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On First Looking into General Principles of Torts: Ruminations on Restating for an Ex-Dean

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On First Looking Into General Principles of Torts: Ruminations on Restating for an Ex-Dean

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Dear Harvey,

I take the occasion of this tribute issue, and your appointment as co-Reporter of the Restatement project on General Principles of Torts, to venture a few remarks on that project.¹

The 1999 Discussion Draft (hereafter, Draft), which I use as a point of departure, augurs an important contribution to the law. It is an admirable first cut at a subject of considerable difficulty.² My reflections on the complexity of setting out general principles for Torts lead me to conclude that in its own way, this task may rival the demands of the decanal position

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* Frederic P. Vose Professor, Northwestern University School of Law. I am grateful for support from the Clemens and Jane Werner Faculty Enrichment Fund.

1. My remarks are, of course, directed also to Gary Schwartz, your co-reporter.

2. To emphasize my limited qualifications as a witness, I note that my references to the Draft are based on a first reading only of key provisions, rather than careful scrutiny of the Draft as a whole. My purpose here is to use the Draft to put some ideas in play, rather than to do close critical commentary.

you have just left, and in which you served so long and with such distinction.

I. GENERAL ISSUES

Here are some of the broader problems that I see in this enterprise:

A. Overall Architecture

The first question concerns the overall architecture of the project. The Draft jumps right into the doctrinal pond with definitions of intent and recklessness.³ Should there be a prefatory section that explains what Torts is, to define for the reader the subject matter that is based on the general principles? This also implicates the question of whether there should be an initial, compressed description of the multiple rationales of tort law.⁴ I elaborate on this issue separately below.

A correlative point, something in the nature of a lament, concerns the prior birth of one full published Third Torts Restatement and the imminent birth of another.⁵ Some observers, myself included, had thought that you couldn't effectively restate a subject comprehensively if you did piecemeal quilting beforehand. One need point only, illustratively, to the Product's Restatement's conflation of several doctrines, including negligence and strict liability, under its defect umbrella,⁶ and suggest that the General Principles Restatement may have to play a catch-up game in, for example, its efforts to define negligence.⁷ And one might mourn the opportunity to establish general principles of contributory fault in a General Principles Restatement before setting them out in the Apportionment Restatement.⁸ So much for spilt gallons. The present project must deal with the world as it is, including the existing world of Restatements Third.

3. See, e.g., RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 (Discussion Draft April 5, 1999) [hereinafter, "DRAFT"].

4. See 1984 A.B.A. Special Committee on the Tort Liability System, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUED CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW: REPORT TO THE AMERICAN BAR ASSOCIATION, ch. 4 (Marshall S. Shapo, Reporter) (summarizing "purposes and policy goals of tort law").

5. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter, "PRODUCTS RESTATEMENT"]; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (Proposed Final Draft (Revised) March 22, 1999) [hereinafter, "APPORTIONMENT DRAFT"].

6. See, e.g., PRODUCTS RESTATEMENT, *supra* note 5, at § 1, cmt. a, at 7-8 (saying that as long as "functional criteria" of defect provisions are met, "courts may utilize the terminology of negligence, strict liability, or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter").

7. Now essayed in DRAFT §§ 3 & 4.

8. See, e.g., APPORTIONMENT DRAFT, *supra* note 5, at §§ 3-5.

It is not news that the range of the subject matter creates obstacles to the formulation of general principles. One can see, without too much difficulty, a parallel between such seemingly disparate torts as defamation and assault and battery.⁹ It is harder, perhaps, to discern the generalizations that will connect, for example, intentional interference with contract with negligent infliction of emotional distress—not to say that there are not very broad foundational ideas on which both rest.

B. Diversity of Opinion on Rationales

A related point concerns the breadth of the spectrum of philosophical points of view on torts, at least among academic observers of tort law. Of course, practically all torts teachers, no matter what theoretical banner they fly, probably agree on, and teach, basically the same fundamentals. But to try to reconcile the views of policy espoused by corrective justice advocates, traditional instrumentalists, devotees of law and economics, feminists, and socialists calls for a different, and perhaps impossible, order of harmonization.

