SECTION 11

LIABILITY

A. INTRODUCTION

Common carriers, transportation equipment manufacturers, governmental agencies, and others may find themselves liable for injury or death to passengers or property under common law doctrines of negligence, warranty, strict liability, trespass, and nuisance. With increasing frequency, common carriers and governmental agencies are defending claims based on federal and state Constitutional causes of action (e.g., invasion of privacy, unlawful search and seizure). A carrier can find that liability settlements and awards can consume a significant portion of operating revenue. For example, one survey of transit organizations found that tort liability payments consumed between 1.45 percent and 12.14 percent of rider fees, with the average being 4.65 percent.[1] This Section begins with an examination of the principal theories of and defenses to carrier liability for personal injury.

Other issues of liability were addressed in earlier Sections—Section 3 addressed environmental liability and Section 10 addressed Constitutional, employment, and disabilities issues, for example. This Section focuses principally on the law of torts, including issues surrounding products liability and contractual warranties. To be an effective advocate on behalf of a transit agency, the transit lawyer must be acquainted with both sides of the case—the plaintiff's *prima facie* case, and defenses thereto. Hence, the discussion elucidates the litigation issues from both perspectives.

B. NEGLIGENCE

1. Common Carriage

A common carrier has been defined as "one who engages in the transportation of persons or things from place to place for hire, and who holds himself out to the public as ready and willing to serve the public, indifferently, in the particular line in which he is engaged."[2] Courts have held that common carriers have a duty to their passengers higher than that of reasonable care.

The common law rule imposing a higher duty of care upon common carriers is of ancient origin. It found wide application against railroads in the 19th century. As one court noted, common carriers "…are held to the strictest responsibility of care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it."[3] Other courts, and some statutes, have described the duty as the "highest" degree of care, "extraordinary" care,[4] or "utmost" care commensurate with the hazards involved,[5] or some similar formulation, such as the "highest degree of vigilance, care, and precaution for safety" of passengers.[6] Though a carrier is neither absolutely liable for, nor an insurer of, a passenger's safety,[7] some courts have held common carriers liable for the "slightest negligence causing injury to a farepaying passenger."[8]

In some jurisdictions, however, common carriers are no longer held to a higher standard of care than are other defendants. New York, for example, has gone to a reasonableness standard.[9] In New York, common carriers are "subject to the same duty of care as any other potential tortfeasor—reasonable care under all the circumstances of the particular case."[10]

Some jurisdictions have shifted the burden of proof to a carrier (such as a transit provider) where, "there is proof of injury to a fare-paying passenger on a public conveyance and the failure to reach his/her destination safely."[11] In actions brought against common carriers, some courts have also found defenses of plaintiff's contributory negligence,[12] or comparative negligence,[13] inapplicable.

Even in jurisdictions that hold common carriers to a higher standard of care, a carrier is subject to a standard of reasonable care before the carrier/passenger relationship has been formed or after it has terminated. A standard of reasonableness has been imposed in areas beyond carriage, such as in the construction and design of facilities or vehicles.[14]

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[1] LARRY THOMAS, STATE LIMITATIONS ON TORT LIABILITY FOR PUBLIC TRANSIT OPERATORS (Transit Cooperative Research Program, Legal Research Digest No. 3, Transportation Research Board, 1994).

[2] Burnett v. Riter, 276 S.W. 347, 349 (Tex. App. 1925) (citation omitted).

[3] Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49, 58, 59, 4 Met. 49 (1842).

[4] "A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers but is not liable for injuries to them after having used such diligence." GA. CODE ANN. § 46-9-132 (2000).

[5] Lindsey v. D.C. Transit Co., 140 A.2d 306, 309 (D.C. App. 1958).

[6] Orr v. New Orleans Pub. Serv., Inc., 349 So. 2d 417, 419 (La. App. 1977).

[7] McCullough v. Regional Transit Auth., 593 So. 2d 731, 739 (La. App. 1992).

[8] Smith v. Regional Transit Auth., 559 So. 2d 995, 996 (La. App. 1990); Lincoln Traction v. Wilhelmina Webb, 102 N.W. 258 (Neb. 1905).

[9] New York has done away with specialized liability for common carriers and moved to a reasonable care standard.

[10] Bethel v. N.Y. City Transit Auth., 703 N.E.2d 1214, at 1218 (N.Y. 1998); Vumbaca v. Terminal One Group Ass'n, 859 F. Supp. 2d 343, 371 (E.D.N.Y. 2012).

[11] McCollough v. Regional Transit Auth., 593 So. 2d 731, 739 (La. App. 1992).

[12] Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478, 496–97 (1858). However, in Alvis v. Ribar, 85 Ill. 2d l, 421 N.E.2d 886, 898 (Ill. 1981), the Illinois Supreme Court adopted pure comparative negligence. However, the Illinois Legislature later replaced that rule with a statue applying modified comparative negligence. 735 Ill. Comp. Stat. 5/2-1107.1.

[13] Albrecht v. Groat, 91 Wash. 2d 257, 588 P.2d 229 (1978). This court applied strict liability principles against the carrier.

[14] THOMAS, *supra* note 1. "The standard has generally been held to apply throughout the entirety of a passenger's journey,

A carrier has a duty to exercise a high degree of care and diligence in selecting a safe place to discharge its passengers, and fulfills that duty when they are so discharged.[15] A bus or street car carrier discharges its duty to a passenger when it deposits him or her in a usual and reasonable place for alighting and crossing the street.[16] However, a carrier is only subject to a standard of reasonable care before the carrier/passenger relationship has been formed or after it has terminated.[17]

A standard of ordinary reasonableness also has been imposed in areas beyond carriage, such as in the construction and design of facilities or vehicles.[18] Transit operators also have been plaintiffs in product liability claims against vehicle manufacturers, and have occasionally found themselves as defendants in product liability actions.[19]

2. Elements of Negligence

Duty, breach, causation, and damages are the four elements of proof that an injured plaintiff must satisfy by a preponderance of the evidence to establish liability.[20] As to causation, the plaintiff must prove both cause-in-fact and proximate cause.[21]

3. Reasonably Prudent Person

The issue of whether one has engaged in negligent conduct is often determined by comparing the defendant's behavior against an objective standard of reasonableness—what a reasonably prudent person would do under like or similar circumstances. As one early court defined it, "such reasonable caution as a prudent man would have exercised under such circumstances."[22] Another early formulation of the standard provided, "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[23]

Due care, or ordinary care, has been defined as "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger,"[24] and "that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise."[25]

It is an objective test, though children are held to a standard of children of similar age and experience, and individuals with physical disabilities are held to a standard of an ordinary reasonable person with such disabilities. As Oliver Wendall Holmes said,

> A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for an injury to another.[26]

In certain professions, a party may be held to a higher standard of having the knowledge, experience, and education of individuals trained in that profession—the standard of qualified specialists in that field. Thus, a railroad engineer or an airline pilot would be held to the knowledge prevalent in their respective fields. A bus driver must exercise "all the care and caution which a motorman of reasonable skill, foresight, and prudence could fairly be anticipated to exercise…."[27] As one court noted,

> "WMATA, like any common carrier, owes a duty of reasonable care to its passengers." This requires "all the care and caution which a bus driver of reasonable skill, foresight, and prudence could be fairly expected to exercise," and "[w]hat is reasonable depends upon the dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised." [citation omitted].[28]

Similarly, the duty has been extended to operators of rail vehicles, or as one court stated, "it is the duty of the operators of street cars to exercise proper care, depend-

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beginning from the time someone presents himself or herself at the designated time and place with the intent of becoming a passenger, and ending at the time the passenger alights from the vehicle." ROBERT HIRSCH, POTENTIAL TORT LIABILITY FOR TRANSIT AGENCIES ARISING OUT OF THE AMERICANS WITH DISABILITIES ACT 17 (Transit Cooperative Research Program, Legal Research Digest No. 11, Transportation Research Board, 1998).

[15] Columbus Transp. Co. v. Curry, 104 Ga. App. 700, 122 S.E.2d 584, 588 (Ga. App. 1961); Wells v. Flint Trolley Coach, Inc., 352 Mich. 35, 88 N.W.2d 285, 287 (Mich. 1958).

[16] Knight v. Atlanta Transit Sys., Inc., 137 Ga. App. 667, 224 S.E. 2d 790, 792 (Ga. App. 1976).

[17] THOMAS, *supra* note 1.

[18] HIRSCH, *supra* note 14. *See, e.g.,* Wash. Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (D.C. App. 1982).

[19] *See, e.g.*, Salvatierra v. Via Metro. Transit Auth., 974 S.W.2d 179 (Tex. App. 1998).

[20] *See, e.g.*, Kayes v. Liberati, 104 A.D.3d 739, 960 N.Y.S.2d 499 (2013); Vallejo-Bayas v. N.Y. City Transit Auth., 103 A.D.3d 881, 962 N.Y.S.2d 203, (2013); Rutledge v. N.Y. City Transit Auth., 103 A.D.3d 423, 959 N.Y.S.2d 182 (2013); Red Rose Transit Auth. v. N. Am. Bus Indus., Slip Copy, 2013 U.S. Dist. LEXIS 6969 (E.D. Pa. 2013).

[21] Palsgraff v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[22] Vaughan v. Menlove, 3 Bing. (N.C.) 468, 472, 132 Eng. Rep. 490, 492 (C.P. 1837).

[23] Blyth v. The Co. of Proprietors of the Birmingham Water Works, 156 Eng. Rep. 1047, 1049 (Ex. 1856).

[24] Brown v. Kendall, 60 Mass. 292, 296 (1850).

[25] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372, 375–76 (Wis. 1931).

[26] OLIVER W. HOLMES, THE COMMON LAW 109 (1881).

[27] Lindsey v. D.C. Transit Co., 140 A.2d 306, 309 (D.C. App. 1958).

[28] Pazmino v. Wash. Area Metro. Transit Auth., 638 A.2d 677, 678–79 (D.C. App. 1994).

ing upon the condition of the street and of traffic at any particular point, especially at crossings."[29] In an emergency, such as a traffic accident, one is expected to respond as a reasonably prudent person would under the circumstances, given that one may not have time to make the optimum decision. According to one court, "The sudden emergency doctrine was developed by the courts to recognize that a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions."[30]

4. Calculus of Risk

An even more objective standard of negligence, one involving economic analysis, is the "calculus of risk" developed by Judge Learned Hand in *United States v. Carroll Towing Co.,*[31] under which the probability of injury (P) and the gravity of the injury (L) is assessed against the burden of taking adequate precautions to avoid the harm (B). Negligence is deemed to exist wherever B<PL. Professor Terry summarized the concept of negligence in these terms:

> To make conduct negligent the risk involved in it must be unreasonably great; some injurious consequences of it must be not only possible or in a sense probable, but unreasonably probable. It is quite impossible in the business of life to avoid taking risks of injury to one's self or others, and the law does not forbid doing so; what it requires is that the risk be not unreasonably great. The essence of negligence is unreasonableness; due care is simply reasonable conduct.…[32]

5. Duty

A plaintiff in a tort case has the responsibility of proving that the defendant owed him a duty of exercising due care.[33] Courts view the issue of whether a duty exists as a question of law for the judge to decide, while the issue of whether facts exist to prove a breach of such duty a question for the trier of fact (the jury, where one is impaneled) to decide. One court summarized the considerations to be weighed in determining whether a duty exists:

> The determination of duty…is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." [citing Professor William Prosser]. Any number of considerations may justify the imposition of a duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty…."[34]

Nonetheless, the concept of duty is not the same as a standard of conduct. Once a duty is deemed to exist, the question is whether the plaintiff's conduct fell below the standard of care and therefore breached its duty.[35] Numerous examples exist of situations where transit operators have been held to have breached their duty of care—(e.g., a transit provider has a duty to not negligently hire, supervise, or retain an individual with a poor driving record as a bus operator; not to be negligent in training or supervising an employee under circumstances where it is foreseeable that the employee's acts could cause injury; and to provide transit police in a terminal in a high crime area because it was foreseeable that the patron could be assaulted).[36]

A bus driver has a duty to take "all the care and caution which a bus driver of reasonable skill, foresight, and prudence could be fairly expected to exercise."[37] Thus, for example, the collision of a bus with a negligently driven automobile may nonetheless constitute a breach of the duty to a standing passenger thrown (as a result of the collision) from the rear of the bus to the fare box in the front of the bus.[38]

6. Custom

Justice Holmes noted, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[39] Thus, courts find that compliance with a customary practice is not necessarily conclusive as to the issue of negligence; before it can be, the jury must be satisfied with the reasonableness of the customary practice.[40] In a case in-

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[29] Schmidt v. Phila. Rapid Transit Co., 253 Pa. 502, 98 A. 691, 693 (Pa. 1916).

[30] Young v. Clark, 814 P.2d 364, 365 (Colo. 1991); Warley v. Grampp, 103 A.D.3d 997, 959 N.Y.S.2d 767 (2013).

[31] 159 F.2d 169, 173 (2d Cir. 1947).

[32] Terry, *Negligence*, 29 HARV. L. REV. 40, 42 (1915).

[33] *See, e.g.*, Saidoff v. N.Y. City Transit Auth., 105 A.D. 3d 726, 963 N.Y.S.2d 157 (2013) ("A transit company owes a duty to a prospective boarding passenger to provide him or her with a reasonably safe, direct means of entrance onto the vehicle, clear of any dangerous obstruction or defect which would impede that entrance.").

[34] Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 173 Cal. Rptr. 468 (Cal. 1975) (citation omitted).

[35] Coburn v. City of Tucson, 143 Ariz. 50 691 P.2d 1078, 1080 (Ariz. 1984).

[36] *See, e.g.,* Lockett v. Bi-State Transit Auth., 94 Ill. 2d 66, 455 N.E.2d 310, 314 (Ill. 1983); Watson by Hanson v. Metropolitan Transit Comm'n, 553 N.W.2d 406, 414 (Minn. 1996); Kirk v. Metro.Transp. Auth., 2001 U.S. Dist. Lexis 2786 p. 23 (S.D. N.Y 2001).

[37] D.C. Transit System Inc. v. Carney, Inc., 254 A.2d 402, 403 (D.C. App. 1969).

[38] Pazmino v. Wash. Metro. Area Transit Auth., 638 A.2d 677 (D.C. App. 1994).

[39] Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S. Ct. 622, 49 L. Ed. 905 (1903) (citation omitted).

[40] Trimarco v. Klein, 56 N.Y.2d 98, 36 N.E.2d 502, 506, 451 N.Y.S.2d 502 (N.Y. 1982).

volving the alleged negligence of a tug operator for failing to equip his tug with a radio, Judge Learned Hand concluded, "in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices."[41]

However, an industry standard or custom can be evidence of negligence where the defendant's conduct falls below it. For example, where it is the industry practice to have pilots warn passengers of oncoming turbulence and to instruct them to fasten their seat belts, the failure to do so may constitute negligence. Similarly, a transit provider must comply, at a minimum, with prevailing customary practices in the industry, and such customary practices are usually admissible at trial.[42]

In *Garrison v. D.C. Transit System, Inc.,*[43] a case in which a passenger was injured when the driver suddenly slammed on the brakes, the court held that the driver's violation of the transit company's driver instruction manual was admissible as some evidence of negligence, but did not constitute negligence per se. But in *Lesser v. Manhattan and Bronx Surface Transit Operating Authority*,[44] a case in which an 81-year-old patron slipped on snow while exiting a bus, the court held the company's operating manual inadmissible because it imposed a standard of care higher than that required by law. According to the court,

> the duty of a common carrier to provide safe passage is not akin to that of a municipal landowner to clear snow. A common carrier is required to exercise that care "which a reasonably prudent carrier of passengers would exercise under the same circumstances, in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated."[45]

7. Statutory Violation

Common carriers are governed by a multitude of federal, state, and local statutes, regulations, and ordinances. For example, the ADA requires that transit operators maintain the accessibility of their vehicles and facilities "in operative condition,"[46] while other federal regulations impose specific safety standards upon rail equipment and operation. However, courts have held that "when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."[47] These standards create legal obligations that may form the basis of establishing the "duty" requirement in tort law.

Various jurisdictions have adopted different approaches regarding the weight to be accorded a violation of a statutory obligation in assessing a defendant's negligence. Some courts view it as "some evidence," or "merely evidence" of negligence, to be considered by the jury with all the other evidence adduced.[48] Others treat a statutory violation as "prima facie evidence" or a presumption of negligence, meaning that if the defendant fails to rebut it, he is liable.[49]

For example, in a case involving a truck driver's violation of a statutory requirement to display clearance lights on his parked truck (though he did hang a kerosene lamp up to warn approaching vehicles), the court held,

> a violation of the statute in question gives rise to a rebuttable presumption of negligence which may be overcome by proof of the attendant circumstances if they are sufficient to persuade the jury that a reasonable and prudent driver would have acted as did the person whose conduct is in question.[50]

> Still other jurisdictions treat a statutory violation as "negligence per se," or conclusive evidence of negligence.

> A majority of jurisdictions follow the rule laid down by Judge Benjamin Cardozo in *Martin v. Herzog,*[51] a case involving the question of whether the violation of a statutory obligation not to drive without lights constituted negligence:

> [T]he unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway…. [T]o omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform.[52]

But Cardozo was careful to distinguish proof of negligence from proof of causation. Said he: "We must be on our guard, however, against confusing the question of

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[41] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932).

[42] McCummings v. N.Y. City Transit Auth., 177 A.D.2d 24, 580 N.Y.S.2d 931 (N.Y. App. 1992), 580 N.Y. Supp. 981 (1992); Lesser v. Manhattan & Bronx Surface Transit Operating Auth., 157 A.D.2d 352, 556 N.Y.S.2d 274, 278 (N.Y. App. 1992) (dissent).

[43] 196 A.2d 924, 925 (D.C. App. 1964).

[44] 157 A.D.2d 352, 556 N.Y.S.2d 274 (N.Y. App. 1990).

[45] *Id*. at 276 (citation omitted).

[46] HIRSCH, *supra* note 14.

