product of a reasonably foreseeable hazard. The Kansas Supreme Court in Savina v. Sterling Drug, Inc., 247 Kan. 105, 795 P.2d 915 (Kan. 1990) stated this proposition as follows:

> Under the strict liability theory, a plaintiff is not required to establish misconduct by the maker or seller but, instead, is required to impugn the product. The plaintiff must show the product is in "a defective condition unreasonably dangerous," which means that it must be defective in a way that subjects persons or tangible property to an unreasonable risk of harm. Prosser and Keeton, Law of Torts §99, p.695 (5th ed. 1984). A product can be defective in one of the following three ways: (1) a flaw is present in the product at the time it is sold; (2) *the producer or assembler of the product fails to adequately warn of a risk or hazard related to the way the product was designed;* or (3) the product, although perfectly manufactured, contains a defect that makes it unsafe. Prosser, §99, pp.695-98.

795 P.2d at 923 (emphasis added).

The district court's restriction of the general duty to warn to specific design defects overlooks that under Kansas law of strict liability, even if a product does not have a design defect, failure to warn of a foreseeable danger arising from the product's normal use makes the product defective.

The mini-trampoline was specifically intended for exercise, and in particular, for jogging. When used for this purpose, however, the mini-trampoline's design results in the foot turning in a way that places stress on the ankle bones. That the design is not defective, within the state of the known art, does not detract from the manufacturer's duty to warn the consumer of foreseeable dangers that can arise from normal use. . . .

Given that repetitive jogging on the mini-trampoline could cause stress fractures, the question becomes whether Richter presented sufficient evidence that a jury could permissibly conclude reasonable tests would have been effective in bringing this danger to light. Richter presented a substantial amount of expert testimony to the effect that visual observation of a person jogging on the mini-trampoline by someone with expertise in biomechanics, would reveal eversion and further that relatively simple tests could measure the degree of eversion. A comparison of that measurement with a measurement of the eversion caused by jogging on a flat surface would have revealed mini-trampolines cause users' feet to evert to a markedly greater degree. Testimony established that it is well known that such stresses, experienced on a repetitive basis, could cause fractures. We hold the jury could have reasonably found Richter's injury was causally related to repetitive jogging on the mini-trampoline, the use for which Limax's product was intended. The jury could also reasonably have concluded Limax should have warned users of this danger because the danger was eminently knowable given the state of the art and Limax should have known of it. . . .

Under Kansas law, both strict liability and negligence require warnings only for dangers which are reasonably foreseeable in light of the intended use of a product. The jury could reasonably have concluded that a simple consultation with a biomechanics expert would have given Limax sufficient information to arrange for appropriate testing of the mini-trampoline. No expert witness for either side expressed any doubt that the mini-trampoline accentuates eversion of the ankles or that eversion could cause stress fractures. It is true that no one appears to have considered the problem until Richter's injury occurred, but it is also true that plaintiff's evidence demonstrated that the danger was patently obvious to any expert who had a reason

to look for it. The jury could permissibly conclude Limax should reasonably have foreseen that design of the mini-trampoline could result in the harm produced. Limax conceded that it did no testing or research to consider foreseeable harm arising out of the uses to which the mini-trampoline would be put. . . .

We find that the district court erred in granting a judgment as a matter of law and we therefore hold that the verdict and judgment in favor of the plaintiff should be reinstated.

NOTES TO RICHTER v. LIMAX INTERNATIONAL

1. *Knowledge of Danger.* *Richter* involves the issues of when and about what risks a manufacturer must warn. In the risk-utility balancing test for design defects, states treat manufacturers as if they had constructive knowledge of all risks and alternatives available to manufacturers at the time of marketing and distribution. As in Kansas, most states apply the same test to whether a manufacturer met a duty to warn under negligence as under strict liability. The Kansas court said, "In warning cases, the test is reasonableness." Compared to the constructive knowledge imposed in defective design cases, what knowledge is imputed in defective warning cases?

2. *The "Read and Heed" Rule.* The Restatement (Second) §402A comment j, quoted in *Richter*, stated the "read and heed" rule, which says that a seller is entitled to assume that if it has provided adequate warnings, those warnings would be read and heeded by product users. This rule is relevant to deciding whether a product was defectively designed. Consumers' expectations are informed by what they are presumed to have read. The risks presented by a product design depend on the users' awareness of the risks and ability to avoid the risks.

After a plaintiff has shown that lack of a warning has made a product defective, the plaintiff must show that "but for" the defective warning, the injury would not have occurred. The "read and heed" rule arises again in this element of the plaintiff's proof. The plaintiff must prove that he or she would have followed a warning if the defendant had provided one. A number of states allow plaintiffs the benefit of a "heeding presumption," allowing the jury to assume that the plaintiff would have obeyed a warning if it had been given. See James v. Bessemer Processing Co., 155 N.J. 279, 714 A.2d 898 (1998).

3. *Defective with Adequate Warning?* The Restatement (Second) §402A comment j also says that a product with an adequate warning is neither defective nor unreasonably dangerous. Many states do not follow this rule. States following the consumer expectation test have rejected this rule, saying that the warning is a factor to be considered is determining whether the product was defective and dangerous beyond a reasonable consumer's expectation. See Delaney v. Deere and Co., 999 P.2d 930 (2000). The Restatement (Third) §2 applies the risk-utility test and, in comment l, rejects the "no defect" rule of the Restatement (Second):

> 1. Relationship between design and instruction or warning. Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product

may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. . . . Warnings are not, however, a substitute for the provision of a reasonably safe design.

The fact that a risk is obvious or generally known often serves the same function as a warning. See Comment j. However, obviousness of risk does not necessarily obviate a duty to provide a safer design. Just as warnings may be ignored, so may obvious or generally known risks be ignored, leaving a residuum of risk great enough to require adopting a safer design. See Comment d.

Illustration:

14. Jeremy's foot was severed when caught between the blade and compaction chamber of a garbage truck on which he was working. The injury occurred when he lost his balance while jumping on the back step of the garbage truck as it was moving from one stop to the next. The garbage truck, manufactured by XYZ Motor Co., has a warning in large red letters on both the left and right rear panels that reads "DANGER—DO NOT INSERT ANY OBJECT WHILE COMPACTION CHAMBER IS WORKING—KEEP HANDS AND FEET AWAY." The fact that adequate warning was given does not preclude Jeremy from seeking to establish a design defect under Subsection (b). The possibility that an employee might lose his balance and thus encounter the shear point was a risk that a warning could not eliminate and that might require a safety guard. Whether a design defect can be established is governed by Subsection (b).

F. Special Treatment for Drugs

During the early development of strict liability for products, drugs presented a unique problem. In connection with the consumer expectation test, it was likely that a drug would be deemed defective if it caused harm to a patient, because a plausible consumer expectation for drugs is that they will be helpful, not harmful. Freeman v. Hoffman-La Roche, Inc., describes comment k to §402A — the Restatement (Second) approach to this problem — and compares it with the approach taken by Restatement (Third). The opinion decides whether a case-by-case method or a blanket rule works best. Edwards v. Basel Pharmaceuticals considers the *learned intermediary doctrine*, an exception to the general rule that product sellers must provide warnings to the ultimate users of their products.

FREEMAN v. HOFFMAN-LA ROCHE, INC.

260 Neb. 552, 618 N.W.2d 827 (2000)

CONNOLLY, J.

In this appeal, we reconsider our approach to products liability for defects in prescription drugs in light of changes in the law and the release of Restatement (Third) of Torts: Products Liability §§1 to 21 (1997) (Third Restatement). The appellant, Aimee Freeman, . . . seeks damages for injuries she sustained following her use of the prescription drug Accutane. Hoffman demurred on the basis that the petition failed to state a cause of action. Based on our decision in McDaniel v. McNeil

Laboratories, Inc., 196 Neb. 190, 241 N.W.2d 822 (1976), the . . . action was dismissed with prejudice.

Freeman's operative petition alleged the following facts: On or about September 23, 1995, Freeman presented herself to her physician for treatment of chronic acne. After examination, her physician prescribed 20 milligrams daily of Accutane. Hoffman is the designer, manufacturer, wholesaler, retailer, fabricator, and supplier of Accutane.

Freeman took the Accutane daily from September 27 through October 2, 1995, and from October 4 through November 20, 1995. Hoffman alleged that as a result of taking the Accutane, she developed multiple health problems. These problems included ulcerative colitis, inflammatory polyarthritis, nodular episcleritis OS, and optic nerve head drusen. As a result, Freeman alleged that she sustained various damages. Freeman alleged that the Accutane she took was defective. . . .

In dealing with products other than prescription drugs, this court has recognized a manufacturer's liability in tort for design defects. Liability arises when an article a manufacturer has placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using the product. We have also adopted and applied the test set out in the Second Restatement §402 A.

Under the Second Restatement, prescription drugs are treated specially under §402 A, comment k. Comment k. at 353-54 provides an exception from strict liability when a product is deemed to be "unavoidably unsafe" and states:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Application of comment k. has been justified under the law in some jurisdictions as a way to strike a balance between a manufacturer's responsibility and the encouragement of research and development of new products. Under certain instances, it is in the public interest to allow products to be marketed which are unsafe, because the benefits of the product justify its risks.

[A] few jurisdictions have interpreted comment k. in a manner that strictly excepts all prescription drugs from strict liability. Under the minority view, a drug that is

properly manufactured and accompanied by an adequate warning of the risks known to the manufacturer at the time of sale is not defectively designed as a matter of law. These jurisdictions are commonly described by legal commentators as providing manufacturers with a "blanket immunity" from strict liability for design defects in prescription drugs. Our decision in *McDaniel*, supra, generally falls under this category of interpretation of comment k.

An application of comment k. to provide a blanket immunity from strict liability is widely criticized. Comment k. has proved to be difficult to interpret and apply, thus, supporting the argument that it should not be applied so strictly. Further, it is said that an approach that entirely excepts manufacturers from immunity limits the discretionary powers of the courts. Also, it is argued that a blanket immunity leads to patently unjust results.

The majority of jurisdictions that have adopted comment k. apply it on a case-by-case basis, believing that societal interests in ensuring the marketing and development of prescription drugs will be adequately served without the need to resort to a rule of blanket immunity. A few courts have not specifically adopted comment k. and have instead either fashioned their own rules or treated prescription drugs in the same manner as that of all other products.

Although a variety of tests are employed among jurisdictions that apply comment k. on a case-by-case basis, the majority apply the comment as an affirmative defense, with the trend toward the use of a risk-utility test in order to determine whether the defense applies. When a risk utility test is applied, the existence of a reasonable alternative design is generally the central factor. Because the application of comment k. is traditionally viewed as an exception and a defense to strict liability, courts generally place the initial burden of proving the various risk utility factors on the defendant. Thus, under these cases, the plaintiff's burden of proof for his or her prima facie case remains the same as it is in any products liability case in the given jurisdiction.

. . . We now believe that societal interests in ensuring the marketing and development of prescription drugs can be served without resorting to a rule which in effect amounts to a blanket immunity from strict liability for manufacturers. Accordingly, we overrule *McDaniel* to the extent it applies comment k. to provide a blanket immunity from strict liability for prescription drugs. Accordingly, we must address how, or if, comment k. should be applied, or whether we should consider adopting provisions of the Third Restatement. We next address those provisions in considering what test should be applied. . . .

Section 6 of the Third Restatement pertains specifically to prescription drugs, with §6(c) applying to design defects. Section 6 at 144-45 states in part:

> (a) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.
>
> (b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:
>
> (1) contains a manufacturing defect as defined in §2(a); or
>
> (2) is not reasonably safe due to defective design as defined in Subsection (c); or
>
> (3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

> (c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

There are several criticisms of §6(c), which will be briefly summarized. First, it does not accurately restate the law. . . .

Second, the reasonable physician test is criticized as being artificial and difficult to apply. The test requires fact finders to presume that physicians have as much or more of an awareness about a prescription drug product as the manufacturer. The test also ignores concerns of commentators that physicians tend to prescribe drugs they are familiar with or for which they have received advertising material, even when studies indicate that better alternatives are available.

A third criticism of particular applicability to Freeman's case is that the test lacks flexibility and treats drugs of unequal utility equally. For example, a drug used for cosmetic purposes but which causes serious side effects has less utility than a drug which treats a deadly disease, yet also has serious side effects. In each case, the drugs would likely be useful to a class of patients under the reasonable physician standard for some class of persons. Consequently, each would be exempted from design defect liability. . . .

Fourth, the test allows a consumer's claim to be defeated simply by a statement from the defense's expert witness that the drug at issue had some benefit for any single class of people. Thus, it is argued that application of §6(c) will likely shield pharmaceutical companies from a wide variety of suits that could have been brought under comment k. of the Second Restatement. As the Third Restatement, §6(c), comment f. at 149, states in part: "Given this very demanding objective standard, liability is likely to be imposed only under unusual circumstances." Thus, even though the rule is reformulated, any application of §6(c) will essentially provide the same blanket immunity from liability for design defects in prescription drugs as did the application of comment k. in the few states that interpreted it as such.

We conclude that §6(c) has no basis in the case law. We view §6(c) as too strict of a rule, under which recovery would be nearly impossible. Accordingly, we do not adopt §6(c) of the Third Restatement.

We conclude that §402 A, comment k., of the Second Restatement should be applied on a case-by-case basis and as an affirmative defense in cases involving prescription drug products. Under this rule, an application of the comment does not provide a blanket immunity from strict liability for prescription drugs. Rather, the plaintiff is required to plead the consumer expectations test, as he or she would be required to do in any products liability case. The defendant may then raise comment k. as an affirmative defense. The comment will apply to except the prescription drug product from strict liability when it is shown that (1) the product is properly manufactured and contains adequate warnings, (2) its benefits justify its risks, and (3) the product was at the time of manufacture and distribution incapable of being made more safe.

