
STABLE DIVISIONS OF AUTHORITY

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INTRODUCTION

We treat the law of torts as a unitary and unified body of law. Few law schools teach or even focus on the law of a single state. Tort-law scholarship—even positive, as distinguished from normative, scholarship—does acknowledge differences in the law of different states. But typically such scholarship actually is all about tendencies, trends, and emerging approaches—about what will eventually become dominant and then unitary. As Lord Mansfield famously said, the common law “works itself pure.”¹ The formation of the American Law Institute (“ALI”) itself, and the project of restating the law that the ALI then undertook, were based on the premise that if a common-law subject were not yet unitary, it was capable of becoming so, and that restating it would help to move that process along.² Without something resembling or at least approaching unity, a common-law subject probably is not restatable at all. The distinction between restatements and other ALI projects—“Principles,”³ “Reporters’ Studies,”⁴ and the like—certainly seems to reflect agreement with this proposition.

For the most part, this presupposition of unity in the law of torts is justified. Although tort law is state based, it is mature and largely stable. The law of different states has had a long time to grow together. Fifty or more years ago there was still talk about majority rules and minority rules, about the “New York rule” and the “Michigan rule” (among others). That kind of talk has died out, and not only because the proliferation of recent-decision updates and the advent of online databases have made it much less necessary than in the past. It is also because there simply are fewer important differences between states than there once were.

There are of course occasions when there are divisions of

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1. *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 23 (Ch.).

2. See G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 23 (1997).

3. See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000).

4. See, e.g., REPORTERS’ STUDY: ENTER. RESPONSIBILITY FOR PERSONAL INJURY (1991).

authority among states because the law on a particular issue is in flux. Take a snapshot of the law of different states in such a situation and at any given time, and the differences may appear stark. But take a series of snapshots over a period of several decades, and very often the differences will shrink. Over time, the law of different states will converge. This was true, for example, both of the demise of the privity rule in products liability ushered in by *MacPherson v. Buick Motor Co.*⁵ and of the introduction of "strict liability" for defective products in the 1960s and 1970s.⁶

There are more areas of doctrine over which the states have what seems to be permanent or at least long-term disagreement, however, than one might think. In these areas there are divisions of authority that show no evidence of movement or significant change. Here or there a state may move from one camp to another, but for the most part these divisions of authority are stable. Such divisions of authority are exceptions to the proposition that we have "one" law of torts in the United States, at least if by that we mean rules that are virtually identical from state to state.

In this Article I want to focus on these divisions. Not only the existence of divisions of authority but also the reasons that the divisions exist can tell us something about the nature of the tort law we have and about the factors that prevent it from becoming wholly unitary. With one exception,⁷ various parts of the *Restatement (Third) of Torts* cover or discuss all of the subjects regarding which there are divisions of authority with which I am concerned. At some risk of overgeneralizing, I will suggest that the reasons for the divisions that I identify fall into three categories: (1) developmental dead ends, (2) fundamental clashes of values, and (3) concerns about consistency of administration.

I. DEVELOPMENTAL DEAD ENDS

The most prominent example of a developmental dead end in recent memory is market-share liability. Introduced by the Supreme Court of California in 1980 in *Sindell v. Abbott Laboratories*,⁸ market-share liability relaxes the cause-in-fact requirement in certain products liability actions. The plaintiff in a market-share liability action need not identify the particular company whose product injured him. Instead, the plaintiff must prove, among other things, that each of the defendants

5. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

6. The seminal sources of the law on this subject are *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963), and the RESTATEMENT (SECOND) OF TORTS § 402A (1965).

7. The exception is the doctrine of informed consent, which, as part of the law of medical malpractice, has not yet been addressed in the *Restatement (Third) of Torts*.

