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Risk/Utility Analysis

Stuart Madden

PROFESSOR MADDEN: I have long imagined that Tort Law, as a presentation of liability rules, presents our culture's optimal image of itself. It is better in terms of safety, innovation, justice, and encouragement of beneficial conduct. Consistent with this in my view, the reporters have set out the central principles justifying negligence law. The general principles, as you see in Section 3 of your handout, indicate that you will be responsible for such negligent conduct as causes harm. Section 4 describes for us the type of factors that will be employed in determining whether or not an individual has acted with reasonable care under the circumstances. A balancing evaluation takes into account the foreseeability and the likelihood of a harmful result, the foreseeable severity of the harm, and the burden on the actor and others if the actor takes actions to eliminate or reduce the possibility of harm. Our burden of precautionary measures must be related to the provability of harm times the magnitude of the loss, should it occur. The ultimate evaluation of that final safety measure has been aptly described by David Owen as the microbalancing that we take into account in making that last decision.¹ That penultimate decision might be, for example, I am hungry and it is lunchtime. The ultimate decision might consider whether I dare eat at the school cafeteria. The penultimate decision might be that I need to clean up the pizza encrusted waxed paper from my pizzeria, and do I have to do it more than once every half hour; the ultimate microbalancing question is what do I gain in terms of enhanced safety for the information costs and the increased labor associated with keeping my pizzeria floor under continuous surveillance. I think that most of us would agree that continual surveillance is probably fairly costly.

The reporters used the example of the microbalancing that goes on when you are responsible for ensuring that the trees along your immense wooded estate do not fall onto adjoining highways. You have some kind of duty of surveillance. Whether that becomes a once every three month duty of surveillance or a monthly duty of surveillance is determined by the microbalancing that weighs the cost of that added precautionary measure against whatever enhanced safety (if one can be identified), you achieve.

The same evaluation applies for contributory negligence as well as for ordinary negligence, according to the reporters. Nevertheless, in evaluating the reasonable care standard in contributory negligence, factors that we will take into account in a more particularized way will be the number of persons exposed and the severity of the harm should it occur. For example, if you have a contributory negligence dilemma associated with the use of a ladder, what you are talking

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about, characteristically, is the risk of injury to the individual ladder user. But if you have negligence that will cause harm or create harm to others, such as what we would associate with drunk driving, the evaluation will be applied more severely in terms of comparative fault, in the event that there is a vehicular accident.

One of the things that the reporters do most marvelously in this restatement is to clarify for us what really constitutes cost benefit analysis and what constitutes risk utility analysis. The cost benefit analysis assumes that you are going to move proactively to reduce the risk, the number of persons who will be exposed to the risk, or the likelihood of harm. The cost of the precautions taken is the road traveled and what do you get in exchange for that cost? What benefits are derived from that expenditure of the cost? The cost can be more than just financial expenditure. It can be a variety of things.

Risk utility is the road not taken. If people continue to go out in seagoing tugs without two way radio we evaluate the risk if the conduct is not changed against the utility of continuation of the conduct. I suppose that the only virtue of continuation of the conduct, other than maybe saving \$40, was perhaps the hedonic "ignorance is bliss" pleasure that the tug owners might have enjoyed at that point. So, for me, and I think for many of you, the distinction between cost benefit analysis and risk utility analysis is valuable. You can see that cost benefit analysis and risk utility analysis are really two sides of the same coin, and the risk utility analysis has been identified by Posner as sort of a crude economic evaluation.² This theory is that a reasonable profit seeking actor will invest in safety precautions up to, but not beyond, the point which they derive certain benefits in terms of safety, or up to but not beyond which point they actually get some alleviation in terms of liability cost.

Now the balancing approach which, as the authors point out, take into account the probability of the harm and the magnitude of the law should it occur. We have run into this a lot in products liability. For example, if there is a one in a million chance of paralysis we will have a duty to warn, but if there is a one in a thousand chance of a mild under arm irritation from aluminum sulphate, we may not have a duty to warn. The authors of the restatement used the example of the steel masted sailboat that, because of new usage of the waterway, has a capacity to run into overhead high tension wires. Certainly, we ought to consider this a material risk, and you also have a great gravity of harm should it occur.

As a torts professor, I wanted to figure out whether this new approach taken by the reporters could be reconciled with the way I have taught torts. Of course, if it is not, I will not confess to it up here. But what we have done, which I think is characteristic in a lot of torts courses, is to start off on the left hand side, with duty. Duty is owed to those whom the eye of reasonable vigilance would perceive an unreasonable risk of harm should the actor proceed with an absence of ordinary care. If the result is not too bizarre, remote or extreme, we will see that with regard to the duty issue, on questions of foreseeability of the risk the plaintiffs carry the day. Without this type of limitation, you would have limitless liability. Activities would become uninsurable, and as *Anderson v.*

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*Owens-Corning Fiberglas Corp.*³ tells us, you would not know what to take precautions against. The duty part of the analysis is only part of the overall negligence evaluation, but without it you cannot seriously weigh costs and benefits as you would not know what costs to undertake. For these reasons, among others, even with the duty of foreseeable harm to foreseeable plaintiffs, there is poor Mrs. Palsgraf⁴ out there beyond the perimeter of the duty. It is a know-or-should-have-known standard without which you cannot really measure costs and benefits for the rationales that I have undertaken to describe briefly as to the lack of a pragmatic opportunity to create safety incentives without them. Thank you.

Notes

1. David G. Owen, *Toward a Proper Test for Design Defectiveness: "Microbalancing" Costs and Benefits*, 75 TEX. L. REV. 1661 (1997).
2. Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165 (1999).
3. *See Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 810 P.2d 549 (1991).
4. *See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).