

The Risks of Risk/Utility

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A LAMENT

The legal revolution of the past 25 years has dramatically changed tort law, but not for the better. The inexorable expansion of liability has taken place on two fronts. The scope of the defendant's basic liability has increased, while the available defenses have been whittled away. This one-two combination has worked dramatic effects that could not be gleaned from looking at each change in isolation. While the changes have been massive, the justifications offered for them have been inadequate. In a short paper it is quite foolish to attempt to assay the entire landscape of tort doctrine, from causation, to proof, to foreseeability, to privity, to assumption of risk. Nonetheless, it is important to stress that this vast array of doctrinal changes have *not* occurred at random. Quite the contrary they all reflect a uniform, if misguided, vision of the role of tort law in particular and of legal rules in general. My hope is to isolate one central methodological weakness of modern tort law and to show, however briefly, the influence it exerts on a large number of doctrinal areas. That weakness is the incurable judicial fondness for replacing fixed rules of tort liability with open-ended balancing tests. The now common risk/utility test, as developed by Professor Wade,¹ is the foremost illustration of the new approach and the unfortunate social consequences that it produces.

The paper is divided into two sections. The first section of this paper argues that rules of thumb should be preferred over balancing tests generally. The second section gives some examples of workable bright line rules and concludes with a brief critique of the risk/utility doctrine generally.

I. RULE, DON'T BALANCE

My basic thesis is that rules should be preferred to balancing tests, both for basic liability and for defenses. To be sure, this opposition between rules and balancing is not ironclad. Every system has to have a little "give" in the joints to take care of the complex or unanticipated cases that do not fall neatly into the available paradigms. Bright line rules are not etched with laser sharpness. Yet the overriding distinction between rules and balancing tests remains structurally important notwithstanding the occasional blurriness at the edges. The critical inquiry is whether each case that comes before judge or jury must receive the same level of anxious consideration that is properly reserved for the most difficult ones. The advantage of well-crafted rules is that they can account for the routine case in a predictable and sensible fashion, while reserving the give in the system for the few atypical cases that remain. As an

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1. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825 (1973).

empirical matter, the vast majority of cases do not raise questions of insanity or private necessity. The typical chain of causation (as Fleming James, an ex-railway lawyer, used to stress in class while banging his right fist into his left hand) does not present a bewildering succession of deliberate and unforeseeable intervening actions and events. The extraordinary may triumph over the mundane in appellate litigation, owing to the selection bias that forces the hardest cases to the top of the system.² Nonetheless, it does not have to do so in the workaday world of ordinary litigation. Traditional rules of thumb *are* serviceable over the broad run of cases. These should be preserved against the wholesale or frontal attacks that have been made against them. What do these rules of thumb look like? And why are they sound?

In asking these questions, we have to focus to some degree on the possible ends of the tort system. These ends can be stated in both a broad and a narrow way. In the broadest sense, the mission of the law is to maximize the welfare of the various individuals who are subject to its governance. At times this goes under the name of utility maximization; at other times the preferred formulation is wealth maximization. While there are learned disputes between these various formulations of the consequentialist position, I do not want to trouble myself with them here.³ The overlap in the different versions of consequentialist theory is very substantial, so that the differences (*e.g.*, how one treats unique subjective values) can be ignored in a general discussion.

Yet note the irony. The articulation of any maximization principle is enough to daunt the most determined of lawyers who comes to praise the rule of thumb. If the concern is with a well-crafted system of rules, then there must be a retreat from abstract principles that necessarily leave an enormous amount of play in the joints. The utilitarian, who is able to step momentarily outside the systemic chains, should understand the utilitarian boobytrap in any rule of decision that purports to capture each utilitarian nuance on its face.⁴ Lofty ambitions do not make good rules. Often it is better to lose a bit in comprehensive overview in order to gain something in workaday precision.

The point can be stated more clearly. The *validity* of any substantive norm has to be tempered by the *reliability* of its application. Validity and reliability stand in inverse relation to each other. Validity seeks to identify the ultimate thing to be measured, while reliability seeks to insure that the measurements undertaken are done accurately. Refined rules seek to control every possibility, and thus to maximize validity. But these rules are very difficult to administer. It is necessary, therefore, to surrender some validity in order to gain additional reliability. What one wants to maximize is the product of the two, which can never be done by insisting upon perfect validity or reliability—that is by setting either validity or reliability at one. (If both

2. Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

3. See, *e.g.*, Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Dworkin, *Is Wealth a Value*, 9 J. LEGAL STUD. 191 (1980); Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263 (1986).

