Forsyth v. Palmer, 14 Pa. 96, 97 (1850). Loss of future earnings is a distinct item of damages, which if properly proved, may result in recovery for the plaintiff.[7]

Inflation and productivity increasingly demand judicial attention, particularly with respect to personal injury action damages for lost future earnings. Traditionally, evidence of future inflation and productivity increases have been deemed too speculative to be included in calculating future damages even though inflation and productivity increases may drastically reduce an initially generous award. However, today, in light of clear scientific evidence of the fact that inflation and productivity have become an established part of our economy, it becomes necessary that these factors be considered in such awards.

The "law does not require that proof in support of claims for damages or in support of compensation must conform to the standard of mathematical exactness." Lach v. Fleth, 64 A.2d 821 (1949). All that the law requires is that "(a) claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough." Stevenson v. Economy Bank of Ambridge, 197 A.2d 721, 727 (1964).

Personal injury awards are usually lump-sum payments, and are not paid in weekly or monthly installments. Thus, all damages for personal injuries, including damages expected to accrue in the future, must be proved and calculated at trial. The loss of future wages is discounted to its present value by using the six percent (6%) simple interest figure.[10] . . .

There are three significant approaches, traditional, middle ground, and evidentiary which the judiciary has adopted in considering the impact of future inflation and productivity on lost future earning capacity. The traditional approach ignores altogether the effects of future productivity and future inflation as being "too speculative." This view was previously adhered to by this Commonwealth . . .

The middle ground approach is anomalous in that it permits the factfinder to consider the effects of productivity and inflation on lost future earning capacity, but prohibits expert testimony on either of these issues. The proponents of this approach argue that expert testimony on future economic trends is "speculative," yet acknowledge that such facts are within the "common experience" of all jurors and, therefore, jurors should not be prohibited from applying their common knowledge in reaching a verdict. However, it has been consistently demonstrated that expert evidence is essential to accurate economic forecasting. Since it is apparent that the middle-ground approach contributes little to the accuracy or predictability of lost future earnings, and paradoxically allows a judge or jury to determine what an acknowledged expert cannot, we decline to adopt it.

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[7] When an injury is a permanent one, one which will cause a loss or lessening of future earning power, a recovery may be had for the probable loss of future earnings. McCormick, Damages, 299 (20th reprint 1975). If the injured party survives, he should receive undiminished, his total estimated future earnings, but if he dies, the proper measure of damages includes a deduction based upon decedent's cost of personal maintenance. Today's opinion does not disturb our requirement for personal maintenance deductions.

[10] The rationale for reducing a lump-sum award to its present value is that:

> it is assumed that the plaintiff will invest the sum awarded and receive interest thereon. That interest accumulated over the number of relevant years will be available, in addition to the capital, to provide the plaintiff with his future support until the total is exhausted at the end of the period. The projected interest must therefore be allowed in reduction of capital lest it be claimed that the plaintiff is overcompensated.

Fleming, *Inflation and Tort Compensation*, 26 Am. J. Comp. Law 51, 66 (1977). . . .

The evidentiary approach in its several variants allows the factfinder to consider productivity and inflation in awarding damages. Since we believe that there is a reasonable basis in fact to consider the impact of inflation and productivity on lost future earnings, we conclude that the evidentiary concept is the most valid method to compute lost future earnings. However, courts employing the evidentiary method differ on the factors to be considered in assessing lost productivity on the one hand and the method to calculate the inflation component in the final lost future earning award on the other. Recognizing that there are myriad of ways to incorporate such economic data we find that there are two versions appropriate for our consideration.

The first of these two variants of the evidentiary approach was developed by the court in Feldman v. Allegheny Airlines, 382 F. Supp. 1271 (D. Conn. 1974), *aff'd*, 524 F.2d 384 (1st Cir. 1975). In *Feldman*, a surviving husband brought a wrongful death action as the administrator of his wife's estate. The defendant airline stipulated as to its liability and the trial was confined to the issue of damages. The court assumed that recovery for lost future earnings included the victim's lost earning capacity. In order to demonstrate the bases for the court's conclusions relative to what course the deceased's life probably would have taken, the court extrapolated the evolving pattern of Mrs. Feldman's life. The court detailed the deceased's college grades, her employment history, the opinion of the deceased held by her fellow workers, the expressed employment goals of the deceased and the potential jobs for which the deceased was qualified. The court also examined the employment history of another individual who had remarkably similar credentials as the deceased. The defendant produced one witness who testified as to the decedent's employment prospects. Based upon the above factors, the court predicted the incremental salary (productivity) increases of the decedent over her work-life expectancy.

The court was then faced with the inflation component and the task of discounting the award to its present value. The court developed a formula known as the "offset present value method" in which it subtracted the estimated inflation rate from the discount rate to calculate the inflation adjusted or "real" rate of interest. Each year's earnings were then discounted to present value by this "real" discount rate. The "real" discount rate employed by the court was 1.5%. . . .

The second variant of the evidentiary method was adopted by the Alaska Supreme Court in Beaulieu v. Elliott, 434 P.2d 665 (1967), and refined in State v. Guinn, 555 P.2d 530 (1976). Pursuant to this formula, the Alaska courts first calculate lost future earning capacity of the victim over his or her work-life expectancy. As to productivity, the Alaska court has stated: "Automatic step increases keyed to the length of service are by their very nature certain and predictable at the time of trial" and the court takes them into account when estimating the lost future earnings. State v. Guinn, 555 P.2d at 546. However, the court excluded as speculative evidence the "non-scheduled salary increases and bonuses that are granted as one progresses in his chosen occupation in terms of skill, experience and value to the employer." Id.

In order to account for the inflationary component's impact on lost future earnings and the effect of future interest rates on lump-sum payment, the Alaska court applied that "total offset method." Under the total offset method, a court does not discount the award to its present value but assumes that the effect of the future inflation rate will completely offset the interest rate, thereby eliminating any need to discount the award to its present value.

Mindful of our goal that a damage award formula should strive to be efficient, predictable as well as accurate, in computing lost future earning capacity this Commonwealth adopts the *Feldman* court's approach to calculating lost productivity and the Alaska court's total offset approach to inflation and discounting to present value. We believe that this eclectic method best computes a damage award which will fairly compensate a victim to the full extent of his or her injuries and avoids unnecessary complexities likely to produce confusion although in reality contributing little to the degree of accuracy to be obtained. Although judges and juries are not fortune tellers equipped with crystal balls, the *Feldman* approach to determining productivity as a factor in awarding future lost earnings best approximates the soothsayers by presenting the triers of fact with all relevant evidence. After laying a proper foundation, expert and lay witnesses are called upon to testify as to the victim's past and future employment possibilities. The defense may cross-examine the plaintiff's witnesses and present evidence on their own behalf. Upon a thorough evaluation of all the evidence presented, the factfinder makes an informed estimation of the victim's lost earning capacity. Although this approach may be time consuming, and like all estimations of future events may be subject to a degree of speculation, it is exceedingly more accurate to assume that the future will not remain stagnant with the past. . . .

In support of our adoption of the "total offset method" in allowing for the inflationary factor, we note that it is no longer legitimate to assume the availability of future interest rates by discounting to present value without also assuming the necessary concomitant of future inflation. We recognize that inflation has been and probably always will be an inherent part of our economy. Although the specific rate of inflation during any given period may vary, we accept the fact that inflation plays an integral part in effectuating increases in an employee's salary, and we choose to adopt a damage formula which will allow for that factor without actually requiring the factfinder to consider it as an independent element of the award. . . .

Since over the long run interest rates, and, therefore, the discount rates, will rise and fall with inflation, we shall exploit this natural adjustment by offsetting the two factors in computing lost future earning capacity. We are satisfied that the total offset method provides at least as much, if not greater, accuracy than an attempt to assign a factor that would reflect the varying changes in the rate of inflation over the years. Our experiences with the use of the six percent discount rate suggest the difficulties inherent in such an approach. As to the concomitant goals of efficiency and predictability, the desirability of the total offset method is obvious. There is no method that can assure absolute accuracy. An additional feature of the total offset method is that where there is a variance, it will be in favor of the innocent victim and not the tortfeasor who caused the loss. . . .

An additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable.

Henceforth, in this Commonwealth, damages will be awarded for lost future earnings that compensate the victim to the full extent of the injury sustained. Upon proper foundation, the court shall consider the victim's lost future productivity. Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are

instructed to abandon the practice of discounting lost future earnings. By this method, we are able to reflect the impact of inflation in these cases without specifically submitting this question to the jury.

In view of the trial court's refusal to permit appellant to introduce evidence relating to a future productivity factor and our formulation of a new standard to be used for accommodating inflation in these cases, we reverse the judgment below and remand the cause for a new trial as to the damage question.

NOTES TO KACZKOWSKI v. BOLUBASZ

1. *Comparing Discounting Methods.* The implications of the choice of discounting methods for future earnings may be illustrated by a case where the plaintiff is injured and as a result takes another position at reduced pay. The following table assumes that the plaintiff's \$100,000 annual income is reduced to \$65,000 in the years following the accident and that the plaintiff would normally retire five years after the trial. It assumes that interest rates on risk-free investments are 5 percent and inflation is running at 3 percent per year. It ignores raises for improvements in productivity.

The first of the three methods illustrated in the table is the Offset Present Value Method, which ignores inflation when considering salaries (no 3 percent cost of living raises) and the discount rate. For this method, the discount rate is 2 percent, the interest rate minus the inflation rate. It gives the smallest award here. Second is the Inflation Adjusted Method, which does include inflation in both projected salaries (3 percent raises) and discount rates. For this method, the discount rate is equal to interest at 5 percent. It gives a larger award here. The difference between these awards depends on a variety of factors, including the size of the income loss and the amount of predicted inflation. The Total Offset Method, adopted in *Kaczkowski*, will result in greater awards to plaintiffs as the time period during with there is an income loss extends further into the future. What is it about each formula that leads to these results?

Year in Which Plaintiff Would Have Received Earnings (Year 1 Is Year of Trial)	*Offset Present Value Method* $D = I \div (1 + DR)^{(t-1)}$	*Inflation Adjusted Method* $D = I(1+i)^{(t-1)} \div (1+DR)^{(t-1)}$	*Total Offset Method* $D = I$
Year 1	\$35,000.00	\$35,000.00	\$35,000.00
Year 2	34,313.73	34,333.33	35,000.00
Year 3	33,640.91	33,679.37	35,000.00
Year 4	32,981.28	33,037.85	35,000.00
Year 5	32,334.59	32,408.56	35,000.00
Totals	**\$168,270.51**	**\$168,459.11**	**\$175,000.00**

D = Damages, I = Lost income, i = inflation rate, DR = Discount Rate, t = year number.
E.g., Year 3, Inflation Adjusted Method. $D = 35{,}000\ (1 + .03)^{(3-1)} \div (1 + .05)^{(3-1)} = \$33{,}679.37$.

2. *Discounting and Structured Settlements.* The vast majority of tort cases settle before going to trial. Payments for future losses are often paid by the defendant over a period of time, such as $10,000 per year for five years. The structure of this settlement may be designed to match times at which the plaintiff is likely to incur future medical expenses or when future wages would have been earned.

A well-informed lawyer must enter into settlement negotiations knowing the rules governing damages that will be awarded if the case goes to trial in order to know the amount of damages to expect in settlement. A lawyer must also know *how to value structured settlements.* If a defendant offers $925,000 now or $1,000,000 paid over five years, for instance, which offer is the more attractive to the plaintiff? Unless the plaintiff has some special need to have the money now or some special reason to avoid spending all of the money now, the lawyer will want to know how to value these offers.

A *present value table* makes it easy to compare offers of present and future payment. The key decision is what interest rate the plaintiff can earn on invested payments. The portion of the table reproduced below considers just two possible interest rates, 2 percent and 5 percent. The decimal fractions in a table are called *discount factors.*

How Many Years from Now Will the Payment Be Made?	*What Interest Rate Can the Plaintiff Earn on Invested Money?*	
	2%	*5%*
0	1.000	1.000
1	.980	.952
2	.961	.907
3	.942	.864
4	.924	.823
5	.906	.784
6	.888	.746
7	.871	.711
8	.853	.677
9	.837	.645
10	.820	.614

The present value of the $925,000 offer is $925,000, because it is all paid now. The present value of $1,000,000 paid in equal installments over five years depends on when the first payment is made and the interest or *discount* rate. Assume that the first payment of $200,000 is made immediately. The present value of that payment is $200,000. The next four payments are made one, two, three, and four years in the future. To determine the present value of a future payment, multiply the amount of that payment by the discount factor for the appropriate year and interest rate.

Payment Year	*Discount Rate = 2%*	*Discount Rate = 5%*
0 (now)		1.000 × $200,000 = $200,000
1		.952 × $200,000 = $190,400
2		.907 × $200,000 = $181,400
3		.864 × $200,000 = $172,800
4		.823 × $200,000 = $164,600
Total Value	?	$909,200

For our example, each of the four future payments is equal to $200,000. If the plaintiff can earn interest of 5 percent, the present value of the payment one year from now is $200,000 times the discount factor of .952 or $190,400. The present value of the payment two years from now is .907 × $200,000 or $181,400. The present value of the entire structured settlement is $909,200, as shown above. Which settlement offer has the higher present value? Which settlement offer has the higher present value if the plaintiff can only earn 2 percent on his or her investments? The difference is even more dramatic if future payments occur in the distant future. What result if the $1,000,000 were to be paid in years 6 through 10 at each interest rate?

III. Punitive Damages

As described in a leading treatise, *punitive*, or as they are often called, *exemplary* damages may be awarded when the defendant is malicious, or "oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or shows flagrant indifference to the safety of others." See Dan B. Dobbs, *Law of Remedies* §3.11(2) p.319 (2d ed. 1993). Punitive damages are intended to punish defendants or to deter defendants from engaging in similar conduct rather than to compensate the plaintiff.