. . . Freeman alleged facts that the Accutane was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Accordingly, we conclude that Freeman has stated a theory of recovery based on a design defect.

NOTES TO FREEMAN v. HOFFMAN-LA ROCHE, INC.

1. ***Breadth of Comment k Protection.*** The *Freeman* opinion outlines the minority and majority treatment of strict liability for defectively designed drugs. The "blanket" test of the Restatement (Second) §402A, comment k, did not mean drug companies always escaped liability. Reviewing comment k, reproduced in the opinion, reveals the various grounds on which plaintiffs may bring claims.

2. ***Significance of Warnings under Restatement (Third).*** The court in *Freeman* also characterizes The Restatement (Third) §6 as a blanket rule. When will a drug manufacturer be liable for a defectively designed drug under the Restatement (Second) test and under the Restatement (Third) test? Does the Nebraska court adopt a consumer expectations test for drugs? A risk-utility test? Or both?

EDWARDS v. BASEL PHARMACEUTICALS

933 P.2d 298 (Okla. 1997)

SUMMERS, J.

The facts provided in the Order of Certification [from the U.S. Court of Appeals for the Tenth Circuit to the Oklahoma Supreme Court] are these. Alpha Edwards brought a wrongful death action for the death of her husband. He died of a nicotine-induced heart attack as a result of smoking cigarettes while wearing two Habitrol nicotine patches. Habitrol is manufactured by Basel Pharmaceuticals. Plaintiff's theory of liability was that the warnings given in conjunction with the Habitrol patches were inadequate to warn her husband of the fatal risk associated with smoking and overuse of the product. A relatively thorough warning was given to physicians providing the Habitrol patch, but the insert provided for the user did not mention the possibility of a fatal or cardiac related reaction to a nicotine overdose, cautioning that an "overdose might cause you to faint."

The pamphlet provided to Dr. Howard and other physicians prescribing the patch said:

> Prostration, hypotension and respiratory failure may ensue with large overdoses. Lethal doses produce convulsions quickly and death follows as a result of peripheral or central respiratory paralysis or, less frequently, cardiac failure.

With regard to the manufacturer's warning directed by the FDA for the ultimate user, the certifying judge said this:

> Although the operative administrative regulation, directive, or stipulation was never produced, defendant expressly admitted that the patient insert it included with its product had been "mandated . . . by the FDA."

She further noted the Defendant's unchallenged assertion that the user's insert had been "approved by the FDA." . . . So for the purposes of our answer to the question we take as fact "the manufacturer's compliance with the very FDA requirements" of warning to the consumer.

Basel contends that the "learned intermediary doctrine" bars liability, because the prescribing physicians were given complete warnings regarding the use of the patches. Basel concedes that consumer warnings were required by the FDA, but argues that by complying with those FDA warning requirements the case again is controlled by the learned intermediary doctrine, with its attendant shield affording protection to the manufacturer. Mrs. Edwards disagrees, stating that the warnings given to her late husband were inadequate, regardless of whether FDA requirements were met.

Our products liability law generally requires a manufacturer to warn consumers of danger associated with the use of its product to the extent the manufacturer knew or should have known of the danger. Certain products, prescription drugs among them, are incapable of being made safe, but are of benefit to the public despite the risk. Their beneficial dissemination depends on adequate warnings, and the law regarding such products appears at Comment k of the Restatement (Second) of Torts, §402A. The user must be adequately warned.

There is, however, an exception known as the "learned intermediary doctrine," which Oklahoma has recognized as applicable in prescription drug cases, and prosthetic implant cases. The doctrine operates as an exception to the manufacturer's duty to warn the ultimate consumer, and shields manufacturers of prescription drugs from liability if the manufacturer adequately warns the prescribing physicians of the dangers of the drug. The reasoning behind this rule is that the doctor acts as a learned intermediary between the patient and the prescription drug manufacturer by assessing the medical risks in light of the patient's needs.

> Where a product is available only on prescription or through the services of a physician, the physician acts as a "learned intermediary" between the manufacturer or seller and the patient. It is his duty to inform himself of the qualities and characteristics of those products which he prescribes for or administers to or uses on his patients, and to exercise independent judgment, taking into account his knowledge of the patient as well as the product. The patient is expected to and, it can be presumed, does place primary reliance upon that judgment. The physician decides what facts should be told to the patient. Thus, if the product is properly labeled and carries the necessary instructions and warnings to fully apprise the physician of the proper procedures for use and the dangers involved, the manufacturer may reasonably assume that the physician will exercise the informed judgment thereby gained in conjunction with his own independent learning, in the best interest of the patient.

Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038, 1052 (1984), *cert. denied*, 469 U.S. 965, 105 S. Ct. 365, 83 L. Ed. 2d 301 (1984). The doctrine extends to prescription drugs because, unlike over the counter medications, the patient may obtain the drug only through a physician's prescription, and the use of prescription drugs is generally monitored by a physician. The learned intermediary doctrine has been held applicable to prescription nicotine gum, because there was a sufficient relationship established between doctor and patient.

Two exceptions have been recognized which operate to remove the manufacturer from behind the shield of the learned intermediary doctrine. The first involves mass immunizations. Mass immunizations fall outside the contemplated realm of the learned intermediary doctrine because there may be no physician-patient relationship, and the drug is not administered as a prescription drug. Under these conditions individualized attention may not be given by medical personnel in assessing the

needs of the patient. The only warnings the patient may receive are those from the manufacturer. Oklahoma has adopted this exception.

The second exception, which has been adopted by several jurisdictions including Oklahoma, arises when the Food and Drug Administration mandates that a warning be given directly to the consumer. By this exception several states have held that the learned intermediary doctrine itself does not protect the manufacturer. Most of the cases adopting this exception have dealt with contraceptives and the FDA's extensive regulation of contraceptive drugs and devices. However, courts have not limited the exception to this arena alone. . . .

The question then becomes whether the manufacturer has fulfilled its legal obligation once the warnings are approved by the FDA and transmitted to the user. Basel contends that because it complied with FDA requirements it had no further duty to warn Mr. Edwards. Jurisdictions split on their answer to this question. In MacDonald [v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 N.E.2d 65 (1985)], the court held that compliance with FDA regulation did not reinstate the learned intermediary doctrine so as to absolve the manufacturer's liability for inadequate warnings. . . .

It has long been the concern of this state to protect the health and safety of its citizens. The Supreme Court has recognized that state concern is warranted and permitted. It is the widely held view that the FDA sets minimum standards for drug manufacturers as to design and warnings. We conclude that compliance with these minimum standards does not necessarily complete the manufacturer's duty. The common law duty to warn is controlled by state law. . . .

It may be that in certain instances compliance with FDA warning procedures will satisfy all state law requirements. But although compliance with FDA standards may prove an effective starting ground, it is not necessarily conclusive. The adequacy of warnings is determined by state law. Our result could improve the safety of prescription drugs by requiring that both standards are met.

In the present case it appears the manufacturer clearly had knowledge of the dangers associated with the Habitrol patch; it furnished detailed warnings to the prescribing physicians. However, as to the warnings the late Mr. Edwards received in his Habitrol insert, state products liability law must be applied to determine their adequacy.

We hold that when the FDA requires warnings be given directly to the patient with a prescribed drug, an exception to the "learned intermediary doctrine" has occurred, and the manufacturer is not automatically shielded from liability by properly warning the prescribing physician. When this happens the manufacturer's duty to warn the consumer is not necessarily satisfied by compliance with FDA minimum warning requirements. The required warnings must not be misleading, and must be adequate to explain to the user the possible dangers associated with the product. Whether that duty has been satisfied is governed by the common law of the state, not the regulations of the FDA, and necessarily implicates a fact-finding process, something beyond our assignment in response to this certified question.

NOTES TO EDWARDS v. BASEL PHARMACEUTICALS

1. ***Required Recipients of Warnings.*** The *Basel Pharmaceuticals* decision considers two responses to the plaintiff's claim that the drug company failed to warn users about the fatal risk associated with smoking and overuse of the Habitrol patch. First,

the drug company had warned doctors and that is sufficient. Second, the FDA approved the warning given to the consumers in the package insert, so it does not matter that warning of that fatal risk was not included. How does the court treat each response? How are the responses related?

2. ***Problem: Generalizing the Learned Intermediary Doctrine.*** Mr. Younger was employed by the Beech Aircraft Corporation in its shop as a jig builder. Part of his job was to spray a compound known as "Dow Corning R-671 Resin" onto jig parts. This product prevents organic materials from adhering to the jig patterns. He was injured by this product, which he claimed contained irritants that were dangerous to his health. The defendant, Dow Corning Corporation, admitted that its product is potentially hazardous to the health of people who inhale it for long periods of time when using it for industrial purposes without adequate ventilation. Mr. Younger was exposed to the vapors for over two years. Beech Aircraft Corporation admitted that it was aware of the potential health hazards of Dow Corning R-671 because it had been warned by adequate warning labels on the product. While Beech Aircraft received adequate warnings, no warnings were given to Mr. Younger. The "learned intermediary" defense was developed with reference to physicians as intermediaries between drug companies and patients. If the learned intermediary defense does not apply to chemical manufacturers, will Dow Corning be liable to Mr. Younger for failing to warn him directly? See Younger v. Dow Corning Corp., 451 P.2d 177 (Kan. 1969).

G. Plaintiff's Carelessness or Misuse of Product

When Restatement (Second) articulated what became a national trend towards adoption of strict liability for products cases, contributory negligence was still the typical system used to account for a plaintiff's own contribution to an injury. It completely barred recovery. Restatement §402A and its associated comments took the position that contributory negligence would *not* bar recovery in a strict liability products case. Nevertheless, §402A also stated that assumption of the risk would continue to operate as a complete bar to recovery and that there could be no recovery if an injury was caused by "abnormal" use of a product.

The limitations §402A placed on a defendant's ability to avoid liability because of a plaintiff's conduct were understandable, given the general motivating force behind adoption of strict liability—a belief that the legal system should be adjusted to allow plaintiffs to recover damages in most product-related injury cases. The development of comparative negligence has led almost all states to reconsider the effect of plaintiff's conduct in strict products liability cases. Smith v. Ingersoll-Rand illustrates the history of these developments in a state that treats a plaintiff's conduct as a type of fault to be balanced in a comparative negligence fashion. *Smith* also illustrates the interplay between common law and statutory enactments. Daniell v. Ford Motor Co. takes a slightly different approach to types of plaintiff conduct that can be characterized as misuse, ignoring an obvious danger, and assumption of risk.

Early in the history of strict products liability, courts focused on whether the product in question was used for its intended purpose. This issue is currently considered under the label "misuse" of a product. Manufacturers formulate "misuse" arguments in a variety of ways. Daniell v. Ford Motor Company is one example.

In Trull v. Volkswagen of America, Inc., the manufacturer argues that it should not be strictly liable because colliding with an automobile is not an intended use. In Hernandez v. Tokai Corp., the manufacturer argues that it should not be strictly liable for the design of its cigarette lighter because the user, a child, was not an intended user. Both of these cases focus attention on how the law evaluates misuses when considering the defectiveness of a design.

SMITH v. INGERSOLL-RAND CO.

14 P.3d 990 (Alaska 2000)

MATTHEWS, C.J.

Dan Smith suffered permanent injuries after an air compressor door fell on his head. He brought a strict products liability lawsuit in federal district court against Ingersoll-Rand Company, the manufacturer of the air compressor. Following three jury trials and a remand from the Ninth Circuit, the United States District Court for the District of Alaska, SINGLETON, J., certified the following [question] to this court:

> Did the 1986 Tort Reform Act change the existing law on comparative fault in products liability cases such that a plaintiff's failure to exercise ordinary care is now sufficient to raise a jury question on comparative fault?

Because the 1986 Tort Reform Act modified the definition of comparative fault in strict liability cases to include ordinary negligence, we answer the . . . question in the affirmative. On August 12, 1987, Dan Smith was injured at Prudhoe Bay while attempting to start the diesel engine of an Ingersoll-Rand portable air compressor. Smith, a light duty mechanic, was not wearing a hard hat when he was dispatched by his supervisor to start the air compressor's engine.

The air compressor was an older model that required the mechanic to open its door in order to start the engine. There was no latch on the door to hold it open. Instead, the mechanic had to prop the door open in one of three ways: (1) the fully-open position; (2) the up-and-folded position; or (3) the wedged position. The first two positions safely hold the door in place; the third position is unsafe.

The exact details of Smith's accident are unknown. Smith does not remember how he propped the door open. All that he remembers is that he opened the door, started the engine, and the "next thing [he] knew, [he] was picking the door[] up off the top of [his] head." Somehow — whether from wind, vibration, or improper placement — the door had fallen from its open position and hit Smith's head. Initially, despite some blood and swelling, Smith did not think that he was seriously injured.

However, eleven days after the accident, Smith suffered a generalized motor seizure. He had no history of seizures in his adult life. On the medevac plane out of Prudhoe Bay, he suffered another seizure. He was later diagnosed with traumatic epilepsy, presumably caused by the compressor door hitting his head.

Since the accident, Smith has continued to suffer from repeated seizures, fatigue, difficulty concentrating, lapses in memory, and other related medical problems. He lost his job because of these medical problems and remains unemployed.

In 1975 this court judicially adopted the doctrine of comparative negligence for fault-based tort actions and abolished the older, harsher doctrine of contributory negligence, which completely barred a plaintiff's recovery if he was to some degree

at fault for his injuries. Under the "pure" system of comparative fault adopted by the court, a plaintiff would still be able to recover if he was comparatively at fault for his injuries, but his recovery would be reduced in proportion to his percentage of fault.

Less than a year later, in Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976), we held that comparative negligence principles also apply to products liability actions based on strict liability. But we held that comparative negligence in strict products liability cases was limited to two specific situations: (1) when the plaintiff knows that the product is defective and unreasonably and voluntarily proceeds to use it; and (2) when the plaintiff misuses the product and the misuse is a proximate cause of the injuries.

