

**“The Pervasive Role of Uncertainty in Tort Law:
Rights and Remedies”**

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THE PERVASIVE ROLE OF UNCERTAINTY IN TORT LAW: RIGHTS AND REMEDIES

Robert L. Rabin*

INTRODUCTION

Poor old Lord Abinger. For at least a century, since Judge Cardozo's magisterial opinion in *MacPherson v. Buick Motor Co.*,¹ he has been raked over the coals for having erected the privity limitation in product-injury cases, in order to ward off "the most absurd and outrageous consequences"²—more precisely, the possibility that an unpredictably large number of suits might arise if there were no clearly articulated bar to a vast array of accident claims. What worried Lord Abinger, of course, was the prospect of what has come to be called "the floodgates concern": an unconstrained volume of lawsuits.

But uncertainty takes more than one form. To take a more modern instance, consider the uproar created by the vaccine manufacturers some twenty-five years ago that led to the congressional enactment of the National Childhood Vaccine Act of 1986.³ In this instance, the core concern had little to do with floodgates; indeed, the vaccine manufacturers had quite precise data on how many side-effect generated injuries might result each year from near-universal inoculations of the standard childhood vaccines.⁴ Here the concern has come to be known as potential "crushing liability" from the sky-

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¹ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

² *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex.) 405.

³ 42 U.S.C. §§ 300aa-1 to 300aa-33 (Supp. IV 1986).

⁴ Such data was well-documented at the time. See STAFF OF THE SUBCOMM. ON HEALTH AND THE ENVIRONMENT OF THE H. COMM. ON ENERGY AND COMMERCE, 99th CONG., CHILDHOOD IMMUNIZATIONS 86 (Comm. Print 1986) (documenting the number of vaccine injury lawsuits by year from 1980 to 1985).

high damage awards in a relatively limited number of cases. Once again, the absence of bright-line rules—in this case, addressing unconstrained damages rather than open-textured liability standards—constituted the crux of the perceived problem.

Of course, floodgates and crushing liability concerns sometimes coalesce; virtually all of the mass torts (think asbestos) can be offered as illustrative. But the central point, commonly observed, is that the classic framework of accident law, grounded in the negligence concept, is open-textured both in the liability determination of fault and the damages determination of non-economic harm.⁵ Lord Abinger and the vaccine manufacturers may have been preoccupied with different aspects of the unpredictability bugaboo, but in the end it came down to a commonly-shared vision of a tort system potentially out of control.

Turning to the scholarly realm, no less an authority than Oliver Wendell Holmes, in his classic *The Common Law*,⁶ provided intellectual respectability of the highest order for a constrained vision of tort. While Holmes was a champion of the negligence principle, his dominant concern was that individual autonomy not be unduly constrained by legal rules that failed the test of providing predictability to individuals about the circumstances in which their conduct would be sanctioned.⁷ In his words, “[A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”⁸

⁵ And in circumstances of egregious misconduct, punitive awards, as well. See discussion *infra* Section IV.

⁶ O. W. HOLMES, JR., *THE COMMON LAW* (1881).

⁷ See *id.* at 77–129 (Lecture III, Torts—Trespass and Negligence).

⁸ *Id.* at 111.

With these opening comments in mind, this Essay will focus on two strands, or themes, that seem to me central to understanding the place of uncertainty in the rich history of tort law: first, from a liability (or substantive doctrinal) perspective, the tension between rules and standards; and second, from a remedial (or damages) perspective, the claims for “make whole” versus categorical approaches.

II. LIABILITY: RULES VERSUS STANDARDS

A. Accident Law from a Historical Vantage Point: A Rules-Constrained System

Holmes had to wait nearly fifty years to seize the opportunity to put his long-held preoccupation with narrowing the range of uncertainty in tort cases into the law reports. In the landmark case of *Baltimore & Ohio Railroad v. Goodman*,⁹ with characteristic brevity, he fashioned a rule of law in the context of reversing a jury verdict in favor of a fatally injured driver who had ventured onto the railroad tracks as a train approached. Holmes exclaimed that in grade-crossing scenarios, “if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.”¹⁰

As virtually every torts teacher will attest, *Goodman* comes paired in tort annals with the decision only seven years later leading to its demise, *Pokora v. Wabash Railway Co.*,¹¹ in which Justice Cardozo—ironically Holmes’ replacement on the High Court—ran through a series of illustrative grade-crossing collision hypotheticals to illustrate “the need for caution in framing standards of behavior that amount to rules of law. . . . In

⁹ *Balt. & Ohio R. R. v. Goodman*, 275 U.S. 66, 69 (1927).

¹⁰ *Id.* at 70.

¹¹ *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934).

default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.”¹²

The less obvious point, perhaps, is that while Holmes may have lost the immediate battle, in an important sense his view was consonant with the dominant tenor of the ongoing war, at least through—and somewhat beyond—the mid-twentieth century. On that score, consider the contributory negligence rule itself, which was the centerpiece of *Goodman-Pokora*. The rule in fact would have evoked robust approval from Lord Abinger because it dictated that *any* negligence on the part of a plaintiff, however trivial, was sufficient to bar recovery. In short, on the books, if not necessarily in practice, contributory negligence as a matter of law loomed large.¹³ As developed below, it was only with the advent of comparative negligence, well after the mid-twentieth century, that the consequences attached to victim fault became truly open-textured.

More generally, if one views tort law until the late 1960s through the prism of rules versus standards, a “deep structure” of rules is identifiable dating back to the advent of tort as a coherent field at the outset of the Industrial Revolution.¹⁴ And this structure is premised, in part at least, on a broader, tacit understanding of the relationship between overlapping domains of common law: tort, property, and contract, as the following illustrations suggest.¹⁵

¹² *Id.* at 105–06.

¹³ Indeed, Justice (then-Judge) Cardozo contributed numerous opinions in support of the other side of this coin: the resort to primary negligence as a matter of law as a device for narrowing the scope of jury (read “unpredictable”) decision-making. *Greene v. Sibley, Lindsay & Curr Co.*, 177 N.E. 416 (N.Y. 1931); see *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919).

¹⁴ See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 350 (3d ed. 2005) (“[T]he law of torts was totally insignificant before 1800...it was in the late nineteenth century that this area of law (and life) experienced its greatest spurt of growth.”).

