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The Impact of the Civil Jury on American Tort Law

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I. INTRODUCTION

> *pruritus*: the symptom of itching, an uncomfortable sensation leading to the urge to scratch. Scratching may result in secondary infection.[1]

I would like to begin by expressing my delight at having this opportunity to participate in honoring Allen Linden. When Rick Cupp first mentioned the idea for this Festschrift to me over two years ago, I thought it was a fabulous idea. And it has only gotten better in the time since.

My initial introduction to Allen occurred some twenty years ago, but he was not there and we did not meet. I was researching a book about

* Williams Professor of Law, Wake Forest University School of Law. I would like to thank Peter Cane and participants at the Linden Symposium for helpful comments about this paper. This paper is an extension of a talk I previously gave at the Institute for European Tort Law of the Austrian Academy of Sciences.

1. MOSBY'S MEDICAL, NURSING, & ALLIED HEALTH DICTIONARY 937 (6th ed. 2005).

Bendectin, a drug for pregnant women who suffered from morning sickness. A number of suits had been filed by parents of children born with birth defects, alleging Bendectin was a teratogen. Its manufacturer, the Wm. S. Merrell Company, had also been the U.S. distributor for thalidomide, a horrific drug that resulted in children born with phocomelia, the symptoms of which are seal-like limbs or even no limbs. Some of us recall those tragic pictures of European infants, some without any limbs, that made their way to American shores in the 1960s.[2]

The United States fortuitously avoided the plague of thalidomide[3]—an FDA staff person, Frances Kelsey, was concerned about another adverse effect of the drug, and thalidomide was never approved for sale in the United States.[4] Kelsey was lionized for her role in saving U.S. children from this plague.[5] Even so, thalidomide was the occasion for another major amendment to the federal Food, Drug, and Cosmetic Act (FDCA).[6] In addition to the requirement of demonstrating safety, the Kefauver-Harris Amendments of 1962[7] required that drug manufacturers demonstrate the efficacy of new drugs submitted to the FDA for approval. Ironically, this strengthening of the FDCA, enabled by the furor over thalidomide, did almost nothing to reduce the risk of a future thalidomide from slipping through the FDA cracks.[8]

But thalidomide was distributed in Canada, and there were almost 100 Canadian victims.[9] Those Canadian victims faced substantial procedural hurdles, much like the British victims, and a young Canadian academic at Osgoode Hall Law School developed, as I wrote in 1996, an "ingenious scheme" for these Canadian plaintiffs.[10] That plan called for crossing Canada's southern border and employing plaintiffs' attorneys in the United States, who could accept cases on a contingent fee.[11] The United States' legal system also protected victims from being subject to fee shifting if they

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2. *See* MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 63–64 (1996).

3. There were thirteen United States cases. *See id.* at 76–78.

4. *See* Cindy Pearson, *Doctor Who Stopped Thalidomide Celebrates 80th Birthday*, NAT'L WOMEN'S HEALTH NETWORK NEWS, Sept. 1994, at 1.

5. *See* Bridget M. Kuehn, *Frances Kelsey Honored for FDA Legacy: Award Notes Her Work on Thalidomide, Clinical Trials*, 304 JAMA 2109 (2010).

6. *See* 21 U.S.C. § 301 (2006).

7. Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 480 (1962) (codified as amended in scattered sections of 21 U.S.C.).

8. Testing new drugs on pregnant women is a difficult matter and the 1962 amendments did not address that issue. *Cf.* Sara F. Goldkind, Leyla Sahin & Beverly Gallauresi, *Enrolling Pregnant Women in Research—Lessons from the H1N1 Influenza Pandemic*, 362 N. ENG. J. MED. 2241, 2241 (2010) (decrying that "clinical [drug] studies are rarely conducted in pregnant women").

9. THE INSIGHT TEAM OF THE SUNDAY TIMES OF LONDON, SUFFER THE CHILDREN: THE STORY OF THALIDOMIDE 134 (1979).

10. GREEN, *supra* note 2, at 76.

11. *Id.*

were unsuccessful, unlike the situation they faced at home.[12] The thalidomide distributed in Canada had been manufactured in Ohio, lending a plausible basis for proceeding in a suit against Merrell in Ohio.[13]

All of those cases were settled by Merrell, and Canadian victims obtained the highest recoveries in the world.[14] The author of this scheme was Allen Linden, whom I would not meet in person for many years—too many. But Allen's plan reveals one answer to the question we are addressing today—United States tort law had much to offer those Canadian children.

Allen later celebrated the role of tort law in calling the financially powerful to task. He wrote about the Canadian victims' thalidomide litigation:

> Ordinary citizens have rendered accountable many manufacturers of shoddy goods . . . . Many of the executive officers of [Merrell] had to spend many hours examining their practices, engaging in discussions with lawyers, and justifying their stewardship to their shareholders. It was tort law, not the administrative or the criminal process, that challenged the conduct of the drug company.[15]

Perhaps more accurately, the United States tort *system*, much of it procedural, was of great benefit to those plaintiffs who, without it, would have suffered a fate more like the British victims. Their claims were delayed for many years because of joint legal aid representation of a group that had conflicts among them.[16]

Having begun with my introduction to Allen, I would like to take a moment to salute him for his creative and inquiring legal mind, remarkable personal warmth, passion for justice, concern for the less powerful, and sage advice over the past decade; and to thank him for his loyal friendship. I would also like to thank him (and Rick Cupp) for developing the topic for today, which provides us an embarrassment of rich choices of avenues to

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12. *Id.*

13. *Id.*

14. INSIGHT TEAM, *supra* note 9, at 136; *see also* Elaine Carey, *Thalidomide 'Babies' at 25: Struggling to Live on a Pittance*, TORONTO STAR, Sept. 27, 1987, at A1 (Canadian victims recovered an average of $200,000 (Canadian) each).

15. Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155, 159 (1973).

16. Foreign Bendectin claimants were not able to pursue the same course as their thalidomide ancestors. *Piper v. Reyno*, decided by the Supreme Court in 1981, placed an almost impenetrable forum non conveniens barrier to foreign plaintiffs suing American defendants in federal courts in the United States for injuries suffered outside the United States. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); *see also In re* Richardson-Merrell, Inc., 545 F. Supp. 1130 (S.D. Ohio 1982). *But see* Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262 (N.D. Ohio 1982).

explore in both domestic and foreign tort law and to be frankly normative in our assessment of whatever aspect of U.S. tort law we might be interested in. Actually, it affords at least twice as many opportunities because we could address the U. S. tort *system*, which so many in other countries look on with horror, or tort *law*. In honor of Allen, I would like to talk about tort doctrine and the extent to which U.S. tort *law* has anything to offer the rest of the world.