This leads me to the fact that the present Draft, perhaps as a matter of prudential choice, does not try to set out in one place a catalog of the rationales, goals or purposes of tort law generally. That may be the better part of valor, but it does leave open the question, especially in a statement of general principles, of what the chemical composition of their foundation is. This might be particularly ironic to students, who we always challenge to state the reason for the rule. A partial answer is that tort rationales can only be meaningful in application to particular doctrines.

A related question is at what level of precision one should try to identify the rationales of tort law, if one undertakes to do so. The Draft refers to a cluster of rationales—"fairness," "providing . . . appropriate safety incentives," and "broadly humanitarian goals"—in a comment to the blackletter definition of negligence.¹⁰ One may contrast this supple pluralism, which on the whole I find congenial, with the insistence of the Reporters for the Products Restatement on pinning its design defect rules to a risk-utility base.¹¹

9. See, e.g., MARSHALL S. SHAPO, *THE DUTY TO ACT* xv (1977) "[O]ne may use words or pictures to achieve the same lacerative or searing effects of fists, guns, and radiation").

10. DRAFT § 4, cmt. j (Proposed Final Draft (Revised) March 22, 1999) ("rationales for negligence liability").

11. PRODUCTS RESTATEMENT, *supra* note 5, at § 2, cmt. d.

C. Approaches to Restatement

Now I mention an issue that is endemic to Restatements: the question of what basic approach the restaters should take to their subject. In previous work on the Products Restatement, I identified three approaches—the literalist, or abacus, attempt to count decisions; the approach that seeks “wisdom and excellence”; and a “frank legislative approach.”¹²

We may put aside, for the moment, the legislative approach, which in general is not as potentially pertinent to a general principles restatement as to a products restatement—although I recognize that political arguments will rear up from time to time concerning what principles are general.

Whatever competition there is between approaches to this project, it would appear, will be between the abacus approach and the search for wisdom and excellence. As to the abacus approach, since there are galaxies of reported decisions on many of the subjects covered in the Draft, with innumerable factual refinements, it would seem impractical to try to classify and count them.

If the default choice is to seek wisdom, however, this places an especially heavy burden on those who try to define what wisdom consists of. There is a particular obligation of self-restraint on the part of reporters, whose choice of rules and formulas is naturally likely, at important margins, to reflect their own favored ideas or *betes noire*. This goes especially for the selection and discussion of rationales. To epitomize the problem, the task is, insofar as possible, to restate rather than to ruminate.

II. SPECIFIC ISSUES

I now turn to a number of more specific issues that may prove among the more vexatious ones.

A. The Definition of Negligence

In quantitative litigation terms, negligence law is the heart of torts. Therefore, it would be good, if it were possible, to try to reach consensus about the general definition of negligence.

The difficulty of that enterprise is evident when one considers the range of locutions of negligence. Start with the definition in section 282 of the Second Restatement that “negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”¹³ Now note the Draft’s definition

12. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 634-35 (1995).

13. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

of a failure to "exercise reasonable care under all the circumstances."¹⁴ Compare Shaw's reference, in *Brown v. Kendall*, to "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."¹⁵ Compare also Brett's reference to the "ordinary care and skill" exercised by the thinking person who "would at once recognise" danger to the person or property of another.¹⁶

Now superimpose on these formulas the Learned Hand test,¹⁷ which employs a cost-cost analysis; the frequent references in decisions to risk-benefit comparison;¹⁸ the still different phraseology of risk-utility;¹⁹ and the concept of the cheapest cost avoider.²⁰

One response to the problem of harmonization created by the diversity of terminology in this catalog is that it is just that — terminology — that it all stands for pretty much the same concept, and that all members of the guild know what that concept is. As readers of Homer know that the Great Earth Shaker and Poseidon are one and the same, lawyers understand that different legal epithets may stand for the same thing. Certainly, we know that epithets are not concepts.

Perhaps too many people have too much investment in each of these terms that it would be a waste of intellectual resources to try to bring them under a single, standardized linguistic roof. But perhaps also the problem is an even more difficult one; maybe the different phrases stand for different ideas. Yet, I am suggesting that if there are general principles of negligence, it would be useful at least to explore the fashioning of a consensus definition.