[47] Hurley v. Motor Coach Indus., 222 F.3d 377, 383 (7th Cir. 2000); *See also* Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

[48] Gill v. Whiteside-Hemby Drug Co., 197 Ark. 425, 122 S.W.2d 597, 601 (Ark. 1938); Smith v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 395, 402 (D. Md. 2001).

[49] For example, CAL. EVID. CODE § 669(a) imposes a presumption of negligence where (a) a statute ordinance or regulations were violated, (b) such violation proximately caused death or injury, (c) the statute was designed to prevent the death or injury complained of, and (d) the statute ordinance or regulation was intended to protect the class of person or property injured. Steering Comm. v. United States, 6 F.3d 572, 576 (9th Cir. 1993).

[50] Seeehan v. Nims, 75 F.2d 293, 294 (2d Cir. 1935).

[51] Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

[52] *Id*. at 815.

negligence with that of the causal connection between negligence and the injury. A defendant who travels without lights is not to pay damages for his fault, unless the absence of lights is the cause of the disaster."[53]

In the transit context, courts have attempted to draw these distinctions in cases involving the failure to wear seat belts,[54] the failure of the operator to have a valid license, and so on.

Nonetheless, impossibility of performance is accepted as a defense to the notion that breach of a statutory obligation constitutes negligence. For example, in *Bush v. Harvey Transfer Co.*,[55] it was held that the failure of vehicle lights caused by a fuse blow-out was excused because it was impossible for the defendant, under the circumstances, to comply with the statute. A statutory obligation may also be excused where the obligations it imposes create greater danger than alternative, statutory-violating conduct. The Restatement of Torts notes:

> Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirits be properly construed as intended to apply only to ordinary situations and be subject to the qualifications that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment…. The provisions of statutes, intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede. Thus, a statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travelers to drive upon the other side, if so doing is likely to prevent rather than cause the accidents which it is the purpose of the statute or ordinance to prevent.[56]

In some states, violation of a statute is negligence per se if the harm is of the kind the statute is designed to prevent, if the person is among the class designed to be protected, and if the statute is designed to promote safety rather than governance.[57] Some courts hold that violation of a statute is negligence per se, whereas violation of a regulation is only prima facie evidence of negligence.[58] In New York,

> It is now beyond cavil that a violation of a statute that imposes specific safety standards of its own constitutes conclusive evidence of negligence and results in absolute liability. Where, however, a statute provides generally for [safety] and vests in an administrative body the authority to determine how such safety mandates will be achieved, a violation of a regulation promulgated pursuant to that statutory mandate merely constitutes some evidence of negligence, and a jury is entitled to consider the plaintiff's comparative negligence.[59]

Many cases focus on the issue of whether the plaintiff is a member of the class of persons that the statute was intended to protect. Others focus on the purpose of the statute more broadly, rather than a breach of the literal language of the statute, and causation, asking whether plaintiff would have suffered injury had the statutory purpose been obeyed.[60] For example, in *Gorris v. Scott*,[61] a suit was brought against a ship owner whose negligent failure to comply with the Contagious Diseases (Animal) Act of 1869 led to the loss of plaintiff's sheep, which washed overboard. The court found that the purpose of the statute was to prohibit overcrowding of livestock to guard against contagious disease, rather than to prevent animals from drowning. Because the damage complained of was different from the purpose of the statute, the court held that the action was not maintainable.

Many regulations specify the duty of care to be observed by pilots, engineers, or vehicle drivers.[62] Nonetheless, courts have rejected the notion that the pilot is always negligent when an air crash occurs.[63] The duty imposed upon pilots has been described as a duty to exercise vigilance to see and avoid other aircraft.[64] Others have declined to hold that the regulatory "vigilance" requirement imposes an elevated standard of care, concluding that it "denotes the care that a reasonably prudent pilot would exercise under the circumstances."[65]

Where a safety statute has been violated, the judge ordinarily plays a greater role in resolving issues that, in other contexts, might be left to the jury. Safety statutes reduce general standards of reasonableness into particular standards of conduct. The judge, as inter-

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[53] *Id*. at 816.

[54] Kircher, *The Seat Belt Defense—State of the Law* (Symposium), 53 MARQ. L. REV. 172 (1970); Snyder, *The Seat Belt as a Cause of Injury,* 53 MARQ. L. REV. 211 (1970); Pollock, *The Seat Belt Defense—A Valid Instrument of Public Policy*, 44 TENN. L. REV. 119 (1976); Timmons & Silvas, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737, 775 (1974); Roethe, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

[55] 146 Ohio St. 654, 67 N.E.2d 851 (Ohio 1946).

[56] AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS § 286, comment (c), *quoted in* Telda v. Ellman, 280 N.Y. 124, 19 N.E.2d 987, 991 (N.Y. 1939).

[57] Flechsig v. United States, 991 F.2d 300, 304 (6th Cir. 1993); *but see* Smith v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 395, 402 (D. Md. 2001).

[58] Carlson v. Meusberger, 200 Iowa 65, 204 N.W. 432, 439 (1925); *but see* Bevacqua v. Union Pacific R.R., Co., 289 Mont. 36, 960 P.2d 273, 286 (Mont. 1998).

[59] Bauer v. Female Academy of the Sacred Heart, 275, A.D.2d 809 712 N.Y.S.2d 706, 708 (N.Y. App. 2000) (citations omitted).

[60] *See* Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197, 198 N.Y. (1926); and Ross v. Hartman, 139 F.2d 14, 15 (D.C. Cir. 1943).

[61] 9 L.R. (Exch.) 125 (1874).

[62] *E.g.,* 14 C.F.R. § 91.3.

[63] Foss v. United States, 623 F.2d 104, 106 (9th Cir. 1980).

[64] Transco Leasing Corp. v. United States, 896 F.2d 1435, 1447 (5th Cir. 1990), amended 905 F.2d 61 (5th Cir. 1990).

[65] Steering Comm. v. United States, 6 F.3d 572, 579 (9th Cir. 1993).

preter of the legislative intent, steps in to play a greater role than would be the case where there is no statutory violation. In a jurisdiction where a statutory violation is negligence per se, and there is no dispute as to whether a violation occurred or caused defendant's harm, the judge will decide the negligence question as a matter of law; where violation is disputed, the jury is relegated to the narrow factual issue of whether a violation occurred.[66] In a jurisdiction where a statutory breach is deemed to be only evidence of negligence, the judge will still play a more influential role in evaluating defendant's conduct.[67]

8. Res Ipsa Loquitur

Res ipsa loquitur is a legal rule allowing the plaintiff to shift the burden of proof on the negligence issue to the defendant.[68] The plaintiff must ordinarily prove three elements in order to shift the burden of proof to the defendant under *res ipsa loquitur*: (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[69] If all three elements are satisfied, the jury may infer negligence on circumstantial evidence alone, even where there is no direct evidence of defendant's negligence.[70] Defendant has the burden of proving plaintiff assumed the risk of injury, or was contributorily negligent.

Res ipsa has been alleged against common carriers, including transit operators as, for example, where a bus stopped abruptly, throwing a standing passenger against the windshield;[71] or where a passenger exiting a stopped bus that suddenly accelerated was thrown under the wheels;[72] where the heels of the passenger's sandals were grabbed by escalator treads;[73] or where an infant was injured in his mother's arms while descending a subway escalator.[74]

9. Liability and Indemnification on Shared Freight/Transit Rail Rights of Way

There are four categories of freight/passenger property sharing. The first type is "Shared Track and Mixed Operation: transit trains and freight trains are separated by headway intervals measured in minutes in an operating schedule." The second type is "Shared Track and Time-Separated Operations: both transit and freight trains utilize the same track but are separated by time windows." The final two types of sharing arrangements are shared right-of-way and shared corridor. The term "shared right-of-way," means that the freight and passenger tracks are less than 25 feet apart from one another. If the tracks are more than 25 feet—but less than 200 feet apart—then the term of art is a "shared corridor."[75]

Passenger ridership had been on the decrease continually and for many years. By 1970, there were fewer than 500 passenger trains compared to the 20,000 that existed in 1929.[76] Therefore, due to a lack of financial sustainability for passenger rail, Congress created Amtrak through the Rail Passenger Service Act of 1970, thus relieving private rail companies of their passenger service obligation.[77] By subsidizing Amtrak to take over passenger lines, private rail relinquished the passenger service.[78] In return, Amtrak could operate on the freight railroad's line and also was given the statutory right to force its way onto a line in the future if demand for passenger service reemerged.[79] Other passenger rail agencies do not share this statutory right and therefore lack Amtrak's ability to negotiate for shared use of a freight railroad's line.[80]

Amtrak's relationship with freight companies is helpful to understand rail indemnification for all passenger rail agencies because Amtrak contractually indemnifies freight rail companies in the case of injury and because "over 95 percent of Amtrak's 22,000-mile

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[66] Wiggins v. Capital Transit Co., 122 A.2d 117, 119 (D.C. 1956); Battle v. Wash. Metro. Area Transit Auth., 796 F. Supp. 579 (D. D.C. 1992).

[67] Tollisen v. Lehigh Valley Transp. Co., 234 F.2d 121 (3d Cir. 1956). JAMES A. HENDERSON, RICHARD N. PEARSON & JOHN A. SILICIANO, THE TORTS PROCESS (5 ed., Aspen 1999). Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1885–86 (1966).

[68] The English translation of the Latin phrase is "the thing speaks for itself."

[69] Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 689 (Cal. 1944); Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102 (1st Cir. 1986). Some states only require the first two prongs of the test. *See, e.g.,* McGonigal v. Gearhart Indus., Inc., 788 F.2d 321, 326 (5th Cir. 1986). *See also* AMERICAN LAW INSTITUTE, *supra* note 56 § 3280.

[70] Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1104–5 (1st Cir. 1986).

[71] *See, e.g.,* Wash. Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (D.C. App. 1982); Lindsey v. D.C. Transit Co., 140 A.2d 306 (D.C. App. 1958).

[72] Robles v. Chicago Transit Auth., 235 Ill. App. 3d 121, 601 N.E.2d 869 (Ill. App. 1992).

[73] Londono v. Wash. Metro. Area Transit Auth., 766 F.2d 569# (D.C. 1985). *See also* D.C. Transit Sys. v. Slingland, 266 F.2d 465 (D.C. Cir. 1959).

[74] Garcia v. Mass. Bay Transit Auth., 1994 Mass. Super. Lexis 87 (1994).

[75] RONFANG LIU, N.J. INST. OF TECH., SURVEY OF TRANSIT AND RAIL FREIGHT, INTERACTION FINAL REPORT 17 (2004).

[76] *See* Charles A. Spitulnik & Jamie Palter Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property,* 26 TRANS. L. J. 319, 321 (1999), at 322.

[77] *See* U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-04-240, COMMUTER RAIL: INFORMATION AND GUIDANCE COULD HELP FACILITATE COMMUTER AND FREIGHT RAIL ACCESS NEGOTIATIONS 17 (2004).

[78] *See* Spitulnik & Rennert, *supra* note 76**,** at 324.

[79] *Id.*

[80] *Id*. at 327.

network operates on freight railroad tracks."[81] To protect the freight railroad from liability, Amtrak contractually indemnifies through no fault liability agreement for injuries "resulting from any damages that occur to Amtrak passengers, equipment, or employees regardless of fault if an Amtrak train is involved."[82]

In 1987, a fatal accident tested Amtrak's liability and track-sharing relationship with freight railroads.[83] A Conrail locomotive collided with an Amtrak train in Chase, Maryland, killing 15 passengers and the Amtrak engineer, and causing numerous injuries to Amtrak passengers and employees.[84] Fault for the accident lay directly on the Conrail engineer and crew. The engineer in control of the Conrail locomotive pled guilty to manslaughter and admitted that the crew had been under the influence of marijuana, was speeding, and failed to follow many safety regulations.[85]

Amtrak attacked on public policy grounds the indemnity provision in its contract with Conrail. The issue at the district court was Conrail's contention that liability must first be settled through an arbitration clause that was part of Amtrak's operating agreement with Conrail.[86] Amtrak prevailed in the district court in which the court held that "public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue."[87] However, the appellate court reversed the district court and required that the issue be settled via the arbitration clause. Because of the indemnification clause, the recklessness of the Conrail crew cost Amtrak $9.3 million in compensatory damages.[88] This was not the only incident in which Amtrak had to pay for a host railroad's negligence. Between 1984 and 2004, Amtrak paid an estimated $186 million for accidents that were caused by host freight railroad companies.[89]

This system has created a conflicting issue between the public's desire for expanded passenger rail service at a minimal cost to taxpayers and the public policy goal of holding tortfeasors accountable to civil liability for reckless and negligent behavior. This issue affects both intercity rail, such as Amtrak, and inner-city commuter and light rail. As ridership increases and more and more cities add rail to their transportation portfolio, a shift in political attitudes toward passenger rail on a national level will increase the need for shared rights-of-way and will further shine a spotlight on indemnification agreements.

The passenger rail industry is fortunate to have had relatively few accidents that resulted in death. However, when accidents do occur, they often result in damages that are financially crippling to both private and public entities. The cost of insurance is part of doing business, but the negative impact of indemnification agreements on a passenger rail agency's operating budget affects the broader public policy goal of expanded, safe, and timely transit service. By reducing the cost of insurance premiums, the savings could be used to improve services provided by these agencies. In the United States, at least 41 passenger rail agencies—either commuter, light, or heavy rail—have some type of shared-use operating agreement with a freight railroad.[90] If all of these agencies have to dedicate yearly operating costs to indemnify freight railroads for their own negligence or recklessness, then millions of dollars a year will be diverted from passenger rail services to insurance costs.

Indemnity agreements, it is argued, erode the public policy goals of tort law that punishes and discourages negligent or reckless behavior.[91] Indemnity agreements vary in scope. Some jurisdictions indemnify for negligence, while others indemnify freight railroads for willful and wanton conduct in addition to negligence.[92] Freight railroads limit their liability by demanding hold harmless indemnity agreements using the theory of "but for" liability.[93] This theory "is the freight railroad's requirement that the passenger rail operator must bear all losses of any party (freight operator, itself, or third-parties) that would not have occurred if the passenger rail operator had never arrived on the property."[94] "But for" liability places a contractual duty on passenger rail agencies to assume the tort liabilities of the freight railroad.[95]

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[81] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 77, at 9 n.8.

[82] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-15, INTERCITY PASSENGER RAIL: NATIONAL POLICY AND STRATEGIES NEEDED TO MAXIMIZE PUBLIC BENEFITS FROM FEDERAL EXPENDITURES 148 (2006).

[83] *See* Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors,* N.Y. TIMES, Oct. 15, 2004, at Al, *available at* http://www.nytimes.com/2004/10/15/national/15rail.html?_r=0 (last visited July 2014).

[84] *See* Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 892 F.2d 1066, 1067 (D.C. Cir.1990).

[85] *See id*. at 1067.

[86] *Id*. at 1068.

[87] *Id*. at 1067.

[88] Bogdanich, *supra* note 83.

[89] *Id*.

[90] *See* Liu, *supra* note 75, at 67–70.

[91] Justin J. Marks, *No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers*, 36 TRANSP. L. J. 313 (2009).

[92] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-282, INTERCITY PASSENGER RAIL: COMMUTER RAIL: MANY FACTORS INFLUENCE LIABILITY AND INDEMNITY PROVISIONS, AND OPTIONS EXIST TO FACILITATE NEGOTIATIONS 14 (2009).

[93] *See generally* Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988), vacated, 892 F.2d 1066 (D.C. Cir. 1990) (for a history of Amtrak indemnity agreements).

[94] *Id.*

[95] U.S. Gen. Accounting Office, *supra* note 72, at 18.

C. CAUSE-IN-FACT

1. The But-For Test

In order to prevail, the plaintiff must prove that the defendant caused the plaintiff's harm by responding to one or two points: (1) "But for the defendant's act, would the plaintiff nevertheless have suffered the harm?,"(2) And was the defendant's conduct a "substantial factor" in producing the plaintiff's harm?[96] Causation may be proven by direct or circumstantial evidence.[97] For example, in the transit context, juries have been asked to decide whether the failure to provide adequate lighting,[98] the placement and maintenance of a bus stop near a busy intersection,[99] the failure of a streetcar motorman to sound a warning to pedestrians,[100] or injuries sustained when rear-ended by a bus[101] were substantial factors in causing plaintiffs' injuries.

2. Multiple Tortfeasors

Where there are concurrent tortfeasors, and indivisible injury, either or all may be subject to liability for the plaintiff's injury; the burden of proof may be shifted to the defendants to absolve themselves if they can.[102] Under a theory of "enterprise liability," where there are multiple producers of a commodity that causes harm, and plaintiff is unable to determine which among them produced the commodity that actually caused the harm, the plaintiff may bring suit against each member of that industry and seek joint and several liability against them all.[103]

In *Kingston v. Chicago & N.W. Ry. Co.,*[104] the defendant railroad was charged with starting a fire. It merged with another fire started by an unknown person, and the merged fire destroyed the plaintiff's property. Either alone would have achieved the same result. The court held:

> It is settled in the law of negligence that any one of two or more tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other…."[105] [citation omitted]

The court held that the burden was on the defendant railroad to prove that the fire set by it was not the proximate cause of the damage.[106]

3. Vicarious Liability

Under the doctrine of *respondeat superior,* an employer can be held vicariously liable for the torts of its employees. Thus, the negligence of a driver or mechanic is imputed directly to the carrier for which such employee works, so long as they are acting within the "scope of employment," and not on a "frolic and detour."[107] Section 1983 claims are discussed in Section 10—Civil Rights. Most governmental employers avail themselves of the case law holding the governmental entity not liable under respondeat superior for 1983 claims, absent gross neglect or indifference.[108] In the civil rights context and in claims arising from willful actions by employees—assault, rape, beating of passenger—employers customarily put the employee on notice that it will not defend or indemnify the employee for a judgment if the proof shows that the employee acted outside the course and scope of his or her employment, or willfully. The employer may, however, seek indemnification against the employee for any damages paid as a result of the employee's negligence.