One can find repeated claims that American tort law is not that different from tort law around the globe.[17] Convergence of private law in this age of globalization is a popular refrain. I have a different perspective I would like to put forth: the jury, surely the most controversial procedural device in American law,[18] has deeply influenced our tort law. That influence results in law that is of no interest to the rest of the world, which has done away with civil juries, save for rare or limited instances.[19]

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17. *See* Ulrich Magnus, *Why is US Tort Law so Different?*, 1 J. EUR. TORT L. 102, 109 (2010) ("Apart from [punitive and compensatory damage] differences, it becomes difficult to identify further [remarkable rules] of US tort law that deviate drastically from their European counterparts."); Eric Engle, *Aristotelian Theory and Causation: The Globalization of Tort*, 2 GUJARAT NAT'L L. UNIV. L. REV. 1 (2009) (asserting that there exists a "remarkably uniform globalized system of tort law"); *cf.* Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J. TORT L. 6, 41 (2007) ("Nonetheless, there has been quite an embarrassing amount of work published that asserts, not merely that there is much harmony already between the tort law of European systems, but also that they are rapidly converging.") [hereinafter Stapleton, *Lost in Translation*]. *But see* Stapleton, *Lost in Translation*, *supra*, at 21 (explaining numerous aspects of tort law influenced by nationalist cultures that are not common and remarking on the "profound influence" of the jury and "covert manoeuvres" employed to constrain the jury's authority). In addition, we should not forget the difference in approach between Civil Law and Common Law systems. *See* Gerhard Wagner, *Comparative Tort Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1003 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

18. Professor Rosenberg has described the paradox that the jury's virtues of injecting community values and knocking the harsh edges off the law often form the basis of the criticism that the jury engages in unbridled and unprincipled lawmaking. Maurice Rosenberg, *Contemporary Litigation in the United States*, *in* LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 176–77 (Harry W. Jones ed., 1977). *Compare* PATRICK DEVLIN, TRIAL BY JURY (1956); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY (1962); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248–54 (J.P. Mayer & Max Lerner eds., 1966); *and* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964), *with* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 108–45 (2d ed. 1950); Dale W. Broeder, *The Functions of the Jury: Fact or Fiction?*, 21 U. CHI. L. REV. 386 (1954); Milton D. Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L. FORUM 152; *and* Leon Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOY. L. REV. 243 (1962). The debate over juries has raged for centuries. *See* JOHN GUINTHER, THE JURY IN AMERICA xiii (1988) ("[F]or each advocate of the jury throughout its long history in America, there seems to have been a matching opponent."). *Compare* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830) (detailing importance of right to jury trial), *with* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (detailing federalists' opposition to jury trials). Even Mark Twain expressed his views on the jury: "The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago." MARK TWAIN, ROUGHING IT 247 (1872) (emphasis in original).

19. *See, e.g.*, JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN

Although I want to emphasize the doctrine of duty and its role in American tort law, there are numerous, prominent aspects of the contemporary torts scene that are influenced by, or simply the result of, the existence of the civil jury. I suspect I have missed some, but consider:

> (1) Strict Products Liability. It is no secret that the United States beat a retreat from section 402A of the *Restatement (Second) of Torts* and *strict* products liability.[20] Replacing consumer expectations with a negligence standard, as the *Third Restatement* did for warnings and design defects, was due to the open-endedness of consumer expectations in the hands of juries. An important assist in this development goes to the aggressiveness of the plaintiffs' bar in taking advantage of this new strict products liability by pushing the design defect envelope.
>
> By contrast, strict liability and consumer expectations were adopted in the European Union as we were turning our backs on them and have survived longer there than they did here. But EU-style strict liability is administered by judges rather than juries. It may be that an environment of judicially applied standards works reasonably well for a strict-liability, consumer expectations-based standard for product liability, and does not result in every design defect claim being a tossup for largely unconstrained jury determination.[21] Thus,

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AMERICA, AND EAST ASIA 1014 (1994) (stating that in common law countries other than the United States, "the civil jury has been abolished"); NEIL VIDMAR, A HISTORICAL AND COMPARATIVE PERSPECTIVE ON THE COMMON LAW JURY, *in* WORLD JURY SYSTEMS 1, 3 (Neil Vidmar ed., 2000) ("[W]ith the exception of the United States and parts of Canada, the jury has been largely abandoned for civil cases . . . ."). Richard Posner reveals his preference in his brief observation on the United States' jury iconoclasm, commenting that the abolition of the civil jury is "a course that the rest of the civilized world took long ago." RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 193–94 n.1 (1996). Peter Cane explains the decline of the civil jury in Australia. Peter Cane, *Searching for United States Tort Law in the Antipodes*, 38 PEPP. L. REV. 257, 276–79 (2011).

20. I would attribute the beginning of that retreat to the New Jersey Supreme Court's reversal of fortune on whether foreseeability of the risk is required before an obligation to warn is required. In *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), the court rejected a role for foreseeability of risk with regard to determining whether a product was defective for strict liability purposes. Eighteen months later, in *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984), the New Jersey Supreme Court limited *Beshada* "to the [unspecified] circumstances giving rise to its holding," *Id.* at 388, and provided manufacturers a state-of-the-art defense. Imposing liability in the absence of foreseeability of risk—a genuine test for whether this "strict liability" is free of fault notions thereafter never really gained traction in products liability law. *See, e.g.*, Vassalo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

21. I have explained the vision of those who were in the vanguard of the strict products liability development and their conception that the consumer expectations test would be applied to significant failures of products to perform in their ordinary fashion, rather than to the question of how much

I question Victor Schwartz's suggestion that the European Union repeated the error of § 402(A) in its Directive.[22]

(2) Preemption. Although preemption is nominally about Congressional intent, there are significant strains of skepticism about jury decision making and the superiority of expert agencies in the Supreme Court's preemption jurisprudence, especially in the medical device case, *Riegel v. Medtronic, Inc.*[23] One may question whether there would be a difference of view if judges replaced juries as fact finders with regard to adopting absolute deference to regulation, as preemption does. My suspicion is that with judges deciding whether to invoke preemption, they would be more sanguine about the ability of judges to make judgments about the appropriate account to take of relevant regulation as an aspect of the common law process without the rigidity of preemption.[24]