8. 607 P.2d 924, 937-38 (Cal. 1980).

manufactured a chemically identical product and that a product made by one or more of the defendants caused the plaintiff's injury. Each manufacturer is then liable in proportion to its market share.⁹

The market-share liability doctrine, which was originally applied to injuries resulting from exposure to diethylstilbestrol ("DES") in utero, was adopted by a number of states other than California.¹⁰ And the doctrine was extended to a few other products by the courts of a few other states.¹¹ Beyond these limited applications, however, the doctrine has gone nowhere. It has often been squarely rejected, not only in cases involving DES, but also where plaintiffs have sought to extend the doctrine to other products.¹²

The market-share liability doctrine has gone almost nowhere for a number of reasons. First, it was developed at the tail end of the era of expanding enterprise liability. By the mid- to late-1980s, an increasing number of conservative judges had ascended to the bench, respected legal scholars¹³ had begun to criticize the expansion of tort liability that had occurred during the prior three decades,¹⁴ the liability insurance "crisis" of 1985–86 had sobered judges of all political stripes about the impact their decisions might have had on the liability insurance markets,¹⁵ and state legislatures had started enacting tort-reform statutes that not only modified tort doctrine but also were sometimes perceived as a symbolic shot across the bow of judicially created expansions of liability.¹⁶ As a consequence of the combination of these factors, courts that had not

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. o (Proposed Final Draft No. 1, 2005).

10. See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1071–73 (N.Y. 1989); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49 (Wis. 1984).

11. See, e.g., *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 551, 560–62 (Wis. 2005) (adopting market-share liability for manufacturers of lead pigment).

12. See, e.g., *Spencer v. Baxter Int'l, Inc.*, 163 F. Supp. 2d 74, 77 n.3 (D. Mass. 2001) (rejecting application to blood products); *Shackil v. Lederle Labs.*, 561 A.2d 511, 520–21 (N.J. 1989) (rejecting application to DPT vaccine); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1067–68 (N.Y. 2001) (rejecting application to handguns); *Black v. Abex Corp.*, 603 N.W.2d 182, 190–91 (N.D. 1999) (rejecting application to asbestos).

13. See, e.g., Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 669 (1985); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462 (1985).

14. See, e.g., G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 244–90 (expanded ed. 2003) (discussing these expansions of liability and the reasons expansion ceased).

15. See Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 406–07, 410 (1987) (discussing expanded liability and its effect on liability insurance).

16. See Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 217–23 (identifying the enacted reforms).

been asked to adopt market-share liability soon after *Sindell* was decided, but instead were confronted with the issue some years later, found themselves considering whether to do so in a new legal climate.¹⁷ And that climate was less favorable to the expansion of liability, and therefore to the adoption of market-share liability, than it had been just a few years earlier.

A second reason market-share liability encountered a developmental dead end is that it turned out not to be practical. Market-share data was likely to be least available in the very cases in which it was most necessary. In the DES cases, for example, there was sometimes a time lag of decades between exposure to DES and the manifestation of injury.¹⁸ Proving which defendant's DES the plaintiff's mother had ingested in such a situation is extremely difficult since over the years medical and pharmacy records disappear. That is a major justification for adopting market-share liability. But the passage of time makes obtaining data about market shares decades after a product was sold equally difficult, if not more so, and for the same reasons: even if market-share data once existed, and that is by no means certain, the data tends to disappear over time.¹⁹

Third, market-share liability depended on there having been a chemically identical product made by different manufacturers,²⁰ but this has not often been the case. Neither the lead pigment manufactured by different paint companies,²¹ for example, nor the diphtheria, pertussis, and tetanus ("DPT") vaccines formulated by different pharmaceutical manufacturers²² were chemically identical. In the absence of such chemical identity, the products made by different potential defendants have different degrees of bioavailability. In such a situation, market share is not a perfect proxy for the total amount of injury that each defendant's product caused, and the strength of the argument for applying the doctrine is significantly weakened.

Finally, the principle behind market-share liability—that because market share is a proxy for the amount of injury caused by any particular defendant's product, it is fair to impose liability in proportion to market share²³—is satisfied only when the disease or injury caused by a product is caused only by that product. If this is not the case, then market share is not an accurate proxy for causal

17. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 671 (1992).

18. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. o (Proposed Final Draft No. 1, 2005).

