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The Monsanto Lecture

ASSUMPTION OF RISK

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I. INTRODUCTION[1]

There is confusion at the very top. I refer to a famous opinion, known to generations of law students as the case of "the Flopper," authored by that common law giant Justice Benjamin Cardozo.[2] The whole point of the Coney Island amusement park ride was to flop its helpless participants to the floor. That is what made it fun, as every participant clearly realized. If years of experience were any guide, the Flopper was a largely harmless amusement. But on one occasion it yielded an unfortunate accident—the plaintiff's fractured knee cap. Cardozo's marvelous style foretells the outcome at the outset when he refers to the plaintiff as "a vigorous young man."

The opinion flops, however, when Cardozo reaches for the Latin maxim "volenti non fit injuria." This is usually translated as "he who consents cannot receive an injury." That, of course, is transparently false. The consenting

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1. I was truly pleased to give this year's Monsanto Lecture. My many distinguished predecessors have talked primarily about tort reform from the *outside*—that is, through legislation. Even though much of my own torts scholarship is also in that vein, I decided instead to address tort reform from the *inside*. Notwithstanding recent statutory changes, torts remains, of all the law school courses we offer, the queen of the common law subjects. As I will argue here, in at least one important area of tort law, judges should change the way they are looking at and talking about the issues they face. "Assumption of risk" has received considerable attention over the years, yet courts continue to get it wrong. The most important classic writing on the issue is by Fleming James, *Assumption of Risk*, 61 YALE L.J. 141 (1952) and *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); John Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961); and Francis Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906). Recent helpful writing includes Kenneth Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987); Stephanie Wildman & John Barker, *Time To Abolish Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647 (1991); and John Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991).

2. Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929).

victim in the Flopper case clearly did receive an injury, and a serious one at that. One might quickly retort that the Latin maxim does not mean to refer to the *physical* injury; rather, it refers to the *legal* injury. Yet that sweeping pronouncement, too, is clearly incorrect as I will soon demonstrate.

But first I want to underline here a theme to which I will return throughout. All too often it is the victim's apparent consent to the physical injury that has captured the legal mind—with scant attention given to whether there might properly be a difference between that consent and consent to the legal injury.

Yet there is a difference. Suppose I go to a plastic surgeon to discuss a possible nose job. My doctor says that while I almost surely will look better afterwards, I need to understand that it is always possible that she might carelessly perform the surgery, leaving me with a very distorted face. To which I reply, "Doctor, I trust you. I'll take that chance." Now suppose, as my luck would have it, her hand was not very steady that day, and, as a result of her negligence, I emerge from surgery looking like the after-version of Dorian Gray. Although I clearly chose to run this very risk—that is, the physical risk—am I prevented from successfully suing her in malpractice? Of course not. I may not be able to regain my original appearance, but I clearly can win money damages through tort law. In short, volenti non fit injuria simply does not apply.

This illustrates the central problem of the doctrinal muddle I explore here. A so-called principle that may or may not apply is of little help: indeed, it is confusing, unnecessary, and if we are not careful, it will lead us to the wrong outcome.

Of course, if my doctor had me sign a document in which I agreed not to sue her even if she committed malpractice on me, and assuming that in our state such agreements not to sue are legally valid,[3] then I would indeed lose my tort suit against her. But by merely consenting to the physical risk of her carelessly wielded scalpel, I surely did not agree that I would refrain from suing her. In short, I consented to the danger, but I still received a legal injury. I assumed the physical risk, but not the financial risk.

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3. On the validity of these sorts of agreements in general, see *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963) and *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995).

To be quite clear about it, the volenti principle relied upon by Cardozo is just another way of stating the doctrine of "assumption of risk."[4] These are not different ideas; they are the same idea—the same bad idea. Yes, of course, the plaintiff assumed the risk in the Flopper case, just as I did in my plastic surgery debacle. In the end, he deserves to lose his tort suit, while I deserve to win mine. Assumption of risk, therefore, can have nothing to do with explaining the different outcomes. Rather, I win because my doctor was negligent, and the vigorous young man loses because the amusement park was not.

Cardozo's opinion reads as though assumption of risk is a separate complete defense that the amusement park could offer up even if it were negligent. That, as we will see, is wrongheaded. Worse, Cardozo compounds this confusion with one of his most memorable phrases: "the timorous may stay at home."[5] Talking this way mis-focuses our attention on the plaintiff, when, in these sorts of situations, we should instead be concentrating on the conduct of the injurer. If my doctor started talking about "timorous" patients, suggesting I should have been content with the looks I originally had, that would get her nowhere.

Two main themes dominate the Sections that follow. The first theme is that when we are tempted to say "assumption of risk" we should instead say something else. Sometimes, we should rely on other tort doctrines that lead to the same result that conventionally has followed from the legal rule of "assumption of risk"—a defendant's outright victory. These other doctrines are "no breach," "no duty," "no cause," and "no proximate cause," and it is important to appreciate why and where "assumption of risk" is a confusing substitute for each of them. In other situations, the defendant should not win outright, in which case saying "assumption of risk" yields the wrong result. Sometimes, the proper result is a partial plaintiff victory, and those cases should be handled by the partial defense of comparative negligence. Other times, the defendant's conduct merits taking full responsibility for the loss, so that invoking "assumption of risk" would turn the proper result on its head. Again, it is important to understand when and why these two very different outcomes should prevail.

My argument here is something of a mixed positive and normative one. On the one hand, I offer what I believe to be a parsimonious explanation for most of the existing cases, one that rejects "assumption of risk" as both superfluous and unilluminating of the real reason for the result. On the other hand, by offering a better way of thinking about the cases, my analysis helps correct the mistakes that I believe some courts have made. In those settings "assumption

4. The Restatement (Second) of Torts sets out "assumption of risk" in Section 496A-G.
5. *Murphy*, 166 N.E. at 174.

of risk" is dangerously misleading. This mixed descriptive/prescriptive analysis is in the tradition of several prominent so-called "tort theorists" such as George Fletcher,[6] Richard Epstein[7] and Richard Posner.[8]

Re-directing tort doctrine as I propose reveals my second main theme—the important and too little discussed problem that I call "when is warning enough?" Howard Latin has recently engaged this question in a most insightful way in the product injury field.[9] I offer, however, a more sweeping approach to the question, showing its importance across many types of accidents with which tort law deals. In the process, I explain why the "libertarian" instinct that "warning is always enough" is, and should be, rejected by the legal system, and, in turn, why, in some appropriate settings, the defendant need actually take precautions that reduce the risk of injury in order to avoid liability.

II. NOT "ASSUMPTION OF RISK" BUT SOMETHING ELSE

A. "Assumption of Risk" as "No Breach"

Many cases in which the courts talk about "assumption of risk" are best understood as ones in which there simply has been no negligence, or more precisely, "no breach" of the duty to exercise due care. Although the Flopper case, which I already discussed, is a prime example, I will focus now on a different, very familiar situation. Suppose you are a spectator at a baseball game and you are struck by a foul ball while seated in an area of the stadium that is not protected from such balls by a screen. Although this sort of injury is often said to be governed by the principle of "assumption of risk," that is a mistake. The reason you lose the case is that the defendant's conduct was reasonable.

Surely it cannot be negligent merely to promote the national pastime. Obviously, we want to attend live baseball games, we don't want baseballs constructed of soft material, and arming each fan with some sort of individual protective shield seems silly as well. Moreover, despite the slight danger, we don't want all the stadium seats fenced, just as we don't want the seats all moved so far back from the game to be out of reach of foul balls. Either of those precautions would deprive the fans of an important pleasure they ought to be able to enjoy—seeing the game relatively up-close without the annoyance of having to look through a screen. Rather, we only want the seats to be screened

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6. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).
7. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).
8. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).
9. Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193 (1994).

where the risk from foul balls is especially great, a precaution that I assume was taken in the stadium where you were injured. That is, I assume you were struck in a location where no case for screening could reasonably be made.

In short, while spectator foul ball injuries are a regrettable by-product of baseball, they are generally not injuries that we should blame on the stadium operators because there was nothing careless about their behavior. Hence "assumption of risk" is beside the point.

Indeed, the "no breach" analysis explains why, for example, even very young children in attendance at the game, who do not really know anything about baseball or the danger of being hit by a foul ball, also properly lose their cases. In the leading California case on the subject, Judge Wood gets into trouble when he writes, "by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game."[10] Fans struck by foul balls do indeed lose because the risks created are reasonable, but not because they knowingly accepted them. In the case before the court the plaintiff alleged that since she was ignorant of baseball, had never been to a ball park before, and was paying no attention to the game at the time, she "cannot be said to have knowingly assumed the risk."[11] The opinion tries to escape from this seemingly telling point (given the court's analysis) by evading it—talking about the risks being "common knowledge," and that they are "imputed to her," and that they "should have been observed by her"[12] (piling on yet more confusion by suggesting, quite wrongly I believe, that first-time adult spectators at baseball games are somehow at fault if they choose to spend the afternoon talking with a friend rather than watching the action).

Rather, to repeat, for both the first-time fan and the five-year-old fan, just as for the experienced fan, being hit by a foul ball is just bad luck—because there is just nothing more that should reasonably have been done to protect the victim from the danger. Obviously, if foul ball injuries were much more common and much more harmful, we might well think differently about the precautions that stadium operators should take.[13]

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10. Brown v. San Francisco Ball Club, Inc., 222 P.2d 19, 20 (Cal. Ct. App. 1950).

11. *Id.* at 21.

12. *Id.*

13. One might ask why didn't the stadium operators at least provide a warning to newcomers. I find this suggestion impractical. If an effective warning really were required, then making an announcement over the public address system once people are already in their seats would seem hardly sufficient. It is implausible to expect people already sitting in the open to at that point ask for new seats behind screening or well out of the reach of foul balls.

Hence, a thorough warning would have to come before tickets are purchased. We could imagine that, before buying a ticket at the stadium, every new patron would watch a video which shows people being hit and injured by foul balls and then explains the seating options (with parallel

A parallel point may be made here from the world of intentional torts. When you participate in a properly run boxing match and your opponent injures you with a series of altogether proper punches, you have no cause of action for battery. The traditional explanation for this result is that it cannot be a battery because there was consent—volenti non fit injuria, assumption of risk.[14] But I think it is quite misleading to think of this as a consent case, when the one thing the plaintiff boxer tried hardest to do was to prevent his opponent from successfully landing a punch. The real reason the plaintiff loses, in my view, is that the defendant did nothing wrong. To be sure the plaintiff's agreement to participate in the boxing match is what legitimates the defendant taking a swing, and to be sure the plaintiff assumes the physical risk of harm. But the reason we want the defendant to win, at the core, is that he acted perfectly reasonably. This approach also better explains those carnival boxing match cases we used to see, where the local yokel gets hoodwinked into fighting the carnival pro (probably to impress his girlfriend) and then has his face smashed in.[15] Assuming we want the victim to win his lawsuit, it is because we find such matches socially unacceptable and improper for defendants to promote. It is the defendant's wrongdoing, not some legal gambit that allows us to void the plaintiff's consent, that best explains the outcome that holds the defendant responsible.

The examples so far all come from the world of sports and entertainment. But the point applies to many other sorts of cases as well. Suppose, for example, you purchase an automobile with a soft top, a convertible. Now, assume, as bad luck would have it, your car overturns for some reason that is not relevant here, and you sue the manufacturer for the damages you suffered—claiming simply that the vehicle is defective because it didn't have a metal top that would have saved you from harm. You will lose. Although it is tempting to say "assumption of risk," the best way to understand the case is that the car you bought simply was not defective.

Although this area of law today typically parades under the label of "strict products liability," in fact, the "design defect" claim you would be making here

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warnings given when people seek to purchase tickets over the phone). But I find it rather preposterous to say that stadium owners are careless for not providing such warnings. Moreover, even if a claimant managed to convince a jury that the defendant was negligent not to have given a warning, it seems to me that the victim would still probably lose on causation grounds. That is, I find it altogether unconvincing that a warned first-time spectator would, as a result, actually choose to sit out of harm's way, which usually means accepting a decidedly worse seat.