In 1986 the Alaska Legislature passed the Tort Reform Act. Modeled after the Uniform Comparative Fault Act, the Tort Reform Act was intended "to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." The legislature hoped to reduce the costs of the tort system while still ensuring "that adequate and appropriate compensation for persons injured through the fault of others" remained available.

As part of the Act, the legislature enacted a rule of comparative fault similar to the doctrine of comparative negligence which this court had adopted a decade earlier:

> In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery. [Alaska Stat. §09.17.060.]

The Act defined "fault" as acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of product for which the defendant otherwise would be liable, and unreasonable failure to avoid injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The question before us is whether these two provisions modified the existing case law on comparative negligence in products liability cases. We conclude that they did.

The Act clearly applies to strict products liability cases. The Act applies to tort actions "based on fault." Fault is defined to include, counter-intuitively, "acts or omissions . . . that subject a person to strict liability." Products liability cases in Alaska are typically based on a strict liability theory. Thus the Act applies to strict products liability actions.

The Act's definition of comparative fault is broader than the comparative fault recognized in pre-1986 strict products liability cases. Our pre-1986 products liability cases limit comparative fault to instances of product misuse and unreasonable assumption of risk. But, in addition to "misuse of product" and "unreasonable assumption" of risk, the Act also defines "fault" as including "acts or omissions that are in any measure negligent [or] reckless. . . . " Thus, the Act modifies the pre-1986 products liability case law by expanding the type of conduct that will trigger a proportional reduction of damages to include ordinary negligence — "acts or omissions that are in any measure negligent."

The Act's modification of comparative negligence in strict products liability cases reflects a general trend occurring across the nation.[36] The recently published Third Restatement of Torts, Products Liability, observes that a "strong majority" of courts now apply comparative negligence principles in strict products liability cases. Moreover, most of these courts do not limit comparative negligence to instances of product misuse or unreasonable and voluntary assumption of risk. Instead, they allow a plaintiff's ordinary negligence to constitute comparative fault.

In addition, legislatures in other states have enacted tort reform statutes similar to the one here, incorporating a universal definition of "contributory fault" for all tort cases, including strict products liability cases. Courts in other jurisdictions have generally interpreted these statutes as incorporating an ordinary negligence framework into the comparative fault analysis in strict liability cases.

We conclude that the [1986 Tort Reform] Act changed the law. Prior to the Act, comparative negligence in products liability cases was limited to product misuse and unreasonable assumption of risk. The Act expands that definition to include other types of comparative fault, including a plaintiff's ordinary negligence.

We therefore answer the . . . certified question in the affirmative.

NOTES TO SMITH v. INGERSOLL-RAND CO.

1. ***Evolving Treatment of Plaintiffs' Fault.*** Alaska's treatment of a plaintiff's blameworthy conduct in products liability cases developed according to a pattern that has been seen in many states. Strict liability for products cases was introduced at a time when contributory negligence typically barred a plaintiff's tort recovery. As part of the pro-plaintiff orientation of the strict liability action, the contributory negligence defense was withdrawn, except in circumstances involving unreasonable assumption of risk or product misuse. When the contributory negligence doctrine was replaced throughout the state's tort law with comparative negligence, a plaintiff's ordinary negligence continued to be ignored in strict liability products cases, but comparative treatment was applied to assumption of risk and misuse. Finally, a statute applied comparative principles to all kinds of fault by plaintiffs in strict liability cases.

2. ***Problem: Causal Effect of Plaintiff's Conduct.*** A grinding wheel shattered because of a manufacturing defect while the plaintiff was using it. Instructions provided with the wheel stated that the user should wear protective clothing, including safety goggles, when using the tool and that the user should operate the tool only while standing in front of it, never to the side. The plaintiff disregarded all of these instructions. Bearing in mind that legal requirements of causal relation apply to fault when it is a basis for liability and when it is a basis for a finding of a plaintiff's comparative fault, what defenses are available to the manufacturer under the rules described in Smith v. Ingersoll-Rand Co.? See Jimenez v. Sears, Roebuck and Co., 183 Ariz. 399, 904 P.2d 861 (1994).

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[36] See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380 (Cal. 1978) (noting that more than 30 states have extended comparative negligence principles to strict products liability). Most legal commentators view this trend with favor. See, e.g., William Keeton, et al., Prosser and Keeton on the Law of Torts §102, at 712 (5th ed. 1984) (declaring the comparative fault system to be the fairest way to allocate costs of accidents in products liability cases).

DANIELL v. FORD MOTOR CO.

581 F. Supp. 728 (D.N.M. 1984)

BALDOCK, D.J. . . .

In 1980, the plaintiff became locked inside the trunk of a 1973 Ford LTD automobile, where she remained for some nine days. Plaintiff now seeks to recover for psychological and physical injuries arising from that occurrence. She contends that the automobile had a design defect in that the trunk lock or latch did not have an internal release or opening mechanism. She also maintains that the manufacturer is liable based on a failure to warn of this condition. Plaintiff advances several theories for recovery: (1) strict products liability under §402A of the Restatement 2d of Torts (1965), (2) negligence, and (3) breach of express warranty and implied warranties of merchantability and fitness for a particular purpose.

Three uncontroverted facts bar recovery under any of these theories. First, the plaintiff ended up in the trunk compartment of the automobile because she felt "overburdened" and was attempting to commit suicide. Second, the purposes of an automobile trunk are to transport, stow and secure the automobile spare tire, luggage and other goods and to protect those items from elements of the weather. Third, the plaintiff never considered the possibility of exit from the inside of the trunk when the automobile was purchased. Plaintiff has not set forth evidence indicating that these facts are controverted.

The overriding factor barring plaintiff's recovery is that she intentionally sought to end her life by crawling into an automobile trunk from which she could not escape. This is not a case where a person inadvertently became trapped inside an automobile trunk. The plaintiff was aware of the natural and probable consequences of her perilous conduct. Not only that, the plaintiff, at least initially, sought those dreadful consequences. Plaintiff, not the manufacturer of the vehicle, is responsible for this unfortunate occurrence.

Recovery under strict products liability and negligence will be discussed first because the concept of duty owed by the manufacturer to the consumer or user is the same under both theories in this case. As a general principle, a design defect is actionable only where the condition of the product is unreasonably dangerous to the user or consumer. Under strict products liability or negligence, a manufacturer has a duty to consider only those risks of injury which are foreseeable. A risk is not foreseeable by a manufacturer where a product is used in a manner which could not reasonably be anticipated by the manufacturer and that use is the cause of the plaintiff's injury. The plaintiff's injury would not be foreseeable by the manufacturer.

The purposes of an automobile trunk are to transport, stow and secure the automobile spare tire, luggage and other goods and to protect those items from elements of the weather. The design features of an automobile trunk make it well near impossible that an adult intentionally would enter the trunk and close the lid. The dimensions of a trunk, the height of its sill and its load floor and the efforts to first lower the trunk lid and then to engage its latch, are among the design features which encourage closing and latching the trunk lid while standing outside the vehicle. The court holds that the plaintiff's use of the trunk compartment as a means to attempt suicide was an unforeseeable use as a matter of law. Therefore, the manufacturer had no duty to design an internal release or opening mechanism that might have prevented this occurrence.

Nor did the manufacturer have a duty to warn the plaintiff of the danger of her conduct, given the plaintiff's unforeseeable use of the product. Another reason why the manufacturer had no duty to warn the plaintiff of the risk inherent in crawling into an automobile trunk and closing the trunk lid is because such a risk is obvious. There is no duty to warn of known dangers in strict products liability or tort. Moreover, the potential efficacy of any warning, given the plaintiff's use of the automobile trunk compartment for a deliberate suicide attempt, is questionable.

The court notes that the automobile trunk was not defective under these circumstances. The automobile trunk was not unreasonably dangerous within the contemplation of the ordinary consumer or user of such a trunk when used in the ordinary ways and for the ordinary purposes for which such a trunk is used.

Having held that the plaintiff's conception of the manufacturer's duty is in error, the court need not reach the issues of the effect of comparative negligence or other defenses such as assumption of the risk on the products liability claim. See Scott v. Rizzo, 96 N.M. 682 at 688-89, 634 P.2d 1234 at 1240-41 (1981) (In adopting comparative negligence, the New Mexico Supreme Court indicated that in strict products liability a plaintiff's "misconduct" would be a defense, but not a complete bar to recovery). The court also does not reach the comparative negligence defense on the negligence claim.

Having considered the products liability and negligence claims, plaintiff's contract claims for breach of warranty are now analyzed. Plaintiff has come forward with no evidence of any express warranty regarding exit from the inside of the trunk. In accordance with Rule 56(e) of the Federal Rules of Civil Procedure and Local Rule 9(j) (D.N.M. October 25, 1983, as amended), summary judgment on the express warranty claim is appropriate.

Any implied warranty of merchantability in this case requires that the product must be fit for the ordinary purposes for which such goods are used. The implied warranty of merchantability does not require that the buyer must prove reliance on the skill and judgment of the manufacturer. Still, the usual and ordinary purpose of an automobile trunk is to transport and store goods, including the automobile's spare tire. Plaintiff's use of the trunk was highly extraordinary, and there is no evidence that that trunk was not fit for the ordinary purpose for which it was intended.

Lastly, plaintiff's claim for a breach of implied warranty of fitness for a particular purpose cannot withstand summary judgment because the plaintiff has admitted that, at the time she purchased the automobile neither she nor her husband gave any particular thought to the trunk mechanism. Plaintiff has admitted that she did not even think about getting out from inside of the trunk when purchasing the vehicle. Plaintiff did not rely on the seller's skill or judgment to select or furnish an automobile suitable for the unfortunate purpose for which the plaintiff used it.

Wherefore, it is ordered that defendant's Motion for Summary Judgment is granted.

NOTE TO DANIELL v. FORD MOTOR CO.

Plaintiff's Conduct Outside of Comparative Fault Analysis. Some states that have substituted comparative for contributory negligence and apply comparative negligence principles to strict products liability do not treat all types of plaintiffs' conduct as "fault," to be balanced as "comparative fault." Daniell v. Ford Motor Co. illustrates

alternative ways of analyzing (a) the plaintiff's *unforeseeable* misuse of a product, (b) the plaintiff's ignoring of an open and obvious danger, (c) the plaintiff's use of a product for a purpose other than that for which it was intended, and (d) the plaintiff's assumption of known risks. If the court finds that the defendant owed no duty to the plaintiff to prevent the harm that occurred or finds that the product was not defective or finds that the defendant's design was not causally related to the harm the plaintiff suffered, the question of comparative fault never arises. The defendant needs no defense because the plaintiff has failed to present a prima facie case. How would the *Daniell* case have been decided under the rule described in Smith v. Ingersoll-Rand Co.?

Perspective: Best Risk-Avoiders

One basis for imposing strict liability in some types of cases is that in those cases we can be confident that a particular class of defendants are generally in the best position to evaluate risks and take justifiable precautions. Owners of wild animals, people engaged in blasting with dynamite and other abnormally dangerous activities, and manufacturers of products generally fit this description. There are, however, cases in which that confidence is misplaced. When a consumer using a product knows of a defect, for instance, but knowingly and voluntarily uses the product because he or she is in an especially good position to avoid the associated risk, the consumer may be the best risk-avoider. Also, where the risk associated with a product only results from an unforeseeable misuse, the manufacturer may not be in a good position to avoid the risk. Each of the defenses discussed in these cases may be evaluated from the perspective of whether the party in the best position to avoid the risk has an incentive, created by the imposition of liability or denial of recovery, to minimize the risk. We might ask, for instance, whether, with respect to products, misuse cases or assumption of risk cases are systematically different in this way from ordinary negligence cases.

TRULL v. VOLKSWAGEN OF AMERICA, INC.

761 A.2d 477 (N.H. 2000)

NADEAU, J. . . .

In February 1991, the plaintiffs, David and Elizabeth Trull, and their two sons, Nathaniel and Benjamin, were traveling in New Hampshire when their Volkswagen Vanagon slid on black ice and collided with an oncoming car. Both parties agree that Nathaniel and Benjamin were seated in the rear middle bench seat of the Vanagon, which was equipped with lap-only seatbelts, and were wearing the available lap belts. Benjamin died in the accident, and both Elizabeth and Nathaniel suffered severe brain injuries.

In this diversity products liability action, the plaintiffs sought damages from the defendants "on the ground that defects in the design of the Vanagon made their

injuries more severe than they otherwise would have been." "Plaintiffs had two primary theories of recovery: (1) the Vanagon was defective because it was a forward control vehicle constructed in such a way that it lacked sufficient protection against a frontal impact, and (2) the Vanagon was defective because the rear bench seats, on which Nathaniel and Benjamin were seated, did not have shoulder safety belts as well as lap belts." The plaintiffs contend that the defendants are liable in, inter alia, negligence and strict liability because the automobile was not crashworthy.

[The trial court entered judgment on a jury verdict for the defendant.] The plaintiffs appealed to the United States Court of Appeals for the First Circuit, arguing, among other things, that the district court "improperly imposed on plaintiffs the burden of proving the nature and extent of the enhanced injuries attributable to the Vanagon's design." Recognizing that the question "of who, under New Hampshire law, should bear the burden in a so-called 'crashworthiness' case, poses sophisticated questions of burden allocation involving not only a choice of appropriate precedent but also an important policy choice," the court of appeals granted the plaintiffs' motion to certify the question to this court.

The plaintiffs' theory of liability for defective design is commonly referred to as the "crashworthiness," "second collision," or "enhanced injury" doctrine. See Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 243 n.2 (2d Cir. 1981) (defining "crashworthiness" as "the protection that a passenger motor vehicle affords its passengers against personal injury or death as a result of a motor vehicle accident"); Larsen v. General Motors Corporation, 391 F.2d 495, 502 (8th Cir. 1968) (defining "second collision" as that occurring between the passenger and the interior of the vehicle).