¹⁵ Previously, I developed these views at greater length in Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981), although without particular attention to

Initially, consider the tort/property intersection. Landowner liability to entrants, including those “in privity” (such as tenants), for third-party violence was simply non-existent.¹⁶ What more could a landowner ask by way of predictability? The straightforward proposition is that claims would not be brought for sexual violence, robbery or any other form of malevolence causing harm to a tenant or visitor, no matter how great the victim’s ex ante vulnerability due to the landowner’s inadequate security measures on the premises. Any such claims would simply have been viewed through the perspective of the bundle of rights and obligations traditionally attached to property ownership, rather than the tort standard of “reasonable” conduct. Indeed, the one historically-based qualification that might be entered is the exception that proves the rule. In the case of an innkeeper/host’s personal security responsibilities to a guest, the terminology itself reveals the underlying characterization of the harm: unlike “tenant” or “entrant” the conception of a “guest,” in the hostelry setting, had no connotation of a property-based relationship.

Of course, the broader scope of landowner liability involved direct (rather than third-party) harm to the land entrant: the victim of a falling beam, an obscured trench, or an unnoticed banana peel. And here again, a structure of rules governed: the familiar sliding scale of obligations owed respectively to invitees, licensees, and trespassers. In the modern (but pre-1960s) era of tort law, this tripartite set of categories expanded to

the rules/standards theme developed in this Essay. On the latter score, I would suggest as a general proposition that the rules-based overlay of property and contracts doctrine seems far more intrinsic to the character of those areas—grounded in a strong need for predictability of rights and obligations—than was traditionally true of tort where the paradigmatic harm resulted from the intersecting conduct of strangers.

¹⁶ The first major case to find liability in this arena was *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), in which the court imposed a duty of care on the landlord of a large apartment building toward a tenant who had been assaulted in a common hallway of the building.

accommodate a broader typology of special circumstances.¹⁷ But the rules nonetheless had bite: the limitation of a landowner's responsibility to social guests—limitation to known, hidden dangers—not infrequently barred access via directed verdict or summary judgment to an open-textured determination of “reasonableness” by a jury.¹⁸

Consider next an illustrative example from the tort/contract intersection. Prior to the early years of the twentieth century, the most prominent example of an injury victim ensnared in the limitations imposed by a rules-based system was the workplace. The story is a familiar one: the rules-based defenses of assumed risk and the fellow-servant rule trumped resort to a standards-based assessment of reasonableness of the employer's conduct.¹⁹ Early in the twentieth century, the workers' compensation movement swept away what was by then a crumbling edifice. But at a lower level of visibility, assumed risk—and in particular *express* assumed risk—continued to negate responsibility for negligent conduct in a predictable fashion. Contract reigned supreme over tort as the dominant paradigm, as attested by the pervasive reliance on exculpatory clauses in contractual agreements ranging from rental leases to hospitalization forms.

As a general proposition, then, standards-based, case-by-case determinations of reasonable conduct—the promise offered by the denouement of the *Goodman/Pokora* saga—was to a certain extent illusory, particularly in instances of pre-existing relationships between the parties. Consider a final example: to prevent accidental harm,

¹⁷ See generally DAN B. DOBBS, *THE LAW OF TORTS* 591-620 (2001).

¹⁸ See, e.g., *Carter v. Kinney*, 896 S.W.2d 926 (Mo. 1995). From a broader perspective, the importance of the rules-based categories can be overstated. Despite the absence of supporting data, one would think that commercial premises liability cases contributed far more injury claims to the broader premises liability category than injuries in private residences. Those claims fell within a generally recognized exception to the status-based limitations—an exception that afforded a standards-based obligation of reasonable conduct to virtually all entrants on business premises.

¹⁹ See generally Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

was a parent obliged to act reasonably in supervising the activities of her child? The domain of intrafamily relations remained essentially within the private sphere—expressed in an immunity rule, respecting the traditional autonomy of individual conduct, and abrogating any uncertainty that standards-generated behavioral norms of reasonable conduct might animate. As late as mid-twentieth century, tort standards of reasonable conduct—and the concomitant uncertainty inherent in case-by-case jury assessment of responsibility—were sharply circumscribed by a constellation of proscriptive rules (no-duty rules, by and large).

B. The Heyday of Standards

Then, in the mid-1960s, something of a realignment of the planets occurred. The paradigm shift—and its correlative restructuring of the rules/standards axis—is apparent in revisiting the illustrations discussed above. In the landmark case of *Rowland v. Christian*,²⁰ status-based protections of land entrants associated with the property rights of landowners were supplanted by the tort framework of assessing reasonable conduct under the circumstances. The court made no effort to hide its contempt for the historical rules-based categories:

[A] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters. . . .²¹

²⁰ *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

²¹ *Id.* at 568. For broader perspectives on the judicial and social contexts in which *Rowland* was decided, see Robert L. Rabin, *Rowland v. Christian: Hallmark of an Expansionary Era*, in *TORTS STORIES* 73 (Robert L. Rabin & Stephen D. Sugarman, eds., 2003).

Similarly, in the influential case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,²² personal security concerns eradicated the notion that landowner responsibility was territorially distinct, metaphorically speaking, from the public authority of policing activity. Disavowing the notion that the landowner might be regarded as an insurer of safety, the court nonetheless intoned the increasingly familiar formula: an obligation “to take those measures of protection which are within his power and capacity to take, and which can reasonably be expected to mitigate the risk of intruders assaulting and robbing tenants.”²³

Rowland-style thinking, spearheaded by the influential California Supreme Court, readily spilled over into neighboring area of risk-generating responsibility for accidental harm, apparent in the court’s confrontation with the intrafamily tort immunity.²⁴ Rejecting limited abrogation that would except exercises of parental authority with regard to basic necessities, the court instead asserted that “the proper test of a parent’s conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances?”²⁵

The playing out of the express assumed risk scenario offers an important instance of the reordering of the torts/contract divide.²⁶ Moreover, it provides the opportunity for noting a further refinement of the rules/standards theme. Here, the landmark decision,

²² *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

²³ *Id.* at 487.

