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# Of Envelopes and Legends: Reflections on Tort Law

Frank L. Maraist\*

## I. INTRODUCTION AND EXPLANATION

More than 40 years ago, when as a student I struggled to master the intricacies of the law, I heard a legend<sup>1</sup> comment that all of tort law could be written on the back of an envelope.<sup>2</sup> As one might suspect, that legend taught contract law. However, his comment stayed with me, albeit usually in the recesses of the mind, during my many years of practicing law and many more years of teaching torts. Because I have always loved tort law and have found it the most intellectually stimulating field in the profession, I never forgave the legend for the comment. Later, I would retaliate when, as a faculty colleague of the legend,<sup>3</sup> I observed that all of contract law can be reduced to three questions, and thus fit on the back of a small envelope. I remain convinced that my observation was correct, and that one may compress contract law into these questions: Can they agree? Did they agree? What did they agree to?

After 30 years as a torts teacher, I now see the wisdom of the legend's comment. While contract law can be reduced to three basic questions, tort law can be reduced to only one: when harm occurs or is threatened because of a human act, is it the better societal choice to impose the loss upon the actor, or to let the loss stay with the victim? This single issue can be subdivided (we are up to two questions now, approaching parity with contract law): 1) did the actor's conduct expose others to a risk of harm that society generally condemns (which we may call the "general risk") and 2) under the particular circumstances of this case, do we want to impose liability upon this actor for this conduct which caused these damages to this plaintiff in this particular manner (which we may call the "specific risk")?

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1. For youngsters and non-members of the Louisiana legal community, the author must explain that the legend was Dean Mac Hebert, a great teacher, scholar and administrator for nearly half a century. He served as Dean at Loyola Law School, as Dean of the LSU Law School for 35 years, and as acting president of LSU, but he is best remembered by his former students as a demanding teacher of negotiable instruments law (NIL, now, by virtue of legislative fiat, the UCC).

This essay was prepared primarily for my students in tort law. I am grateful to Bill Corbett, John Church, and John White, my fellow torts teachers at LSU, and to Glenn Morris, who teaches contracts, for their helpful comments about this essay. I also am grateful to Raley Alford, my research assistant (and the student editor of this piece), for his excellent assistance.

2. Actually, the author did not hear the comment, but has it on reliable (by law school standards) hearsay.

3. Of course, this retaliation did not come until the author was a full professor with tenure at LSU. Contrary to widely held beliefs at the bar, the acquisition of some academic knowledge does not necessarily mean the total loss of environmental knowledge, a/k/a "street smarts."

What the legend did not add (although I am certain he realized it) was that the basic three-question contract law and two-question tort law are made incredibly complicated (and sometimes incomprehensible) by legislative alteration and by judicial application in a myriad of fact patterns. Adding to the difficulties are the frequent commingling of tort law and contract law in the resolution of controversies and the role of tort law as the "garbage heap" of private law, i.e., "if it doesn't fit under anything else, can it be a tort?"

## II. STATUTES, CONTRACTS AND TORT LAW

The complications of contract law are beyond this discussion. What I focus upon here is the way in which the two basic tort law questions (the "general risk" and the "specific risk" inquiries described above) have been made difficult to understand and to apply because of statutory and judicial innovations. I begin with two basic truths: 1) legislation "trumps" jurisprudence and 2) contract law usually prevails over tort law. Thus, when the act of one person (the actor) causes harm to another (the victim), the first inquiry in tort law analysis is whether the legislature has made a determination of how the loss should be allocated between them. If there is a statute providing that an actor who does a particular act which causes harm to another must bear the cost ("you break, you pay"), then tort law is irrelevant. The legislature has spoken, and, given the "pecking order" of law,<sup>4</sup> has resolved the matter. Such statutes are rare, however.

