part of the consumer/environmental revolution discussed above.[88] By the early 1980s, this sensitivity—and a correspondingly acute claims consciousness—stood as an accepted part of the legal

84. A strong indictment of the industry is offered in P. BRODEUR, OUTRAGEOUS MISCONDUCT (1985). The Institute for Civil Justice has conducted a series of empirical studies of the costs of the asbestos litigation. *See, e.g.*, D. HENSLER, W. SELVIN & P. EBERNER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985) [hereinafter HENSLER].

85. The mass tort asbestos phenomenon, itself, dates back to exposure of shipyard workers during World War II.

86. *See* HENSLER, *supra* note 84, at 41.

87. Richard Epstein has argued that worker's compensation benefits should be the exclusive source of compensation for victims in the asbestos cases. *See* Epstein, *Manville: The Bankruptcy of Product Liability*, REGULATION, Sept.-Oct. 1982.

88. *See* Rabin, *supra* note 53.

culture. If the consumer rights theme seems most evident in the newly emerging product design litigation of the 1970s, as I have suggested,[89] it is the environmental rights motif that is most pronounced in the mass tort explosion.

As far back as the early 1960s, Rachel Carson's book, *The Silent Spring*,[90] focused widespread attention on the ecological impact of the chemical revolution in pesticide use. Her popular account of the health effects of toxic poisoning on innocent species of lower-order life was followed by a number of toxic and drug tragedies elsewhere in the world, claiming frightening numbers of human victims, that were brought home to the American public in vivid detail; in particular, the massive suffering set off by mercury poisoning at Minamata, Japan, and the grotesque array of birth defects in Europe attributed to the drug Thalidomide.[91]

By the early 1970s, episodes of this kind no longer seemed isolated in nature or confined to foreign shores. The *Reserve Mining* case in Minnesota, raising the possibility that asbestos-like tailings might be poisoning the drinking water supplies of Lake Superior, received nationwide attention.[92] The Santa Barbara oil spill, portraying massive devastation of marine life, shocked the country and contributed mightily to the sense of concern about environmental risks that culminated in Earth Day, 1980.[93] Public perceptions of "pollution-related" risks (very broadly defined) had changed dramatically: the recent events were catastrophes that could be traced to identifiable corporate sources, and, in short order, the notion of corporate responsibility became as closely identified with health risks as with product safety.

In the Congressional forum, far-reaching air and water pollution regulatory schemes were enacted, workplace health and safety legislation was passed, and toxic waste prevention and clean-up controls were established.[94] The new regulatory agencies were mandated to study and report on emerging chemical risks in the environment and the workplace as well as designed to control more stringently existing sources of danger.

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89. *See supra* text accompanying notes 52-58.

90. R. CARSON, THE SILENT SPRING (1962).

91. For a discussion of the impact of Thalidomide, see H. SJOSTROM & K. NIELSSON, THALIDOMIDE AND THE POWER OF THE DRUG COMPANIES (1972). For discussion of the Minamata tragedy, see J. GRESSER, K. FUJIKURA, & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 65-105 (1981).

92. For a case study of *Reserve Mining*, see R. BARTLETT, THE RESERVE MINING CONTROVERSY (1980).

93. *See* W. ROSENBAUM, THE POLITICS OF ENVIRONMENTAL CONCERN 53-91, 136 (1973).

94. The major pollution control regulatory schemes are succinctly summarized in R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW (Nutshell series, 2d ed. 1988).

In this atmosphere, there could hardly fail to be a heightened consciousness of the propriety of compensating the individual victims of drug and toxic-related harm whenever the linkage to perceived corporate irresponsibility arose. Any such compensation-minded demands on the judicial system were a natural complement to the political impulse to reduce health and safety risk through regulatory controls. In short, the mass tort revolution, which comes to fruition in the 1980s, seems grounded in the new environmental consciousness that can be traced to the rise of public concern identifiable a decade earlier.

D. The Duty Concept

In the earlier sections, I have suggested that doctrinal change, in itself, has played a real *but limited* role in explaining the major upheavals experienced by the tort system in the past quarter century. Customary due care remains, as it was before, the test for liability in medical malpractice cases; risk-utility analysis is similar in kind to the traditional *MacPherson* test of fault liability in defective product cases; established principles of strict liability and negligence doctrine, construed in an imaginative—but by no means tendentious—manner have been employed in the mass tort cases; and so forth. In each of these areas, tort principles were available twenty-five years ago that could be shaped, cut, and expanded to accommodate a new litigation consciousness in injury victims and the widespread acceptance of enterprise liability thinking. The broad expanse of the fault principle offered little resistance to this substantial shift in injury victims' assertions of a right to compensation.