19. *Id.*

20. See *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 171–73 (Pa. 1997).

21. See *id.*

22. See *Shackil v. Lederle Labs.*, 561 A.2d 511, 522 (N.J. 1989).

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. o (Proposed Final Draft No. 1, 2005).

responsibility because nondefendants or other factors may have caused some of this disease or injury. The particular adenocarcinoma that results from exposure to DES in utero appears to be a signature of exposure to DES and only DES. And mesothelioma, a rare form of lung cancer, results only, or almost only, from exposure to asbestos fibers. But it turns out to be rare that a particular disease or injury is a “signature” for exposure to a particular product or substance and only that product or substance.²⁴ So there are few instances in which there have been both products and diseases that satisfied the principle underlying market-share liability.

The market-share liability doctrine has nonetheless been adopted in a number of states and has not been overruled.²⁵ It seems unlikely that the doctrine would be overruled in these states if it happened that the doctrine were invoked in a new wave of suits alleging liability on the part of the makers of chemically identical products that were alleged to cause a signature disease or injury. On the other hand, it seems just as likely that the states that have rejected market-share liability would not adopt this doctrine now if such cases were brought in their courts. The doctrine has simply dead-ended in the states where it is in force.

II. A CLASH OF VALUES

Although there is disagreement among tort-law scholars about whether tort law is best described as reflecting concern for corrective justice, civil redress, loss distribution, deterrence, or some combination of these and other concerns, there can be no dispute that the scope of particular tort-liability doctrines reflects value choices that are often contestable at the margin. Some states go one way, and others go the other way. Two prime examples of this phenomenon involve premises-liability rules and the tests for a defectively designed product.

A. Premises Liability

Beginning in the 1960s, the tripartite classification of entrants onto land—invitees, licensees, and trespassers—began to break down.²⁶ As a draft of the *Restatement (Third)* notes, nine states have abolished these categories entirely.²⁷ These states hold that the owner of land owes a duty of reasonable care under all the

24. See, e.g., Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 531 (Wis. 2005).

25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. o (Proposed Final Draft No. 1, 2005).

26. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters’ note (Council Draft No. 7, 2007).

27. *Id.*

circumstances to anyone on the land²⁸ and permit the jury to take the situation that brings the entrant onto the land into account in determining whether the duty was breached. Some fifteen other states have abolished the distinction between invitees and licensees but continue to apply the traditional rule to trespassers.²⁹ The draft *Restatement (Third)* sides with the jurisdictions that have abolished the categories, except that it retains the traditional rule for what it terms “flagrant” trespassers.³⁰

There is much that can be said about this division of authority,³¹ but I think that it is hard to deny one reason for its existence. The states that have retained the traditional tripartite distinction, or that have only abolished the distinction between invitees and licensees, have a different attitude toward trespassers than the states that still apply the traditional rule to trespassers. The states adhering to the traditional rule want a rule that automatically precludes at least some trespassers, and perhaps most, from recovering for a landowner’s negligence. The proposed treatment of “flagrant” trespassers under the *Restatement (Third)* is itself a reflection of this attitude at the same time that it reflects an attempt to have things both ways.

I recognize that there are routes by which courts that adhere to the traditional rule can still circumvent that rule. The exceptions for discovered (and sometimes foreseeable) trespassers and the attractive-nuisance doctrine are the most prominent such routes.³² And I recognize that the courts in states that have retained the traditional rule are complicit in—indeed, at some point they created—these routes. But the fact is that the courts in these states have felt the need to retain the traditional rule at least in part because they subscribe to the value at its core. These courts believe that, absent special circumstances, a landowner should owe trespassers only a very minimal duty, as a matter of law. In contrast, the courts in states that have liberalized the traditional rule are content to have this issue taken up case by case and therefore are content to have juries decide that, even absent special circumstances, the landowner owed a trespasser more care than the traditional rule would require. This difference reflects a clash of values that is likely, for the foreseeable future, to preserve the division of authority over the treatment of trespassers.

28. *Id.*

29. *Id.*

30. *Id.* § 52.

