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APOLOGIES AND REASONABLENESS: SOME IMPLICATIONS OF PSYCHOLOGY FOR TORTS

Jennifer K. Robbennolt*

INTRODUCTION

One does not need to think long about the range of situations that are addressed by tort law to realize that tort law implicates any number of questions about human behavior and decision making. What motivates people to pursue tort claims? How do people determine whether particular conduct is reasonable? How do people reason about what factors caused which harms? How do such judgments inform determinations of blame and liability? How do cases get settled, and do less tangible things such as apologies matter? How do people think about compensation and punishment?¹

Some of these questions focus on tort doctrine; others center on how tort lawsuits are brought, handled, and ultimately resolved. As a “hub science”² with a particular focus on human behavior, psychology has much to offer that is useful for understanding these questions. Some psychological findings—primarily the literature on heuristics and biases³—have already made their way into discussions of tort law and are taken into account with increasing frequency. Links between

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1. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (addressing the question of how legal actors and observers experience the procedures used to resolve tort cases, and what effect these procedures have on them); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (examining what values people desire to incorporate in the system and how reform of the system occurs); Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers As Goal Managers*, 68 BROOK. L. REV. 1121 (2003) (discussing how people view and address emotional harms, as well as how people seek to simultaneously achieve the multiple, potentially inconsistent goals of tort law (for example, appropriate compensation, deterrence, and punishment)).

2. Kevin W. Boyack et al., *Mapping the Backbone of Science*, 64 SCIENTOMETRICS 351 (2005) (identifying hub sciences based on relationships and patterns of influence among scientific disciplines); John T. Cacioppo, *Psychology Is a Hub Science*, OBSERVER, Sept. 2007, at 5, 42.

3. The literature on heuristics and biases examines the mental short-cuts that people take in making complex information manageable. Such short-cuts are often efficient ways to reach accurate decisions, but can sometimes result in systematic errors in judgment. See generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002).

tort questions and other areas of psychology have not been as carefully developed. In this Article, I highlight just two examples of the ways in which psychological research has informed our understanding of tort law and practice: research on the role of apologies in civil cases⁴ and research that has complicated our understanding of the “reasonable person.”⁵

II. APOLOGIES AND TORT SUITS

Apologies have played a role in a range of prominent and not so prominent cases. Kobe Bryant, via his attorneys, offered a public apology to the woman who accused him of rape.⁶ The president of the Massachusetts Institute of Technology (MIT) issued an apology to the parents of a student who died in an alcohol-related incident on campus.⁷ Corporations such as Ford, Wal-Mart, Continental Airlines, and McDonald’s have apologized to claimants.⁸ Doctors and hospitals have apologized to patients, and some medical schools are starting to incorporate disclosure and apologies into the curriculum.⁹

More than two-thirds of the states now provide some form of statutory evidentiary protection for apologetic statements. The reach of many of these statutes is limited to cases involving healthcare,¹⁰ while

4. See *infra* Part II.

5. See *infra* Part III.

6. See Associated Press, *Kobe Bryant’s Apology*, ESPN, Sept. 2, 2004, <http://sports.espn.go.com/nba/news/story?id=1872928>.

7. See Letter from Charles Vest, President, Mass. Inst. Tech., to Mr. and Mrs. Krueger (Sept. 8, 2000), available at <http://web.mit.edu/newsoffice/2000/letter.html>.

8. See IAN AYRES, *SUPER CRUNCHERS* 29–30 (2007) (describing apology experiments by Continental Airlines); Patti Waldmeir, *Ford Goes into the Business of Saying Sorry*, FIN. TIMES (London), Jan. 14, 2001, at 8; Wendy Zellner, *Wal-Mart: Why an Apology Made Sense*, BUS. WK., July 3, 2000, at 65.

9. See Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 376, 380 (2009).

10. ARIZ. REV. STAT. ANN. § 12-2605 (Supp. 2008); COLO. REV. STAT. § 13-25-135 (2005); CONN. GEN. STAT. § 52-184(d) (Supp. 2008); DEL. CODE ANN. tit. 10, § 4318 (Supp. 2008); D.C. CODE § 16-2841 (2001); GA. CODE ANN. § 24-3-37.1 (Supp. 2009); IDAHO CODE ANN. § 9-207 (Supp. 2009); 7 ILL. COMP. STAT. 5/8-1901 (2008); IND. CODE § 34-43.5-1-4 (Supp. 2009); IOWA CODE § 622.31 (Supp. 2009); LA. REV. STAT. ANN. § 13:3715.5 (2006); ME. REV. STAT. ANN. tit. 24, § 2907 (Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (2006); MONT. CODE ANN. § 26-1-814 (2007); NEB. REV. STAT. § 27-1201 (Supp. 2008); N.H. REV. STAT. ANN. § 507-E:4 (2009); N.C. GEN. STAT. § 8C-4, Rule 413 (2007); N.D. CENT. CODE § 31-04-12 (Supp. 2009); OHIO REV. CODE ANN. § 2317.43 (LexisNexis 2005); OKLA. STAT. tit. 63, § 1-1708.1H (Supp. 2008); OR. REV. STAT. § 677.082 (2008); S.C. CODE ANN. § 19-1-190 (Supp. 2007); S.D. CODIFIED LAWS § 19-12-14 (Supp. 2009); UTAH CODE ANN. § 78B-3-422 (2008); VT. STAT. ANN. tit. 12, § 1912 (Supp. 2008); VA. CODE ANN. § 8.01-581.20:1 (2005); W. VA. CODE § 55-7-11(a) (2008); WYO. STAT. ANN. § 1-1-130 (2009).

other statutes more broadly encompass all civil cases.¹¹ The statutes also vary as to the nature of the statements that they cover. For example, some statutes make statements that express sympathy for the other's injuries inadmissible, but allow the admission of statements that admit responsibility.¹² Other statutes protect a wide range of statements, specifically making statements that express "fault," "error," or "mistake" inadmissible.¹³ Both legal scholars and psychologists have begun to explore how apologies influence decision making in the context of tort litigation. Civil defendants or potential defendants must make decisions about whether to offer an apology, and if they decide to offer one, they must decide when and in what manner they should offer it, including what they should say. Apologies or lack thereof may influence the ways in which claimants understand the events that caused their injuries. Likewise, apologies or lack of apologies may influence their decisions about whether to seek legal advice, whether to file a lawsuit, and whether and for how much to settle a lawsuit. Lawyers advise their clients about whether to give an apology, whether to request an apology, and how to respond to an apology. Judges preside over settlement conferences in which apologies may play a role. Lurking in the background is the possibility that the decisions of fact finders—judges and juries—may be affected by the existence of an apology.¹⁴

Psychologists have conducted considerable research into the ways in which apologies may influence perceptions, judgments, and decision making in a variety of contexts. In particular, apologies have

11. CAL. EVID. CODE § 1160(a) (West 2009); FLA. STAT. § 90.4026(2) (Supp. 2009); HAW. R. EVID. 409.5 (2007); IND. CODE § 34-43.5-1-4 (Supp. 2009); MASS. GEN. LAWS ch. 233, § 23D (2008); MO. REV. STAT. § 538.229 (2008); TENN. R. EVID. § 409.1 (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2008); WASH. REV. CODE § 5.66.010(1) (2009).

12. See, e.g., CAL. EVID. CODE § 1160(a) (West 2009); DEL. CODE ANN. tit. 10, § 4318 (Supp. 2008); D.C. CODE § 16-2841 (2001); FLA. STAT. § 90.4026(2) (Supp. 2009); HAW. R. EVID. 409.5 (2007); IDAHO CODE ANN. § 9-207 (Supp. 2009); IND. CODE § 34-43.5-1-4 (Supp. 2009); LA. REV. STAT. ANN. § 13:3715.5 (2006); ME. REV. STAT. ANN. tit. 24, § 2907 (Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (2006); MO. REV. STAT. § 538.229 (2008); NEB. REV. STAT. § 27-1201 (Supp. 2008); N.H. REV. STAT. ANN. § 507-E: 4 (2009); TENN. R. EVID. § 409.1 (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2008); WASH. REV. CODE § 5.66.010(1) (2009); W. VA. CODE § 55-7-11(a) (2008).