If there is no damage-allocating statute,<sup>5</sup> the next inquiry is whether the parties (actor and victim) have agreed in advance on how the loss should be borne. In such a case, lawyers are wont to say that the contract is the law between the parties.<sup>6</sup> This, of course, provokes the three questions governing contract law: Can they agree? Did they agree? What did they agree to? If the parties have not agreed, or

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4. Every high school student who has not escaped a civics course knows that legislatures make law and judges apply it. Lawyers (and, before very long, law students) know that judges make more law than do legislatures. Judges make law by interpreting and applying statutes to given fact patterns when the statutory language does not clearly dictate the result. Sometimes judges overzealously find that the statutory language does not clearly dictate the answer, and, thus, seize the opportunity to make law through interpretation of an "ambiguous" statute. Judges also make law in the many situations that arise in which there is no legislative expression on the issue. In such a case, a court with jurisdiction must either allow the matter to proceed to trial, or dismiss the case at the outset (a demurrer, a motion to dismiss for failure to state a claim upon which relief can be granted, or, in Louisiana procedure, an exception of no cause of action). Whichever way he or she goes, the judge is making substantive law.

5. See, e.g., La. R.S. 23:106(A)(3) (1998) (an employment bureau licensee "shall pay all damages resulting from any unlawful action in its capacity as an employment service"); La. R.S. 46:1956(C) (1999) (person who interferes with or injures an assistance dog "shall pay for actual damages for any economic loss to any person aggrieved thereby"). A statutory allocation of the loss may be altered by contract, although such a reallocation by the parties may in some cases be void. See *infra* note 7.

6. See, e.g., *Caskey v. Kelly Oil Co.*, 737 So. 2d 1257 (La. 1999).

if the law does not permit them to agree (because we need a Latin name to keep up appearances, we say the contract is *contra bones mores*<sup>7</sup>), then contract law is inapplicable and the next level—tort law—is reached.

This does not mean, however, that legislation and contract law disappear from the tort process. A statute which does not directly impose the loss upon the actor may do so indirectly through judicial adoption of it as the standard for tort liability.<sup>8</sup> Contract law also plays a major role in the configuration of tort law. One example is contractual waiver in advance of any liability for a future act which may cause harm.<sup>9</sup> Such a waiver generally is upheld when the damages are traditional contract damages (the so called "benefit of the bargain"),<sup>10</sup> but often it is rejected as *contra bones mores* when the damages are traditional tort damages (personal injury and property damage).<sup>11</sup> Conversely, tort law is hesitant to provide recovery of damages where the underlying tortious conduct also involves a breach of contract.<sup>12</sup> Tort law may borrow from contract law, such as in the development of products liability, where the underlying theory of recovery was first tort (negligence), and then contract (redhibition, or, in common laws terms, breach of implied warranty) and, finally, back to tort (strict products liability).<sup>13</sup> Of course, contract law makes its most pervasive foray into tort law with insurance contracts that indemnify the actor against liability arising from the actor's tortious conduct.<sup>14</sup>

7. A contract that is *contra bones mores*, meaning "against good morals," is void. See, e.g., *Holliday v. Holliday*, 358 So. 2d 618, 620 (La. 1978) (finding a provision of an antenuptial agreement in which a wife waived her right to temporary alimony in the event of judicial separation from bed and board to be null and void as against public policy).

8. This generally is reflected in the doctrine providing that the violation of a certain criminal statute is negligence *per se*, i.e., negligence in and of itself without more. The result is a conversion of the negligence action into a strict liability or absolute liability action. See, e.g., *Meany v. Meany*, 639 So. 2d 229 (La. 1994). See also Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La. L. Rev. 1509, 1515-21 (1993).

9. Sometimes called "express contractual assumption of the risk," the classic example is the term usually printed on a parking lot ticket providing that the customer agrees to relieve the parking lot of liability for damage to the vehicle.

10. See, e.g., La. Civ. Code art. 2548 (parties may agree to exclude warranty); La. Civ. Code art. 2004 (any clause is null that in advance limits the liability of a party for intentional or gross fault). Thus, a party may limit liability for economic loss caused by another's conduct which is not intentional or gross fault.

11. See, e.g., La. Civ. Code art. 2004, providing in relevant part that "[a]ny clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party." See also *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811 (La. 1991).