Typically, under the "coming and going rule," an employer is not liable for negligence of his or her employee in causing third party injury while commuting to and from work. However, more and more employers are encouraging their employees to engage in rideshare or other vanpool services in order to improve their organization's compliance with environmental obligations. To

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[96] *See* Maupin v. Widling, 192 Cal. App. 3d 568, 573, 237 Cal. Rptr. 521, 524 (1987).

[97] Hoyt v. Jeffers, 30 Mich. 181, 189–90 (1874).

[98] Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3d Cir. 1978); Merino v. N.Y. City Transit Auth., 89 N.Y.2d 824, 675 N.E.2d 1222, 653 N.Y.S.2d 270 (N.Y. 1996).

[99] Bonanno v. Cent. Contra Costa Transit Auth., 89 Cal. App. 4th 1398, 107 Cal. Rptr. 20916 (Cal. App. 2001). At this writing, the case is on appeal to the California Supreme Court, 31 P.3d 1270 (Ca. 2001).

[100] Evans v. Capital City Transit Co., 390 A.2d 869 (D.C. 1944).

[101] Cipolone v. Port Auth. Transit Sys., 667 A.2d 474 (Pa. 1995).

[102] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 13 (Cal. 1948). Some courts have embraced a "concert of action" theory for multiple tortfeasors acting tortuously pursuant to a common design, particularly where the information necessary to prove which of several defendants caused plaintiff's injury lies peculiarly within defendants' control. Ybarra v. Spangard, 75 Cal. 2d 486, 154 P.2d 687, 690 (Cal. 1944). Where fungible commodities are produced by several manufacturers, some courts have used "market share" as a proxy for ascribing fault, each defendant being held liable for its proportion of the judgment represented by its share of the market. Sindell v. Abbot Lab., 26 Cal. 3d 588, 607 P.2d 924, 936 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[103] Hall v. DuPont de Nemours & Co., 345 F. Supp. 353, 373 (E.D. N.Y. 1972).

[104] 191 Wis. 610, 211 N.W. 913 (Wis. 1927).

[105] *Id*. at 914. The court noted that there would be no liability had the railroad's fire united with a fire of natural origin. *Id*.

[106] *Id*.

[107] Penn. Central Transp. Co. v. Reddick, 398 A.2d 27, 29–30 (Pa. 1979). Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 170 (2d Cir. 1968). A slight or minor deviation is not a "frolic and detour." *See* AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF AGENCY §§ 220, 229 (1958).

[108] *See, e.g.,* Kirk v. Metro. Transp. Auth., 2001 U.S. Dist. Lexis 2786 at 30–31 (S.D. N.Y. 2001).

the extent that such services may benefit the employer, the argument can be made that they fall within the "scope of employment," for which vicarious liability may be imposed.[109] Some transit systems are responsible for the rideshare program. Some states have enacted laws exempting employers who participate in such programs from liability under workers' compensation laws.[110]

However, if the tortfeasor is an independent contractor (a non-employee not controlled by the other person, who has independence in the manner and method of performing the work),[111] liability may flow to the independent contractor, rather than the person for whom the work is done.[112] Even here, however, the employer of the contractor may be held liable: (1) for negligence in selecting, instructing, or supervising the independent contractor; (2) where the duty is nondelegable; or (3) where the work to be performed is inherently dangerous.[113] This has significance with transit systems contracting out work or services. Other transit systems are so-called "Memphis formula" systems for Section 13(c) reasons, and all transit workers are private sector employees.[114] Is the transit system liable under respondeat superior or agency? Some tort liability statutes condition the removal of immunity and/or the tort liability cap on the individual being a governmental employee.

D. PROXIMATE CAUSE

1. Foreseeability

While the cause-in-fact element of liability focuses on the link between the defendant's conduct and the plaintiff's harm, proximate (or legal) cause focuses on the link between the defendant's negligence and the plaintiff's harm. As one court put it, "Proximate or legal causation is that combination of 'logic, common sense, justice, policy and precedent' that fixes a point in the chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery."[115] A key element of proximate causation is foreseeability—whether defendant reasonably should have foreseen that his conduct might cause harm to plaintiff. The seminal case is Justice Benjamin Cardozo's opinion in *Palsgraf v. Long Island R.R. Co.*[116]

In *Palsgraf*, railroad employees tried to assist a man boarding a moving train. The man dropped a package which, unbeknownst to the railroad employees, contained explosives. The explosion rocked the platform and threw heavy scales on Helen Palsgraf, who was standing some distance away. Cardozo found that "the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." He concluded, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[117] Though the railroad employees may have been negligent with respect to the man boarding the train with his package, the railroad was in no way negligent to the plaintiff, Helen Palsgraf, for it could not foresee her within the zone of danger in assisting a man boarding a moving train.

The element of foreseeability has been an important criterion in evaluating the issue of whether the defendant owes a duty to the plaintiff. *Berry v. The Borough of Sugar Notch*[118] offers an interesting illustration. The Borough of Sugar Notch had passed an ordinance limiting rail transit cars to a speed of eight miles an hour. On the day in question, the driver was proceeding at a speed well in excess of the speed limit, which caused him to reach a point on the street at which a large chestnut tree, blown by a fierce wind, came crashing down on the transit car, injuring the plaintiff. Plaintiff argued that the transit line's speed was the immediate cause of plaintiff's injuries, since but for the defendant's excessive speed, the car would not have arrived at the place where and when the chestnut tree fell. Describing this argument as "sophistical," the court acknowledged that while speeding in violation of the ordinance may well be negligence, the fact that the "speed brought him to the place of the accident at the moment of the accident was the merest chance, and not a thing which no foresight could have predicted." In *dictum*, the court conceded that had the tree blown down across the tracks before the transit car arrived there, the excessive speed may have rendered it impossible for the driver to have avoided a collision that he either foresaw or should have foreseen.

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[109] Moreover, "the more involved a [rideshare] organizer becomes in administering a rideshare program or in encouraging use of a particular rideshare program, the closer it comes to the kind of control that may give rise to a duty [to the employee for foreseeable harm in negligence]." RUSSELL LIEBSON & WILLIAM PENNER, SUCCESSFUL RISK MANAGEMENT FOR RIDESHARE AND CARPOOL-MATCHING PROGRAMS (TCRP Legal Research Digest, 1994).

[110] Claros v. Highland Employment Agency, 643 A.2d 212, 214 (R.I. 1994); Boyce v. Potter, 642 A.2d 1342, 1343–44 (Me. 1994).

[111] Sanford v. Goodridge, 234 Iowa 1036, 13 N.W.2d 40, 43 (Iowa 1944).

[112] *But see* AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS § 427, which imposes liability upon the employer of an independent contractor where the work involves special dangers to others that is inherent in the nature of the work.

[113] *See, e.g.,* Wash. Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864, 868 (D.C. App. 1982) (transit authority held responsible for damaged water line in proximity of subway station); HENDERSON ET AL., *supra* note 67, at 155.

[114] Under the so-called "Memphis formula," a transit operator contracts out to a private management company, which may enter into a collective bargaining agreement with the union enabling the employees to have essentially the same rights accorded to them when they were private employees. Macon v. Marshall, 439 F. Supp. 1209, 1215 (M.D. Ga. 1977).

[115] People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (N.J. 1985).

[116] 248 N.Y. 339, 162 N.E. 99 (1928).

[117] 162 N.E. at 100 (citations omitted).

[118] 191 Pa. 345, 348, 43 A. 240 (Pa. 1899).

Negligence, therefore, does not always lead to liability. Another passenger transportation case that offers useful illustration is *Central of Georgia Ry. Co. v. Price*,[119] a case in which the railroad failed to inform a passenger of her stop. The train proceeded several stations beyond before the mistake was realized. The conductor escorted the passenger to a hotel. That evening, the kerosene lamp beside her bed exploded, caught her mosquito netting afire, and she was burned. The court held that the railroad's negligence in passing the station where the plaintiff was to alight was too remote from the plaintiff's injuries in being burned. Between the negligence of the carrier in failing to leave the passenger at the proper stop, and her physical injury, there was the interposition of the negligence of the hotel in providing a defecting lamp—an intervening, superceding cause, if you will. Hence, the injuries the plaintiff suffered "were not the natural and proximate consequences of carrying her beyond her station, but were unusual, and could not have been foreseen or provided against by the highest practicable care."[120] Numerous cases exist in which passengers disembark from the bus, cross a street, and are struck by a vehicle. They sue the transit system, and the case often turns on the foreseeability of the injury.[121]

Yet another passenger injury case that illustrates the relationship between negligence, foreseeability, and intervening causes is *Hines v. Garrett*.[122] As in *Price,* the negligence of the railroad lay in carrying the passenger beyond her stop. It was night, and she was forced to walk about a mile through an "unsettled area" to get to her destination. On her journey home, she was raped twice, once by a soldier and once by a hobo. The court recognized the prevailing doctrine that one is not ordinarily held liable where the independent act of a third party intervenes between defendant's negligence and plaintiff's injury. Nonetheless, the court held, "this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury." Holding the railroad liable, the court concluded, "wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting such passenger against the same."[123]

Transit providers have been held liable where a passenger is foreseeably assaulted,[124] hit,[125] shot,[126] or a victim of an attempted rape,[127] or pickpocketed by another passenger.[128] Typically, these cases hold that a common carrier is bound to exercise extraordinary care to protect its passengers when the carrier knows or should know that a third person threatens injury to, or might be anticipated to injure, the passenger.[129] But when the carrier cannot reasonably anticipate that one passenger might injure another, it owes no such duty. For example, one court held that allowing a passenger to board a train in an intoxicated state would not give rise to knowledge on the part of the carrier that the intoxicated passenger would later viciously attack another passenger.[130]

Yet another illustrative proximate cause case is *Smith v. Washington Metropolitan Area Transit Authority*,[131] which involved a wrongful death suit brought by the parents of a passenger who suffered a heart attack climbing a 107-foot out-of-order escalator in 90-degree heat exiting a Metro station. Because the elevator was ill equipped to handle the passenger demand, and the plaintiff's medical expert testified that the combination of the high temperature and the enormous length of the climb aggravated his heart disease and caused the heart attack, the court held that the passenger's collapse, heart attack, and death withstood a summary judgment challenge and posed a question for the jury to determine.[132] The court went on to identify the duty held by carriers with respect to ingress and egress:

> The duty of a common carrier to provide a safe means of ingress and egress is widely recognized. This is particularly true in the instance of an underground railway where the common carrier controls the avenues of entrance and exit. The passengers cannot tunnel out of the ground on their own. They are confined to the routes the carrier provides.[133]

2. Substantial Factor

The seminal case of *Palsgraf* is also notable for its dissent. In it, Judge Andrews argued that one owes a duty to the world at large to refrain from those actions that unreasonably threaten the safety of others, and that duty extends even to those generally thought to be outside the danger zone. According to Andrews, foreseeability is only one part of a more comprehensive assessment of proximate cause, which includes such

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[119] 106 Ga. 176, 32 S.E. 77 (Ga. 1898).

[120] *Id*. at 78.

[121] *See, e.g.,* Tollisen v. Lehigh Valley Transp. Co., 234 F.2d 121 (3d Cir. 1956).

[122] 131 Va. 125, 108 S.E. 690 (Va. 1921).

[123] *Id*. at 695.

[124] McCoy v. Chicago Transit Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (Ill. 1977); Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3d Cir. 1978).

[125] Carswell v. Southeastern Pa. Transp. Auth. 259 Pa. Super 167, 393 A.2d 770 (Pa. 1978).

[126] Martin v. Chicago Transit Auth., 128 Ill. App. 3d 837, 471 N.E.2d 544 (Ill. App. 1984).

[127] Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (N.Y. 1982).

[128] Eagan v. Chicago Transit Auth., 240 Ill. App. 3d 784, 608 N.E.2d 292, 181 Ill. Dec. 219 (Ill. App. 1992).

[129] McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527, 531–32 (5th Cir. 1967) [unprovoked attack by a Caucasian passenger on an African-American passenger].

[130] German-Bey v. National R.R. Passenger Corp., 703 F.2d 54 (2d Cir. 1983).

[131] 133 F. Supp. 2d 395 (D. Md. 2001).

[132] *Id*.

[133] *Id*. at 133. F. Supp. 2d at 406. Judgment vacated and case remanded, 290 F.3d 201 (4th Cir. 2002).

things as whether there is a continuous sequence of events directly traceable between cause and effect, whether one is a substantial factor in producing the other, and whether there were intervening causes, or remoteness in time and space. Andrews argued that the determination of liability depends on the line drawn by courts on the basis of convenience, public policy, and a rough sense of justice.

The *Restatement of Torts*, in fact, embraces much of Andrews' methodology. Under the *Restatement,* an actor's negligent conduct is a legal (or proximate) cause of harm to another if his conduct is a substantial factor in bringing about the harm.[134] In determining whether an actor's conduct is a substantial factor in causing harm, the *Restatement* suggests analysis of other factors that contributed in producing the harm, whether there was a continuous and active sequence of events linking the defendant's conduct with the plaintiff's injury, and the lapse of time between the two.[135] For example, in *Merino v. New York City Transit Authority*,[136] where the intoxicated plaintiff fell on rail tracks and was hit by an oncoming train, the transit authority's failure to have adequate lighting at the platform was found not to have been a substantial factor in the loss of plaintiff's arm. Yet in *Hoeft v. Milwaukee & Suburban Transport Corp*.,[137] the court held that the inability of a bus driver to avoid a collision with an intoxicated pedestrian was a substantial factor in the plaintiff's injuries.

3. Rescue

In another railroad case, Justice Cardozo introduced the doctrine of "danger invites rescue." In *Wagner v. International Railway,* the court found that the railroad owed a duty not only to a passenger who fell off a train as a result of the defendant's negligence, but also to another passenger who fell off a trestle in his search for the fellow who fell off the train.[138] The rescue doctrine allows a rescuer to recover from the person whose negligence placed the person to be rescued in peril so long as (1) a reasonable person would, in balancing the risk against the utility, have acted as did the rescuer, and (2) the rescuer carried out the rescue attempt in a reasonable manner. Fulfilling these two requirements establishes a causal nexus between the defendant's negligent conduct and the rescuer's injury, and relieves the rescuer of the defense of contributory negligence.[139]

Note, however, that the common law imposes no duty of rescue absent a special relationship between the parties (e.g., parent-child, common carrier-passenger);[140] conduct by the defendant that put the plaintiff in peril; or the failure to complete a rescue once begun.[141]

4. Direct Consequences

Under the "thin skull" rule, once it is established that defendant has injured a plaintiff to whom he owes a duty, defendant is liable for the full personal damages sustained even if the extent of the damages was not foreseeable.[142] This doctrine was applied to property damage in *Petition of Kinsman Transit Co*.,[143] which involved flooding caused when a large grain barge broke loose of its moorings in the Buffalo River, collided with another moored vessel, and the two rammed into a drawbridge, and dammed the river. The court held that the cause of the damage was precisely that which was foreseen—ice, water, and the physical mass of the vessels. The court held, "The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked."[144]

Other courts have come out differently on the comparison between the harm risked and the harm that resulted. In another seminal case, *Polemis & Furness, Withy & Co*.,[145] the arbitrator had found that while some damage to the ship could have been foreseen (by the negligence of defendant's servants in dropping a plank into the hold), it could not have been foreseen that the dropped plank would cause a spark that would ignite benzene in the hold, and consume the vessel. The court nevertheless held for the plaintiffs, in adopting a "direct consequences rule." Said the court,

> if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to independent causes having no connection with the negligent act….[146]

Polemis was overruled in *Wagon Mound No. 1*,[147] which involved a fire that resulted from an oil spill by defendant's oil burning vessel in Sydney Harbor. Plaintiffs, whose wharf was destroyed by the fire, alleged that defendant's spill was negligent in that it was foreseeable that it would foul bilge pumps, shipways, and other equipment. The court held for the defendants

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[134] AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF TORTS § 432 (1996).

[135] *Id*. § 433.

[136] 89 N.Y.2d 824, 675 N.E.2d 1222, 653 N.Y.S.2d 270 (N.Y. 1996).

[137] 42 Wis. 2d 699, 168 N.W.2d 134 (Wis. 1969).

[138] Wagner v. International Ry., 232 N.Y. 146, 133 N.E. 437 (N.Y. App. 1921).

[139] Solomon v. Shuell, 435 Mich. 104, 457 N.W.2d 669, 683 (Mich. 1990).

[140] Milone v. Wash. Metro. Area Transit Auth., 91 F.3d 229 (D.C. Cir. 1996).

[141] Sibley v. City Serv. Transit Co., 2 N.J. 458, 66 A.2d 864, 867 (N.J. 1949).

[142] One transit case on point is Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S.W. 114, 116–17 (Mo. 1909).

[143] 338 F.2d 708 (2d Cir. 1964).

[144] *Id.* at 724.

[145] [1921] 3 K.B. 560 (C.A.).

[146] *Id*. at 577.

[147] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., [1961] 1 All E.R. 404.

based on the specific finding of the trial court that the ignitability of the oil was not foreseeable, saying,

> it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct."[148]

In a subsequent case arising out of the same fire, *Wagon Mound No. 2*,[149] the court allowed defendants (whose vessels had been damaged in the fire) to recover because evidence had been adduced that the risk of fire would have been foreseeable to defendants. Though these seminal cases were decided decades ago, they still influence the law of torts today.