To recover punitive damages, the plaintiff must prove the elements of an intentional tort or recklessness of the sort that includes a conscious disregard of the high risk of serious harm to others. Peete v. Blackwell and Shugar v. Guill take slightly different approaches to the additional proof required to show particularly outrageous conduct.

The permissible amount of punitive damages is governed by both common law and constitutional law. Two questions arise: (1) Is the punitive damage award in the particular case excessive given the facts of that case? (2) Is the punitive damage award in the particular case excessive given punitive damages previously awarded to other plaintiffs in other cases arising out of the same conduct by the same defendant? State Farm Mutual Automobile Insurance Co. v. Campbell examines how the Due Process Clause limits state court awards of punitive damages.

PEETE v. BLACKWELL

504 So. 2d 222 (Ala. 1986)

TORBERT, C.J.

This is an assault and battery case. The defendant, Dr. Robert W. Peete, appeals from a judgment based on a jury verdict assessing punitive damages against him. Peete contends that punitive damages were improperly awarded in this case. For the reasons set forth below, we reject Dr. Peete's arguments and affirm the judgment of the trial court.

In late December 1983, the defendant, Dr. Robert W. Peete, hospitalized one of his patients for a severe nosebleed. As part of this patient's treatment, Dr. Peete applied anterior and posterior nasal packs to control the bleeding. On December 26, Dr. Peete was recalled to the hospital, because this patient was again experiencing difficulties. When he arrived there, he found that the string securing the posterior pack had been cut and that his patient was bleeding profusely. Because his patient was in danger of suffocation, Dr. Peete immediately sought to retrieve the pack and to control the bleeding. In order to retrieve the posterior pack, Peete required the use of a suction machine to remove the blood from his patient's throat. Unless this blood was removed, he could not see well enough to remove the pack.

He was assisted in these efforts by the plaintiff, Beverly S. Blackwell, the nurse in charge of the floor on which the patient had been hospitalized. Blackwell testified that at one point Peete struck her on the forearm and demanded that she "turn on the [goddamn] suction." She also testified that no physical injury of any kind resulted from this striking. It is from this incident that this case arose.

In a trial before a jury, Blackwell alleged that Peete had committed an assault and battery against her. She demanded $1.00 in compensatory damages and $100,000 in punitive damages. The jury returned a verdict against Peete in the amount of $10,001, indicating that the jury found for the plaintiff on her assault and battery claim and that they assessed $10,000 in punitive damages against Peete. The trial court entered judgment on this verdict and did not rule within 90 days on Peete's motion for judgment notwithstanding the verdict, his motion for new trial, or his motion to alter or amend the judgment. These motions were thus denied pursuant to A.R. Civ. P. 59.1.

Although Peete testified at trial that he did not strike the plaintiff, he does not challenge the finding that he committed an assault and battery. Rather, he argues on this appeal that the punitive damages awarded in this case were excessive or that they were improperly awarded in light of the evidence presented, and he asserts that the trial court therefore erred in denying his various post-trial motions.

Our rules regarding the award of punitive damages for assault and battery are relatively clear and well-established. While one of our recent cases stated that punitive damages are available for assault and battery where the "acts complained of were committed with malice, willfulness, or wanton and reckless disregard of the rights of others," Surrency v. Harbison, 489 So. 2d 1097, 1105 (Ala. 1986), our previous cases have typically held that assault and battery will support an award of punitive damages "whenever there is averment and proof tending to show that the act charged was wrongful and attended with an insult or other circumstances of aggravation." John R. Thompson & Co. v. Vildibill, 100 So. 139, 141 (1924). In short, the longstanding rule

of this jurisdiction requires that particularized circumstances of aggravation or insult appear in cases of assault and battery if punitive damages are to be properly awarded.

Although Peete's specific challenges to the award of punitive damages are somewhat unclear, we discern two basic grounds for his objections. First, he asserts error on wholly *evidentiary* grounds. He argues that the evidence presented was insufficient to show the requisite "insult or other aggravating circumstances" required for an award of punitive damages, and he therefore asserts error in the trial court's refusal to grant his motion for judgment notwithstanding the verdict. Alternatively, he contends that, even if sufficient evidence of aggravating circumstances was presented, the actual assessment of punitive damages was against the weight and preponderance of that evidence, and he therefore asserts error in the trial court's refusal to grant his motion for new trial. . . .

Viewing this evidence in a light most favorable to the non-moving party, we find that the jury could have found that the doctor had insulted the hospital staff prior to the time the incident took place. In addition, the jury could have found that Dr. Peete cursed frequently throughout the events leading up to the incident, that he had been "yelling and hollering" earlier in the morning, and that he threw or slammed a patient's chart across a desk some time prior to the striking. Finally, the evidence is uncontradicted that Dr. Peete cursed at nurse Blackwell at the time the alleged striking occurred. While telling Blackwell to "turn on the goddamn suction" is arguably not an "insult" to Blackwell, this statement does present at least a scintilla of evidence that "aggravating circumstances" in the form of angry or intimidating behavior accompanied the assault and battery, especially when considered in light of the evidence reflecting on Peete's earlier actions. Given this evidentiary showing, the trial court properly denied Peete's motion for judgment notwithstanding the verdict.

Likewise, we do not believe that the trial court erred in failing to grant a new trial on the basis of the weight and preponderance of the evidence. Admittedly, both plaintiff and defendant testified that this incident arose in the midst of a medical emergency in which a human life was threatened. In view of this fact, which tends to indicate that this was not an "aggravated" assault and battery, reasonable minds might well differ on the question of whether a strong case was actually made for an award of punitive damages. We cannot say, however, that the evidence in this case "plainly and palpably" shows that the trial court erred in failing to grant a new trial. We find no "abuse of discretion" in the trial court's decision to allow some award of punitive damages, in view of the evidence tending to show that the required circumstances of aggravation or insult accompanied this assault and battery. Therefore, on the basis of the evidence presented, we cannot say that an award of punitive damages in some amount was improper in this case. . . .

SHUGAR v. GUILL

283 S.E.2d 507 (N.C. 1981)

Plaintiff's evidence tended to show that on 19 October 1978 around 9:25 a.m. he entered the defendant's restaurant in Tarboro known as "Cotton's Grill" for the purpose of joining several regular customers for coffee. After serving himself a cup of coffee, he joined the group. Plaintiff moved toward the table where the men sat

without paying for his cup of coffee. Defendant was seated at the table, and as plaintiff took a seat at the table, he said to defendant, "This cup of coffee is on the house." Plaintiff then told defendant to "charge it against the formica that you owe me for" [referring to a continuing dispute over whether the defendant owed the plaintiff $6.25 for a piece of construction material].

Following plaintiff's comment regarding the charging of the coffee against the formica cost, defendant commented on plaintiff's cheapness and demanded that plaintiff leave the restaurant immediately. Plaintiff responded by saying, "Make me." Defendant then picked plaintiff up in a "bear hug" and started toward the door. Plaintiff managed to free himself and blows were exchanged. Plaintiff was struck about the eyes twice, and defendant's glasses were broken when he was hit in the face during the scuffle. A bystander attempted to intervene, and plaintiff, apparently thinking the melee over, dropped his hands to his side at which point defendant struck plaintiff squarely in the face breaking his nose and causing it to bleed profusely. [The plaintiff's nose was treated by a painful medical process of straightening, packing, and bandaging costing $234.]

The jury answered the issue of liability in plaintiff's favor and awarded him $2,000 in compensatory damages and $2,500 in punitive damages.

Branch, C.J. . . .

The rationale permitting recovery of punitive damages is that such damages may be awarded in addition to compensatory damages to punish a defendant for his wrongful acts and to deter others from committing similar acts. A civil action may not be maintained solely for the purpose of collecting punitive damages but may only be awarded when a cause of action otherwise exists in which at least nominal damages are recoverable by the plaintiff.

It is well established in this jurisdiction that punitive damages may be recovered for an assault and battery but are allowable *only* when the assault and battery is accompanied by an element of aggravation such as malice, or oppression, or gross and wilful wrong, or a wanton and reckless disregard of plaintiff's rights. . . .

Some jurisdictions permit the recovery of punitive damages on the theory of *implied* or *imputed* malice when a person intentionally does an act which naturally tends to be injurious. These jurisdictions thus infer the malice necessary to support recovery of punitive damages from *any* assault and battery. We do not adhere to this rule. To justify the awarding of punitive damages in North Carolina, there must be a showing of *actual* or *express* malice, that is, a showing of a sense of personal ill will toward the plaintiff which activated or incited a defendant to commit the alleged assault and battery.

In jury trials the usual rules governing motions for a directed verdict apply when there is such a motion as to a claim for punitive damages on the grounds of insufficiency of evidence, and the trial judge must determine as a matter of law whether the evidence when considered in the light most favorable to the plaintiff is sufficient to carry the issue of punitive damages to the jury. Application of this rule is difficult under the particular facts of the case *sub judice*, and we therefore find it helpful to review the *types* of cases in which punitive damages have been allowed. Punitive damages were recovered in cases where a clergyman while peacefully walking down a street was attacked by the defendant and severely injured; where the plaintiff while eating

in a hotel dining room was compelled to sign a retraction by a show of violence, accompanied with offensive and threatening language; where defendant assaulted a weak and old person with a stick loaded with lead for the reason that defendant *thought* plaintiff was a trespasser; where a twelve year old boy was assaulted in public in the presence of others without justification or excuse. We note that all of these cases contain a thread of unprovoked, humiliating assaults, assaults on children, assaults on weaker persons, or assaults where a deadly weapon was callously used. Such is not the case before us. . . .

Applying the above-stated principles of law to the facts presented by this appeal, we conclude that the evidence presented was not sufficient to permit the jury reasonably to infer that defendant's actions were activated by personal ill will toward plaintiff or that his acts were aggravated by oppression, insult, rudeness, or a wanton and reckless disregard of plaintiff's rights. To the contrary, the evidence shows that two adults acting as adolescents engaged in an affray which was precipitated by plaintiff's "baiting" of defendant and plaintiff's invitation that he be ejected from defendant's premises. Thus, the trial court erred by denying defendant's motions to dismiss on the ground that there was not sufficient evidence to carry the issue of punitive damages to the jury. We affirm the Court of Appeals' action in vacating for the reasons set forth herein. . . .

NOTES TO PEETE v. BLACKWELL AND SHUGAR v. GUILL

1. ***When Punitive Damages Are Appropriate.*** The courts in *Peete* and *Shugar* both require proof of some element of aggravation in addition to proof that the defendant's conduct was reckless or constituted an intentional tort. The court in *Shugar* notes, however, that some jurisdictions infer the additional element from the proof of recklessness or intent. These two opinions describe their standards somewhat differently for when punitive damages are appropriate. Would applying the *Shugar* standard in *Peete* or applying the *Peete* standard in *Shugar* have changed the results in those cases?

2. ***Problem: Appropriateness of Punitive Damages.*** A vehicle owned and operated by Dennis Rhoads was parked on a side road. Eric Heberling, while wearing a camouflage suit, aimed and shot his rifle into Rhoads's automobile and continued shooting as the automobile was driven down the road. At this time, Rhoads's automobile was occupied by three other individuals, Sandra Helm, Jacob Lopp, and Tamar Dombach. Tamar Dombach was struck six times with fragments of a shattering bullet. Pieces of the metal still remain in her body. Sandra Helm suffered a slight scratch across her lower back but received no medical attention. Would punitive damages be proper? See Rhoads v. Heberling, 451 A.2d 1378 (Pa. Super. Ct. 1982).

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL

538 U.S. 408 (2003)

JUSTICE KENNEDY delivered the opinion of the Court.

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where

full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: "You may want to put for-sale signs on your property to get things moving." Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful death and tort actions. State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. On remand State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559 (1996), and refused to sustain a $2 million punitive damages award which accompanied a verdict of only $4,000 in compensatory damages. Based on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. The trial court denied State Farm's motion.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial:

> "State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's 'Performance, Planning and Review,' or PP&R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages."

Evidence pertaining to the PP&R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in *Gore,* and it reinstated the $145 million punitive damages award. . . .

II

We recognized in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Ibid.* [*see also*] *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U.S. 1 (1991) ("Punitive damages are imposed for purposes of retribution and deterrence").

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. . . .

In . . . *Gore,* we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable

cases. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. . . .

III

Under the principles outlined in *BMW of North America, Inc.* v. *Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award. We address each guidepost of *Gore* in some detail.

A

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct toward the Campbells. This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced from $145 million to $25 million. . . .

Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. This argument misses the mark. Lawful out-of-state conduct may be probative when it demonstrates the

deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. . . .

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore*, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. . . . The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

B

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, or, in this case, of 145 to 1. . . .

. . . In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the

economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. . . .

. . . While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. . . . The principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality.

C

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." . . .

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, dissenting.

. . . The large size of the award upheld by the Utah Supreme Court in this case indicates why damage-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers. . . .

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that "in our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S., at 568. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[2] Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee." In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

NOTES TO STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. CAMPBELL

1. ***Common Law and Constitutional Restrictions on Punitive Damages.*** The Restatement (Second) of Torts §908 comment e deals with the size of punitive damage awards. How does its test, developed decades before the *BMW of North America* decision, compare with current constitutional requirements?

> **e. Amount of damages.** In determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act. In addition, the extent of harm to the injured person can be considered by analogy to the doctrine of the criminal law by which the seriousness of a crime may depend upon the harm done, as when a battery with intent to kill results in mayhem or murder. Included in the harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits. The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

2. ***Problem: Excessiveness of Punitive Damages.*** Applying the rules governing the amount of single and cumulative punitive damage awards, was the punitive damage award of $150 million excessive in the following case?