²⁴ *See Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971).

²⁵ *Id.* at 653 (Emphasis omitted).

²⁶ The reordering of the torts/contract divide was even more pervasive, extending deeply into the area of products liability. While a detailed treatment of products liability is beyond the scope of this Essay, the ghost of Lord Abinger lingered on between *MacPherson* in 1916 and the 1960s; not in continued adherence to the privity doctrine, but in the contract law-influenced premise of liability essentially limited to manufacturing defects—tantamount to a breach of warranty of merchantable quality. Not until the 1960s did the courts begin to adopt open-textured design defect liability and more expansive warning defect liability.

once again provided by the California Supreme Court, was *Tunkl v. Regents of the University of California*.²⁷ In the context of invalidating a hospital exculpatory clause, the court stopped short of a flat-out declaration that such clauses violated public policy, instead mediating between the poles of across-the-board, rules-based no liability and open-ended standards of circumstance-based interparty reasonableness.²⁸ In an effort to provide a measure of predictability regarding when such clauses would be sustained, the court offered guideposts via a multi-factor test; in summary, suitability for public regulation, essentiality and public nature of the service, and superiority of bargaining power (as evidenced in a standardized adhesion contract).²⁹

The battleground on the validity of exculpation shifted to recreational activities, and jumping ahead for a moment in this narrative, a Vermont case involving ski resort liability (a particular point of contention) offers a revealing contrast to *Tunkl*. In *Dalury v. S-K-I Ltd.*,³⁰ the Vermont Supreme Court invalidated an incontestably clear “hold harmless” (from negligence) form signed by a skier who collided with a metal pole that was part of the control maze for a ski lift line. Reciting but then ignoring the *Tunkl* guideposts, the court concluded that “ultimately the ‘determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.’”³¹ Entirely apart from treating contract considerations as irrelevant, the *Dalury* “test,” a featureless standard,

²⁷ *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).

²⁸ *Id.* at 774.

²⁹ *Id.* at 445–46.

³⁰ *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 796 (Vt. 1995).

³¹ *Id.* at 798 (quoting *Wolf v. Ford*, 644 A.2d 522, 527 (Md. 1994)).

reaches a high-water mark in promoting uncertainty regarding how future efforts to exculpate might fare.

This observation about the *Tunkl* guideposts as a modified rules-based approach leads to the related proposition that the California expansion was not quite the route that has sometimes been suggested.³² The leading case on bystander emotional distress, *Dillon v. Legg*,³³ operates in the same intermediate zone as *Tunkl*. Rather than relying on a general foreseeability approach to the scope of responsibility for emotional distress to third-party observers of negligently inflicted physical injury, the court once again established guideposts—ironically somewhat reminiscent of the pre-*Rowland* reliance on status considerations in landowner liability cases—for determining the circumstances in which a bystander might recover: 1) proximity to the scene of the accident, 2) direct observation of the injury, and 3) close family relationship.³⁴

Even if the erosion of stability and predictability in accident law was somewhat overstated, there would be little disagreement among close observers of tort law that, by the late 1970s, a rather sleepy backwater of the civil justice domain had evolved into a closely-watched (and feared, by many) scene of turbulence. This instability reflected both ethical norms on doing justice in individual cases versus treating like victims in like fashion, and economic perspectives on risk-bearing capacity tempered by pragmatic concerns about avoiding crushing liability and promoting administrative feasibility. At a still more fundamental level, there appeared to be a tectonic shift in social norms attached to protection of interests in liberty/personal autonomy and security

³² See, e.g., James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

³³ *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

³⁴ *Id.* at 920.

(always in precarious balance)—*a shift away from liberty and towards security*. And this shift, which is a pervasive feature of twentieth century public and private law, is especially evident in the maturation of tort.³⁵ Inevitably, these tensions—expressed at the surface level, in part at least, by the oscillation between rules and standards—resolved into a state of equipoise in which the boundaries of tort became more difficult to discern.

C. Rules/Standards in Equipoise: The Current Scene

Writing in 1992, the highly respected torts scholar Gary Schwartz surveyed the accident law developments just discussed and concluded, “During the last decade courts have rejected invitations to endorse new innovations in liability; moreover, they have placed a somewhat conservative gloss on innovations undertaken in previous years. What is portrayed, then, is ‘the beginning and the end of the rise in modern tort law.’”³⁶

In my view, Schwartz’s observations continue to ring true today, almost two decades later. While he did not locate his survey of the accident law scene explicitly on a rules/standards axis, my assessment of the current scene from that vantage point suggests that the *Rowland*-style embrace of circumstances-grounded, reasonableness analysis came to rest in late twentieth-century equipoise with a moderated attachment to systemic rules.

To illustrate, one might consider new frontiers that *could* have been opened. For at least a century, it had seemed clear that claims for free-standing economic loss were subject to a no-duty rule, apart from a narrow exception for particularly close tripartite

³⁵ Correspondingly, as tort matured, so too did the mechanism of liability insurance as an economic buttress for re-shaping the influence of tort—in tandem with the partial eclipse of contract and property regimes by tort.

³⁶ Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992).

configurations that resembled third-party beneficiary contracts.³⁷ Then, the New Jersey Supreme Court—the pro-active successor to the California court of the preceding two decades—handed down *People Express Airlines v. Consolidated Rail Corp.*,³⁸ a case involving a chemical spill in a railroad yard adjacent to Newark Airport that required the closing down of the facility with consequent loss of business to the plaintiff airline.

Rejecting the traditional economic loss rule of no-duty, the New Jersey court held that if a plaintiff could establish “particular foreseeability”—clearly a standards-based, case-by-case inquiry—an obligation of due care would be established.³⁹ At the time, *People Express* triggered considerable attention and speculation over its prospective influence.⁴⁰ But in the event, it was not followed by courts elsewhere, and the economic loss rule maintained its dominant position.⁴¹

In a similar vein, the same court decided to break the no-duty barrier in social host cases, deciding in *Kelly v. Gwinnell*⁴² that an individual who furnished alcohol to another person in a social setting could be held responsible for subsequent injuries to the victim of the intoxicated person’s negligent driving. Here, the court was especially moved to

³⁷ See generally Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857 (2006).