13. See, e.g., ARIZ. REV. STAT. ANN. § 12-2605 (Supp. 2008); COLO. REV. STAT. § 13-25-135 (2005); CONN. GEN. STAT. § 52-184(d) (Supp. 2008); GA. CODE ANN. § 24-3-37.1 (Supp. 2009); S.C. CODE ANN. § 19-1-190 (Supp. 2007).

14. See, e.g., Marc T. Boccaccini et al., *I Want to Apologize, But I Don't Want Everyone to Know: A Public Apology As Pretrial Publicity Between a Criminal and Civil Case*, 32 LAW & PSYCHOL. REV. 31 (2008); Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393 (2002); Michael N. O'Malley & Jerold Greenberg, *Sex Differences in Restoring Justice: The Down Payment Effect*, 17 J. RES. PERSONALITY 174 (1983).

been found to influence the attributions that people make about the causes of injury-producing behavior. Paradoxically, apologies may both provide evidence that an offender engaged in a particular behavior,¹⁵ and simultaneously alter attributions such that the causes of that behavior are perceived as being less internal to the offender, less controllable by the offender, and less likely to recur.¹⁶ In addition, drawing on equity theory, psychologists have explored the possibility that apologies help to restore a sense of equity to the relationship between the parties by demonstrating that the offender has also suffered.¹⁷ Apologies can also contribute to an experience of justice and respect,¹⁸ and they can shape parties' emotional reactions.¹⁹ The psychology of reciprocity—that we experience a felt obligation to “try to repay, in kind, what another person has provided us”²⁰—and the role

15. Such evidence might raise the likelihood of an adverse liability verdict and alter the defendant's settlement position. For literature on the effects of confessions, see, for example, Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *PSYCHOL. SCI. PUB. INT.* 33 (2004); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 *LAW & HUM. BEHAV.* 469 (1997).

16. See, e.g., Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance-Attribution Model of Interpersonal Forgiveness*, 141 *J. SOC. PSYCHOL.* 494, 495 (2001). See generally BERNARD WEINER, *JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT* (1995) (describing an attribution model of emotion and motivation).

17. See William Austin et al., *Equity and the Law: The Effect of a Harmdoer's "Suffering in the Act" on Liking and Assigned Punishment*, 9 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 163 (1976); Dana Bramel et al., *An Observer's Reaction to the Suffering of His Enemy*, 8 *J. PERSONALITY & SOC. PSYCHOL.* 384 (1968); Jerry I. Shaw & James A. McMartin, *Perpetrator or Victim? Effects of Who Suffers in an Automobile Accident on Judgmental Strictness*, 3 *SOC. BEHAV. & PERSONALITY* 5 (1975); Harry S. Upshaw & Daniel Romer, *Punishment for One's Misdeeds As a Function of Having Suffered from Them*, 2 *PERSONALITY & SOC. PSYCHOL. BULL.* 162 (1976); Elaine Walster et al., *New Directions in Equity Research*, 25 *J. PERSONALITY & SOC. PSYCHOL.* 151 (1973); see also Bornstein et al., *supra* note 14; O'Malley & Greenberg, *supra* note 14.

18. See Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 *ANN. REV. PSYCHOL.* 527, 537–38 (2001); see also Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE* 145 (Melvin J. Lerner & Sally C. Lerner eds., 1981); Tom R. Tyler, *Procedural Strategies for Gaining Deference: Increasing Social Harmony or Creating False Consciousness?*, in *SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS* 69 (John M. Darley et al. eds., 2001).

19. See, e.g., Mark Bennett & Deborah Earwaker, *Victims' Response to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 *J. SOC. PSYCHOL.* 457 (1994); Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 *BASIC & APPLIED SOC. PSYCHOL.* 291 (2000); Ken-ichi Ohbuchi et al., *Apology As Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 219, 221 (1989); Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 *MICH. L. REV.* 460, 462 (2003); Takaku, *supra* note 16; Bernard Weiner et al., *Public Confession and Forgiveness*, 59 *J. PERSONALITY* 281, 291 (1991).

20. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 19 (3d ed. 1993).

of social norms and scripts suggest that when apologies are viewed as concessions, they may elicit favorable reciprocal responses.²¹

Drawing on this rich psychological literature, researchers have discovered much about how apologies influence claimants' litigation decisions. In particular, empirical studies have shown that claimants profess to want to receive apologies²² and that those who receive apologies report a lower inclination to seek the assistance of an attorney.²³ In addition, despite being more likely to predict that they will win their lawsuit than claimants who do not receive apologies,²⁴ claimants who receive apologies tend to have perceptions and judgments that are more favorable to the other party,²⁵ tend to moderate their positions in settlement negotiations,²⁶ and are more willing to accept a settlement offer.²⁷

These effects, however, depend on the content of the apology. Full apologies that accept responsibility for causing the harm result in the most consistent effects.²⁸ Apologies that convey sympathy for the injuries but that do not acknowledge wrongdoing have effects that are more variable and context dependent; these apologies produce effects that are similar to but smaller than those produced by full apologies under some circumstances, but few effects, or even somewhat negative effects, under others.²⁹ Similarly, offers of repair or promises of for-

21. See Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" A Study of the Identity Implications and Constraints That Apologies Create for Their Recipients, 13 CURRENT PSYCHOL. 10 (1994) (finding a tendency for recipients to accept even an unconvincing apology); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCHOL. 418 (2007) (same).

22. See Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359 (1992); Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409 (2004); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (1994); Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565 (1996).

23. See Mazor et al., *supra* note 22; Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, 21 J. GEN. INTERNAL MED. 704 (2006).

24. See Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006).

25. See Robbennolt, *supra* note 19, at 462; Robbennolt, *supra* note 24, at 341–42.

26. See Robbennolt, *supra* note 24, at 353–56, 362–63.

27. See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109–10 (1994); Robbennolt, *supra* note 19, at 485–86.

28. See Robbennolt, *supra* note 19; Robbennolt, *supra* note 24.

29. Robbennolt, *supra* note 19; Robbennolt, *supra* note 24.

bearance can make apologies more effective.³⁰ In addition, contextual factors such as the severity of the injury experienced,³¹ the type of violation,³² and evidence about what led to the injury³³ can have an effect on how an apology is understood. The timing and other characteristics of an apology can also influence its effectiveness.³⁴

Research has also explored the ways in which *attorneys* respond to apologies in the context of litigation. There is evidence that although attorneys understand the messages communicated by apologies in much the same way as do claimants, apologies differently affect attorneys' decision making.³⁵ In particular, while apologies have been shown to *decrease* lay people's aspirations and estimates of fair settlement value under some circumstances, apologies tend to *increase* the aspirations and fair settlement estimates of attorneys.³⁶ Such differences can complicate the ways in which attorneys represent clients and negotiate settlements in tort lawsuits.

We know significantly less about how defendants decide whether and how to apologize. Physicians have been the most widely studied potential defendants. Studies of physicians have found that many physicians express a desire to apologize to patients when an error has occurred,³⁷ but these same studies have also found that physicians are

30. See Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127, 134–36 (1997); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465, 480 (2004). The notion that appropriate compensation is relevant to understanding apologies has been articulated by Bishop Desmond Tutu: "If you take my pen and say you are sorry, but don't give me the pen back, nothing has happened." NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 61 (2005).

31. See Ken-ichi Ohbuchi et al., *Apology As Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219 (1989); Robbennolt, *supra* note 19; Robbennolt, *supra* note 24; Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271 (1981).

32. See Peter H. Kim et al., *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial for Repairing Competence- Versus Integrity-Based Trust Violations*, 89 J. APPLIED PSYCHOL. 104 (2004).

33. See Robbennolt, *supra* note 19; Robbennolt, *supra* note 24.

34. See, e.g., Cynthia McPherson Frantz & Courtney Bennisson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 201 (2005).

35. See Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349 (2008).

36. *Id.* at 351. Additionally, judges may respond differently than either claimants or attorneys. See Jennifer K. Robbennolt, *Apologies and Settlement*, 45 CT. REV. (forthcoming 2010); Jeffrey J. Rachlinski et al., *Do Apologies Affect Trial Judges?* (Oct. 2009) (unpublished manuscript on file with author).