The crashworthiness doctrine "extends the scope of liability of a manufacturer to the situations in which the construction or design of its product has caused separate or enhanced injuries in the course of an initial accident brought about by an independent cause." . . .

Two divergent approaches have been developed to analyze whether a manufacturer may be held liable for enhanced injuries arising from a defective design. The first concludes that a product's intended purpose does not include its involvement in collisions with other objects, and thus refuses to hold a manufacturer liable for enhanced injuries due to defective design resulting from such collision. See, e.g., Evans v. General Motors Corporation, 359 F.2d 822, 825 (7th Cir.), *cert. denied*, 385 U.S. 836, 87 S. Ct. 83, 17 L. Ed. 2d 70 (1966), overruled by Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977). While the continued vitality of *Evans* is questioned, subsequent decisions continue to recognize it as a possible approach to this issue. The second approach [adopted in *Larsen*] concludes that enhanced injuries arising from collisions are foreseeable in the normal use of automobiles and imposes liability on manufacturers for such injuries. Although *Larsen* was a negligence case, courts have applied its interpretation of "intended use" to the strict liability area.

Under New Hampshire law, the duty of a manufacturer "is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated." We do not, however, restrict this rule to the "intended" purpose of the product. "Manufacturer liability may . . . attach even if the user employs the product in an unintended but foreseeable manner." . . .

We conclude, therefore, that our case law supports the *Larsen* approach. While we do not hold that manufacturers are "insurers" for defectively designed vehicles, we do

hold that in a crashworthiness case, a "manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." . . .

When . . . plaintiffs receive injuries that are indivisible, courts are split as to whether the plaintiffs or the defendants bear the burden of segregating the injuries caused by the automobile's defect. . . .

The defendants urge us to adopt the minority approach referred to as the "Huddell-Caiazzo" approach, which places the burden on the plaintiffs to prove the nature and extent of their enhanced injuries. See Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976) (applying New Jersey law); *Caiazzo*, 647 F.2d at 250 (applying New York law).

Under the Huddell-Caiazzo approach,

> first, in establishing that the design in question was defective, the plaintiffs must offer proof of an alternative safer design, practicable under the circumstances. Second, the plaintiffs must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used. Third, the plaintiffs must offer some method of establishing the extent of enhanced injuries attributable to the defective design.

The plaintiffs, conversely, urge us to adopt the majority approach referred to as the "Fox-Mitchell" approach, derived from Fox v. Ford Motor Co., 575 F.2d 774, 786-88 (10th Cir. 1978) (applying Wyoming law), and Mitchell [v. Volkswagenwerk, AG, 669 F.2d 1199 (8th Cir. 1982)] (applying Minnesota law).

Under the Fox-Mitchell approach, the plaintiffs must "prove only that the design defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision." This approach provides that once the plaintiffs carry the burden of proving that the defective design of the car was a substantial factor in causing the enhanced injury, the burden of proof shifts to the tortfeasors to apportion the damages between them.

The principles that guide our answer to the question of which approach New Hampshire should adopt are derived from products liability law grounded in both negligence and strict liability. . . .

In crashworthiness cases involving indivisible injuries, we conclude that the plaintiffs must prove that a "design defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision. Once the plaintiffs make that showing, the burden shifts to the defendants to show which injuries were attributable to the initial collision and which to the defect."

This answer is supported by our treatment of products liability actions, where we have, based upon a "compelling reason of policy," abandoned the higher burden of proof of negligence actions in lieu of adopting the less stringent burden of proof of strict liability. Our rationale has been that the plaintiff's burden "had proven to be, and would continue to be, a practically impossible burden." Similar policy reasons compel us to allocate the burden of apportionment to the defendants once the plaintiffs prove causation. . . .

Remanded.

NOTES TO TRULL v. VOLKSWAGEN OF AMERICA, INC.

1. ***Foreseeable Non-Intended Uses.*** *Trull* shows that foreseeable misuses are treated differently from unforeseeable uses. In *Daniell*, the court found that it was not foreseeable that someone would use the trunk of a car to commit suicide. The common occurrence of traffic accidents makes it difficult to argue that collisions are unforeseeable, even if it is not intended that a car will be use for that "purpose." The majority view on crashworthiness reflects the belief that collisions are foreseeable in the normal use of cars. How does the foreseeability of the collision "use" of a car affect the court's analysis of whether there is a duty, whether the car was defectively designed, and for what injuries the design was a proximate cause of the plaintiff's injuries?

2. ***Burden Shift.*** If no one can tell what part of a vehicle occupant's injury was caused by the vehicle's defective design, why is it fair to have the defendant pay for the entire injury? Would it be worse for a plaintiff to bear some costs that he or she would not have had to bear if more information had been available than it would be for a defendant to bear some costs that it would not have had to bear if more information had been available?

HERNANDEZ v. TOKAI CORP.

2 S.W.3d 251 (Tex. 1999)

HECHT, J.

The United States Court of Appeals for the Fifth Circuit has certified to us the following question:

> Under the Texas Products Liability Act of 1993 . . . whether a disposable butane lighter, intended only for adult use, can be found to be defectively designed if it does not have a child-resistant mechanism that would have prevented or substantially reduced the risk of injury from a child's foreseeable misuse of the lighter.

The factual circumstances in which the certified question comes to us are these.

Rita Emeterio bought disposable butane lighters for use at her bar. Her daughter, Gloria Hernandez, took lighters from the bar from time to time for her personal use. Emeterio and Hernandez both knew that it was dangerous for children to play with lighters. They also knew that some lighters were made with child-resistant mechanisms, but Emeterio chose not to buy them. On April 4, 1995, Hernandez's five-year-old daughter, Daphne, took a lighter from her mother's purse on the top shelf of a closet in a bedroom in her grandparents' home and started a fire in the room that severely burned her two-year-old brother, Ruben.

Hernandez, on Ruben's behalf, sued the manufacturers and distributors of the lighter, Tokai Corporation and Scripto-Tokai Corporation (collectively, "Tokai"), in the United States District Court for the Western District of Texas, San Antonio Division. Asserting strict liability and negligence claims, Hernandez alleged that the lighter was defectively designed and unreasonably dangerous because it did not have a child-resistant safety mechanism that would have prevented or substantially reduced the likelihood that a child could have used it to start a fire. Tokai does not dispute that mechanisms for making disposable lighters child-resistant were available when the

lighter Daphne used was designed and marketed, or that such mechanisms can be incorporated into lighters at nominal cost.

Tokai moved for summary judgment on the grounds that a disposable lighter is a simple household tool intended for adult use only, and a manufacturer has no duty to incorporate child-resistant features into a lighter's design to protect unintended users — children — from obvious and inherent dangers. Tokai also noted that adequate warnings against access by children were provided with its lighters, even though that danger was obvious and commonly known. In response to Tokai's motion, Hernandez argued that, because an alternative design existed at the time the lighter at issue was manufactured and distributed that would have made the lighter safer in the hands of children, it remained for the jury to decide whether the lighter was defective under Texas' common-law risk-utility test.

The federal district court granted summary judgment for Tokai, and Hernandez appealed. . . .

[The statute] does not attempt to state all the elements of a product liability action for design defect. It does not, for example, define design defect or negate the common law requirement that such a defect render the product unreasonably dangerous. Additionally, the statute was not intended to, and does not, supplant the risk-utility analysis Texas has for years employed in determining whether a defectively designed product is unreasonably dangerous. . . .

A product's utility and risk under the common-law test must both be measured with reference to the product's intended users. A product intended for adults need not be designed to be safe for children solely because it is possible for the product to come into a child's hands. . . .

A child may hurt himself or others with a hammer, a knife, an electrical appliance, a power tool, or a ladder; he may fall into a pool, or start a car. The manufacturers and sellers of such products need not make them childproof merely because it is possible for children to cause harm with them and certain that some children will do so. The risk that adults, for whose use the products were intended, will allow children access to them, resulting in harm, must be balanced against the products' utility to their intended users. . . .

A disposable lighter without a child-resistant mechanism is safe as long as its use is restricted to adults, as its manufacturer and users intend. Tokai makes lighters with and without child-resistant devices. Adults who want to minimize the possibility that their lighter may be misused by a child may purchase the child-resistant models. Adults who prefer the other model, as Hernandez and Emeterio did, may purchase it (although we note that the federal Consumer Product Safety Commission has adopted a safety standard banning the manufacture and importation of non-child-resistant disposable lighters after July 12, 1994). Whether adult users of lighters should be deprived of this choice of product design because of the risk that some children will obtain lighters that are not child-resistant and cause harm is the proper focus of the common-law risk-utility test.

The utility of disposable lighters must be measured with reference to the intended adult users. Consumer preference — that is, that users like Hernandez and Emeterio simply prefer lighters without child-resistant features — is one consideration. Tokai also argues that adults whose dexterity is impaired, such as by age or disease, cannot operate child-resistant lighters, but Hernandez disputes this. If Tokai were shown to be

correct, then that would be an additional consideration in assessing the utility of non-child-resistant lighters.

The relevant risk includes consideration of both the likelihood that adults will allow children access to lighters and the gravity of the resulting harm. The risk is not that a child who plays with a lighter may harm himself. We assume that that risk is substantial. As Hernandez and Emeterio both acknowledged in this case, they would not allow a child to have a lighter and would discipline a child caught playing with one. Rather, the risk is that a lighter will come into a child's hands. The record before us suggests that children will almost certainly obtain access to lighters, that this will not happen often in comparison with the number of lighters sold, but that when it does happen the harm caused can be extreme. Each of these considerations is relevant in assessing the risk of non-child-resistant lighters. . . .

Tokai argues that the weight of authority in other jurisdictions is to reject disposable lighter design-defect claims as a matter of law. This is true, but there is more to it. Courts in jurisdictions that employ a consumer-expectation test for determining defect have mostly held that disposable lighters without childproof features are not defectively designed because they function in the manner expected by the intended adult consumers. But courts in jurisdictions employing a risk-utility analysis have mostly concluded that the determinative considerations are usually matters for the jury. Courts in risk-utility jurisdictions that have rejected disposable lighter design-defect claims as a matter of law have reasoned that the test for liability should apply differently to "simple tools" like disposable lighters.

In sum: a claimant can maintain a defective-design claim in the circumstances posited by the certified question if, but only if, with reference to the product's intended users, the design defect makes the product unreasonably dangerous, a "safer alternative design" as defined by statute is available, and the defect is the producing cause of the injury.

NOTES TO HERNANDEZ v. TOKAI CORP.

1. ***Unintended User.*** *Hernandez* involves an unintended but foreseeable product *user* (unlike the unintended but foreseeable *use* in *Trull*). *Hernandez* further illustrates the close connection between the user's conduct and the analysis of whether the product is defectively designed. How is the use of a butane lighter that is safe for adults but dangerous for children analyzed under the risk-utility test or the consumer expectation test?

2. ***Problem: Breakable Bottles.*** An eight-year-old child was playing with friends near his home when he found a bottle of Miller High Life beer that someone had discarded. According to the child, the bottle "came in contact with a telephone pole" while he was playing with it. The child later indicated that he had thrown the bottle against the pole. Following the impact of the glass container with the telephone pole the bottle shattered, and particles of glass entered the plaintiff's eye, causing severe injury. The plaintiff's basic premise is that Miller and the bottle manufacturers should have been aware of the dangers inherent in their bottles and should have accordingly designed and marketed a product better able to safely withstand such foreseeable misuse as breakage in the course of improper handling by children. Would the crashworthiness doctrine apply to this case in determining whether the design was defective?

How would the *Trull* court's approach to the causation question apply in this case? See Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980).

H. Compliance with Statutes and Regulations

A defendant's compliance with a federal statute or regulation is sometimes a complete defense to a state-based tort action. The *preemption doctrine* prohibits state claims that are expressly prohibited in federal legislation or that are impliedly prohibited. In situations where a federal statute does not have preemptive effect, states are entitled to treat proof of compliance as either a full defense or as evidence that is relevant but not conclusive regarding the issue of defectiveness.

Freightliner Corp. v. Myrick offers a brief introduction to preemption issues. Cases involving preemption issues may focus on interpretation of a statute's specific language about preemption or on a broader question about the possible incompatibility between the federal statutory scheme and state-based remedies.

A number of states have enacted statutes specifying how proof of compliance with a statute should be treated in products liability cases. Examples of statutes from Arkansas, Florida, and Tennessee are provided. They differ in terms of the weight they give to particular types of proof of compliance and the detail with which they specify the circumstances where such proof shall be permitted.

FREIGHTLINER CORP. v. MYRICK

514 U.S. 280 (1995)

JUSTICE THOMAS delivered the opinion of the Court.

By statute, the Secretary of Transportation has the authority to issue appropriate safety standards for motor vehicles and their equipment. Respondents filed lawsuits under state common law alleging negligent design defects in equipment manufactured by petitioners. Petitioners claim that these actions are pre-empted by a federal safety standard, even though the standard was suspended by a federal court. We hold that the absence of a federal standard cannot implicitly extinguish state common law.

This case arises from two separate but essentially identical accidents in Georgia involving tractor-trailers. In both cases, 18-wheel tractor-trailers attempted to brake suddenly and ended up jackknifing into oncoming traffic. Neither vehicle was equipped with an antilock braking system (ABS).[37] In the first case, respondent Ben Myrick was the driver of an oncoming vehicle that was hit by a tractor-trailer manufactured by petitioner Freightliner. The accident left him permanently paraplegic and brain damaged. In the second case, the driver of an oncoming car, Grace Lindsey,

[37] ABS "helps prevent loss of control situations by automatically controlling the amount of braking pressure applied to a wheel. With these systems, the Electronic Control Unit (ECU) monitors wheel-speeds, and changes in wheel-speeds, based on electric signals transmitted from sensors located at the wheels or within the axle housings. If the wheels start to lock, the ECU signals a modulator control valve to actuate, thereby reducing the amount of braking pressure applied to the wheel that is being monitored." 57 Fed. Reg. 24213 (1992).

was killed when her vehicle collided with a tractor-trailer manufactured by petitioner Navistar.