14. RESTATEMENT (SECOND) OF TORTS § 13 (1965); RESTATEMENT (SECOND) OF TORTS §§ 892-892D (1979).

15. *See* RESTATEMENT (SECOND) OF TORTS § 892C cmt. e, illus. 9 (1979).

is largely a matter of negligence law.[16] In any event, regardless of the label, the central point is that for you to win we would have to be convinced that, because of the risks involved, the car maker should not have sold you a convertible. But society does not feel that way. Because people like the open air sensation of driving convertibles and, in general, this is not dangerous, we have concluded that it is perfectly all right for car makers to sell, and motorists to buy, vehicles designed like that. As a result, there was "no breach" of the duty to provide a non-defective car.

Consider next a common situation from the medical injury field. Returning to my nose job example, suppose my doctor had told me something rather different. Suppose she said, "I want to warn you that about one percent of the time, people getting nose jobs emerge from surgery looking far worse. This is not because of any carelessness by the doctor, but, apparently, because of something about the bones certain people have. We plastic surgeons have been trying to figure out when this is likely to happen and how to prevent it, but it is all still a big mystery to us." And suppose I respond, "I understand that, doctor. I'll take the chance."

Unfortunately, in my view, this area of the law has come to be headed "informed consent,"[17] and you can bet that today my doctor would have arranged for me to sign a so-called "consent form" acknowledging that I had been informed of and was willing to run that one percent risk. But this situation, too, is best understood as one in which I lose simply because my doctor did not commit malpractice. Of course, she needs my consent to attempt the surgery at all. Otherwise, it would be battery. But when we focus in on the risks of surgery, the better analysis goes like this. Doctors have a duty to make reasonable disclosures of those risks to their patients. My doctor satisfied her duty by telling me what she did. Because I was just one of the unlucky one percent, I cannot fairly blame her for my harm. Since there was "no breach," she does not need the volenti principle as some sort of separate defense.

Next, I want to give an example of my general point from the area of premises liability. You will recall that President Clinton recently badly injured his knee when he fell down some stairs at the home of his good buddy, the golfer, Greg Norman. Imagine that the conversation just before the fall went like this. "Mr. President" (I am assuming here that even friends address the President that way) "Watch out. There are some confusing shadows down at the bottom of this stairway. I would not want you to be injured in my home." "No problem, Greg," replies the President, as I imagine it. And then bang, he falls,

16. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Tenatative Draft No. 2, 1995).

17. *See generally* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994).

and the next thing we know the meeting with Russia's President Yeltsin is delayed for a day. Many of us had previously thought of Gerald Ford as our slip-and-fall President, but no longer. Now suppose Clinton sues Norman. Maybe he would not mind being on the plaintiff side of a case given all of his other legal woes these days. Yet, I trust that the President would lose because (I am assuming at least for the moment) Norman simply was not negligent. We can say to the President "volenti non fit injuria," but assumption of risk is legally beside the point.

Finally, I want to turn to a couple of examples about which some people say "assumption of risk" where that is even more far-fetched. Suppose you are sitting in your living room watching television and suddenly, and amazingly, a car comes crashing in through the window and injures you, the driver having had an unexpected heart attack and blacked out.[18] Or suppose you are out on a walk near a baseball park when suddenly, and to your astonishment, you are struck and injured by a ball hit outside the park for the first time, a feat of such mighty prowess that no one had previously imagined it was possible.[19] In both of these instances, if you sue your injurer, you will lose. And you will lose for the same reason the plaintiff loses in the Flopper case: the defendant simply was not negligent.

Or course, in these cases you never really thought about the risk that eventuated, or had any real reason to do so, and hence in the lay sense it sounds preposterous to say that you agreed to, or assumed, it. Nonetheless, sometimes legal people are heard to say that risks like these are ones that the law "deems" you to have assumed. I admit that this is not an incoherent thing to say, although in that sense, any case in which the plaintiff loses is a "deemed assumption of risk" case. Yet it is especially confusing to bring talk of "assumption of risk" into cases like these when your choice, in effect, was simply to live in a world where freak events occur. This choice, of course, has nothing to do with explaining the legal outcome.

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18. This example is based on *Hammontree v. Jenner*, 97 Cal. Rptr. 739 (Cal. Ct. App. 1971).
19. This example is based on *Bolton v. Stone*, [1951] App. Cas. 850.

B. *Duty v. Breach and the Problem of Saying "No Duty" When What Is Meant Is "No Breach"*

In another well-known Cardozo opinion, a young boy was injured when a wire he was swinging, while crossing a bridge, came into contact with the defendant's electric railway wires, thus transmitting a damaging shock to his body.[20] In his lawsuit, the boy was required, among other things, to prove that the defendant was negligent. Establishing that the railroad failed to exercise due care generally necessitates demonstrating not only that the defendant was aware of the dangerousness of its conduct (or should have been), but also that there is some reasonable precaution that the defendant should have taken to avoid the harm. Perhaps the easiest way to justify the railway's victory in this case is on the ground that the danger to the victim was simply unforeseeable.

However, Cardozo goes on to discuss, and dismiss, possible precautions that the defendant might have taken even had it been aware of the danger (or, presumably, that it might take in the future, once it was on notice of this risk). One of those precautions would be to insulate the railroad's wires; another would be to put them underground. But, Cardozo concluded, in neither case was it negligent to fail to take such precautions. On the one hand, the electric railway needed uninsulated wires in order to function, and impliedly it was not negligent to operate an electric rather than, say, a coal-powered system. And on the other hand, demanding that they put the electric wires underground would be asking too much. That is, it would be financially too burdensome and hence unreasonable to ask that of the railway, given the small risk that the overhead wires presented. Therefore, because the boy failed to identify a reasonable precaution that the railway could have taken, the defendant would not have been negligent (and hence not liable to the boy) even if the risk was foreseeable.

This all makes a great deal of sense to me, and is fully consistent with the current understanding of "negligence" as the failure to take reasonable precautions. Put differently, the job of the legal system in such cases (usually the jury, but sometimes the judge) is to decide whether a specifically proposed precaution is appropriate or too burdensome, and it is supposed to do this by weighing the heaviness of the burden against the danger that the precaution would avoid.

The only problem I have with Cardozo's opinion in the case is that, when discussing the possible precautions, he talks about the railroad having no "duty" to underground the wires.[21] This, unfortunately, is a common formulation in

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20. Adams v. Bullock, 125 N.E. 93 (N.Y. 1919).
21. *Id.* at 94.

judicial opinions. But, to be precise, what Cardozo means is that the defendants did not "breach" their duties to take reasonable care by failing to take the precaution in question. This imprecision would not be a serious problem but for the fact that there is a separate defendant's legal doctrine called "no duty," and this case is not an example of it.

That is to say, sometimes, as I will next illustrate, defendants win cases because they had "no duty" to exercise due care towards plaintiffs in the first place. Hence, the fact that the plaintiff may be able to identify even a simple precaution that the defendant might have taken does the plaintiff no good. For you cannot fail to exercise due care as a legal matter when there is no obligation to do so in the first place.

A classic instance of this concerns the common law principle that you have "no duty" to rescue strangers.[22] Suppose, for example, you are sitting alone at the end of a pier next to a life-saving ring and I come along the pier, accidentally slip into the water, and call out for your help, but you do nothing and I drown. In a lawsuit by my heirs against you, you would prevail even if a jury, if given a chance, would have strongly condemned your inaction as callous—reflecting the failure to have taken the totally reasonable precaution of having almost effortlessly tossed the life-saving ring out to me. I will discuss the reason(s) why you would win this case shortly.

For the moment the point to be made clear is that you win for a doctrinally quite different reason than the railway wins its case with the boy swinging the wire. You win because the legal system imposes on you no duty to exercise due care towards me. The railway, by contrast, clearly did have a duty to exercise due care to pedestrians and others passing along side of their rail system; it is just that, at least in this situation, the railway in fact exercised due care. Put differently, they win because there was nothing they failed to do that they should have done; by contrast, you win the pier case despite the fact that nearly everyone will say that you failed to do something you had a compelling moral duty to do. The reason, again, is that as a legal matter, you had no duty, whereas the railroad had a duty but did not breach it.

Therefore, because "no duty" is a decidedly different idea, and hence a separate legal concept from "no breach," I find it unnerving and potentially quite deceiving when Cardozo employs the phrase "no duty" when referring to some potential precaution the railway might conceivably have taken, when it would be better to say that the failure to take that precaution was "no breach."

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22. *See generally* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

Put more broadly, the difference between the doctrines comes to this. "Breach/No breach" involves the evaluation of a specific defendant. Given what she knew or should have known, is there some way that the community (i.e., the jury, or perhaps the judge) thinks she should have acted otherwise? "No duty," however, is not a matter of making an evaluation of the specific facts of this case. Rather, it is a global determination that, for some overriding policy reason, courts should not entertain causes of action for cases that fall into certain categories.

C. Justifying "No Duty" Rules

Several overriding policy reasons may support "no duty" rules. Three common sorts of justifications I will call: 1) trumping values, 2) fears of socially undesirable conduct were a legal duty granted, and 3) judicial manageability. Often more than one such reason may be offered for a specific "no duty" rule.

I will take the space here to discuss at some length these underpinnings of "no duty" rules—not only to make even more forceful the distinction between "no duty" and "no breach," but also in order to provide the groundwork that will later be needed when I explain why certain cases that may be labeled "assumption of risk" (by others) are better understood as "no duty" cases.

Returning to the "no duty to rescue" strangers rule, this may be justified first by assigning such great weight to the value of "individual liberty." The idea is that the importance of permitting you to do what you want with your time and not have to serve as a "slave" to the needs of others should trump even the slightest social obligation to go to the aid of another. This is a principle that meshes as well with the peculiarly American commitment to the value of "rugged individualism" in which individuals are meant to be self-sufficient and not have the right (or need) to call on others for assistance.

Second, the "no duty to rescue" rule may rest on fears that it would do more harm than good. This could be based on the belief that those who can competently rescue will generally voluntarily do so even without a legal duty, and that imposing a legal duty will only bring out incompetent rescue efforts and officious intermeddlers seeking to provide help where none is needed or wanted. In the same vein, imposing a legal duty might also cause talented rescuers, like physicians, to remove themselves from locations where they might be coerced to rescue, thus undermining their opportunity voluntarily to do so.

Third is the problem of judicial administration. In many rescue settings, such as where people are in distress in public places like on the highways or in auditoriums, there are a large number of potential rescuers, and the courts may well fear that the legal system would not be able either to determine fairly just

who should have made the effort, or to handle the caseload if everyone present were permitted to be sued.

I do not mean to argue that each (or any) of these justifications is necessarily persuasive, but only to present them as examples of three types of justifications that may be put forward for a "no duty" rule. Maybe the "no duty to rescue" rule is actually better justified by yet other reasons, for example, by a different trumping value. One possibility is that we need to make room for people to act "heroically" or "charitably" rather than allowing their altruism to be demeaned by being identified as legally compelled.[23] Or perhaps, in the end, the courts are just wrong not to impose a legal duty, at least a duty of easy rescue.[24]

After all, many other common law "no duty" rules of earlier days have since been abandoned or modified. For example, it could once be said in a fairly sweeping way that product makers had "no duty" to exercise reasonable care towards users of their products with whom they had no privity of contract—which was most users once most manufacturers began selling their products through middlemen.[25] Possible early justifications for this rule were that it was too hard to tell what modifications a user might have made in the product, or that we very strongly valued the idea of "caveat emptor," or that we feared that new and desirable forms of capitalism would otherwise be stymied.

As another example, at an earlier time people in general had no duty to avoid negligently imposing emotional (as contrasted with physical) harm on others.[26] Perhaps early justifications were that allowing such actions would flood the courts with an administratively unmanageable torrent of "hurt feeling" cases, or on a ground that devalued "emotional" injury as beneath public recognition and compensation.