An interesting exercise would be to have all one hundred-plus members of the Members Consultative Group for the General Principles project give their own preferred definitions of negligence. Then we would know if we have a potential consensus or a Tower of Babel. I speculate that torts specialists of all stripes think that everyone knows negligence when she sees it and believe that almost everyone's perceptions converge closely. But it would be helpful to know just what the level of agreement is. (In this discussion I do not pause to discuss the negligence that many observers see in strict liability for

14. DRAFT § 4.

15. *Brown v. Kendall*, 6 Cush. 292, 296 (Mass. 1850).

16. *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883).

17. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

18. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978).

19. See, e.g., *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993).

20. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135-40 (1970).

products,²¹ not to mention the confusion engendered in many students by the use of the phrase negligence per se.)

B. Contributory Fault

I have adverted to the strategic problem created by publishing the sections on claimant fault of the Apportionment project before the drafting of General Principles. As able and dedicated a job as the Apportionment reporters did, this may tend to paint General Principles into a doctrinal corner, or corners. The brief discussion of "negligence and contributory negligence" in a comment to section 4 of the Draft,²² observing that "[t]here are certain differences in emphasis between" the two, only begins to represent the shadings of definition that your co-Reporter excellently captured two decades ago.²³ I note, in this connection, that there seems at least superficially to be a difference between the section 4 comment and the subhead in the proposed final draft of the Apportionment Restatement that declares "[p]laintiff's negligence same as defendant's negligence."²⁴

I am not sure how to get out of this corner. One way to do it is to have a separate section on contributory negligence. This would require a blackletter that tries to create a treaty with the Apportionment Restatement, insofar as the relevant actors can agree on the terms of the treaty.

C. Strict Liability and Negligence

I take it that the General Principles draft eventually will extend to strict liability, at least apart from products.²⁵ In doing so, it will have to deal with such complex doctrinal relationships as those between strict liability and negligence, and strict liability and nuisance. (I can note only in passing that the exclusion of products will require ignoring a complex body of case law that provides special challenges to those who would restate general principles of torts.)²⁶

To state "general principles" of torts, it will be necessary to suggest answers to questions like these: How much of strict liability is really

21. See, e.g., Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980).

22. DRAFT § 4, cmt. b.

23. See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L. J. 697 (1978).

24. APPORTIONMENT DRAFT, *supra* note 5, at § 3, cmt. a. I am informed by Professor William Powers, a co-Reporter of the APPORTIONMENT RESTATEMENT, that although this language will be changed in the published Restatement, the substance will remain the same.

25. See DRAFT xxxi (Reporter's Introductory Note).

26. See, e.g., 2 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* (3d ed. 1994 & Supp. 1999) ¶ 26.03-05 (discussing comparisons and contrasts among strict liability, warranty and negligence).

an exaggerated version of negligence? And, more generally, how much of strict liability is really strict? Is it true that Traynor saw through the *res ipsa* mask to an underlying strict liability more than half a century ago,²⁷ and there is too much case law indicating that the concepts really are different to view them as equivalents.²⁸ But, conversely, we also do know that often strict liability is a mask for suspicions of negligence.²⁹

D. Judge and Jury

The Draft's section on judge and jury³⁰ is suitably modest with respect to the negligence/standard of care issue. I simply note that this subject will require considerable further discussion with respect to the duty/proximate cause issue. The section labeled "Duty" in the Draft is rather compressed in its references to the roles of judge and jury.³¹ Confronting this problem in its broadest compass will be trying to catch the proverbial tiger by the tail. I wonder, in this regard, what parts of Green's duty question,³² if any, will be covered by later parts of the Draft as "doctrines of . . . proximate causation"³³

In connection with this problem, so much a part of the basic fabric of tort law, I make reference to a particular interest of mine: the way that tort law reflects culture.³⁴ Of course, judges do not deliberately set out to conform their decisions to prevailing attitudes. But I think that restaters of General Principles of Torts ought, as a descriptive matter, refer to the way that judges' thinking is conditioned by culture. Indeed, Cardozo, one of the progenitors of the Restatements, self-consciously described such aspects of his thinking process.³⁵

27. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (separate opinion of Traynor, J.).

28. See, e.g., SHAPO, *supra* note 26, at ¶ 26.04 [2].

29. See, e.g., *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).

30. DRAFT § 5.

31. See DRAFT § 6, cmt. c ("[t]he proper role for duty in unusual cases"); cmt. e ("[a]dministrability"); cmt. h (courts' breadth of perspective greater than that of juries).