In reality, however, the domains of negligence circa 1960 remained far more circumscribed than this account might suggest. Surveying the field at large, one still found the heritage of two centuries of historically grounded limitations on the fault principle.

The overriding constraint was that in order to establish a claim based on the fault of another, one had the threshold obligation to demonstrate the existence of a duty of due care. It was here, in the hidden recesses of a wide variety of no-duty (and limited duty) rules, that a vast number of potential claims for negligent conduct were extinguished without ever seeing the light of day. Consequently, it seems fitting that my last illustration of the dramatic changes in tort law during the past twenty-five years should include some of the most significant examples of a broad-ranging phenomenon: the "purification" of the negligence principle through the widespread abolition of rules limiting the duty of due care.[95]

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95. *See also* Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 964-70 (1981).

1. The Erosion of Status

The nineteenth century view of the tort system was highly particularized.[96] Contrary to widely-accepted beliefs, there was no comprehensive commitment to the fault principle. As cities grew and industries developed, a steadily increasing volume of accident cases arose in which the parties were of distinctly different status. Foremost among these categories was the workplace injury, where the status differential between employer and employee led the courts to create strong barriers to recovery—most notably, assumed risk and the fellow servant rule—which had very little to do with fault principles. In similar fashion, the privity requirement afforded special, status-based protection to product manufacturers, despite their careless behavior, in suits by injury victims who had no direct dealings with the defendant.

Nor were these the only such limitations. Still another well-recognized example of categorical, status-based exemption from the obligation of due care was the immunity conferred on governmental entities. Consider, as well, the limited obligations—harking back to pre-capitalist norms of landowner protection—imposed on land occupiers to social guests and unwanted entrants. A *generalized* duty of due care was simply foreign to the customary way of thinking about personal harm. To the contrary, the courts were inclined to examine the particular status relationship between the parties and create special categories of privileged defendants. This predisposition rested on narrow, focused assumptions about the obligations of employers, governmental entities, product manufacturers, and landowners, among others.

In the interstices among this wide array of limited (and limiting) status relationships, a fault principle gradually emerged and became increasingly influential. But its origins were modest. The superstructure of negligence law was crafted from horse-and-buggy collisions and careless accidents among neighbors and playmates. Prior to this century, the fault principle in "pure" applications (that is, where it was not overridden by the earlier mentioned non-fault limitations on liability) was most prominent in cases where the status relationship of the parties was not a salient feature of the case.[97]

By the mid-twentieth century, one might have thought that these ob-

96. The discussion that follows draws on a more detailed treatment in Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

97. These cases did, at times, include claims against industry, particularly the railroads; but those cases tended to arise in a context where the defendant and plaintiff were unrelated "strangers," such as grade-crossing collisions and spark-ignited fires. For a broader reading of the applicability of the negligence principle, see generally Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

servations would be ancient history. Such was not the case. Although the privity doctrine and the "unholy trinity" of workplace injury defenses had been retired to the archives of tort lore, governmental entities, charities, and family members still enjoyed immunity from suit; landowners continued to rely upon the status of entrants to limit their liability; and, in a more general sense, a variety of "custodial" parties (institutional caretakers, storeowners, landlords, and the like), were shielded from liability as long as a colorable claim existed that an accident arising out of their contact with the victim was associated with "a mere failure to act."

Around 1960, these barriers to claims began to fall.[98] Within the short span of a decade, most state courts had overturned or sharply limited all of the major immunities. For purposes of tort liability, the status characteristic of a municipal entity, charity, or related family member no longer created a roadblock to injury claims. In like fashion, many courts followed the landmark California decision in *Rowland v. Christian*,[99] abolishing the status distinctions among land entrants and creating a general foreseeability test as the standard for landowner and occupier liability. Even highly specialized professionals found that their conduct no longer went unquestioned on "policy" grounds.[100]

Simply to identify these discrete instances of expansion in the duty concept, however, is to miss the larger meaning of this period of ferment. Apart from the immunity situations, a central touchstone of the duty concept traditionally rested on a distinction between action and inaction.[101] The landowner cases are, in fact, illustrative. The restrictive categories of landowner liability were premised in part on the view that *no affirmative obligations* should be imposed in favor of "strangers." One who created a trap or acted with reckless disregard for the safety of a "tolerated" entrant might be held responsible for harm, but the hapless victim of a landowner's passive failure to maintain safe surroundings had to bear his or her own loss.[102]