Respondents independently sued the manufacturers of the tractor-trailers under state tort law. They alleged that the absence of ABS was a negligent design that rendered the vehicles defective. Petitioners removed the actions to the District Court for the Northern District of Georgia on the basis of diversity of citizenship. They then sought summary judgment on the ground that respondents' claims were pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act) and its implementing regulations. In respondent Myrick's case, the District Court held that the claims were pre-empted by federal law and granted summary judgment for petitioner Freightliner. . . . Following the opinion in the *Myrick* case, the District Court granted summary judgment in the *Lindsey* action in favor of petitioner Navistar.

The Court of Appeals for the Eleventh Circuit consolidated the cases and reversed. . . . We granted certiorari. We now affirm.

In 1966, Congress enacted the Safety Act "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. §1381. The Act requires the Secretary of Transportation to establish "appropriate Federal motor vehicle safety standards." The Act defines a safety standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria."

The Safety Act's express pre-emption clause provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

§1392(d). The Act also contains a savings clause, which states:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

§1397(k).

The Secretary has delegated the authority to promulgate safety standards to the Administrator of the National Highway Traffic Safety Administration (NHTSA). In 1970, the predecessor to NHTSA issued regulations concerning vehicles equipped with air brakes, which are used in trucks and tractor-trailers. Known as Standard 121, this regulation imposed stopping distances and vehicle stability requirements for trucks. . . . Because these stopping distances were shorter than those that could be achieved with brakes without ABS, several manufacturers notified NHTSA that ABS devices would be required. Some manufacturers asked NHTSA to alter the standard itself because they believed that ABS devices were unreliable and rendered vehicles dangerously unsafe when combined with new, more effective brakes. In 1974, NHTSA responded that Standard 121 was practical and that ABS devices did not cause accidents. . . .

Several manufacturers and trade associations then sought review of Standard 121 in the Court of Appeals for the Ninth Circuit. That court remanded the case to NHTSA because "a careful review of the extensive record" indicated that "the Standard was neither reasonable nor practicable at the time it was put into effect." [Paccar, Inc. v. NHTSA, 573 F.2d 632, *cert. denied,* 439 U.S. 862 (1978).] The court found that NHTSA had failed to consider the high failure rate of ABS devices placed in actual use, id., at 642, and that "there [was] a strong probability that [ABS] has created a potentially more hazardous highway situation than existed before the Standard became operative," id., at 643. Until NHTSA compiled sufficient evidence to show that ABS would not create the possibility of greater danger, the court concluded, the Standard would remain suspended. Ibid.

After the Ninth Circuit's decision in *Paccar,* the agency amended Standard 121 so that the stopping distance and lock-up requirements no longer applied to trucks and trailers. NHTSA nevertheless left the unamended Standard 121 in the Code of Federal Regulations so that "the affected sections [could] most easily be reinstated" when the agency met *Paccar*'s requirements. NHTSA also stated that the provisions would remain in place so that manufacturers would know "what the agency still considers to be reasonable standards for minimum acceptable performance." Although NHTSA has developed new stopping distance standards, to this day it still has not taken final action to reinstate a safety standard governing the stopping distance of trucks and trailers.

Despite the fact that Standard 121 remains suspended, petitioners maintain that respondents' lawsuits are expressly pre-empted. We disagree. The Act's pre-emption clause applies only "[w]henever a Federal motor vehicle safety standard . . . is in effect" with respect to "the same aspect of performance" regulated by a state standard. 15 U.S.C. §1392(d). There is no express federal standard addressing stopping distances or vehicle stability for trucks or trailers. No NHTSA regulation currently establishes a "minimum standard for . . . motor vehicle equipment performance," §1391(2), nor is any standard "stated in objective terms," §1392(a). There is simply no minimum, objective standard stated at all. Therefore, States remain free to "establish, or to continue in effect," their own safety standards concerning those "aspect[s] of performance." §1392(d).

Petitioners insist, however, that the absence of regulation itself constitutes regulation. Relying upon our opinion in Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), petitioners assert that the failure of federal officials "affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." Id., at 178. Unlike this case, however, we found in *Ray* that Congress intended to centralize all authority over the regulated area in one decision-maker: the Federal Government. . . . Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by 15 U.S.C. §1392(a) should be the absence of all standards, both federal and state.[3] Rather, the lack of a federal standard stemmed from the decision of a

[3] Because no federal safety standard exists, we need not reach respondents' argument that the term "standard" in 15 U.S.C. §1392(d) pre-empts only state statutes and regulations, but not common law. We also need not address respondents' claim that the savings clause, §1397(k), does not permit a manufacturer to use a federal safety standard to immunize itself from state common-law liability.

federal court that the agency had not compiled sufficient evidence to justify its regulations.

Even if §1392(d) does not expressly extinguish state tort law, petitioners argue that respondents' lawsuits are pre-empted by implication because the state-law principle they seek to vindicate would conflict with federal law. We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . .

Petitioners' pre-emption argument is ultimately futile . . . because respondents' common-law actions do not conflict with federal law. First, it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 imposes no requirements either requiring or prohibiting ABS systems, tractor-trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability.

Second, we cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist.

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

NOTES TO FREIGHTLINER CORP. v. MYRICK

1. ***Effect of Preemption.*** When state law is preempted by federal law, state statutes, regulations, and court rulings may not be inconsistent with federal law. If a preemptive federal law (or regulation) requires that trucks weighing between six and ten tons must have six wheels, a state statute may not allow only four or five wheels. Nor may a state court rule that a truck with six wheels is defective because it should have seven or eight wheels. Careful statutory analysis indicates the extent of the preemption for each federal statute or regulation. In *Freightliner*, the Safety Act prohibited state standards that were different from the federal standards. This prohibition includes state court rulings holding that motor vehicles complying with federal standards are nevertheless defective because that would effectively set a higher state standard.

2. ***Effect of Suspended Regulations.*** In *Freightliner*, the federal standard that would have preempted a conflicting state standard had been suspended. The manufacturer still wanted to take advantage of the fact that there had been a standard because that would prevent plaintiffs' lawsuits. The manufacturer argued that state standards were expressly, or, if not, impliedly preempted. How did the manufacturer make these arguments and how did the court respond?

Perspective: Uniformity Versus Variety and Innovation

Preemptive federal regulations impose uniform national standards with which manufacturers must comply. Whether federal regulation yields better standards than state regulations or court decisions is debatable. A benefit to applying federal standards to design defect litigation might be that the standards are likely to have been developed with some degree of impartiality and to have been developed by experts. Whether federal regulatory standards lead to better safety rules depends on how the quality of regulatory decision making compares to the quality of decision making in trials. The amount of data available and the expertise of the decision maker may be relevant factors in deciding this question. A shortcoming of applying federal standards to design defect litigation might be that they are static. While knowledge of both risks and safety precautions may grow, regulations may lag behind and be slow to respond to new information. These considerations may help the U.S. Congress decide the appropriate extent of preemption for a particular type of federal regulation.

Statute: COMPLIANCE AS EVIDENCE

Ark. Code Ann. §16-116-105 (2002)

(a) Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards of design, inspection, testing, manufacture, labeling, warning, or instructions for use of a product shall be considered as evidence that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

Statute: GOVERNMENT RULES DEFENSE

Fla. Stat. Ann. §768.1256 (2000)

(1) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm:

(a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury;

(b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and

(c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.

(2) In a product liability action as described in subsection (1), there is a rebuttable presumption that the product is defective or unreasonably dangerous and the

manufacturer or seller is liable if the manufacturer or seller did not comply with the federal or state codes, statutes, rules, regulations, or standards which:

(a) Were relevant to the event causing the death or injury;

(b) Are designed to prevent the type of harm that allegedly occurred; and

(c) Require compliance as a condition for selling or distributing the product.

Statute: PRESUMPTION FOR COMPLIANCE

Tenn. Code Ann. §29-28-104 (2002)

§29-28-104 Compliance with Government Standards—Rebuttable Presumption

Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

NOTE TO STATUTES

A manufacturer's compliance with a statute does not necessarily mean that the product was not defective. These statutes specify the evidentiary weight to be given to a defendant's claim that it complied with a statute or regulation. The Florida statute is more detailed than the other two examples with regard to the type of enactments to which it applies. How might that difference affect the operation of the Florida statute compared with the operation of the others?

CHAPTER 15

TRESPASS AND NUISANCE

I. Trespass

A. Trespass to Land

The intentional tort of trespass protects people's interest in the "exclusive possession" of their land. The interest in exclusive possession is analogous to the interests in bodily integrity protected by the tort of battery and in freedom from apprehension of imminent harmful or offensive contact protected by the tort of assault.

A typical trespass-to-land case involves a defendant who, without permission, walks onto another's land. The conduct leading to the entry must be voluntary, because the *act requirement* applies to the tort of trespass, as it does to all torts. An early English case established that if a person is thrown against his will onto another's land by thugs, the thugs are the trespassers, not the person. See Smith v. Stone, 82 Eng. Rep. 533 (1647). In addition to the conduct being voluntary, the actor must intend that the act lead to an entry. A trespass may result if an actor acts intending to personally enter the land of another or to cause an object to enter or remain on the land without permission. The act is the behavior, the conduct. *Intent* is the mental state that accompanies the act — the desire or substantial certainty that an entry will result from the act.

Thomas v. Harrah's Vicksburg Corp. explores the meaning of "intent" in the trespass context. The defendant argued that trespassing on the plaintiff's land was necessary to construct a casino. The court considered the evidence of intent, the defendant's argument that they took precautions to avoid entry, and whether there was actually an unpermitted entry.

In addition to its inclusion of the act and intent requirements, the tort of trespass is similar to other intentional torts in two other ways. First, the trespass plaintiff does not need to prove actual or compensatory damages. The plaintiff may be awarded *nominal damages*, which signify that the defendant interfered with the plaintiff's rights even if the defendant caused no harm. Second, the trespass defendant may be liable for harms he or she could not have foreseen. Barker v. Shymkiv considers whether a trespasser may be liable for the death of the landowner resulting from their secretive nocturnal efforts to build a trench on the landowner's property.

THOMAS v. HARRAH'S VICKSBURG CORP.

734 So. 2d 312 (Miss. Ct. App. 1999)

PAYNE, J. . . .

This litigation stems from the development of Harrah's gambling facility in Vicksburg, Mississippi, beginning over five years ago and acts of trespass admittedly committed by Harrah's and Yates[, the contractor building the facility,] for an approximate six month period beginning in July 1993 and continuing through December 1993. The property in question is a vacant lot adjoining Surplus, which is a closely held corporation wholly owned by Thomas. [Harrah's offered evidence to establish that they took reasonable precautions to avoid entering the Thomas/Surplus land while building their facility but that the close proximity of the building and wall to the adjacent land made trespass inevitable. Following a judgment for the plaintiffs, Harrah's argued on appeal that a negligence standard should apply in this trespass case. Thomas/Surplus argued that proof of negligence is not necessary in a trespass case.]

We think it instructive to briefly look at the historical basis for the trespass to land action. Professors Prosser and Keeton note that "[h]istorically, the requirements for trespass to land under the common law action of trespass were an invasion (a) which interfered with the right of exclusive possession of the land, and (b) which was the direct result of some act committed by the defendant." W. Page Keeton et al., Prosser and Keeton on Torts, §13 at 67 (5th ed. 1984). Further, the tort of trespass to land can be committed by other than simply entering on the land; trespass occurs by placing objects on the property, by causing a third party to go onto the property, or by remaining on property after the expiration of a right of entry. Keeton §13 at 72-73.

With regard to the requisite intent for trespass to land, the Restatement (Second) of Torts §163 comment (b) addresses this issue:

> *b. Intention.* If the actor intends to be upon the particular piece of land, it is not necessary that he intend to invade the other's interest in the exclusive possession of his land. The intention which is required to make the actor liable under the rule stated in this Section is *an intention to enter upon the particular piece of land in question,* irrespective of whether the actor knows or should know that he is not entitled to enter. It is, therefore, immaterial whether or not he honestly and reasonably believes that the land is his own, or that he has the consent of the possessor or of a third person having power to give consent on his behalf, or that he has a mistaken belief that he has some other privilege to enter. [Emphasis added.]

Thus, as Professors Prosser and Keeton point out, "the intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass occurred." Keeton §13 at 73. . . .

The Thomas and Surplus position is correct in asserting that negligence is not necessary for common law trespass liability. Furthermore, while there is an intent requirement, it is very broad in definition as demonstrated in the Restatement (Second) §163 above. Common law trespass is an intrusion upon the land of another without a license or other right for one's own purpose. The testimony establishes that is exactly the case here.

Two key witnesses, Charles Wells, Harrah's construction manager for this project, and Jim Smith, the construction superintendent for Yates, admitted that there were

trespasses that occurred on Thomas' property. First, Wells testified that he worked on the project from July 1993 until July 1994, and that he understood that there was a continuing dispute with Thomas over the property lines. Further, Wells admitted that he, as well as Yates, were involved in the decision to move the north wall because it encroached on Thomas' property. The plans for the facility, according to Wells, called for the building to extend "right up to the property line. . . ." Questioning by appellants' counsel also established that the trespass was inevitable:

> By Mr. Lotterhos [counsel for appellants]: Now, as a practical matter, if you were going to construct that [building] absolutely on the property line, it would have been necessary to get on the adjacent property to work on the exterior. Isn't that true?
>
> By Mr. Wells: On that ten foot face, yes, sir.
>
> By Mr. Lotterhos: Alright and that happened, didn't it?
>
> By Mr. Wells: Yes, sir.