Proximate cause is not necessarily the next or immediate cause of plaintiff's injury. In *Marshall v. Nugent,* the court found a trucking company liable under circumstances where a passenger, who had been earlier run off the road as a result of the truck driver's cutting a corner too sharply, was subsequently hit by an automobile driver when trying to warn oncoming vehicles that there was a truck obstructing the highway. The court concluded that the truck driver's "negligence constituted an irretrievable breach of duty to the plaintiff. Though this particular act of negligence was over and done with…still the consequences of such past negligence were in the bosom of time, as yet revealed."[150]

5. Intervening Causes

An intervening, superceding cause can break the causal chain between defendant's negligence and plaintiff's harm. In *Watson v. Kentucky & Ind. Bridge and Ry. Co.,*[151] plaintiff was injured as a result of an explosion of gasoline that escaped from defendant's railway tank car. A third party had thrown a match into the gasoline, causing the explosion. The railroad argued that it was not liable for the action of this individual. The court held,

> the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability…the defendant is clearly responsible where the intervening causes…were set in motion by his earlier negligence, or naturally induced by such wrongful act or omission, or even…if the intervening acts or conditions were of a nature the happening of which was reasonably to have been anticipated….[152]

The court observed that, "A proximate cause is that cause which naturally led to and which might have been expected to produce the result."[153] The court held that the railroad should reasonably have foreseen that if it negligently dumped gasoline onto a street, another person might inadvertently or negligently light and throw a match upon it, and that such an act would be a proximate cause of plaintiff's injury; but, the railroad could not foresee that one might maliciously do such an act. An intervening, intentional, and criminal act will usually sever the liability of the original tortfeasor, unless such act is reasonably foreseeable.[154] Thus, in *Felty v. New Berlin Transit*, *Inc.,*[155] the court held that a jury could find it foreseeable that a third party might come into contact with overhead streetcar electric wires. In *Robinson v. Chicago Transit Authority*,[156] the court held that it is foreseeable that a driver of an automobile might make a sharp turn into a gasoline station, so that when a bus rear-ended her and shoved the third-party's vehicle into plaintiff's oncoming lane of traffic, the line of causation between defendant's negligence (inability to bring the bus to stop) and plaintiff's collision (with the third-party vehicle) was not broken.

6. Emotional Injury

Courts have struggled with the issue of whether plaintiff should recover for emotional harm on grounds of duty and proximate cause.[157] Pain and suffering or mental anguish is universally recognized as an element of damages in tort cases. Many states now recognize psychological injury as a separate form of injury.

The early English cases involved railroad defendants.[158] The courts adopted the "impact rule,"—a plaintiff was prohibited from recovering for emotional damages unless he or she had suffered an actual impact.[159] Gradually, some courts moved to the "zone of danger rule," whereby a plaintiff could recover for emotional injury where plaintiff was not actually injured, but nearly was.[160]

For example, in a case involving a mother's emotional injury occurring when defendant negligently killed her child on the highway, the court denied recovery on grounds that otherwise "liability [would be] wholly out of proportion to the culpability of the negligent tortfeasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent

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[148] *Id*. at 413.

[149] Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. Ltd., [1966] 2 All E.R. 709.

[150] Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

[151] 126 S.W. 146 (Ky. 1910).

[152] *Id*. at 150.

[153] *Id*.

[154] Kush v. City of Buffalo, 59 N.Y.2d 26, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831 (N.Y. 1983).

[155] 71 Ill. 2d 126, 374 N.E.2d 203, 205, 15 Ill. Dec. 768 (Ill. 1978).

[156] 69 Ill. 3d 1003, 388 N.E.2d 163, 26 Ill. Dec. 539 (Ill. 1979).

[157] *See, e.g.,* Pentoney v. St. Louis Transit Co., 108 Mo. App. 681, 84 S.W. 140 (Mo. App. 1904).

[158] Victoria Rys. Comm'rs v. Coultas, [1888] 13 A.C. 222. *See also* Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (N.Y. 1896).

[159] Marchica v. Long Island R.R., 31 F.3d 1197, 1202 (2d Cir. 1994).

[160] Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E. 2d 1, 5, 75 Ill. Dec. 211 (Ill. 1983); Gillman v. Burlington Northern R.R. Co., 878 F.2d 1020, 1023 (7th Cir. 1989).

claims, and enter a field that has no sensible or just stopping point."[161]

In *Rickey v. Chicago Transit Authority*,[162] plaintiff, a minor, brought a negligence and strict products liability action against the Chicago Transit Authority and the United States Elevator Company for emotional distress suffered when his 5-year-old brother's clothing became entangled at the base of the escalator, where he was choked and fell into a coma. Because the emotional harm was unaccompanied by contemporaneous physical injury to or impact on the plaintiff, the lower courts held for the defendant. But on appeal, the Illinois Supreme Court remanded the case, adopting the "zone of danger" rule, saying,

> under it a bystander who is in a zone of physical danger and who, because of defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that a by-stander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact.[163]

Other courts have decried "the hopeless artificiality of the zone of danger rule," and instead adopted an analysis that focuses on the proximity of the plaintiff to the injured person in terms of time, space, and relationship.[164] But even the California courts have stepped back, concluding that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages are for an intangible injury."[165] Finding it necessary "to avoid limitless liability out of all proportion to the degree of a defendant's negligence…the right to recover for negligently caused emotional distress must be limited."[166] Thus, many courts have drawn lines on proximate cause grounds precluding recovery for intangible injuries in such circumstances.

7. Economic Injury

Another issue that has troubled courts is whether one should recover for purely consequential economic loss in situations where no tangible personal or property damage occurred. In *Barber Lines A/S v. M/V Donau Maru*,[167] the owners of the vessel Tamara brought an action to recover the economic injury they incurred because they were unable to dock at a scheduled berth due to a negligent fuel oil spill from the vessel Donau Maru. Damages included extra labor, fuel, transport, and docking costs incurred as a result of such negligence. Writing for the court, Judge Breyer upheld the traditional common law rule prohibiting recovery for negligently caused financial harm except in special circumstances—physical injury to plaintiffs or their property. Breyer noted that the number of persons suffering foreseeable financial harm in an accident would likely be far greater than those suffering traditional physical harm. Thus, allowing recovery under such circumstances would flood the courts with litigation.

Similarly, in *Petitions of Kinsman Transit Co. (Kinsman No. 2),*[168] a case whose facts are discussed above, the court held that the defendant who negligently moored his ship (which broke loose and collided with another ship and a bridge) would not be held liable because the downed bridge made the Buffalo River impassible, thereby prohibiting them from delivering grain and unloading their cargo. Relying on Judge Andrews' dissent in *Palsgraf* (also discussed above), the court held that the connection between defendant's negligence and plaintiff's injury is too tenuous and remote to permit recovery. As Andrews said, proximate cause…"is all a question of expediency…of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."[169] In *Sacramento Regional Transit District v. Grumman Flexible,*[170] it was held that the transit district could not recover for economic losses caused by defective buses because plaintiff failed to allege physical injury to its property apart from the defect.

A majority of courts have retreated from the restrictive view of *Barber,* limiting recovery of economic injury to the "special circumstances" of accompanying physical injury or property damage, though there has been little agreement on where to draw the line.[171] One case that struggled with the question was *People Express Airlines, Inc. v. Consolidated Rail Corp*.,[172] where an airline was forced to evacuate its terminal because of the negligent release of toxic chemicals by defendant railroad. The court acknowledged that the traditional

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[161] Waube v. Warrington, 216 Wisc. 603, 258 N.W. 497, 501 (Wis. 1935). Many courts have insisted that, in order to recover for emotional harm unrelated to physical harm, there must nonetheless be a physical manifestation of emotional harm (e.g., hair falling out, hives, shingles). Waube was abandoned in Wisconsin in Bowen v. Lumbermen's Mut. Cas. Co., 183 Wis. 2d 627, 517 N.W.2d 432 (Wis. 1994), where it was found that "the physical manifestation requirement has encouraged extravagant pleading, distorted testimony, and meaningless distinctions between physical and emotional symptoms. *Id*. at 443.

[162] 98 Ill. 2d 546, 457 N.E.2d 1 75 Ill. Dec. 211 (Ill. 1983).

[163] 457 N.E. at 5.

[164] Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920 69 Cal. Rptr. 72 (Cal. 1968).

[165] Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865, 877 (1989).

[166] *Id*. 257 Cal. Rptr. at 877–78.

[167] 764 F.2d 50 (1st Cir. 1985).

[168] 388 F.2d 821 (2d Cir. 1968).

[169] *Id*. at 825.

[170] 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (Cal. App. 1984).

[171] HENDERSON ET AL., *supra* note 67, at 406.

[172] 100 N.J. 246, 495 A.2d 107 (N.J. 1985).

common law rule was motivated by the desire to limit damages to the reasonably foreseeable consequences of negligent conduct. The physical harm requirement "acts as a convenient clamp on otherwise boundless liability."[173] Nonetheless, the court noted the countervailing policies of fairness, which subordinate the threat of potential baseless claims, to the right of an aggrieved person to pursue a just and fair claim for redress in the courts. One objective of the tort process is to assure that innocent victims enjoy legal redress, absent a contrary, overriding public policy—those wronged should recover for their injuries, while those responsible for the wrong should bear the costs of their tortuous conduct.

The court in *People Express* sought to split the baby. It adopted a rule that one may recover for economic losses, even where there was no physical injury, if the particular plaintiff(s) comprise "an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct."[174] The court emphasized that an identifiable class, so defined, is not simply a foreseeable class of plaintiffs. According to the court:

> [P]ersons traveling on the highway near the scene of a negligently-caused accident…who are delayed in the conduct of their affairs and suffer varied economic losses, are certainly a foreseeable class of plaintiffs. Yet their presence within the area would be fortuitous, and the particular type of economic injury that could be suffered by such persons would be hopelessly unpredictable and not realistically foreseeable. Thus, the class itself would not be sufficiently ascertainable. An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty of predictability of their presence, the approximate members of those in the class, as well as the type of economic expectations disrupted.[175]

The court in *People Express* noted the close proximity of the airline's terminal to the railroad freight yard, the obvious nature of the plaintiff's operations, and the particular foreseeability of economic losses it would incur if forced to evacuate its facilities, as well as the railroad's knowledge of the volatile properties of ethylene oxide. In remanding the case to trial, the court instructed the trial judge to be exacting in ensuring that "damages recovered are those reasonably to have been anticipated in view of the defendant's capacity to have foreseen that this particular plaintiff was within the risk created by their negligence."[176]

Sacramento Regional Transit District v. Grumman Flexible[177] was a products liability action brought against the manufacturer of transit buses that had cracked fuel tank supports. Noting that where damages consist purely of economic losses, the court found that the defect and the damage are one and the same, and recovery on a theory of strict liability is precluded.[178] The court also noted that under negligence, a manufacturer's liability is limited to damages for physical injury, and recovery may not be had for economic injury alone.[179]

E. DEFENSES

1. Contributory Negligence

According to the *Restatement (Second) of Torts*, "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."[180] The first case to recognize the doctrine was *Butterfield v. Forrester*,[181] a case involving an injury to the plaintiff who, "riding violently" on his horse after leaving a public house, collided with defendant's pole negligently left in the highway. The court held that, "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." Thus, the contributory negligence of the plaintiff would absolutely bar recovery.[182]

Under the doctrine of avoidable consequences, the failure of a plaintiff to fasten his seat belt may preclude his recovery.[183] Courts accepting the "seat belt defense" typically have embraced one of three approaches to the subject:

> (1) plaintiff's nonuse is negligent per se; (2) in failing to make use of an available seat belt, plaintiff has not complied with a standard of conduct which a reasonable prudent man would have pursued under similar circumstances, and therefore he may be found contributorily negligent; and (3) by not fastening his seat belt, plaintiff may, under the circumstances of a particular case, be found to have acted unreasonably and in disregard of his or her best interests and, therefore, should not be able to

[173] *Id*., 495 A.2d at 110.

[174] *Id*. at 116.

[175] *Id*.

[176] *Id*. at 118.

[177] 158 Cal. App. 3d 289 (Cal. App. 1984).

[178] *Id*. at 293.

[179] *Id*. at 298.

[180] AMERICAN LAW INSTITUTE, *supra* note 134 § 463.

[181] 11 East. 60, 61 103 Eng. Rep. 926 (K.B. 1809).

[182] An FTA publication concluded that

> In general, few transit passenger falls are caused by design or operating deficiencies. The very low frequency of falling accidents...show that the majority of patron falling accidents are caused by behavior factors, preexisting medical conditions or personal actions of the victim, rather than the transit facility design or operation.

U.S. FTA, Pedestrian Falling Accidents in Transit Terminals (1985), http://transit-safety.volpe.dot.gov/publications/order/singledoc.asp?docid=88 (last visited July 2014); cited in Girdler v. United States, 923 F. Supp. 2d 168 (2013). *See also* Ortiz v. City of New York, 103 A.D.3d 595, 962 N.Y.S.2d 77 (2013).

[183] Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 958 (7th Cir. 1982).

recover those damages which would not have occurred if his or her seat belt had been fastened.[184]

However, some states do not prohibit recovery for one who fails to wear a seat belt if state law does not require a driver to wear one.[185] Others hold that though the failure to wear a seat belt does not bar recovery, it is of relevance to the issue of damages.[186]

Pulling one's vehicle in front of an oncoming bus may constitute contributory negligence.[187] Pedestrians stepping into the path of an oncoming bus may be contributorily negligent as well.[188] Traditionally, the common law imposed an absolute bar to recovery where the plaintiff's own negligence contributed to his injury, or where the plaintiff had voluntarily assumed a known risk of injury.[189]

2. Last Clear Chance

The harshness of the contributory negligence doctrine led many courts to adopt various means of avoiding it, such as concluding that the plaintiff was not contributorily negligent or had not assumed the risk, by finding the defendant's conduct willful and wanton, or by developing the doctrine of last clear chance.[190] The doctrine of last clear chance allows a plaintiff to recover, despite the fact he was contributorily negligent, where the defendant was or should have been aware of the helplessness or inattentiveness of the plaintiff and could have avoided the injury with the exercise of due care.[191] As one court observed, "Were this not so, a man might justify the driving over goods [negligently] left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."[192] However, jurisdictions that adopt comparative negligence abolish the doctrine of last clear chance as being inconsistent with the apportionment of fault among all tortfeasors.

3. Assumption of Risk

A similar defense is assumption of risk, where the plaintiff voluntarily accepted a known risk of injury. For example, a passenger who stands up on a bus or streetcar may assume the risk of some normal movement of the vehicle, but may not assume the risk of abnormal jerking or jolting of the vehicle.[193] Some courts have distinguished between "primary" and "secondary" assumption of risk. Primary assumption of risk involves a situation where the defendant was not negligent—either he owed no duty to the plaintiff, or did not breach a duty owed. Secondary assumption of risk is really a form of contributory negligence, where the plaintiff incurred a risk, or behaved in a manner that a reasonable person would not.[194] But the *Restatement of Torts* takes the position that assumption of risk is a separate defense, barring recovery by a person who explicitly agrees to accept the risk of defendant's negligence.[195] In states that have adopted one of the forms of comparative fault, the doctrine of assumption of risk has been limited or abolished.

4. Comparative Fault

Many modern courts and state legislatures have ameliorated the harsh rule of contributory negligence by adopting the doctrine of comparative fault, which now governs a solid majority of jurisdictions.[196] Typically, the statutes require the jury to issue a special verdict specifying the amount of damages and the degree of fault of each party as a percentage of the total fault.[197]

Some jurisdictions have adopted a modified form of comparative negligence, allowing plaintiff to recover only where his negligence is no greater than (or, in some jurisdictions, is less than) the fault of the defendant.[198] In some jurisdictions, the jury can be informed of the impact of its allocation of fault on recovery, which might lead plaintiff-sympathetic juries to allocate fault differently. But some modified comparative fault jurisdictions will not allow the plaintiff to recover where he was as culpable as the defendant. In such jurisdictions, plaintiff would recover only if his negligence was less than 50 percent of the cause of his injuries.[199]

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[184] Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984). (citations omitted).

[185] Smith v. Regional Transit Auth., 559 So. 2d 995 (La. App. 1990) (transit driver recovery prohibited where she was not required by state law or applicable procedures to wear a seat belt).

[186] Normoyle v. N.Y. City Transit Auth., 181 A.D.2d 498, 581 N.Y.S.2d 28 (N.Y. App. 1992).

[187] Capitol Transit Co. v. Hedin, 222 F.2d 41 (D.C. App. 1955); McGuire v. San Diego Transit Sys., 143 Cal. App. 2d 509, 299 P.2d 905 (Cal. 1956); D.C. Transit Sys., Inc. v. Harris, 284 A.2d 277 (D.C. App. 1971).

[188] Bilams v. Metro. Transit Auth., 371 So. 2d 693 (Fla. App. 1979).

[189] *See, e.g.,* RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS (5th ed., Little Brown 1990).

[190] *See, e.g.,* Capital Transit Co. v. Smallwood, 162 F.2d 14, 16 (D.C. App. 1947).

[191] *Id*. As to last clear chance, *see* AMERICAN LAW INSTITUTE, *supra* note 134 §§ 479–80. Lappin v. Alameda-Contra Costa Transit Dist., 233 Cal. App. 2d 634, 43 Cal. Rptr. 785 (Cal. App., 1965).

[192] Davies v. Mann, 152 Eng. Rep. 588, 587 (1842).

[193] Zawicky v. Flint Trolley Coach Co., 288 Mich. 655, 286 N.W. 115 (Mich. 1939).

[194] Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 93 (N.J. 1959).

[195] AMERICAN LAW INSTITUTE, *supra* note 134 § 496B.

[196] *See, e.g.,* Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (Calif. 1975); Rivas v. N.Y. City Transit Auth., 103 A.D.3d 414, 959 N.Y.S.2d 178 (2013).

[197] *See, e.g.,* IDAHO CODE 6-801 (1979); COLO. REV. STAT. §§ 13-21-111(2), 13-21-111.5. S*ee* Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1555 (10th Cir. 1989); and Williamson v. Piper Aircraft Corp., 968 F.2d 380 (3d Cir. 1992).

[198] 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982).