4. For a brief account of this point in the context of medical malpractice, see EPSTEIN, *THE MORALS AND TECHNIQUE OF MEDICAL INNOVATION*, IN *MEDICAL INNOVATION AND BAD OUTCOMES: LEGAL SOCIAL AND ETHICAL RESPONSES*, (Health Administration Press, Ann Arbor, ed. M. Siegler) 137 (1987).

could be set at one, we would inhabit Coase's friendlier, but unrecognizable world of zero transaction cost in which our problems would disappear.)⁵

There is a good way to split this difference. The narrower proposition that a good consequentialist works with is that social utility will be advanced, as a first approximation,⁶ by specific rules that curb the use of force, lying, and misrepresentation, and insure that persons keep their promises. The consistent application of these principles can lead to the proper social ends, first by defining individual spheres of control, and second by allowing people to correct by voluntary agreement any mistakes in the initial allocation of resources made by the general law. This last point rests on the ground that private parties are apt to have better information about their own positions than the state, even if their information is—as seems necessarily the case—itsself highly imperfect.

One critical point about this system is that it invites, indeed requires, reasonably clear rules. The function of the rules is to demarcate the zones of decision for individual choice. When we speak of courts and nations, jurisdictional rules work best when they are clear and well focused. This is why principles of territoriality, the political analogue to property, persist into modern times, even though political decisions have manifest economic spillover effects beyond territorial borders.⁷ An equally pressing need exists for clear rules to specify initial entitlements, and to define their violation. Indeed as societies become more complex, the gains from simple rules become ever greater. Families and small groups can adopt complex rules to govern behavior because, given their commonality of interest, they can monitor each other's behavior to assure compliance, and make the necessary informal adjustments to novel or troublesome situations.⁸ But for large social groups, the desirable rules must be easily communicated across the large numbers of individuals who are bound by them. Rules of thumb make the law workable.

The question then becomes, do we have any easy surrogates which tell us when rules are simple and when they are complex. Here the litmus test of a complex rule is any which makes use of the idea of "reasonableness" and the implicit cost-benefit, or risk/utility calculus that it contains. In some sense it might be thought that to criticize any legal system for its reliance upon a reasonableness test is to misstate a source of legitimate modern concern. After all, how can a test which has been with us for so long, as a central part of the law of negligence, be the source of any fresh doubts about the soundness of the tort system? The answer is that while the reasonableness standard itself is old, its application has traditionally been hemmed in by the application of a variety of hard edged rules that did not depend upon the case

5. See Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15-19 (1960).

6. I ignore here all the complications that arise out of the need for forced exchanges when voluntary transactions cannot coordinate the problems of many separate persons with conflicting ambitions. For a discussion of those questions, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

7. We know that people who live outside a state are "affected" by decisions within it. Yet could one imagine a workable rule whereby these individuals could vote in state elections?

8. I stress this point in a newspaper column, Epstein, *Simple Rules for a Complex World*, Wall Street Journal, June 27, 1985, at 30, col. 3.

by case use of any risk/utility formula as such. The next section gives a few examples.

II. SOME BRIGHT LINE RULES

A. Force

The first example of a bright line rule involves the use of force. The early accounts of harm caused by one individual to another stressed the trespassory nature of the defendant's action. He had to hit the plaintiff with a stick or a bullet, or run him down with his coach. This physical "invasion" requirement filters out an enormous number of cases that might otherwise be brought within the ambit of the tort law—those cases which involve an asserted duty of the defendant to protect the plaintiff against his own incompetence, or the aggression of a third person, for example. Within the well-defined class of invasion cases, I have long argued that the defendant should only be entitled to defenses based upon plaintiff's misconduct, and not those based upon his own efforts to take the highest possible care.⁹ Where the invasion line is kept intact, the legal system made a mistake when it dwelled on the reasonableness of the defendant's conduct. But the error was not too costly because it did little to change the outcome in most cases.¹⁰ In many cases, such as trespass, *Rylands v. Fletcher*,¹¹ and nuisance, strong pockets of strict liability survived even when negligence principles were dominant. The doctrine of *res ipsa loquitur* (originally announced in a case when defendant's barrel rolled out of a loft and struck the hapless plaintiff below him)¹² helps narrow the gap between negligence and strict liability still further. Viewed as a whole, the common law of negligence in its earlier version placed far less reliance on the reasonableness concept, than the modern rules with their ever greater set of affirmative duties upon defendant.