³⁸ *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107, 108 (N.J. 1985).

³⁹ *Id.* at 116.

⁴⁰ See, e.g., David W. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations*, 46 LA. L. REV. 737, 748 (1986) (considering the impact of *People Express* and arguing that the case’s “‘particular foreseeability’ approach appears to be gaining favor”). See also *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 156 (N.J. 1983), in which the New Jersey Supreme Court took a similar foreseeability-based approach to third-party liability for negligently-conducted audits; a position that has not attracted broad support in other states.

⁴¹ See, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097 (N.Y. 2001).

⁴² *Kelly v. Gwinnell*, 476 A.2d 1219, 1228 (N.J. 1984).

emphasize the case-by-case nature of the inquiry it anticipated.⁴³ Once again, however, the decision was widely noted but mustered little support from other state courts.⁴⁴

More commonly, perhaps, the salient feature of the decades since the early 1980s has been a tendency to hold the line at what I have described as a mid-point on the rules/standards continuum: that is, the recognition of a circumscribed obligation of reasonableness, hedged in by the predictability constraints associated with defined borders on the limits of case-by-case decisionmaking. *Dillon v. Legg*,⁴⁵ the pathbreaker on recovery for bystander emotional distress, is a prime example of this phenomenon, which stands out even more clearly in its subsequent evolution from flexible to fixed guideposts.⁴⁶ So too is the companion piece to bystander emotional distress: stand-alone recovery for negligently inflicted *direct* emotional distress, initially recognized in cases such as *Falzone v. Busch*.⁴⁷ Here as well, the common law developments of the two decades beginning in the early 1960s reveal a cautious move toward allowing recovery in circumscribed scenarios where the victim is in a zone of physical danger, but steadfast

⁴³ In responding to the dissent, the court emphasized that

Given the facts before us, we decide only that where the social host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving. We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host. We will face those situations when and if they come before us.

Id.

⁴⁴ See, e.g., *Reynolds v. Hicks*, 951 P.2d 761, 767 (Wash. 1998).

⁴⁵ *Dillon v. Legg*, 441 P.2d 912 (Cal.1968).

⁴⁶ On this further refinement, post- *Dillon*: from flexible to fixed guideposts, see *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) as modified by *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989). For a generally more restrictive approach to recovery for bystander emotional distress, see *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y. 1984) (requiring that a bystander victim, no matter how close the family relationship, be in the zone of physical danger).

⁴⁷ *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965).

resistance by the courts to recognition of duties to “foreseeable” victims of more elusive, long-latency exposure in cancerphobia cases.⁴⁸

And indeed, *Rowland* itself, and the broader sphere of landowner obligation cases, has been a battleground on which something of a standstill has been established between the advocates of assessing liability case by case and those favoring predictable guideposts. Roughly half the states have sided with the former camp and half with the latter.⁴⁹

In the neighboring category of obligations to secure against third-party violence, *Posecai v. Wal-Mart Stores, Inc.*⁵⁰—a relatively recent case involving a gunpoint robbery in a Sam’s Club parking lot—maps out the terrain. As in the broader domain of landowner liability, the courts are divided for the time being—suggesting something of a state of equipoise—among a rules-based approach (making liability contingent upon prior similar incidents) and more open-ended “foreseeability” and circumstances-grounded balancing tests.⁵¹

In concluding this section, I turn to an often-overlooked corner of the world of accident law for a concise and articulate statement of what generates the ineradicable

⁴⁸ See, e.g., *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

⁴⁹ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 table at 57–62 (Tentative Draft No. 6, 2009) (tallying the states). See also, *Koenig v. Koenig*, 766 N.W.2d 635, 639–40, 643 (Iowa 2009) (appearing to tilt the balance of states into the pro-*Rowland* register).

⁵⁰ *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762, 764 (La. 1999).

⁵¹ Interestingly, the Louisiana court, along with others adopting the “balancing” test, appears to blur entirely the distinction between no duty and no negligence as a matter of law: the balancing test, which the court asserts establishes the threshold obligation of duty, seems simply an application of the Learned Hand formula for determining breach. See *id.* at 766. For clearer evidence of this conflation (and apparently, concern about open-ended jury determinations), see *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381 (Mich. 1988), another case involving robbery on business premises, in which the court straightforwardly asserts that while juries ordinarily determine what constitutes due care “in cases in which overriding public policy concerns arise, the court determines what constitutes reasonable care.” *Id.* at 382–84. Rather than striving for predictability through the medium of fixed rules, these strategic shifts in allocation of decision making authority seem premised on reducing uncertainty simply by having judges undertake assessments of reasonable conduct ordinarily left to the discretion of a jury.

tension between rules and standards—an articulation that would have warmed Holmes’s heart. *Roessler v. Novak*⁵² involved a stereotypical hospital setting, raising the independent contractor defense to a vicarious liability claim. A radiologist member of a private group, working in defendant hospital, allegedly misinterpreted a scan of the plaintiff’s abdomen, leading to a variety of secondary health consequences.⁵³ The majority opinion recited the Florida three-element test of whether the radiologist had “apparent authority” (thus negating the hospital’s immunity from vicarious liability), and reversed summary judgment for the defendant.⁵⁴

The concurring opinion by the deeply frustrated chief judge of the court is of particular interest:

I concur because precedent requires me to do so. I believe, however, that our twenty-year experiment with the use of apparent agency as a doctrine to determine a hospital’s vicarious liability for the acts of various independent contractors has been a failure. Patients, hospitals, doctors, nurses, other licensed professionals, risk managers for governmental agencies, and insurance companies all need to have predictable general rules establishing the parameters of vicarious liability in this situation. Utilizing case-specific decisions by individually selected juries to determine whether a hospital is or is not vicariously liable for the mistakes of a radiology department, an emergency room, or some other corporate entity that has been created as an independent contractor to provide necessary services within the hospital is inefficient, unpredictable and, perhaps most important, a source of avoidable litigation. Our society can undoubtedly function well and provide insurance coverage to protect the risks of malpractice if there is either broad liability upon the hospital for these services as nondelegable duties or if liability is restricted to the independent contractor. The uncertainty of the current system, however, does not work.

. . . .