Wells later testified that Harrah's Vice-President of Design and Construction, Pat Monson, approved of moving the encroaching wall. Second, Jim Smith, the construction superintendent for Yates on Harrah's Vicksburg project, testified for the appellees. On direct examination, Smith took great pains to detail how careful Yates was in constructing special scaffolding to avoid trespassing on the Thomas/Surplus property and emphasized the fact that he had personally fired three employees of Yates for trespassing. Additionally, Smith, in a strained and futile effort, attempted to disassociate Yates from the various subcontractors employed by Yates, while admitting that Yates had control over the subcontractors. Yet, on cross-examination, Smith admitted that scaffolding erected by Yates in conjunction with the construction of the facility was indeed on the Thomas/Surplus property and that they received permission from Thomas to enter the property for the *specific* purpose of removing the scaffolding to halt the trespass. Further, Smith admitted to repeated airspace violations on the Thomas/Surplus property with the boom swinging over the property. As did Wells, Smith also admitted that the trespass on the Thomas/Surplus property was unavoidable after the construction reached a certain point and when the wall was ultimately moved:

> By Mr. Lotterhos: And you were aware that . . . it was to be—a portion of that north wall was to be right on the Thomas property line, isn't that true?
>
> By Mr. Smith: Yes, sir.
>
> By Mr. Lotterhos: Now, you have been involved in construction a lot of years, haven't you?
>
> By Mr. Smith: Yes, sir. . . .
>
> By Mr. Lotterhos: . . . based on your experience, when you build right upon the line or wall, it is necessary to get on the outside of the wall to work on it, isn't that true?
>
> By Mr. Smith: Yes, sir, it is. . . .
>
> By Mr. Lotterhos: In order to break out that wall, you had to get on Mr. Thomas' property, didn't you?
>
> By Mr. Smith: Yes, sir, we did.

This *uncontroverted* testimony established that there were trespasses on the Thomas/Surplus property. . . .

BAKER v. SHYMKIV

451 N.E.2d 811 (Ohio 1983)

SYLLABUS BY THE COURT . . .

The parties, on appeal, agreed to the following statement of facts:

1. On March 22, 1978, at 8:00 p.m. . . . [Mr. Baker] and his wife were returning home and turned into the driveway leading to their home.

2. They observed a car was parked in the driveway blocking their access, and they observed Mr. and Mrs. Shymkiv throwing tools and other equipment in the trunk of their car, close the trunk lid and jump into their car.

3. Mr. and Mrs. Baker got out of their car and observed a trench with dimensions of approximately 1 foot in width and 1 ½ feet in depth and more than 10 feet in length had been dug across their driveway and that a drain tile had been placed in the trench so that water from the Shymkiv property could drain through the trench and onto the property of an adjoining landowner.

4. Mr. Baker was angry and visibly upset over the actions of the Shymkivs and approached the Shymkiv automobile.

5. Mr. Shymkiv got out of the car and an argument concerning the trench followed. Mary Baker interceded and pushed herself between Homer Baker and John Shymkiv and told her husband to calm down.

6. Mary Baker indicated that she had never seen her husband so upset or angry in all the years they had been married.

7. Mrs. Baker then left the scene to call the police.

8. When Mrs. Baker returned approximately 3 minutes later she found her husband laying face-down in the mud puddle while the Shymkivs were driving away.

9. Emergency squad arrived approximately 10-15 minutes later, worked on Homer Baker and transported him to Grant Hospital where he was pronounced dead at 9:20 p.m.

10. Mary Baker has described her husband as a very easygoing person, very friendly, and not easily prone to argue or get upset.

11. Mary Baker has indicated that Homer Baker took great pride in the maintenance and upkeep of the driveway, home and yard.

In the court of common pleas, Mrs. Baker filed several claims against the Shymkivs: (1) as administratrix, for the wrongful death of Mr. Baker, and for her own pecuniary loss; and (2) for trespass seeking both compensatory and punitive damages. . . .

The trial court instructed the jury, in part:

> Now, the test then [of proximate cause] is whether in the light of all the circumstances a reasonably prudent person would have *anticipated* that injury was likely to result to someone from the preponderance of the evidence or performance of the evidence or act. In other words, before liability attaches to the defendants in this case, the damages claimed by Mrs. Baker must have been *foreseen or reasonably anticipated* by the wrongdoer as likely to follow the trespass and the digging of the trench or the digging of the hole or whatever. (Emphasis added.) . . .

LOCHER, JUDGE.

This case presents one issue: whether the trial court erred by instructing the jury that only foreseeable damages could result in liability. Appellants, the Shymkivs, contend that the trial court properly charged the jury on foreseeability. We disagree. . . .

Intentional trespassers are within that class of less-favored wrongdoers. For example, under the Restatement of Torts 2d, intentional conduct is an element of trespass: "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he *intentionally* (a) enters land in the possession of the other or causes a thing or a third person to do so. . . ." (Emphasis added.) Restatement of Torts 2d 277, Section 158. The Restatement also articulates the scope of liability for a trespass in Section 162, which states: "A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser." Id., at pages 291-292. Comment f to Section 162 of the Restatement explains the intended effect of that provision:

> *f. Peculiar position of trespasser.* This Section states the peculiar liability to which a trespasser is subject for bodily harm caused to the possessor of land or the members of his family by the conduct of a trespasser while upon the land, irrespective of whether his conduct if it occurred elsewhere would subject him to liability to them. . . . Thus, one who trespasses upon the land of another incurs the risk of becoming liable for any bodily harm which is cause [sic] to the possessor of the land or to members of his household by any conduct of the trespasser during the continuance of his trespass, no matter how otherwise innocent such conduct may be.

Id., at page 293.

Accordingly, we hold that damages caused by an intentional trespasser need not be foreseeable to be compensable.

We affirm the judgment of the court of appeals [which had also found error in the trial court's instruction].

NOTES TO THOMAS v. HARRAH'S VICKSBURG CORP. AND BAKER v. SHYMKIV

1. ***Proof of Intent.*** The Restatement (Second) of Torts Section 8A explains that intent may be proved either by demonstrating that the defendant desired to enter or the defendant was substantially certain that his or her act would lead to an entry. On which of these alternatives did the plaintiff rely in *Thomas*?

2. ***Distinguishing "Act" and "Intent."*** There may be an act without any intent to enter, as when a person drives a car and, to the driver's surprise, it spins out of control on ice and ends up on another person's lawn. The driver has acted by driving the car, but neither desired nor was substantially certain that the driving would result in an entry onto the lawn. A recent case illustrates the difference between the act requirement and the intent to enter requirement. An oil company undoubtedly intended to refine oil where its refinery was, and the refining process caused the oil to leak under the

plaintiffs' land. But intending to refine oil, the voluntary conduct, is not enough to make a trespass. The court held that the company must intend for the refining to cause the oil to migrate under the plaintiffs' land. See Martin v. Amoco Oil Company, 679 N.E.2d 139 (Ind. Ct. App. 1997).

3. ***Negligent and Reckless Entries to Land.*** The court in *Thomas* makes it clear that negligence is not an element of a trespass action. Negligent and reckless entries onto land are not referred to as trespasses. They are analyzed using the elements of duty, breach, cause, damages, as developed in Chapters 3 and 4. Actual damages must be proved to recover for entries caused by negligent or reckless conduct, while damages may be recovered for trespass without proof of actual damages.

4. ***Trespass and Mistake.*** The court in *Thomas* cited Restatement (Second) of Torts §163 comment b, which states that the intent requirement is met even if the trespasser mistakenly believes that land is his own, that he has permission to be on the land. All that is required is that the defendant desired or was substantially certain that he would be on that land. Section 163 comment a emphasizes that the risk of error is on the person entering the land:

> . . . If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its possessor. Unless the actor's mistake was induced by the conduct of the possessor, it is immaterial that the mistake is one such as a reasonable man knowing all the circumstances which the actor knows or could have discovered by the most careful of investigations would have made. One who enters any piece of land takes the risk of the existence of such facts as would give him a right or privilege to enter. So too, the actor cannot escape liability by showing that his mistaken belief in the validity of his title is due to the advice of the most eminent of counsel. Indeed, even though a statute expressly confers title upon him, he takes the risk that the statute may thereafter be declared unconstitutional.

The protection given to the interests of the lawful possessors of land is enhanced by the broad definition of the extent of their rights. Recall that in *Thomas* the court referred to evidence that the contractors violated Thomas's airspace by swinging a boom over Thomas's land. Traditionally, a landowner's rights extend from "the center of the earth to the top of the sky." Intentionally extending the boom arm of a crane over the land of another qualifies as a trespassory entry even if it does not touch the plaintiff's earth. An exception has developed over the years to permit the flight path of airplanes to enter private property.

5. ***Trespass of Invisible Particles and Intangibles.*** Entry to land may be by a person or an object and a person who acts intending to cause the unpermitted entry of the object onto the land of another is also a trespasser. In trespass cases involving entry by the by-products of industrial activity, the objects entering the plaintiff's land are often very small particles such as dust or even intangible items such as radio waves, noise, or vibrations.

Jurisdictions take different approaches to whether the invasion of land by invisible particles and intangibles constitutes a trespass. Recent California cases have held that a fire that spread to the plaintiff's land from the neighbor's could be considered a trespass, see Elton v. Anheuser-Busch Beverage Group, Inc., 58 Cal. Rptr. 2d 303,

306 (Cal. App. 1996), and that electronic signals sent by a computer hacker could be trespassory, see Thrifty-Tel, Inc., 54 Cal. Rptr. 2d 468 (Cal. App. 1996). On the other hand, in a case of first impression, a Michigan court in Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich. Ct. App. 1999), held that the invasion of neither airborne particles (dust from an iron ore mine) nor noise nor vibrations could be the basis for a trespass claim. A Maryland court held that low-level radioactive emission from a plant manufacturing nuclear and radioactive pharmaceuticals could qualify as a trespass, see Maryland Heights Leasing, Inc. v. Mallickrodt, Inc., 706 S.W.2d 218 (Md. App. 1985), but a Colorado court held that electromagnetic fields and radiation waves emanating from power lines and encroaching on the plaintiffs' properties could not constitute a trespass, at least without proof of actual damages, see Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377 (Colo. 2001). Several states have adopted this requirement of proof of actual damages, which is not normally a requirement for trespass, for trespasses by forces rather than physical objects. Proof of actual damages was required, for instance, in Wilson v. Interlake Steel Co., 185 Cal. Rptr. 280 (Cal. 1982) (noise from a steel factory), and Staples v. Hoefke, 235 Cal. Rptr. 165 (Cal. App. 1983) (vibrations from punch press at a leather factory).

6. ***Problem: The Act Requirement, Foreseeability of Harm, and Intent to Enter.*** Farmland owned and operated a fertilizer plant in which, prior to June 1982, it began using hexavalent chromium as a corrosion inhibitor in its water coolant system. Sometime prior to June 1982, the chemical leaked from the cooling system or a storage system designed to contain the chemical into the ground under Farmland's plant. The chemical traveled underground and contaminated the groundwater underneath the adjacent land, which, at the time of the suit, was owned and operated by United Proteins, Inc. [UPI], a producer of pet food. In June 1982, Farmland notified the Department of Health and Environment of the leak and began to remove the chemical from its own and UPI's land. Despite Farmland's efforts, the chemical continued to seep into the groundwater under UPI's land. On these facts, did Farmland trespass on UPI's land? See United Proteins, Inc. v. Farmland Inc., 915 P.2d 80 (Kan. 1996).

Perspective: Historical Foundation for Trespass

The importance of private property in the United States derives from its significance in English common law. In a 1765 action for trespass, Entick v. Carrington and Three Other King's Messengers, quoted in Boyd v. United States, 116 U.S. 616 (1886), Lord Camden stressed the sanctity of private property:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.

B. Trespass to Chattel and Conversion

The intentional torts of trespass to chattel and conversion extend the rules protecting possession of real property, land, to protection of chattel, which is personal property. The cases in this Section illustrate that the difference between trespass to chattel and conversion is one of degree. The tort of conversion applies to more serious interferences with the lawful possessor's interest in exclusive possession of personal property. Koepnick v. Sears Roebuck & Co. is a trespass to chattel claim involving the relatively minor interference caused by Sears's security guard searching Koepnick's truck for stolen property. Note how the court identifies interferences that are not substantial enough to be characterized as trespasses to chattel. United States v. Arora involves a government researcher who intentionally destroyed cells created by other researchers. This interference with possessory rights was so severe that the court characterized it as a conversion rather than a trespass to chattel. These two cases also illustrate the circumstances under which nominal, compensatory, and punitive damages are available remedies available for the torts of trespass and conversion.

KOEPNICK v. SEARS ROEBUCK & CO.

762 P.2d 609 (Ariz. Ct. App. 1988)

FROEB, Presiding Judge. . . .

Koepnick was stopped in the Fiesta Mall parking lot by Sears security guards Lessard and Pollack on December 6, 1982, at approximately 6:15 p.m. Lessard and Pollack suspected Koepnick of shoplifting a wrench and therefore detained him for approximately 15 minutes until the Mesa police arrived. Upon arrival of the police, Koepnick and a police officer became involved in an altercation in which Koepnick was injured. The police officer handcuffed Koepnick, placed a call for a backup, and began investigating the shoplifting allegations. Upon investigation it was discovered that Koepnick had receipts for the wrench and for all the Sears merchandise he had been carrying. Additionally, the store clerk who sold the wrench to Koepnick was located. He verified the sale and informed Lessard that he had put the wrench in a small bag, stapled it shut, and then placed that bag into a large bag containing Koepnick's other purchases. The small bag was not among the items in Koepnick's possession in the security room. To determine whether a second wrench was involved, the police and Lessard searched Koepnick's truck which was in the mall parking lot. No stolen items were found. Having completed their investigation, the police cited Koepnick for disorderly conduct and released him. The entire detention lasted approximately 45 minutes.