B. Custom and Malpractice

Consider in this context the law of medical malpractice. Under the older view the deviation from custom was exceptionally powerful evidence of negligence, and the compliance with custom was virtually a safe harbor.¹³ The rule had strong bright line characteristics, as compliance with custom insulated the defendant physician from the case by case cost-benefit analysis which, as best anyone can tell, is the only relevant alternative methodology. One can raise the objection that treating compli-

9. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a Theory of Strict Liability*, 3 J. LEGAL STUD. 165 (1974). Here too the idea of reasonableness works its way into the system at the back end, e.g., in cases of the use of excessive force in self-defense. See Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975). But only a tiny fraction of stranger cases are so complex as to turn on this very difficult set of issues.

10. See for a discussion of the convergence across separate legal systems, Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982); Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987); Kroll, *Breach of Contract in the Soviet Economy*, 16 J. LEGAL STUD. 119 (1987).

11. 3 L.R.-E. & I. App. 330 (H.L. 1868).

12. *Byrne v. Boadle*, 2 H&C. 722, 159 Eng. Rep. 299 (Ex. 1863).

13. See for the classical defense, Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942).

ance with custom as an absolute defense allowed some cases to escape liability when it should have been imposed. But the error costs in the opposite direction cannot be ignored. The open-ended cost-benefit analysis confers upon the jury an enormous degree of discretion and doubtless often results in the imposition of liability when none should be had. (After all, if a jury is instructed that compliance with custom is not an absolute defense, then to be faithful to its role, it cannot act as if it were, simply because it prefers the older common law rule in principle.) Both kinds of errors are costly to the system. It makes no sense to charge the physician who has behaved properly with malpractice, as the costs imposed necessarily move medical care away from the desired social levels. The costs of doing a cost-benefit analysis are sufficiently high that we have moved to a system where we pay more money to get less reliable decisions—which is our problem today.

C. Occupier's Liability

Occupier's liability is another area with recent doctrinal developments, which, however, give rise to less concern. Here the older view was that patent defects were not actionable, but latent defects were.¹⁴ The sense was that a trap was indeed a source of danger to another party, and the law therefore worked to overcome the inequality of information that otherwise existed. The modern standards in contrast take, albeit cautiously, the view that it is possible to recover when the defects themselves are patent. Overcoming information differentials is no longer the sole purpose of the law.¹⁵ But in so doing it is assumed that courts after the fact can make better judgments about which risks should be assumed, and which not, than private parties. The incentives, however, point quite the opposite way, as parties whose welfare turns on making the right choice at the time should make far better calculations than some third party long after the fact. We have, alas, the beginnings of a system that drives us away from the contractual norm, with the predictable loss in social welfare.

There is a need to be cautious about the law of occupier's liability, for it does not seem to have moved in any dramatic fashion. Even the recent case of *Becker v. IRM Corporation*,¹⁶ which announces strict liability against residential landlords, confines its holding to cases in which there are latent defects that cause injury in ordinary use.¹⁷ Strict liability itself is neither a self-evident good nor a self-evident bad until we answer the key question, "strict liability for what?" Strict liability for the use of force, or for the setting of dangerous spring-guns or other traps is welcome, while strict liability for not saving a plaintiff from acts of self-destruction is a very different question, for it invites the prospect of holding everyone responsible for the wrongs committed by everyone else. The court in *Becker* used a narrow account of

14. *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358, which defended the categorical lines among invitees, licensees, and trespassers, while recognizing that categories "rigid in law" had some give at the joint in practice.

15. *See, e.g., Rowland v. Christian*, 69 Cal. 2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968).

16. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

17. *See supra* notes 4-6.

premise defect: the case involved a shower door made of untempered glass, which posed a recognized safety hazard to a user who had slipped in the bathroom of his rented apartment. If courts hew to this line, then it will go a long way toward keeping this traditional head of liability within sensible boundaries.