. . . [A] theory that requires a representation by the principal and reliance

⁵² *Roessler v. Novak*, 858 So.2d 1158, 1160–61 (Fla. App. 2003)

⁵³ *Id.* at 1160.

⁵⁴ *Id.* at 1163.

by the plaintiff is inherently case specific. Thus, after twenty years of precedent, if a hospital were sued by two different patients for two identical acts of malpractice occurring on the same day and committed by the same doctor in the radiology department, the hospital's vicarious liability would be a fact question for resolution by two different juries. Because such liability is based on case-specific representations by the defendant and reliance by the plaintiff, the two juries would be free to decide that the hospital was vicariously liable for one act but not the other.⁵⁵

Neither the Florida Supreme Court nor the state legislature has taken up Chief Judge Altenbernd's invitation. *Pokora* lives on, but *Goodman* shows signs of continuing vitality.⁵⁶

III. DAMAGES: MAKE WHOLE VERSUS CATEGORICAL APPROACHES

Yetta Seffert suffered particularly horrendous injuries when the doors of a municipal bus closed suddenly, trapping her right hand and left foot.⁵⁷ Unaware of Seffert's predicament, the bus driver started up, and she was dragged some distance

⁵⁵ *Id.* at 1163–64 (Altenbernd, C.J., concurring).

⁵⁶ In her commentary on this Essay, Professor Catherine Sharkey's central theme is that "rules, in pursuit of certainty and predictability, could take us (at least theoretically), in two polar opposite directions in tort. At one end point lies no-duty rules; at the opposite resides no-fault rules of strict liability (or absolute liability)." She correctly points out that my emphasis is almost exclusively on the no-duty end of the continuum. I do not find this point in any way inconsistent with my thesis and I would endorse her point; indeed, as she notes, it is explicit in the concurring opinion of Chief Judge Altenbernd. *Id.* at 1163 (suggesting that predictability could usefully be promoted "if there is either broad liability upon the hospital for these services as nondelegable duties or if liability is restricted to the independent contractor").

I would offer one qualification, however, to Professor Sharkey's illustrative point, when she rhetorically asks, "what of the dominance and acceptance of the rule of vicarious liability, which—unlike the other examples discussed by Professor Rabin—works indisputably in a pro-liability direction?" While this is accurate as far as it goes, vicarious liability rests on the foundation of primary tort liability of a responsible agent—whether that responsibility is premised on failure to adhere to a rule *or* a standard. Thus, vicarious liability "operates in a pro-liability direction" in the secondary sense of imputing liability to assure a solvent defendant.

A second qualification, standing apart from Professor Sharkey's commentary, is that liability-enhancing "rules" of strict liability for defective products and abnormally dangerous activities are in practice far less clearly categorized as "rules," rather than standards, than appears on the surface. But this is too large a topic to explore in this Essay.

⁵⁷ *Seffert v. L. A. Transit Lines*, 364 P.2d 337, 339 (Cal. 1961).

before being thrown to the pavement.⁵⁸ On appeal from a pain and suffering award of \$134,000, the California Supreme Court rejected the defendant's claim of excessiveness and recited in some grim detail Seffert's devastating heel, ankle, and foot injuries—necessitating nine operations, eight months in hospitals and rehabilitation, and the prospects of a continuing lifetime of pain and further medical interventions.⁵⁹

From the evidence at trial, Seffert clearly appeared to be radically and permanently disabled. But was the pain-and-suffering award of \$134,000 excessive? A majority of the court thought not.⁶⁰ What if the award had been \$350,000? Would that amount have been regarded as excessive? Or conversely, if it had been \$50,000, would that have been too little? One is left to speculate. The court's test, reflecting the appellate review standard frequently adopted in other states as well, was whether the award "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury."⁶¹

Perhaps more importantly, what guidance was given at trial to the jury in determining the parameters of pain-and-suffering recovery? At present, the model jury instruction in California provides that plaintiff is to recover "[r]easonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered," and further instructs that "[i]n making an award for pain and suffering you should

⁵⁸ *Id.*

⁵⁹ *Id.* at 341–42. In 2010 dollars this award would have been approximately \$1.4 million. Seffert's award of just under \$54,000 in pecuniary damages was uncontested on appeal.

⁶⁰ *Id.* at 344.

⁶¹ *Id.* at 342. States that have used the "shocks the conscience" test include Arkansas, Connecticut, Georgia, Idaho, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Nebraska, New Jersey, Texas, Virginia, Washington, and Washington, D.C.. 22 AM. JUR. 2d *Damages* § 815 (2010) (providing case citations for these states). States that have used the "passion or prejudice" test include Arkansas, Connecticut, Idaho, Illinois, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, Ohio, South Carolina, South Dakota, Virginia, and Washington, D.C. *Id.*

exercise your authority with calm and reasonable judgment and the damages you fix must be *just and reasonable in the light of the evidence*.”⁶²

In view of such an open-ended, indeterminate standard and the corresponding conceptual difficulties of monetizing intangible loss, some have argued that pain and suffering damages should be eliminated, advocating, in effect, a rules-based perspective parallel to a no-duty approach on the liability side.⁶³ But these remonstrances have fallen on deaf ears; the courts adhere to recognition of individualized pain and suffering recovery as a foundational principle of tort damages.

Interestingly, in *Seffert*, the preeminent figure on the California Supreme Court (and indeed the leading architect of the expansive era in California tort law), Justice Roger Traynor, dissented from the majority opinion’s adherence to the “shocks the conscience” test and registered his view that the pain and suffering award was indeed excessive.⁶⁴ Reviewing the reported California cases, Justice Traynor pointed out that “ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses.”⁶⁵ Traynor then went on to note that an earlier case reviewing awards for injuries to legs and feet had failed to record any recoveries above \$100,000,⁶⁶ leading him to the broader observation that “awards for similar injuries may be considered as one factor to be weighed in determining whether the damages awarded

⁶² California Jury Instruction (Civil) 4.13 (2010) (emphasis added); *See also* 22 AM. JUR. 2D *Damages* § 798 (2003).

⁶³ *See, e.g.*, Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219 (1953); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004). For critical assessment, see Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006).

⁶⁴ *Seffert v. L. A. Transit Lines*, 364 P.2d at 344–45 (Traynor, J., dissenting).