Koepnick sued Sears for [*inter alia*] trespass to chattel. . . .

TRESPASS TO CHATTEL

Arizona courts follow the Restatement (Second) of Torts absent authority to the contrary. The Restatement provides that the tort of trespass to a chattel may be committed by intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another. Restatement (Second) of Torts §217 (1965).

The Restatement (Second) of Torts §221 (1965) defines dispossession as follows:

> A dispossession may be committed by intentionally
>
> (a) taking a chattel from the possession of another without the other's consent, or
>
> [(b) obtaining possession of a chattel from another by fraud or duress, or]
>
> (c) barring the possessor's access to a chattel [or
>
> (d) destroying a chattel while it is in another's possession, or
>
> (e) taking the chattel into the custody of the law].

Comment b to §221 provides that dispossession may occur when someone intentionally assumes physical control over the chattel and deals with the chattel in a way which will be destructive of the possessory interest of the other person. Comment b further provides that "on the other hand, an intermeddling with the chattel is not a dispossession unless the actor intends to exercise a dominion and control over it inconsistent with a possession in any other person other than himself."

The Restatement (Second) of Torts §218 (1965) provides:

> One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
>
> (a) he dispossesses the other of the chattel, or
>
> (b) the chattel is impaired as to its condition, quality, or value, or
>
> (c) the possessor is deprived of the use of the chattel for a substantial time, or
>
> (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

Koepnick argued at trial that Lessard's participation in searching his truck constituted an actionable trespass to the truck. He was awarded $100 damages by the jury which he characterizes as damages for a dispossession pursuant to subsection (a) or deprivation of use pursuant to subsection (c) of §218.

The Restatement recognizes that an award of nominal damages may be made, even in the absence of proof of actual damages, if a trespass to chattel involves a dispossession. See §218, comment d. However, both parties have agreed that the $100 compensatory award is not nominal.

Sears' actions with respect to the trespass consisted of Steve Lessard accompanying a Mesa police officer out to the parking lot and looking in the truck. There is no evidence in the record of an intent on the part of Sears' employee to claim a possessory interest in the truck contrary to Koepnick's interest. No lien or ownership interest claim of any kind was made. Further, there is no evidence that Sears intentionally denied Koepnick access to his truck.

Koepnick was in the City of Mesa's custody at the time of the search and Sears had no control over how the police department conducted its investigation or the disposition of Koepnick during that investigation. There is no evidence that Sears' employees objected to any request by Koepnick to accompany them down to the vehicle.

Comment e to the Restatement §218 discusses the requirement of proof of actual damage for an actionable trespass to chattel claim.

> The interest of a possessor of chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for

> harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.

The search in question took approximately two minutes. Neither the truck nor its contents were damaged in any manner by the police or Sears' employee. As a matter of law, Sears' action did not constitute an actionable trespass under §218(c).

In arguing that Sears should not have been given a directed verdict in its favor on the trespass to chattel claim, Koepnick asserts that the search of his truck caused him to remain in custody longer than he would otherwise have been detained. While this may be true, there was no evidence showing any connection between $100 and the few minutes that Koepnick was detained as a result of waiting for that search to be completed — apparently 15 minutes. For a deprivation of use caused by a trespass to chattel to be actionable, the time must be so substantial that it is possible to estimate the loss that is caused. The record in the present case lacks any evidence to permit a jury to estimate any loss caused to Koepnick. It is well settled that conjecture and speculation cannot provide the basis for an award of damages. The evidence must make an approximately accurate estimate possible.

Even if a verdict on the claim of trespass could be affirmed on the basis that a dispossession occurred, the award on the verdict would necessarily be limited to nominal damages. As discussed above, both parties agree that the $100 award was not nominal. Furthermore, punitive damages were erroneously awarded because punitive damages cannot be awarded absent evidence of actual damages.

We conclude that there was no dispossession of the vehicle as contemplated under §218 of the Restatement nor was Koepnick deprived of its use for a substantial period of time. Any increase in the length of detention caused by the search is not the kind of interest protected by the tort of trespass to chattel. Accordingly, we affirm the trial court's directed verdict in favor of Sears on this issue.

The judgment of the trial court is affirmed and this matter is remanded to the trial court for proceedings in accordance with this opinion.

UNITED STATES v. ARORA

860 F. Supp. 1091 (D. Md. 1994)

MESSITTE, J.

In this civil suit for conversion and trespass, the United States contends that Doctor Prince Kumar Arora intentionally tampered with and destroyed cells in a research project at the National Institutes of Health in Bethesda, Maryland. [The cell line, dubbed Alpha 1-4, was being developed by Drs. Wong and Sei. If successful, the cell line would have significant implications for studies of alcohol, Alzheimer's disease, and neurotoxicity. While initially cordial, the relationship between Dr. Arora

and Dr. Sei was straining by disagreements over who deserved credit for certain research and by allegations of harassment brought by a female graduate student that resulted in her reassignment from Dr. Arora's supervision to Dr. Sei's.] Dr. Arora denies tampering and in any case responds that the Government sustained no damages by reason of the cell deaths. . . .

. . . The Court concludes, in this most unhappy affair, that Dr. Arora did in fact tamper with and cause the death of the Alpha 1-4 cells at the NIH laboratory in Bethesda in the Spring of 1992.

Was There a Conversion or Trespass?

A) It is not necessary to recount here the historical development of the torts of trespass and conversion, a matter more than adequately explored in Prosser and Keeton on The Law of Torts, §§14-15 (5th ed. 1984). For present purposes, it suffices to observe that the difference between the two torts is fundamentally one of degree, trespass constituting a lesser interference with another's chattel, conversion a more serious exercise of dominion or control over it. See Restatement (Second) of Torts, §222A, Comment (1965).

Thus a trespass has been defined as an intentional use or intermeddling with the chattel in possession of another, Restatement (Second) of Torts, §217(b), such intermeddling occurring, inter alia, when "the chattel is impaired as to its condition, quality, or value." Restatement (Second) of Torts, §218(b). See also Walser v. Resthaven Memorial Gardens, Inc., 98 Md. App. 371, 395, 633 A.2d 466 (1993).

A "conversion," on the other hand, has been defined as:

> [A]n intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

Restatement (Second) of Torts, §222A(1). Whereas impairing the condition, quality or value of a chattel upon brief interference can constitute a trespass, intentional destruction or material alteration of a chattel will subject the actor to liability for conversion. Restatement (Second) of Torts, §226.

A number of factors are considered in determining whether interference with a chattel is serious enough to constitute a conversion as opposed to a trespass. These include:

a) the extent and duration of the actor's exercise of dominion or control;
b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
c) the actor's good faith;
d) the extent and duration of the resulting interference with the other's right of control;
e) the harm done to the chattel;
f) the inconvenience and expense caused to the other.

Staub v. Staub, 37 Md. App. 141, at 143-144, 376 A.2d 1129 (1977), quoting Restatement (Second) of Torts, §222A(2).

Assuming for the moment that a cell line is a chattel capable of being converted or trespassed upon, it is clear that the United States owned the Alpha 1-4 cell line, and that

Dr. Arora's dominion or control over it, while brief, was total. He intended to act inconsistently with Dr. Sei's right to control the cells, he did not act in good faith, and he committed the ultimate harm—he destroyed the cells. While certain easily identifiable expense was caused by Dr. Arora's inappropriate acts, it is also apparent that he caused serious inconvenience to what was a critically important research project. By this analysis, if any tort was committed, it was unquestionably a conversion, not a mere trespass.

B) But what exactly did Dr. Arora convert? It is undoubtedly fair to conclude that by his wrongful act he caused the loss of the flasks, pipets and other materials used to culture the cells, a total value of $176.68.

But did he convert the cell line? . . .

The fact is that the United States Supreme Court has recognized that a living cell line is a property interest capable of protection. Other courts have likewise acknowledged the cell line's status as property. The Court thus sees no reason why a cell line should not be considered a chattel capable of being converted. Indeed, if such a cause of action is not recognized, it is hard to conceive what civil remedy would ever lie to recover a cell line that might be stolen or destroyed, including one with immense potential commercial value, as this one apparently had and has. The Court is satisfied, therefore, under the circumstances of this case, that the Alpha 1-4 cell line was capable of being converted and that in fact Dr. Arora converted it. The more difficult question, perhaps, is how to assess damages, the next question before the Court.

What Compensatory Damages, if Any, Should Be Assessed?

A) The Government claims a broad array of damages by reason of Defendant's acts, including the costs of the flasks, materials and supplies used to create the cells, the reasonable value of the wages paid to the laboratory assistant who cultured the cells, and a sizeable amount for the delay in the research project occasioned by the conversion. Defendant, in sharp contrast, maintains that the Government has sustained no damage at all; indeed he has sought throughout to dismiss these proceedings by reason of that alleged fact.

The conventional rule in cases of conversion, it is true, fixes damages for a totally destroyed chattel at the market value as of the date of the conversion, plus interest to the date of judgment. To the extent that the chattel is a discrete tangible item of discernible market value, the calculation is fairly straightforward and presents little problem. The matter becomes more difficult when property of limited extrinsic or uncertain market value is involved.

But mere difficulty in ascertaining damages is not a basis for denying them. While the market value measure is the traditional rule in conversion cases, it is also the case, as stated by the Maryland Court of Appeals in Staub v. Staub that:

> [a]s in other tort actions, additional damages adequate to compensate an owner for other injurious consequences which result in a loss greater than the diminished or market value of the chattel at the time of the trespass or conversion may be allowed unless such claimed damages are so speculative as to create a danger of injustice to the opposite party.

37 Md. App. at 145-146, 376 A.2d 1129.

As observed by the United States District Court for the Eastern District of Pennsylvania in America East India Corp. v. Ideal Shoe Co., 400 F. Supp. 141 (E.D. Pa. 1975):

> [t]he general purpose of damages in conversion is to provide indemnity for all actual losses or injuries sustained as a natural and proximate result of the converter's wrong. The measure of damages, generally employed, is the value of the property, with interest from the time of conversion, at the time and place of the conversion. However, it is appropriate to use whatever measure of damages accomplishes the general objective of indemnity under the particular circumstances. (Citations omitted.)

400 F. Supp. at 169.

For this reason, in a number of cases involving chattels of limited extrinsic or market value, courts have allowed as damages the original or replacement cost or cost of repair of the chattel. See generally Dobbs at §5.13(1); see also Lakewood Engineering and Manufacturing Co. v. Quinn, 91 Md. App. 375, 604 A.2d 535 (1992) (allowing replacement value of household items lost in fire). And, where, as here, the converted chattel is essentially a product of creative effort as to which no original or replacement cost can fairly be assigned — for example, manuscripts or professional drawings — courts have also fixed damages based upon the value of the time that it took or would take to create the chattel. See e.g., Wood v. Cunard, 192 F. 293 (2d Cir. 1911) (taking into account the value of two years of intermittent labor required to reproduce lost manuscript); Rajkovich v. Alfred Mossner Co., 199 Ill. App. 3d 655, 145 Ill. Dec. 726, 557 N.E.2d 496 (1990) (compensating for 172 hours of architectural time at specified rate necessary to redo damaged architectural drawings); see also Redwine v. Fitzhugh, 78 Wyo. 407, 329 P.2d 257, 72 A.L.R.2d 664, *reh. den.*, 78 Wyo. 407, 330 P.2d 112 (1958) (allowing recovery for value of seed and for labor expended in sowing and cultivating seed where seed destroyed in the ground).

B) These principles find relatively easy application in the present case. The tangible chattels converted consist of the Alpha 1-4 cells and the flasks and related materials which contained them. The latter have a market value of some $176.68, while the value of the former is essentially unascertainable. But the evidence in the record also establishes the cost of creating or recreating the Alpha 1-4 cells at $273.52, the amount attributable to the services of a laboratory assistant necessary to culture the cells. The total of these two sums, $450.20, while modest, is nevertheless nontrivial. It is an amount properly awardable in this case and the Court has determined to award it.

On the other hand, the Court acknowledges the caveat of *Staub* that consequential damages may not be "so speculative as to create a danger of injustice." 37 Md. App. at 146, 376 A.2d 1129. The Court, therefore, is inclined to agree with Defendant that any effort to quantify with precision damages for delay in the research project would run counter to that principle. . . .

NOTES TO KOEPNICK v. SEARS ROEBUCK & CO. AND UNITED STATES v. ARORA

1. ***Trespass to Chattels and Conversion Compared.*** The court in United States v. Arora classified the intentional killing of the cells as a conversion despite the fact that the conduct also fits within the language of a trespass to chattel: "the chattel is impaired as to its condition, quality, or value" or "the possessor is deprived of the use of the

chattel." See Restatement (Second) of Torts §218. Which of the factors described by the *Arora* court led it to conclude that the interference was serious enough to be considered a conversion? Why was the security guard's interference with Koepnick's use of his truck not serious enough even to be considered a trespass?

2. ***Remedies for Trespass.*** Nominal and compensatory damages are available for trespasses to land and chattel and for conversions. Damages for more serious interferences with possessory rights are naturally greater than for minor transgressions. Note the variety of approaches to calculating the full loss suffered by the plaintiff in *Arora*. Trespass plaintiffs may also sue to enjoin a defendant from continuing to trespass.