31. Contributors to this Symposium, for example, have much to say about this division that is interesting. See James A. Henderson, Jr., *The Status of Trespassers on Land*, 44 WAKE FOREST L. REV. 1071 (2009); Keith Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049 (2009); Stephen D. Sugarman, *Land Possessor Liability in the Restatement (Third) of Torts: Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079 (2009).

32. See DAN B. DOBBS, THE LAW OF TORTS §§ 232, 236 (2000).

B. *The Test for Design Defects*

One of the great contributions of the first portion of the *Restatement (Third)* to be completed, the *Restatement (Third) of Torts: Products Liability*, was to clarify the extent to which liability for product defects is, and is not, strict liability. Most importantly, in connection with design defects, section 2(b) provides that the test is whether the foreseeable risks posed by a product could have been reduced by the adoption of a reasonable alternative design.³³ This is essentially a risk-utility test.³⁴ Although consumer expectations may be relevant to the question of whether an alternative design was reasonable, consumer expectations “do not constitute an independent standard for judging the defectiveness of product designs.”³⁵ Some courts, however, have rejected the *Restatement (Third)* approach and have adopted the consumer-expectations test.³⁶ Others employ the tests as alternatives, permitting the imposition of liability as long as a product design fails one of them.³⁷

This is a fundamental difference, since the risk-utility test is negligence-like, whereas liability based on the failure to satisfy consumer expectations is a form of strict liability. That is, under the consumer-expectations test, a product design may be defective even if that design is (in the *Restatement (Third)* sense) “reasonable”—even if the utility of the product outweighs the risks posed by its design. It may be that part of the explanation for this difference is simply the desire of the courts that adhere to the consumer-expectations test to make good on their historic assertions that products liability is strict liability. Once these courts recognize that a risk-utility approach is not strict liability, the principal way to maintain their commitment to strict liability is through some version of a consumer-expectations approach. But I think that this stance is more than just an effort to be consistent with past pronouncements. The courts that adhere to the consumer-expectations test do so because they believe that liability for defective design (at least in cases where a product is not so complex as to make it impossible for a consumer to have design-safety expectations³⁸) should be imposed when a product is not as safe as consumers expect it to be, even if it is reasonably safe. It may be that ultimately this belief is grounded in the notion that product

33. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

34. *Id.* § 2(b) cmt. a.

35. *Id.* § 2(b) cmt. g.

36. For discussion and case citations, see James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 678 (2000).

37. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446 (Cal. 1978).

38. See *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1334 (Conn. 1997) (distinguishing between cases in which “everyday” experience permits the jury to make a finding about consumer expectations and those in which it does not).

manufacturers are responsible for unduly high consumer expectations regarding a product's safety, either because their advertising creates the expectations or because manufacturers fail to dispel expectations that are independently acquired. I suppose that this might be considered an oblique form of fault, but it is not something that must ever be proved.³⁹

In short, the states that employ the risk-utility test for design defects and those that employ the consumer-expectations test hold conflicting values about what should trigger liability for injuries associated with the design of a product. This conflict is not merely methodological or transitory. It is substantive and durable.

III. CONSISTENT ADMINISTRATION

The third basis for divisions of authority that I will identify is concern for the consistent administration of a form of liability or across different forms of liability. Some courts decline to adopt certain forms of liability and place limitations on the scope of others because of practical concerns about difficulties of implementation or concerns about the consistency of permitting recovery for a particular form of damages in one kind of case but not in another. In contrast, other courts are less concerned about these difficulties and therefore are more willing to adopt new forms of liability or expand existing forms. I will discuss three examples of divisions of authority that derive from these differences about consistent administration: liability for negligent infliction of emotional distress, the standard of care applicable to actions against physicians for the failure to obtain informed consent, and liability for reduction in the chance of survival.