⁶⁵ *Id.* at 346 (Traynor, J., dissenting). A foreshadowing, perhaps, of the U.S. Supreme Court’s view on punitive damages announced in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), discussed *infra* Section IV..

⁶⁶ *Seffert*, 364 P.2d at 346 (Traynor, J., dissenting) (citing *McNulty v. S. Pac. Co.*, 216 P.2d 534 (Cal. Ct. App. 1950)).

are excessive.”⁶⁷ This falls short, of course, of an outright endorsement by this widely respected judge of either a flat-out ratio or categorical scheduling. But it surely edges in those directions.

At first blush, this constrained approach to non-economic damages by the leading voice advocating expansive strict enterprise liability for product defects may seem perplexing. But the key to understanding Justice Traynor’s restraint is found in his characteristically straightforward articulation of the policy rationale for his views: “[pain and suffering damages] become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation.”⁶⁸ Traynor, in other words, dons the mantle of actuary and anchors his perspective on damages in the quest for predictable assessment of risk.

Taken to its logical conclusion, either a fixed ratio or categorical scheduling of pain and suffering—the antithesis of an individually-focused make-whole approach—almost certainly would have struck Traynor as a legislative enterprise rather than consonant with the domain of judicial authority. But even partial moves in that direction, along the lines he tentatively suggests in his *Seffert* dissent, have not found a receptive audience in the courts. Traynor’s aspirations have been haunted by the shades of *Pokora*: every case is distinct and the common law is committed to doing justice to the victim standing before the court. Formally, this has remained the touchstone of judicial case law

⁶⁷*Id.* at 346 (Traynor, J., dissenting).

⁶⁸*Id.* at 345 (Traynor, J., dissenting).

on pain and suffering damages, although rules of thumb undoubtedly loom large in the settlement process (particularly in smaller out-of-pocket injury cases).⁶⁹

Nonetheless, there have been some interesting recent ventures on the perimeter aimed at imposing more certainty in non-economic damage verdicts. Consider, on this score, *Arpin v. United States*,⁷⁰ a wrongful death case for alleged medical malpractice involving a claim for loss of consortium damages brought under the Federal Tort Claims Act.⁷¹ The district court judge had, in conclusory fashion, entered an award of \$7 million on behalf of the decedent's widow and four adult children⁷²—a figure that Judge Posner, for the Seventh Circuit Court of Appeals, remarked was “plucked out of the air.”⁷³ Grounding remand for new trial in Federal Rule of Civil Procedure 52(a),⁷⁴ which requires federal judges as triers of fact to explain their decisions, Posner offered the following “guidance”:

The first step in taking a ratio approach to calculating damages for loss of consortium would be to examine the average ratio [of economic to noneconomic damages] in wrongful-death cases in which the award of such damages was upheld on appeal. The next step would be to consider any special factors that might warrant a departure from the average in the case at hand. Suppose the average ratio is 1:5—that in the average case, the damages awarded for loss of consortium are 20 percent of the damages awarded to compensate for the other losses resulting from the victim's death. The amount might then be adjusted upward or downward on the basis of the number of the decedent's children, whether they were minors or adults, and the closeness of the relationship between the decedent and

⁶⁹See generally H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (2d ed. 1980). For a recent study, see Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009). See also Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

⁷⁰*Arpin v. United States*, 521 F.3d 769, 771 (7th Cir. 2008).

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 776.

⁷⁴*Id.* at 776–77.

his spouse and children. In the present case the first and third factors would favor an upward adjustment, and the second a downward adjustment because all of Arpin's children were adults when he died.⁷⁵

Loss of consortium, of course, is quite a different proposition from pain and suffering. Most critically, a serious non-fatal accident case typically involves substantial medical expense, which is not a factor in a wrongful death case on behalf of survivors. This distinctive factor may, in fact, tilt in favor of a ratio approach in pain and suffering cases, because it somewhat softens the discrimination against survivors of a low-income decedent, which could be taken as a substantial objection to Judge Posner's consortium-based ratio.⁷⁶

But in a pain and suffering context, what factors would be utilized to make the adjustments Judge Posner contemplates, since the family characteristics he mentions are inapplicable? Arguably, the regressive income contamination of a ratio approach makes Traynor's scheduling suggestion, which focuses on the nature of the harm rather than pre-existing economic status, more attractive.⁷⁷ But as mentioned, scheduling has been a nonstarter to date.⁷⁸

Another pathway, mediating between make-whole, case-by-case damage assessments and categorical approaches, is suggested by a cluster of Section 1983 cases involving allegedly wrongful strip-searches by the Chicago Police Department. By the

⁷⁵ *Id.* at 777. Posner prefaces these suggestions with a reference to the discussion of an appropriate ratio for satisfying constitutional due process requirements imposed in punitive damages claims in *State Farm Mutual Automobile Co. v. Campbell*, 538 U.S. 408 (2008), discussed *infra* Section IV.

⁷⁶ Posner does suggest flexibility regarding upward and downward adjustments, but the adjustments he mentions are based on family characteristics not income characteristics.

⁷⁷ On the other hand, a fixed ratio of economic to non-economic loss would provide greater ex ante certainty than a scheduling approach, which inherently suffers from "borderline" ambiguity in non-generic cases, and is also virtually certain to provide for exceptions in especially grievous cases.

⁷⁸ Note that from an institutional capacity perspective, a ratio approach to promoting certainty seems more congenial to judicial administration than scheduling, which maps better with legislative action. Consider, for example, worker's compensation permanent partial disability schedules.

time *Levka v. City of Chicago*⁷⁹ was decided, the Seventh Circuit Court of Appeals had determined that the defendant's policy of strip-searching all female detainees violated the Fourth Amendment.⁸⁰ *Levka*'s case was appealed by the defendant on the grounds that the \$50,000 jury verdict for her emotional harm was excessive.⁸¹ Adhering to formula, the appellate court recited a standard of review echoing *Seffert*: whether the award was "so large as to shock the conscience of the court."⁸²

But for present purposes, the court's next turn is of particular interest. The opinion proceeded to spell out in graphic detail the strip-search of *Levka*; noted her consequent claims of distress and humiliation; listed the damage awards in the nine previous wrongful strip-search cases (the range was \$3,300–\$112,000); sorted those awards by reference to aggravating circumstances; determined that *Levka*'s case fell short of the most serious on the continuum; and consequently determined that her damages should be remitted to \$25,000 (or a new trial).⁸³

Levka can be seen as a variant on Justice Traynor's scheduling proposition, with the focal point being the character of defendant's conduct rather than the type of the victim's physical injury. As such, a *Levka* approach would be (and was) grounded in what is tantamount to de novo review of somewhat singular factual scenarios: a cluster of reasonably similar situations, featuring a pattern of repetitive misconduct by a defendant and a corresponding repetitive pattern of harm to a plaintiff. Perhaps these limiting

⁷⁹ *Levka v. City of Chicago*, 748 F.2d 421 (7th Cir. 1984).