37. See Gallagher et al., *supra* note 22.

reluctant to conclude that error has occurred.³⁸ Additional studies have found that, despite a wide variation in actual practice,³⁹ physicians tend to provide minimal information, to choose their words carefully, to believe that patients who want more information will ask for it,⁴⁰ and to wait to make any offer of compensation unless and until a lawsuit is filed.⁴¹ Research that explores how these tendencies play out in the decision-making processes of defendants and their counsel, as well as the factors underlying these tendencies, would provide welcome insight into how apologies operate in litigation contexts. In addition, research that examines the ways in which apologizing influences defendants' approach to bargaining would be useful.

Similarly, we know very little about how the rules of evidence that protect different kinds of apologies may affect the defendant's decision to make an apology. Proponents often argue that providing evidentiary protection will allow defendants to apologize safely, concluding that more apologies will be offered as a consequence.⁴² Indeed, defendants tend to cite fear of litigation or liability as the primary barrier to offering apologies.⁴³ However, there are a variety of other potential impediments to offering apologies, including cognitive dissonance, loss aversion, embarrassment, and uncertainty about how to offer an apology.⁴⁴ As Nancy Berlinger has noted, "[M]erely pro-

38. See PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* 125 (1993).

39. Compare David K. Chan et al., *How Surgeons Disclose Medical Error to Patients: A Study Using Standardized Patients*, 138 *SURGERY* 851 (2005) (finding that forty-seven percent of surgeons surveyed offered some expression of apology or regret to the patient; these expressions ranged from explicit apologies for the error to much less direct statements of regret, such as "I'm sorry to have to tell you this"), with Thomas H. Gallagher et al., *Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients*, 166 *ARCHIVES INTERNAL MED.* 1585 (2006) (finding across a range of scenarios that six percent of physician respondents indicated that they would not offer any apology, sixty-one percent indicated that they would only express sympathy, and thirty-three percent claimed that they would give an explicit apology acknowledging the error).

40. See Gallagher, *supra* note 22, at 1004.

41. See ATUL GAWANDE, *BETTER: A SURGEON'S NOTES ON PERFORMANCE* 101 (2007); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 *VAND. L. REV.* 1085, 1122 (2006); Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 *IOWA L. REV.* 1783, 1828 (2007).

42. See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 *U. CIN. L. REV.* 819 (2002).

43. See Gallagher et al., *supra* note 22, at 1003; Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Study*, 22 *HEALTH AFF.* 73, 76 (2003); see also Stephan Landsman, *Reflections on Juryphobia and Medical Malpractice Reform*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 151 (Brian H. Borstein et al., eds. 2008) (exploring "juryphobia" as a source of these fears).

44. See generally CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME)* (2007); Cohen, *supra* note 42, at 1023–24, 1042–46 (detailing obstacles to apologies in the

tecting apologies is not the same as encouraging them. Genuine apologies are never fun to make.”⁴⁵ It remains to be seen how evidentiary protection for apologies will influence the complex decisions that defendants make about whether and how to apologize.

Critics of evidentiary protection for apologies raise concerns about the extent to which legal protection for apologies diminishes their moral value.⁴⁶ To date, experimental studies have failed to find that recipients discount the value of apologies that are inadmissible.⁴⁷ There is, however, some evidence that drawing attention to or explaining a lack of evidentiary protection—that is, making the legal risks of an apology salient—may provide those who desire an apology with an explanation for the other party’s failure to apologize completely. In one study, when claimants were told that the legal rules did not protect the opposing party’s apology, the claimants made more positive assessments of offenders who did not apologize or who offered only a partial apology than did those claimants who were told that apologies were protected or who were not given any information about the relevant evidentiary rule.⁴⁸ Thus, the effects of protective statutes on how apologies will be interpreted by claimants may be complex and could even change over time.

Even with as much as we have discovered about the role of apologies in tort cases, there are still many open research questions. What effect does the type of wrong have on how apologies are understood? Will claimants become increasingly skeptical of apologies offered in litigation? How might factors such as tone of voice, non-verbal gestures, or facial expressions moderate the effects of apologies? How do people evaluate apologies that are negotiated as part of a settlement agreement or that are offered post-settlement? Empirical answers to these questions and others will help to better inform practice and policy.

legal context). For a discussion of barriers to apologies by physicians, see Thomas H. Gallagher et al., *US and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients*, 166 *ARCHIVES INTERNAL MED.* 1605 (2006); Lauris C. Kaldjian et al., *An Empirically Derived Taxonomy of Factors Affecting Physicians' Willingness to Disclose Medical Errors*, 21 *J. GEN. INTERNAL MED.* 942 (2006).

45. BERLINGER, *supra* note 30, at 62.

46. See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135 (2000).

47. See Robbennolt, *supra* note 19, at 499–500, 502; Robbennolt, *supra* note 24.

48. See Robbennolt, *supra* note 24, at 360.

III. PSYCHOLOGY AND TORT DOCTRINE: THE REASONABLE PERSON

In addition to the implications of psychology for tort settlement, psychology has also contributed to analyses of tort doctrine. Perhaps not surprisingly, psychology has important implications for understanding the figure at the center of negligence law: the “reasonable person.”⁴⁹ Many determinations in tort are to be made with reference to a standard of “reasonableness.”⁵⁰ In particular, whether a person has acted negligently depends on whether she acted with “reasonable care under all the circumstances.”⁵¹ Factors thought to be relevant to this analysis include “the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”⁵²

A. *Judging the Reasonable Person in Hindsight*

Importantly, determinations of whether particular conduct is reasonable are to be made from an *ex ante* perspective, judging the reasonableness of the conduct before the consequences of the chosen action were known. As Prosser and Keeton note,

The actor’s conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward “with the wisdom born of the event.” The standard is one of conduct, rather than of consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.⁵³

49. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 634–35 (1999) (“[A]ny legal concept that relies in some sense on a notion of reasonableness or that is premised on the existence of a reasonable or rational decisionmaker will need to be reassessed in light of the mounting evidence that a human is ‘a reasoning rather than a reasonable animal.’”); see also Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 136–37 (2004).

50. For example, whether contact is offensive is judged by whether it offends a reasonable sense of personal dignity, and defense of self or others with reasonable force is allowed when one reasonably believes that another is about to inflict harmful or offensive contact. See RESTATEMENT (SECOND) OF TORTS §§ 18, 63 (1965).

51. Restatement (Third) of Torts: Liability for Physical Harm § 3 (Apr. 6, 2005) (Proposed Final Draft No. 1).

52. *Id.*

53. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984); see also Restatement (Third) of Torts: Liability for Physical Harm § 3 cmt. g (Apr. 6, 2005) (Proposed Final Draft No. 1) (“[I]t is not enough that there be a likelihood of harm; the likelihood must be foreseeable to the actor at the time of the conduct.”).

In negligence cases it is not enough that genuine harm has been suffered by a claimant. Among other things, the finder of fact must consider what harms were foreseeable,⁵⁴ the likelihood that the harms would result, the likely severity of the harms, and the extent to which precautions could lessen the risk of harm.

While the law is clear that negligence should be assessed from an ex ante perspective, research in psychology has demonstrated that people have difficulty taking an ex ante perspective when making ex post judgments. In particular, the hindsight bias makes it difficult to assess the predictions that one would have made in foresight.⁵⁵ Once a scenario has unfolded, it is common to experience a feeling that one “knew [it] all along.”⁵⁶ When outcome information is known, other information about the event can be re-construed in light of the outcome, creating an integrated picture of the event and its outcome that is hard to disentangle.⁵⁷ The hindsight bias occurs when people—attempting to recreate a prospective estimate of the likelihood of a particular outcome in hindsight—assign a higher probability to that outcome than do those making similar estimates in foresight.⁵⁸ Of particular importance for tort law, people “not only tend to view what has happened as having been inevitable, but also to view it as having appeared ‘relatively inevitable’ *before* it happened. People believe

54. See Restatement (Third) of Torts: Liability for Physical Harm § 3 cmt. h (Apr. 6, 2005) (Proposed Final Draft No. 1) (“The harm whose severity should be considered under this Section is not the particular harm suffered by the plaintiff, but whatever harms are rendered more likely by the actor’s conduct. There may well be a range of foreseeable harms . . .”).