This theme, often characterized as a distinction between nonfeasance and misfeasance, traditionally cut a wide swath in tort law. It is perhaps most familiar in the rescue cases, where the illustrations are so vivid—consider the man beside the railroad tracks indifferent to the peril of a child threatened by an oncoming train. It is also apparent in more prosaic settings where injury resulted simply because an unconcerned observer felt

98. *See* Schwartz, *supra* note 95, at 964-70.

99. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

100. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (therapist's duty of affirmative action to an endangered third party).

101. *See* Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 44 AM. L. REG. 209, 273, 337 (1905).

102. PROSSER & KEETON, *supra* note 13, at 412-15.

no obligation to make a reasonable effort to prevent harm from occurring to a heedless victim.[103] Still another variant on the nonfeasance/no duty theme—and the most prominent, in my view—includes the many situations in which a collateral relationship between the parties did in fact exist: the victim rented a boat, leased an apartment, or shopped at the store of the potential injury preventer, but fell prey to harm outside the narrow perimeter of the formal transactional relationship.[104]

In all of these cases the link between inaction or nonfeasance and the status relationship of the parties is subtle. The coldhearted bystander beside the railroad tracks clearly did not base his claim to tort immunity on membership in a defined category analogous to a government employer or product manufacturer. Nonetheless, it was his status as a stranger, in the strong sense of lacking any responsibility for the victim's plight, that shielded the indifferent onlooker from legal responsibility. Similarly, the shopkeeper or landlord could rely upon formalistic notions of "control" to limit liability to customers and tenants, respectively. Here again, privity-like conceptions of the boundaries of the commercial relationship between the parties created the basis for a narrow, particularized duty of reasonable care.

In the past twenty-five years, these status considerations have been dramatically reversed. It is not simply that status no longer creates immunity in the inaction cases; rather, the very status boundaries which formerly were translated into no-duty rules are now frequently the foundation for affirmative obligations to protect potential victims from the risks imposed by third parties. In classic common law fashion, the status relationships which have in recent years been relied upon as a basis for obliterating the nonfeasance-misfeasance distinction—relationships including landowner-tenant, storeowner-customer, and therapist-patient, among others[105] — have reduced the domain of protected inaction to the point where it is now the exception rather than the rule.

How might one account for this striking reversal of field? The broadest explanation would be that a sea change has occurred in the American ethos of individualism. The argument would go something like this: Where once, not so long ago, the dominant moral vision stressed the virtue of personal autonomy, and left no room for governmentally mandated other-regarding conduct, a new sense of community has arisen that recognizes the claims we all have on each other for assistance in cases of fundamental need.

Certainly, many of the social welfare programs, dating back to the New Deal, provide evidence that American society has moved beyond a

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103. The classic instance is Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1897).

104. *See generally* PROSSER & KEETON, *supra* note 13, at 373-85.

105. *See* RESTATEMENT (SECOND) OF THE LAW OF TORTS, §§ 314A, 320 (1965). *Cf.* Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1976).

staunchly libertarian ethic, assuming it was once pervasive. Still, it is one thing to detect widespread popular assent to a brand of welfare capitalism and quite another to deduce strong tendencies towards a communitarian ethic of interpersonal behavior. In the political sphere, the continuing resistance to comprehensive social insurance, let alone more modest no-fault schemes, surely argues otherwise.

In my view, it seems more likely that the recent status-based extensions of the duty of affirmative action are yet another manifestation of the powerful theme of enterprise liability in tort law, but with a special twist. As I suggested earlier, enterprise liability thinking has grown far beyond its initial domain of industry responsibility for harm; professional and service activities have likewise been fitted to the logical pattern which stresses the accident prevention and risk-spreading potential of liability in tort. Thus, the therapist who fails to warn an unknowing third party of the homicidal tendencies of his or her patient is viewed as better situated to serve as an accident preventer and risk spreader than the prospective victim of harm related to the counseling activity.[106] In similar fashion, courts have fashioned norms that extend legal responsibility to a landlord whose failure to accident-proof a residence leads to violence against a tenant, or to a business establishment whose parking area poses risks of armed assault that come to fruition in the case of an invited user.[107]

In each of these situations, it is possible to argue that the provider of the "activity"—whether offering therapy to patients or groceries to customers—is better positioned than the unwitting victim to warn, guard, or take whatever other steps seem reasonably necessary to avoid danger or, in the event of harm, to treat the loss as a cost of doing business. The question is why this almost formulaic rationale for liability was extended in recent years to these traditional nonfeasance scenarios; the answer, in my view, is bound up in a ubiquitous feature of post-midcentury life in America—the terror of urban violence.