⁸⁰ *Id.* at 422.

⁸¹ *Id.*

⁸² *Id.* at 424 (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1275 (7th Cir. 1983)).

⁸³ *Id.* at 425–27.

considerations explain why, once again, this variant on individualized make-whole damage assessment has not “had legs,” so to speak.

But if the judiciary has remained resistant to imposing constraints on pain and suffering in the pursuit of greater predictability, the same cannot be said for state legislators. Under the umbrella of “tort reform,” legislation capping pain and suffering damage awards—one avenue to imposing greater predictability—has been widespread, beginning with the influential California enactment in 1975 of the Medical Injury Compensation Reform Act (MICRA).⁸⁴ Thirty-five years later, nearly thirty states have enacted some form of limitation on non-economic damages, although not all such efforts have withstood state constitutional attack.⁸⁵

Caps, of course, promote predictability in a fashion that is particularly vulnerable to criticism on fairness grounds—namely, that it is the most grievously injured who are targeted for the make-whole shortfall. As a consequence, torts-policy analysts have offered an array of proposals along the lines of Traynor’s dissent seeking to impose greater certainty on tort awards while remaining cognizant of the fairness concern for treating like cases in like fashion.⁸⁶

⁸⁴ Cal. Civ. Code § 3333.2 (West 2010).

⁸⁵ According to the American Medical Association, “courts in 16 states have upheld the laws, while those in 11 states have overturned them.” Kevin Sack, *Illinois Court Overturns Malpractice Statute*, N.Y. TIMES, Feb. 5, 2010, at A13. See also, *Atlanta Oculoplastic Surgery v. Nestlehutt*, 691 S.E.2d 218, 224 (Ga. 2010); *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895, 914 (Ill. 2010), recently overturning state legislative caps on liability for non-economic damages in medical malpractice suits.

⁸⁶ For a useful survey and critique, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 789–96 (1995).

Some twenty years ago, Blumstein, Bovbjerg, and Sloan offered a proposal along these lines, developing a more elaborate, formalized version of a scheduling approach.⁸⁷ The authors proposed collecting and analyzing prior data with a view to generating information "on the spectrum of prior damage awards [that would] be provided to juries, judges, or both, as an aid to decisionmaking."⁸⁸ The jury would then be instructed that if it wanted to make an award in the top (or bottom) quartile of past results it must justify that result by pointing to facts in its case that tilted to the high (or low) side of the range:

[T]he middle range of prior awards of a similar nature should be given "presumptive" validity. That is, awards that fall in the middle range of the distribution should be deemed presumptively valid. In contrast, where valuations in a case differ significantly from prior results, tort valuations should be subject to both a burden of explanation by the jury and heightened review by the court. . . . An unexplained outlier should constitute a prima facie case for either remittitur or additur by the trial judge or an appellate holding of inadequacy or excessiveness of the judgment.⁸⁹

Scheduling proposals of this kind have been criticized by torts scholars such as Mark Geistfeld, who pointed out, the seeming paradox in rejecting unstructured jury decision making in favor of a scheduled approach, which from a horizontal equity perspective takes arbitrary prior awards as the cornerstone for future awards, and from a vertical equity perspective takes the ordering of magnitude in past jury awards as an

⁸⁷ James F. Blumstein, Randall R. Bovbjerg & Frank A. Sloan, *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 178–85 (1991). For a similar approach, using the analogy of prison sentencing guidelines, see Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"* 22 U. MICH. J.L. REFORM 303 (1989). See also, 2 THE AMERICAN LAW INSTITUTE REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 217–30 (1991), proposing guidelines "based on a scale of inflation-adjusted damage amounts attached to a number of disability profiles that range in severity from the relatively moderate to the gravest injuries." *Id.* at 230. The profiles were to be developed not from previous jury awards, but "by a consortium of experienced judges, lawyers, insurers, doctors, and others, whose conclusions would then be adopted by the state legislature or the state supreme court." *Id.* at 226 n. 30. Candor requires noting that I was an associate reporter on the ALI study, although not the author of this chapter.

⁸⁸ Blumstein, et al., *supra* note 87, at 178.

⁸⁹ *Id.* at 178–79.

appropriate key for hierarchical sorting in the designated severity-categories for future awards.⁹⁰

In the end, the unresolved tension in liability assessment between doing justice retail—with all its attendant unpredictability—and opting for a categorical rules-based approach, discussed above, spills over into damage assessment as well. But this pervasive theme in tort law has played out quite differently in the latter realm of fixing compensation, where the judiciary has been singleminded in resisting the allure of imposing structure on case-by-case decision making (and correlatively, reining in the virtually unchecked discretion of juries).

IV. A BRIEF AFTERWORD: PUNITIVE DAMAGES

If tort law played a purely compensatory role, this would be the end of my account for now. But the narrative needs supplementing by a not-insignificant afterword, animated by the sometimes complementary presence of punitive damage awards. Here too, the doppelganger of vague jury instructions—and trial attorneys' corresponding pleas to “send a message” to the alleged malefactor—fuel criticisms of unpredictability and arbitrariness.⁹¹

⁹⁰ And, of course, there is the core problem of defining coherent categories in the first instance. *See generally* Geistfeld, *supra* note 86 at 773. Geistfeld offers his own proposal, grounded in an economic perspective, which seeks to replace current open-ended jury instructions with an instruction to the effect that “the damages award should equal the amount of money that a reasonable person would have accepted as fair compensation for the pain-and-suffering injury when confronted by the risk of suffering that injury.” *Id.* at 842.

