

Interpretive Construction, Systemic Consistency, and Criterial Norms in Tort Law

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These brief remarks focus on the concepts of intent and recklessness in tort and how a *Restatement* should approach them. They center on three jurisprudential issues that are raised in any discussion of the basic building block concepts of a body of law, namely, the role of interpretive construction in the application of such concepts, the value of systemic consistency between such concepts and similar ones in other bodies of law, and, finally, the need to determine which concepts are criterial and which are merely evidential. They reflect my commentaries as a member of the panel on intent at the John W. Wade Conference on the *Restatement (Third) of Torts: General Principles*. The charge of the panel, which included George Fletcher and Anthony Sebok, was to reflect critically on the draft of an essay by Professors Henderson and Twerski entitled *Intent and Recklessness in Tort: The Practical Craft of Restating Law*. Their thoughtful essay made a host of theoretical and practical claims, two of which I dispute below. I conclude with a comment on the proper conceptualization of recklessness.

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I. INTERPRETIVE CONSTRUCTION

Henderson and Twerski argue that proper conceptualization of the intent requirement requires recognition of a distinction between “the proximate consequences of discrete acts, on the one hand, and the inevitable consequences of general courses of conduct, on the other.”¹ They contend that the concept of “intended consequences” should not be applied to a course of repetitious conduct—such as batting in the lineup on a major league baseball club throughout a long season—undertaken by an actor, because over the course of such conduct “some types of unhappy consequences are, sooner or later, virtually certain to occur.”²

For a batter in the major leagues, hitting foul balls into the stands, thereby striking patrons, is certain to occur from time to time across many thousands of swings of a bat. Yet in connection with any given swing, not only does the batter not desire to hit a foul ball when he swings the bat, he does not believe that such a consequence is certain—or even very likely—to follow. The player understands at the outset of the baseball season that foul balls will inevitably occur; but the “act” referred to in the phrase “one intends the consequence of an act” is the discrete act of swinging a bat at a pitched ball, not the deliberate undertaking of the course of conduct involved in batting regularly in a major-league lineup. Properly conceptualized, intent focuses on discrete acts, not general courses of conduct.³

Recognition of such a distinction would undermine a significant non-instrumentalist or fairness rationale supporting strict liability for manufacturing defects in the area of products liability. A manufacturer of large quantities of products intended for mass consumption in a mass market “knows with substantial certainty” (in other words, “intends”) that some percentage of those products will contain manufacturing defects that pose safety risks. No quality control process is infallible. The defect rate for any given manufacturing process will typically vary according to how many resources are invested in quality control. Once the manufacturer concludes that it has invested “reasonable” resources in quality control, it will take no further steps to prevent defects even though it knows residual defects remain. It can predict the number of accidents and accident victims that will stem from the residual defects that even reasonable quality control processes cannot prevent. In a word, the manufacturer is like an actor who shoots into a crowd. As Henderson rightly points out:

1. James A. Henderson, Jr., & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1141 (2001).

2. *Id.*

3. *Id.* at 1141-42 (internal citations omitted).

The producer, like the shooter, does not know who will be injured; but as surely as the shooter knows that someone will be shot, the producer knows that someone will be injured The shooter loads his gun with a certain number of bullets, and the producer accepts a certain defect rate when setting the level of quality control for its products Choosing to limit quality control means accepting a certain number of accidents; so in a sense, the eventual victims of this choice are harmed deliberately.⁴

Of course, unlike the shooter, the producer who invests adequate resources in quality control can be said to be behaving reasonably and hence not liable under a negligence regime for harms caused by the residual defects.⁵ Nevertheless, in the famous landmark case of *Vincent v. Lake Erie Transportation Co.*, an actor who *intentionally* harms others is liable even when the actor is privileged to act, that is to say, even when the actor has acted reasonably and has not committed a trespass in deliberately taking the welfare of another.⁶ “The best that can be said for the manufacturer is that it has behaved in a economically rational manner; but that does not alter the fact that its deliberate decision has condemned users and consumers to suffer harm.”⁷ Fairness, therefore, may require that he compensate his victims.⁸

The authors seek to avoid this train of thought by crafting the “proximate consequences of discrete acts” versus “inevitable consequences of general courses of conduct” distinction. This distinction works, however, only to the extent that we accept their interpretive construction of the facts. Interpretive construction is a process by which we decide to characterize facts either broadly or narrowly, at a high level of generality or with particularity, within a broad or narrow time frame, etc.⁹ Regardless of the substantive legal standard, interpretive construction of the facts can make a case seem very hard or very easy, and determine the outcome of the case. In proximate cause, for instance, the substantive legal criterion may be foreseeability, but how one interpretively constructs the facts may really be the decisive issue. Thus, in *Hines v. Morrow*, the defendant negligently permitted a railroad crossing to become full of pot holes.¹⁰ A car became mired in the mud at the crossing.

4. James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 937 (1981).

5. *Id.*

6. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

7. Henderson, *supra* note 4, at 937.

8. *Id.*

9. For a thoughtful general discussion of the phenomenon of interpretive construction in the criminal law setting, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

10. *Hines v. Morrow*, 236 S.W. 183, 184 (Tex. Civ. App. 1921).