A. *Negligent Infliction of Emotional Distress*

This form of liability has evolved over a period of more than a century from a posture in which there was no liability for "pure" emotional distress to one in which there are two major approaches. The first approach permits recovery only when the plaintiff was within the zone of danger herself and feared for her own physical safety; recovery for the resulting emotional distress is then permitted.⁴⁰ The second approach goes further, permitting recovery under limited circumstances even if the plaintiff was not within the zone of physical danger. Under this approach, the plaintiff must satisfy criteria based on proximity to the zone of danger, the visibility of the person put at risk by virtue of being in the zone of

39. Application of the consumer-expectations test does not require proof of the origin of consumer expectations. Indeed it is not clear that the test even requires proof of the expectations themselves. Rather, it appears simply to be understood that jurors are capable of applying the test based on their own knowledge and experience.

40. See DOBBS, *supra* note 32, § 309.

danger, and the relation of the plaintiff to that person.⁴¹ Derived from the California case of *Dillon v. Legg*,⁴² for practical purposes these proximity, visibility, and relation criteria require that the plaintiff be a nearby eyewitness who is closely related to the person put at risk and that the plaintiff suffer distress beyond what would be anticipated in a disinterested witness.⁴³ The draft *Restatement (Third)* adopts what is essentially the *Dillon* rule.⁴⁴

The difference between these two approaches, in my view, has little or nothing to do with an underlying philosophy about tort rights, tort wrongs, or the value that tort law ought to place on compensating different forms of emotional distress.⁴⁵ The courts adopting the zone-of-danger approach do not appear to believe that there is something intrinsically more blameworthy about negligent action that risks physical injury to one person but causes that person only emotional distress, as compared to negligent action that risks physical injury to one person but causes emotional distress to a second person who witnesses the first person's injury. Nor do the courts that adhere to the zone-of-danger rule appear to believe that the person within the zone of danger is more deserving of compensation than the person who merely witnesses what happens in that zone from outside the zone.

Rather, it is these courts' concerns about the administrability of the *Dillon* rule that prompts them to adhere to the zone-of-danger limitation. The two traditional concerns that have led all courts to place limitations on the scope of liability for negligently inflicted emotional distress are that permitting such liability risks fraudulent claims⁴⁶ and opens "the potential for a flood of trivial suits."⁴⁷ By permitting fewer claims overall, the zone-of-danger rule necessarily is more successful than the *Dillon* rule in both of these respects.

The administrability concern of the zone-of-danger courts, however, is not limited to protecting against fraudulent claims or reducing the number of claims overall. In addition, any rule that hinges the right to recover on the plaintiff's relation to the accident, as the *Dillon* rule does, puts the courts in the business of deciding

41. *Id.*

42. 441 P.2d 912, 920 (Cal. 1968).

43. *See* *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989).

44. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (Tentative Draft No. 5, 2007). However, unlike the *Dillon* rule, this draft contains no requirement that the plaintiff suffer greater distress than would be suffered by a disinterested witness.

45. For articles in this Symposium addressing the doctrine and proposing explanations for the limits on the scope of liability for negligently inflicted emotional distress, see Gregory C. Keating, *Obligation and Harm in the Law of Negligent Infliction of Emotional Distress*, 44 WAKE FOREST L. REV. (forthcoming Dec. 2009); Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. (forthcoming Dec. 2009).

46. *See* *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994).

47. *Id.*

whether the particular relation that a plaintiff bears to the particular accident in question is sufficiently close to warrant sending the case to the jury. The zone-of-danger rule asks a binary question: was the plaintiff within the zone of danger or not? But the *Dillon* rule asks a question of degree: was the plaintiff in a sufficiently close relation to the accident to warrant sending the case to the jury? The proximity, visibility, and relationship criteria are efforts to circumscribe this question of degree.

But these criteria are not self-applying. They inevitably create line-drawing issues that require judicial involvement. The kind of involvement that fashioning and applying the relationship criterion would require may be especially worth avoiding for some courts. For example, I suspect that the prospect of being confronted with the need to address the rights of those who are in sexual relationships that have incomplete or no legal recognition and who witness a partner's injury or death gives some courts considerable concern about adopting the *Dillon* rule. This kind of administrability challenge is precisely what the zone-of-danger courts are able to avoid, and it seems likely that they will continue avoiding it.