[199] Colorado is such a state. *See* COLO. REV. STAT. § 13-21-111 (2000). So is Illinois. Ill. REV. STAT., ch. 110, para. 2-1116 (2001). Mrowca v. Chicago Transit Auth., 317 Ill. App. 3d 784

5. The Federal Employers' Liability Act

One federal statute that has imposed pure comparative fault is the Federal Employer's Liability Act (FELA),[200] which applies to negligence[201] that causes damages or death of the employees of interstate rail common carriers. FELA provides that the employee's "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[202]

FELA is a major liability issue for transit providers operating commuter rail systems. Transit systems go to great pains to avoid FELA liability, if practicable, because of the large difference in cost of a FELA claim as compared to a workers' compensation claim. For example, the U.S. Supreme Court has held that causes of action for negligent infliction of emotional harm are cognizable under FELA.[203] Though it does not impose strict liability for workplace injuries, violations of a statutory safety requirement are deemed negligence per se.[204] Assumption of risk is eliminated as a defense under FELA.[205]

SEPTA avoided FELA liability by showing that, though one of its four divisions provided interstate commuter rail service, the one in which the injured plaintiff employee worked did not. The Third Circuit (whose approach is not followed in all Circuits)[206] held, "Congress did not intend to extend FELA to employees of an intrastate transportation entity…even though it is organizationally affiliated with an interstate carrier, which is subject to FELA, such as SEPTA's Regional Rail Division."[207] The WMATA also avoided FELA by proving that the Interstate Compact giving it birth exempted it from nonsafety federal laws.[208]

Many state statutes also impose liability upon railroads for personal injury or wrongful death of their employees.[209]

In *CSX Transp., Inc. v. McBride*,[210] the U.S. Supreme Court addressed the question of whether FELA requires proof of proximate causation. Justice Ginsburg delivered the opinion of the Court and concluded, in accord with FELA's text and purpose, its prior decision in *Rogers v. Missouri Pacific R. Co.,*[211] and the uniform view of the federal appellate courts, that FELA does not incorporate stock "proximate cause" standards developed in nonstatutory common law tort actions. The charge proper in FELA cases simply tracks the language Congress employed, informing juries that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury." That, indeed, is the test Congress prescribed for proximate causation in FELA cases. [212]

McBride, a locomotive engineer with petitioner CSX Transportation, Inc., an interstate railroad, sustained a debilitating hand injury while switching railroad cars. He filed suit under FELA, which holds railroads liable for employees' injuries "resulting in whole or in part from [carrier] negligence."[213] McBride alleged that CSX negligently required him to use unsafe switching equipment and failed to train him to operate that equipment. The district court instructed that a verdict for McBride would be in order if the jury found that CSX's negligence "caused or contributed to" his injury. The court declined CSX's request for additional charges requiring McBride to "show that…[CSX's] negligence was a proximate cause of the injury" and defining "proximate cause" as "any cause which, in natural or probable sequence, produced the injury complained of." Instead, relying on *Rogers,* the court gave the Seventh Circuit's pattern FELA instruction, "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury." The jury returned a verdict for McBride.[214]

On appeal, CSX renewed its objection to the failure to instruct on proximate cause, now defining the phrase

740 N.E.2d 372, 374, 251 Ill. Dec. 29 (Ill. App. 2000), and New York. N.Y. CIV. PRAC. L. & R. § 1411 (Consol. 2001). Michigan has a statute so providing for railroad employees. MICH. STAT. ANN. § 419.52 (2000).

[200] 45 U.S.C. §§ 51-60

[201] Though the statute literally requires negligence for recovery, *see* Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949), which required only the thinnest evidence of negligence of rail common carriers under FELA. Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506, 79 S. Ct. 448, 1 L. Ed. 2d 493 (1957).

[202] 45 U.S.C. § 53. However, neither contributory negligence nor assumption of risk shall bar recovery where the carrier's negligence in violating any statute enacted for the safety of employees contributed to his injury or death. 45 U.S.C. §§ 53-54.

[203] Consolidated Rail Corp. v. Gotshall, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 424 (1994). *But see* Gillman v. Burlington Northern R.R. Co., 878 F.2d 1020, 1023 (7th Cir. 1989) ("FELA does not create a cause of action for tortuous harms brought about by acts which lack physical contact or the threat of physical contact….").

[204] Ries v. National R.R. Passenger Corp., 960 F.2d 1156, 1159 (3d Cir. 1992).

[205] 57 F.3d 1269, 1080 (3d Cir. 1995).

[206] For example, the Fourth Circuit uses a four-factor analysis, and the Second uses six factors. The Third Circuit's approach is merely characteristic.

[207] Felton v. Southeastern Pa. Transp. Auth., 952 F.2d 59, 61 (3d Cir. 1991). *See also* Strykowski v. Northeast Ill. Regional Commuter R.R. Corp., 1994 U.S. App. Lexis, 16236 (7th Cir. 1994) [unpublished, not to be cited].

[208] McKenna v. Wash. Metro. Area Transit Auth., 829 F.2d 186, 188 (D.C. Cir. 1987). FELA also includes an exemption for street railways. *Id*.

[209] *See, e.g.,* MICH. STAT. ANN. § 419.51.

[210] 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011).

[211] 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

[212] *McBride*, 131 S. Ct. at 2634.

[213] 45 U.S.C. §51

[214] *Rogers*, 352 U.S. at 505 n.9.

to require a "direct relation between the injury asserted and the injurious conduct alleged." The appeals court, however, approved the district court's instruction and affirmed its judgment for McBride. Because *Rogers* had relaxed the proximate cause requirement in FELA cases, the court said, an instruction that simply paraphrased *Rogers'* language could not be declared erroneous.

The Supreme Court affirmed the proximate cause issue in *McBride* with the narrowest majority (5-4). FELA's "in whole or in part" language is straightforward. "[R]easonable foreseeability of harm is an essential ingredient of [FELA] *negligence*."[215] If negligence is proved, however, and is shown to have "played any part, even the slightest, in producing the injury,"[216] then the carrier is answerable in damages even if "'the extent of the [injury] or the manner in which it occurred'" was not "[p]robable" or "foreseeable."[217] Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their "common sense" in reviewing the evidence, juries would have no warrant to award damages in far out "but for" scenarios, and judges would have no warrant to submit such cases to the jury.[218]

6. Sovereign Immunity

English common law adopted the ancient Roman law maxim that "the King can do no wrong." Essentially, since the King, in effect, made and enforced the law, he could not be deemed subject to it. American common law courts embraced the doctrine as well, and many states and some local governments codified it. But in recent decades, the doctrine has endured some constriction by both the common and statutory law.

Sovereign Immunity of Federal Agencies. Sometimes, the question arises whether an institution of the federal government (such as the DOT or one of its modal administrations) is liable for injuries it may cause. Congress has codified the circumstances under which a federal agency will be liable for its torts. The Federal Tort Claims Act provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[219]

Often, the most significant exception is for a "governmental function" versus "proprietary function."[220] Specifically, the Act's provisions do not apply, *inter alia*, to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation…or based on the exercise or performance or the failure to exercise or perform a discretionary function or duty…whether or not the discretion be abused.[221]

The seminal federal case on the discretionary function exemption is *United States v. S.A. Empresa de Viacao Aereo. Rio Grandese (Varig)*,[222] a case involving the issue of whether the FAA should be liable for its alleged negligent failure to inspect a Boeing 707 aircraft that it had certified as airworthy but that crashed near Paris, France, when the lavatory caught fire. The U.S. Supreme Court held that it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies…."[223] The purpose of the exemption was to "prevent judicial 'second guessing' of legislative and administrative decisions [of federal agencies] grounded in social, economic, and political policy through the medium of an action in tort."[224]

Other U.S. Supreme Court decisions assessing the "discretionary function" exemption from liability have noted that conduct cannot be discretionary unless it involves an element of judgment or choice:[225] "Where there is room for policy judgment and decision there is discretion."[226] The exemption applies "only to conduct that involves the permissible exercise of policy judgment."[227]

In 1966, Congress, acting under to the Compact Clause of the Constitution,[228] approved establishment of the Washington Metropolitan Area Transit Authority Compact between Maryland, Virginia, and the District of Columbia ("Compact") to deal with growing traffic

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[215] Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 117, 83 S. Ct. 659, 665, 9 L. Ed. 2d 618, 626 (1963).

[216] *Rogers*, 352 U.S. at 506.

[217] *Gallick*, 372 U.S. at 120–121.

[218] *McBride*, 131 S. Ct. at 2641.

[219] 28 U.S.C. § 2674.

[220] Beatty v. Wash. Metro. Area Transit Auth., 860 F.2d 1117, 1126 (D.C. Cir. 1988).

[221] 28 U.S.C. § 2680(a). Another exemption applies to combatant military activities during time of war. *Id*. § 2680(j).

[222] 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

[223] *Id*. at 813.

[224] *Id*. at 814. In *Varig*, the Supreme Court observed that Congress had given the FAA broad authority to establish and implement a comprehensive program of enforcement and compliance with aircraft safety standards, and held that the FAA's policy of "spot-checking" aircraft was acceptable based on the need of its employees "to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id*. at 820. Such discretionary acts were shielded from liability under the FTCA because they fell within the range of choices permitted by the Federal Aviation Act and were the results of policy determinations.

[225] Dalehite v. United States, 346 U.S. 15, 34, 73 S. Ct. 956, 97 L. Ed. 1429 (1953): The exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course."

[226] *Id*. at 36.

[227] Berkovitz v. United States, 486 U.S. 531, 539, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

[228] U.S. CONST. art. I, § 10, cl. 3,

problems in the Washington area.[229] Today, WMATA operates an extensive Metrobus and Metrorail system throughout northern Virginia, the District of Columbia, and two Maryland counties.[230]

Because the WMATA is a creature created by an Interstate Compact statutorily approved by Congress, it too enjoys sovereign immunity.[231] The Compact provides that WMATA "shall not be liable for any torts occurring in the performance of a governmental function." Quintessential governmental functions, such as "police activity," falls within the exemption.[232] For those activities not quintessential governmental functions, immunity depends on whether the activity is discretionary or ministerial—the former immune, and the latter not. If a federal statute, regulation, or policy leaves room for choice, the action is discretionary, and immune; but if it decrees a particular course of action for an employee to follow, the function is ministerial, and not immune.

In concluding the WMATA Interstate Compact, Maryland, Virginia, and the District of Columbia conferred upon WMATA their respective sovereign immunities; however, the Compact waives immunity for torts "committed in the conduct of any proprietary function," while retaining immunity for torts committed by its agents "in the performance of a governmental function."[233] A function is immunized if it is ministerial and not discretionary. "[A] duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary [i.e., ministerial] if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required."[234]

WMATA has been held immune for discretionary activity, such as the negligent hiring, training, and supervising of employees;[235] negligent termination of employees; [236] and the design, construction, and location of its facilities.[237] It was deemed not immune, however, for the faulty maintenance and operation of fare collection machines,[238] or for its failure to maintain a station escalator.[239] WMATA's tort and quasi-contract claims were dismissed, while its breach of contract claims were not in *Greenbelt Ventures v. WMATA*.[240]

Certain statutes also place caps on liability. For example, Congress has placed a ceiling on personal injury and wrongful death liability for rail passenger transportation, including a commuter authority or operator, of $200 million per occurrence.[241]

Sovereign Immunity Under State Law. In *Salvatierra v. Via Metropolitan Transit Authority*,[242] it was alleged that a VIA driver negligently caused his bus to "jump the curve" and run over a 3-year-old child, crushing his leg. VIA successfully exerted the Texas sovereign immunity statute, which limited its liability to $100,000. The court upheld the statute as limiting liability in two ways—(1) circumscribing the types of claims that can be brought against a governmental entity, such as VIA; and (2) placing a cap on damages.[243]

But state tort immunity legislation has been strictly construed in many states. As a waiver of the sovereign's immunity, the requirements for asserting immunity must be strictly followed, and the scope of the immunity waived is not to be construed liberally. Most state common law, and many state statutes, recognize the discretionary function exemption to liability for government functions that involve discretion in weighing social, economic, and political policies and objectives. Many such activities are involved in the planning, design, and construction of transit or highway facilities. As one source noted:

> [A] transit agency is less likely to be held liable for negligence when it is engaged in making design and construction decisions deciding to build or update a structure; changing a route; collecting data; engaged in certain, but not all, inspection and maintenance activities; or, in some situations, providing training for personnel. The agency is more likely to be held liable when it engages in non-policy-level planning or merely implements a previously approved plan, fails to give an adequate warning under the circumstances of a dangerous condition, negligently conducts an inspection, or negligently repairs or maintains property.[244]

The immunity applies only where the government actually participates in discretionary design decisions, either by designing the product itself or approving spec-

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[229] *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966) (originally codified as amended at D.C. Code Ann. § 1-2431 (1992)); this part of the Code has been moved, and the citation is now § 9-1107.01(80) ; H. REP. NO. 89-1914, at 5-6 (1966).

[230] Beebe v. WMATA, 327 U.S. App. D.C. 171, 129 F.3d 1283, 1285 (D.C. Cir. 1997).

[231] Pub. L. No. 89-774, 80 Stat. 1324 (1966); amended Pub. L. No. 94-306, 90 Stat. 672 (1976).

[232] Dant v. District of Columbia, 829 F.2d 69, 73 (D.C. Cir. 1987).

[233] Originally, D.C. CODE ANN. § 1-2431(80); now § 9-1107.01(80).

[234] Monument Realty v. Wash. Metro. Area Transit Auth., 535 F. Supp. 2d 60; 2008 U.S. Dist. LEXIS 14073 (D.D.C. 2008).

[235] Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997). *But see* Griggs v. Wash. Metro. Area Transit Auth., 66 F. Supp. 2d 23, 29–30 (D. D.C. 1999), which appears to hold the opposite.

[236] Sanders v. Wash. Metro. Area Transit Auth., 819 F.2d 1151, 1156–58 (D.C. Cir. 1987).

[237] Souders v. Wash. Metro. Area Transit Auth., 48 F.3d 546 (D.C. Cir. 1995).

[238] Dant v. District of Columbia, 829 F.2d 69, 74–75 (D.C. Cir. 1987).

[239] Wainwright v. Wash. Metro. Area Transit Auth., 903 F. Supp. 133 (D. D.C. 1995).

[240] 2010 U.S. Dist. Lexis 90345 (D. Md. 2010).

[241] 49 U.S.C. § 28103 (2000).

[242] 974 S.W.2d 179 (Tex. App. 1998).

[243] *Id*. at 182.

[244] LARRY THOMAS, STATE LIMITATIONS ON TORT LIABILITY FOR PUBLIC TRANSIT OPERATIONS (TCRP Legal Research Digest No. 3, 1994).

ifications prepared by the contractor.[245] Courts have distinguished between quantitative specifications that detail precise requirements to be satisfied in manufacture, which enjoy the immunity, and general qualitative specifications promulgated during the early stages of procurement, which do not.[246] They have also drawn a line between the government's thorough review and critique of the contractor's work at various stages of design, testing, and performance, which enjoy the immunity, and rubber stamping the contractor's design, which does not.[247] However, the exemption will not apply when a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive."[248]

Another line drawn in this arena delineating liability is the distinction between governmental functions, which are immune from liability, and proprietary functions, which are not.[249] The provision of transportation services by a governmental institution has been deemed by many courts a proprietary function, ineligible for sovereign immunity.[250] In contrast, the provision and maintenance of a transit police force has been deemed a governmental function, eligible for sovereign immunity.[251] Of course, absent sovereign immunity, the negligence of governmental institutions can make them legitimate targets of tort litigation.[252]

7. Sovereign Immunity Under State Law

Sovereign immunity claims have been raised in a number of recent decisions involving transit providers. The Eleventh Amendment of the Constitution immunizes states from "any suit in law or equity, commenced or prosecuted…by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms…applies only to suits against a State by citizens of another State," the Supreme Court has repeatedly held that this immunity also applies to suits brought by a state's own citizens to which the state does not consent.[253]

Whether an agency is entitled to sovereign immunity is determined by balancing three factors: (1) state treasury, (2) status under state law, and (3) autonomy.[254] In *Cooper v. SEPTA,*[255] a driver alleged that SEPTA undercompensated its bus drivers. SEPTA maintainted that Eleventh Amendment jurisprudence and SEPTA's state funding formula entitled it to sovereign immunity on this issue. The Third Circuit disagreed, concluding that the state-treasury factor weighed against a finding of sovereign immunity, as did the autonomy factor.

A state's acceptance of federal funds, however, waives its Eleventh Amendment defense pursuant to 42 U.S.C. § 2000d-7:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[256]

As a quasi-public entity, a state transit operator "partakes of the state sovereign immunity conferred by the eleventh amendment." [257] Such a transit operation may be sued in federal court only if it has waived its immunity or if Congress has abrogated that immunity under the Fourteenth Amendment.[258] Eleventh Amendment immunity does not bar the claims against a city, however, because such immunity only applies to states.[259] However, cities may nonetheless enjoy immunity in state courts.

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[245] Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

[246] Kleeman v. McDonnell Douglas Corp., 890 F.2d 698, 703 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990).

[247] Stout v. Borg-Warner Corp., 933 F.2d 331, 336 (5th Cir. 1991), *cert. denied*, 502 U. S. 981 (1991).

[248] Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

[249] Szadkowski v. Wash. Metro. Area Transit Auth., 1998 U.S. App. Lexis 5033 at 6 (4th Cir. 1998); Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 127–27, 448 N.Y.S.2d 141 (N.Y. 1982). *But see* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457 (Cal. 1961), which abrogated the governmental/proprietary distinction in California. *See also* discussion in Pacific Tel. & Tel. v. Redevelopment Agency, 75 Cal. App. 3d 957, 142 Cal. Rptr. 584 (1977), in relation to utility relocation. Public transportation has been determined to be a "governmental" function by most modern courts presented with the issue. See discussion in Northwest Natural Gas v. City of Portland, 300 Or. 291, 711 P.2d 119 (Or. 1985) (also regarding utility relocation).

[250] THOMAS, *supra* note 1. *See, e.g.,* Dant v. District of Columbia, 829 F.2d 69 (D.C. Cir. 1987).

[251] *See, e.g.,* Heffez v. Wash. Metro. Area Transit Auth., 569 F. Supp. 1551, 1553 (D. D.C. 1983), *aff'd*, 786 F.2d 431 (D.C. Cir. 1986); Keenan v. Wash. Metro. Transit Auth., 643 F. Supp. 324, 328 (D. D.C. 1986).

[252] *See, e.g.,* Pan American World Airways v. Port Auth. of N.Y. and N.J., 995 F.2d 5 (2d Cir. 1993).

[253] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72–73, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000). AT&T Communications-East v. BNSF Railway Co., 2006 U.S. Dist. LEXIS 85781 (D. Or. 2006).