The plaintiff, who had one wooden leg, went to the crossing to lend a hand in removing the car.¹¹ A truck was brought up, and the plaintiff went between the car and the truck to tie a rope to each.¹² When the truck started to back up, the plaintiff attempted to step out from between the two vehicles, but found that he could not because his wooden leg had sunk into a mud hole.¹³ A coil from the tow rope caught the plaintiff's good leg, causing it such serious injury that it had to be amputated below the knee.¹⁴ On appeal, the defendant argued that the condition of the crossing was not the proximate cause of the plaintiff's injury.¹⁵

A finding of proximate cause in this case hangs as much on interpretive construction of the facts as on the substantive test for proximate cause. As Professor Morris has pointed out, had the court focused on the details of the events, the defendant might have prevailed.¹⁶ Instead, the court adopted a broader interpretive focus in line with the plaintiff's description of the facts:

The case, stated in the briefest form, is simply this: [Plaintiff] was on the highway, using it in a lawful manner, and slipped into this hole, created by [defendant's] negligence, and was injured in undertaking to extricate himself . . . [To the defendant's argument that it] could not reasonably have been foreseen that slipping into this hole would have caused the [plaintiff] to have become entangled in a rope, and the moving truck, with such dire results . . . [the] answer is plain: The exact consequences do not have to be foreseen.¹⁷

This kind of interpretive legerdemain lies behind the intuitive appeal of the authors' foul ball analogy. A counter-analogy could be a shooter who fires not a single shot from a single action rifle into a crowd, but one who, armed with an automatic AK-47 with a long ammunition belt, takes aim at a crowd. Imagine that the ammunition belt he feeds the AK-47 contains a hundred randomly selected rounds, ninety-nine of which are blanks and only one of which is "live." If we interpretively construct the facts by narrowing the time frame to each discrete shot and disjoining (or disaggregating) each shot from its predecessor and successor, we might conclude that he did not "intend" or "know with substantial certainty" that he would injure anyone in the crowd. Indeed, we can even assume that the shooter connects the AK-47 to an automatic

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Clarence Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 193 (1950).

17. *Hines*, 236 S.W. at 187-88.

timer and abandons it, so that it only fires one round from the ammunition belt per day or week, resulting in great temporal distance between the *discrete* acts. Nevertheless, our intuitions would demand that he be responsible for an intentional injury when the "live" round is finally discharged into the crowd. Engaging in dueling analogies, however, is not the proper way to resolve a question, like this, that turns on interpretive construction. Rather, the focus should be on the background propositions (specifically, the normative commitments and factual assumptions) that motivate us to broadly or narrowly construct the facts.

II. SYSTEMIC CONSISTENCY

Professors Henderson and Twerski also contend that a general requirement of a Tort *Restatement* concept or definition is that it "must be kept endogenous to tort" without regard for how the concept or definition is conceptualized in legal contexts other than tort.¹⁸ They specifically say that the fact that "intent" has a certain meaning in the criminal law should be quite irrelevant to our thinking about tort law since a *Restatement of Torts* speaks only to, and need only concern itself with, the tort system of which it is a constituent part.¹⁹

Such a perspective ignores the value of systemic consistency²⁰ among all the rules that make up the body of the law; that is, rules and principles across different areas of law should be consistent with one another. Systemic consistency does not require that concepts and definitions in different areas of law always be treated identically. When we require consistency in everyday activities, we usually mean that any differences in the treatment of two cases must be justified by some relevant background propositions. The same is true in common law reasoning, and here the relevant background propositions consist chiefly of applicable moral norms, social policies, and empirical propositions about the way the world works.

For example, consider the concepts and definitions that make up self-defense doctrine. As between criminal law and torts, these concepts and definitions are largely coextensive. Indeed, when he examines the privilege of self-defense in his own excellent *Torts* casebook, Henderson has included and still includes relevant references to criminal law self-defense cases involving battered

18. Henderson & Twerski, *supra* note 1, at 1136.

19. *Id.*

20. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 44 (1988).

women.²¹ This is appropriate because there are no moral norms, social policies, or empirical propositions that justify any difference in the treatment of self-defense concepts in tort as against criminal law. For the same reason, Henderson extensively examines the criminal law case of *People v. Collins*²² in the chapter in his Torts casebook on actual causation and statistical proofs.²³ Of course, if there are relevant background propositions that justify treating ostensibly similar concepts in different doctrinal areas differently, by all means they should receive different treatment, but only after explicitly advertent to the reasons of morality, policy, or experience that justify the difference. That way, the values promoted by systemic consistency may be fully vindicated. These values include predictability, evenhandedness, harmonizing legal outcomes with the expectations of private citizens, and furthering the legitimacy of the law by demonstrating its substantive and formal rationality.

III. RECKLESSNESS

My chief concern with the concept of recklessness is that it should not turn on a requirement of conscious risk-taking. Recklessness may be viewed as having a cognitive component (awareness of risk-taking) and a dispositional component (indifference—or callous indifference—to the interests of others). What can be easily overlooked is that these two components may not always be in harmony; indeed, in a given actor, the dispositional component may negate the formation of the cognitive component. That is, an actor may be so callously indifferent to the interests of others that it never consciously crosses his mind that his behavior poses risks of injury to them. An actor should not escape liability for recklessness simply because he failed to care enough (his dispositional defect) to notice the obvious risk to life (or other weighty social interests) created by his conduct. Liability for recklessness should extend to actors who are callously indifferent to the interests of others, whether that indifference is manifested in their conscious risk-taking or in their very failure to notice risks they are creating. Viewed in this way, the cognitive component of recklessness (conscious risk-taking) is not criterial (a necessary element) but merely evidential. The dispositional component (callous indifference), however, does play a criterial role in the sense of being the necessary

21. JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* 82 (4th ed. 1994).

22. *People v. Collins*, 438 P.2d 33 (Cal. 1968).

23. JAMES A. HENDERSON ET AL., *THE TORTS PROCESS* 106-08 (5th ed. 1999).

(and in this case sufficient) condition of liability for recklessness. Conscious risk-taking may be probative evidence of callous indifference, but an action for recklessness should lie even if the actor's dispositional defect renders him oblivious to the safety of others.