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[2] *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462, n. 8, (1993), noted that "under well-settled law," a defendant's "wrongdoing in other parts of the country" and its "impressive net worth" are factors "typically considered in assessing punitive damages." It remains to be seen whether, or the extent to which, today's decision will unsettle that law.

> Ira Weinstein, a United States citizen, was killed in the terrorist bombing of the Number 18 Egged passenger bus in Jerusalem, Israel on February 25, 1996. He brought suit against the Iranian Ministry of Information and Security under the Foreign Sovereign Immunities Act of 1976, which created a federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism. The defendant provided material support in the form of training and money to HAMAS so that the organization could carry out terrorist attacks such as the one on February 25, 1996.
>
> The Iranian Ministry of Information and Security has approximately 30,000 employees and is the largest intelligence agency in the Middle East, with an estimated annual budget between $100-$400 million. The Islamic Republic of Iran gave the HAMAS organization at least $25-$50 million in 1995 and 1996, and also provided other groups with tens of millions of dollars to engage in terrorist activities. In total, Iran gave terrorist organizations, such as HAMAS, between $100 and $200 million per year during this period. The money, among other things, supported HAMAS' terrorist activities by, for example, bringing HAMAS into contact with potential terrorist recruits and by providing legitimate front activities behind which HAMAS could hide its terrorist activities. Punitive damages of $420,000,000 were awarded in two other cases in lawsuits brought by two other victims of this same bombing.

See Weinstein v. The Islamic Republic of Iran, 2002 WL 185507 (D.D.C. 2002).

Statutes: PUNITIVE DAMAGES

In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), followed in State Farm Mutual Automobile Insurance Co. v. Campbell, Justice Ginsburg and Chief Justice Rehnquist dissented. They believed that state tort reform measures were sufficient to curtail excessive punitive damages awards. The following excerpt from Justice Ginsburg's opinion outlines some of those tort reform measures then being considered or that had been adopted by states. Observing that states were actively considering the limits on punitive damages, the opinion concluded that the majority had unnecessarily and unwisely ventured into this issue. Following are the statutes Justice Ginsburg cited:

Colorado — Colo. Rev. Stat. §§13-21-102(1)(a) and (3) (1987) (as a main rule, caps punitive damages at amount of actual damages).

Connecticut — Conn. Gen. Stat. §52-240b (1995) (caps punitive damages at twice compensatory damages in products liability cases).

Delaware — H.R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would cap punitive damages at greater of three times compensatory damages, or $250,000).

Florida — Fla. Stat. §§768.73(1)(a) and (b) (Supp. 1992) (in general, caps punitive damages at three times compensatory damages).

Georgia — Ga. Code Ann. §51-12-5.1 (Supp. 1995) (caps punitive damages at $250,000 in some tort actions; prohibits multiple awards stemming from the same predicate conduct in products liability actions).

Illinois — H. 20, 89th Gen. Ass. 1995-1996 Reg. Sess. (enacted Mar. 9, 1995) (caps punitive damages at three times economic damages).

Indiana — H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (caps punitive damages at greater of three times compensatory damages, or $50,000).

Kansas — Kan. Stat. Ann. §§60-3701(e) and (f) (1994) (in general, caps punitive damages at lesser of defendant's annual gross income, or $5 million).

Maryland — S. 187, 1995 Leg. Sess. (introduced Jan. 27, 1995) (in general, would cap punitive damages at four times compensatory damages).

Minnesota — S. 489, 79th Leg. Sess., 1995 Reg. Sess. (introduced Feb. 16, 1995) (would require reasonable relationship between compensatory and punitive damages).

Nevada — Nev. Rev. Stat. §42.005(1) (1993) (caps punitive damages at three times compensatory damages if compensatory damages equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000).

New Jersey — S. 1496, 206th Leg., 2d Ann. Sess. (1995) (caps punitive damages at greater of five times compensatory damages, or $350,000, in certain tort cases).

North Dakota — N.D. Cent. Code §32-03.2-11(4) (Supp. 1995) (caps punitive damages at greater of two times compensatory damages, or $250,000).

Oklahoma — Okla. Stat. tit. 23, §9.1(B)-(D) (Supp. 1996) (caps punitive damages at greater of $100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously).

Texas — S. 25, 74th Reg. Sess. (enacted Apr. 20, 1995) (caps punitive damages at twice economic damages, plus up to $750,000 additional noneconomic damages).

Virginia — Va. Code Ann. §8.01-38.1 (1992) (caps punitive damages at $350,000).

Perspective: Punitive Damages

The proper amount for an award of punitive damages inevitably depends on the goals the law is pursuing by allowing such rewards. The Restatement (Second) of Torts §908(2) allows recovery of punitive damages for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." According to that section, "the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant." Compare a test adopted in Reynolds Metals Co. v. Lampert, 316 F.2d 272, 275 (9th Cir. 1963):

> To justify an award of punitive damages, it is not necessary that the act have been done maliciously or with bad motive. Where it has become apparent, as it has here, that compensatory damages alone, while they might compensate the injured party, will not deter the actor from committing similar trespasses in the future, there is ample justification for an award of punitive damages.

What are the underlying goals of these alternative approaches? How does the underlying goal affect policy choices on maximum allowable punitive damage awards?

IV. Adjustments to Damages: Collateral Sources and Statutory Ceilings

Limiting the amount of damages owed by a defendant found to have committed a tortious act has been a dominant goal in the tort reform movement. Chapter 8 highlighted some states' abrogation of joint and several liability. Also, a number of states have modified a doctrine known as the *collateral source rule.* Many states have adopted statutes that impose ceilings on the amounts of damages that may be awarded either in any tort action or in particular types of tort actions such as medical malpractice cases. Perreira v. Rediger interprets a state statute that abolished the collateral source rule. Etheridge v. Medical Center Hospitals and Knowles v. United States of America present differing treatments of claims that statutory limits on damages deprive plaintiffs of constitutional rights.

PERREIRA v. REDIGER

778 A.2d 429 (N.J. 2001)

LONG, J. . . .

[The first of these consolidated appeals, the] *Beninato* case arose when Takako Beninato, a professional dog groomer, was seriously injured during a grooming session involving a dog owned by Lenore and Leonard Achor. Beninato's health insurer, Oxford Health Plans, Inc. ("Oxford"), paid $7,357 for her medical expenses. Beninato then sued the Achors, whose homeowner's insurance carrier, Preferred Mutual Insurance Company ("Preferred"), defended the suit. . . .

The *Perreira* case arose when Maria Perreira fell on the premises of the Columbia Savings Bank ("Columbia"). She sued Columbia along with its liability carrier Atlantic Mutual Insurance Company ("Atlantic"), Michael Rediger, the bank's snow removal contractor and Rediger's liability carrier, the Preserver Insurance Company ("Preserver"). In that case, Oxford, Perreira's health insurer, had paid about $13,000 for her medical expenses.

[The insurance companies claim that, under the collateral source rule embodied in N.J.S.A. 2A:15-97, health insurers who expend funds on behalf of an insured are allowed to recoup those payments through common law or contractual subrogation when an insured recovers a judgment against a tortfeasor. Contractual subrogation is also referred to as *contractual reimbursement.*]

The collateral source rule, with deep roots in English common law, is firmly embedded in American common law as well. It was first cited in an American judicial decision in 1854 and has had continued currency in the centuries to follow. Michael F. Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?,* 22 U. Tol. L. Rev. 39, 40 (1990) (citing The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 15 L. Ed. 68 (1854)). The common law collateral source rule "allows an injured party to recover the value of medical treatment from a culpable party, irrespective of payment of actual medical expenses by the injured party's insurance carrier. The purpose of the collateral source rule is to preserve an injured party's right to seek tort recovery from a tortfeasor without jeopardizing his or her right to receive insurance payments for medical care." Ibid. The rule "prohibits the tortfeasor from reducing payment of a

tort judgment by the amount of money received by an injured party from other sources" and "bars the submission of evidence that the injured plaintiff received payment for any part of his damages, including medical expenses, from other sources." Id. at 42. It is thus a rule of damages as well as a rule of evidence. Ibid.

According to the Restatement (Second) of Torts §920A(2) (1977), under the collateral source rule, payments made to an injured party by a source other than the tortfeasor are "not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." The policy advanced by the rule is that "a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor." Id. §920A comment b. Thus, if an injured party has the foresight to provide that his or her medical expenses will be paid by maintaining an insurance policy, the common law collateral source rule allows him or her to benefit from that foresight by recovering not only the insurance proceeds but also the full tort judgment. Ibid.

However, in the early to mid-1980's, state legislatures began to revisit the collateral source rule based on the notion, advanced by insurance industry analysts, that the rule contributed "to the liability insurance availability and affordability crisis in this country. . . ." Christian D. Saine, *Note, Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 Case W. Res. L. Rev. 1075, 1080 (1997). . . .

In response, many state legislatures passed comprehensive tort reform legislation in the latter half of the 1980's. Statutory modification of the collateral source rule in one form or another was a common factor among those different legislative initiatives. No universal approach was adopted in all jurisdictions.

One common legislative reform to avoid double recovery to plaintiffs requires a tort judgment to be reduced by the amount of collateral source payments but specifies that such reduction will not occur if a subrogation or reimbursement right exists.[1]

A second approach permits a plaintiff [sic?] to introduce evidence at trial of collateral source benefits received, presumably to reduce the amount of the tort judgment and benefit liability carriers. Within that category, contractual reimbursement is allowed and subrogation denied to the health insurers in some states. In other states, contract reimbursement and subrogation are specifically prohibited.

A third approach does not purport to tinker with the common-law collateral source rule at all, but simply creates a statutory right to subrogation for health insurers, thus eliminating double recovery to plaintiffs and benefitting the health insurance industry.

Each of the aforementioned initiatives has the effect of avoiding double recovery to plaintiffs and thus altering the effect of the common-law collateral source rule. However, they differ dramatically regarding which segment of the insurance community will benefit from the change. Where subrogation or contract reimbursement rights are granted to health insurers, that industry is the beneficiary of the legislative

[1] Subrogation substitutes the health insurer in place of the plaintiff insured "to whose rights he or she succeeds in relation to the debt and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §222:5 (3d ed. 2000). Reimbursement, a contractual undertaking, allows the insurer to recover payments directly from its own insured upon its insured's recovery of the loss from a third party. *Couch on Insurance* 3d §222:81.

modification. Where subrogation and reimbursement are prohibited, the liability carriers benefit.

Like other jurisdictions, New Jersey responded to the call for modification of the collateral source rule by enacting N.J.S.A. 2A:15-97 in 1987. Although, like the modifications enacted in other jurisdictions, its primary effect was to eliminate double recovery to plaintiffs, it was not modeled exactly on any of the other statutes. It provides:

> In any civil action brought for personal injury or death, . . . if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff of the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

On its face, N.J.S.A. 2A:15-97 eliminates double recovery by directing the court to deduct from any tort judgment the amount received by plaintiff from collateral sources (other than workers' compensation and life insurance) less any insurance premiums plaintiff has paid.[2] Unlike the out-of-state enactments, the statute is silent regarding any right to subrogation or reimbursement on the part of the health insurers. . . .

As the legislative history reveals, the choice was made to favor liability carriers. . . . That legislative determination took the form of a reduction from the tort judgment of the amount received from collateral sources. By that action, the Legislature eliminated double recovery to plaintiffs, reduced the burden on the tortfeasors' liability carriers and left health insurers in the same position as they were prior to the enactment of N.J.S.A. 2A:15-97.

One of Oxford's core claims is that health insurers had a common-law equitable right to subrogation that pre-dated N.J.S.A. 2A:15-97 and that that right has to be taken into account in interpreting the collateral source statute. . . .

The rationale behind the rule against finding equitable subrogation in personal insurance contracts is set forth in one treatise as follows:

> Subrogation rights are common under policies of property or casualty insurance, wherein the insured sustains a fixed financial loss, and the purpose is to place that loss ultimately on the wrongdoer. To permit the insured in such instances to recover from both the insurer and the wrongdoer would permit him to profit unduly thereby.
>
> In personal insurance contracts, however, the exact loss is never capable of ascertainment. Life and death, health, physical well being, and such matters are incapable of exact financial estimation. There are, accordingly, not the same reasons militating against a double recovery. The general rule is, therefore, that the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts of personal insurance, at least in the absence of a policy provision so providing. Nor would a settlement by the insured with the wrongdoer bar his cause of action against the insurer. However, if a subrogation provision were expressly contained in such

[2] The insurance premium is essentially charged to the liability carrier because the liability carrier, not the plaintiff, has received the benefit of the insurance.

contracts, it probably would be enforced quite uniformly. Such a provision cannot be read into a policy by calling it an indemnity contract, however.

[3 J.A. Appleman & J. Appleman, *Insurance Law & Practice*, §1675 at 495-97.]

Thus, courts typically have not implied a non-contractual or non-statutory right to subrogation in health insurance. . . .

We turn next to contract reimbursement. Oxford's policies contained a reimbursement provision allowing it to recover expended health care costs "when payment is made directly to the member in third-party settlements or satisfied judgments." That contract provision was not authorized by law at the time the collateral source rule was amended in 1987. . . .

. . . Later, the Commissioner promulgated regulations that for the first time permitted such provisions in large group health insurance policies. . . .