The paradigm case of the impassive bystander at the railroad tracks may still retain its vitality, but it is little more than an interesting academic exercise. The cases that arise—in which the claims to "bystander" treatment are increasingly denied—involve hospitals, commercial establishments, and, most frequently, residential settings, where danger lurks at the perimeter of daily activity and public concern has reached unprecedented heights. Nineteenth century notions of individual autonomy seem particularly inapt in these cases. The duty of affirmative action has grown in response to recognition that the ability to maintain public safety is beyond the

106. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

107. *See, e.g.*, cases discussed in M. FRANKLIN & R. RABIN, *supra* note 14, at 176-83.

capacity of the police acting alone, and that service providers engaged in high risk activities bear certain public responsibilities.[108]

2. The Recognition of Intangible Interests

The nineteenth century view of duty to avoid unintentional injury was not only highly particularized, emphasizing status relationships; it was also grounded in the requirement of tangible physical harm. While pain and suffering was a recognized component of damages, it was recoverable only when the injury victim suffered physical harm as well. Taken to its extreme, in the "impact requirement" cases, the courts were explicit about the fact that no recovery for emotional distress—as it came to be known—would be allowed in the absence of a wrongful contact with the injured party, however slight.[109]

This rule, which now seems so anachronistic, continued to be dominant throughout the first half of the twentieth century, reflecting a suspicion about the genuine character of emotional distress, a conviction that one had to bear the psychological hard knocks in life, and a concern that recognition of emotional distress would open the floodgates to fraudulent claims. It was not until 1961, for example, that New York took the major step of announcing that henceforth there might be recovery for emotional harm without the talisman of actual contact.[110] And it was near the end of the same decade before California issued a landmark opinion establishing a circumscribed right to recover for "indirect" emotional harm from the shock of eyewitnessing a serious injury to another.[111]

The duty concept in emotional distress cases has been in constant flux throughout the quarter century since these developments began. The courts have divided on whether "direct" emotional harm should be actionable only when a consequence of fear of physical harm or, more broadly, whenever distress might be a foreseeable result of an unreasonable act.[112] Similarly, judicial views have differed on the question of linking bystander recovery for emotional distress to presence in a "zone of danger" or some other limiting circumstances.[113] More recently, courts have struggled with a variety of

108. On police liability, see Sorichetti v. City of New York, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985); DeLong v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981).

109. *See* PROSSER & KEETON, *supra* note 13, at 362-65.

110. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961).

111. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

112. *Compare* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961) *with* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

113. *Compare* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) *with* Bovsun v. Sanpieri, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

second generation issues ranging from the limits on consortium actions to claims of emotional distress for cancerphobia and related toxic exposure concerns.[114]

Not all of these potential extensions of the duty concept have been judicially recognized. Once again, however, tort law has been subjected to considerable turbulence after an extended period in which the law seemed entirely impervious to change. A survey of the tort scene in 1960 might well have missed the issue of recovery for negligently caused emotional distress altogether.

An initial cut at understanding the legitimation of emotional distress claims requires a careful look at other areas of tort law. During the same period that emotional distress has been afforded new recognition, a number of related developments have occurred. Pain and suffering awards, attendant upon physical harm, have assumed a new order of magnitude;[115] intangible loss claims in wrongful death cases have broken their century-long shackles;[116] defamation awards entered by juries have reached extraordinary proportions.[117] In all of these cases, the notion of intangible loss was viewed in relatively modest terms not so long ago—in keeping with a broader view that the core of compensatory redress was the out-of-pocket loss suffered by an injury victim as a consequence of physical harm.

The next level in understanding these developments is more speculative. As before, the issue is whether there are exogenous circumstances in the past twenty-five years that help explain the emerging sense that intangible loss had been inappropriately ignored or undervalued in earlier years. In my view, changing cultural attitudes provide an insight.[118] By the 1960s, in widening circles resort to mental health professionals was no longer regarded as an exotic move. While it is hard to pinpoint precisely the change in social acceptability, by the late 1960s the legitimacy of seeking profes-

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114. *See supra* note 74, and, on consortium actions, compare Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977) with Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980).