[254] Cooper v. SEPTA, 548 F.3d 296 (3d Cir. 2008).

[255] *Id.*

[256] Everybody Counts v. N. Ind. Reg'l Planning Comm., 2006 U.S. Dist. LEXIS 39607 (N.D. Ind. 2006).

[257] Souders v. Wash. Metro. Area Transit Auth., 310 U.S. App. D.C. 370, 48 F.3d 546, 548 (D.C. Cir. 1995).

[258] Barbour v. Wash. Metro. Area Transit Auth., 362 U.S. App. D.C. 336, 374 F.3d 1161, 1163 (D.C. Cir. 2004). Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., 239 F.R.D. 9 (D.D.C. 2006).

[259] Sensible Traffic Alternatives and Resources v. FTA, 307 F. Supp. 2d 1149 (D. Haw. 2004).

F. TRESPASS AND NUISANCE

Trespass constitutes an interference with the exclusive possession of land.[260] It involves an unauthorized physical entry onto another's land. Such physical invasion need not involve entry by persons or tangible objects, and may instead constitute such things as smoke, gases, and odors. [261]

Trespass may be intentional or unintentional. If the defendant's action consists of an *intentional trespass*, harm and mistake are irrelevant, and typically nominal damages are recoverable (in addition to actual damages, where proven). Some courts have held that one with knowledge or reason to know of physical entry commits an intentional trespass.[262]

Beausoleil v. Massachusetts Bay Transportation Authority[263] was a wrongful death action brought by the estate of a 13-year-old girl killed by an oncoming train while trying to cross the tracks at the Attleboro, Mass., rail station. The court noted that a landowner owes a foreseeable trespasser a duty only to refrain from willful, wanton, or reckless behavior. Liability may exist "for injuries sustained while crossing railroad tracks outside of a public crossing only if the railroad took affirmative action which would warrant a reasonable belief that a passenger had a right to cross at that location."[264] Though many jurisdictions hold that a landowner owes no duty to a trespasser for ordinary negligence (though it may be liable for willful and wanton injury, or where the landowner knows the trespasser is trapped and in peril),[265] some recognize an exception to the "no duty" rule under the permissive use/frequent trespass doctrine. As one court noted, "A typical case is the frequent use of a 'beaten path' that crosses a railroad track, which is held to impose a duty of reasonable care as to the operation of trains."[266] Even one who rises to the level of a licensee in crossing trolley tracks still has a responsibility to avoid contributory negligence by not stepping onto the path of an oncoming vehicle.[267] But an enhanced duty of care arises under the doctrine of "attractive nuisance" to child trespassers who, because of their immaturity, are unable to discover or comprehend the danger, and for example, wander onto commuter rail tracks.[268] However, some states have exempted railroads from liability of pedestrians walking upon their tracks, even where the trespassers are minors.[269]

Recovery for an *unintentional trespass* may be had for actual harm suffered by recklessness, negligence, or an ultrahazardous activity. For an unintentional trespass, nominal damages are not awarded, and plaintiff must prove actual damages suffered.[270] Injunctions for an unintentional trespass may be denied if it was made innocently, or the cost of removal would be greatly disproportionate to the harm suffered.[271] The social value of defendant's conduct is typically not considered in assessing compensatory damages, though it may be relevant on the issue of punitive damages.[272] The duty of care a landowner owes to an unintentional trespasser is higher. Thus, in *Demand v. New York Central & Hudson River Railroad Co.*,[273] it was held that a railroad engineer, having seen the decedent plaintiff trying to remove his horse some 1,300 feet before hitting him with the train, should have used "reasonable efforts and care to avoid injuring the latter even though primarily and originally he may have been a technical trespasser…."[274]

A nuisance constitutes an interference with the quiet use and enjoyment of land.[275] To recover, there need be no physical entry onto the land, but actual damages must be proven.

Nuisances are of two types, public and private. A *public nuisance* is an unreasonable interference with rights common to the general public, particularly those involving public health, safety, peace, comfort, or convenience.[276] A government body may enjoin such a nuisance, though an individual may bring an action against a public nuisance where he has suffered a harm of a different kind than that suffered by the public generally.[277]

A *private nuisance* constitutes a nontrespassory invasion of the private use and enjoyment of land. It may be intentional and unreasonable (essentially meaning the gravity of the harm outweighs the utility of the conduct),[278] or negligent, reckless, or abnormally danger-

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[260] Kayfirst Corp. v. Wash. Terminal Co., 813 F. Supp. 67, 71 (D. D.C. 1993).

[261] Davis v. Georgia-Pacific Corp., 251 Ore. 239, 445 P.2d 481, 483 (Ore. 1968).

[262] McGregor v. Barton Sand & Gravel, Inc., 62 Ore. App. 24, 660 P.2d 175, 178 (Ore. 1983). Injunctions may be issued against an intentional trespass. La Motte v. United States, 254 U.S. 570, 41 S. Ct. 204, 65 L. Ed. 410 (1921).

[263] 138 F. Supp. 2d 189 (D. Mass. 2001).

[264] *Id*. at 197.

[265] Jad v. Boston & Maine Corp., 26 Mass. App. Ct. 564, 530 N.E.2d 197, 199 (Mass. App. 1988).

[266] Miller v. General Motors Corp., 207 Ill. App. 3d 148, 152 Ill. 2d 432 565 N.E.2d 687, 691 152 Ill. Dec. 154 (Ill. App. 1990). *See also* Lee v. Chicago Transit Auth., 152 Ill. App. 2d 432 605 N.E.2d 493, 498, 178 Ill. Dec. 699 (Ill. 1992).

[267] *See, e.g.,* Gara v. Phila. Rapid Transit Co., 320 Pa. 497, 182 A. 529 (Pa. 1936).

[268] *See, e.g.,* Colls v. City of Chicago, 212 Ill. App. 3d 904, 571 N.E.2d 951, 965, 156 Ill. Dec. 971 (Ill. App. 1991).

[269] Jad v. Boston & Maine Corp., 361 Mass. 91, 530 N.E.2d 197, 201 (Mass. App. 1988).

[270] AMERICAN LAW INSTITUTE, *supra* note 134 § 165.

[271] Peters v. Archambault, 361 Mass. 91, 278 N.E.2d 729 (Mass. 1972).

[272] Davis v. Georgia-Pacific Corp., 251 Ore. 239, 251 Ore. 239, 445 P.2d 481, 483 (Ore. 1968).

[273] 187 N.Y. 102, 91 N.E. 259 (N.Y. 1910).

[274] 91 N.E. at 261.

[275] Beatty v. Wash. Metro. Area Transit Auth., 860 F.2d 1117, 1122 (D.C. Cir. 1988).

[276] AMERICAN LAW INSTITUTE, *supra* note 134 § 821B.

[277] *Id*. § 821C.

[278] *Id*. § 822.

ous.[279] Under nuisance (as opposed to trespass), courts are generally more willing to engage in a balancing approach,[280] focusing on the reasonableness of one interest yielding to another.[281] As one court observed, "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all circumstances."[282] Most courts will authorize damages, but not an injunction, in a nuisance case where the utility of defendant's conduct outweighs the gravity of plaintiff's harm.[283] Some courts have issued an injunction requiring the nuisance be abated where damages will not adequately remedy the substantial and irremediable injury plaintiff suffers.[284] Other courts, embracing the notion of inverse condemnation, have imposed equitable servitude on plaintiff's land, forcing offending defendants to pay damages for past, present, and future harm caused by the offending nuisance.[285]

In *Brumer v. Los Angeles County Metropolitan Transportation Authority*,[286] for example, the court rejected a claim that store-front property had been condemned when the transit authority constructed a rail line on the street adjacent to it, eliminating curbside parking or traffic on the part of the street nearest the property. The court held there was no actionable interference with access.[287] In *Anderson v. Washington Metropolitan Area Transit Authority*,[288] a case in which a resident alleged that the renovation and expansion of a transit bus garage across the street caused noise and vibration that constituted a private nuisance, a federal court held,

> Liability for private nuisance will lie only if the act was intentional or if it was the result of negligence or reckless conduct…. If the defendants knew or were on notice that such construction was likely to interfere with [plaintiffs'] use and enjoyment of their property, the invasion is intentional.[289]

Generally speaking, temporary injuries, inconveniences, annoyances, and discomfort resulting from construction of public improvements are not compensable provided such interferences are not unreasonable—that is, occasioned by actual construction work. It is often necessary to break up pavement, narrow streets, and block ingress and egress to adjoining property when streets are being repaired or improved, or transit facilities are being constructed. As one court noted,

> It would unduly hinder and delay or ever prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.[290]

In *Cameron v. Central Puget Sound Regional Transit Auth.*,[291] the plaintiff corporation claimed an unconstitutional taking of its land under inverse condemnation as a result of construction of a transit tunnel. The plaintiff alleged that the transit operator adversely affected their rights (1) of access; (2) light, air, and view; (3) quiet enjoyment; and (4) to lease and/or dispose of the property. The court held that to constitute a "takings" based on a denial of right of access, the plaintiffs must establish that their right of access was eliminated or substantially impaired and not merely that they suffered an inconvenience in having to travel a further distance to their property. The court held that plaintiffs' claims of inconvenience might rise to the level of nuisance, but they did not amount to an unconstitutional takings of property.

G. STRICT LIABILITY

Strict liability was once the dominant rule of liability in tort law. Negligence, now the dominant common law doctrine, did not emerge until the 19th century. Though negligence now dominates, major areas still fall under the liability doctrine of strict liability.

One famous English case, *Fletcher v. Rylands*,[292] involved the flooding of plaintiff's mine shafts by water escaping from a reservoir constructed on defendant's land. The court held,

> the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie an-

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[279] *Id*. § 822.

[280] Fisher v. Capital Transit Co., 246 F.2d 666 (D.C. Cir. 1957).

[281] Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (Ore. 1960).

[282] Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371, 373 (Mass. 1914); Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (Ariz. 1972) (holding that having brought people to the nuisance by building homes in close proximity of defendant's cattle feedlot to defendant's foreseeable detriment, plaintiff Webb would have to indemnify defendant for a reasonable amount of the cost of moving or shutting down).

[283] *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 874, 309 N.Y.S.2d 312 (N.Y. 1970).

[284] Crushed Stone Co. v. Moore, 1962 Okla. 65, 369 P.2d 811, 815 (Okla. 1962).

[285] Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 874 309 N.Y.S.2d 312 (N.Y. 1970).

[286] 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314 (Cal. App. 1995).

[287] *Id*. at 1748.

[288] 1991 U.S. Dist. Lexis 12877 (D. D.C. 1991).

[289] *Id*. at 3 (citations omitted).

[290] Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 80 Cal. App. 3d 863, 869 146 Cal. Rptr. 5 (1978), quoting from Heiman v. City of L.A., 30 Cal. 2d 746, 755, 185 P.2d 597 (Cal. 1947).

[291] 610 F. Supp. 2d 1288 (W.D. Wash. 2009).

[292] [1861-73] All E. R. Rep. 1.

> swerable for all the damage which is the natural consequence of its escape.[293]

The court recognized that the rule of liability on the highways was one of negligence:

> Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and, that being so, those who go on the highway…may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger…[and cannot] recover without proof of want of care or skill occasioning the accident; …."[294]

On appeal, the court focused on the distinction between "natural" and "non-natural" uses of land. The first *Restatement of Torts* focused on whether the activity was "ultrahazardous," while the second *Restatement* focused on whether it was "abnormally dangerous."[295] In determining whether an activity is abnormally dangerous, the following factors are considered:

> existence of a high degree of some harm…;
>
> likelihood that the harm that results will be great;
>
> inability to eliminate the risk by the exercise of reasonable care;
>
> extent to which the activity is not a matter of common usage;
>
> inappropriateness of the activity to the place where it is carried on; and
>
> extent to which its value to the community is outweighted by its dangerous attributes.[296]

Some transportation cases, however, have resulted in the application of strict liability, particularly when injury results from the transportation of dangerous commodities. In *Siegler v. Kuhlman*,[297] a young woman unknowingly drove an automobile into an area on the highway where a vehicle had accidentally spilled a large quantity of gasoline. An explosion ensued, and she was burned alive. Applying *Fletcher,* and noting that evidence necessary to prove negligence would have been lost in the explosion, the court noted:

> When gasoline is carried as cargo…it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight—extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties….[298]
>
> We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all the hazards of high-speed traffic, multiplied by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied by the quantity and size of the load….[299]
>
> Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care….[300]

In *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*,[301] a case involving a spill of 20,000 gallons of highly flammable, toxic, and possibly carcinogenic acrylonitrile, Judge Posner noted that strict liability would provide "an incentive, missing in the negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident."[302] Nevertheless, the court concluded that negligence would be adequate to remedy and deter its accidental spillage.[303]

There are, however, limitations on liability even for harm caused by ultrahazardous activities. Liability is limited to harm resulting from that which makes the activity ultrahazardous to begin with, and not for harm resulting from the plaintiff's abnormal sensitivity to defendant's conduct.[304] Assumption of risk and contributory negligence are also defenses,[305] though in comparative fault jurisdictions, they may not be absolute bars to liability. Actual and proximate causation must also be proven by the plaintiff.

1. Products Liability

Transit providers typically are purchasers of expensive, sophisticated, and complex products, such as buses, rail cars, and communications systems. When passengers are injured, they may sue both the transit operator, under negligence, and the manufacturer of

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[293] *Id*. at 7. The court recognized exceptions from liability if the cause of harm was the plaintiff's, or an act of God.

[294] *Id*. at 11.

[295] AMERICAN LAW INSTITUTE, *supra* note 134 § 519.

[296] *Id*. § 520.

[297] 81 Wash. 2d 448, 502 P.2d 1181 (1972).

[298] *Id*. at 1184.

[299] *Id*. at 1186.

[300] *Id*. at 1187. The court applied Section 519 of the *Restatement (Second) of Torts*, which provides that "One who carries on abnormally dangerous activity is subject to liability for harm…although he has exercised the utmost care to prevent the harm."

[301] 916 F.2d 1174 (7th Cir. 1990).

[302] *Id*. at 1177.

[303] *Id*. at 1179. Transporters of explosives are frequently held strictly liable for the harms they cause. Rejecting the argument that the railroad was authorized by law to transport explosives, in Chevez v. Southern Pacific Co., 413 F. Supp. 1203 (E.D. Cal. 1976), the court applied strict liability when 18 bomb-loaded boxcars exploded in defendant's switching yard.

[304] Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645, 648 (Wash. 1954); AMERICAN LAW INSTITUTE, *supra* note 134 § 524A.

[305] AMERICAN LAW INSTITUTE, *supra* note 134 § 523. Contributory negligence is a defense only if the plaintiff "knowingly and unreasonably subject[ed] himself to the risk of harm." *Id*. § 524(2).

the vehicle, under strict liability.[306] Transit agencies may also find themselves as plaintiffs against equipment manufacturers in products liability litigation.

2. Metamorphosis of the Law of Torts and Contracts

The development of the modern concept of products liability (or "enterprise" liability, as some refer to it) has proceeded through several stages. The steps in the metamorphosis were these:

1. During the early Industrial Revolution, products liability was characterized by an emphasis on "privity" between buyer and seller,[307] with the remote manufacturer ordinarily being shielded from direct liability.[308]

2. Exceptions to this strict rule gradually were carved out for (a) "an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind," (b) "an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises," and (c) "one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not."[309]

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[306] *See, e.g*., Red Rose Transit Auth. v. N. Am. Bus Indus., Slip Copy, 2013 U.S. Dist. LEXIS 6969 (E.D. Pa. 2013).

[307] Early 19th century common law in the United States followed that of England, which appeared to favor the position of defendants in personal injury cases on grounds of fostering the development of cottage industry. *See* Priestly v. Fowler, 3 Mees. & Wels 1, 150 Eng. Rep. 1030 (1837); Albro v. The Agawam Canal Co., 60 Mass. (6 Cushing) 75 (1850). One exception of this pro-defendant bias was the doctrine of *respondeat superior*, pursuant to which a master would be held liable for his servant's negligence causing injury to a stranger. Farwell v. Boston & Worcester R.R. Corp., 45 Mass. (4 Met.) 49, 57 (1842). Most courts during the early common law period denied recovery for personal injury where the plaintiff could show no privity of contract with the defendant. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157, 160 (Wis. 1909); Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (Mass. 1907). That is to say, no party could recover from another unless he had purchased the product directly from him.

Even where privity existed, courts often denied recovery based upon the doctrine of *caveat emptor* ("let the buyer beware"). Thus, plaintiffs could not recover for contractual claims for latent defects unless they could prove a breach of express warranty, or the existence of fraud. Seixas v. Woods, 2 Caines 48, 52-3 (S. Ct. N.Y. 1804). The buyer could protect himself contractually in arm's-length bargaining with the seller, or so it was assumed. In most cases, the buyer could examine the product before tendering the purchase price. If he hadn't the sense to insist upon the inclusion of a warranty in the contract of sale, and if the seller hadn't defrauded him, the buyer was simply stuck without a remedy, even where he was personally injured by the defective nature of the product he had purchased.

[308] Epstein, *supra* note 189. *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), where a driver injured by a defective coach was barred from recovering because of the absence of privity of contract. Judge Abinger noted,

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

Id. at 405. As one court noted, Huset v. J.I. Case Threshing Mach., 120 F. 865, 867–68 (8th Cir. 1903), "The liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale…. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence…." As the case law evolved, these rigid distinctions became blurred. For example, an exploding steam boiler causing only property damage was deemed not to be a dangerous instrument; no duty arising out of contract or law (tort) was deemed owed the plaintiff. Losee v. Clute, 51 N.Y. 494 (1873). But as courts became more sympathetic to the plight of plaintiffs suffering personal injury, they discovered means of sweeping aside traditional common law liability limitations based on the absence of privity of contractual relations between the parties.