The Commissioner's authorization of subrogation and reimbursement provisions in health insurance contracts must be tested against N.J.S.A. 2A:15-97. As we have indicated, in that statute the legislature eliminated double recovery to plaintiffs and allocated the benefit of what had previously been double recovery to the liability insurance industry. The Commissioner was not free to alter that scheme. [Under the New Jersey collateral source statute, benefits paid by health insurers, less associated premiums, are to be deducted from a tortfeasor's liability to a plaintiff. Heath insurers cannot invoke either the common law or a contractual right of subrogation in order to seek reimbursement for their expenses.] . . .

NOTES TO PERREIRA v. REDIGER

1. *Policy Choices and the Collateral Source Rule.* Statutory modifications of the collateral source rule involve legislative choices favoring defendants over plaintiffs and some defendants over other defendants. Who is favored and who is harmed by the New Jersey statute's changes to the traditional collateral source rule?

2. *Double Recovery, Deterrence, and Compensation.* The wisdom of a particular type of tort reform depends on what goals a legislature is pursuing:

> [The collateral source rule] presents policymakers with a choice between allowing a "windfall" to the plaintiff or to the defendant in a tort case. To illustrate, consider an automobile accident case in which the victim loses his foot in the accident. The plaintiff arguably receives a "double" recovery if he gets both the proceeds of his insurance policy and tort damages for the loss of his foot. On the other hand, the negligent driver will receive a windfall if she finds she must pay less because she had the foresight to injure an insured individual.
>
> Courts and commentators advance two major justifications for the collateral source rule: tortfeasors must pay the full costs of their actions (either to promote deterrence or for punitive reasons) and injured parties should receive the benefits of their contracts. The rule has recently come under attack, both in courts and in legislatures. Criticisms of the rule center on the costs to insurers of providing "double" recoveries for plaintiffs who are also compensated through the tort system and on rejection of the deterrence rationale for the tort system. Additionally, a leading treatise suggests that the real function of the rule is to assist plaintiffs' attorneys in financing lawsuits, since deducting insurance proceeds or government benefits from damages would reduce the size of the contingency fees available.

> The theoretical efficiency rationale for allowing "double" recovery seems relatively airtight. A victim's purchase of insurance or receipt of government benefits is logically unrelated to a potential tortfeasor's conduct. Encouraging efficient behavior by potential tortfeasors therefore requires that they pay the full cost of their behavior.

See John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholary Opinion*, 62 Alb. L. Rev. 667, 687-688 (1998). How would support for modifying the collateral source rule depend on whether the primary purpose of tort law is to deter tortious conduct or, alternatively, to compensate injured parties?

Statute: MODIFIED COLLATERAL SOURCE RULE

Colo. Rev. Stat. §13-21-111.6

In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

NOTE TO STATUTE

How does this provision differ from the traditional collateral source rule and from the statute analyzed in *Perreira?* Who benefits and who is harmed under the Colorado statute?

ETHERIDGE v. MEDICAL CENTER HOSPITALS

376 S.E.2d 525 (Va. 1989)

STEPHENSON, J.

The principal issue in this appeal is whether Code §8.01-581.15, which limits the amount of recoverable damages in a medical malpractice action, violates either the Federal or Virginia Constitution. . . .

Louise Etheridge and Larry Dodd, co-committees of the estate of Richie Lee Wilson (Wilson), sued Medical Center Hospitals (the hospital) and Donald Bedell Gordon, executor of the estate of Clarence B. Trower, Jr., deceased (Trower), alleging that the hospital and Trower were liable, jointly and severally, for damages Wilson sustained as a result of their medical malpractice. Evidence at trial revealed that, prior to her injuries, Wilson, a 35-year-old mother of three children, was a normal, healthy woman. On May 6, 1980, however, Wilson underwent surgery at the hospital to restore

a deteriorating jaw bone. The surgery consisted of the removal of five-inch-long portions of two ribs by Trower, a general surgeon, and the grafting of the reshaped rib bone to Wilson's jaw by an oral surgeon. The jury found that both Trower and the hospital were negligent and that their negligence proximately caused Wilson's injuries.

Wilson's injuries are severe and permanent. She is brain damaged with limited memory and intelligence. She is paralyzed on her left side, confined to a wheelchair, and unable to care for herself or her children.

At the time of trial, Wilson had expended more than $300,000 for care and treatment. She will incur expenses for her care the remainder of her life. Her life expectancy is 39.9 years. Wilson, a licensed practical nurse, earned almost $10,000 in 1979, the last full year she worked. She contends that she proved an economic loss "in excess of $1.9 million."

The jury returned a verdict for $2,750,000 against both defendants. The trial court, applying the recovery limit prescribed in Code §8.01-581.15 (1977 Repl. Vol.), reduced the verdict to $750,000 and entered judgment in that amount. Wilson appeals.

At all times pertinent to this case, Code §8.01-581.15 provided that in an action for malpractice against a health care provider, "the total amount recoverable for any injury . . . shall not exceed seven hundred fifty thousand dollars." Wilson challenges the validity of this legislation on multiple grounds [including claims that the statute violated her right under the Virginia Constitution to a trial by jury and her rights to procedural and substantive due process under the Virginia and United States Constitutions].

On February 6, 1975, the General Assembly adopted House Joint Resolution No. 174, authorizing a study and report on malpractice insurance premiums for physicians. H.R. Res. 174, Va. Gen. Assem. (1975). The study was conducted by the State Corporation Commission's Bureau of Insurance.

Upon completion of its study in November 1975, the Bureau of Insurance submitted its report to the General Assembly. The report showed that since 1960 medical malpractice insurance rates had increased nationwide more than 1000 percent.

> The increase resulted from the number and severity of medical malpractice claims. Significantly, the report stated that 90 percent of all medical malpractice claims ever pursued originated after 1965. Bureau of Insurance, State Corporation Commission, Medical Malpractice Insurance in Virginia, the Scope and Severity of the Problem and Alternative Solutions.

Based upon its study, the General Assembly found that the increase in medical malpractice claims was directly affecting the premium cost for, and the availability of, medical malpractice insurance. Without such insurance, health care providers could not be expected to continue providing medical care for the Commonwealth's citizens. Because of this threat to medical care services, the General Assembly, in 1976, enacted the Virginia Medical Malpractice Act (the Act). Acts 1976, c. 611.

The need and reasons for the legislation are stated in the Preamble to the Act:

> Whereas, the General Assembly has determined that it is becoming increasingly difficult for health care providers of the Commonwealth to obtain medical malpractice insurance with limits at affordable rates in excess of $750,000; and
>
> Whereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment to health care providers entering into

practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; and

Whereas, these factors constitute a significant problem adversely affecting the public health, safety and welfare which necessitates the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases[.] . . .

One of Wilson's primary contentions is that Code §8.01-581.15 violates her right under the Virginia Constitution to a trial by jury. She asserts that "legislation may not override the findings of a jury by prescribing an absolute limit upon the amount of damages, irrespective of the facts and the jury verdict."

Article I, §11, of the Constitution of Virginia provides, inter alia, "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." It is "well settled that . . . the State . . . Constitution [neither] guarantees [nor] preserves the right of trial by jury except in those cases where it existed when" the Constitution was adopted. . . .

The resolution of disputed facts continues to be a jury's sole function. "The province of the jury is to settle questions of fact, and when the facts are ascertained the law determines the rights of the parties." Forbes & Co. v. So. Cotton Oil Co., 108 S.E. 15, 20 (Va. 1921). Thus, the Virginia Constitution guarantees only that a jury will resolve disputed facts.

Without question, the jury's fact-finding function extends to the assessment of damages. Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. Thereafter, it is the duty of the court to apply the law to the facts.

The limitation on medical malpractice recoveries contained in Code §8.01-581.15 does nothing more than establish the outer limits of a remedy provided by the General Assembly. A remedy is a matter of law, not a matter of fact. A trial court applies the remedy's limitation only *after* the jury has fulfilled its fact-finding function. Thus, Code §8.01-581.15 does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process.

More importantly, as previously stated, the jury trial guarantee secures no rights other than those that existed at common law. Significantly, the common law never recognized a right to a full recovery in tort. Thus, although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment. For this reason, too, the limited recovery set forth in Code §8.01-581.15 effects no impingement upon the right to a jury trial.

In the present case, the jury resolved the disputed facts and assessed the damages. Wilson, therefore, was accorded a jury trial as guaranteed by the Virginia Constitution. Once the jury had determined the facts, the trial court applied the law and reduced the verdict in compliance with the cap prescribed by the General Assembly in Code §8.01-581.15. By merely applying the law to the facts, the court fulfilled its obligation. Accordingly, the remedy prescribed by the General Assembly did not infringe upon Wilson's right to a jury.

Wilson also contends that Code §8.01-581.15 violates the constitutional guarantee of due process. The due process clauses of the Federal and Virginia Constitutions provide that no person shall be deprived of life, liberty, or property without due

process of law. U.S. Const. amend. XIV, §1; Va. Const. art. I, §11. Both procedural and substantive rights are protected by the due process clauses.

Procedural due process guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard. The procedural due process guarantee does not create constitutionally-protected interests; the purpose of the guarantee is to provide procedural safeguards against a government's arbitrary deprivation of certain interests.

By comparison, substantive due process tests the reasonableness of a statute vis-a-vis the legislature's power to enact the law. Ordinarily, substantive due process is satisfied if the legislation has a "reasonable relation to a proper purpose and [is] neither arbitrary nor discriminatory." Duke v. County of Pulaski, 247 S.E.2d 824, 829 (1978). If legislation withstands this so-called "rational basis" test, due process is not violated.

When, on the other hand, legislation affects a "fundamental right," the constitutionality of the enactment will be judged according to the "strict scrutiny" test, i.e., the law must be necessary to promote a compelling or overriding governmental interest. Those interests that have been recognized as "fundamental" include the right to free speech; the right to vote; the right to interstate travel; the right to fairness in the criminal process; the right to marry; and the right to fairness in procedures concerning governmental deprivation of life, liberty, or property. . . .

In the present case, Wilson has not been denied reasonable notice and a meaningful opportunity to be heard. Code §8.01-581.15 has no effect upon Wilson's right to have a jury or court render an individual decision based upon the merits of her case. Thus, . . . Code §8.01-581.15 creates no presumptions whatsoever regarding the individual merits of Wilson's medical malpractice claim. The section merely affects the parameters of the remedy available to Wilson after the merits of her claim have been decided. We hold, therefore, that Wilson's constitutional guarantee of procedural due process has not been violated.

The effect of Code §8.01-581.15 on the remedy available to Wilson likewise is not violative of any substantive due process right. As discussed [above], a party has no fundamental right to a particular remedy or a full recovery in tort. A statutory limitation on recovery is simply an economic regulation, which is entitled to wide judicial deference. *Duke Power Co.,* 438 U.S. at 83. Because Code §8.01-581.15 is such a regulation and infringes upon no fundamental right, the section must be upheld if it is reasonably related to a legitimate governmental purpose.

. . . The purpose of Code §8.01-581.15 — to maintain adequate health care services in this Commonwealth — bears a reasonable relation to the legislative cap — ensuring that health care providers can obtain affordable medical malpractice insurance. We hold, therefore, that substantive due process has not been violated. . . .

KNOWLES v. UNITED STATES

544 N.W.2d 183 (S.D. 1996)

SABERS, J.

Parents brought suit for severe injuries suffered by minor son while under care of Air Force hospital. The United States admitted liability and invoked the $1 million cap on medical malpractice damages. The federal district court held the cap was constitutional under the South Dakota and United States Constitutions. On appeal

to the Eighth Circuit Court of Appeals, four certified questions were presented and accepted by the South Dakota Supreme Court. For the reasons set forth herein, we hold that the damages cap of SDCL 21-3-11 is unconstitutional. . . .

Kris Knowles was twelve days old when he was admitted for treatment of a fever at the Ellsworth Air Force Base Hospital, near Rapid City, South Dakota. Medical Service Specialists, the Air Force's equivalent to nurses' aides, recorded Kris' temperature. On the night before his discharge, the specialists failed to report to nurses or physicians that Kris' temperature had been dropping throughout that night. Kris developed hypoglycemia and suffered respiratory arrest resulting in severe, permanent brain damage.

William and Jane Knowles brought suit on their own behalf and for Kris for medical malpractice, emotional distress, and loss of consortium. The United States admitted liability for medical malpractice and filed a motion for entry of judgment of $1 million based on SDCL 21-3-11, which limits damages in medical malpractice actions to $1 million. . . . Knowles appealed. . . .

Initially, we note that many courts have invalidated limitations on damages based on their respective state constitutions. [Citing cases from Alabama, Illinois, New Hampshire, North Dakota, Ohio, Texas, Utah, and Washington State.]

Other jurisdictions have upheld a damages cap. [Citing cases from California, Indiana, Kansas, and Virginia.]

However, the questions presented herein generally turn on the particular constitutional provisions of the state and the case law precedent interpreting those provisions. Because the provisions of the South Dakota Constitution guaranteeing the right to jury trial . . . and due process are dispositive, we do not reach the other constitutional questions.

South Dakota Constitution article VI, §6 guarantees the right of trial by jury:

> The right of trial by jury shall remain *inviolate* and shall extend to all cases at law without regard to the amount in controversy[.]

(Emphasis added). "Inviolate" has been defined as "free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact[.]" Sofie v. Fibreboard Corp., 771 P.2d 711, at 721-22 (Wash. 1989) (citing Webster's New Third International Dictionary, 1190 (1976) (amended by 780 P.2d 260). In discussing the role of the jury, the United States Supreme Court has stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (assessment of damages is a "matter so peculiarly within the province of the jury[.]").

"A jury is the tribunal provided by law to determine the facts and to fix the amount of damages." Schaffer v. Edward D. Jones & Co., 521 N.W.2d 921, 927 n.9 (S.D. 1994) (citation omitted). "[T]he amount of damages to be awarded is a factual issue to be determined by the trier of fact[.]" Sander v. Geib, Elston, Frost Professional Ass'n, 506 N.W.2d 107, 119 (S.D. 1993). With any jury award for personal injuries, we "have allowed [the jury] 'wide latitude'" in making its award. Id.