55. See Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990).

56. *Id.* at 311.

57. *Id.*

58. For example, in one of the initial studies demonstrating this effect, respondents were provided with materials that described a war between the British and the Gurkas of Nepal, the strengths and weaknesses of each side, and four possible outcomes. Different groups of respondents were told that the conflict had resulted in one of the four different outcomes; a fifth group was given no outcome information. Each respondent then estimated the probability of the occurrence of each possible outcome. Respondents who had been told that a particular outcome had occurred inflated the probability of that outcome occurring as compared to the probability assigned by respondents before receiving the information. See Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288, 289 (1975). See generally Fischhoff, *supra*; Baruch Fischhoff & Ruth Beyth, “*I Knew It Would Happen*”: *Remembered Probabilities of Once-Future Things*, 13 ORG. BEHAV. & HUM. PERFORMANCE 1 (1975). For reviews of the literature, see Jay J.J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis*, 48 ORG. BEHAV. & HUM. DECISION PROCESSES 147 (1991); Rebecca L. Guilbault et al., *A Meta-Analysis of Research on Hindsight Bias*, 26 BASIC & APPLIED SOC. PSYCHOL. 103 (2004); Hawkins & Hastie, *supra* note 55; Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

that others should have been able to anticipate events much better than was actually the case.”⁵⁹

A related phenomenon, the outcome bias, occurs when people judge the quality of a decision based on its outcome. For example, decisions resulting in negative consequences are judged to have been bad decisions.⁶⁰ Thus, when people were given information about the risks and benefits related to a medical treatment decision, they judged the quality of the same decision more favorably when the treatment turned out to be successful than when it did not.⁶¹

Hindsight and outcome biases have been demonstrated in a variety of domains, including judgments about historical and political events,⁶² clinical predictions and diagnoses,⁶³ and judgments about business and financial decisions.⁶⁴ Such biases have implications for the types of judgments and decisions required of experts and fact finders in tort cases.⁶⁵ A legal decision maker who is asked to evaluate

59. Baruch Fischhoff, *Debiasing*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 422, 428 (Daniel Kahneman et al. eds., 1982) (emphasis added).

60. See Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 569, 570 (1988) (observing that while hindsight bias and outcome bias may produce similar results and may often work in tandem, the outcome bias is a distinct bias that is distinguishable from the hindsight bias).

61. *Id.* at 571–72.

62. See, e.g., Fred B. Bryant & Jennifer Howard Brockway, *Hindsight Bias in Reaction to the Verdict in the O.J. Simpson Criminal Trial*, 19 *BASIC & APPLIED SOC. PSYCHOL.* 225 (1997); Fred B. Bryant & Rebecca L. Guilbault, *“I Knew It All Along” Eventually: The Development of Hindsight Bias in Reaction to the Clinton Impeachment Verdict*, 24 *BASIC & APPLIED SOC. PSYCHOL.* 27 (2002); Fischhoff, *supra* note 58, at 428; Fischhoff & Beyth, *supra* note 58 (examining hindsight bias in the context of Nixon’s visit to China and the Soviet Union); Lee J. Gilbertson et al., *A Study of Hindsight Bias: The Rodney King Case in Retrospect*, 74 *PSYCHOL. REP.* 383 (1994); Mark R. Leary, *Hindsight Distortion and the 1980 Presidential Election*, 8 *PERSONALITY & SOC. PSYCHOL. BULL.* 257 (1982).

63. See, e.g., Hal R. Arkes et al., *Hindsight Bias Among Physicians Weighing the Likelihood of Diagnoses*, 66 *J. APPLIED PSYCHOL.* 252 (1981); Baron & Hershey, *supra* note 60; Neal V. Dawson et al., *Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences*, 8 *MED. DECISION MAKING* 259 (1988).

64. See, e.g., Clifton E. Brown & Ira Solomon, *Effects of Outcome Information on Evaluations of Managerial Decisions*, 62 *ACCT. REV.* 564 (1987); Thomas A. Buchman, *An Effect of Hindsight on Predicting Bankruptcy with Accounting Information*, 10 *ACCT. ORG. & SOC’Y* 267 (1985). The hindsight bias has also been shown to affect judgments of visual material. See Daniel M. Bernstein et al., *We Saw It All Along: Visual Hindsight Bias in Children and Adults*, 15 *PSYCHOL. SCI.* 264 (2004); Erin M. Harley et al., *The “Saw It All Along” Effect: Demonstrations of Visual Hindsight Bias*, 30 *J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION* 960 (2004). Such visual hindsight bias has implications for judgments in legal cases as well, including expert review of medical images. See Erin M. Harley, *Hindsight Bias in Legal Decision Making*, 25 *SOC. COGNITION* 48 (2007) (reviewing studies).

65. The effects of hindsight and outcome bias are not limited to laypeople, but have also been found to affect the judgments of judges and other experts. See, e.g., John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 *J. ECON. PSYCHOL.* 711 (1993); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777

the reasonableness of particular conduct will know that harm has in fact occurred. Hindsight and outcome biases are likely to affect judgments about the range of risks that were foreseeable, whether a particular risk was foreseeable, the likelihood that a particular risk would materialize, and estimates of the likely severity of harm. The risk of loss is likely to seem significant and any precautions taken are likely to seem less reasonable.

Experimental studies that have explored the hindsight bias in the context of tort litigation generally support these predictions.⁶⁶ For example, Susan LaBine and Gary LaBine compared judgments about therapists' assessments of patient dangerousness in foresight and hindsight across six different scenarios.⁶⁷ When mock jurors were told that the patient became violent, they rated the actions taken by the therapist as being less reasonable, were more likely to believe that the therapist should have done more, thought that the violence was more foreseeable, and were more likely to predict that they would have predicted violence themselves than did mock jurors who did not have this hindsight information.⁶⁸ Ultimately, mock jurors were more likely to find that the therapist was negligent when they were told that a violent outcome had occurred (24% of mock jurors) than when no violence resulted (6% of mock jurors) or when the outcome was not specified (9% of mock jurors).⁶⁹

Kim Kamin and Jeff Rachlinski obtained similar results using a scenario involving whether a city should have taken precautions to prevent flooding.⁷⁰ Participants who judged the decision in hindsight

(2001); see also Guilbault et al., *supra* note 58, at 112, 115 (finding no differences between experts and nonexperts).

66. Hindsight bias has also been explored in other legal contexts, including judgments relating to the propriety of searches and seizures. See, e.g., Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 *LAW & HUM. BEHAV.* 291 (1989); Jonathan D. Casper et al., *Cognitions, Attitudes, and Decision-Making in Search and Seizure Cases*, 18 *J. APPLIED SOC. PSYCHOL.* 93 (1988); Dorothy K. Kagehiro et al., *Hindsight Bias and Third-Party Consentors to Warrantless Police Searches*, 15 *LAW & HUM. BEHAV.* 305 (1991); Jennifer K. Robbennolt & Mark S. Sobus, *An Integration of Hindsight Bias and Counterfactual Thinking: Decision-Making and Drug Courier Profiles*, 21 *LAW & HUM. BEHAV.* 539 (1997).

67. See Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 *LAW & HUM. BEHAV.* 501 (1996).

68. *Id.* at 507-09.

69. *Id.* at 510. Despite the overall shift in assessment, post-event and pre-outcome judgments do tend to be influenced by the same types of factors, including the severity of risked outcome (potential harm) and the level of precautions taken. See Marylie Karlovac & John M. Darley, *Attribution of Responsibility for Accidents: A Negligence Law Analogy*, 6 *SOC. COGNITION* 287 (1988).