(3) *Daubert*.[25] Of course it comes as no surprise to say that evidentiary rules are influenced by the existence of juries. Much of what domestic courts are doing today with *Daubert* in tort cases might have been done with another procedural device, namely sufficiency of the evidence. Either way, this is a development that is a consequence of the jury meeting the rise of toxic substances litigation in the 1970s, after the Federal Rules of Evidence liberalized the admissibility of expert testimony, and skepticism about juries' ability to sort out the testimony of experts about causation.[26]

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marginally safer a product should be designed. *See* Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807 (2009). Professors Aaron Twerksi and James Henderson, the co-Reporters for the *Products Liability Restatement*, have been among the most vociferous critics of consumer expectations as an independent standard for design defects. In significant part they rely on its indeterminacy in difficult cases, leaving the jury to its own, largely unfettered, discretion. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 880 (1998).

22. Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 554, 554–58 (2011).

23. 552 U.S. 312, 325 (2008).

24. Might Congress, in enacting legislation, be more sanguine about that prospect as well?

25. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

26. Commentators are unanimous in attributing *Daubert* to jury skepticism. *See* Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1292 (2007) ("*Daubert*'s concept of judge as gatekeeper is fundamentally infused with skepticism toward the jury . . . ."); Gary Edmond, *Supersizing* Daubert *Science for Litigation and its Implications for Legal Practice and Scientific Research*, 52 VILL. L. REV. 857, 908 (2007). Actually, the implementation of *Daubert* should be attributed to jury skepticism. Justice Blackmun in *Daubert* made it a point to disagree with the extreme views expressed by respondents and their supporters about jury capacity.

(4) The Constitutionalization of Communicative Torts. One cannot help but read *New York Times Co. v. Sullivan*[27] as a brief concerning provincial southern attitudes that required containment. To be sure, a robust right of free speech was also a necessary condition for this development; my claim is that without the jury it also would not have been necessary.[28]

(5) Comparative Fault. The United States was quite late in adopting comparative fault.[29] In one respect, I believe the jury, with its capacity to knock the rough edges off of the unfairness of contributory negligence by returning compromise verdicts, dampened the unfairness of that rule and contributed to its delayed adoption here.[30] The jury's ignoring the rule of contributory negligence may, at the same time, have contributed to the hastening of comparative fault. This conflict then reveals the schizophrenia in our attitudes about the jury, thus reflecting, on the one hand, the jury's use of common sense notions of justice to provide grass roots normalization of law while simultaneously, on the other, demonstrating jury lawlessness.

(6) Retention of status-based rules for landowners. These rules, born in Britain, were disavowed there beginning in 1957.[31] That reform began later in the United States and did not reach majority

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Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595–96 (1993) (characterizing as "overly pessimistic" the view that, without constraints, the result will be a "'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions"). What *Daubert* did was to give the opportunity to federal judges who were jury-skeptics to intervene on expert testimony.

27. 376 U.S. 254 (1964).

28. I recognize that Great Britain is contemplating reforms to scale back its vigorous defamation laws and that the Canadian Supreme Court recently adopted a "responsible journalism" defense. *See* Sarah Lyall, *Britain, Long a Libel Mecca, Reviews Laws*, N.Y. TIMES, Dec. 11, 2009, at A1; Grant v. Torstar Corp., 2009 SCC 61 (Can.). One must recall, however, that Britain largely retains the jury for defamation cases. Supreme Court Act, 1981, c. 54, § 69(1) (Eng.). Canada continues with some jury trials—the *Grant* case was tried by a jury, which awarded compensatory and punitive damages to the plaintiff. *See Grant*, 2009 SCC para. 5.

29. *See* Stapleton, *Lost in Translation*, *supra* note 17, at 26 ("[A non-U.S. tort lawyer] may be shocked to discover that contributory negligence was a complete defense to U.S. tort claims until relatively recently.").

30. This account conflicts with that of Robert Keeton, who credits juries' refusal to adhere to the rigidity of contributory negligence as hastening the comparative fault reform. *See* ROBERT E. KEETON, VENTURING TO DO JUSTICE 74–75 (1969); FRANK, *supra* note 18, at 110–11.

31. *See* Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, c. 31 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1957/31/pdfs/ukpga_19570031_en.pdf (as enacted).

status until sometime in the twenty-first century,[32] half a decade after Britain. Their survival here might be attributed to the disciplinary tools they provided to courts in supervising juries deciding premises liability cases.[33]

(7) My conviction that tort reform—specifically caps on damages—is a consequence of jury determination of damages, particularly non-pecuniary damages, is tempered only slightly by the fact that the Supreme Court of Canada did the same thing in 1978 in a case tried by the court.[34] Yet throughout Europe, formal and informal mechanisms by which judges keep the variability of damage awards in check make damage caps unnecessary.[35] At least some decisions finding those caps to be unconstitutional rely on constitutional protection of the right to a jury trial.[36]

(8) Primary Assumption of Risk. As a prelude to going into a bit more detail about another topic, duty, I would add that primary assumption of risk, a sibling of no duty, is another mechanism by which American tort law withdraws from juries a specified activity—recreational sports or operating sports stadia—the authority to impose liability for conduct that the jury might find unreasonable.[37]

(9) Settlement effects. The greater variability in damage awards by juries, particularly in personal injury cases for non-pecuniary losses, provides incentives for those who are risk averse, which describes most personal injury claimants and many defendants, to settle. The extremely high settlement rate in the United States,[38] which is

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32. The *Third Restatement* reports that, as of 2009, of forty-eight jurisdictions that are classifiable, twenty-four had "adopted a unitary standard of reasonable care to at least licensees and invitees." RESTATEMENT (THIRD) OF TORTS § 51 reporter's note cmt. a (Tentative Draft No. 6, 2009). Later that year, the Iowa Supreme Court rejected the status-based rules for licensees, adopting a duty of reasonable care. *See* Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009).

33. *See* DAN B. DOBBS, THE LAW OF TORTS § 237, at 615 (2000) (theorizing that the status-based rules, as applied by courts, resemble in substance a rule of reasonable care but provide courts greater control of juries); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 440 (1999) (explaining the advantage of "spurious rules," such as landowner duties).