> We are unwilling to allow the trial court authority to limit a damages award as a matter of law . . . *A jury determination of the amount of damages is the essence of the right to trial by jury*—to go beyond the procedural mechanisms now in place [remittitur] for reduction of a verdict and to bind the jury's discretion is to deny this constitutional right.

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 161 (citing Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987) (invalidating a damages cap on personal injury awards) (emphasis in original). The damages cap is unconstitutional because it limits the jury verdict "automatically and absolutely" which makes the jury's function "*less* than an advisory status." Id. at 164 (emphasis in original).

SDCL 21-3-11 arbitrarily and without a hearing imposes a limitation of one million dollars on all damages in all medical malpractice actions. It does so without provisions for determining the extent of the injuries or resulting illness, or whether these injuries or illness resulted in death. It purports to cover even those cases where the medical costs occasioned by the malpractice alone exceed one million dollars. In other words, the damages recovered in these cases could actually be payable *to* the wrongdoers for medical expenses, not to the victims. It does so in all cases, even when a judicial determination of damages above one million dollars results from an adversarial hearing after notice. . . .

For these reasons, we hold that the damages cap violates the right to a jury trial under South Dakota Constitution article VI, §6. . . .

Under South Dakota Constitution article VI, §2, "[n]o person shall be deprived of life, liberty or property without due process of law." People have a right to be free from injury. We apply a more stringent test than the federal courts' rational basis test. The statute must "bear a real and substantial relation to the objects sought to be attained." Katz v. Bd. of Med. & Osteopathic Examiners, 432 N.W.2d 274, 278 n.6 (SD 1988).

Ohio uses the same test. In Morris v. Savoy, 576 N.E.2d 765, 770-71 (Ohio 1991), the Supreme Court of Ohio held that a medical malpractice damages cap was a violation of due process. A 1987 study by the Insurance Service Organization, which sets the rates of the insurance industry, found that the savings from various tort reforms including a damages cap were "marginal to nonexistent." Id. 576 N.E.2d at 771. The court concluded that the cap was irrational and arbitrary and that it did "not bear a real and substantial relation to public health or welfare[.]" Id.

In Arneson v. Olsen, 270 N.W.2d 125, 136 (N.D. 1978), the North Dakota Supreme Court examined whether a medical malpractice damages cap violated equal protection and due process under the North Dakota constitution:

> Defendants argue that there is a societal quid pro quo in that the loss of recovery potential to some malpractice victims is offset by "lower insurance premiums and lower medical care costs for all recipients of medical care." This quid pro quo does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.

Id. (quoting Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976). The North Dakota Supreme Court held that the damages cap violated equal protection and due process. *Arneson,* 270 N.W.2d at 135-36.

In Lyons v. Lederle Laboratories, 440 N.W.2d 769, 771 (S.D. 1989), we discussed equal protection rather than due process and stated: "We fail to perceive any rational basis for assuming that medical malpractice claims will diminish simply by requiring that suits be instituted at an earlier date." The statute of limitations in *Lyons*, which carved out an exception for minors which did not allow tolling, created an arbitrary classification of those minors with medical malpractice claims versus other tort claims. Id. Likewise, SDCL 21-3-11 creates arbitrary classifications of medical malpractice claimants and of those claimants who sustain damages over $1 million and those who do not. Those who suffer less than $1 million in damages may be compensated fully while those who suffer more shall have their damages capped.

The arbitrary classification of malpractice claimants based on the amount of damages is not rationally related to the stated purpose of curbing medical malpractice claims. See *Lyons*, 440 N.W.2d at 773 (Sabers, J. concurring specially). The legislation was adopted as a result of "some perceived malpractice crisis." Id. at 771. Many courts and commentators have argued that there was no "crisis" at all.[6]

As noted by the court in Hoem v. State, 756 P.2d 780 (Wyo. 1988):

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[6] SDCL 21-3-11 was adopted as a result of recommendations by the 1975 South Dakota Legislature's Special Committee on Medical Malpractice. As noted by one commentator:

> Statements made by insurance representatives before the [Committee], referring to the low number of medical malpractice claims brought in the state, can only create significant doubt that South Dakota was experiencing a genuine insurance crisis at that time. Startling data on medical malpractice claims in South Dakota, North Dakota, and Minnesota, collected by the Minnesota Department of Commerce from 1982-1987 [the Hatch Study], also tends to call into question the basis for cries of *any* insurance crisis; if claim frequency and severity did not change significantly in those years, and if in those same six years only one-half of one percent of all medical malpractice plaintiffs were awarded any damages, why then did physicians' insurance premiums *triple* in that same time period?

Gail Eiesland, note, Miller v. Gilmore: *The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, 38 S.D. L. Rev. 672, 703 (1993) (emphasis in original).

The Hatch Study concluded that "[d]espite unchanging claim frequency and declining loss payments and loss expense, on average, physicians paid approximately triple the amount of premiums for malpractice insurance in 1987 than in 1982." Hatch Study, at 31. During that time period, there were three files where a company paid $1 million or more, and 15 files where a company paid equal to or greater than $500,000. Hatch Study, at 15-16. The Hatch Study was a study of the two major medical malpractice insurers for Minnesota, North Dakota, and South Dakota during 1982-1987.

Evidence presented to the 1975 Committee indicated that only two jury verdicts in the last few years had been obtained against doctors in South Dakota. One verdict was for $1 and the other was for $10,000.

In *Arneson*, 270 N.W.2d at 136, the North Dakota Supreme Court upheld the trial court's finding that no medical malpractice insurance availability or cost crisis existed:

> The Legislature was advised that malpractice insurance rates were determined on a national basis, and did not take into account the state-wide experience of smaller States such as North Dakota. Thus, premiums were unjustifiably high for States such as North Dakota with fewer claims and smaller settlements and judgments.

Id. Similar evidence on how rates are calculated was presented to the 1975 South Dakota Committee.

In addition, a 1986 report by the National Association of Attorneys General concluded that "insurance premium increases were not related to any purported liability crisis, but 'result[ed] largely from the insurance industry's own mismanagement.' " [Gail Eiesland, note, Miller v. Gilmore: *The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, 38 S.D. L. Rev. 672,] 685 n. 121 (quoting W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 Temp. L. Rev. 459, 473 (1992) (quoting National Association of Attorneys General, *An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (1986))).

> It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health.

756 P.2d at 783.

In *Moore,* 592 So. 2d at 167-169, the court examined several studies to conclude that the connection between recovery caps and decreased malpractice insurance rates was "at best, indirect and remote." Id. at 168. The court balanced this remote connection against the "direct and concrete" burden on severely injured claimants. Id. at 169; see Carson, 424 A.2d at 837 (It is "unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."). "[T]he statute operates to the advantage not only of negligent health care providers over other tortfeasors, but of those health care providers who are *most irresponsible.*" *Moore,* 592 So. 2d at 169 (emphasis in original). . . .

SDCL 21-3-11 does not treat each medical malpractice claimant uniformly. It divides claimants into two classes: those whose damages are less than $1 million and those whose damages exceed $1 million. Those who have awards below the statutory cap shall be fully compensated for their injury while those exceeding the cap are not.

Therefore, SDCL 21-3-11 does not bear a "real and substantial relation to the objects sought to be obtained" and we hold that the damages cap violates due process guaranteed by South Dakota Constitution article VI, §2.

In this instance, if we assume that the economic damages are $2 million and the noneconomic damages are $1 million, it becomes clear that the statute is neither reasonable nor constitutional. The reasons are many, but the most basic is that the statute impermissibly gives all the benefits to the wrongdoer (his liability is limited to $1 million) while it places all the corresponding detriment on the negligently injured victim (his recovery, economic & noneconomic, is limited to $1 million). There is no quid pro quo or "commensurate benefit" here. Despite a claimed medical malpractice crisis in the *rural* areas of this state, this legislation wholly failed to differentiate between rural and urban problems and solutions. It purported to cover *all* practitioners of the healing arts, including chiropractors and dentists. There is no showing of a shortage of chiropractors or dentists. The statutes purported to cover the entire state even though there was no medical malpractice crisis in the urban areas such as Minnehaha and Pennington Counties, as opposed to the rural areas.

Even in this case, we are dealing with a United States Air Force hospital situated in Pennington County. There is no showing that any United States Air Force hospital had any difficulty obtaining and keeping practitioners of the healing arts. This legislation does not bear a *real* and *substantial* relation to the objects sought to be attained and it violates many rights in the process. The fact that certain fringe benefits may result to the public in general is insufficient to save this statute. The same rationale applies to prior versions of the statute. Therefore, they violate the constitutional provisions stated herein.

We are not saying that the state cannot subsidize health practitioners or even the health insurance industry. We are simply saying that it cannot be done in this manner to the sole detriment of the injured. Obviously, fewer constitutional objections would exist if the state would pay the difference to the injured; or, before the fact, to the

insurer or health care provider; or, in all personal injury actions, all damages, economic and noneconomic, were limited in reasonable proportions for all those wrongfully injured for the benefit of all wrongdoers. We decline to comment on the wisdom, as opposed to the constitutionality of such approach. . . .

NOTES TO ETHERIDGE v. MEDICAL CENTER HOSPITALS AND KNOWLES v. UNITED STATES

1. ***Right to a Jury Trial.*** The Virginia Constitution states that "trial by jury is preferable to any other, and ought to be held *sacred.*" The South Dakota Constitution states that "The right of trial by jury shall remain *inviolate.*" Does the difference between *sacred* and *inviolate* explain the courts' different outcomes? If not, what is the key difference in their analyses?

2. ***Due Process Rights.*** Virginia and South Dakota use different tests for when constitutional due process rights have been violated. What are the differences? If each had used the other's test, would the outcomes have been different?

3. ***The "Insurance Crisis."*** In footnote 6 and in the conclusion of its opinion in Knowles v. United States, the South Dakota court questioned whether there was any need for tort reform. Would knowing whether in fact a crisis did exist affect an analysis of who benefits and who suffers from the adoption of a ceiling on damages?

CHAPTER 13

Traditional Strict Liability

I. Introduction

For injuries caused by some kinds of activities, tort law imposes liability without regard to the actor's fault. This type of liability is usually called *strict liability*. From the point of view of a plaintiff, characterizing an activity as subject to strict liability provides a great benefit. The plaintiff does not have to show that the defendant was at fault or engaged in tortious conduct, or intended the injury, or acted negligently. A problem for contemporary tort law is determining when strict liability doctrines should apply. This chapter examines strict liability in traditional contexts of injuries caused by animals and by particularly dangerous activities. The cases in these traditional areas of strict liability describe underlying criteria for deciding whether strict liability should apply.

II. Injuries Caused by Animals

Animals can injure people, for example by biting or kicking them. Common law doctrines impose strict liability for these types of injuries when inflicted by wild animals. For injuries caused by a domesticated animal, a negligence-based cause of action is always available, but the animal's owner can also be subject to strict liability if the owner knew that the particular animal was vicious. In some states, statutes apply to injuries by domesticated animals, typically imposing strict liability regardless of the owner's knowledge of the animal's propensities.

Animals can also damage property, for example by knocking over structures, by colliding with vehicles, or by eating crops. At common law, property damage by all types of trespassing animals was governed by strict liability. Some state statutes modify the common law by allowing a strict liability action for destruction of property only if the plaintiff had maintained a fence to attempt to protect the plaintiff's property.

Clark v. Brings, involving injuries caused by a Siamese cat, introduces the common law and statutory approaches to personal injuries caused by animals. Byram v. Main,

involving property damage by a trespassing donkey, reviews Maine's 1857 doctrines on the subject and applies them in a contemporary setting.

CLARK v. BRINGS

169 N.W.2d 407 (Minn. 1969)

PETERSON, J.

While working as a babysitter for respondents' three young children, appellant was without warning attacked and bitten by their pet Siamese cat. She brought this action to recover for the extensive injuries which allegedly resulted, and she appeals from an order denying a new trial after the court below directed a verdict for respondents and from the judgment entered pursuant to that verdict. These alternative contentions are argued: (1) That the common-law cause of action for injuries by animals should be changed, or the statute covering injuries by dogs judicially extended, to hold owners of cats strictly liable for the acts of their pets; (2) that the evidence in this case should be held sufficient to prove a cause of action under the common law as it now stands, that is, to show that respondents' cat was dangerous and that they were aware of the fact. . . .

Most of the problems in this appeal fall within the ambit of the common-law's system of distributing the costs of misbehavior by animals. The relevant cause of action in tort, sometimes called "the scienter action,"[1] which is not, at least in this jurisdiction, based on negligence, divides animals held as property into two classes: Domesticated animals, or those *mansuetae* or *domitae naturae*, and wild beasts, or those *ferae naturae*. In the case of injury by one of the first class, the plaintiff must prove that the particular animal was abnormal and dangerous, and that its owner or harborer let it run unfettered though he actually or constructively had knowledge of its harmful propensities — knowledge usually found to have been gleaned from specific acts of the animal prior to the injury sued upon. The possessor of an animal within the second class, on the other hand, is conclusively presumed to know of the danger, so a person injured need not prove such knowledge before he can recover.

This judicial distinction between classes of animals was clearly announced, at least by dicta, as early as 1730. The scienter action as it has come down to us is not without its modern critics, who would apply the simpler rules of liability for negligence to some or all of the situations it covers, but the ancient doctrine has long been given continuous approval and application in Minnesota.