B. *Informed Consent*

The physician's liability for failure to disclose the risks of treatment to a patient—for the failure to obtain “informed consent”—is well established.⁴⁸ There are two different standards, however, for assessing the physician's duty.⁴⁹ One standard requires disclosure in accordance with the standards of the profession.⁵⁰ In effect, under this “reasonable physician” standard, the failure to obtain informed consent is a species of malpractice. The other standard requires disclosure of information that a reasonable patient under the circumstances would wish to know.⁵¹ This standard makes informed consent a negligence issue.

At an earlier time the difference between these two standards probably had an impact on the amount of information that was disclosed to patients. Because physicians tended to be more paternalistic than they are today, medical standards probably required disclosing less information than some patients reasonably would have wished to know. Physicians were more likely to believe that they knew what was best for the patient and less likely to disclose information that would increase the probability that the patient would not take the physician's advice about what treatment to accept. Under these conditions, the “reasonable patient” standard would therefore have required the disclosure of more information than the reasonable physician standard.

48. See DOBBS, *supra* note 32, § 250.

49. *Id.*

50. *Id.*

51. *Id.*

The difference in the kind and amount of information that the two standards require, however, has almost certainly narrowed. When the threat of liability was new, both standards probably caused physicians to err increasingly on the side of disclosure. And once this began to occur, the professional standard evolved to require what it does today—more disclosure than had once been the norm. In addition, contemporary physicians are likely to be less paternalistic than their predecessors and hence more likely to see themselves in a working relationship with their patients. More information disclosure follows naturally from this conception of the physician-patient relationship.

The principal impact of the difference between the two standards, therefore, does not lie in the amount of information disclosure that they generate. It lies in the impact of the standards at trial. I am referring here not only to the obvious fact that the reasonable physician standard requires expert testimony as to the professional standard of disclosure, whereas the reasonable patient standard does not. The difference, I think, also lies in the way that the two standards relate to the other issues that tend to arise in informed-consent cases.

The key is to recognize that the alleged failure to obtain informed consent frequently is not a freestanding claim, but an additional count in a case where the dominant allegation is that the defendant committed malpractice in the provision of medical treatment.⁵² In this typical situation, if the informed-consent count is governed by the reasonable physician standard, then the organization of expert testimony at trial and the jury's comprehension of the issues to which that testimony is directed both are likely to be clearer than when the reasonable patient standard governs the informed-consent count. When the reasonable physician standard applies, often the same experts will be able to testify regarding the breach issues under both the malpractice and informed-consent counts, and the inquiry in each instance will be the same—what the relevant professional standards required.

In contrast, when the reasonable patient standard applies to the informed-consent issue, testimony regarding the breach issue under the malpractice and informed-consent counts is likely to come from different sources and to undermine, rather than enhance, the jury's comprehension of the issues. Expert testimony will of course be directed at the breach issue under the malpractice count. And expert testimony regarding the risks and benefits of the treatment to which the patient consented, and any alternative treatment that may have been feasible, will still be required in order to prove breach under the informed-consent count. But this testimony is merely a predicate to the ultimate question—whether information

52. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

regarding risks and benefits that was not disclosed would have been material to a reasonable person in what the physician knew to be the plaintiff's position. Therefore, there may also be lay testimony—perhaps from the plaintiff herself—directed at this ultimate issue. As a result, in contrast to testimony that is relevant to the malpractice allegations, in connection with the informed-consent allegations, either there will be no testimony about the ultimate breach issue from either the plaintiff or the defendant, or there will be testimony in the plaintiff's case-in-chief but none in the defendant's case. These kinds of asymmetries are likely to make the issues seem less clear and the presentation of issues at trial seem less organized and thereby to impede the jury's comprehension of what the testimony from various sources on various issues is designed to prove.