Nowadays, as values have changed, new understandings have emerged about behavioral responses to rules, and new notions of judicial competence have arisen, many of these sweeping no duty rules have been thrown over.

Nevertheless, even beyond the "no duty to rescue" principle, other "no duty" rules remain, and some new ones are regularly being adopted as novel lawsuits are tried out and categorically rejected. For example, when water companies carelessly fail to provide water at hydrants at the time when it is

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23. *See* Epstein, *supra* note 7, at 198.

24. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

25. *See generally* Winterbottom v. Wright, 10 Meeson & Welsby 109, 152 Eng. Rep 402 (Ex. P. 1842); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

26. *See generally* Falzone v. Busch, 214 A.2d 12 (N.J. 1965).

needed to fight a fire,[27] or when power companies carelessly cause massive "blackouts,"[28] victims who had relied on having these "essential" services and were injured by their shortage may well be barred by a "no duty" rule—justified perhaps because of fears that the potential enormity of liability would bankrupt these providers of essential services (thereby possibly depriving the public of the services altogether), or that an avalanche of claims, including faked claims, would overwhelm the judicial system.

Let me complete this illustrative run-through with a contemporary example. Suppose a television program portrays a bizarre and nasty assault by a group of boys on a girl, and the next day, in real life, the conduct displayed on this show is copied by a group of boys who had watched it together.[29] Under ordinary negligence principles, if the girl sued the program's producers (and the network that ran it), she might well win—if she could convince a jury that it was foreseeable that viewers would be inspired to act out what they watched on that particular program, and that, in view of the danger it presented, it was, on balance, unreasonable to have aired that program at all (at least with the specific attack portrayed in it). But when courts reject such cases, what they are saying is that tort law imposes no legal duty on networks to take reasonable care towards victims who are injured in the way here assumed. That is, plaintiffs are never allowed even to ask a jury to condemn this defendant's specific conduct as negligent because the judiciary has decided in advance to rule out this category of cases.

In this instance, once more, a series of justifications may be offered in support of the "no duty" holding. One is the free speech value of the First Amendment. This does not necessarily mean that the First Amendment itself actually precludes such lawsuits as a matter of constitutional law; the courts usually do not find it necessary to get that far. The point is rather that, as a matter of state common law, such suits should not be allowed because to do so would too much chill the media's exercise of free speech in deciding what programs to run. One way to put this worry is that when a local person has been injured, then local juries will improperly and unwisely devalue the free speech interest in the specific case, condemning a program regardless of its artistic, social or other merit. There is also an administrative worry concerning proof—that the jury will unfairly find a causal connection between the defendant's conduct and the plaintiff's injury that may well be lacking. In the next case the assault depicted on TV may have been of a generic sort without distinctive features, and in the following case the plaintiff may seek to connect

27. *See, e.g.*, H. R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928).

28. *See, e.g.*, Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985).

29. This example is based on *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Cal Ct. App. 1981).

the violence with a program watched weeks ago, or a series watched over a season. The risk then is that mass media operators' fears of open-ended and unpredictable liability for both these reasons would in turn be translated into socially undesirable self-censorship to the overall net detriment of society at large. And to protect against this "chilling effect," a "no duty" rule is adopted. Or put somewhat differently, the courts may conclude that tort law (i.e., decisions by juries) should not be the forum in which we try to resolve the contemporary public debate over the extent to which television violence breeds violence and what sort of censorship, if any, should follow.

Speaking generally, then, we have seen that "no duty" rules are adopted by courts as a way of preventing juries from attempting to award damages to plaintiffs in the individual case—maybe for fear that the jury will not give the proper weight to the overriding value that the court has identified (like liberty, or free speech), maybe for fear that the jury will make too many mistakes, or maybe for the other sorts of fears already canvassed (e.g., there will be too many cases brought, or bad behavioral consequences will flow from allowing such cases, or excessive liability will fall on and perhaps wipe out this class of defendants).

I want finally to emphasize that a "no duty" rule may also reflect the judgment that the social values the tort system is meant to promote are already being well served through other institutional arrangements so as to make it, in a sense, redundant to provide a tort remedy in the particular setting. This is perhaps best illustrated for the moment with workplace injuries. The idea is that, given the existence of workers' compensation schemes, governmental occupational safety agencies, and union and other bodies to which workers may turn when they discover workplace dangers, it may be concluded that the compensation, safety promotion, punishment, and individual justice objectives of tort law are already sufficiently furthered. And, in fact, the typical American solution has been to create a "no duty" barrier to nearly all lawsuits by workers against their employers—although in this setting, not by judicial adoption, but rather through workers' compensation legislation itself.

D. "Assumption of Risk" as "No Duty"

Now we are prepared to look at that category of cases in which "assumption of risk" is commonly invoked, but which are better understood as "no duty" cases. For example, it was often said that under the early common law a trespasser assumed the risk of any and all dangers he encountered on the defendant's premises.[30] Some years ago considerable attention was given to

30. *See generally* Blakely v. Camp Ondessonk, 38 F.3d 325 (7th Cir. 1994).

a California case in which a criminal fell through a high school roof to the gymnasium floor below, sued the school district, and received a substantial financial settlement.[31] The gist of the objection to the case clearly was that if you engage in illegal acts, getting hurt is a risk you take. But in the actual case, talk about "assumption of risk" decidedly puts the emphasis in the wrong place. That trespasser did not knowingly run the physical danger that injured him; rather, he crashed through a painted-over skylight that, in the dark, looked like wood. If you want that trespasser to lose, it is, I suggest, because you support the rule that the defendant simply owes trespassers "no duty" of care. To be sure, the plaintiff's status as an undeserving "outlaw" is one way to understand the reason underlying the traditional "no duty" rule—something with which the case's critics would no doubt have agreed. But that is quite different from the idea that the trespasser chose to engage any specific peril.

An especially good illustration of my point here is revealed, I believe, by cases in which professional athletes are injured in the course of competition through what they claim is the negligence of others, usually fellow players. On the whole, these plaintiffs lose. For example, in one prominent New York case a jockey, who was hurt through the alleged careless riding of another jockey, sued and was denied recovery.[32]

Notice carefully that we are not talking about inherent risks of the game arising from reasonable conduct by others—such as legitimate tackles in football, appropriate slides in baseball, fair checks in hockey, to say nothing of proper punches in boxing. Nor are we talking about unintended, inevitable accidents of the sport that are not the result of what might properly be considered negligence—such as the broken baseball bat or the accidental elbow to the body when battling for a basketball rebound. Victims in all of those cases would lose because there was no fault, that is, "no breach." Rather, I am talking here about *careless* conduct that, the plaintiff alleges, the jury would label as unreasonable if given the opportunity.

Of course, athletes know, in a general way, that they may well be exposed to injury through the careless playing of the sport by others. But, ordinarily, the physical risk they thereby may be said to assume when they elect to play would hardly itself be a ground for denying them recovery. After all, by analogy, passengers know about a parallel danger they face whenever they get on a bus, but assuming that physical risk obviously does not block a lawsuit against a negligent driver.

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31. For a fuller description of the case and some of the controversy surrounding it, see Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 337 n.47 (1987).

32. Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986).

Still, there may well be good policy reasons generally to prevent lawsuits by professional athletes for injuries suffered as part of the game through the fault of other participants. The broad argument here is one we have seen in the prior Section—that courts should keep out of the business of resolving disputes within professional athletics because the social objectives that tort law might serve by providing a remedy are already effectively dealt with through parallel institutions.

Specifically, professional sports have their own special rules (and rule-making bodies), their own umpires and referees, and their own penalty structure (both during the game and afterwards when higher-up officials can impose even stronger sanctions). Hence, in most professional sports there already exists, outside the formal legal system, an elaborate structure to deal with goals of deterrence, punishment and justice. Moreover, professional athletes (and their leagues) typically (although not always) have reasonably generous injury insurance schemes that go well beyond what workers' compensation would provide, thereby, arguably, eclipsing tort law's compensatory function. Finally, as an administrative matter, were tort law to try to offer a remedy for ordinary negligence, there might be considerable uncertainty and inconsistency in deciding whether certain conduct was fairly treated as negligence. Examples here include a wild pitch or throw in baseball, or tackling to break up the flow of the game in soccer—conduct which, on the one hand, may be undesired by the injurer but perhaps not reasonably avoidable in the heat of play, or, on the other hand, conduct which, although "penalized" by the officials, is generally treated by the players as a legitimate "part of the sport."

In sum, it is perhaps well justified to deny recovery in tort to a professional athlete for an injury arising from what would otherwise be viewed by the jury in a specific case as the negligence of another competitor. Nonetheless, as I have shown, the volenti principle is not the persuasive justification, and all the talk by the New York court that the injured-jockey "accepted the risk"[33] once more confuses the assumption of physical risks with the proper legal outcome. Rather, the explanation I have put forward is of the sort classically used to justify a "no duty" rule.

Notice further that, if the sporting behavior in question (or perhaps I should say, the "unsportsmanlike conduct" in question) goes too far beyond the bounds of routine misconduct within the sport, or perhaps if the game's officials are seen by the courts as having lost control of the sport, then the judges may well conclude that tort law has a role to play after all, and they achieve this result by

33. *Id.* at 971.

recognizing a legal duty of care.[34] The New York court in the injured-jockey case appreciated this distinction. Yet this line, if and when it is crossed, does not have anything to do with the point at which the risk of physical injury, in any real sense, ceases to be assumed, since athletes voluntarily compete knowing that they are at risk of flagrant infractions as well. Put differently, for the participants, it is not any more "all right" for opponents to carelessly injure them than it is for opponents to recklessly or intentionally injure them. Rather, the courts probably sensibly draw that line on grounds that, once the defendant's conduct has become flagrant, the policy reasons that free an athlete from liability for injuring an opponent no longer apply.

E. "Express Assumption of Risk" as "No Duty"

More than fifty years after the Flopper case, and right around the time of the injured-jockey case, another New York Court of Appeals decision provided further confusing signals in yet another amusement case.[35] A high school senior class arranged for a day of "donkey basketball" as a fund raiser. The defendant company, which provided the donkeys, helmets for participants to wear, and so on, warned everyone that there was a slight chance that the donkeys might buck or put their heads down thereby tossing the riders off. Sure enough, when her donkey put its head down, the plaintiff, a student teacher, fell off and permanently injured her arm.

The issue before the court was whether the plaintiff had expressly assumed the risk. In the torts literature it has long been well understood that "express assumption of risk" is a label applied to what are better termed "express agreements not to sue"—that is, situations, like that hypothesized earlier involving me and my doctor, where she gets me to sign a waiver of liability by agreeing not to sue her, even if she commits malpractice on me.

However, clearly no such agreement was signed in the donkey basketball case. There was evidence that, in view of the warning, the student teacher expressly assumed the physical risk—just as I did before undergoing plastic surgery; and just as the vigorous young man riding on the Flopper did. But I trust we have seen by now that this fact by itself is useless in telling us whether

34. *See generally* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979).
35. Arbegast v. Board of Educ., 480 N.E.2d 365 (N.Y. 1985).

the plaintiff should win or lose the case. The donkey riding teacher no more signed away her right to sue than I did in the original version of the plastic surgery fiasco. To hold for the donkey owners on the ground of express assumption of risk, as the New York Court of Appeals did, is altogether the wrong analysis. It fell into this trap by looking no further than the plaintiff's assumption of the physical risk.

Maybe the student teacher should lose her case—but if so, it is for a different reason. We see that better when, once again, we turn our focus away from the teacher's consent to the physical risk and examine the behavior of the defendant. Maybe, as with the owners of the Flopper, the defendant simply was not negligent. After all, if even normally tame animals very occasionally throw their riders, regardless of what precautions the owners take, then it may well be quite reasonable to provide this sort of amusement, at least when the participants are well warned of the danger. And if the defendants were not negligent, they should win outright.