[309] Liberalization of these strict rules began in cases where the defendant performed an act of negligence imminently dangerous to human life. Thomas and Wife v. Winchester, 6 N.Y. 397, 410 (1852). Where the defendant's negligence put human life in imminent danger, he was held to have a duty of exercising caution beyond that arising out of the contract of sale. *Id*. Early distinctions were made between dangerous instruments, or products that in their nature were dangerous, and those that were not, the former requiring a higher degree of care, and therefore imposing upon their manufacturers (or sellers) a higher degree of potential liability. Longmeid v. Holliday, 155 Eng. Rep. 752 (1852). On an *ad hoc* basis, courts during this period attempted to develop liability regimes based upon the nature of the commodity that caused the injury. Thus, poison, gunpowder, spring guns, and torpedoes were deemed dangerous instruments; flywheels were not. Loop v. Litchfield, 42 N.Y. 351 (N.Y. 1870).

Gradually, the courts began to focus on the issue of foreseeability of injury with respect to certain types of products as a basis for imposing a duty to exercise a higher standard of care. For example, in Devlin v. Smith, 89 N.Y. 470 (N.Y. 1882), a 19th century New York decision, the court found the defendant liable for the death sustained by a carpenter who fell from a scaffold negligently built by it; there was no privity between the parties. The court found that a duty was nevertheless owed the carpenter because "Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence to the builder's negligence…such negligence is not an act imminently dangerous to human life." Although a scaffolding was arguably not a "dangerous instrument" per se, unless properly constructed it was a "most dangerous trap." *Id*. at 478. Hence the act, not just the product, could be of such danger as to sweep aside the privity barrier. This was the beginning of the infamous assault on the citadel of privity. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 401 (N.Y. 1962). 226 N.Y.S.2d 363.

Other decisions broke through the traditional contract defenses such as *caveat emptor* by, for example, finding an im-

3. With Justice Cardozo's New York decision in *MacPherson v. Buick Motor Co.*,[310] courts began to jettison privity as a bar to recovery against remote manufacturers under negligence law.[311]

4. Justice Traynor's concurring opinion provided the intellectual foundation for the movement toward strict liability in *Escola v. Coca-Cola Bottling Co.*,[312] in 1944. In addition to his focus on risk minimization (because the manufacturer is in a superior position to minimize the losses), and loss spreading (so that the cost of injury does not fall upon a single innocent consumer),[313] Traynor advanced several other rationales for strict products liability. He noted that although the doctrine of *res ipsa loquitur*, where applicable, offered an inference of defendant's negligence, nonetheless, that inference could be rebutted by an affirmative showing of proper care, often leaving the person injured by a defective product without an ability "to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."[314]

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plied warranty that the work was suitable and proper for the purposes for which the producer knew it was to be used. Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 112 3 S. Ct 537, 28 L. Ed. 86 (1884); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918).

But other courts were still reluctant to go so far, limiting liability where there was no privity or fraud, or where the product was not imminently dangerous to human life or health. Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (Tenn. 1912). One was quite prophetic in its rationale:

> [I]f suits of the kind were sanctioned against manufacturers there would be no end to litigation, and practically no means, in the great majority of the cases, for the manufacturer to protect himself, and therefore that useful class of producers would be so loaded with litigation that their labor, skill, and enterprise would be greatly discouraged, if not destroyed, to the great detriment of the public welfare.

Id. at 423. Nonetheless, 2 years later the same court allowed recovery for the ingestion of a cigar stub in a Coca-Cola bottle on grounds that, "All medicines, foods, and beverages are articles of such kind as to be imminently dangerous to human life or health unless care is exercised in their preparation." Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80, 81 (Tenn. 1914).

[310] 217, N.Y. 382, 111 N.E. 1050 (N.Y. 1916).

[311] A significant expansion in the law of products liability, and perhaps the beginning of the modern era of the law, was marked by Justice Benjamin Cardozo's powerful decision in McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), involving a suit by the purchaser of a Buick against its manufacturer for a personal injury caused by a defective wheel made by a subcontractor. Cardozo rejected the traditional distinction between things "imminently dangerous to life" or "implements of destruction," such as poisons, explosives, and deadly weapons, and those not so dangerous. Instead, he emphasized the foreseeability of the injury if the product is negligently made, concluding that this foreseeability imposes upon the manufacturer a duty to exercise ordinary care. A neglect of such duty imposed liability for negligence.

Sweeping aside the privity limitation, Cardozo held that such a duty was extended to all persons for whose use the thing is supplied before there was a reasonable opportunity to discover the defect. But Cardozo saw an important distinction in liability based on proximity or remoteness:

> We are not required at this time to say that it is legitimate to go back to the manufacturer of the finished product and hold the manufacturers of the component part. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong. We leave that question open.

Id. at 1053 [emphasis original citations omitted]. Thus, foreseeability of injury imposed a duty of ordinary care, the breach of which was actionable negligence, *see* Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N.E. 396 (Mass. 1918), unless there was no proximate cause. Cardozo would subsequently expand the notion of foreseeability, and the proximate cause limitation on duty and liability, in his seminal opinion in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928): "[N]egligence in the air, so to speak, will not do…. [T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty…. The risk reasonably to be perceived defines the duty to be obeyed…." *Id*., 162 N.E. at 100. Nevertheless, some courts were reluctant to jump on board right away and sought to limit the expansion of liability to personal injury cases, holding that no such cause of action existed on such grounds where a loss to property (as opposed to personal injury) was suffered. Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (Mass. 1921). Other courts got round this limitation by holding that the breach of a duty imposed by a statute constituted negligence *per se*, as a matter of law, irrespective of whether recovery was sought for personal or property injury. Pine Grove Poultry Farm, Inc. v. Newton By-Products Mfg. Co., 248 N.Y. 293, 162 N.E. 84 (N.Y. 1928).

[312] 24 Cal. 2d 453, 150 P.2d 436 (Cal. 1944).

[313] As Judge Traynor was subsequently to observe, "The purpose of [strict products] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697 (Cal. 1963).

[314] *Escola*, 150 P.2d at 441. Traynor also noted that under already existing law, the retailer of a product was strictly liable to the consumer under an implied warranty of fitness for use and merchantable quality, which include a warranty of safety. The retailer forced to pay a judgment to an injured consumer could then bring suit against the manufacturer. This produced circuitous and wasteful litigation. Judicial efficiency could much be enhanced by allowing a direct suit by the consumer against the manufacturer based on its warranty. *Id*. at 441–42.

Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product….
>
> *Id*.

5. Beginning with the New Jersey decision in *Henningsen v. Bloomfield Motors, Inc.* [315] in 1960, privity, as a bar to recovery against remote manufacturers, began to be swept aside in contracts actions, and implied warranties were extended to ultimate purchasers.[316] Standardized contractual disclaimers of liability were also swept aside in situations where the parties lacked equal bargaining power.[317]

6. With the 1962 decision of *Greenman v. Yuba Power Products Inc.,*[318] strict liability began to be adopted to the exclusion of negligence principles, a trend solidified by the adoption of Section 402A of the *Restatement (Second) of Torts* by the American Law Institute in 1965.[319]

7. After the adoption of 402A, defective design and duty to warn cases were expanded under traditional negligence doctrine.

8. Finally, heavily lobbied by insurance companies, beginning in the 1980s several state legislatures promulgated tort reform statutes limiting liability in various ways, including imposing limitations on damages and Statutes of Repose.[320]

3. Rationale for Expanded Liability

The rationale for the metamorphosis in the law reflected the change in the economy driven by the industrial revolution. The early common law was developed during a period where buyers and sellers were in close proximity, frequently in the same town. The seller was often also the craftsman who built or assembled the product. They stood in an arm's-length relationship in which both parties could look each other in the eyes and bargain on equal terms. Products themselves were relatively uncomplicated and conducive to inspection by a buyer seeking to evaluate their quality.[321] The pro-business bias of the judiciary reflected a desire to promote the cottage industries and small-scale commerce of the day.

As the nation expanded and industrial enterprise grew, purchasers were buying products made by large assembly-line manufacturers in distant cities. Producers were selling to wholesalers who sold to retailers who sold to consumers. Privity of contractual relations was no longer likely. With the development of radio and television, marketing was becoming a mass media affair. Disparity of bargaining power made *caveat emptor* a one-sided legal doctrine. Moreover, the types of products manufactured in the 20th century were more dangerous to human life—the automobile, for example, which could reach speeds well beyond those of the horses and carriages they replaced, and the airplane, which defied gravity. One court candidly noted the trend:

> Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer….[322]

Similarly, in a case holding that manufacturers' express warranties ran with the product to the ultimate purchaser, irrespective of privity, the court held:

> The world of merchandising is…no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer….[323]

The advantage of a contracts claim is that the plaintiff need not prove negligence; it need only prove breach of warranty, which now could be implied.[324] All the while, privity was shrinking as a barrier.

The policy rationale for imposing liability upon producers of defective products irrespective of negligence or warranty had been eloquently stated by Justice Traynor of the California Supreme Court in a concurring opinion to a 1944 decision:

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[315] 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

[316] Dean Prosser observed, "In the field of products liability, the date of the fall of the citadel of privity can be fixed with some certainty. It was May 9, 1960, when the Supreme Court of New Jersey announced the decision in Henningsen v. Bloomfield Motors Inc." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[317] Still others held that actions brought for recovery under contractual warranties, express or implied, rather than tortuous negligence, continued to be limited by the requirement of privity of contract between the plaintiff and defendant. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923). Nonetheless, some courts expanded the concept of privity to include family members of the individual who purchased the product. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961). Others allowed the introduction of the warranty as evidence in negligence cases. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 412 (1932).

[318] 377 P.2d 897 (Cal. 1963).

[319] Section 402A provides:

> One who sells any product in a defective condition unreasonable dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

[320] *See* EPSTEIN *supra* note 188, at 611–12.

[321] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

[322] Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 412 (1932).

[323] Randy Knitwear, Inc. v. Am. Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363 (1962).

[324] *Id*.

> [A] manufacturer incurs absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings…. [Irrespective of the absence of privity of contract or negligence] public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is in the public interest to discourage the marketing of products having defects that are a menace to the public.[325]

Other courts focused on the need "to avoid injustice and for the protection of the public."[326]

Liability exposure discourages the production of dangerous goods, or conversely, encourages manufacturers to make them safer, forcing them to internalize the cost of production (e.g., capital, raw materials, and labor) and consumption (e.g., personal injury). This sends consumers superior pricing signals by increasing the price of goods relative to their respective dangers, thereby causing marginal demand to shift to comparable products having less risk.[327]

[325] Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 441 (1944).

[326] Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

> [T]he erosion of the citadel of privity has been proceeding apace…all with the enthusiastic support of text writers and the authors of law review articles…. [A] The dynamic growth of the law in this area has been a testimonial to the adaptability of our judicial system and its resilient capacity to respond to new developments, both of economics and of manufacturing and marketing techniques. A developing and more analytical sense of justice, as regards both economics and the operational aspects of production and distribution has imposed a heavier and heavier burden of responsibility on the manufacturer….

298 N.E.2d at 626.

[327]

> Many commodities sold in the market do not reflect the full cost to society or even the costs imposed upon parties to the transaction. This leads to overconsumption. Alcohol…and firearms are prime examples, whose manufacturers escape the cost of health and life their products take. Our legal system assumes free will, and absolves these manufacturers from liability. But for a moment assume a different legal regime [, one which internalized the cost of such harm]…. Undoubtedly, this would have an inflationary impact on the price of [these commodities]. But the price would better reflect the costs incurred by society through the consumption of these products, and actually discourage marginal consumption.

Paul Dempsey, *Market Failure and Regulatory Failure As Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 20–21 (1989).

4. Criteria of Products Liability

Section 402A of the *Restatement (Second) of Torts* provides a modern formulation of the rule of products liability:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) the rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> Caveat:
>
> The Institute expresses no opinion as to whether the rules stated in this Section may not apply:
>
> (1) to harm to persons other than users or consumers;
>
> (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
>
> (3) to the seller of a component part of a product to be assembled.[328]

Thus, the existence of negligence or a warranty are irrelevant to a products liability claim under 402A. The comments that follow Section 402A reveal that: (1) the plaintiff has the burden of proving that the product was in a defective condition at the time it left the seller's hands;[329] (2) the seller can be a manufacturer, wholesaler, distributor, or retailer;[330] (3) the seller is not liable for abnormal handling of the product;[331] (4) contributory negligence in the form of the plaintiff's failure to discover the defect or guard against the possibility of its existence is not a defense to liability;[332] (5) however, assumption of risk in the form of "voluntarily and unreasonably proceeding to encounter a known danger" (sometimes known as "secondary assumption of risk") is a defense;[333] (6) the nonexistence of a warranty is irrelevant;[334] (7) the seller can avoid having his products deemed unreasonably dangerous with an appropriate warning;[335] and (8) some products are obviously danger-

[328] AMERICAN LAW INSTITUTE, *supra* note 134 § 402A (1966).

[329] *Id*. Comment g.

[330] *Id*. Comment f.

[331] *Id*. Comment h.

[332] *Id*. Comment n.

[333] *Id*.

[334] *Id*. Comment m.

[335] *Id*. Comments j and k.

ous in the eyes of an ordinary consumer, and are unreasonably dangerous only to the extent not contemplated by him.[336]

Every state has adopted its elements of proof on issues such as negligence, warranty, or products liability. The New York Court of Appeals has been particularly influential in the development of the law of products liability, and its formulation is therefore of particular interest.

Only a few years after the *Restatement's* formulation, the New York court adopted the following criteria:

> [U]nder a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.[337]

In *N.J. Transit Corp. v. Harsco Corp*.,[338] the issue was whether the transit corporation could rely on the implied warranties of merchantability and fitness for a particular purpose to recover damages for a defective new track geometry inspection vehicle, under circumstances in which the contract's 1-year express warranty had expired prior to the loss. The court held that there was no implied warranty of fitness for a particular purpose and that the implied warranty of merchantability was displaced by the contract's express warranty after its expiration.

5. The Three Categories of Defective Products

Liability can be imposed for products that are defective because of (1) The presence of a defect in the product at the time the defendant sold it (a manufacturing, production, or construction defect, sometimes termed the "lemon" product);[339] (2) A marketing defect—a failure of the defendant to warn the consumer of the risk (defective or nonexistent warning);[340] or (3) A design defect.[341]

6. Defective Design

Some courts have rejected the application of Section 402A in the area of design defects, concluding that although it contemplates that the producer will be liable in the production of a defective product even where it has "exercised all possible care in the preparation and sale of his product," nonetheless the "existence of a defective design depends upon the reasonableness of the manufacturer's action, and depends upon the degree of care which he has exercised…."[342] The consumer expectations test and the risk/utility test have dominated products liability analysis in design defect cases.

The *consumer expectations test* asks what reasonable consumers expect of the product, the assumption being that products should perform as reasonable consumers expect them to.[343] This test flows from Section 402A of the *Restatement (Second) of Torts*, which imposes liability for defective products that are "unreasonably dangerous…to an extent beyond that which would be contemplated by the ordinary consumer…."[344]

Consumers' expectations may also be developed by the producer's advertising, or its warranty with respect to the performance of the goods. Section 2-313 of the Uniform Commercial Code provides, *inter alia,* that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

A defense often raised is that consumer expectations cannot be high where the risks posed by the product are obvious. Under the *patent danger rule*, defendants argue that the obviousness of the risk should bar recovery for a design defect as a matter of law. A majority of courts have rejected this defense, one noting that an "[u]ncritical rejection of design defect claims in all cases wherein the danger may be open and obvious…contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products."[345]

The *Restatement (Third) of Torts* rejects the consumer expectations test as an independent standard for judging the defectiveness of product designs because "Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety."

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[336] *Id*. Comment j.

[337] Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 628–29, 345 N.Y.S.2d 461 (1973).

[338] 497 F.3d 323 (3d Cir. 2007).

[339] *See, e.g*., Pouncey v. Ford Motor Co., 464 F.2d 957, 961 (5th Cir. 1972).

[340] *See, e.g*., Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974).

[341] *See, e.g*., Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 747 (1974); Barker v. Lull Eng'g Co., 20 Cal. 3d 413; 573 P.2d 443, 446; 143 Cal. Rptr. 225 (1978).

[342] Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 747 (1974). *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect in the Manufacture and Design of Products*," 20 SYRACUSE L. REV. 559 (1969), who would limit recovery of defective products "to the case of an unintended condition, a miscarriage in the manufacturing process." *Id*. at 562.

[343] Heaton v. Ford Motor Co., 248, Or. 467, 435 P.2d 806, 808 (Or. 1967).

[344] AMERICAN LAW INSTITUTE, *supra* note 134 § 402A, comment i.

[345] Camancho v. Honda Motor Co., Ltd., 741 P.2d 1240, 1246 (Colo. 1987).

Nonetheless, the *Restatement* recognized the usefulness of consumer expectations in "judging whether the omission of a proposed alternative design renders the product not reasonably safe."[346] The expectation of the consumer has not been deemed the exclusive means for determining design defect because the reasonable consumer often knows not what to expect. The California courts have held that:

> a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design [citations omitted].
>
> [A] jury may consider…the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design [citation omitted].[347]

These courts have embraced a hybrid test consisting of both consumer expectations and risk/utility analysis, concluding that design defects exist

> (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove…that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[348]

The California courts have tried to draw a dividing line identifying the circumstances appropriate for the alternative analysis. In their view, the consumer expectations test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design.*" Under this approach, the consumer expectation test is appropriate whenever the product's design "performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."[349] However, the risk/utility test is appropriate where "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance."[350] Under this approach, the risk/utility test must be used unless the facts establish that the design failed the consumer expectations test.