The degree of complication and lack of clarity that such a trial involves is likely to be aggravated by the fact that there will be additional complications associated with proof of causation. To get to the jury at all on an informed-consent claim, the plaintiff must introduce evidence not only that the defendant failed to disclose necessary information but also that this failure to disclose caused the injury for which the plaintiff seeks compensation.⁵³ In most states this requires proving both that the plaintiff would have declined treatment if the necessary information had been disclosed and that a reasonable person in the plaintiff's position would have declined treatment.⁵⁴ In the typical case involving allegations of both malpractice and failure to obtain informed consent, the plaintiff will therefore be taking the stand to testify not only about facts relevant to the malpractice claim but also about facts relevant to both prongs of the causation issue in the informed-consent claim. In an already complicated setting, then, the reasonable patient standard will have the tendency to elicit testimony from the plaintiff on yet another issue and to require a jury instruction identifying yet another different issue for the jury to decide.

In short, actions that allege both malpractice and failure to obtain informed consent are likely to be difficult to administer in a way that is comprehensible to juries even when the reasonable physician standard applies to the informed-consent claim. But the reasonable patient standard, whatever might be said in favor of that standard on the merits, threatens to complicate administration of such cases further and therefore to undermine further their

53. See DOBBS, *supra* note 32, § 250.

54. See, e.g., *Canterbury*, 464 F.2d at 790 (opining that “a technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory”); DOBBS, *supra* note 32, § 250. The impact of the rule that causation be assessed by reference to what a reasonable person in the plaintiff's position would have done is discussed in KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 78–80 (3d ed. 2007).

comprehensibility to juries. It would not be at all surprising if some appellate courts considering which informed-consent standard to adopt have recognized these complications and preferred a standard that reduces such complications at the margin. This difference in administrability considerations may at least partly account for the division of authority regarding the appropriate standard to apply in informed-consent cases.

C. *Loss of a Chance*

The last doctrine I will examine, the doctrine of lost chance, permits malpractice recovery by a patient whose condition a physician misdiagnoses or mistreats when the malpractice has reduced the patient's chance of surviving or being cured.⁵⁵ For example, in the classic case adopting the lost-chance doctrine, the physician failed to diagnose cancer in a patient.⁵⁶ At the time of the misdiagnosis, the patient would have had a thirty-nine percent chance of surviving if the cancer had been diagnosed (and then treated). Instead, diagnosis was delayed, and when diagnosis did occur, the patient's chance of surviving was twenty-five percent.⁵⁷ Although the physician's failure to diagnose was not more probably than not the cause of the plaintiff's death, the court held that there was nonetheless a cause of action for the reduction in the patient's chance of surviving that resulted from the misdiagnosis.⁵⁸ Logically, the proper measure of damages in such a case is the value of the chance that is lost—that is, a percentage of the damages that would be awarded if the defendant's negligence were proven to be the cause in fact of the patient's death.⁵⁹

There is a division of authority about whether there is a cause of action for loss of a chance to survive. The most persuasive argument for the loss-of-chance doctrine, I think, sounds in deterrence. Without the threat of liability for loss or reduction of a chance, physicians misdiagnosing patients who later turn out to have had less than a fifty percent chance of survival face no threat of liability for misdiagnosis. On the other hand, the most persuasive argument against liability, in my view, is that in this situation the misdiagnosis is not likely to have caused the patient's death. The traditional cause-in-fact requirement simply is not satisfied. This concern, I think, explains why the courts that have adopted the

55. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 cmt. n (Proposed Final Draft No. 1, 2005).

56. *Herskovits v. Group Health Coop.*, 664 P.2d 474 (Wash. 1983).

57. *Id.* at 476.

58. *Id.* at 479.

59. See Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1382 (1981). Some courts nonetheless seem to permit full recovery, though often when the probability of causation has not been quantified one way or the other. DOBBS, *supra* note 32, § 178.

doctrine do not characterize the loss as death, but instead see it as loss of a chance, or reduction in the chance, to survive.

I strongly suspect, however, that at least part of what underlies this division of authority is not the courts' differences of opinion regarding the comparative importance of deterring malpractice versus adhering to the traditional causation requirement. Rather, the difference lies in the greater concern of the courts that have rejected the lost-chance doctrine about the difficulty of administering the doctrine and the implications that adopting it would have for the administration of other tort claims.