⁹¹ See, for example, California's jury instructions for punitive damages:

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice. In arriving at any award of punitive damages, consider the following factors: (1) The reprehensibility of the conduct of the defendant; (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage [actually] suffered by the plaintiff.

For present purposes, this afterword focuses on a trilogy of recent cases: *BMW of North America, Inc. v. Gore*,⁹² *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁹³ and *Exxon Shipping Co. v. Baker*.⁹⁴ In *Gore*, involving alleged fraud on the part of an auto manufacturer by concealing the repainting of newly-minted autos damaged by acid rain exposure,⁹⁵ the Court first enunciated a set of three guideposts as requisites in determining whether a punitive damage award satisfied the strictures of constitutional due process: “the degree of reprehensibility of the [defendant’s misconduct]; the disparity between the [actual] or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases.”⁹⁶ Significantly, at the time, the Court made no effort to spell out what might constitute an acceptable upper-limit on ratio, under the second guidepost, for constitutional purposes.

But in *State Farm*, involving an insurance bad faith claim, the Court—moving somewhat gingerly—ventured into this uncharted territory. Disavowing any effort to “impose a bright-line ratio,” the Court nonetheless proclaimed that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁹⁷ While acknowledging a possible exception where major reprehensible conduct resulted in minor economic harm, the

California Jury Instruction (Civil) § 14.71 (2010).

⁹² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

⁹³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

⁹⁴ *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008).

⁹⁵ *Gore*, 517 U.S. at 563.

⁹⁶ *Id.* at 574–75.

⁹⁷ *State Farm*, 538 U.S. at 425.

Court, once emboldened to enter the terrain, went on to add that when compensatory damages are substantial, “a lesser ratio, perhaps only equal to compensatory damages,” might define the outer constitutionally tolerable limit.⁹⁸

Putting aside *Exxon* for the moment, this is where matters stand for the present. From the perspective of predictability, one can easily exaggerate the significance for judicial administration of this quite ephemeral ratio-driven set of guideposts. By contrast, the widespread adoption of state legislative caps, albeit a patchwork, seems far more consequential.⁹⁹ Significantly, not long after *State Farm*, when the Court was asked to strike down a roughly 100:1 ratio of punitive to compensatory damages for alleged misrepresentations about the health effects of cigarettes, both the majority and dissent took a rain check, focusing instead on whether the jury instructions adequately cabined course-of-conduct harm.¹⁰⁰

Before turning to *Exxon*, it is important to pause for a moment and take stock of the situation with an eye on the broader landscape of make-whole damages. To the extent that these guideposts are to be read *cumulatively*, their direct relevance to compensatory non-economic damage assessments seems correspondingly limited. On this score, the initial guidepost—reprehensibility—is not properly regarded as a salient factor in fine tuning damages assessments for *accidental* misconduct; and, the final guidepost—correspondence to legislative penalties—has virtually no applicability in the

⁹⁸ *Id.* There is a consistent counterpoint of dissent in these cases to addressing perceptions of arbitrariness and unpredictability through substantive due process limitations. The objections are grounded in overlapping federalism concerns, see *id.* at 431 (Ginsburg, J., dissenting), and interpretive differences, see *Gore*, 517 U.S. at 598–602 (Scalia, J., dissenting) (Justices Scalia and Thomas would read constitutional due process as limited to the procedural realm).

⁹⁹ Currently, “[t]wenty states . . . impose a general cap on punitive damages awards, and one additional state imposes a more limited punitive cap.” Jonathan Klick & Catherine M. Sharkey, *The Fungibility of Damage Awards: Punitive Damage Caps and Substitution 2* (Columbia Law and Economics, Working Paper No. 298, 2007), available at <http://ssrn.com/abstract=912256>.

¹⁰⁰ *Philip Morris USA v. Williams*, 549 U.S. 346, 349–53, 355 (2007).

realm of compensatory damages. Only the ratio guidepost arguably has meaningful carryover to reining in pain and suffering awards.¹⁰¹ And its *constitutional* significance in restraining punitive damage awards—freighted with notions of due process constraints in addressing willful criminal wrongdoing—seems out of sync, in my view, with a civil justice tradition that reflects distinctly different normative foundations.

So, as a concluding matter, what does *Exxon* add to the mix? In this final resolution of the long-contested civil damages claims growing out of the notorious Exxon Valdez oil spill, the Court, on the surface, appears to press boldly its agenda of imposing greater predictability on punitive damage awards, enunciating a 1:1 ratio of punitive to compensatory damages.¹⁰²

But surface appearances may well be misleading. *Exxon* was decided under the Court's admiralty jurisdiction,¹⁰³ which is an open invitation to limit its reach; and as such, the decision was explicitly located in the domain of federal common law, rather than constitutional due process requirements. One might expect, then, that the broader influence of *Exxon* will stand or fall on its persuasive power. And in that regard, Catherine Sharkey spells out, in a comprehensive critique, how the Court's reasoning leaves much to be desired on virtually all counts, starting from a baseline criticism that the majority opinion offers no rationale for grounding its ratio in the purposes of punitive damages assessments, and proceeding to point out the total confusion of the Court's statistics-based methodology for arriving at a 1:1 ratio.¹⁰⁴

¹⁰¹ See generally Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005).

¹⁰² *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2633 (2008).

¹⁰³ *Id.*

¹⁰⁴ See Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25 (2009).

In the end, I suspect that one is left with the veneer of imposing predictability on outliers in the territory of punitive damages, expressed in the *Gore/State Farm* guideposts. Whereas, in the broader realm of pain and suffering recovery for accidental harm, there remains an impregnable fortress of make-whole, case-by-case decision making.

V. SUMMING UP

As mentioned earlier, the tensions I have discussed reflect both ethical perspectives on doing justice in individual cases versus treating like victims in like fashion, and pragmatic concerns about promoting rational deterrence and administrative feasibility. In truth, these points of friction—expressed at the surface level, in part at least, by the tension between rules and standards as well as make-whole versus categorical damages—can never be fully resolved, because the claims on both sides have too much persuasive force to be summarily overridden.