Unlike the plaintiff in the donkey basketball case, accident victims in recreational activities settings may well have earlier signed an agreement not to sue. For example, suppose before joining a health club you sign a contract providing, in part, that you agree not to sue the club for any injuries you might suffer owing to the club's negligence. Assuming this agreement is valid, its effect is to relieve the club of a legal duty to exercise due care towards you. The club would probably still owe you a duty to avoid grossly or recklessly injuring you, but if, for example, you slipped on the shower floor or strained your back on an exercise machine or hurt your knee in an aerobics class and claimed that their negligence was responsible for your injury, your lawsuit would fail.[36]

Might it make sense for you and the club to make this agreement? Perhaps it does. Both management and club members may realize that it will often be very difficult to determine whether an injury was caused by the fault of the club, or by the carelessness or general health condition of the member, or whether it was just an unavoidable injury. Agreeing that there will not be litigation over such injuries, with the member then on notice to obtain her own first-party insurance elsewhere (if that is what she wants), probably helps keep the dues down. Moreover, since joining a health club is hardly compulsory, and since there are often many health clubs in a community, if people wanted to retain the right to sue, they could probably find a club that offered membership on that basis. Hence, in order to promote individual preferences we generally allow

36. For cases upholding signed releases of liability for negligence in recreational settings, see, e.g., *Barnes v. New Hampshire Karting Ass'n, Inc.*, 509 A.2d 151 (N.H. 1986) and *Okura v. United States Cycling Federation*, 231 Cal. Rptr. 429 (Cal. Ct. App. 1986).

people to sign and then uphold these sorts of agreements not to sue. Although these cases are typically said to involve "express assumption of risk," as I have already noted, the better way to understand the situation is that, by reason of the explicit agreement, there is simply no legal duty to exercise due care.

Not every agreement not to sue is upheld by the courts. For example, the leading California case striking down such a release involved an agreement not to sue hospitals for malpractice connected with medical treatment.[37] If the agreement is voided, the case proceeds as under ordinary tort doctrine and the plaintiff, with the right proof, can win outright. In these settings, public policy precludes the defendant from cutting a deal in advance with the would-be victim which curtails the victim's later ability to sue.[38]

To be sure, some of the reasons for disallowing express agreements not to sue include doubts as to the voluntariness on the plaintiff's side—such as the plaintiff's critical need for the service from the defendant, or the burying of the disclaimer in the agreement's fine print. On the other hand, Vermont's highest court recently voided a ski resort's efforts to obtain a waiver of liability on the ground (at least in part) that this would undesirably remove the resort's safety incentives.[39] In any event, when an agreement not to sue for negligence is struck down, it is only confusing to say that we are taking away a "defense." Rather, we are saying that the defendant was never properly relieved of his duty of care in the first place.

F. "Assumption of Risk" as "Contributory/Comparative Negligence"

I now turn to another category of cases where "assumption of risk" is not only the wrong way to look at the problem, but also where to do so would reach the wrong result. Suppose you go out dancing at a nightclub. You meet someone who offers to drive you to a second club. Your new friend clearly has been drinking too much, although you have not. But you are in a carefree mood and agree to go along. You see just how unsteady your friend is both while walking to the car and as your friend drives through the parking lot toward the street. Yet you remain in the car and say nothing. Sure enough, about two blocks away your friend smashes the car into a tree, and you are hurt. Assuming your state has neither an automobile guest statute (now a rarity) nor a comprehensive auto no-fault plan (which currently exists in North America only in Quebec), what happens when you sue the car's driver in tort? Volenti

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37. Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (Cal. 1963).

38. This follows even if the class of those who signed the agreement not to sue (including the victim) benefitted from the agreement through, say, lower costs of the service or product.

39. Dalury v. S-K-I Ltd., 670 A.2d 795 (Vt. 1995).

non fit injuria—you clearly assumed the risk. Do you lose? My sense is that the clear majority, if not universal rule, is "no," and properly so.[40]

At common law, simplifying somewhat, if the simultaneously negligent conduct of two parties combined to produce the injury of one of them, that victim would fail in her lawsuit against her injurer. This is because the defense of contributory negligence was a complete bar to recovery. One justification for this rule was that since the plaintiff could have avoided her harm through her own due care, she should have looked to her own precaution for protection and should not now come to the courts for relief. Another justification was simply the common law's abhorrence of anything but all-or-nothing outcomes, and its unwillingness to provide full recovery to someone who was also at fault in causing her own injury.

In recent years, this all-or-nothing thinking about a plaintiff's fault has been overthrown, driven partly by the widespread belief that juries often refused to follow their common law instructions—finding a careless plaintiff not at all at fault, and then perhaps taking some of that generosity back through a lowered damages award. As well, many commentators sharply objected to a rule that freed from any responsibility a careless (and often insured) defendant whose proper behavior would have avoided the injury, especially when this meant that the careless (and often uninsured) victim would have to bear all of the physical pain of the accident as well all of its financial consequences.

As a result, nearly everywhere today, the plaintiff's fault will serve only as a partial defense, with the plaintiff thereby entitled to recover from the defendant a portion of her loss (assuming, of course, that the defendant is also at fault or otherwise thought legally responsible for the injury).[41] Therefore, through the application of this new regime—generally called comparative negligence—the tort law now has an official device for blaming both parties to an accident by making each of them take partial responsibility for paying for its financial consequences.

In other words, the attitude of tort law today towards my example of you riding with your drunk driver friend is "a plague on both of your houses." The driver was clearly negligent in driving while seriously inebriated; you, too, were negligent, however, by accepting a ride in those circumstances. The way we punish you both for your combined foolishness is by making the defendant pay something, but at the same time by denying you full recovery. To be sure, the timorous would have stayed at the first club. But going for the ride is not the

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40. *See generally* Gonzalez v. Garcia, 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977) (upon which this example is based); UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 33 (1996).

41. *See generally* Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330 (Ala. 1993).

same as signing away your right to sue. To be sure, in this instance, even the venturous would have refused the ride. But, as I have just said, your contributory negligence, almost everywhere, is no longer a complete bar; instead, you will obtain a partial recovery, something like, say, three-quarters of your damages.

One more thing. A person might well ask *why* does tort law consider the drunk driver negligent when the passenger was willing to go along for the ride? The paradigm case for the application of the modern notion of comparative negligence, after all, is one in which both parties are carelessly *inattentive*—for example, one motorist is talking to a passenger and not paying attention to his speed or the road ahead while the other motorist pulls away from the curb without checking for traffic from the rear. There is a crash that either driver could have avoided had he been paying proper attention. Under comparative negligence (at least in the pure form), any losses the two then suffer are shared by them in proportion to their fault.[42]

But not all careless conduct is inattentive or oblivious, or the product of misjudgment or poor application of skill. That is to say, sometimes actors may be said to be "knowingly" or perhaps even "deliberately" negligent. That was certainly the case in the drunk driving example before us. A fundamental policy issue therefore is whether this latter sort of conduct by plaintiffs—about which it may be said "assumption of risk"—should be treated in a different way from inattentive negligence. On the whole, the answer has been to treat the two the same.[43]

In order to understand why that is so, the first thing to note is that this is tort law, not contract law. The community sets standards of behavior in tort law, not the parties themselves. Still, one might press, if the parties are willing to run the danger, why does the community demand more of them? Why does it, in effect, paternalize them, telling them to act safer than they apparently felt was necessary? In short, why doesn't it treat the car ride like the Flopper? This actually is a very difficult question about which I will have more to say later. For now, however, let me offer at least three reasons that together seem reasonably compelling in this situation.

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42. In the so-called "pure form" of comparative negligence, even the mostly at fault victim may still recover a small share of her damages from her relatively little at fault injurer. Under the "modified" versions, the injurer must be at least either equally or more at fault (depending upon which "modified" form has been adopted) for the victim to be able to recover anything at all. In short, in those latter jurisdictions the domain over which loss sharing operates is more restricted. *See generally* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986 & Supp. 1993).

43. *See, e.g.*, UNIF. COMPARATIVE FAULT ACT § 2 Commentary, 12 U.L.A. (1996).

First, the drunk driver endangered not just the passenger, but others on the road as well, and since we are eager to discourage and punish drunk driving generally, we are not about to let the driver off completely just because, as it happens, only the passenger was hurt.

Second, the drunk driver was far more dangerous to the passenger than the Flopper was to its participants. And so, even if the passenger and the drunk driver want to get their kicks like this, we, the rest of society, simply do not approve of that in the way we do approve of people running some other risks. After all, if someone is hurt, which is all too likely in this situation, the rest of us are probably going to have to pick up some or all of the tab through public or private insurance arrangements, but we are not eager to do that. This is in contrast to the Flopper situation where we think of the plaintiff as merely a victim of fate, like someone who happens to be hit by lightning and now needs medical care.

Third, even though the passenger willingly got in the car at the time, this is probably the sort of risk that the passenger would candidly acknowledge, in the light of day, that he should not have run. This is unlike the Flopper situation, which presumably continued to draw its patrons, even those in line when the plaintiff in that case was hurt. Indeed, the very victim of the Flopper would probably like to try the ride again, at least if his knee were up to it.

The riding-with-the-drunk example is by no means the only case in this "both at fault" category. Consider two others that come from the defective products area. Suppose you drive your new car home from the showroom, and within a day or two you realize that the brakes are working badly, pulling you sharply to the right whenever you apply them quickly. But rather than immediately taking the car back to be fixed, you are so eager to be behind the wheel that you go ahead and drive the car some more, trying to compensate by braking more slowly. Sure enough, two days later another motorist ahead of you in traffic unavoidably skids on wet pavement, you brake to get out of the way, and your defective brakes pull you into a tree.

You sue your car manufacturer for the personal injuries you suffer. Again, the general rule nowadays is that you will recover some but not all of your damages.[44] In short, both you and the car maker are held responsible for the injury—the company on the ground that it sold you a defectively manufactured auto and you for your negligence. In other words, comparative fault, or what is sometimes called comparative responsibility, applies not only to pure

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44. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2 cmt. l, 12 cmt. b (Tentative Draft No. 2, 1995).

negligence cases, but also to cases where the defendant is so-called strictly liable.

Even though this may seem like comparing apples and oranges, the jury is nonetheless told to do its best to determine the parties' relative shares of the responsibility for the injury and make its award accordingly.[45] As a result, although, by continuing to drive the defective car after discovering the defect, you clearly assumed the physical risk of just the sort of injury that happened to you, your claim will not be completely barred.

The same rule has been applied to many cases involving the foreseeable misuse of defective products. In those cases, the defendant is held responsible for its inadequate design when it did, or should have, anticipated the likely misuse of its product and had a ready way of preventing the misuse (such as by adding a better guard to a press used in the workplace). When that very misuse occurs (such as when the victim removes the inadequate guard), tort law does not want to let the defendant off. To be sure, the victim, typically, well knew that by misusing the product as he did, he was taking a risk of the very injury that followed. Volenti non fit injuria. Yet, because of the irresponsible behavior on both sides, the typical solution today is to give the plaintiff a partial recovery.[46]

Not all cases will have undisputed outcomes. You come to a skating rink, pay your money, don your rental skates, and just as you start out onto the ice you see that some rowdy teenagers are skating in ways that have made the rink dangerous for everyone. So, you complain to the manager, who assures you that he will immediately deal with the problem. You wait ten minutes, but the rowdies are still at it. Rather than complain again, or ask for your money back and leave, you venture cautiously onto the rink. Sure enough, very soon two of the rowdies bang into you, knocking you down and hurting you. Although you assumed the risk, I have little doubt that the rink owner will nonetheless be held responsible for your injuries (the rowdies, of course, are judgment proof). So, what is clear again is that the volenti principle does not apply to bar your recovery. What is not entirely clear is whether you will only receive a partial recovery on the ground that your own conduct was unreasonable. Although I would consider you partly at fault, perhaps some will disagree.[47]

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45. *See* Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978).

46. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2 cmts. l, o; 12 cmts. b-c (Tentative Draft No. 2, 1995).

47. This example is based on *Rauch v. Pennsylvania Sports & Enterprises, Inc.*, 81 A.2d 548 (Pa. 1951), a case from the pre-comparative fault era that in my view gets it all wrong, by holding for the defendant on the basis of "assumption of risk."