34. *See* Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229 (Can.).

35. *See* Cane, *supra* note 19, at 277 (explaining "semi-authoritative 'tariff' of injury awards designed to achieve predictability and uniformity" in the United Kingdom and, to a lesser extent, in Australia).

36. *See* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010).

37. *See, e.g.*, Davidoff v. Metro. Baseball Club, Inc., 463 N.E.2d 1219 (N.Y. 1984); Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

38. Professors Clermont and Eisenberg have documented that roughly two-thirds of all civil cases filed are settled by the parties. Kevin M. Clermont & Theodore Eisenberg, *Litigation*

> surely due as well to a number of other factors, is supported by the uncertainty created through ad hoc jury awards of non–pecuniary damages.
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> (10) The popularity of arbitration. Arbitration is limited to parties who have a contractual relationship, which is often not the case for personal injury torts, with the exception of products liability. Nevertheless, the rise of arbitration, including in commercial litigation in which economic harm torts may be asserted and in consumer protection disputes, is influenced by the alternative of a jury arbiter if one resorts to the courts for dispute resolution.[39]

Let me begin my discussion of the role that the jury plays in forming (and deforming) duty doctrine by returning to the shaping of the American tort system. A trilogy of tort cases appeared to open a role for a robust negligence system—one that would be administered by the jury with courts having a modest role. The first two of these cases involve the classic *Goodman-Pokora* pairing. Holmes had the opportunity in *Baltimore & Ohio Railroad v. Goodman*[40] to employ the ideas he had written about in *The Common Law*, published in 1881.

In his commentary about tort law in *The Common Law*, Holmes made four observations that are relevant to the respective roles of judge and jury:

> (1) Standards of conduct are for judges to set forth, while historical facts are for the jury;
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> (2) However, negligence or breach of duty is submitted to the jury, even when the doubt is about the appropriate standard of care rather than the facts;

Realities, 88 CORNELL L. REV. 119, 135 (2002).

39. Chris Drahozal, who specializes in international commercial arbitrations, reports that there is no good data on the comparative incidence of arbitration in the United States and other countries. E-mail from Chris Drahozel, Professor of Law and Assoc. Dean for Faculty Dev., Univ. of Kan., to Michael D. Green, Williams Professor of Law, Wake Forest Univ. (July 21, 2010) (on file with author). There are, however, legal impediments to the enforcement of arbitration provisions in consumer and employment contracts in other countries that contrast with the aggressive enforcement of arbitration clauses in the United States. Steven Ware attributes that difference to the civil jury in the United States. *See* Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865 (2002).

40. 275 U.S. 66 (1927).

(3) Nevertheless, submission to the jury is not required and when a "state of facts often repeated in practice" exists—judges should set forth the appropriate standard of care, leaving to juries only the question of historical fact;

(4) Setting forth those specific standards of care would further an important function of law: "narrow[ing] the field of uncertainty."[41]

Goodman involved a railroad crossing accident in which the plaintiff was injured while driving over railroad tracks, when defendant's train hit him.[42] Defendant asserted that the plaintiff was contributorily negligent in crossing the tracks.[43] Although this appeared to be a case in which maxim two was operative and the jury would decide the matter, Holmes invoked principle three: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him," and he must take precautions, including stopping and getting out of his vehicle if unable to determine whether a train is bearing down on him.[44] Not only did the adoption of a specific standard narrow uncertainty by providing a rule of law rather than a jury verdict having no precedential value, specific legal standards address the respective role of judge and jury, displacing the jury and leaving for the court a determination that, as it was in *Goodman*, dispositive on the question of liability. The narrow rule that required stopping and departing from the vehicle limited the relevant facts to the point that there was no dispute of historical fact and no issue about whether the legal standard was satisfied. Depending on how often judges found repeated patterns and invoked Holmes's dictum to provide a specific rule of law, *Goodman* could have produced a system in which juries played a considerably subdued role.

Seven years later, Benjamin Cardozo had replaced Holmes on the Supreme Court (two other justices had also been replaced) and, in another railroad crossing case, *Pokora v Wabash Railway Co.*,[45] the Court effectively overruled *Goodman*, declaring that exiting the car and reconnoitering was not required of a driver crossing railroad tracks in all cases.[46] Not only was the *Goodman* rule out of touch with ordinary behavior (as any jury would appreciate, Cardozo might have added), but different circumstances prevailing at a railroad crossing may require

41. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 161–63 (1993) (citing OLIVER WENDEL HOLMES, JR., THE COMMON LAW 123–28 (1881)).

42. *Goodman*, 275 U.S. at 69.

43. *Id.*

44. *Id.*

45. 292 U.S. 98 (1934).

46. *Id.* at 101.

different precautions.[47] Thus, Cardozo imbued in determinations of negligence[48] what the *Restatement* characterizes as "an ethics of particularism, . . . which requires that actual moral judgments be based on the circumstances of each individual situation."[49]

The third case in this trilogy is another Cardozo opinion, earlier than *Goodman* and *Pokora*, from his time on the New York Court of Appeals. *MacPherson v. Buick Motor Co.*[50] cast aside the privity barrier that had insulated defendants for so long from a jury scrutinizing their behavior. *MacPherson* thus exposed to tort liability those whose negligence occurred in the performance of a contract that resulted in harm to a person not a party to that contract.[51]

These cases, in sum, seemed to lend succor to Holmes's claim that tort law involves a duty owed "of all the world to all the world."[52]

With a general "reasonable care" standard owed to the entire world, the jury would be empowered to decide cases, unencumbered by the normative views of the judge as to the appropriate standard of conduct.[53] It is common wisdom that the Cardozo view of jury hegemony won out and that the American tort system reflects that view.[54] Thus, Richard Posner observed recently that while contract law has a number of constraints to limit jury authority: "Tort law does not have these screens against the vagaries of the jury."[55] With the law providing a general duty of care owed to all—that

47. *See id.* at 105–06.

48. There is an irony in Cardozo playing the role of putting the jury in the ascendancy in deciding tort cases. Cardozo could be quite cavalier about rejecting jury verdicts with which he disagreed. *See, e.g.*, Greene v. Sibley, Lindsay & Curr Co., 177 N.E.2d 416 (N.Y. 1931); Adams v. Bullock, 125 N.E. 93 (N.Y. 1919). Nevertheless, Andrew Kaufman, Cardozo's biographer, reports: "Although Cardozo was assiduous in protecting the role of the jury, he did not hesitate to take an issue away from the jury when his reading of a record convinced him that the factual issue should be decided only one way." ANDREW L. KAUFMAN, CARDOZO 255–56 (1998).

49. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 8, cmt. c (2010).

50. 111 N.E. 1050 (N.Y. 1916).

51. *See id.* at 1053.

52. *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873) (author not named but widely believed to be Oliver Wendell Holmes (2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 81–82 (1963)). A contemporaneous British case, *Heaven v. Pender*, [1883] 11 Q.B.D. 503 at 509 (Eng.), expressed a similar idea.

53. *See* Stapleton, *Lost in Translation*, *supra* note 17, at 21.

54. *See* Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 676 (1949) ("On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of the reasonably prudent man under the circumstances . . . .").

55. All-Tech Telecom, Inc. v Amway Corp., 174 F.3d 862, 866 (7th Cir. 1999). Posner's

duty consisting of the flexible balancing approach of reasonable care, the determination of whether a breach occurred left to the unconstrained judgment of a sample from the community—one might have expected that tort law would move forward with, as Jane Stapleton puts it, an era of a "dominant and voracious tort."[56]

It is my thesis, by contrast, that the history of tort law since the trilogy has been the development of various devices to control the jury, often covertly, and to shift to judges greater authority over the outcome of tort cases.[57] Of course, in countries without the civil jury, these devices are largely unnecessary. This phenomenon leads me to suggest that there are pockets of our tort law that have no utility for other countries—countries that do not have to contend with the judge-jury tension so prevalent in domestic tort law. And so, I invoke the epigram with which I began this article: duty doctrine in the United States is more likely to cause an epidemic of pruritus than to be of use to the rest of the world.

In the United States, sometimes duty is employed for explicit reasons to limit liability, as for example the concern with "crushing liability," expressed in the well-known case of *Strauss v. Belle Realty Co.*[58] Recall that *Strauss* involved a blackout in New York City when Consolidated Edison failed properly to manage its power grid.[59] The court declared that Consolidated Edison owed the plaintiff, with whom it was not in privity, "no duty" because the liability to which the utility would otherwise be exposed would be too great.[60] Rules of law such as adopted by the *Strauss* court are required, whether based on duty or not, and regulate matters such as which kinds of harms under what circumstance are cognizable. Those kinds of rules are necessary in any jurisdiction with tort law, rather than leaving the outcome to unbridled fact finder discretion.

But there are linguistic and conceptual difficulties in using "duty" as the means to carve out an area of no liability. Ordinary usage of "duty" means "something that one is expected or required to do by moral or legal

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proclamation about tort law is all the more surprising in light of his comment, four years earlier, about the revival of duty limitations after a universal duty of reasonable care had been recognized: "[T]he concept of duty was revived to name some of these limitations [on the scope of liability for negligence] and to exert some control over juries." Edwards v. Honeywell, Inc., 50 F.3d 484, 488 (7th Cir. 1995).

56. *See* Stapleton, *Lost in Translation*, *supra* note 17, at 14.

57. I take comfort in the fact that our honoree has made a similar claim: "The duty concept is a control device that enables courts to check the propensity of juries to award damages in situations where matters of legal policy would dictate otherwise." ALLEN M. LINDEN & BRUCE FELDTHUSEN, CANADIAN TORT LAW 285 (8th ed. 2006).

58. 482 N.E.2d 34, 39 (N.Y. 1985). Jane Stapleton identifies other no-duty rules in American law that she attributes to jury control. *See* Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, *in* EXPLORING TORT LAW 262, 290–92 (M. Stuart Madden ed. 2005) [hereinafter Stapleton, *Controlling the Future of the Common Law by Restatement*].

59. *See Strauss*, 482 N.E.2d at 39.

60. *See id.* at 35.

obligation."[61] Thus, duty is concerned with obligations about how one acts—primary behavior. But in deciding that Consolidated Edison had no duty to Mr. Strauss, the New York Court of Appeals surely did not mean that Consolidated Edison had no obligation with regard to how it managed its power grid. Indeed, Consolidated Edison had already been found grossly negligent and liable to another injured customer, albeit one who was injured in a location where he was a customer of Consolidated Edison.[62]

The logical conclusion of this is that Consolidated Edison simultaneously owed and did not owe a duty of care in managing its power grid, depending on where Mr. Strauss was when he was injured.[63] This brings me to the first instance of duty-rhetoric induced pruritus. Head scratching is but one means of dealing with the dissonance created by such decisions.

But the use of duty in the United States has the potential to cause a worldwide epidemic of pruritus and goes well beyond the now-you-have-it, now-you-don't aspect of *Strauss*. There are several other uses of duty to control the jury on the modern domestic torts landscape—yet all are employed opaquely without acknowledging the purpose for their invocation.

II. USING NO-DUTY WHEN THE COURT BELIEVES THAT THERE IS NO NEGLIGENCE OR AN ABSENCE OF CAUSATION

This may be the most common misuse of duty,[64] in which the court believes there is no negligence but relies on no-duty instead as the basis for

61. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 609 (1996).

62. *See* Food Pageant, Inc. v. Consol. Edison Co., 429 N.E.2d 738 (N.Y. 1981). This is the manner in which duty is employed in tort law today. *See* Donaca v. Curry Cnty., 734 P.2d 1339, 1340 (Or. 1987) ("'[N]o duty' is only a defendant's way of denying legal liability for conduct that might be found in fact to have unreasonably caused a foreseeable risk of harm to an interest of the kind for which the plaintiff claims damages.").

63. The same situation of simultaneous duty/no-duty to the same person arises from the use of duty to police the boundaries of recovery for stand-alone emotional harm. Thus, a defendant may act without reasonable care and put at risk a plaintiff. If the plaintiff suffers personal injury, the defendant had a duty to the plaintiff and will be liable. But if the plaintiff only suffers emotional harm, the defendant had no duty and will not be liable.