115. A recent ICJ survey estimates that the average growth in compensation paid per liability claim in accident cases has been rising at the rate of 12% annually in auto cases and 17% in non-auto cases between 1981 and 1985. *See* J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, xii (1986). Unfortunately, these data are not broken down as to economic and non-economic loss, but it seems a logical inference (despite inflation in medical costs) that a substantial part of the growth is due to a more expansive view of intangible loss.

116. *See, e.g.*, Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980).

117. *See* J. GOODALE, SURVEY OF RECENT MEDIA VERDICTS, THEIR DISPOSITION ON APPEAL, AND MEDIA DEFENSE COSTS, IN MEDIA INSURANCE AND RISK MANAGEMENT, 78-80 (1985) (summarizing data collected by the Libel Defense Resource Center).

118. For a similar view of the compensation phenomenon in the defamation area, see R. SMOLLA, SUING THE PRESS 15-25 (1986).

sional assistance for mental health problems had taken a notable leap forward. At the same time, organizations such as the Esalen Institute and Erhard Seminar Training (EST) were achieving growing popularity and receiving widespread publicity. During the 1970s, in a related sequence, a popular literature emerged that was devoted to self-help measures in dealing with anxieties and overcoming various impediments to a positive state of mind.

The common core of these superficially disparate events was a developing preoccupation with emotional health and getting one's life under control—stress, anxiety, and depression came into the popular consciousness as legitimate concerns. As a corollary, the shocks associated with extraordinary emotional and psychic distress were no longer viewed as inevitable risks of everyday life to be borne in stoic fashion. Emotional distress came to be seen as costly and unnecessary—a departure from a norm of mental well-being. In this context, the substantial value attached by tort law to the protection of emotional tranquility seems to be the logical outcome of the transformation of emerging social attitudes into legal norms.

III. Concluding Thoughts

At the doctrinal level, accident law has been based on the fault principle for some two centuries. Present day rules of liability in auto accident cases can be traced back to horse-and-buggy days just as existing principles governing professional malpractice have their antecedents in nineteenth century (and earlier) customary standards applicable to innkeepers and common carriers.

But the superficially enduring character of the fault principle is illusory, both in historical and contemporaneous terms. Although the nineteenth century version of negligence appeared to be an all-embracing scheme, it was hemmed in by immunities, limited conceptions of duty, and restrictive definitions of due care. The fault principle promised far more than it delivered, and in many ways the negligence system continued to operate under major constraints through the mid-twentieth century. Moreover, the internal constraints on accident law were reinforced by exogenous factors, namely, bounded cultural definitions of legal responsibility and limited social conceptions of "victimization." An accident victim's perception of actionable harm was modest when compared to present sensibilities.

These diverse limitations on the reach of the fault principle provided implicit support to the longstanding corrective justice model of accident law. By keeping the demands on the system within tolerable limits, the parsimonious law of negligence concealed the potentially troublesome costs of maintaining a two-party perspective based on a determination of "fault."

In present day terms, the continuity of accident law principles is simi-

larly misleading, but for strikingly different reasons. If anything, the system—at a conceptual level where negligence and risk-utility analysis remain foundational principles—promises *less* than it delivers, because the underlying corrective justice notion of liability based on unreasonable conduct has, in many instances (often *de facto*), been supplanted by a distributional norm of assigning costs to appropriate activities. This critical shift in ideology to a norm of enterprise (and activity-based) liability has been driven by changes in technology, the advent of near-universal liability insurance, the liberalization of social attitudes towards compensation, and the breakdown of deferential status conceptions. The immediate consequence has been tremendous stress on a system designed to achieve corrective justice.

A word about the future. At some point, if the system were to become totally schizophrenic—arriving at an unqualified commitment to distributional norms of activity-based liability under the guise of a process narrowly designed to do corrective justice—a breakdown might be unavoidable. But history indicates the durability of the fault system. In the absence of a broad-based social welfare movement, such as the Progressive Era impulse that triggered adoption of workers' compensation schemes, the negligence system—supplemented by selective commitment to strict liability and no-fault—is likely to be with us for some time to come.[119] In terms of its staying power, the expansive capacity of the fault principle can be viewed as its greatest virtue as well as its deepest vice.

119. For a detailed development of this thesis, see Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 15-23 (1988).