G. Plaintiff Wins Notwithstanding "Assumption of Risk"

In this Section, I want to address cases in which "assumption of risk" threatens to produce entirely the wrong result, that is, cases in which, rather than losing, plaintiffs should decidedly recover in full. I have already given one example, the first version of my nose job story. But if that sounded somehow fishy to you, consider next this slight variation on another well-known case.[48]

A porter employed by a railroad negligently spills a very slippery substance on a railway platform and does nothing to deal with the danger thereby created. Sure enough, a passenger walking down the platform while awaiting a train slips and falls onto the tracks. This passenger happens to be a two-year-old who then becomes trapped on the rails, both too frightened and too weak to move. The train is now roaring towards the station, and the child's father who had planned to take the helpless infant on a journey with him, faints with terror. But you, our super-hero, seeing that the child will almost surely be killed if nothing is done, jump down onto the tracks, and in a flash pick up the child in your arms and scamper towards safety. Alas, even you could not outrun the oncoming locomotive which rolls over your trailing foot causing you grave injury. The child is safe; you get your picture in the paper and lifelong thanks from the child's family.

Not satisfied with those rewards, you sue the railroad in tort. Its lawyers plead "volenti non fit injuria"—assumption of risk. But, unlike the victim in the Flopper case, you will win. In yet another of Cardozo's marvelously coined phrases, "danger invites rescue."[49] In these circumstances, harm to a rescuer like you is exactly what the defendant should have expected would happen, and the railroad will be liable to you for the harm resulting from the negligence of its porter. You clearly did assume the risk of physical harm, but not the legal risk; the "timorous" remained on platform, yet you will win your case.

Consider next a similar outcome from an entirely different area of tort law. You buy a power lawn mower. It contains a large caution sign over the hole from which the grass comes out, warning you to keep your hands, feet and the like out of there. Although you know you are supposed to keep away from that hole, suppose that while using the mower you accidentally slip and fall, and sure enough one of your limbs goes part way into the hole and you are badly mangled. At trial your lawyer is able to show that for one dollar more the mower manufacturer could have added a guard to the product that would have prevented your injury. In most jurisdictions today, the so-called "open and

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48. This example is based on *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871).
49. Wagner v. International Ry. Co., 133 N.E. 437 (N.Y. 1921).

obvious danger" rule has been abrogated because of situations just like this.[50] Despite the fact that you clearly realized the risk you were running, courts have concluded that tort law nonetheless should condemn product makers for clear design errors. As a result, the jury is very likely to find the mower to be a defective product and award you full recovery in this example, even though it might be said about you "volenti non fit injuria."

III. WHEN IS WARNING ENOUGH?

Although I have not especially emphasized it so far, my examples reveal a difficult and too little discussed problem to which I turn next. I will call it: "when is warning enough?"[51] A warning was sufficient in the soft top convertible case, but not in the lawn mower case. A warning was sufficient in the Flopper case, but not in the defective brakes case. A warning was sufficient in the President's slip and fall case, but not in the riding with the drunk case. When I discussed the drunk driver case, I gave some reasons to justify that specific result. In this Section, I want to discuss the issue more generally: when should a clear warning fully discharge the defendant's duty to exercise due care, and when should the defendant be required to take precautions to reduce the danger?

A. No Reasonable Precautions Available

In many situations a warning is sufficient because there are no additional precautions available that the plaintiff can reasonably suggest that the defendant should have taken. I have in mind here cases in which society believes that the product, service or whatever ought to be able to be offered as it was, and to have reduced the danger would have meant a dramatic and unacceptable change in what the defendant provided.

For example, suppose a ski slope operator carefully warns you, through markers, maps and the like, which of its trails are suitable for beginners, which are suitable for intermediate skiers, and which are suitable for advanced skiers. Alas, you, an intermediate skier, break your leg while on an advanced slope

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50. This example is based on *Luque v. McLean*, 501 P.2d 1163 (Cal. 1972). *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmts. c, i (Tenative Draft No. 2, 1995).

51. For a fine discussion of this problem in the product injury settings, see generally Latin, *supra* note 9. For a response to Latin, see Kenneth Weissman, *A "Comment J" Parry to Howard Latin's "Good" Warnings, Bad Products, and Cognitive Limitations*, 70 ST. JOHN'S L. REV. 629 (1996). In important respects Weissman seems to be talking past Latin, because, despite all of his criticism, Weissman concedes that plaintiffs should be able to win by showing that the product was defective notwithstanding the provision of a "good" warning. *Id.* at 689. That, however, is also what Latin wants the victim to be able to do. Latin, *supra* note 9, at 1290-92.

where you should not have been. In this instance, the warning will satisfy the operator's duty to exercise due care. So that friends and families can all go to the same mountain, we want ski slope operators to be able to cater to a range of skier abilities. But in order to do that, they need to offer ski runs of increasing difficulty.[52] I am assuming that everyone agrees that it is totally impractical for the resort operator to test skier abilities before every run they take. So, as I have emphasized throughout, if you sue you should lose, although the reason is not "assumption of risk" but rather that there simply was "no breach." The point to be emphasized now, however, is that in this instance an adequate warning was enough.

This category also contains the Flopper case and the convertible case. The amusement park could have turned the Flopper into a very safe moving sidewalk going nowhere, but then who would want to ride on it? And if drivers could only open the windows but not put the top down, the motoring experience just wouldn't be the same.

This analysis applies as well, I believe, to more controversial matters. Take cigarettes, for example. To me the right way to understand the core of the tobacco litigation to date is that society, in the end, has considered cigarettes to be like the Flopper. In short, cigarettes, as a legal matter, have not been treated as a defective product. This is because, despite their great dangers, we have concluded that this product ought to be able to be sold (at least to adults), and so far as we can tell, to take away the risk of cancer, heart disease, and lung disease would also mean to eliminate cigarettes as we now know them. In short, like the Flopper, so long as the dangers are made clear, we have been unwilling to say that they should be taken off the market. Of course, the legal conclusion could change if people start believing otherwise—either about the viability of a safer cigarette or about the acceptability of selling cigarettes at all.[53]

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52. Obviously, ski slope operators can be at fault on some occasions, either by failing to warn adequately, or by failing to take precautions we do want them to take, such as properly maintaining the chair lifts and closing runs where there are special avalanche dangers. But I am assuming in this example that nothing of that sort is amiss.

53. *See generally* SMOKING POLICY: LAW, POLITICS AND CULTURE (Robert Rabin & Stephen D. Sugarman eds., 1993). To be sure, some smokers today might understandably gripe that the tobacco makers failed to provide them an adequate warning about the risks and addictive nature of the product, especially those people who started smoking as youths. But the United States Supreme Court concluded that Congress has pre-empted those tort claims (at least for those who started smoking after 1965) by deciding that the legally required warnings on cigarette packages are sufficient. *See* Cipollone v. Liggett Group, 505 U.S. 504 (1992). Those who started smoking before the warnings appeared have different legal problems. Some find it hard to prove that the companies themselves knew of the dangers at the time the victim began using the product. Most also confront a cause in fact problem—convincing the jury that they would not have started smoking had they been warned. On this score, their continued smoking in the face of the warnings, notwithstanding claims

A nice counter-example makes the point even more sharply. Many years ago I saw a cartoon depicting a customer inside a supermarket looking at two bins of apparently similar products. One has a sign that reads "Mushrooms $2.49 a pound." The other has a sign that says "Mushrooms? 3 cents a pound." Suppose you actually buy some of the 3 cents a pound product, eat it, and become critically ill because those mushrooms were poisonous. In contrast to cigarettes, I am firmly convinced that we would find it entirely unacceptable for supermarkets to sell such a potentially fatal product, regardless of its low price. Hence, the store would be liable for selling you a defective product, notwithstanding the clearly implied warning that the bin of cheap mushrooms might be deadly to eat.[54] That is, warning was not enough.

In fact, there are actually very few reported cases like the mushrooms example. New Jersey courts started down this route at one point when they concluded that certain backyard, above-ground swimming pools could be deemed defective (and the manufacturers held liable), regardless of any warnings they carried.[55] These pools were viewed as simply too dangerous and thus should not have been sold at all. It has also been suggested that diabolical products like highly dangerous lawn darts are also in this category.[56] But, for understandable reasons, tort law has been very slow to condemn products, services and conditions squarely on the ground that they are so dangerous that their very provision to a seemingly willing plaintiff was socially unacceptable.

B. Available Precautions and Injuries to "Strangers"

So, let me turn then to cases in which the plaintiff can propose a plausible precaution that the defendant might have taken without dramatically transforming the good, service or situation it provides, but where, instead of taking the precaution, the defendant only warned of the danger.

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of addiction, will frequently doom their cases.

54. Perhaps you would be held contributorily negligent for buying the product and have your damages reduced accordingly.

55. O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983). Whether the plaintiff could also be held contributorily negligent is another matter.

56. The New Jersey legislature has restricted *O'Brien* by statute. Now that statute permits a product to be condemned essentially only where the product is "egregiously unsafe," of "little or no usefulness" *and* the ordinary user "cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer." N.J. STAT. ANN. § 2A:58C-3 (West 1996). The proposed Restatement (Third) of Torts: Products Liability, however, does not appear to give such product makers a "warnings" escape hatch. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (Tenative Draft No. 2, 1995).

In some settings, it seems clear that warning alone will not suffice. Suppose the defendant posts a large sign telling people to be on the lookout for trucks emerging from its building site. You see the sign as you approach the site on foot on the sidewalk and continue on alertly. Just as you are crossing the driveway, you are struck by a truck being carelessly driven out of the site by one of the defendant's employees (say, the driver was going too fast). In that event, the defendant would be liable to you. The warning clearly will not replace the duty of its employees to drive carefully.

Or consider another example. Defendant is a new driver and posts a large "learner" notice on his vehicle. You, an experienced driver, find yourself driving in traffic along side of the defendant and you see and understand the defendant's notice. You don't pull out of the way, but continue to drive as you normally would. The defendant then changes lanes carelessly, crashes into your car, injuring you. Once more the warning alone will not suffice to satisfy the defendant's duty of care.

In other words, in both of these examples the defendant is not permitted to slough off his duty to exercise due care merely by making you aware that he is acting, or might act, carelessly. Even with this knowledge, you are still, as a legal matter, entitled to demand that he actually take the precautionary measure. Perhaps your knowledge entitles us to say of you that by continuing your activity in the face of the warning you assumed the physical risk. But legally saying "assumption of risk" would get us into trouble.

To be sure, there may be some cases in this category in which we would consider it unduly foolhardy for the plaintiff to continue on with her own lawful activity in the face of the defendant's conduct. For example, suppose she saw not just the warning signs, but also the speeding truck heading for the exit, or suppose she saw the novice driver actually weaving out of control. In those situations, her failure to take reasonable precautions to get out of the way (despite minor inconvenience to her) could well be viewed as negligent on her part. But as we have already seen, the consequence of that today, generally speaking, is not a complete bar (as would follow from "assumption of risk") but rather some appropriate reduction of her damage award.

The examples just described involve what we usually would call injuries to "strangers." Although the plaintiff and the defendant may belong to the same community and have been sharing the road or sidewalk or crosswalk, they were not really involved in a transaction together. In such settings, tort law says you may not subject another to unreasonably dangerous risks merely by warning that you are about to do so.

C. Available Precautions and Voluntary Relationships Among Ordinary People

It gets much trickier, however, when there is something of a voluntary relationship between the parties, such as buyer and seller, owner and invitee, employer and employee, doctor and patient, and the like.

Consider first the homeowner with a guest in his house. Let's re-run President Clinton's recent injury with a different script. Now suppose the President hears Greg Norman say, "Watch out when you go down those stairs Mr. President. The handrail broke off last week, and I haven't had time to replace it yet." Or suppose the President simply realizes that, even though the stairs are rather steep, there is no handrail. In that situation, even if the President could convince us that he would not have fallen had there been a hand rail for him to hold onto, he probably will lose.[57] As usual, I would say this is not because he "assumed the risk" but rather because the legal system would conclude that, in this case, a warning is sufficient—either the personal warning by the defendant or the implicit warning by the open and obvious condition of the stairs themselves.