There is, in fact, a series of such concerns. First, it is easy enough to imagine administration of a malpractice case in which the probability of the deceased's survival at the time of misdiagnosis and at the time of proper diagnosis is undisputed. But in practice these probabilities are likely to be the subject of factual disputes. Different survival-expectancy data about the relevant medical condition at the relevant times is likely to be introduced by the plaintiff and the defendant. Among other things, *Daubert* challenges to the experts who are offered to testify about this data and the studies on which they rely can be routinely expected in such situations.⁶⁰ Lost-chance suits therefore risk considerable administrative complexity in this regard alone.

Second, the logic underlying the lost-chance doctrine cannot be easily cabined. If a misdiagnosis followed by death is subject to the doctrine, then it would be logical for a misdiagnosis followed by a failure to recover completely from ill health or from injury also to be subject to the doctrine. And if misdiagnosis is subject to the doctrine, it would be logical to apply the doctrine to mistreatment as well. Physicians who performed surgery that reduced a patient's chance of survival or reduced a patient's chance of recovering from the condition requiring surgery, for example, would logically be subject to the lost-chance doctrine. Disputes over the magnitude of the relevant lost chances in all these additional situations could be routinely expected, with corresponding administrative complexity.

Nor is the lost-chance doctrine logically limitable to cases involving medical diagnosis and medical treatment. Any negligent act or omission that aggravates a preexisting, but not necessarily permanent, condition of the plaintiff may reduce the plaintiff's chance of recovering from that condition. The thin-skull rule provides for recovery when that negligence is more probably than not the cause of such a failure to recover, whether the result is worsened health, worsened injury, or death.⁶¹ The lost-chance doctrine, however, would permit recovery for the reduced chance of

60. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–92 (1993) (specifying the criteria for the qualification of expert testimony regarding scientific issues).

61. DOBBS, *supra* note 32, § 188.

recovery or survival when the defendant's negligence was probably not the cause of the failure to recover from or survive a thin-skull problem. All of the administrative difficulties entailed in litigating the amount of the reduced chance of recovery or survival that resulted from the defendant's negligence would have to be faced in this context if the lost-chance rule were applied to ordinary negligence claims.

Finally, the distinction between negligently reducing an individual's chance of survival and negligently increasing an individual's risk of being injured is problematic. The distinction can be persuasively maintained only if a lost chance is analytically different from an increased risk. For courts that do not find this distinction persuasive, the logic of the lost-chance doctrine would lead to a wholesale regime of proportional liability, rather than the much simpler and easier to administer all-or-nothing regime based on proof of cause in fact that now obtains.

For all of these reasons, adopting the lost-chance doctrine is like stepping onto a conceptual slippery slope. Doing so risks sliding all the way down to a system of proportional liability, with the only way to fashion a stopping point being to draw doctrinal lines that logic does not necessarily support. But conceptual slippery slopes are not the same as real ones. There is no risk of falling to the bottom of a conceptual slippery slope if you do believe that you are on it. Many of the courts that have adopted the lost-chance doctrine appear not to believe that they are on a slippery slope and therefore do not fear the administrative difficulties that would be entailed in following the doctrine's logic where it leads. Others recognize that they would be stepping onto a conceptual slippery slope by adopting the doctrine and choose not to do so. The result is a stable division of authority on the issue.

CONCLUSION

The idea that the common law works itself pure is an attractive one, and it may be largely true. But in the common law of torts there are more divisions of authority that show no signs of disappearing than might be thought. That is because the reasons for these divisions show no signs of disappearing. The facts that are prerequisites to the application of market-share liability are unlikely to become routinely available. Differing attitudes toward the rights of trespassers and the obligations of product manufacturers are unlikely to converge. And the challenges to the consistent administration of suits seeking recovery for the negligent infliction of emotional distress, failure to obtain informed consent to treatment, and loss of a chance to survive are unlikely to disappear. As long as this remains the case, divisions of authority over these forms of liability will be stable and persist.