Appellant first contends that this distinction is based on comparative economic utility, the owners of "useful" animals being somewhat protected as an encouragement to maintaining them and the owners of "useless" animals receiving no protection whatever. Although the cat may once have served rural society as a "mouser," it is argued, in modern cities it is merely a dispensable pet, the owner of which ought to be held, as would the owner of a tiger, liable for any damage it causes.

So far as this argument may be based on the relative productivity of animals, it is not well founded. It is true that the economic contribution made by certain animals has been considered by the courts in the difficult cases of animals whose tameness has

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[1] Williams, Liability for Animals, Part Five. The name derives from a phrase in the ancient writ, "scienter retinuit," or "knowingly he has kept" a dangerous animal. Id. p.273.

seemed in doubt. Thus, holding bees to be domesticated, the court in Earl v. Van Alstine, 8 Barb. (N.Y.) 630, 636, said that "the law looks with more favor upon the keeping of animals that are useful to man, than such as are purely noxious and useless." It is also true that many of the animals which have been held to be of a harmless nature, such as milch cows, are obviously more economically productive and, in that narrow sense, more useful to society than are cats. . . .

A close examination of the authorities shows that the law's division of animals into those domesticated and those dangerous is based rather on "[e]xperience as interpreted by the English law." Holmes, The Common Law, p.157. Horses, cows, and other animals have been regarded by the courts as *domitae naturae* because "years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof." Filburn v. People's Palace and Aquarium Co. L.R. 25 Q.B. 258, 260. In cases where there is doubt as to the propensities of a species, rather than looking to economic utility, . . . the courts may instead admit expert testimony on the question, as in Spring Co. v. Edgar, 99 U.S. (9 Otto) 645, 25 L. Ed. 487, involving deer kept in a park. More often, however, courts simply take judicial notice of an animal's characteristics, as in one of the earliest cases, Mason v. Keeling, 12 Mod. 332, 335, 88 Eng. Reprint 1359, 1361, where the court remarked that "the law takes notice, that a dog is not of a fierce nature, but rather the contrary." . . .

We should be most reluctant, therefore, to be the first to observe judicially in this little house pet, the cat, the "fearful symmetry" which the poet, William Blake, saw in the tiger. If the law has erred in interpreting mankind's experience with cats, or if this animal's value to society strikes an inadequate balance against whatever damage and injury it might cause, then it is for the legislature, which can best assess the total dimension of the problem, to change the common law by statute.

This change, appellant asserts alternatively, has in fact been accomplished by the legislature. She argues that Minn. St. 347.22, which makes the owner of a dog liable for the bites which it might without provocation inflict on those rightfully coming near it, by necessary implication includes cats—that is, if the owner of one pet is thus to be held liable, then the same statutory policy should be applied to the owner of another.

Minn. St. 347.22 (L. 1951, c. 315, §1) was the first statute on this subject and provides:

> If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be in any urban area, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species.

Before 1951, a person bitten by a dog in Minnesota could recover only through the scienter action.

Whatever the theory on which this statute was enacted, its close wording would seem to preclude any extension of its severe provisions to the owners of other animals, even those others of the "leisured classes" of pets. This court has not so extended this statute in other cases, for since its enactment we have continued to apply the common law in cases involving all other beasts, including both farm animals, such as [a] bull, and animals kept for pleasure, such as [a] riding horse. . . .

If the Minnesota Legislature had in 1951 intended to revise the common law as to cats in the same manner as it abolished it as to dogs, there would have been no difficulty in doing so expressly, and there would be no apparent barrier to amending the statute now. Absent legislative action, we decline to hold that Minn. St. 347.22 applies to the owners of cats.

We must consider, then, whether appellant made out a jury issue as to her scienter action. To prove that respondents' cat had committed prior acts of viciousness, known to them, appellant's evidence was threefold: First, the cat had once before bitten a babysitter; second, the cat had scratched several members of the household; and third, the cat was usually confined to the basement.

The biting incident, although not without significance, is less significant than appellant would acknowledge. The babysitter who had been bitten testified that the incident occurred when she and the children were playing with the cat by pulling a spool across the basement floor on a string. The cat became excited from chasing it, she related, and inflicted a "superficial" bite on her ankle. The respondents, moreover, were not informed of this "attack" incident. . . .

It is true that a pet's owner need not "have notice that the animal has frequently 'broken through the tameness of his nature' into acts of aggression," and that the notice is sufficient should the animal just once "throw off the habits of domesticity and tameness, and . . . put on a savage nature." Kittredge v. Elliott, 16 N.H. 77, 81. "It is not true, as has often been stated, that 'the law allows a dog his first bite,' for if the owner has good reason to apprehend, from his knowledge of the nature and propensity of the animal, that he has become evilly inclined, the duty of care and restraint attaches." Cuney v. Campbell, 76 Minn. 59, 62, 78 N.W. 878, 879. Here, however, the testimony shows that the cat was provoked and excited by play when it inflicted the first injury, and the authorities universally hold that "[s]uch an attack is no evidence of viciousness in the animal . . . and is insufficient to render the owner liable. . . ." Erickson v. Bronson, 81 Minn. 258, 259, 83 N.W. 988. At best, to say that this bite "was vicious is merely conjecture," and the testimony thus cannot withstand a motion for a directed verdict. Eastman v. Scott, 182 Mass. 192, 194, 64 N.E. 968, 969.

The evidence that the cat had several times scratched respondents themselves, their children, and their other babysitters is scarcely more significant. The cat usually scratched them on their hands, it appears, when they were picking it up or playfully handling it. . . . [I]njuries of so slight a nature as those shown, unaccompanied by any indications of a propensity of the cat to cause greater harm, are inadequate to prove that it was dangerous and ought to have been caged or destroyed.

Appellant relies upon evidence that respondents kept their cat confined in their basement to establish knowledge and acknowledgment by respondents that their cat was dangerous. There is indeed authority to the effect that such restraint of a pet may be proof that the animal was, as its owner knew, vicious. . . . The sort of confinement shown in the case at bar, however, could hardly support an inference that respondents knew of any danger from their cat. It was kept in the basement, they testified, simply to prevent its scratching their living room furniture, not to protect against attack upon people. Respondents' three children, the youngest only about 3 years old, shared with the cat a furnished basement recreation room, where many of their toys were kept and where they often played. The precautions taken to keep the cat downstairs were minimal, consisting largely of a catch on the basement door, and the restraint was

not continuously effective. The trial court, in our opinion, rightly considered the whole of this evidence far too tenuous for submission to the jury. . . .

Affirmed.

NOTES TO CLARK v. BRINGS

1. ***Negligence Theory for Animal Injuries.*** The *Clark* opinion shows that when a person is injured by an animal, recovery against the keeper of the animal may be based on strict liability (with no required showing of fault) or may require a showing of negligence, depending on what kind of animal is involved. In what cases must plaintiffs prove fault? Based on the facts provided in the opinion, what difficulties would the plaintiff have faced in attempting to establish negligence?

2. ***Strict Liability for Animal Injuries.*** The common law doctrine exposes the owner of a wild animal to strict liability for harms caused by that animal. The Restatement (Second) of Torts §506 defines "wild animal" as an animal that "is not by custom devoted to the service of mankind at the time and place at which it is kept." A cow in New York City or an elephant in New Delhi may be classified differently than a cow in rural Vermont or an elephant in rural India. This approach is consistent with both the reciprocal risk and best cost-avoider approaches. The Restatement (Third) of Torts §22 defines "wild animal" as "an animal that belongs to a category which has not been generally domesticated and which is likely, unless restrained, to cause personal injury." Would judicial treatment of a cow be different under the Second and Third Restatements? Animals that have been classified as wild include a tiger named Stubby, in Franken v. Sioux Center, 272 N.W.2d 422 (Iowa 1978); a zebra, in Smith v. Jalbert, 221 N.E.2d 744 (Mass. 1966); and a coyote, in Collins v. Otto, 369 P.2d 564 (Colo. 1962).

The common law also imposed strict liability for injuries inflicted by domesticated animals where the animal's owner knew or had reason to know that the animal had dangerous tendencies abnormal to its breed. This is sometimes called the "one bite" rule of strict liability, but that description of the rule is too simplistic. In Clark v. Brings, the court concluded that the cat's previous bites were insufficient to create strict liability. Moreover, the court observed that conduct other than a bite could put an animal's owner on notice that the animal had an aggressive nature. If non-bite conduct had given the owner a basis for knowing that a domesticated animal was vicious, then the owner would be subject to strict liability for any bite injury the animal later inflicted.

3. ***Problem: Negligence versus Strict Liability.*** Bullu was an old tamed elephant kept by a circus for the purpose of entertaining circus patrons by performing tricks in the center ring of the show. Bullu also participated in parades used by the circus to attract patrons to its performances. During one parade, Bullu was scared by a dog, escaped from the handler, and ran through the circus grounds trampling a girl who was attending the parade. If the girl sues the circus, must she prove negligence on the part of the circus or may she rely on strict liability? See Behrens v. Bertram Mills Circus, Ltd., 2 Q.B. 1 (1957).

4. ***Statutory Liability for Animal Injuries.*** Many states have enacted statutes similar to the Minnesota statute quoted by the court in *Clark*. The plaintiff argued that the statute governed this case. Note that while the statute can be described as imposing

strict liability, it would not support recovery even for every person bitten by a dog. What reasoning did the court use to say that this statute should not apply to injuries cats inflict?

5. *Defenses.* The Restatement (Second) of Torts §515 treats unreasonable assumption of risk as a complete defense in a case of strict liability for harm caused by an animal, but does not allow a defense of contributory negligence. The Restatement (Third) of Torts §25 and cmt. e (Proposed Final Draft No. 1, April 26, 2005), reflecting the shift of most jurisdictions to a comparative negligence system, permits a reduction in the plaintiff's recovery of damages that reflects the plaintiff's contributory negligence and unreasonable assumption of risk.

Statute: HARBORING A DOG

S.D. Codified Laws §40-34-2

Any person owning, keeping, or harboring a dog that chases, worries, injures or kills any poultry or domestic animal is guilty of a Class 2 misdemeanor and is liable for damages to the owner thereof for any injury caused by the dog to any such poultry or animal. . . .

NOTE TO STATUTE

Statutory Recognition of Particular Harms. The South Dakota statute provides a specific definition of the harms it seeks to remedy. If a defendant's dog entered a farmyard and bit both a farmer and a chicken, what effect would the statute have on potential recovery for harms caused by those bites?

Perspective: Rationale for Strict Liability

The court in *Clark* considers and rejects *comparative economic utility* as the basis for imposing strict liability only on wild animals. Other arguments for imposing strict liability in selected cases include the *reciprocal risk* theory and *best cost-avoider* theory. Consider how each of these theories coincides with the Restatement definitions of what animals are wild.

The reciprocal risk theory suggests that strict liability is reserved for those whose conduct imposes risks on others unlike the risk others impose on them. For instance, we all impose similar (reciprocal) risks on each other by our conduct in driving automobiles. Because the risks are reciprocal, the negligence standard is applied. A person keeping a grizzly bear or blasting with dynamite, however, imposes risks on others that are not reciprocal. The people who might be harmed by the bear or the blasting do not typically expose others to the risks of attack by a bear or harm from blasting.

The best cost-avoider theory suggests that for some categories of activities one of the parties almost always has superior knowledge of the risks presented by the conduct and how they may be avoided. This superior knowledge puts that party in the best position to avoid the costs associated with the activity. For

activities in which many engage—automobile driving, for instance—generalizing about which party is the best cost-avoider is difficult, and the negligence standard is appropriate. For conduct that is not customary at a particular place at a particular time, the person engaging in the conduct is quite likely to be the best cost-avoider, and court time is saved by making that person strictly liable.

BYRAM v. MAIN

523 A.2d 1387 (Me. 1987)

McKusick, C.J.

Defendant Peter Main appeals from a judgment entered on August 22, 1986, by the Superior Court (Penobscot County) in the amount of $27,483.52 for plaintiff Ray Byram. After a jury-waived trial the court found Main strictly liable for damages to Byram's tractor-trailer rig caused in the early morning hours of July 22, 1981, when Byram's rig struck Meadow, the pet donkey of Main's daughter, which had escaped from its enclosure and wandered onto Interstate 95 in Orono. The judgment here on review was entered following a second trial in this case, on remand from plaintiff Byram's earlier appeal to this court. . . . Before the second trial Byram amended his complaint to add a strict liability count, and by stipulation of the parties the original negligence count was dismissed with prejudice.

The sole issue presented by this second appeal is whether the owner of a domestic animal that has escaped and wandered onto a high-speed public highway is strictly liable for harm resulting from a motor vehicle's collision with that animal. Main urges us that the Superior Court erred in relying upon Decker v. Gammon, 44 Me. 322 (1857), as authority for imposing strict liability upon him and that there is no basis in common law for finding strict liability on the facts of this case. We agree, and therefore vacate the judgment for Byram. In doing so we adopt for application to the present facts the rule of liability set forth in the Restatement (Second) of Torts §518 (1977).

Decker defines three classes of cases in which the owners of animals are liable for harm done by them to others:

> 1. The owner of wild beasts, or beasts that are in their nature vicious, is, *under all circumstances,* liable for injuries done by them. . . .
>
> 2. If domestic animals, such as oxen and horses, injure any one, . . . *if they are rightfully in the place where they do the mischief,* the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. . . .
>
> 3. The owner of domestic animals, *if they are wrongfully in the place where they do any mischief,* is liable for it, though he had no notice that they had been accustomed to do so before.

. . . Id. at 327-29 (emphasis in original). The Superior Court found that the case at bar fell within the third class.