Punitive damages are available for trespass plaintiffs, as they are for victims of other intentional torts. In an omitted portion of the opinion in *Arora*, the Federal District Court, applying Maryland law, affirmed a jury award of $5,000 in punitive damages:

> Maryland law holds that punitive damages are awardable only if there is clear and convincing evidence of actual malice. The Court is satisfied to that degree that Dr. Arora did act with an evil and rancorous intent against Dr. Sei. His intentional actions, moreover, not only delayed a vitally important research project; they were obviously calculated to diminish the reputation of the entire laboratory involved with the project. Beyond that, Dr. Arora had to know that his actions might deprive the scientific community of the benefits of the research involving the Alpha 1-4 cell line for some period of time, possibly forever. Finally — and here perhaps the deterrent effect of a punitive award comes most into play — his actions undermined the honor system that exists among the community of scientists, a system which is ultimately based on "truthfulness, both as a moral imperative and as a fundamental operational principle in the scientific research process." Taking all these considerations into account, the Court has determined that a punitive damage award in the amount of $5,000.00 would be fair and just.

3. ***Problem: Trespass to Chattels and Conversion.*** CompuServe is an online computer service linking its subscribers to the Internet and providing e-mail services. Cyber Promotions sent unsolicited e-mail advertisements on behalf of its clients to Internet users, including CompuServe subscribers. Despite CompuServe's complaints, Cyber Promotions continued to send such advertisements, which used up a considerable amount of CompuServe computer storage and processing capacity. CompuServe's subscribers complained, and some terminated the service because they paid for e-mail access on an hourly basis and deleting the e-mails cost the subscribers money. After unsuccessfully trying to prevent these e-mails by technological means, CompuServe sought to enjoin Cyber Promotions, claiming that Cyber Promotions was trespassing on CompuServe's personal property. Is this a trespass? A conversion? Neither? See CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (D. Ohio 1997).

C. Privileges: Private and Public Necessity

Defenses to the tort of trespass are analogous to defenses to assault and battery. Because trespass is an unprivileged entry onto land, permission of the owner (like consent) or a public policy-based privilege (like self-defense) will affect the entrant's status and

liability. Vincent v. Lake Erie Transportation Co. is a classic case exploring the liability of a private person who interferes with another's right to exclusive possession to protect her own person and property. Marty v. State of Idaho considers the liability of those who cause an unpermitted entry onto the property of another for a public rather than private purpose.

VINCENT v. LAKE ERIE TRANSPORTATION CO.

124 N.W. 221 (Minn. 1910)

O'BRIEN, J.

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p.m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift away from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think,

be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In Depue v. Flatau, 111 N.W. 1 (Minn.), this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In Ploof v. Putnam, 71 Atl. 188, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

LEWIS, J.

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

MARTY v. STATE OF IDAHO

786 P.2d 524 (Idaho 1989)

JOHNSON, J.

This is a flood liability case. It involves the flooding of farmland near Mud Lake in 1984 and 1985. The owners of this farmland (the landowners) sued various governmental agencies, officers and employees (the governmental agencies) and local canal companies (the canal companies) and water users (the water users) seeking damages and injunctive relief. . . .

The Mud Lake area is a terminal basin without a natural drainage outlet, comprised of the presently diked area of Mud Lake and adjacent low-lying farmlands. In the 1920's the early settlers began diking the lake in order to reclaim productive agricultural lands from the marshes and to provide storage for irrigation. Prior to the diking of Mud Lake, the lands now owned by the landowners had been subjected to periodic flooding because they were located in a 100-year flood plain. . . .

On June 3, 1983, the board of commissioners of Jefferson County declared the area surrounding Mud Lake to be a flood emergency area and requested assistance from the governor of the State of Idaho. On June 6, 1983, the governor declared the existence of a state of extreme emergency because "excessive runoff and spring rains have seriously weakened the Mud Lake dikes" and the failure of these dikes would result in "serious flooding to approximately forty residents and several thousand acres of land" and "endanger the lives and property of the citizens of Terreton." All agencies of state government were required by the proclamation "to take action . . . to arrest or alleviate the conditions perpetuating the state of extreme emergency."

Unusually heavy rainfall in the spring of 1984 combined with the already saturated water table from 1983 to create a flow into the Mud Lake water system that had not occurred since 1923.

In a combined effort the governmental agencies, the Army Corps of Engineers, the canal companies, the water users and numerous volunteers responded to the impending flood. The Idaho Department of Water Resources (IDWR) coordinated this effort [by strengthening and increasing the height of the Mud Lake dike, which encloses the lake on the south, southeast and southwest and other efforts that resulted in the flooding of the landowners' property].

In late 1985 the landowners filed suit seeking damages and injunctive relief against the governmental agencies, the canal companies and the water users. The landowners based their claims for damages on theories of [inter alia] trespass. They alleged that their farmland had been flooded as a result of the actions and decisions of the governmental agencies, the canal companies and the water users, including the failure to construct a spillway to prevent the flooding of the landowners' farmland.

The governmental agencies, the canal companies and the water users moved for summary judgment, denying that there was any basis for liability under the theories advanced by the landowners and that their actions and decisions were immunized under several Idaho statutes. The trial court granted summary judgment dismissing all of the claims of the landowners. The landowners appealed. . . .

. . . The governmental agencies invoke the doctrine of public necessity contained in Restatement (Second) of Torts §196 (1965). The thrust of this doctrine is that "[o]ne is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster." Id. The governmental agencies point out that a comment to the Restatement states that the privilege carries with it the privilege to do "any other acts on the premises reasonably necessary to effectuate the purpose for which the privilege exists." Id. at comment (f).

The governmental agencies acknowledge that this Court has not previously adopted the doctrine of public necessity. They cite decisions from our sister states of Washington and Colorado as demonstrating the application of the doctrine. Short v. Pierce County, 194 Wash. 421, 78 P.2d 610 (1938); Srb v. Board of County

Commissioners, 43 Colo. App. 14, 601 P.2d 1082 (1979), *cert. denied,* 199 Colo. 496, 618 P.2d 1105 (1980). In *Srb* the court held that "when property is taken by the state or one of its political subdivisions under circumstances of imminent necessity, the failure justly to compensate the owner does not violate" the just compensation provision of the Colorado constitution. 601 P.2d at 1085.

Since 1864 the statutes of Idaho, first as a territory and then as a state, have declared:

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.

I.C. §73-116.

The doctrine of public necessity was the common law of England. 2 Kent's Commentaries (14th ed. 1896) 339, n.(a). In 1853 the Supreme Court of California recognized the existence of the doctrine:

> The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata.*"

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity.

> This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

Surocco v. Geary, 3 Cal. 69, 73 (1853).

The United States Supreme Court also has stated:

> [T]he common law had long recognized that in times of imminent peril — such as when fire threatened a whole community — the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.

United States v. Caltex, Inc., 344 U.S. 149, 154 (1952).

These authorities convince us that although this Court has never before had the occasion to recognize the existence of the doctrine of public necessity, it was part of the common law of England. As we said in 1922 regarding another common law doctrine — the right of distress *damage feasant* — the doctrine "is applicable to this state in so far as it is not repugnant to or inconsistent with our constitution and laws." Kelly v. Easton, 35 Idaho 340, 343, 207 P. 129 (1922).

Recently, the United States District Court for the District of Idaho acknowledged the doctrine of public necessity, but stated that Idaho has abrogated the doctrine

by adopting the State Disaster Preparedness Act, I.C. §46-1001, et seq. Union Pac. R.R. v. State of Idaho, 654 F. Supp. 1236, 1243, modified on other grounds, 663 F. Supp. 75 (D. Idaho 1987). In reaching this conclusion the federal district court relied on comment (g) to Restatement (Second) of Torts §196 (1965). This comment states:

> *g.* In many States statutes have been enacted designating certain public officials as authorized to determine the necessity for and to order the destruction of buildings in the path of a conflagration. Usually these statutes merely prescribe a condition upon which the statutory right to recover compensation from the organized community is dependent. A statute may, however, confer on specified public officials the exclusive authority to act in such matters. By such a statute, the privilege stated in this Subsection is abrogated.

We agree with the federal court that by enacting the State Disaster Preparedness Act (the Act), the legislature abrogated the common law doctrine of public necessity. The Act defines "disaster" to mean

> occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man made cause, including but not limited to fire, flood, earthquake, windstorm, wave action, volcanic activity, explosion, riot, or hostile military or paramilitary action.

I.C. §46-1002(3). The Act grants to the governor and to mayors and chairpersons of county commissions the authority to declare emergencies. I.C. §46-1011(1). I.C. §46-1017 also grants immunity from liability for death, injury or damage resulting from activity conducted pursuant to the Act. This statute indicates to us that the legislature intended to codify a version of the doctrine of public necessity. It is then the Act and not the doctrine of public necessity that must be considered to determine whether the landowners are entitled to pursue their claim.

Whether the landowners are entitled to compensation for inverse condemnation will first depend on whether their property was permanently damaged. What is permanent damage for recovery for inverse condemnation under our state constitution may depend on the probability of future flooding. Under the fifth and fourteenth amendments to the United States Constitution whether the damage is permanent may depend on proof of frequent and inevitably recurring inundation due to governmental action.

In the event permanent damage is shown by the landowners, the immunity provisions of I.C. §46-1017 must be applied. This immunity exists only when the state, its political subdivisions or other agencies were "acting under a declaration by proper authority." Here, the board of county commissioners did not declare an emergency until June 12, 1984. The governor declared an emergency on June 14, 1984. The emergency declared by the county commissioners was for a period of seven days. I.C. §46-1011(1). The emergency declared by the governor was for thirty days, unless extended by further declaration. I.C. §46-1008(2). Whether the actions of the governmental agencies were immunized by I.C. §46-1017 will depend on whether they were taken during these periods.

These questions should be resolved by the trial court. We reverse and remand for this purpose. . . .

NOTES TO VINCENT v. LAKE ERIE TRANSPORTATION CO. AND MARTY v. STATE OF IDAHO

1. ***Obligations of Persons Who Interfere with the Possessory Rights of Others.*** For policy reasons, a private person or the public may, in times of necessity, interfere with another's right to exclusive possession of real or personal property without permission. This policy prevents a trespass defendant from being liable for nominal or punitive damages. Is a private person still liable for compensatory damages? Is the public?

2. ***Rights of Persons to Interfere with the Possessory Rights of Others.*** The privilege of necessity affects both liability to possessors of property and liability of possessors of property. On this topic, the court in *Vincent* cites to Ploof v. Putnam, in which a boater taking refuge from a storm at another's dock was held not to be a trespasser. Moreover, because the boater was on the dock as a matter of necessity, the landowner was liable for any damages resulting from casting the boater off from the dock. See also Depue v. Flatau, also cited by the court in *Vincent*, where the landowner is held liable for damages caused to a sick person compelled to leave the premises. The privilege of necessity reflects the law's preference for human life over property rights.

The Restatement (Second) of Torts §345 describes the nature of the duty owned by a possessor of land to a person who enters the land under conditions of necessity:

> SECTION 345. PERSONS ENTERING IN THE EXERCISE OF A PRIVILEGE
>
> (1) Except as stated in Subsection (2), the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.
>
> (2) The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.

3. ***Problem: Private Necessity.*** Eight year-old Patricia and her third grade classmate Ida were walking home from their school in Methuen, Massachusetts, when they saw a dog, a German Weimaraner, coming toward them on the street. They turned and ran and the dog followed them. Being frightened, the girls ran along a path behind the defendant's property, where they saw, for the first time, a black Great Dane. The Great Dane belonged to the defendant, who kept it to protect equipment he kept on the back of his property. It jumped on Patricia and knocked her down. Patricia screamed for help. Her father, who found her under the dogs on her knees with her hands on her face, took her to the hospital.

Massachusetts had a statute stating:

> If any dog shall do any damage to either the body or property of any person, the owner or keeper, or if the owner or keeper be a minor, the parent or guardian of such minor, shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog.

Following this statute, will the defendant (owner of the Great Dane) be liable to Patricia? See Rossi v. DelDuca, 181 N.E.2d 591 (Ma. 1962).

Perspective: Property and Liability Rules

The customary rule governing the use of private property is that an actor must negotiate with the rightful possessor for permission to use the property. This is often described as a "property rule" or "bargaining rule." The privilege of necessity substitutes a "liability rule," which allows the actor to use the property first and then pay damages, an amount determined by the court rather than by negotiations, after the fact. Torts scholars have suggested that liability rules are appropriate where it would be difficult for parties to bargain. The necessity cases seems to fit that category, though whether the facts of *Vincent*, where the parties have a preexisting contractual relationship, do so is another question.

Torts scholars have also suggested that liability for damages should be placed on the best avoider of costs, on that person who can best evaluate risks and take precautions to avoid them. A private person who would otherwise be a trespasser is relieved of some of the burdens of that categorization (nominal and punitive damages) under circumstances of necessity. Potential liability for actual damages, however, maintains an incentive for such a person to weigh the costs and benefits of his interference with the other's possession. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

Perspective: Moral View of the Necessity Defense

Professor George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 Duke L.J. 975, 995 (1999), argued that there is no moral justification for the rule in Vincent:

> In many states — including, for example, California, New York, and Washington, the owners and operators of aircraft are not strictly liable for ground damage that is not occasioned by their fault. In these states, requiring someone to pay for property destroyed to save lives would encourage an airline pilot who is obliged by an act of God to make a forced landing to place his life and those of his passengers in greater jeopardy because the safest alternative landing place has very valuable flower beds on it, while nearby less valuable vacant land is rockier and less flat. Surely the possible value of the property that might be destroyed should not enter into the pilot's consideration at all. The situation becomes even more ludicrous when the actor is in no danger himself but destroys property to save the life of a third party. The Restatement (Second) clearly makes the actor liable for the property he has destroyed. One would be hard put to create a doctrine more calculated to discourage people from coming to the aid of imperiled human beings.
>
> Assuming that the destruction of property is morally as well as legally permissible when necessary in order to save human lives, is there nevertheless a moral obligation to pay for the harm done? . . . After all, it is not necessary that one should have a legal obligation to do something in order for it to be true that one has a moral obligation to do that something.