12. See W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 92, at 655-67 (5th ed. 1984).

13. See Dan B. Dobbs, *The Law of Torts* §§ 352-53, at 969-75 (2000).

14. Insurance is a contract whereby one party (the insurer) agrees to indemnify (repay) the other (the insured) for damages sustained through the conduct of the insured or a third person. An insured purchases "first party" insurance to obtain reimbursement from the insurer for damages to his person or property. Examples of first party insurance include comprehensive and collision automobile coverage, hospitalization coverage, and fire coverage in a homeowner's policy. More important to tort law is "third party" or "liability" insurance, where the insurer agrees to indemnify the insured against his tort liability to third persons. The most obvious example of third party insurance is the liability coverage provided by an automobile policy. Either type of insurance is a method by which the law

As noted, if there is no applicable damage-allocating statute or contractual provision, and the victim seeks to impose the loss upon the actor, traditional tort law rules apply. Over several hundred years and millions of cases, the common law has developed an approach to resolving tort claims that focuses upon the general risk which the actor's conduct created, and the specific risk which the victim suffered. Not surprisingly, Louisiana law, although developed from civil law traditions,<sup>15</sup> applies the same "general risk/special risk" concept.

### III. THE GENERAL RISKS

The first inquiry in the traditional tort approach is identifying the general type of risk that may apply—is there a general principle of tort law which condemns the actor's conduct? If there is, then the other question is whether that general risk protects against the specific risk that caused the damage, i.e., should this actor be liable to this victim for these damages occurring in this particular manner? There are six general risks: 1) was the actor's conduct intentional,<sup>16</sup> 2) was the actor's conduct willful or wanton (sometimes termed reckless or gross negligence),<sup>17</sup> 3) was the actor negligent,<sup>18</sup> 4) does the actor's relationship to a person make the actor liable for the wrongful conduct of that person (vicarious liability),<sup>19</sup> 5) does the actor's relationship to a thing make the actor liable for the damage-causing condition of the thing (strict liability),<sup>20</sup> and 6) does the actor's participation in an activity subject him or her to liability for the damages caused by that activity (absolute liability)?<sup>21</sup> When the actor's conduct does not fit within one of these six general risks, traditional tort law dictates that the loss should stay where it is, i.e., with the victim. At this point one may say there is "no tort" or that the injury-causing event was "an accident," although the latter term is too legally imprecise to be helpful.

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permits a group of persons (those insured by the same insurer against the same risk) to spread their losses among themselves, thereby reducing the impact of a particular loss upon an individual member. See *infra* note 31.

15. The "fountainhead" of Louisiana tort law is found in one article in the Civil Code: Article 2315. That article provides rather cryptically that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." A comprehensive body of Louisiana tort law has been developed by judicial application of that 20-word legislative directive.

16. See Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* 1-15 (1996).

17. *Id.* The most common general risks, discussed below, are that the victim will be injured by the intentional conduct or negligence of another. There is another level of egregious conduct which falls somewhere between intentional and negligent conduct. While authorities generally agree that there is only one intermediate level, it may be given any one of several names by a particular jurisdiction, including "willful," "wanton," "reckless" and "gross negligence." The first thing a law student should learn is to escape the "tyranny of terminology," i.e., identify the nature of the conduct which the law proscribes, and not focus solely upon the name which the lawmaker uses.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Each general risk is confined by an operative principle which may be precise or vague. The intentional torts are generally precise; a specific operative principle determines whether certain conduct is a battery, or an assault, or a false imprisonment, or an intentional infliction of emotional distress. For example, the tort of battery occurs when the actor does an act that, to a person of ordinary sensibilities, is substantially certain to cause a harmful or offensive touching.<sup>22</sup> Other general risks often have imprecise operative principles which invite more fact-specific analysis. The classic is negligence—one is negligent if he or she fails to act as a reasonably prudent person under all of the circumstances.<sup>23</sup> The application of the definition/operative principle of a general risk to a particular set of facts may occur often enough, and produce the same result often enough, that a “rule” of tort law develops.<sup>24</sup> However, one should never lose sight of the fact that it is the operative principle, and not the rule, which controls.