The Superior Court misinterpreted the *Decker* court's use of the word "wrongfully" when it included in that term the donkey's extremely inappropriate presence on

the interstate. Viewing *Decker* against the backdrop of the common law, we read that opinion to say that cases involving trespass by domestic animals are the only cases imposing strict liability encompassed in the third class. Under common law both in 1857 and today, an owner of a domestic animal not known to be abnormally dangerous is strictly liable only for harms caused by that animal while trespassing; if the animal causes harm in a public place, no liability is imposed upon the owner without a finding that the owner was at fault. Restatement (Second) of Torts §§504, 509, 518 (1977). The *Decker* court, in defining three classes of cases, set forth the whole common law of animal owner liability so as to fit the particular case before it into that general framework. The holding of the *Decker* case was limited to its facts. The *Decker* court decided only that strict liability applies in a fact situation that supports a trespass action. . . .

We realize that since 1857 radical changes have occurred in the nature and use of public highways, particularly those with limited access and high-speed motor traffic. Despite those changes, however, we do not read *Decker*'s words "wrongfully in the place" to apply to the facts of the case at bar. The general development of the law has not been in that direction. In fact *Decker*, when its third class is correctly interpreted to include animal trespass cases but not cases where the animal is in a merely inappropriate place when it causes harm, is still a remarkably good statement of the common law as it remains today, as reflected by the Restatement.

Furthermore, the considerations that support the strict liability rules in animal trespass and wild animal cases do not apply to the present facts. The liability imposed by courts in cases described by the third *Decker* category and by section 504 of the Restatement and the comments following[5] developed as an extension of liability for trespass by persons; the possessor of a domestic animal was identified with the animal, so that when it trespassed the owner trespassed. The imposition of strict liability for trespass protects the crucial right of the possessor of land to its exclusive use and control. Strict liability could not serve that same purpose in the case at bar because no individual has the right to the exclusive use and control of a public highway.

The first *Decker* rule, now set forth in Restatement (Second) of Torts §507,[6] imposes strict liability for the consequences of keeping a wild animal, an activity that, while not wrongful, exposes the community to an obvious abnormal danger.[7]

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[5] Restatement (Second) of Torts §504 (1977) provides in pertinent part:

> (1) . . . [A] possessor of livestock intruding upon the land of another is subject to liability for the intrusion although he has exercised the utmost care to prevent them from intruding.
>
> (2) The liability stated in Subsection (1) extends to any harm to the land or to its possessor or a member of his household, or their chattels, which might reasonably be expected to result from the intrusion of livestock.
>
> "Livestock" is defined in comment (b) thereto as "those kinds of domestic animals and fowls normally susceptible of confinement within boundaries without seriously impairing their utility and the intrusion of which upon the land of others normally causes harm to the land or to crops thereon."

[6] Restatement (Second) of Torts §507 (1977) provides:

> (1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm.
>
> (2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know.

[7] The keeping of wild animals is categorized with such dangerous activities as blasting, pile driving, storing inflammable liquids, and accumulating sewage. Prosser and Keeton on Torts §76, at 541, §78, at 547.

The keeper of a wild animal "takes the risk that at any moment the animal may revert to and exhibit" "the dangerous propensities normal to the class to which it belongs." Restatement (Second) of Torts §507 comment c, at 11-12. Nonetheless, strict liability is not applied to all damages caused by wild animals. Even a wild animal that goes astray and causes damage to a highway traveler in circumstances similar to those of the case at bar would not at common law bring strict liability down upon its keeper.

> [The possessor of a wild animal] is liable for only such harm as the propensities of the animal's class or its known abnormal tendencies make it likely that it will inflict. Thus . . . if [a tame] bear, having escaped, goes to sleep in the highway and is run into by a carefully driven motor car on a dark night, the possessor of the bear is not liable for harm to the motorist in the absence of negligence in its custody.

Id. comment e, at 12. The rationale for imposing strict liability upon the owners of wild animals thus does not support applying anything beyond a negligence rule on the facts presented to us here.

For the purposes of this decision, therefore, we adopt the approach of Restatement (Second) of Torts §518, which is supported by the case law in Maine and elsewhere:

> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done . . . if, but only if,
>
> (a) he intentionally causes the animal to do the harm, or
>
> (b) he is negligent in failing to prevent the harm.

We, as does the Restatement, leave the highway traveler who is injured by colliding with a stray domestic animal solely to his remedy in negligence. The degree of care required of the animal owner is of course commensurate with the propensities of the particular domestic animal and with the location, including proximity to high-speed highways, of the place where the animal is kept by its owner. Whether the owners of large domestic pets should be required to bear more stringent responsibilities for those animals than are imposed by common law is a question the public policy makers of the other branches of state government may well wish to address.

The entry is: Judgment vacated. Remanded with directions to enter judgment for defendant.

NOTES TO BYRAM v. MAIN

1. ***Limits on Strict Liability for Wild Animal Injuries.*** The court in *Bryam* discussed a limitation on the strict liability applied to the owner of a wild animal for injuries caused by that animal, stating that the liability will be applied only for injuries caused by its "abnormal danger," by "the dangerous propensities normal to the class to which it belongs," and by dangers "of which the possessor knows or has reason to know." What significance did these limitations have for the court's resolution of the case?

2. ***Strict Liability for Trespassing Animals.*** Bryam v. Main focused on whether it matters where the animal was when it caused harm, not on the classification of the animal as wild or domesticated. The location of the collision between the plaintiff's vehicle and the defendant's donkey was an interstate highway. How did that fact affect

the court's resolution of the case? If the collision had occurred in the plaintiff's driveway, would the result have been the same?

Statute: TRESPASS ON CULTIVATED LAND

Nev. Rev. Stat. Ann. §569.450 (2002)

No person is entitled to collect damages, and no court in this state may award damages, for any trespass of livestock on cultivated land in this state if the land, at the time of the trespass was not enclosed by a legal fence.

Statute: RECOVERY FOR DAMAGE TO UNFENCED LANDS; EXCEPTION

Ariz. Rev. Stat. §3-1427 (2001)

An owner or occupant of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence, but this section shall not apply to owners or occupants of land in no-fence districts.

Statute: [NO-FENCE DISTRICT] FORMATION

Ariz. Rev. Stat. §3-1421 (2001)

A. A majority of all taxpayers [of localities meeting certain definitions] may petition the board of supervisors of the county in which such district or land is situated that a no-fence district be formed and that no fence be required around the land in the no-fence district designated in the petition.

B. Upon filing the petition, the board shall immediately enter the contents upon its records and order that the no-fence district be formed.

NOTE TO STATUTES

The common law favors those who cultivate land over those who raise cattle by requiring keepers of animals to fence them in or be liable for their trespasses. This tension between farmers and ranchers has been resolved in some states in favor of ranchers, with statutes that prohibit a strict liability action unless the plaintiff has attempted to protect his or her land (and crops) with a fence. The Nevada statute is an example of a "fencing out" statute. The Arizona statutes offer options to be selected by local areas.

III. Selected Dangerous Activities

An 1868 English case, Rylands v. Fletcher, imposed strict liability on a landowner for harm caused to a neighbor when water collected on the defendant's land escaped onto the plaintiff's land. Relying on that famous case about the "activity" of collecting water

in a holding pond, American courts have considered what other activities should be subject to strict liability.

Clark-Aiken Company v. Cromwell-Wright Company examines the significance of Rylands v. Fletcher and applies the criteria set out in the Restatement (Second) of Torts to harm caused by water that escaped from a dam maintained by the defendant. Klein v. Pyrodyne Corp. decides whether damages from an injury associated with the display of fireworks on the Fourth of July in a public park should be available on a strict liability theory.

CLARK-AIKEN COMPANY v. CROMWELL-WRIGHT COMPANY

323 N.E.2d 876 (Mass. 1975)

TAURO, J.

This case is before us pursuant to G.L.c. 231, §111, on a report by a judge of the Superior Court. The question submitted on report is as follows: "Does Count II of the plaintiff's declaration set forth a cause of action known to the law of the Commonwealth of Massachusetts?"

The plaintiff brought an action in tort in two counts; the first alleging negligence, the second in strict liability. It seeks to recover for damage caused when water allegedly stored behind a dam on the defendant's property was released and flowed onto its property. A Superior Court judge sustained the defendant's demurrer on the ground that "Count II . . . does not allege a cause of action under the law of this Commonwealth." He held that, "in order to recover for damage caused by the water which escaped from the dam owned by the Defendants, the Plaintiffs must allege and prove that the escape was caused by intentional or negligent fault of some person or entity." The sole issue before us is whether a cause of action in strict liability exists in this Commonwealth regardless of considerations of fault on the part of the defendant. After careful consideration, we conclude that strict liability as enunciated in the case of Rylands v. Fletcher, [1868] L.R. 3 H.L. 330, is, and has been, the law of the Commonwealth. . . .

The doctrine known as strict liability, or absolute liability without fault, was first enunciated in the English case of Rylands v. Fletcher, supra. In that case, the defendants had a reservoir built on land located above a number of vacant mine shafts. When the reservoir was partially filled it burst through one of the underlying shafts, causing water to flow into the plaintiff's coal workings. The actual construction of the reservoir was undertaken by contractors of the defendants, who were found to have been negligent. The defendants themselves were unaware of the shafts, and were found not to have been negligent. The trial court found for the defendants. Fletcher v. Rylands, [1865] 3 H. & C. 774, 799.

On appeal, this decision was reversed in Fletcher v. Rylands, [1866] L.R. 1 Ex. 265. The lower appellate court considered two possible courses in the case: it could be decided on the basis of negligence, in which case the court would be required to face the issue of whether a defendant would be liable for the acts of its contractors,[3]

[3] At that time, such liability did not exist in England. In fact, liability for the acts of contractors was not established until ten years later in Bower v. Peate, [1876] 1 Q.B.D. 321. See Prosser, Torts, §78, p.505, fn. 45 (4th ed. 1971).

or it could be viewed as a strict liability case, thereby obviating the need for making such a determination.

The court concluded, "[T]he true rule of law is, that the person who for his own purposes brings on his lands 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 answerable for all the damage which is the natural consequence of its escape." [1866] L.R. 1 Ex. at 279. After reaching this conclusion, Mr. Justice Blackburn stated, "The view which we take of the first point *renders it unnecessary to consider* whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them" (emphasis added). Id. at 287. It is clear that negligence was not a factor in the appellate court's decision of the case. Were it otherwise, the court would have been required to reach an issue on which it specifically reserved decision. In imposing strict liability, it also ruled that where only the contractors were found to have been negligent, and considering the then state of English law, negligence could not be imputed to the defendants. Thus, negligence was clearly irrelevant to the decision in that case.

On appeal to the House of Lords, Mr. Justice Blackburn's decision was upheld, although the doctrine of strict liability was narrowed somewhat. Speaking for the House, Lord Cairns stated: "[I]f the Defendants . . . had desired to use . . . [their land] for any purpose which I may term a non-natural use . . . and if in consequence of their doing so, *or* in consequence of any imperfection in the mode of their doing so, the water came to escape . . . that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose . . . [escape and resulting injury] then for the consequence of that, in my opinion, the Defendants would be liable" (emphasis added). Rylands v. Fletcher, [1868] L.R. 3 H.L. at 339. Although Lord Cairns limited the doctrine to include liability only for "non-natural" uses of one's land, he indicated that he "entirely concur[red]" with Mr. Justice Blackburn's analysis. Id. at 340. Further, in using the disjunctive "or" in the quotation above, he made clear that conduct of the activity itself is sufficient for imposition of liability, and that imperfection in the mode of doing so, or negligence, is merely an alternative basis therefor. . . .

Rylands v. Fletcher, supra, has been cited with approval by this court on many subsequent occasions, but liability has not been imposed in reliance thereon for a variety of reasons. These include findings that the activity in question was neither ultrahazardous nor extraordinary, Fibre Leather Mfg. Corp. v. Ramsay Mills, Inc., 329 Mass. 575, 577 (1952) ("[T]he rule of Rylands v. Fletcher 'applies to unusual and extraordinary uses [of land] which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of the use.' Where, however, the injury complained of is caused by a use that is 'ordinary and usual and in a sense natural, as incident to the ownership of the land,' liability is imposed only for negligence. . . . The installation and use of the tank in the circumstances disclosed here were not extraordinary or unusual and involved no great threat of harm to others."), and findings that one of the exceptions to the general rule was applicable . . . Cohen v. Brockton Sav. Bank, 320 Mass. 690 (1947) (act of third persons). In none of these cases, however, was the validity and vitality of the doctrine challenged, and in all, it was affirmed.

Strict liability without regard to negligence or fault exists in this Commonwealth in other contexts. Notable among these are the blasting cases, where there has never been

any dispute that "one carrying on blasting operations is liable without proof of negligence for all *direct* injuries to the property of another" (emphasis added). Coughlan v. Grande & Son, Inc., 332 Mass. 464, 467 (1955). Likewise, strict liability is often imposed for the keeping of wild animals. "The owner or keeper of a wild animal is strictly liable to another for damage done to his person or property. And this liability does not depend on proof of previous acts showing a vicious disposition; nor can the owner or keeper escape liability by showing that he has exercised the utmost care to confine the animal or otherwise prevent it from doing harm." Smith v. Jalbert, 351 Mass. 432, 435 (1966). The policy underlying Rylands v. Fletcher, supra, that one who for his own benefit keeps a dangerous instrumentality should be liable per se for its escape, is equally applicable to these cases. . . .

In light of what we have said, it becomes necessary to examine the parameters of the strict liability doctrine to determine whether it is applicable to the facts as pleaded in count 2 of the declaration in this case. As previously stated, Lord Cairns in Rylands v. Fletcher, supra, narrowed the applicability of strict liability to those uses of one's property which could be termed "non-natural." This limitation subsequently developed into the requirement that, in order to subject a landowner to strict liability, he must be using his property in an "unusual and extraordinary" way. Ainsworth v. Lakin, 180 Mass. 397, 400 (1902).