64. As John Goldberg and Ben Zipursky have said, collapsing breach and duty "is probably the greatest single source of confusion over duty" and its use "surreptitiously . . . shrink[s]" the jury's role in deciding breach. John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 713 (2001); *see also* Stapleton, *Controlling the Future of the Common Law by Restatement*, *supra* note 58, at 294 (remarking on the "typically covert maneuvers that are made to prevent issues reaching the jury"). For judicial recognition and criticism of collapsing duty and breach, see for example, Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006); Coburn v. City of Tucson, 691 P.2d 1078 (Ariz. 1984).

ruling as a matter of law that the defendant is not liable.[65] Consider *Lawlor v. Orlando*,[66] in which the estate of a former patient who committed suicide sued the deceased psychotherapist. The patient had made no suicide attempts, made no threats about committing suicide, made no mention of suicide, and revealed no suicidal tendencies.[67] A screening performed a few months before the patient committed suicide found no threat of suicide.[68] One might wonder what possible basis existed for concluding that the defendant-psychotherapist acted unreasonably. Of course, that determination was one for the fact finder, and the court concluded that the defendant owed no duty to a patient treated as an outpatient.[69] Yet, suppose that a patient, treated on an outpatient basis, exhibits signs of being suicidal and that these signals accelerate over a period of time during which the patient's psychotherapist sees the patient regularly. To make the case even more compelling, let us add that the patient's spouse contacts the psychotherapist and explains additional behavior that points toward the patient being suicidal, expresses concern about the patient's intentions, and adds that the patient resisted any assistance from the spouse. I doubt that the resolution of that case would be on the basis of no duty, despite the general reluctance of courts to permit tort claims that arise from a competent individual's decision to commit suicide.[70]

III. USING NO-DUTY IN A SIMILAR FASHION TO PART II, WHEN THERE ARE OTHER GOOD AND SUFFICIENT (BUT UNSPECIFIED) REASONS FOR NO LIABILITY

One example of this no-duty usage is based on John Goldberg and Ben Zipusky's discussion of *Parmely v. Hildebrand*[71] as an example of a case in which they claim courts have to struggle with duty even in the core situation of physical harm.[72] Defendant in *Parmely* built a house for himself and his

65. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. i (2010).

66. 795 So. 2d 147, 148 (Fla. Dist. Ct. App. 2001) (holding that the defendant-psychotherapist owed no duty with regard to former patient's suicide where patient evidenced no suicidal tendencies; had made no threats of committing suicide; made no suicide attempts; nor mentioned suicide; and a screening performed a few months before he committed suicide revealed no threat of such).

67. *See id.*

68. *See id.*

69. *See id.*

70. Other examples of employing no duty in place of no breach of duty as a matter of law can be found in Goldberg & Zipursky, *supra* note 64, at 712–16 and RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 reporters' note cmt. i (2010).

71. 603 N.W.2d 713 (S.D. 1999).

72. Goldberg and Zipursky did this in the context of critiquing duty provisions adopted in the *Third Restatement of Torts*, which employs a default duty of reasonable care when someone creates a risk of harm to others. *See* Goldberg & Zipursky, *supra* note 64, at 679.

family.[73] Shortly after it was completed, serious settling problems developed.[74] Selling the house to Parmely, Hildebrand disclosed the difficulties he had had.[75] When additional problems developed—windows that wouldn't close, floors and walls cracking, and roof leaking—Parmely sued, alleging, inter alia, negligent construction of the house.[76] The court concluded ("somewhat surprisingly," in Goldberg and Zipursky's view)[77] that a non-professional builder owes no duty to purchasers of the home.[78]

But suppose that due to negligent construction of the house by Hildebrand, the roof collapsed, injuring Parmely. This change in the facts reveals immediately that *Parmely* is not a core physical harm case. Rather, it is one that involves economic loss and economic loss in the context of a contract between the parties. That is a classic area in which courts leave the rights and obligations of the parties to contract law and withdraw the availability of tort claims in order to respect the boundary between tort and contract.[79] That is a sufficient, more revealing, and more limited explanation for the outcome in *Parmely*—one that leaves room for liability in the hypothetical above.[80]

IV. EMPLOYING UNFORESEEABILITY TO CONCLUDE THAT THERE IS NO DUTY BASED ON CASE-SPECIFIC FACTS OF THE SORT THAT WOULD ORDINARILY BE FOR THE JURY OR OTHERWISE EMPLOYING UNFORESEEABILITY IN AN INCOHERENT FASHION[81]

Courts have long been addicted to using unforeseeability both to deny the existence of a duty in fact-specific terms and to establish a duty where it had not previously existed. Foreseeability is an exceedingly attractive platform for the former moves because it is highly manipulable.[82]

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73. *Parmely*, 603 N.W. 2d at 714.

74. *Id.*

75. *Id.* at 714–15.

76. *Id.* at 715.

77. Goldberg & Zipursky, *supra* note 64, at 679.

78. *Parmely*, 603 N.W. 2d at 717–18.

79. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. d (2010).

80. Courts often use no duty in explaining why there is no liability for causing economic loss. That usage is similar to *Strauss*'s usage in that it does not address the idea of obligation and primary behavior. Hildebrand's legal obligations of care in building the house surely cannot depend on the ex post consequences—economic loss or personal injury—of shoddy construction methods.

81. The seminal contemporary work on foreseeability, critiquing its use for duty determinations, is W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005).

82. Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law:*

Foreseeability can be helpful (but misleading) for the latter effort because the reasons for no duty often have nothing to do with the existence of foreseeability. Thus, the basis for the no-duty-to-rescue rule has nothing to do with the foreseeability vel non of harm,[83] but the California Supreme Court has utilized foreseeability to adopt an exception to that rule and to the rule barring liability for economic loss.[84]

In a two-for-one opportunity, illustrating both the collapsing of breach and duty and a head-scratching use of foreseeability, consider *Posecai v. Wal-Mart Stores, Inc.*,[85] a case confronting the duty of a retail business to provide security for its customers in the parking lot of the store. The court said that whether a duty exists depends on the foreseeability of a criminal act.[86] The court then adopted a "balancing test" for determining whether this foreseeability existed.[87] The test entailed comparing the foreseeability of harm with the burden of a duty to protect.[88]

Note, first, the incoherence of a test of foreseeability, in which foreseeability is but one of two elements to be considered. Note, second, the role of the burden of precaution in determining foreseeability: what does the expense of hiring a security guard or two have to do with foreseeing anything? Note, third, that this determination of duty is a ticket good for only one ride on the *Posecai* line, depending as it does on past instances of crime at the business and in the vicinity, and thus relying on facts specific to the case.[89] Note, fourth, that the court's determination of duty based on balancing the foreseeability of harm with the burden of precaution is essentially the same inquiry the jury would decide for breach purposes. Finally, note that foreseeability is context specific—requiring consideration of the specific facts in the case.[90] Those are for the jury and, since breach

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Descriptive Theory and the Rule of Law, 54 VAND. L. REV. 1039, 1046 (2001) (foreseeability is "so open-ended [it] can be used to explain any decision, even decisions directly opposed to each other. . . . [T]herefore, [it] undermine[s] clarity and certainty in the law whenever [it is] embedded in a legal standard."). Ben Zipursky also puts it well, observing that foreseeability with "its accordion-like meaning, is clearly one of the murky concepts that has led students and scholars to think that negligence law lacks conceptual integrity." Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1249 (2009).