70. See Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 *LAW & HUM. BEHAV.* 89 (1995) (using a scenario based on *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964)).

made higher estimates of the probability of flooding than did those judging in foresight.⁷¹ In addition, only 24% of those judging in foresight thought that the precaution ought to have been taken, while 57% of those judging in hindsight indicated that the failure to take the precaution was negligent.⁷² Similar results have been found for hindsight judgments assessing medical diagnoses and auditor performance.⁷³

Concern about the effects of the hindsight bias in tort litigation has sparked much discussion. The hindsight bias has proven to be difficult to overcome, and those techniques that appear to hold some promise are not easily adapted to the contours of the legal system.⁷⁴ Therefore, some scholars have looked to a variety of other mechanisms that are directed at counteracting the bias, such as bifurcating trials⁷⁵ or otherwise structuring proceedings so that fact finders do not know the consequences of the decision or conduct at issue,⁷⁶ using a clear and convincing standard,⁷⁷ introducing increased reliance on strict liability

71. *Id.* at 98–99.

72. *Id.* at 98.

73. For example, physicians asked to estimate the probability of particular diagnoses being correct given a patient's symptoms either before or after learning the pathologic diagnosis display the hindsight bias, assigning higher probabilities to the correct diagnosis in hindsight than they did in foresight. See Arkes et al., *supra* note 63; Dawson et al., *supra* note 63. Similarly, several studies of the evaluation of auditor performance have found that auditor decision making is judged more harshly when the audit is followed by a negative outcome. See, e.g., Anderson et al., *supra* note 65; D. Jordan Lowe & Philip M.J. Reckers, *The Effects of Hindsight Bias on Jurors' Evaluations of Auditor Decisions*, 25 DECISION SCI. 401 (1994). Hindsight bias has also been shown to influence judgments about whether or not punitive damages are appropriate. See Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 LAW & HUM. BEHAV. 597 (1999).

74. See, e.g., Hal R. Arkes et al., *Eliminating the Hindsight Bias*, 73 J. APP. PSYCHOL. 305 (1988); Martin F. Davies, *Reduction of Hindsight Bias by Restoration of Foresight Perspective: Effectiveness of Foresight-Encoding and Hindsight-Retrieval Strategies*, 40 ORG. BEHAV. & HUM. DECISION PROCESSES 50 (1987); Kamin & Rachlinski, *supra* note 70; Lowe & Reckers, *supra* note 73; Michelle R. Nario & Nyla R. Branscombe, *Comparison Processes in Hindsight and Causal Attribution*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1244 (1995); Paul Slovic & Baruch Fischhoff, *On the Psychology of Experimental Surprises*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 544 (1977); Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 LAW & HUM. BEHAV. 671 (1998).

75. See Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 633–36 (1994); David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. & L. 485, 489–90, 493–96 (1989).

76. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1527–29 (1998).

77. *Id.* at 1530–1532.

or the regulatory system,⁷⁸ or allowing for increased deference to custom or practice guidelines.⁷⁹ Others have been more cautious, arguing that various aspects of the current system may work to minimize, counter, or offset any effects that the bias might have.⁸⁰

Recent work on the hindsight bias by psychologists has focused on exploring the mechanisms that underlie the effect, ways in which to attenuate the effect, and the nature of boundary conditions on or moderators of the effect.⁸¹ While the hindsight bias is relatively resistant to debiasing,⁸² some moderators of the hindsight effect suggest that the effect might be somewhat weaker in the kinds of situations that result in tort lawsuits. For example, while an earlier review suggested that negative outcomes resulted in stronger hindsight effects,⁸³ a recent meta-analysis found that negative outcomes result in weaker hindsight effects than do neutral outcomes.⁸⁴ In addition, studies examining real world and case histories have found weaker hindsight effects than have studies exploring the effect in the context of factual knowledge questions.⁸⁵ Similarly, tasks that require subjective assessments of the probability of risk tend to find weaker hindsight effects than those that require objective probability estimates.⁸⁶ Given that tort lawsuits tend to involve real world case scenarios that have resulted in negative outcomes, and that fact finders are not required to provide numerical probability estimates, we might expect somewhat attenuated hindsight effects in evaluations of legal cases.

Other recent studies have investigated some boundary conditions on the hindsight bias and even some circumstances in which the effect might be reversed. For example, in one recent study, Neal Roese and his colleagues explored the extent to which courtroom computer ani-

78. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1053, 1098–1100 (2000).

79. See Arkes & Schipani, *supra* note 75, at 597–601; Rachlinski, *supra* note 58, at 574, 607–613.

80. See, e.g., Philip G. Peters, *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277 (1999); Rachlinski, *supra* note 58; see also John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15 (2006). The Reporter's Note to Restatement (Third) of Torts § 3 notes that "if there is such a [hindsight] bias, it is one that the negligence system evidently finds generally acceptable." Restatement (Third) of Torts: Liability for Physical Harm § 3 cmt. g (Apr. 6, 2005) (Proposed Final Draft No. 1).

81. See Guilbault et al., *supra* note 58.

82. *Id.* at 110.

83. See Christensen-Szalanski & Fobian Willham, *supra* note 58.

84. See Guilbault et al., *supra* note 58, at 110 (finding that positive outcomes produced weaker effects than neutral outcomes).

85. *Id.*

86. *Id.* at 113.

mation might have implications for the hindsight bias.⁸⁷ One possibility is that computer animation might serve to increase hindsight bias. This might occur because “the clarity of visual presentation” depicting the outcome makes the information easier to process and points to a “coherent causal explanation” for the outcome that is difficult to discount.⁸⁸ At the same time, however, the psychology of representational momentum and intuitive physics suggests that the hindsight bias might be reversed under conditions in which the perception of motion triggers strong lay intuitions about future trajectory.⁸⁹ In such cases, *foresight* estimates might be even greater than hindsight estimates.⁹⁰

Using two different accident scenarios, Roese and his colleagues varied the presence or absence of a computer animated accident recreation and varied the point at which the animation sequence ended.⁹¹ When the accident was portrayed via computer animation, foresight participants who saw a recreation that stopped just after the negligent act made estimates of the likelihood of a serious accident that were significantly *higher* than the estimates of hindsight participants.⁹² In other words, “[p]eople became hyperconfident of impending events that involved motion and trajectory, giving higher likelihood estimates for an outcome that might happen than for an outcome they had actually seen.”⁹³ The authors suggest that this *propensity effect* could also “be related to the tendency of drivers both to underestimate the time remaining before a vehicle collision . . . and to ‘give-up’ (i.e., cease active attempts at avoidance) when a collision seems imminent.”⁹⁴ In addition, these findings hint that judging conduct in hindsight is more complex than has been previously recognized, with aspects of fact finder cognition interacting with features of the legal system to influence judgment.

B. Judging the Reasonable Person’s Cognitive Abilities

Similar problems can arise when fact finders are asked to make judgments about the cognitive abilities of others. The law contemplates that decision makers “can simply consider whether the reasonably careful person would have been aware of the risk. For example,

87. Neal J. Roese et al., *The Propensity Effect: When Foresight Trumps Hindsight*, 17 PSYCHOL. SCI. 305 (2006).

88. *Id.* at 305.

89. *Id.* at 306.

90. *Id.*

91. The study used computer animation that had been prepared for trials. *Id.*

92. *Id.* at 307.

93. *Id.* at 308.

94. *Id.* (citations omitted).

the jury can determine whether a pedestrian should have detected, and hence avoided stumbling over, a banana peel located on a crowded sidewalk.⁹⁵ However, research into the psychology of metacognition—people's intuitive understanding of their own and others' cognitive abilities—raises the possibility that fact finders will have difficulty in making these judgments in some instances. As Jeff Rachlinski has noted,

If lay intuition suggests people can see things that most people actually fail to see, hear sounds that most people actually cannot hear, attend to stimuli that most people actually miss and remember events that most people actually forget, then the reasonable person is actually a superhero; ordinary people cannot conform their conduct to the entity endowed with these abilities.⁹⁶

To take just one set of examples, research in psychology has demonstrated that people can suffer from inattention blindness (that is, failure to notice objects) and change blindness (that is, failure to notice even substantial changes in objects or scenes) when their attention is otherwise engaged.⁹⁷ In one series of studies, participants were asked to watch two teams of three basketball players and to keep track of the players' passes.⁹⁸ When participants' attention was focused in this way, nearly half failed to notice a person in a gorilla costume or a person with an open umbrella walk through the game.⁹⁹ In another study, people engaged in conversation about directions failed to notice that they were talking to a different person after their conversation was interrupted as two people carrying a door passed between them.¹⁰⁰ In still other studies, people watching filmed conversations failed to detect changes in the color of the speakers' plates, changes in whether one speaker was wearing a colorful scarf or not, and changes in the identity of the speakers.¹⁰¹

95. Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 3, cmt. k (Mar. 28, 2001) (Tentative Draft No. 1).

96. Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1057 (2003).

97. See generally ARIEN MACK & IRVIN ROCK, *INATTENTIONAL BLINDNESS* (1998); Daniel J. Simons & Daniel T. Levin, *Change Blindness*, 1 TRENDS COGNITIVE SCI. 261 (1997); Daniel J. Simons & Ronald A. Rensink, *Change Blindness: Past, Present, and Future*, 9 TRENDS COGNITIVE SCI. 16 (2005).

98. See Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1062 (1999).

99. *Id.* at 1068.

100. See Daniel J. Simons & Daniel T. Levin, *Failure to Detect Changes to People in a Real-World Interaction*, 5 PSYCHONOMIC BULL. & REV. 644 (1998); see also Daniel J. Simons, *Current Approaches to Change Blindness*, 7 VISUAL COGNITION 1, 5 (2000).

101. See Daniel T. Levin & Daniel J. Simons, *Failure to Detect Changes to Attended Objects in Motion Pictures*, 4 PSYCHONOMIC BULL. & REV. 501, 502-03 (1997).

Importantly, for purposes of a tort system that relies on fact finders to make judgments about the reasonableness of conduct, people often incorrectly predict that they would be able to detect such changes. For example, in one study, 83% of participants predicted they would detect changes that only 11% of participants in previous studies had actually detected.¹⁰² This phenomenon has been described as change blindness blindness.¹⁰³

If judges and jurors believe that particular perceptual details or changes in an environment are relatively easily detected, it is likely that such beliefs will impact their evaluations of the reasonableness of a defendant's or plaintiff's conduct.¹⁰⁴ For example, it would not be surprising if assessments of people's general ability to detect a banana peel on the sidewalk affect their judgments about the reasonableness of an actor who fails to avoid such a banana peel. Similarly, such misperceptions could also impact actors' ability to accurately judge their own abilities, with such overconfidence leading to "unreasonable" behavior.¹⁰⁵ Even if we ultimately determine that these possibilities do not warrant significant legal reform,¹⁰⁶ inquiry into the nature of such effects, their boundaries, and the implications for legal decision making can help to further our understanding of decisions regarding "reasonableness."

102. See Daniel T. Levin et al., *Change Blindness Blindness: The Metacognitive Error of Overestimating Change-Detection Ability*, 7 *VISUAL COGNITION* 397, 401 (2000).

103. *Id.* at 398.

104. However, as Jeff Rachlinski has noted, "Although psychologists have conducted numerous experiments to identify misperceptions about cognitive abilities, no one has yet clearly demonstrated that these misperceptions lead to mistaken assignments of blame." Rachlinski, *supra* note 96, at 1074.

105. See David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 334, 334 (Thomas Gilovich et al. eds., 2002); see also Jolls et al., *supra* note 76; Korobkin & Ulen, *supra* note 78; Donald C. Langevoort, *Ego, Human Behavior, and Law*, 51 *VA. L. REV.* 853 (1995). Other work in psychology has demonstrated a "bias blind spot" such that individuals are willing to believe that psychological biases and other phenomena occur in others, but not in themselves. See, e.g., Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 680, 689 (2005); Justin Kruger & Thomas Gilovich, "Naive Cynicism" in *Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 *J. PERSONALITY & SOC. PSYCHOL.* 743, 751 (1999); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 793 (2004).

106. See Rachlinski, *supra* note 96, at 1083–84 (arguing that various existing legal doctrines—such as bright line rules, negligence per se, and comparative negligence—might "blunt" the effects of this kind of misjudgment).

C. *Judging Other Aspects of the Reasonable Person*

Hindsight bias and other phenomena, such as change blindness and blindness, have interesting implications for how people judge whether particular conduct comports with the standard of reasonable care. While the implications for determinations of reasonableness of these aspects of psychology—particularly hindsight bias—have been widely discussed, exploration of the implications of other aspects of psychology for our understanding of the reasonable person standard has only just begun. For example, psychology still has much to contribute to an understanding of the reasonable person standard with regard to the ways in which the reasonableness of corporate actors is assessed;¹⁰⁷ the role of scripts in determining and evaluating behavior;¹⁰⁸ the effects of omission bias,¹⁰⁹ betrayal aversion,¹¹⁰ outcome severity,¹¹¹ and emotion¹¹² on judgments of reasonableness; the implications of pluralistic ignorance,¹¹³ false consensus,¹¹⁴ and normality bias¹¹⁵ for assessments of custom; the implications of counterfactual thinking for the

107. See VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 112–23 (2000).

108. See, e.g., Paul Heald, *Mindlessness and Nondurable Precautions*, 27 GA. L. REV. 673 (1993). See generally Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOLOGIST 715 (1981).

109. See Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475 (1994).

110. See generally Jonathan J. Koehler & Andrew D. Gershoff, *Betrayal Aversion: When Agents of Protection Become Agents of Harm*, 90 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 244 (2003).

111. See generally Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility": A Meta-Analytic Review*, 30 J. APPLIED SOC. PSYCHOL. 2575 (2000).

112. See generally Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 397 (Thomas Gilovich et al. eds., 2002); Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 322 (2006).

113. Pluralistic ignorance occurs when "individuals mistakenly assume that their beliefs, perceptions, and feelings differ from those of their peers." Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 541 (1994). See generally Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, in 28 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 161 (Mark P. Zanna ed., 1996).

114. False consensus "involves an overestimation of the commonness of one's own responses and reactions." Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 636, 642 (Thomas Gilovich et al. eds., 2002). See generally Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977); Joachim Krueger, *On the Perception of Social Consensus*, in 30 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 163 (Mark P. Zanna ed., 1998).

115. See Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583 (2003).

tension between standards and rules for reasonableness;¹¹⁶ the implications of the representative heuristic for our understanding of the doctrine of *res ipsa loquitur*;¹¹⁷ the ability and willingness of actors to engage in risk-utility calculations;¹¹⁸ differences in how people apply a “reasonable woman,” a “reasonable person,” or a “reasonable man” standard;¹¹⁹ the ways in which the presentation of risk information (for example, as frequencies or probabilities) influences judgments of likelihood;¹²⁰ and the ways in which an actor might rationalize tortious conduct as reasonable.¹²¹ Some of these areas have received more attention; others remain relatively unexplored. While this list surely does not exhaust the ways in which psychological theory can offer insight into our understanding of the reasonable person standard, it clearly suggests the potential breadth of the relationship.

IV. CONCLUSION

This Article focuses on the role of apologies in the settlement of tort suits and on one central element of a negligence claim—the breach of a reasonable person standard. But psychology is certainly relevant to a broad range of settlement issues and to each of the elements in a prima facie case for negligence, including issues of duty, causation, scope of liability, and damages.¹²²

116. See Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557; see also Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (considering the implications of self-serving bias, hindsight bias, availability, the endowment effect, and norm compliance for standards versus rules).

117. See Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 OR. L. REV. 61, 90–93 (2000).

118. See Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705 (1995); Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions That Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 285–86 (1997); Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853 (2000); Thomas S. Ulen, *Rational Victims—Rational Injurers: Cognition and the Economic Analysis of Tort Law*, in 4 CRITICS OF INSTITUTIONS: LAW AND ECONOMICS 387 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

119. See Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33 (1998); Margo Schlanger, *Injured Women Before Common Law Courts, 1860–1930*, 21 HARV. WOMEN'S L.J. 79 (1998).