32. See, e.g., Leon Green, *The Duty Problem in Negligence Cases: I*, 28 COLUM. L. REV. 1014 (1928); *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

33. See DRAFT xxi (Reporter's Introductory Note.)

34. See, e.g., SHAPO, *supra* note 26, at vii (discussing cultural symbolism of products); MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE 73-91 (1993) ("Cognition and Choice in a Mass Culture"); Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 Nw. U. L. REV. 1567-69 (1995) (speaking of "the proper role of judges as interpreters of culture as well as law").

35. See, e.g., BENJAMIN M. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66-75, 104-13, 167-69 (1921).

E. The "Core of Tort Law": What to Include

It would be well to reflect further about two subjects specifically excluded from this Draft. The Reporter's Introductory Note says that "given its focus on the core of tort law," the Draft "does not itself consider liability for emotional distress or economic loss."³⁶ What is "the core of tort law?" That portentous question would probably get at least 250 answers from any 100 members of my proposed focus group, the Members Consultative Group.

More specifically, the proposed exclusions would probably raise a number of eyebrows. Are we to assume that the Second Restatement's position on negligently inflicted emotional distress³⁷ continues to represent the considered position of the A.L.I.? Is the decision to exclude this issue attributable to its degree of particularity? If history is an indicator of the core-ness of a question, one may observe that there is a long history of tort-like law in which a cluster of analogous issues are central.³⁸

The economic loss issue so bedevils our jurisprudence that it seems at least arguable that it is sufficiently general to include in a statement of "general principles." The Products Restatement spoke to the issue in a section³⁹ that did not include nuances that seem important to me,⁴⁰ but it did speak. Will a Third Restatement project subsequent to General Principles try to define this subject? This is not just a storm on the horizon. There has been considerable thunder and lightning for years.⁴¹ I don't want to suggest a premature leap to judgment on the issue, but this is a topic on which the law cries out for guidance,

36. DRAFT XXI (Reporter's Introductory Note).

37. RESTATEMENT (SECOND) OF TORTS §436A (1965).

38. See, e.g., Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 356-57 (1915) (summarizing, inter alia, Greek and Roman law on injuries to "personality").

39. PRODUCTS RESTATEMENT, *supra* note 5, at § 21 & cmt. a (opposing tort suits for "pure economic loss").

40. A comment makes reference to the principal problem of this kind, that of economic loss caused by "products that are dangerous." *Id.*, cmt. d.

41. See, e.g., *People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 495 A.2d 107 (1985) (upholding cause of action for airline that sued for business interruption expenses attributable to negligence that allegedly caused fire requiring evacuation of nearby airport terminal). Compare *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (holding a claim stated for commercial fishermen for fish kills in oil spill case), with *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (denying recovery to diverse plaintiffs, including recreational fishermen, for injuries to marine life from chemical spill). Compare *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (holding no recovery for "purely economic" loss associated with malfunctions in turbines on supertankers), with *Alaskan Oil, Inc. v. Central Flying Servs., Inc.*, 975 F.2d 553 (8th Cir. 1992) (affirming plaintiff's judgment for economic losses attributable to plane being so corroded that it was "economically unfeasible" to repair).

even the guidance of a draft that does no more than summarize authorities and points of view and leaves courts to develop the law.

III. CONCLUSION

This brief essay is only suggestive. There is much more that could be said about both general philosophy and specifics, and I have not even touched on the majority of sections in the Draft. I have tried here only to identify some matters of general concern related to the process of restating, and a few particulars that seem of quantitative importance.

I can epitomize my most basic view of the subject by saying that General Principles should be informed, as much as possible, by general principles.

I close on an entirely personal note. I have known you as a friend and colleague, as a scholar,⁴² and as one of the most valuable contributors to the work of the American Law Institute over many years. I have learned to value your integrity and your judgment. Having no first-hand knowledge of your work as Dean — the occasion for this tribute issue — I can only fall back on my own intuition for the belief that these qualities have done you proud in that job. We all look forward to your enhanced contributions to the law as you return to full time teaching.

42. Most notably, in my own research work, for Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982).