83. *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729–30 (2008).

84. *See* Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

85. 752 So. 2d 762 (La. 1999).

86. *Id.* at 768.

87. *Id.*

88. *Id.*

89. For the arguments against duty being narrowed to decide only the case at hand, see Gergen, *supra* note 33, at 438–39.

90. I issue this challenge to my students when we confront the use of foreseeability for duty purposes: "Identify a category of cases in which we might inquire about whether a duty should exist. If I cannot give you two sets of facts—with polar opposite likelihoods of harm—I will buy you a free lunch." I have not yet had to pay off on this challenge.

requires consideration of the foreseeable risk of harm, the breach inquiry is the place for consideration of foreseeability.[91]

Reading cases like *Posecai* might result in a severe case of pruritus for those uninitiated in the process of jury control.[92] How can a court decide if a duty exists by using the same standards that the jury would use to decide if there was breach of that duty?

Ben Zipursky has taken issue with the proposition that foreseeability has no role in duty and that the only proper usage of foreseeability is context specific.[93] He argues that foreseeability might properly be used on a categorical basis, as the court in *Posecai* promised it would, but did not.[94] Thus, a court might consider the foreseeability of harm by social hosts, psychotherapists, or land possessors with regard to trespassers on their land in deciding whether to impose a duty. The degree of categorical foreseeability might inform a court's decision about whether to extend or withdraw a duty.

Professor Zipursky's position is theoretically appropriate and reasonable. Categorical foreseeability *could* be used by courts for duty purposes. Indeed, at one point in time, I agreed with Zipursky, but with reflection I am dubious.[95] For a court to use this concept of categorical

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91. *See* Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007); Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009); A.W. v. Lancaster Cnty. School Dist., 784 N.W.2d 907 (Neb. 2010); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568 (Wis. 2009).

92. A case similar to *Posecai*, but one in which the court employed foreseeability to decide a duty existed, is *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997). Plaintiff alleged she was sexually abused by one Gadams, who was hired only after positive, but misleading, references were provided by former employers-defendants. *Id.* at 585–86. In addressing whether a duty of care existed in providing references, the Court employed foreseeability, a factor that is the primary one for California duty determinations, but carefully observed that its foreseeability inquiry was:

> [N]ot to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.

Id. at 588–89. The court then proceeded to address *the facts alleged in the complaint* to inquire whether defendants could "reasonably have foreseen that the representations and omissions in their reference letters would result in physical injury to someone?," and concluded, "[a]lthough . . . Gadams's alleged assault on plaintiff is somewhat attenuated, we think the assault was reasonably foreseeable." *Id.* at 589.

93. *See* Zipursky, *supra* note 82, at 1263.

94. *Id.*

95. In early drafts, the *Third Restatement of Torts*, of which I was a co-Reporter, recognized the use of categorical foreseeability for duty purposes. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 cmt. i (Tentative Draft No.2, 2002). Only in 2005, after Jonathan Cardi exposed the misuse of foreseeability for duty purposes, did I rethink that proposition and its desirability. *See* Cardi, *supra* note 81.

foreseeability, it would require knowledge or evidence about the distribution of individual likelihoods across the entire universe of incidents comprising the category. I do not know who knows or even where to ascertain information about the foreseeable risks across all, say, incidents of social hosts' serving alcohol to others. Professor Zipursky invokes suits against gun manufacturers regarding their distribution practices, stating, "[t]hus, when courts decline to recognize a duty of care from manufacturers of guns to victims of gun violence on 'no duty' grounds, part of their concern is the limited capacity of gun manufacturers, as a categorical matter, to anticipate (or foresee) how their products will be used."[96] Perhaps, but does anyone know what gun manufacturers know about their distributors' practices that create risks of criminal use of handguns? About their shadier distributor practices? At least some of the gun suits involved instances of deplorable and irresponsible distributor conduct (revealed by police sting operations) and allegations of manufacturer knowledge of such.[97] How shall we put all of this information together to form a categorical foreseeability judgment?[98]

Not only is the idea of categorical foreseeability non-implementable, cases like *Posecai* reveal an additional concern. There the court agreed that it should conduct its foreseeability analysis on a categorical level and then proceeded to do just the opposite.[99] Leaving foreseeability in duty determinations thus results in *Posecai* producing law in Louisiana that a commercial establishment is only liable for inadequate security when both the court and the jury concur that the defendant acted unreasonably.[100] But a

96. Zipursky, *supra* note 82, at 1263. Contrary to Professor Zipursky's claims, in *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001), the most prominent case denying a duty of gun manufacturers with regard to their distribution practices, the court rejected the role of foreseeability for duty purposes in response to plaintiffs' arguments that foreseeability supported a finding of duty. *Id.* at 1066. The court also suggested that its no-duty holding might change if a particular group of corrupt distributors could be found, suggesting little patience for categorical foreseeability in the duty calculus. *Id.* at 1064 n.5.

97. *See* City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). The Bureau of Alcohol, Tobacco, and Firearms conducts gun traces for law enforcement organizations and has amassed considerable data about guns that have been of interest in investigations that might provide information about problematical gun distribution patterns. *See* NAACP v. Acusport Corp., 210 F.R.D. 268 (E.D.N.Y. 2002).

98. I am not even sure what the category is when we think about psychotherapists and the foreseeable risks to third parties: do we mean all psychotherapist/patient interactions? Only those with patients that might plausibly pose a risk to others? Only those who make implicit or explicit threats to harm others? Or some other category? Does anyone think they have any idea what the categorical foreseeability is for any of those groups? Research in this area has focused on assessments of dangerousness for criminal law purposes and reveals that there is a very low rate of actual dangerousness, albeit among in-patients being evaluated. That low rate explains much of the inaccuracy in predictions, even though those predictions are about dangerousness in general over a long period of time. *See* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); Joseph M. Livermore, Carl P. Malmquist & Paul E. Meehl, *On the Justifications For Civil Commitment*, 117 U. PA. L. REV. 75, 84 (1968).