But why is a warning sufficient here, when it would not be all that difficult for Norman to have replaced the handrail? The right answer, I believe, is that we feel that it is too burdensome to ask ordinary homeowners to make these repairs even if they are not very expensive. In other words, if the homeowner himself is willing to live with this sort of danger (usually not a very large danger), then we conclude that it suffices to satisfy his obligation to exercise "due care" to put the visitor on the same footing.

Historically, this point was broadly captured by the different levels of care said to be owed to invitees and licensees. The paradigm invitee was someone welcomed for business onto commercial premises, whereas the paradigm licensee was a social guest in one's home. Simplifying somewhat, the law allowed the invitee to demand that the owner both reasonably search for dangers and repair those he found, or should have found; whereas the licensee could ask no more than for reasonable warnings of dangers already known to his host.[58] But now, even in those many jurisdictions where the formal distinction between invitees and licensees is breaking down,[59] the application of the general negligence principle will yield the same result. That is, for social hosts, the exercise of due care will generally be satisfied by warning, so that the victim

57. RESTATEMENT (SECOND) OF TORTS § 342 (1965).

58. *Compare* RESTATEMENT (SECOND) OF TORTS §§ 341, 342 (1965) (regarding licensees) *with* §§ 341A, 343, 343A (regarding invitees).

59. *See, e.g.*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

will generally not succeed if he bases his case on the claim that the danger should have been removed.[60]

Take two seasonally different examples. The weather has brought us snow and ice. I have invited you over for dinner, but I have not cleared my driveway or stairs. You see the danger, but alas you slip and fall and injure yourself. You probably will lose your suit against me for failing to shovel or de-ice.[61] Alternatively, you come to town to play in a summer tennis tourney and need some place to practice. You ask to use the court I have in my backyard, and I warn you that there is an uneven spot along the baseline that I have not repaired. You decide to practice there anyway and trip at that spot. You will probably lose your case against me.[62]

D. The Inadequacy of the Libertarian Perspective

The outcome of these cases might suggest that the courts have embraced what I will call the "libertarian outlook." But, after explaining what I mean by that, I will then show that this conclusion is a mistake.

From the libertarian perspective, in cases involving "voluntary relationships," an effective warning should always suffice. If the plaintiff did not want to go ahead in the face of the danger, she should not have done so. Because she has chosen to do so, she should not later be able to say that the defendant should have presented the transaction to her on different and safer terms. If the defendant had no obligation to enter into the transaction in the first place, it was sufficient to disclose at the outset the risks involved and leave it to the plaintiff to decide.

Put differently, the libertarian would be opposed in principle to having the legal system step in and allow the jury to conclude that the defendant should have done something different. This would remake the transaction between the parties, and that presumably would over-ride their own (original) preferences and interfere with their private liberty to make the transactions they wish. In short, victims should be stuck with the choices they made.

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60. In the leading *Rowland* case, for example, there is every reason to believe that the apartment-dweller host would have satisfied her obligation to exercise due care had she warned her guest of the hidden danger in the bathroom. *Id.* at 567.

61. *See, e.g.*, Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995).

62. This example is loosely based on *Heldman v. Uniroyal, Inc.*, 371 N.E.2d 557 (Ohio Ct. App. 1977).

Notice that, by contrast, in cases that do not involve voluntary relationships, the libertarian outlook cuts the other way. So, as in my learner-driver and truck-pulling-out-of-the-building-site examples, when the plaintiff is out on the road (on foot or in a car) exercising her liberty of movement, the defendant will certainly not satisfy his duty of care by warning, thereby hoping to get away with imposing an unreasonable risk on the plaintiff. This is because doing so would, of course, interfere with the victim's liberty to drive or walk where she has a right to be.

The libertarian perspective puts considerable weight, then, on determining whether a specific relationship is voluntary or not. Even when it is voluntary, it is necessary to determine whether the warning given was truly effective so as to make it fairly said that the plaintiff knowingly made an informed choice to continue in the face of the danger. If these conditions are not met, then the libertarian would also agree that the defendant might be blamed for the injury.

Although the libertarian perspective comfortably explains the Flopper case, the situation with cigarettes (provided we agree that the warning has been adequate), the tennis court case, the missing handrail case, and so on, it would be wrong to assume that this is the right way to understand today's tort law. This is because it fails to explain a large number of cases, to which I will turn next, in which a clear warning to someone in a voluntary relationship is insufficient. In these cases society, through tort law, insists that the defendant actually take the safety precaution that removes the danger. In other words, the libertarian perspective too much emphasizes contract and consent—assumption of risk if you will—without allowing a sufficient role for tort and community standards.

For example, as noted earlier, in most jurisdictions, product makers are very unlikely to escape liability for patent dangers in their products that are readily eliminated by simple redesign strategies. A warning will not suffice. My lawn mower case demonstrates this point. Other illustrations from the product injury field include situations in which the victim uses the product after discovering the defect—my bad brakes example—and those in which the product maker realizes that the product will be misused—my example of the plaintiff using a machine after removing the guard.

But product makers are not the only defendants required to do more than warn. For example, landowners increasingly have duties to take reasonable steps to make safe areas that are open to the public, to protect tenants and patrons from crime and so on. Those defendants are now much less likely to

escape liability because the danger is open and obvious or because the defendant had warned of the danger.[63]

A key point to notice here is that these defendants tend to be commercial actors on whom we are willing to impose the burden of taking precautions beyond warnings. This may be seen more clearly in the following example. Suppose you come to my home and I warn you that the chair you propose to sit in has a weak leg. If so, I probably will not be found liable to you when the chair collapses, because I discharged my duty of care to you through warning. I am not obligated to fix these sorts of dangers in my home in order to prevent such injuries to my guests. Hotels, by contrast, would generally not get away with providing their guests with rickety seating even if they did warn of the danger.[64]

E. Why More than a Warning Is Required

But why do we insist on more than a warning from these commercial defendants when the plaintiff himself did not demand more? A generalized response is this: tort law asks more for the same reasons that our society has imposed housing codes on landlords, FDA requirements on food sellers, CPSC regulations on product makers, OSHA restrictions on employers and so on. Simply put, we just do not always trust individual choice and the market to provide the level of safety that society considers desirable.

But, at least in the torts area, what more specifically might be said to lie behind these requirements? Let me offer several arguments. First, we may have generalized doubts as to the voluntariness of the conduct of those in the plaintiff's situation. At the workplace, for example, the libertarian viewpoint simply assumes that when employees accept dangers connected to their jobs they do so truly by choice, by obtaining higher wages in return. But many people today do not generally accept the libertarian's underlying assumption about the free market for labor, reasoning that all too many workers must accept whatever dangers they face on the job for fear that they would otherwise be out of work and out of money. Rather than seeing a worker as someone who prefers to handle a printing press whose guard has been removed, they see that worker as a victim of superior bargaining power—someone who, in effect, has to accept the dangerous machine under duress. Tenants who wind up living in dangerous housing (typically lower income people) are also seen to be other than truly

63. A leading case is *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). *See also* Woolston v. Wells, 687 P.2d 144 (Or. 1984); Harrison v. Taylor, 768 P.2d. 1321 (Idaho 1989); Ward v. K Mart Corp, 554 N.E.2d 223 (Ill. 1990); Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994); Bertrand v. Alan Ford, Inc., 537 N.W.2d 185 (Mich. 1995).

64. *See generally* RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

voluntary participants to the transaction in question. These realities may help explain why warning is found to be insufficient in cases involving workplace and apartment house accidents.

Note well, that the tort rules applied in these settings that require defendants to do more than merely warn not only reject the generalized libertarian assumption about transactions of these sorts (e.g., in employment and housing), but they also reject its application in an individualized way to the accident in question. This employee will be able to insist that the defendant should have provided a safer machine without having to show that his specific encountering of that machine was effectively coercive rather than voluntary. This tenant will be able to insist that the landlord should have provided better locks and lighting without having to show that she actually had no choice in accepting the apartment in question.

Second, some injuries arise out of situations in which it is widely believed that reasonable people would wish, if they really thought about it, to have been protected against the danger that they faced—even though, by their conduct, they appear to have willingly confronted that danger. Suppose, for example, you are told about a very small chance of a very serious harm, but because it seems so small you simply disregard it. Now it turns out that there was a way to have paid a bit more to have avoided the risk. The libertarian view is that this is a risk you ran, and you must bear the consequences. But society might nonetheless believe that it well serves people's own best interests—their true preferences if they really thought about them—to prevent them from running that risk at all. Tort law tries to do that by telling defendants that it will not be sufficient to warn of the risk, and that to avoid liability it is necessary to take the precaution that eliminates the risk. The problem of momentary inattention and slips-of-the-hand by product users is another example in this same vein. Again, society might well conclude that we, the users, actually want the law to impose a kind of self-paternalism on us, one that keeps us from choosing a product that could hurt us through our momentary carelessness, if it would only cost a bit more to eliminate that risk altogether.

Third, sometimes a warning will suffice for some people, perhaps even most of those who are exposed to the risk. This is because, once forewarned, they are able to deal with the danger in ways so that they will remain uninjured. Yet other people need the defendant to take actual precautions if they are to be protected from harm. Those in the latter group may be especially clumsy, or have bad judgment, or do not properly read, digest, or remember warnings given to them. Others may be children who are immature or have an

exaggerated taste for danger. And so on.[65] The law might well, in the end, treat some of these people as contributorily negligent if it were to come to that, but as we have seen, that defense would only arise as a partial defense to an already liable defendant. And that is the question here. Should some people's need for protection against their own inadequacies, whether or not they are contributorily negligent, create an obligation in the defendant to do more than warn? Assume further, for the moment, that the defendant will have to treat everyone alike, so that the precautions would have to be imposed on some people who do not need them. Even in this setting, however, society may well decide that defendants must do more than warn, and that, on balance, it is better to insist on precautions that may only help some. Mandating air bags, although not quite the right example, illustrates the point. Their primary benefit is to those who should, but for whatever reason do not, use their seat belts. Yet we are now insisting on air bags for everyone. (In fact, air bags also provide some extra safety benefit even for those who are already using seat belts, but even if they did not, the point here is that we might mandate them anyway.)

Fourth, sometimes what seems like a voluntary transaction between two parties also involves risk of harm to third parties. This risk creates what is commonly termed an externality. My earlier example of riding with a drunk driver fits this category. Again, contrary to the libertarian who would hold you responsible for your own choice, tort law today permits you to advance what are, at least in part, the safety concerns of others who were involuntarily endangered by the driver's conduct.

Even more broadly, there may be a desire in cases like this to impose precautions on would-be victims for the benefit of their loved ones who later suffer if the victim is badly injured, and/or for the benefit of society at large which wants neither to lose the productive capacity of needlessly injured workers nor to have to bear the welfare costs of caring for such people. These sentiments might be said to involve a different sort of externality. Nonetheless, they seem directly to reject the libertarian ideology which treats people much more seriously as autonomous individuals.

Economists typically point out that imposing more safety on defendants will result in lower wages, higher rents, more expensive products and the like. If those costs were large, a point to which I return below, we may well be reluctant to impose them. But the general point here is that, in those instances in which the burden of precaution is modest, tort law is a vehicle for promoting the adoption of that precaution when we believe that more than a warning is socially desirable.

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65. *See generally* Latin, *supra* note 9.