120. See generally Paul Slovic et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 LAW & HUM. BEHAV. 271 (2000).

121. See TAVRIS & ARONSON, *supra* note 44.

122. I have focused on the reasonable person standard, but the psychological phenomena described may have similar implications for other standards, such as recklessness. See Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111 (2008). Similar links can be drawn between many different areas of psychological research and other areas of tort

The research on apologies is but one recent example of the contributions of psychology to the understanding of case settlement. Much additional work in psychology has proven useful in shaping our understanding of the settlement of tort lawsuits. We have learned much from psychology about persuasion and influence in negotiation;¹²³ the effects of how offers are framed;¹²⁴ the importance of the different reference points on which negotiators might anchor;¹²⁵ the self-serving ways in which parties and lawyers interpret case evidence;¹²⁶ the role of regret in lawsuit settlement;¹²⁷ the importance of fairness;¹²⁸ the role of power;¹²⁹ the psychology of options;¹³⁰ the role of reactive de-

law, including products liability, intentional torts, privacy torts, defamation, and others. See, e.g., John M. Darley & Charles W. Huff, *Heightened Damage Assessment As a Result of the Intentionality of the Damage-Causing Act*, 29 BRIT. J. SOC. PSYCHOL. 181 (1990); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1998); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 258 (2000); Korobkin & Ulen, *supra* note 78; Howard A. Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1993); Evelyn Rosset, *It's No Accident: Our Bias for Intentional Explanations*, 108 COGNITION 771 (2008).

123. See, e.g., Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829 (2003); Donna Shestowsky, *Psychology and Persuasion*, in THE NEGOTIATOR'S FIELDBOOK 361 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

124. See, e.g., Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000).

125. See, e.g., Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 3 (2002); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 18-19 (1994).

126. See, e.g., Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289 (1995); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176 (1992).

127. See, e.g., Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43.

128. See, e.g., Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 86 (Kenneth J. Arrow et al. eds., 1995); Max H. Bazerman et al., *Perceptions of Fairness in Interpersonal and Individual Choice Situations*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 39 (1995); George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426 (1989); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2003).

129. See, e.g., Joe C. Magee et al., *Power, Propensity to Negotiate, and Moving First in Competitive Interactions*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 200 (2007).

130. See, e.g., Chris Guthrie, *Panacea or Pandora's Box?: The Cost of Options in Negotiation*, 88 IOWA L. REV. 601 (2002).

valuation;¹³¹ the role of interpersonal perception;¹³² and the complications that difficulties in affective forecasting pose for settlement.¹³³

Much of the work on damages is also familiar and has focused on the factors that influence decision makers who are asked to determine damages. For example, psychologists have explored the implications of assessing compensatory damages from an *ex ante* versus an *ex post* perspective;¹³⁴ the factors that underlie decision makers' awards for different types of damages;¹³⁵ the difficulty of translating pain and suffering and punishment into dollar values;¹³⁶ the influence of anchors provided by the media, attorney *ad damnum* requests for damages, and other sources;¹³⁷ the extent to which fact finders are able to sepa-

131. See, e.g., Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 255, 270 (Mark P. Zanna ed., 1995).

132. See, e.g., Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 98 (1990).

133. See generally Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, in 35 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 345 (Mark P. Zanna ed., 2003); Chris Guthrie & David F. Sally, *Miswanting*, in *THE NEGOTIATOR'S FIELDBOOK* 277, 279–81 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). See also John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 *COLUM. L. REV.* 1516 (2008); Peter H. Huang, *Emotional Adaptation and Lawsuit Settlements*, 108 *COLUM. L. REV. SIDEBAR* 50 (2008); Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 *COLUM. L. REV. SIDEBAR* 39 (2008).

134. See, e.g., Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 *VA. L. REV.* 1341 (1995).

135. See, e.g., EDIE GREENE & BRIAN H. BORNSTEIN, *DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS* (2003); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 *BUFF. L. REV.* 103 (2002); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 *MICH. L. REV.* 751 (1999); Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 *LAW & HUM. BEHAV.* 181 (1997); see also John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 *PERSONALITY & SOC. PSYCHOL. REV.* 324 (2003).

136. See, e.g., Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 *YALE L.J.* 2071 (1997); Ivo Vlaev et al., *The Price of Pain and the Value of Suffering*, 20 *PSYCHOL. SCI.* 309, 316 (2009) ("Our results do not necessarily imply that the brain does not have stable representations of pain, but they do suggest that it cannot readily translate such representations into monetary terms.").

137. See, e.g., Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 *APPLIED COGNITIVE PSYCHOL.* 519, 522 (1996); Guthrie et al., *supra* note 65, at 802–03 (2000); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 *LAW & HUM. BEHAV.* 445 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 *J. APPLIED SOC. PSYCHOL.* 991, 1005, 1010, 1013–15 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damages Amounts in Personal Injury Trials*, 129 *J. SOC. PSYCHOL.* 491, 494 (1989); Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 *LAW & HUM. BEHAV.* 353, 359 (1999); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 *LAW & HUM. BEHAV.* 243, 252 (1997).

rate considerations of liability and damages;¹³⁸ the effect of the hindsight bias on damages awards;¹³⁹ and the “double-discounting” of damages awards in cases involving comparative negligence.¹⁴⁰

Some recent work has focused less on fact finder determinations of damages and has considered questions about the appropriate scope of damages. For example, recent work has considered the implications of counterfactual thinking for appropriate compensation: Should compensation be paid for the heightened frustration and regret attendant to nearly avoiding injury? Should compensation be paid for the harm caused by a near miss?¹⁴¹ Similar questions could be posed with regard to recent findings that the experience of pain is worse when it is intentionally inflicted than when it is not.¹⁴² Should greater compensation be paid for the same injury when it is inflicted intentionally? Other scholars have begun to debate the implications of the literature on affective forecasting and hedonic adaptation for tort damage awards.¹⁴³

138. See, e.g., Roselle L. Wissler et al., *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 *LAW & HUM. BEHAV.* 125 (2001).

139. See, e.g., Hastie et al., *supra* note 73.

140. See, e.g., Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 *LAW & HUM. BEHAV.* 577 (1999) (finding a tendency to award less in damages to a plaintiff who is negligent even when told that the judge would reduce the award to account for the plaintiff's negligence).

141. See generally Hirsch & Mitchell, *supra* note 116. See also Robert K. Bothwell & Kermit W. Duhon, *Counterfactual Thinking and Plaintiff Compensation*, 134 *J. SOC. PSYCHOL.* 705 (1994); C. Neil Macrae, *A Tale of Two Curries: Counterfactual Thinking and Accident-Related Judgments*, 18 *PERSONALITY & SOC. PSYCHOL. BULL.* 84 (1992); Dale T. Miller & Cynthia McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory*, 12 *PERSONALITY & SOC. PSYCHOL. BULL.* 513 (1986); Christopher W. Williams et al., *The Role of Counterfactual Thinking and Causal Attribution in Accident-Related Judgments*, 26 *J. APPLIED SOC. PSYCHOL.* 2100 (1996).

142. See Kurt Gray & Daniel M. Wegner, *The Sting of Intentional Pain*, 19 *PSYCHOL. SCI.* 1260 (2008).

143. See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *VAND. L. REV.* 745 (2007); Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 *IND. L.J.* (forthcoming 2010), available at <http://ssrn.com/abstract=1354234>; Cass R. Sunstein, *Illusory Losses*, 37 *J. LEGAL STUD.* S157 (2008); Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't Be (Just) About Pain and Suffering*, 37 *J. LEGAL STUD.* S195 (2008).

Psychologists have also long studied the counterfactual reasoning¹⁴⁴ that is at the heart of the but-for test of causation.¹⁴⁵ However, while the counterfactual analysis is central to a consideration of causation, causal attribution is not always, or not completely, driven by counterfactual thinking.¹⁴⁶ Psychologists know that people attribute more causal importance to acts than to omissions,¹⁴⁷ to acts that are consistent with people's pre-existing schemas about what factors typically cause particular injuries,¹⁴⁸ to acts that are otherwise morally blameworthy,¹⁴⁹ and to dispositional factors more than to situational factors, a phenomenon known as the fundamental attribution error.¹⁵⁰

144. For reviews, see Neal J. Roese, *Counterfactual Thinking*, 121 *PSYCHOL. BULL.* 133 (1997); Hirsch & Mitchell, *supra* note 116. See also Richard L. Wiener et al., *Counterfactual Thinking in Mock Juror Assessments of Negligence: A Preliminary Investigation*, 12 *BEHAV. SCI. & L.* 89 (1994). For example, researchers have found predictable patterns in the ways in which people counterfactually mutate events. See Roese, *supra*. Thus, while it is possible to alter a given scenario in infinite ways, people tend to find it easier to mutate acts rather than omissions, abnormal rather than normal antecedents, and controllable rather than uncontrollable antecedents. *Id.*

145. See Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 26 (Mar. 25, 2002) (Tentative Draft No. 2). In some instances, simply conducting the counterfactual inquiry can be complicated by other psychological phenomena. See Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 *U. ILL. L. REV.* 607 (arguing that findings in psychology about people's neglect of base rate information, difficulty in considering multiple risks simultaneously, and susceptibility to framing and availability effects make it difficult—if not impossible—to assess causation in informed consent medical malpractice cases); see also William C. Thompson, *Psychological Issues in Informed Consent*, in 3 *MAKING HEALTH CARE DECISIONS: STUDIES ON THE FOUNDATION OF INFORMED CONSENT* 83 (1982).