In United Elec. Light Co. v. Deliso Constr. Co., Inc., 315 Mass. 313, 322 (1943), this court characterized a proper subject for imposition of strict liability as "an unusual undertaking or one of such an extremely dangerous nature that it must be performed at the sole risk of the one therein engaged." Thus, while upholding the strict liability doctrine, we held nonetheless that a mixture of cement and water used in underground tunnelling which escaped onto the plaintiff's property, was not a proper subject for imposition of strict liability, on the ground that "[t]hey were ordinary materials widely used in construction work." Ibid. To the same effect is a water tank or pressing system in a commercial building, Fibre Leather Mfg. Corp. v. Ramsay Mills, Inc., 329 Mass. 575 (1952); Brian v. B. Sopkin & Sons, Inc., 314 Mass. 180 (1943), and a chemical widely used in cleaning, Kaufman v. Boston Dye House, Inc., 280 Mass. 161 (1932). Conversely, we found the useless wall of a burned out structure left standing to be an appropriate subject for strict liability, Ainsworth v. Lakin, supra, and the same is true of dams and dikes in certain circumstances. Bratton v. Rudnick, 283 Mass. 556 (1933).

This formulation of strict liability is in accord with the proposed revision of Restatement 2d: Torts (Tent. Draft No. 10, April 20, 1964), §519, which provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm . . . resulting from the activity, although he has exercised the utmost care to prevent such harm." Section 520 then sets out the factors to be considered in determining whether the activity in question is to be considered "abnormally dangerous." These are: "[a] Whether the activity involves a high degree of risk of harm to the person, land or chattels of others; (b) Whether the gravity of the harm which may result from it is likely to be great; (c) Whether the risk cannot be eliminated by the exercise of reasonable care; (d) Whether the activity is not a matter of common usage; (e) Whether the activity is inappropriate to the place where it is carried on; and (f) The value of the activity to the community." Comment f to §520 states in part, "In general, abnormal dangers arise from activities which are in themselves unusual, or from unusual risks created by more usual activities under particular

circumstances. . . . The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it, even though it is carried on with all reasonable care."

The tentative draft cautions against defining a type of activity as "abnormally dangerous" in and of itself, however, and advocates considering the activity in light of surrounding circumstances on the facts of each case. This, in essence, shifts consideration from the nature of the activity to the nature and extent of the risk. As an example, it distinguishes cases where large quantities of water are stored "in dangerous location in a city" from those in which "water is collected in a rural area, with no particularly valuable property near," imposing strict liability in the former but not the latter case. §520 (3). We believe this approach is sound and comports well with the basic theory underlying the strict liability rule. Additionally, it finds support in our prior case law, and accordingly we choose to follow it. . . .

It is not for this court, at this juncture, to decide whether the ultimate facts established at the trial will make out a case for imposition of strict liability. "Whether the activity is an abnormally dangerous one is to be determined by the [trial] court, upon consideration of all the factors listed . . . and the weight given to each which it merits upon the facts in evidence." Restatement 2d: Torts (Tent. Draft No. 10, April 20, 1964), §520, comment, p.68. Moreover, the real issue is not the *sufficiency of the pleadings* but rather one of substantive law, namely the existence of strict liability as the law of Massachusetts. We decide merely that the plaintiff's declaration is sufficient to set forth a cause of action under Massachusetts law. Accordingly, (a) we answer the reported question in the affirmative and (b) we reverse the order below sustaining the defendant's demurrer.

NOTES TO CLARK-AIKEN COMPANY v. CROMWELL-WRIGHT COMPANY

1. *Strict Liability for Abnormally Dangerous Activities.* The draft Restatement provisions discussed in *Clark-Aiken* were adopted in the Restatement (Second) of Torts. The following case, Klein v. Pyrodyne Corp., provides another example of their application. The plaintiff in *Clark-Aiken* sought damages on theories of negligence and strict liability. To support a strict liability claim, the plaintiff must show that the defendant's activity should be classified as abnormally dangerous. How would the evidence required to support a negligence claim differ from the evidence required to establish strict liability?

2. *Problem: Strict Liability for Dangerous Activities.* Plaintiff Spano is the owner of a garage in Brooklyn, which was wrecked by a blast occurring on November 27, 1962. Spano sued Perini, who was engaged in constructing a tunnel in the vicinity pursuant to a contract with the City of New York. The blaster had set off a total of 194 sticks of dynamite at a construction site that was only 125 feet away from the damaged premises. Although the plaintiff alleged negligence in his complaints, he made no attempt to show that the defendant had failed to exercise reasonable care or to take necessary precautions when he was blasting. Instead, the plaintiff chose to rely solely on the principle of strict liability. Do the policies supporting strict liability apply to this case? See Spano v. Perini Corp., 250 N.E.2d 31 (N.Y. 1969).

Statute: STRICT LIABILITY FOR [OIL] CONTAINMENT, CLEANUP AND REMOVAL COSTS

N.H. Rev. Stat. Ann. §146-A:3-a (2002)

I. Any person who, without regard to fault, directly or indirectly causes or suffers the discharge of oil into or onto any surface water or groundwater of this state, or in a land area where oil will ultimately seep into any surface water or groundwater of the state in violation of this chapter, or rules adopted under this chapter, shall be strictly liable for costs directly or indirectly resulting from the violation relating to:

(a) Containment of the discharged oil;

(b) Cleanup and restoration of the site and surrounding environment, and corrective measures as defined under RSA 146-A:11-a, III(a) and (b); and

(c) Removal of the oil.

NOTES TO STATUTE

1. ***Coverage.*** Numerous state statutes similar to New Hampshire's impose strict liability for a variety of environmental harms. This statute covers pollution of both surface water and ground water and covers direct and indirect costs for containment and restoration.

2. ***Federal Provisions.*** A complex body of federal statutes treats environmental harms. See 42 U.S.C. §9607 (2002) for treatment of pollutants other than petroleum-related pollutants, and 33 U.S.C. §2702 (2002) for treatment of petroleum-related pollutants.

Perspective: Strict Liability for Non-Reciprocal Risks

There were three levels of appellate review in Rylands v. Fletcher and numerous opinions. The following excerpt confronts the question of why there should be a strict liability duty placed on "him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

> But it was further said . . . that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible. This is no doubt true . . . but we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. . . . But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants. . . .

Blackburn, J. Exchequer Chamber: L.R. 1 Exch. 265 (1866).

This excerpt seeks to justify denying the benefits of a strict liability action to those who use or are adjacent to a highway. One possible explanation could be that strict liability is allowed for those activities where one person imposes a "non-reciprocal risk" on others. Activities involving bringing "dangerous instrumentalities" onto the land that are "non-natural" and "unusual and extraordinary," may fairly be characterized as creating nonreciprocal risks. While automobiles may be dangerous instrumentalities, they present customary and ordinary risks, and all users of the highways impose the risks, on one another. Strict liability would therefore not be justified under the nonreciprocal risk analysis.

The best cost-avoider theory is a second explanation for denying strict liability for injuries associated with roads. Most people are aware of the risks imposed by use of the highways. That knowledge may give them some opportunity to avoid the risks, by staying away from the roads, for example. By contrast, the risks presented by dangerous instrumentalities that are non-natural, unusual, and extraordinary are hard to avoid, either because those at risk are unaware of the activity or unappreciative of the associated risks. In these cases, strict liability is appropriate. As Justice Blackburn observed: "there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants."

KLEIN v. PYRODYNE CORP.

117 Wash. 2d 1, 810 P.2d 917 (1991)

GUY, Justice.

The plaintiffs in this case are persons injured when an aerial shell at a public fireworks exhibition went astray and exploded near them. The defendant is the pyrotechnic company hired to set up and discharge the fireworks. The issue before this court is whether pyrotechnicians are strictly liable for damages caused by fireworks displays. We hold that they are.

Defendant Pyrodyne Corporation (Pyrodyne) is a general contractor for aerial fireworks at public fireworks displays. Pyrodyne contracted to procure fireworks, to provide pyrotechnic operators, and to display the fireworks at the Western Washington State Fairgrounds in Puyallup, Washington on July 4, 1987. All operators of the fireworks display were Pyrodyne employees acting within the scope of their employment duties. . . .

During the fireworks display, one of the 5-inch mortars was knocked into a horizontal position. From this position a shell inside was ignited and discharged. The shell flew 500 feet in a trajectory parallel to the earth and exploded near the crowd of onlookers. Plaintiffs Danny and Marion Klein were injured by the explosion. Mr. Klein's clothing was set on fire, and he suffered facial burns and serious injury to his eyes. . . .

The Kleins brought suit against Pyrodyne under theories of products liability and strict liability. Pyrodyne filed a motion for summary judgment, which the trial court granted as to the products liability claim. The trial court denied Pyrodyne's summary judgment motion regarding the Kleins' strict liability claim, holding that Pyrodyne was strictly liable without fault and ordering summary judgment in favor of the Kleins on the issue of liability. Pyrodyne appealed the order of partial summary judgment to the Court of Appeals, which certified the case to this court. Pyrodyne is appealing solely as to the trial court's holding that strict liability is the appropriate standard of liability for pyrotechnicians. A strict liability claim against pyrotechnicians for damages caused by fireworks displays presents a case of first impression in Washington.

The Kleins contend that strict liability is the appropriate standard to determine the culpability of Pyrodyne because Pyrodyne was participating in an abnormally dangerous activity. . . .

The modern doctrine of strict liability for abnormally dangerous activities derives from Fletcher v. Rylands, 159 Eng. Rep. 737 (1865), *rev'd,* 1 L.R.-Ex. 265, [1866] All E.R. 1, 6, *aff'd sub nom.* Rylands v. Fletcher, 3 L.R.-H.L. 330, [1868] All E.R. 1, 12, in which the defendant's reservoir flooded mine shafts on the plaintiff's adjoining land. Rylands v. Fletcher has come to stand for the rule that "the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts §78, at 547-48 (5th ed. 1984).

The basic principle of Rylands v. Fletcher has been accepted by the Restatement (Second) of Torts (1977). . . . Section 519 of the Restatement provides that any party carrying on an "abnormally dangerous activity" is strictly liable for ensuing damages. The test for what constitutes such an activity is stated in section 520 of the Restatement. Both Restatement sections have been adopted by this court, and determination of whether an activity is an "abnormally dangerous activity" is a question of law. . . .

Section 520 of the Restatement lists six factors that are to be considered in determining whether an activity is "abnormally dangerous." The factors are as follows:

a. existence of a high degree of risk of some harm to the person, land or chattels of others;
b. likelihood that the harm that results from it will be great;
c. inability to eliminate the risk by the exercise of reasonable care;
d. extent to which the activity is not a matter of common usage;
e. inappropriateness of the activity to the place where it is carried on; and
f. extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts §520 (1977). As we previously recognized in Langan v. Valicopters, Inc., 88 Wash. 2d 855, 861-62, 567 P.2d 218 (Wash. 1977) (citing Tent. Draft No. 10, 1964, of comment (f) to section 520), the comments to section 520 explain how these factors should be evaluated:

> Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay

> of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

Restatement (Second) of Torts §520, comment f (1977). Examination of these factors persuades us that fireworks displays are abnormally dangerous activities justifying the imposition of strict liability.

We find that the factors stated in clauses (a), (b), and (c) are all present in the case of fireworks displays. Any time a person ignites aerial shells or rockets with the intention of sending them aloft to explode in the presence of large crowds of people, a high risk of serious personal injury or property damage is created. That risk arises because of the possibility that a shell or rocket will malfunction or be misdirected. Furthermore, no matter how much care pyrotechnicians exercise, they cannot entirely eliminate the high risk inherent in setting off powerful explosives such as fireworks near crowds. . . .

The factors stated in clauses (a), (b), and (c) together, and sometimes one of them alone, express what is commonly meant by saying an activity is ultrahazardous. Restatement (Second) of Torts §520, comment h (1977). As the Restatement explains, however, "[l]iability for abnormally dangerous activities is not . . . a matter of these three factors alone, and those stated in Clauses (d), (e), and (f) must still be taken into account." Restatement (Second) of Torts §520, comment h (1977). . . .

The factor expressed in clause (d) concerns the extent to which the activity is not a matter "of common usage". The Restatement explains that "[a]n activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." Restatement (Second) of Torts §520, comment i (1977). As examples of activities that are not matters of common usage, the Restatement comments offer driving a tank, blasting, the manufacture, storage, transportation, and use of high explosives, and drilling for oil. The deciding characteristic is that few persons engage in these activities. Likewise, relatively few persons conduct public fireworks displays. Therefore, presenting public fireworks displays is not a matter of common usage.

Pyrodyne argues that the factor stated in clause (d) is not met because fireworks are a common way to celebrate the 4th of July. We reject this argument. Although fireworks are frequently and regularly enjoyed by the public, few persons set off special fireworks displays. Indeed, the general public is prohibited by statute from making public fireworks displays insofar as anyone wishing to do so must first obtain a license. . . .

The factor stated in clause (e) requires analysis of the appropriateness of the activity to the place where it was carried on. In this case, the fireworks display was conducted at the Puyallup Fairgrounds. Although some locations — such as over water — may be safer, the Puyallup Fairgrounds is an appropriate place for a fireworks show because the audience can be seated at a reasonable distance from the display. Therefore, the clause (e) factor is not present in this case.

The factor stated in clause (f) requires analysis of the extent to which the value of fireworks to the community outweighs its dangerous attributes. We do not find that this factor is present here. This country has a long-standing tradition of fireworks on the 4th of July. That tradition suggests that we as a society have decided that the value