D. *Products Liability*

The risks of the risk/utility formula have been most pronounced in the law of products liability. Here the relationship between the basis of liability—negligence or strict—and the definition of product defect—latent defect or risk/utility analysis—is of exceptional importance. The choice between negligence and strict liability is relatively unimportant if liability is confined to latent defects only. The expansion of liability to patent defects has enormous consequences, even if liability is confined to negligence theories. The reason the early law of products liability produced no serious disruption of commercial insurance markets was that the wall between latent and patent defects was not breached, even as strict liability had become the order of the day.

To put the point in perspective, if one had to summarize the traditional law before, say, 1968 in a couple of propositions, these are the two I would choose:¹⁸ First, ordinarily no liability for products with patent defects, and second, liability for latent defects only if the product caused damage in ordinary use. The application of these two tests was designed to make sure that liability existed only when (1) there was differential knowledge or access to knowledge between the parties, and (2) no misconduct of the plaintiff (who typically is using the product at the time of injury and well able to prevent the loss) helped bring about the loss in question.

This system of liability may give the wrong answer in some cases. Still as a rule of thumb it gives a clear, cheap, and correct answer in most cases. The distribution of cases along the latent/patent axis is such that there are few cases when the line between latent and patent is in doubt. By working to insure the easy transmission of information, this account strengthens market institutions by helping consumers make informed choices. Private contracts work fitfully at best before individual consumers have purchased or used a wide variety of goods, and the prohibition against latent defect spares producers from having to devise ways of providing independent guarantees that the product sold meets its promised quality standards. What seller of foodstuffs is able to provide warranties to all the people who eat its products? The utter want of any concern about “contracting out” of products liability rules, and the complete disinterest in undoing them through legislation is pretty strong evidence of how close the common law rules once adhered to the social optimum.

The risk/utility formulas are a very different kettle of fish, as a bare listing of the Wade factors shows.¹⁹ While Professor Wade wrote as if his factor analysis offered

18. There would be qualifications, such as for drug and vaccine cases. There, most defects are latent, and the traditional test was whether the drug meets FDA approval. The expansion of liability in the drug and vaccine cases all rests upon the proposition that juries can second-guess administrative agencies like the FDA, which are known for their extreme caution in letting new products onto the market.

19. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837–38 (1973). The factors are:

a convenient rationalization of existing tort law, he was an unwitting firebrand. Risk/utility represents nothing less than a totally revolutionary way of looking at products liability. The latent defect tests reinforce market disciplines. The risk/utility test is a massive, if unintended, assault on markets and private ordering, for defendants are now required to *justify independently* every decision that they and their customers have made with respect to a product's use. No longer is it sufficient to say that the defendant informed the plaintiff of the hazards involved. Instead it becomes necessary to go behind the consent of consumers by finding expert testimony to reconstruct their past decisions from the ground up. And for what end?

Surely it is not to control administrative costs. The traditional rules have massive administrative efficiencies that are frittered away under Wade's risk/utility test. Substantive certainty is sacrificed as well. Risk/utility opens up every machine tool and every generic product to case-by-case attack within the judicial system: after all, the mere fact that the risk was assumed can no longer be treated as decisive on the reasonableness of the risk in question, even if relevant in some attenuated sense. But for all the intrusiveness of his test, Wade never explains why *ex post* collective judgments are superior to the *ex ante* judgments people make on their own. Yet surely the obviousness of the danger (which surely conveys something of its seriousness as well) is protection against both ordinary mistake and manufacturer misrepresentation or deceit, both of which harken back to the traditional concern with latent defects. And when the defect is patent, the ability to sell the product in the first instance is surely diminished, so that there is a powerful market check against systematic product abuse, one which the risk/utility test wholly ignores.

To see both the magnitude and the weakness of this entire risk/utility approach, it is instructive to ask the questions: Where does the application of the risk/utility test end, and why? If it can be used to decide whether certain features of a machine tool should be replaced, why cannot it be used to answer the question of whether entire classes of products, from handguns to convertible automobiles to alcohol should be marketed at all?²⁰ There is nothing in the disorganized array of relevant factors that

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

The influence of these tests have been enormous. *See, e.g.,* *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983). I have criticized the doctrine in R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 76-90 (1980).