99. *See* Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762 (La. 1999).

100. As Leon Green remarked about this matter over eighty years ago: "[I]t would be stranger still

judge from a country in which there is no civil jury might be left wondering (and head-scratching), after considering cases such as *Posecai*, "Why would I want to decide the same inquiry twice in one case?"

V. DESCRIBING THE DUTY DETERMINATION IN FACT-SPECIFIC TERMS BEFORE CONCLUDING NO DUTY EXISTS OR THAT A MORE STRINGENT DUTY THAN REASONABLE CARE APPLIES[101]

Bill Powers provides a nice example of the narrowing of duty: a front-end loader was designed with a roll over protective structure (ROPS) that could be removed.[102] The owner, using it on ships with limited clearance, removed the ROPS.[103] Plaintiff, who operated the loader, was using it in a warehouse where the ROPS would not have diminished the machine's function, but the employer had not reinstalled it.[104] Plaintiff was in an

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if the law should provide the judge with the same formula for use in determining the *existence* of duty as it gives to the jury for the determination of the *violation* of duty." Leon Green, *The Duty Problem in Negligence Cases (Part I)*, 28 COLUM. L. REV. 1014, 1029 (1928).

Posecai is not a one-off case in this "stranger still" world of the same standard being employed for duty and breach of that duty. *See* Hoffman v. Union Elec. Co., 176 S.W.3d 706, 708 (Mo. 2005) (en banc) (holding that the existence of a duty depends on a judgment of "sound public policy;" specifically: "In considering whether a duty exists in a particular case, a court must weigh the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on defendant"); Castaneda v. Olsher, 162 P.3d 610 (Cal. 2007); *In re* Asbestos Litig., 2007 WL 4571196, at *7 (Del. Super. Ct. Dec. 21, 2007) ("Learned Hand's so-called 'risk-benefit method' has taken hold among jurists who subscribe to a 'law and economics' approach to tort law. And while not specifically adopted in Delaware, our courts have recognized that it is appropriate when engaged in the duty analysis for the court to measure the risk to the plaintiff caused by the defendant's conduct, and the cost or burden to the defendant in minimizing the risk."); Levy v. Fla. Power & Light Co., 798 So. 2d 778, 780 (Fla. Dist. Ct. App. 2001) (A legal "[d]uty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed."); McCall v. Wilder, 913 S.W.2d 150 (Tenn. 1995) ("A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." (citing RESTATEMENT (SECOND) OF TORTS § 291 (1964)).

101. Thus, in *Mussivand v. David*, 544 N.E.2d 265, 268 (Ohio 1989), the court narrowed the duty determination to the detriment of the defendant. Plaintiff sued his wife's paramour after plaintiff contracted a sexually transmitted disease. *Id.* at 270. Addressing the issue of defendant's duty, the court wrote, "[A] person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at the minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition." *Id.*

102. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1705 (1997) (citing Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 381 (Tex. 1995)). Powers also explains other cases in which the Texas Supreme Court relied on narrowed duties.

103. *See id.*

104. *See id.*

accident, and suffered an injury that the ROPS would have prevented.[105] Plaintiff claimed that making the ROPS removable was a design defect, and the jury found in his favor.[106] The Texas Supreme Court reversed, relying on the proposition that a manufacturer has no duty to design a multipurpose machine in a way that would make it unavailable for any of its intended uses.[107] That narrowing of the scope of duty prevented the fact finder from considering whether the manufacturer had acted unreasonably in designing and selling a machine that could be used without a ROPS (negligence) or whether such a machine was defective (strict liability). Perhaps the Texas Supreme Court truly meant that there was no circumstance—regardless of the magnitude of the risk—in which a manufacturer should install a guard that could eliminate that risk when doing so would render the product less functional—regardless of the magnitude of lost functionality. I doubt it, however, because risk-benefit analysis, like foreseeability, depends on the facts of the case, not categorical statements.

VI. CONCLUSION

There are many answers to the question posed for this symposium, and the array of subjects addressed by participants reveals the richness of the inquiry and, indeed, tort law. The subject I chose, the impact of the jury, is one that, in my judgment, pervades American tort law.

This impact is complicated, however, and contributes to inconsistent outcomes and confusing doctrinal rhetoric. There is remarkable ambivalence about the civil jury in American jurisprudence. But "ambivalence" may not be the right word—unless we are speaking in an aggregate way. Rather, "antipodal" is a more accurate characterization, with diametrically opposing views about the jury.[108] It would be interesting to compare judges who have ruled on multiple *Daubert* motions in the frequency with which those motions are granted by each judge. My theory is that the best predictor of how frequently they would rule that an expert's testimony is inadmissible would be how they had ruled in the past on all motions as a matter of law and that none of the case specific characteristics would be more influential than those prior rulings. Those rulings, I suggest, are influenced by the judge's attitude about the jury and its appropriate role in civil cases.

To understand American tort law one must be acutely conscious of the jury and the role that it plays not only for adjectival law but also for

105. *See id.*

106. *See id.*

107. *See id.* (citing *Caterpillar*, 911 S.W.2d at 385).

108. *See, e.g.*, Stapleton, *Controlling the Future of the Common Law by Restatement*, *supra* note 58, at 294 ("[T]his simply reflects a deeper schizophrenia in United States tort law toward the extent of power that juries should wield."); Vidmar, *supra* note 19, at v.

substantive law. The modern history of tort law is replete with the development of doctrine and devices that regulate the respective roles of judge and jury. The rest of the world, without a civil jury, has no need for these developments, and since much of this work is done covertly, many would have difficulty understanding what is taking place.

Duty doctrine in the United States is in an unenviable state, and much of the problem can be attributed to it being a convenient device for courts to assert hegemony over juries. Deciding that no duty exists in a case is a comfortable exercise of legal authority by a judge because it does not require wrestling with whether there is a real dispute that requires a jury to resolve it. Recent decisions in a handful of courts,[109] relying on guidance from the *Third Restatement of Torts*, are heartening, but they leave a long way to go before the United States can untangle its duty knots. There is little to recommend the rest of the world take on the confusion and meanderings that are suffused in American tort law.

109. *See supra* note 91. *But see* Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008).

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