Of course, as an institutional matter, tort law imposes these obligations on defendants through juries as guided by judges. People have very different views about how good a mechanism this is to determine community sentiment. Still, since we already depend upon it for the implementation of the negligence standard generally, so long as we have tort law at all, it is the mechanism we have. It might be argued from the libertarian view that at least with stranger injuries we have no choice since somebody has to set the standard, but with relationship cases, the argument goes, we should always defer to the parties themselves. The response of tort law today is this: If those in voluntary relationships do not like tort law imposing on defendants more than the obligation to provide a reasonable warning, they should expressly agree to that, thereby relieving the defendant of any such additional burdens. The law will uphold that agreement—unless, of course, there appears to be a strong public policy reason not to do so. In short, the default legal rule rests on the assumption that would-be victims want tort law as I have described it to serve as backup—to make reasonable demands on would-be defendants for precautions that they, as consumers, employees and the like, probably should have made themselves.

It is also worth pointing out some more general reasons why we use tort law to insist that *commercial defendants* (in comparison to individuals) take precautions that victims did not insist upon. First, we are more willing to use enterprises than individuals for social engineering purposes because enterprises are more likely to be responsive to legal signals. That is, because business organizations plan with the "bottom line" in mind, they are more likely to take precautions in order to avoid liability.[66] Second, these defendants are generally in a better position to bear and spread the loss afterwards if the precaution was not taken and the victim is injured. Moreover, we tend to give little moral weight to the liberty interests of what are impersonal entities. Third, through their repeated behavior, commercial actors are more likely to subject more people to risk.

By contrast, as I already noted, when it comes to *ordinary individuals* in their private settings, things look different. If I have not gotten around to fixing my dining room chair or my stair rail or my tennis court in order to protect myself, then I may well not take these precautions before you come over for a visit as my guest. Besides, unlike the enterprise, I have no product or service into which I can internalize the cost of making my home safer. Furthermore, my liberty to keep my home in the condition I like has substantial social value.

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66. *See* Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985).

F. The Problem of Options

The analysis so far has pretty much assumed an all-or-nothing resolution of the choice between warning and precautions. But consider those situations in which the victim clearly had options, that is, where there was a choice to confront either a safer or a less safe version. Sometimes, it seems clear that we are pleased that there are options like that, and in such circumstances the informed victim who selects the more dangerous option generally will not recover. We saw that in the example of the intermediate skier who tried the advanced slope. It is also true that Chrysler will not be liable merely for selling you its, say, less safe small and lightweight Neon car just because that model is more dangerous, say, than are Chrysler's Jeep Grand Cherokees. We want people to have these options, if nothing else, because of the great price difference between them.

Indeed, a car maker need not offer both a safe and less safe option to get away with providing only a less safe model. The car market today is filled with many sources of information about autos and their safety. Consumers tend to shop carefully, and models differ along so many dimensions that our society tolerates vehicles with a wide range of passenger safety. Indeed, the government tests many models and reports their relative safety rating based on those crash tests.

For other products, however, it may not suffice for a defendant to rely on the fact that other makers offer safer versions. Consider, for example, safety leg guards for motorcycles. Assume that these are just the sort of thing that will especially benefit inexperienced cyclists, but at the same time are exceedingly annoying and probably of rare help to expert cyclists. In this setting, we probably do not want motorcycle makers to provide the leg guards on every vehicle they sell (although we might think differently if they were not so annoying and we saw that lots of beginners were foolishly going without them). On the other hand, it may not be enough that only some brands offer the guards as an option. That is, perhaps we would term any individual maker's cycles defective if it too did not provide the guards as an option.[67] Otherwise, given the lesser public information about motorcycles as compared with cars, we might fear that buyers who come into their local motorcycle dealer and try out that brand will not be aware that they can obtain this option elsewhere.

There are still other safety features, however, that we probably want to insist upon. In those cases we would hold responsible in tort those defendants who merely provide them as options. One example is the one dollar guard on the power lawn mower, which presumably provides substantial safety benefits

67. This discussion is based on *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987).

without impairing the operation of the machine. In that setting, we would probably consider someone who refuses the model with the guard to be contributorily negligent. Nonetheless, we would still probably want him to recover partially because we find it unacceptable for the defendants to have offered a guard-free version in the first place.

G. Assumption of Risk as "No Cause"

Lurking here is the very difficult issue of how tort law's "cause in fact" requirement should be applied. Suppose the defendant in the guard-less mower case says that even if it had sold its mowers only with the one dollar guard, this buyer, given his actual selection, probably would have removed it. If we allow the argument and believe the assertion, the defendant would get off on the ground that the failure to provide a guard on all of its mowers was not a cause-in-fact of the plaintiff's injury—that is, the victim would have been hurt anyway.

Courts dealing with this sort of issue have been inconsistent from one area of tort law to the other. In the medical malpractice area, the dominant rule in so-called informed consent cases has the jury decide whether *a typical patient* would have gone ahead with the operation even had the doctor disclosed the risk that she failed to disclose.[68] If so, then the injured patient loses on cause-in-fact grounds. The usual reason for looking to patients in general, as opposed to the plaintiff, is that, after-the-fact, the plaintiff will always testify that he would not have gone ahead if he had known of the risk. This solution is perhaps overly cautions. After all, there is no reason for the jury automatically to believe what the plaintiff says, and evidence of what other patients typically do could be used to discount such self-serving testimony.

Indeed, in both the product injury area and in the premises liability area, where the claim is that the manufacturer or owner failed to warn of a certain risk, courts do not seem to react the same way. There they ask the jury to decide whether this plaintiff would have acted differently had he known of the danger, perhaps not realizing the inconsistency with the medical malpractice cases.[69]

With this general framework before us, let us return to the situation in which the mower was sold without a guard and the jury thinks that all such mowers should have had a guard. In that setting, it seems clear to me that if we ask whether the typical consumer would have removed the guard, the answer will very likely be "no." Moreover, even if we focus on this buyer, it is rather

68. *See generally* 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.

69. *Id.*

dubious that, if this mower came with a guard, he would have removed it. Instead, it is far more likely either that he paid no attention to the guard when buying the mower, or else wanted the lowest priced mower. Under those assumptions there is no reason to surmise that he would have removed the guard had it been standard. On this analysis, the defendant will not get off on cause-in-fact grounds regardless of which cause-in-fact test we apply.

But if we now alter the facts a bit, we can create an example in which the cause-in-fact limit would seem to have bite, at least if we direct it toward the actual plaintiff rather than at buyers in general. Consider the sport of hang gliding. Suppose the jury decides that it is negligent for the defendant not to offer a safer version of its product (say, one that contained a safety cage). But suppose we are also convinced that even if that had been done, this particular plaintiff would not have bought the safer version. That might be the case if, say, beginner and intermediate hang gliders would find this extra security very welcome, but some advanced hot shots like the plaintiff found the cage unaesthetic and cumbersome. Although applying the cause-in-fact test to buyers generally might keep the defendant on the hook, if the test is instead applied to this particular plaintiff, then the jury would presumably let the defendant off. [70]

I do not object to that result. The first thing to notice is that the explanation for the victim's loss is not "assumption of risk," but rather "no causation." That conforms to my general thesis. Second, although we are unhappy with the defendant for not offering the optional safety cage, it is probably all right in this setting that the cause-in-fact rule prevents this specific victim, who has a special and understandable taste for danger, from relying on that social objection. After all, this case arises in a context in which the jury was only saying that the defendant should provide an option and not that all hang gliders should come with the safety cage.

H. Harder Cases Where the Precaution Is More Burdensome

Throughout, in the examples I have used, I have made simplifying stipulations in order to demonstrate my general points. But in the real world we confront situations which are far messier. An important category is where the safety feature that the plaintiff says the defendant should have included carries a more substantial cost or significantly interferes with some other feature (productive or aesthetic). In such cases, what is needed to protect the victim is more than what might be termed an "easy rescue," and, therefore, it is more

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70. I draw this example from Kenneth W. Simons' discussion, *supra* note 1; although he sees this as a case of true assumption of risk, I find it better understood as a matter of "no cause."

difficult to confidently conclude that the defendants should have done more than warn of the dangers.

A good example is illustrated by injuries incurred in national parks. Assume that the victim is able to identify precautions, such as handrails, that probably would have protected the plaintiff from injury. Yet, a core value at stake in our national park system is allowing people to go out and confront nature without the protective interference of humans—a value that would be lost were handrails installed. This, of course, does not mean that no safety precautions need be provided in our national parks. Nonetheless, it does show why we are likely to feel conflicted about whether, in a particular situation, the condition that might have been made safer should have been left in its natural state.

It may be agreed that, as a general proposition, where the safety precaution carries a substantial burden, we ought to be much more certain that substantial safety gains will accrue before insisting on the proposed precaution, rather than a clear warning. Even then, we ought to be cautious before imposing the safety feature on everyone. After all, not too far down this line we come to the soft-top convertible and the advanced ski run.

Nonetheless, in clear enough cases, tort law will properly insist on even more than an easy rescue—as, for example, in the very dangerous above-ground swimming pool and lawn darts examples. Some people may say they want to buy that sort of recreational equipment, and claim they are unhappy having only wading pools or underground pools, or having only bar darts or outdoor nerf darts as their options. Yet, we may conclude that the highly unsafe nature of these products is simply socially unacceptable.

Indeed, there are some cases that are rather like these in which the courts, in my view, have become too caught up in the volenti principle and have refused to condemn unacceptable products outright. One example is a case in which a court tolerated a BB-gun that was much more dangerous than it need be, just because its dangerous design made it look like an old-fashioned rifle.[71]

However we resolve difficult individual controversies like this, let me emphasize once more that "assumption of risk" does not lead us to the answer. "Assumption of risk" would always tell us to conclude that an adequate warning was enough. Rather, as I have explained, we must look to other considerations in order to determine when more than a warning should have been provided.

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71. Dias v. Daisy-Heddon, 390 N.E.2d 222 (Ind. Ct. App. 1979). For a further discussion, see Latin, *supra* note 9, at 1267-68.

IV. THE MOST DIFFICULT CASES: "ASSUMPTION OF RISK" AS "NO PROXIMATE CAUSE"?

Sometimes, a single course of conduct can injure two victims. One is entitled to full recovery, the other none at all. What distinguishes these claimants is that for one type a warning is sufficient to discharge the defendant's duty of care, but for the other it is not. Of course, I resist the notion that the explanation for those cases where plaintiffs lose is "assumption of risk." Rather, it is better, I think, to treat these as cases of "no proximate cause."

This problem is best illuminated by claims brought by professionals whose job is to confront negligently created dangers. Suppose you carelessly allow a fence to fall over and break a power line. You call the power company. Its employee comes over and is accidentally electrocuted while making the repair. Or suppose you carelessly break a water pipe. You call a plumber, who comes to deal with the emergency, but is accidentally injured while trying to stop the flow of water. Or suppose you carelessly knock coals from your fireplace, starting a fire that burns out of control. You call the fire department and a fire fighter who responds is burned while battling the blaze.

Each of these examples fits the same model. You were negligent at what could be called "time 1." A professional, whose job it is to deal with the consequence of your negligence, comes to the scene to confront the danger at "time 2" and is injured. Surely we might say about these events, "Danger invites rescue." Yet, unlike the amateur rescuer who jumps onto the tracks to save the trapped child, the general rule is that these professional rescuers will lose if they sue you.[72] Why?

Some of the claimants in the above examples are denied recovery in many states by the so-called "fireman's rule"—which generally applies not only to the fire-fighter, but to police officers as well.[73] It should not come as a surprise that I do not like ad hoc, free-standing doctrines like this. We need to know "why" the fireman loses and, in my view, we ought to be able to explain that treatment by reference to more general underlying legal rules. The question, then, is whether we can do that—and without resorting to "assumption of risk."

One possible explanation for the fireman's rule is that this is an awkward way of saying that the defendant owes the plaintiff no duty of care. This explanation draws on the usual sorts of arguments that justify a no duty result. These include: 1) the fire-fighter's generous disability compensation

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72. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 427 (5th ed. 1984).

73. *Id.* at 429-30.

arrangements make that role for tort law superfluous; 2) because fires tend to burn up the evidence, it is unwise to create a cause of action where the legal system will have difficulty determining fault; and 3) we do not want to give the careless fire-starter a perverse incentive not to call the fire department for fear of potential liability. Although merely stating these arguments does not make them convincing, let us assume for the moment that they are.