20. *See, e.g.,* *Martin v. Harrington & Richardson*, 743 F.2d 1200 (7th Cir. 1984) (handguns); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (handguns), *rev'g* *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983); *Garrison v. Heublein, Inc.*, 673 F.2d 189 (7th Cir. 1982) (alcohol); *Height v. Kawasaki Heavy Indus., Ltd.*, 190 N.J. Super. 7, 461 A.2d 757 (1983) (motorcycle gas tank); *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985) (convertible car).

prevents a single headstrong jury from making fundamental decisions about what may be marketed and what may not be sold at all. Indeed, whenever the defendant has obtained a directed verdict or summary judgment, the judicial decision sooner or later returns to the “open and obvious” test whose supposed inadequacy ushered in the risk/utility test in the first instance. In truth, it is no principled way to identify one domain where open and obvious dominates and another where risk/utility prevails. While we have been largely spared risk/utility in generic product cases, the risk/utility test continues to work its mischief by undermining countless standardized product warnings and designs.

There is, moreover, nothing about the parade of utilitarian factors that justifies the risk/utility test on any utilitarian grounds. Quite the opposite, its cost and unreliability suggest that it should be banished from the legal system. The older view, which said, let us control force and fraud, does have application to products liability. It explains why the latent/patent distinction, while widely rejected today, has far more intellectual staying power than the vogueish, complex, multifactored test that has replaced it. The latent/patent distinction can yield the clean yes/no answer necessary on the issue of liability. In contrast, the Wade factors are utterly untranslatable into yes/no inquiry. We are asked, for example, to take a wide range of variables with continuous distributions, but without preassigned weights, and to meld them into a single yes/no judgment on the question of product defect.

A cursory inspection of the text shows how difficult that task is to execute. Who can decide what the total levels of social utility are, as set out in factor #1? Nor is there any single “substitute product” against which the challenged product can be compared, as factor #3 might suggest. There are in reality a large number of different products (all of which can be configured in different ways) which may be the baseline on comparative analysis. These alternative products may not “eliminate” the risk, as suggested in factor #4. They may reduce it by an uncertain amount. Alternatively they may increase the probability of injury but reduce the anticipated severity of the injuries that do occur. Nor must a substitute product meet the “same” need. It could only meet some portion of the need and perhaps at some greater, or different, cost. And the ability to respond to changes in liability rules may be met only in part by changes in price or insurance coverage, as noted in factor #7.

With variables so numerous, the ingenuity of lawyers should never be doubted when the stakes in litigation are very high and discovery underregulated. The test is couched in an offhand way that makes difficult matters of degree look as though they involved simple distinctions in kind. It is a utilitarian nightmare. What starts out as a faithful application of the utilitarian calculus ends up as an unprincipled battle of the experts. Everything is admissible; nothing is quantifiable; nothing is dispositive. The degree of freedom left to the trier of fact after trial is as great as it was before. All too often, anything from a plaintiff’s verdict for punitive damages to a defendant’s verdict of no liability is consistent with the evidence. And it is all quite unnecessary; “awareness” in factor #6 points to the key element of knowledge, and usually gives more useful information than everything else taken together.

Nonetheless, once courts are committed to risk/utility, it quickly becomes clear that they have no formal test of liability equal to the task of sorting out the cases they must decide. Courts have quite naturally been most reluctant to grant any defendant (or plaintiff) a summary judgment, which is likely to be reversed on appeal in any event. Instead, judges are encouraged to hide behind the verdict, which decides without reasoning. The rise of the jury in modern law is no accident.²¹ It is an inevitable consequence of the present level of doctrinal poverty. Error costs and administrative costs continue to rise, and only the lawyers and experts, whose skills are necessary to navigate the morass, are able to turn a profit. For in these times the best legal and professional talent is strictly necessary to handle any complex case.

III. CONCLUSION

So we return to our original theme. One can find the odd difficult case under the older common law rules. But as a general rule, it is quite easy to decide who has hit whom, who has complied with the rules of the road, who has complied with statute or custom, or who has sold a product with a latent defect dangerous in ordinary use. These are rules with bite in routine cases. It is not equally possible to decide whether a product is too dangerous or too safe. The legal system today spends an enormous amount of energy and effort to make these impossible substantive judgments. In so doing it insures that no product nor any medical treatment is ever safe from judicial challenge. The spate of balancing tests that are so common today is a recipe for continued institutional dislocation. And that, alas, is the road down which modern courts and legislatures have taken us, today more than ever before.

21. See, e.g., *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65 (1985).