146. See Barbara A. Spellman & David R. Mandel, *When Possibility Informs Reality: Counterfactual Thinking As a Cue to Causality*, 8 *CURRENT DIRECTIONS PSYCHOL. SCI.* 120 (1999). See generally EDWARD E. JONES, *INTERPERSONAL PERCEPTION* (1990); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* (1985); BERNARD WEINER, *JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT* (1995); Harold H. Kelley, *The Processes of Causal Attribution*, 28 *AM. PSYCHOLOGIST* 107 (1973); Mark Alicke, *Culpable Causation*, 63 *J. PERSONALITY & SOC. PSYCHOL.* 368 (1992). See also Barbara A. Spellman, *Crediting Causality*, 126 *J. EXPERIMENTAL PSYCHOL.: GEN.* 323 (1997); Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual ("But For") and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 *LAW & CONTEMP. PROBS.* 241 (2001).

147. See Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 475 (1994).

148. See Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors' Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 *BEHAV. SCI. & L.* 127 (1994); see also Allen J. Hart et al., *Injuries, Prior Beliefs, and Damage Awards*, 15 *BEHAV. SCI. & L.* 63 (1997).

149. See Alicke, *supra* note 146. For example, people will more often find a speeding driver to be a cause of an accident when that driver is speeding so that he can get home to hide his drugs than when he is speeding so that he can get home to hide an anniversary present. *Id.* at 369–70.

150. See EDWARD E. JONES, *INTERPERSONAL PERCEPTION* 138–66 (1990); NISBETT & ROSS, *supra* note 146; Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the*

In addition, people expect to find consistency between the nature of causes and their consequences.¹⁵¹

Interesting work could be done to explore the ways in which and the extent to which people make causal attributions that depart from a straightforward but-for cause analysis. For example, psychologists have found that in cases of multiple sufficient causes, people attribute cause to both sources, even though the harm would still have occurred in the absence of either source.¹⁵² This lay intuition is consistent with the exception to the but-for rule of causation, as embodied in the Restatement (Third) of Torts § 27.¹⁵³ It would be instructive to explore other lay intuitions about causal relationships and the extent to which these intuitions are consistent or inconsistent with other facets of the legal analysis—for example, the rules regarding the scope of liability (proximate or legal cause)¹⁵⁴ or loss of chance.¹⁵⁵

Psychological findings can also be useful in understanding the rules related to limited duties. For example, the rules relating to rescue

Attribution Process, in 10 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 173 (Leonard Berkowitz ed., 1977).

151. Consistency is expected, for example, in terms of magnitude (big consequences are thought to stem from big causes), complexity (complex outcomes are thought to stem from complex causes), normality (normal outcomes result from normal causes, and abnormal outcomes from abnormal causes), and valence (negative outcomes have negative causes, and positive outcomes have positive causes). See NISBETT & ROSS, *supra* note 146; Damien L.H. Sim & Michael W. Morris, *Representativeness and Counterfactual Thinking: The Principle That Antecedent and Outcome Correspond in Magnitude*, 24 *PERSONALITY & SOC. PSYCHOL. BULL.* 595 (1998).

152. See Spellman & Kincannon, *supra* note 146. There is also evidence that “psychologically, attributions of preventability and causality are different. In attributing preventability, people focus on controllable antecedents (e.g., choice of route, stopping at a yellow light); in attributing causality, people focus on antecedents that general knowledge suggests would co-vary with, and therefore predict, the outcome (e.g., drunk drivers).” Spellman & Mandel, *supra* note 146, at 123.

153. Restatement (Third) of Torts: Liability for Physical Harm § 27 (Apr. 6, 2005) (Proposed Final Draft No. 1) (“If multiple acts exist, each of which alone would have been a factual cause . . . of the physical harm at the same time, each act is regarded as a factual cause of the harm.”).

154. For example, it would be interesting to explore how people reason about “trivial causes.” See, e.g., *id.* § 36 (addressing “trivial contributions to multiple sufficient causes”); Joseph Sanders et al., *The Insubstantiality of the “Substantial Factor” Test for Causation*, 73 *MO. L. REV.* 399 (2008); see also Joel T. Johnson & Jerome Drobny, *Happening Soon and Happening Later: Temporal Cues and Attributions of Liability*, 8 *BASIC & APPLIED SOC. PSYCHOL.* 209 (1987); Joel T. Johnson & Jerome Drobny, *Proximity Biases in the Attribution of Civil Liability*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 283 (1985); Joel T. Johnson et al., *Causal Primacy and Comparative Fault: The Effect of Position in a Causal Chain on Judgments of Legal Responsibility*, 15 *PERSONALITY & SOC. PSYCHOL. BULL.* 161 (1989).

155. See Jonathan J. Koehler, *Which Chance Was Lost? The Psychology of Damage Awards Under the Loss of Chance Doctrine*, in 2 *THE PSYCHOLOGY OF ECONOMIC DECISIONS: REASONS AND CHOICES* 211 (Isabelle Brocas & Juan D. Carrillo eds., 2004); John M. Darley et al., *Liability for Risk: Citizens’ Perspectives on Liability for Creation of Risk and Loss of Chance* (2nd Annual Conf. on Empirical L. Studies, Working Paper Series, 2007), available at <http://ssrn.com/abstract=998641>.

might be enlightened by the psychology of omission bias—that acts are perceived to be more blameworthy than omissions¹⁵⁶—or by the psychology of bystander intervention.¹⁵⁷ A consideration of how people engage in counterfactual thinking can also enlighten the rules regarding emotional harm and bystander recovery.¹⁵⁸

The range of psychological research areas with implications for tort law and practice is significant, and goes beyond the literature on heuristics and biases. A broad understanding of the ways in which legal actors think and behave allows us to refine the assumptions underlying the legal rules, to predict how the law will affect behavior, or to improve the ways in which we evaluate behavior. Sometimes, the findings from psychology have clear implications or suggest straightforward avenues for reform, but frequently the implications are more complicated. Indeed, given the myriad ways in which the influences on behavior can interact and the boundary conditions on the various findings, reform efforts based on such findings should not be undertaken lightly.¹⁵⁹ Nonetheless, research findings in psychology have provided a variety of valuable insights into, as well as variety of complications for, the tort system. Grappling with the implications of these findings for tort law can only enrich our understanding of the law and its effects.

156. See Prentice & Koehler, *supra* note 115, at 590.

157. See, e.g., John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968); John M. Darley, *Bystander Phenomenon*, in 1 ENCYCLOPEDIA OF PSYCHOLOGY 493 (Alan E. Kazdin ed., 2000).

158. See Hirsch & Mitchell, *supra* note 116 (discussing the implications of counterfactual reasoning for bystander cases). For example, Hirsch and Mitchell argue that counterfactual thinking—the “realization that ‘a near miss may be as frightening as a direct hit’”—explains the zone of danger rule. *Id.* (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 547 (1994)).

159. See Gregory Mitchell, *Taking Behaviorism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1936 (2002) (“If the policy prescriptions drawn from legal decision theory are based on faulty assumptions, bad research, or incomplete understandings of behavior, then unintended results may ensue following implementation of the suggested reforms and the intellectual integrity of the field may suffer.”).