But even if these explanations disposed of fire-fighter claimants (and perhaps police officer claimants as well), we are still left with the power company worker and the plumber. As to them the "no duty" arguments just made are much less convincing—except perhaps for the idea that the threat of liability will perversely cause the originally negligent party not to call for help.[74] Yet, tort law generally blocks recovery for plumbers and power company workers as well.[75]

How do we explain this? The general point applicable to all of these claimants is the familiar one discussed earlier: reasonable warning is sufficient. Yet, before, a sufficient warning meant that there was no breach. Here, however, that cannot be said. Clearly, had the fire spread to a neighbor's house, or had the downed power line injured a passing pedestrian, and so on, the defendant would have been liable to those victims. So, if there was a duty and a breach, how do we extricate the defendant from liability other than by saying "assumption of risk"? Clearly the defendant was the cause-in-fact of the injury to what I am calling the professional rescuer, and the victim was not at fault (which, anyway, would only lead to a reduced recovery).

To overcome this difficulty, I suggest that we turn to notions typically employed in connection with the doctrine of proximate cause. Under the Restatement view, you are not the proximate cause of the plaintiff's harm if you were not negligent "toward" the plaintiff, even if you were negligent toward another.[76] Under a somewhat different formulation, you are not the proximate cause of the plaintiff's harm if the plaintiff's harm resulted from a "hazard" that is different from that which would have made you liable to another.[77] And

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74. Prosser considered this argument "rubbish." *Id.* at 431.

75. *See, e.g.*, Cohen v. McIntyre, 20 Cal. Rptr. 2d 143 (Cal. 1993) (veterinarian injured by dog bite); Hacker v. City of Glendale, 20 Cal. Rptr. 2d 847 (Cal. Ct. App. 1993) (professional tree trimmer electrocuted by power line); Nunez v. R'Bibo, 260 Cal. Rptr. 1 (Cal. Ct. App. 1989) (gardener injured on a ladder); Nelson v. Hall, 211 Cal. Rptr. 668 (Cal. Ct. App. 1985) (veterinary assistant injured by dog bite). *But see* Neighbarger v. Irwin Industries, 882 P.2d 347 (Cal. 1994) (rejecting the application of both the "no duty" rule and the "firefighter's" rule to an oil refinery's safety employees who were injured fighting a fire that the defendant negligently set); Davis v. Cashler, 14 Cal. Rptr. 2d 679 (1992) (dog handler was bit by injured dog).

76. RESTATEMENT (SECOND) OF TORTS § 281(b) cmt. c (1965).

77. *Id.* § 281(b) cmts. e, f.

under yet a different formulation, you are not the proximate cause of the plaintiff's harm if your responsibility for the hazard has been superseded by the conduct of another.[78]

We can, I believe, apply each of these formulations in a reasonably convincing way to the professional rescuer setting—although, I admit, not without some awkwardness. The strongest way to put it, I think, is to say that the arrival of a professional rescuer is superseding, that is, cutting off the defendant's responsibility for the subsequent injury. Consider, for example, the case in which X orders wood from the defendant to build a scaffold, and the defendant negligently sends bad wood. But X discovers that the wood is bad, and yet uses it anyway. X's taking responsibility for the wood, knowing that it is bad, becomes a superseding cause and cuts off the defendant's liability to the plaintiff who is later hurt when the scaffold collapses.[79] The analogy here is that the professional rescuer takes responsibility for the danger once she arrives on the scene. This is a comfortable notion to apply to professionals but not amateurs and thereby helps to explain the different results in the two cases. Yet, I admit that the analogy is not exact, if for no other reason than that the bad wood case involves a third party as the superseding cause, whereas here the victim herself is seen as the superseding cause.

Turning then to the "wrong hazard" notion, we might draw, for example, on the case in which the defendant negligently rented the plaintiff a car with a defective hood latch.[80] As a result, the hood flies open while the plaintiff is on the highway. Had that caused an accident right there, as it might well have, then surely the defendant would have been liable. But suppose instead the plaintiff manages to get the car off the road and into a regular parking place, and while getting out to lower the hood, the plaintiff is struck by a passing motorist. The defendant now wins and the reason is that it seems only coincidental and not legally relevant that the plaintiff happened to be standing outside his car on his way to lower the hood. A driver getting out of his car at a parking space might just as well have been on his way to get an ordinary package out of the trunk. The injury is not a "hazard" for which the defendant is fairly held accountable. Analogously, then, it might be argued that it is not relevant that the fire, downed wire, and broken pipe dangers were negligently created. They might just as easily have been accidentally created because in that

78. *Id.* § 440.

79. Stultz v. Benson Lumber Co., 59 P.2d 100 (Cal. 1936).

80. This discussion is based on *Ventricellli v. Kinney System Rent A Car*, 383 N.E.2d 1149 (N.Y. 1978).

instance the plaintiff would equally have been on the scene and equally at risk in the very same way.[81]

Finally, in the famous Palsgraf case[82] it was assumed that the defendant railway workers were negligent towards a passenger they pushed onto the moving train, even though he was not injured. But they were not negligent towards Mrs. Palsgraf. Hence they escaped liability to her when she was injured as a result of scales that fell on her in response to the vibrations caused by the explosion of the fireworks that had been knocked from the arms of that man they pushed onto the train. Analogously, then, it might be argued that although the defendants in these professional rescue cases were negligent toward their neighbors and to passersby, they were not negligent toward the plaintiffs. That is, whereas the former were entitled to precautions, the latter were due only the fair warning they got.

Trickier is to understand why they are entitled only to a warning. Although, in one sense, they depend for their livelihood upon being called out in emergencies, surely in a more immediate way they would rather not put themselves on the line in order to save someone (or someone's property) who should not have created the dangerous predicament in the first place. Nonetheless, thinking back to the cases involving dangers on the property of ordinary homeowners, we saw there, too, that those who come onto the land are typically entitled to no more than a warning. This, however, seems to imply that commercial actors who call out professional rescuers would be held to a higher standard, and yet they do not seem to be.[83]

In sum, I concede that putting the professional rescue cases into the "no proximate cause" category is a little bit awkward. This will lead some to say that what plainly is needed here is "assumption of risk." But let me emphasize again that this is unsatisfactory if for no other reason that it does not explain the different treatment of professional and amateur rescuers. Indeed, in a certain sense the amateur's conduct constitutes a more voluntary encountering of the danger. After all, he can refuse. By contrast, the professionals, certainly the police officer and the fire fighter, have a duty to confront the risk whether they feel like it or not. Of course, those professionals knew about the risk when they took their jobs and, more specifically, when they arrived on the scene. But, as I showed in my discussion of defective products in the workplace, the mere willingness of an employee to accept a dangerous job clearly no longer precludes tort recovery. A manufacturer who readily could have made the work

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81. For a recent decision involving a professional rescuer that follows this general form of analysis, see *Bryant v. Glastetter*, 38 Cal. Rptr. 2d 291 (Cal. Ct. App. 1995).

82. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

83. *See, e.g.*, Giorgi v. Pacific Gas & Elec. Co., 72 Cal. Rptr. 119 (Cal. Ct. App. 1968).

environment safer by providing a different machine, for example, is likely to be held liable notwithstanding the employee's volitional encounter of the machine's danger.

Perhaps these professional rescuer cases are simply wrongly decided. Maybe the courts have been hypnotized by the fact that the victims assumed the physical risk and confuse that with the legal risk. There is indeed some judicial and legislative support for this position.[84] Or maybe the courts are too caught up on the old licensee-invitee distinction with professional rescuers relegated to the less protected category. That aside, and assuming you are still not convinced by the "no duty" argument I made earlier, I then conclude that "no proximate cause" will just have to do to explain the result.

V. CONCLUSION

Although the Restatement of Torts still provides that assumption of risk is a complete defense to a cause of action in tort, I have tried to show that assumption of risk is a trap—in two senses. First, assumption of risk is both redundant and confusing as a legal doctrine: any result fairly achieved by the application of assumption of risk can also be reached, and is better understood, by the use of one of a number of other familiar doctrines. Second, the mere assumption of the physical tends to be wrongly equated with the legal doctrine, thereby leading to inappropriate bars to legal recovery under the current personal injury law system. The more important and difficult question for courts to ask is when should the defendant's warning suffice, and when that question is thoughtfully answered, often it will be determined that the defendant should have done more.[85]

The ideas I have presented here are perhaps best summed up through one final example. In recent years courts around the country have been presented with a great number of sporting injury lawsuits between participants, but outside the professional sports context. Some cases simply apply ordinary negligence principles, holding careless participants liable for injuries to others, a result that

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84. *See, e.g.*, the views of Justice Tobriner in *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977) (Tobriner, J., dissenting). *See also* N.J. STAT. ANN. § 2A:62A-21 (West Supp. 1996) (discussed in Boyer v. Anchor Disposal, 638 A.2d 135 (N.J. 1994)).

85. I have put aside here the possible role of a defense of "assumption of risk" in cases where plaintiffs voluntarily encounter ultrahazardous activities for which the defendant would otherwise be strictly liable. Nor have I considered the role for an entirely new doctrine of assumption of risk in a regime of the sort imagined by Judge Calabresi in which the goal of the system were to identify the "cheapest cost avoider." *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

is, of course, consistent with the broad sweep of tort law generally.[86] Most, however, relieve the defendant from liability for ordinary negligence—at least in so-called "contact" sports settings.[87]

In some of these cases, the courts seem to understand the doctrinal approach I have urged here, and rest their decision on "no duty" grounds.[88] Typically the emphasis is on, first, judicial manageability (can juries meaningfully distinguish unreasonable from reasonable risk taking in such settings, and will the courts be swamped with cases?) and second, a fear that liability will lead to perverse behavioral incentives (that is, competitors will no longer be willing to go all out to win because of an excessive fear of liability). I concede that these are exactly the sort of arguments that are appropriate to a no duty theory.

Whether they are convincing arguments is another matter, however. If nothing else, I feel confident saying that informal recreational sports settings do not present nearly as many reasons for a "no duty" rule as do professional settings. Specifically, there is no well-structured alternative behavioral control regime and no generous alternative compensation arrangements. In a leading case, for example, some friends decided to play touch football during the halftime of a Super Bowl.[89] The female plaintiff had complained to the male defendant not to be so rough, after he had already run into her, reminding him that it was only touch football after all. He promised to behave better, but on the very next play, according to her complaint and deposition, he negligently knocked her down, seriously injuring her. It is not obvious to me just why courts should be so eager to free defendants, like those portrayed in this complaint, from tort liability for their negligence.

Far worse, however, are those judicial opinions in this area that seem mesmerized by the idea that participants in these activities know that they might get hurt, and so ought not complain about it.[90] Assumption of the physical risk is essentially equated with assumption of the legal risk. It is as though, in the

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86. *See, e.g.*, Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28 (Wis. 1993).

87. *See* Hana Miura, Lestina v. West Bend Mutual Insurance Co.: *Widening the Court as a Playing Field for Negligent Participants in Recreational Team Contact Sports*, 1994 WIS. L. REV. 1005, at 1008-11; Yancy v. Superior Court, 33 Cal. Rptr. 2d 777 (Cal. Ct. App. 1994) (treating discus-throwing injuries to fellow participants as subject to ordinary negligence principles). Some cases have also distinguished between injuries involving co-participants and those involving students and teachers. *See, e.g.*, Fidopiastis v. Hirtler, 41 Cal. Rptr. 2d 94 (Cal. Ct. App. 1995).

88. *See, e.g.*, Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

89. *Id.*

90. *See, e.g.*, Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982); Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983); Marchettti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990); Connell v. Payne, 814 S.W.2d 486, 488 (Tex. Ct. App. 1991).

case I just described, the woman having realized that the man was not playing by the rules must have (or at least should have) appreciated that he might do so again (notwithstanding his assurances). If she did not want to take any further chances, she should have quit there and then. If there is one single message to take away from this Monsanto Lecture, it is my belief that this is altogether the wrong way to think about tort liability.