The risk/utility test requires application of a balancing process to determine whether the product is unreasonably dangerous—weighing the utility of risk inherent in the design against the magnitude of the risk. But in some cases the product is so inherently unreasonable that no balancing is necessary.[351]

In order to prevail in a product liability case based on a defective design, courts have considered the following criteria:

- The foreseeable risk of harm could have been reduced by a reasonable alternative design;
- The technological feasibility of manufacturing a product with the suggested safety device at the time the product was manufactured;
- The availability of the materials required;
- The chances of consumer acceptance of the device;
- The relative advantages and disadvantages of the product as designed and as it could have been designed;
- The effects of the alternative design on production costs;
- The effects of the alternative design on product longevity, maintenance, repair, and aesthetics; and
- The overall safety impact of the alternative design, not only on plaintiff, but on other users of the product.[352]

Though the feasibility of an alternative design may be proven by plaintiff, some courts do not insist that the plaintiff must prove the existence of a feasible alternative design in every case.[353] The *Restatement (Third) of Torts* states that, "reasonable alternative design is the predominant, yet not exclusive, method for establishing defective design."[354]

Another question in defective design cases is whether the court should assess the state of the art in the manufacturer's trade of business at the time of its design, or at the time of the litigation. Technology evolves rapidly, so that more recently designed products can be made safely. The dominant view on the issue was expressed in *Bruce v. Martin-Marietta Corp.*,[355] which measured the state of the art at the time the product (aircraft seats) entered the stream of commerce,

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[346] AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF TORTS § 2, Comment g (1998).

[347] Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 430–31, 573 P.2d 443 (Cal. 1978).

[348] 20 Cal. 3d at 435.

[349] Soule v. General Motors Corp., 8 Cal. 4th 548, 882 P.2d 298, 309, 34 Cal. Rptr. 2d 607, 618 (1994).

[350] *Id.*, 882 P.2d at 308.

[351] Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516, 519 (Md. App. 1985).

[352] Kirk v. Hanes Corp., 16 F.3d 705, 708 (6th Cir. 1994); AMERICAN LAW INSTITUTE, *supra* note 345 § 2, comment f.

[353] Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 694 A.2d 1319, 1332 (Conn. 1997).

[354] AMERICAN LAW INSTITUTE, *supra* note 345 § 2(b), and comment b. In some cases, defendants have argued that an aircraft was not defective because its design had been approved by the Federal Aviation Administration (FAA), and it had been issued an FAA certificate of airworthiness. The courts have observed that the Federal Aviation Act provides that the FAA's standards shall constitute a mere minimum.

[355] 544 F.2d 442, 447 (10th Cir. 1976).

in 1952 (at which time they satisfied FAA safety standards), rather than the prevailing safety standards at the time of the crash, in 1970. The court observed that the crucial question was the expectations of an ordinary consumer, who "would not expect a Model T to have safety features which are incorporated in automobiles today."

With respect to seat belts, courts have generally not imposed a duty upon carriers to provide vehicles equipped with seat belts as a matter of law, but have left the question open to the jury in assessing whether the defendant was negligent in providing defective equipment.[356]

One other issue that could result in liability for a transit provider is the extent to which the defective design flows from its RFP. If its engineers have laid out precise specifications for the type of equipment or structure to be supplied, and that design ultimately results in personal injury, the transit provider may find itself liable for its design. In many instances, it would be safer for the transit provider to specify the function and general dimensions of the equipment or structure, leaving it to the bidder to draw up the precise technological design specifications. The prudent transit attorney will insist on a process of prior legal review before any RFP is issued.

7. Defective Warning

A problem with a warning may exist either because the warning was deficient in failing to appraise consumers of the product's dangers, or because there was no warning given in a situation where there should have been. In determining whether a warning should have been given, courts focus on the knowledge, actual or constructive, of the defendant at the time the product was produced or sold, of its dangerous propensities. Thus, unlike other product liability cases that focus on the product, the failure to warn line of cases focuses on the conduct of the manufacturer, and is therefore more heavily grounded in negligence. Nonetheless, though in negligence the plaintiff must prove that the seller did not warn for reasons that fall below an appropriate standard of care, in strict liability, the reasonableness of defendant's failure to warn is immaterial. Strict liability requires the plaintiff to prove only that the defendant failed to warn of a risk that was known or knowable in light of generally accepted scientific or medical knowledge existing at the time of manufacture and distribution.[357] When one steps off of the London Underground rail cars, one hears and reads the warning, “Mind the Gap.”

But a warning may not always be an adequate defense. In a case where the plaintiff garbage man's leg was amputated when caught between the blade and compaction chamber on a garbage truck, the court held, "If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury."[358] Where a commercially feasible alternative design would have avoided the injury, the existence of a warning is not an absolute bar to liability.[359]

Abdulwali v. Washington Metropolitan Area Transit Authority[360] is an interesting “failure to warn” case, which succeeded in the lower court, but the decision was reversed in the Court of Appeals. The plaintiff, Mrs. Abdulwali, alleged, among other claims, that the Transit Authority had failed to warn passengers adequately of the dangers of travelling between cars on a moving train. The only warning in a Metro car was a sign on each bulkhead door that read “No Passage—Except in Emergency.” [361]

Mrs. Abdulwali and her 6-year old son were on the platform in the U Street–Cardozo Metrorail station preparing to board. Her son boarded the Metro train, but before she could get on, the doors closed and the train pulled away from the station. Tyri, the son, became upset and called to his mother, who was running alongside the moving train and shrieking for help. But the train did not stop, and Mrs. Abdulwali immediately reported this to the station manager.

The train left the station and proceeded into a tunnel. Tyri moved to the rear of the car and exited through the bulkhead doors. In an attempt to pass into the next car he fell through the gap between the two cars and onto the tracks. His cries, 70 feet deep into the tunnel, prompted the station manager to notify transit officials, who hurried to him. Tyri was still conscious but severely injured. He died 4 days later despite efforts to save him at Children’s Hospital.

Mrs. Abdulwali sued the Transit Authority for negligence in various respects that caused the death of her son. She alleged, among other claims, that the Transit Authority had failed to warn passengers adequately of the dangers of moving between cars on a moving train. The Transit Authority invoked the defense of sovereign immunity and moved to dismiss or, in the alternative, for summary judgment. The district court granted summary judgment on all counts but, interestingly, rejected the immunity defense on the failure to warn one. The lower court found that although the Transit Authority had provided specifications for the bulkhead signs in its contract for the purchase of Metro cars,

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[356] As one court observed,

> [we have not imposed] a duty on common carriers to provide seat belts. Rather, the court[s have] left it for the jury to decide whether under the circumstances such a failure was a negligent act. These circumstances could vary in many respects including whether the common carrier was a taxicab, a full-size bus, or, as in this case, a smaller bus for the elderly and the disabled.…

Montgomery v. Midkiff and Transit Auth. of River City, 770 S.W.2d 689, 691 (Ky. App. 1989).

[357] Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 989, 810 P.2d 549, 550, 281 Cal. Rptr. 528 (Cal. 1991).

[358] Uloth v. City Tank Corp., 376 Mass. 874, 384 N.E.2d 1188, 1192 (1978).

[359] Eads v. R.D. Warner Co., 109 Nev. 113, 847 P.2d 1370, 1371 (1993).

[360] 315 F.3d 302 (D.C. Cir. 2003).

[361] *Id.* at 303.

those specifications did not prohibit it from furnishing cars with additional signs or otherwise providing increased warning of the danger of passing between cars on a moving train. The Transit Authority appealed against the order denying its defense of immunity.

The Transit Authority was created when Congress approved the WMATA Compact signed by Maryland, Virginia, and the District of Columbia.[362] The Compact confers on the Transit Authority the sovereign immunity enjoyed by the signatories.[363] That immunity has been waived for "torts, committed in the conduct of any proprietary function," but preserved for "torts occurring in the performance of a governmental function."[364]

The learned judges applied a two-part test in determining whether a particular activity is governmental or proprietary.[365] The first question is whether the activity is "quintessentially governmental," such as the operation of a police force. If so, this activity falls within the ambit of the Transit Authority's immunity. When the activity is not quintessentially governmental, the judges move on to see whether the Transit Authority's actions were "discretionary," and if so, would be governmental and protected under sovereign immunity.[366] The judges, like both parties, agreed that decisions concerning the design and placement of warning signs in Metro cars were not a quintessentially governmental function.

They then focused on whether the Transit Authority's decisions constituted discretionary functions. These are governmental actions and decisions "based on considerations of public policy" and requiring "an element of judgment or choice."[367] But where any "statute, regulation, or policy specifically prescribes a course of action," then no discretion is involved as the Transit Authority has "no rightful option but to adhere to the directive."[368] When no such prescription exist, the Transit Authority's decisions are discretionary if they involve "political, social, or economic choices."[369]

Here the Transit Authority was required to make choices as the Compact left it with broad discretion to design all transit facilities and to enter into contract for their operation and furnishment. The court scrutinized these choices to determine whether they were discretionary. There is a morass of conflicting cases in determining the application of the discretionary function test.[370] The court followed the constancy in precedents that found the Transit Authority making discretionary choices while "establishing 'plans, specifications or schedules'" regarding the Metro system.[371]

A distinction was drawn between complaints alleging "negligent design" and those alleging "negligent maintenance." The first one is barred by the Transit Authority's immunity but not "negligent maintenance."

Mrs. Abdulwali did not allege that the Transit Authority had negligently maintained the signs, she had challenged only the adequacy of the signs' warning. The complaint pointed toward the design of the signs specified in the transit car contract. Thus, sovereign immunity barred her claim of "failure to warn." The judges further stated that holding otherwise would foster "judicial 'second guessing'" of "political, social, and economic" decisions that the Transit Authority's immunity was designed to prevent.[372]

8. Sales vs. Services

Both *Restatement (Second) of Torts* Section 402A and the Uniform Commercial Code purport to apply only to sales transactions. However, the *Restatement (Third) of Torts* applies to commercial transactions "other than a sale," to one who distributes, provides products to others, or provides a combination of products and services.[373]

Some courts have also applied strict liability to lessors of products. For example, in *Cintrone v. Hertz Truck Leasing & Rental Service,*[374] the New Jersey Supreme Court applied strict liability to a truck lessor for injury caused by defective brakes. The court held that the commercial vehicle lessor impliedly warrants that its vehicles are in proper working order irrespective of the actual age of the vehicle. The *Restatement (Third) of Torts* also provides that "[a] commercial lessor of new and like-new products is generally subject to the rules governing new product sellers."[375]

9. Warranty

Though, as noted above, *caveat emptor* and privity no longer dominate contract law, contract law remains an alternative to tort law litigation of products liability cases.[376] The law of contracts has three potential advantages over tort law: (1) proving the existence and breach of a contractual warranty may be easier than proving duty and breach in a negligence action; (2) typically, contractual claims have longer statutes of limitations than tort actions; and (3) purely consequential economic

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[362] D.C. Code Ann. § 9-1107.01 *et seq*.

[363] *See* Beebe v. WMATA, 129 F.3d 1283, 1287 (D.C. Cir. 1997).

[364] D.C. Code Ann. § 9-1107.01(80).

[365] *See* Burkhart v. WMATA, 112 F.3d 1207, 1216 (D.C. Cir. 1997).

[366] *Id.*

[367] Berkovitch by Berkovitch v. United States, 486 U.S. 531, 536–37, 108 S.Ct. 1954, 1958–59, 100 L. Ed. 2d 531 (1988).

[368] United States v. Gaubert, 499 U.S. 315, 322–23, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335, 340 (1991).

[369] *Burkhart*, 112 F.3d at 1217.

[370] *See* Shansky v. United States, 164 F.3d 688, 693 (1st Cir. 1999).

[371] Beatty v. WMATA, 860 F.2d 1117, 1127 (D.C. Cir. 1988).

[372] Sanders v. WMATA, 819 F.2d 1151, 1155, 1156 (D.C. Cir. 1987) (quoting United States v. Varig Airlines, 467 U.S. 797, 814, 104 S. Ct. 2755, 2764–65, 81 L. Ed. 2d 660 (1984).

[373] AMERICAN LAW INSTITUTE, *supra* note 345 § 20.

[374] 45 N.J. 434, 212 A.2d 769 (N.J. 1965).

[375] AMERICAN LAW INSTITUTE, *supra* note 345 § 20, comment c.

[376] *See, e.g.,* Southeastern Pa. Transp. Auth. v. General Motors Corp., 103 F.R.D. 12, 13 n.l (E.D. Pa. 1984).

losses are more easily recoverable under contract principles than in tort law.

Article 2 of the Uniform Commercial Code established three types of express warranties: (1) express warranties that the product will perform in a certain manner,[377] (2) implied warranties of merchantability, that the product is free of defects and is fit for the ordinary purpose for which such goods are used,[378] and (3) implied warranties of fitness for a particular purpose communicated to the seller at the time of the sale.[379] Note, however, that for agencies following the FAR, the contracts may provide for limited warranties, provided that all implied warranties of merchantability and fitness for a particular purpose are excluded.[380] FTA's Circular 4220.1D and Best Practices Manual also diverge from the UCC in certain respects.[381]

10. Causation

Whether a products liability action is brought in warranty, negligence, or strict liability, the plaintiff must prove cause-in-fact and proximate causation, as described above. To establish a *prima facie* case of products liability, plaintiff must prove that: (1) the product that caused his injury was distributed by the defendant; (2) the product was defective; (3) but for the defect the plaintiff would not have been injured; (4) the resulting harm to the plaintiff was within the range of foreseeable risks created by the defect; and (5) damages. Some courts, though, suggest different terminology for the issue of proximate causation in products liability cases. The Texas Supreme Court in *Union Pump Co. v. Allbritton* noted:

Negligence requires a showing of proximate cause, while *producing cause* is the test of strict liability. Proximate and producing cause differ in that foreseeability is an element of proximate cause, but not of producing cause. Proximate cause consists of both cause in fact and foreseeability. Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred. A producing cause is "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." Common to both proximate and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.[382]

Though the court thought that foreseeability was not a part of "producing cause" analysis, it nonetheless acknowledged that at some point defendant's conduct or product may be too remotely connected with plaintiff's injury to constitute legal causation; defining the limits of legal cause requires some line drawing based on policy considerations.

In *Lear Siegler, Inc. v. Perez*,[383] the Texas Supreme Court also embraced a restrictive view of proximate causation. Perez, a Texas Highway Department employee, had gotten out of his truck to fix a defective flashing sign which, after hit by a sleeping motorist, hit Perez. Finding that the connection between the defect in the sign was too attenuated with plaintiff's injuries, the court held that the defect in the sign was not the legal cause of Perez's injuries.

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[377] UCC § 2-313.

[378] UCC § 2-314.

[379] UCC § 2-315. However, an implied warranty may stand on a different footing where made by a supplier of a component part. The seminal case is Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S. 593 (1963), decided by the New York Court of Appeals. Goldberg involved an action for personal injury suffered in an American Airlines crash near LaGuardia Airport in New York. Goldberg brought suit against Kollsman Instrument Corp., the manufacturer of a defective altimeter on an aircraft assembled by Lockheed, but owned and flown by American Airlines, on breach of implied warranties of merchantability and fitness. Of course, there was no privity between the passenger (the purchaser of a service from American Airlines), and the manufacturer of the altimeter. The court noted that the traditional distinction between torts and contracts in the products liability arena had been blurred:

> A breach of warranty, it is now clear, is not only a violation of the sales contract…but is a tortuous wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer…. 191 N.E 2d at 82. [W]here an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned, the manufacturer as well as the vendor is liable, for breach of law-implied warranties, to the persons whose use is contemplated…. [I]t is no extension at all to include airplanes and the passengers for whose use they are built—and, indeed, decisions are at hand which have upheld complaints, sounding in breach of warranty, against manufacturers of aircraft where passengers lost their lives when the planes have crashed….

Id. at 84.

Although the New York Court of Appeals in *Goldberg* noted that other jurisdictions (including, notably, California) had adopted a strict tort liability regime wholly dispensing with the privity requirement, *See* Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 687 (1963), New York was not yet willing to go so far as to extend liability to a producer of a component part—"Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." 191 N.E.2d at 84. Despite the *Restatement's* ambivalence on the question (noted above), most courts today allow recovery against manufacturers of component parts.

[380] 48 C.F.R. § 52.246-17(4), 18(6), and 19(10) (1999). These issues are also discussed in Section 5—Procurement.

[381] For example, the FTA's *Best Practices Procurement Manual* (6.3.1.2) notes that APTA's Guidelines on bus procurement warranty provisions should be followed.

[382] Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995) [citations omitted and emphasis supplied].

[383] 819 S.W.2d 470 (Tex. 1991).

H. COMPARATIVE NEGLIGENCE AND STRICT LIABILITY

Some courts have had difficulty in meshing the apples-to-oranges comparison of plaintiff's contributory negligence with defendant's strict liability, particularly after comparative fault methodology (described above, of reducing plaintiff's recovery by his degree of fault) was adopted by most jurisdictions. Strict liability focuses on the condition of the product, rather than the conduct of the defendant; the plaintiff need only prove the existence of a defect rather than any negligence that may have caused it. However, one may conceptualize strict liability as a fault-based system in the sense that the fault lies within the nature of the product itself—"The product is 'bad' because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous."[384] Nonetheless, though a defective product may be seen as "faulty," such a characterization is qualitatively different from the plaintiff's fault in contributing to his own injury.

Recognizing this conceptual difficulty, some courts have adopted a notion of "comparative causation," whereby the defendant is strictly liable for the harm caused by his defective product, but the plaintiff's recovery is discounted by the degree of his own fault—"how much of the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions."[385] Others have refused to apply comparative fault statutes to strict liability cases.[386]

I. RISK MANAGEMENT

The Transit Cooperative Research Program has published several documents on risk management, urging transit providers to establish a Preventive Law approach to avoiding liability.[387] They should be consulted in terms of identifying “Best Practices” for transit providers.

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[384] Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

[385] Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979). The *American Law Institute, Restatement (Third): Apportionment of Liability* (1999) uses the term "proportionate allocation."

[386] Conti v. Ford Motor Co., 578 F. Supp. 1429, 1434 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[387] *See, e.g.,* LIEBSON & PENNER, *supra* note 109; MICHAEL KADDATZ, RISK MANAGEMENT FOR SMALL AND MEDIUM TRANSIT AGENCIES (Transit Cooperative Research Program, Synthesis No. 13, Transportation Research Board, 1995) and PATRICIA MAIER, IDENTIFYING AND REDUCING FRAUDULENT THIRD PARTY TORT CLAIMS AGAINST PUBLIC TRANSIT AGENCIES (Transit Cooperative Research Program, Synthesis No. 36, Transportation Research Board, 2000).