Nowhere is the general risk inquiry more fragmented (at least in Louisiana) than in the negligence sphere. The general risk of negligent conduct is subdivided into traditional elements of duty, breach and causation.<sup>25</sup> The duty element generally asks whether the actor should have taken any care whatsoever for the safety of others. This turns upon the foreseeability of harm resulting from the actor’s conduct, i.e., could the actor foresee that his or her conduct would expose others to a risk of harm?<sup>26</sup> Arguably, that is the end of the duty inquiry, and the reasonableness of the actor’s conduct is considered at the breach level. Some, however, would add to the duty inquiry a reasonableness factor, i.e., assuming the actor could foresee that his conduct would expose others to a risk of harm, was that risk unreasonable in the light of all of the factors (determined for the most part by balancing the likelihood and severity of harm from the conduct against the cost to society of banning the conduct). The breach inquiry concerns whether the actor behaved reasonably in light of the foreseeable risk.<sup>27</sup> Sometimes the breach inquiry

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22. See Dobbs, *supra* note 13, §§ 28-32, at 52-63. See also Maraist & Galligan, *supra* note 16, at 27-29.

23. See Dobbs, *supra* note 13, §§ 116-23, at 275-93; Maraist & Galligan, *supra* note 16, at 75-77.

24. The classic example is the rule that mere words do not constitute an assault. Ordinarily this is true because in most cases words, without some overt act, will not satisfy the operative principle governing assault, i.e., an act which is substantially certain to cause apprehension of an imminent harmful or offensive touching to a person of ordinary sensibilities. But one can envision cases in which words alone are enough, given the particular strengths and susceptibilities of parties (such as “I’m gonna whip you” told to a child, or, for that matter, to an adult who is trapped in an elevator with the heavyweight champion).

25. See, e.g., Maraist & Galligan, *supra* note 16, at 75-80; Dobbs, *supra* note 13, § 115, at 270-71.

26. Foreseeability-in-fact asks whether a reasonable person, in ordering his or her daily affairs, would take this risk into consideration. For example, a reasonable person may look both ways before crossing a one-way street (it is likely enough that someone is proceeding in the wrong direction to take that into consideration); but, would he or she look skyward (although it is possible that a helicopter could be landing in the street)? It is important to draw this distinction, because “foreseeability” also has become a legal term of art, used in determining legal causation. See *infra* Part IV.

27. See *supra* note 26. One may discern that, depending upon the test applied to determine duty, the duty and breach inquiries may be duplicative. However, the only important distinction in such a

is expanded to encompass the duty inquiry, such as where a court states that the defendant owed a duty to the plaintiff to drive less than the speed limit in a rainy school zone shortly after expiration of the special zone speed limit.<sup>28</sup>

One might wonder why different courts at different times word differently what appears to be the same operative principle or why some legal issues are treated at different levels of analysis, i.e., as part of the general risk or as a specific risk. For example, the operative principle of the intentional tort of battery may be defined by a court as "an act substantially certain to cause a harmful or offensive touching" or as "an act substantially certain to cause a touching which is harmful or offensive" or as "an act substantially certain to cause an unconsented to touching." Sometimes these differences are merely sloppy lawyering, but in many cases they are deliberate policy choices.<sup>29</sup>

How do courts formulate and, as is frequently necessary, alter, expand or contract these operative principles? Generally, they do the same thing a legislator does (or should do) when he or she must vote on legislation: weigh the societal good that will come from imposing liability upon the actor against the societal harm that such an imposition may produce. There always is some societal harm from any imposition of liability upon an actor for any conduct. One such harm is infringement upon the freedom of that actor to do as he or she pleases, something which we all would concede is a fundamental American value. Another is proper allocation of resources: lawsuits require judges and court reporters and bailiffs and courthouses and juries; consequently, we worry about allocating too much of our resources to the judicial resolution of controversies. Yet another evil in imposition of liability is that it may overdeter desirable conduct; one may be hesitant, for example, to impose liability upon an actor who botches a rescue, lest future rescuers would be inclined to look the other way.<sup>30</sup> Imposing liability may also compromise society's desire to encourage people to learn to live together peacefully in a now-crowded world; thus society may command that its members sometimes bear "the slings and arrows of outrageous fortune."

However, a reasonable person may not be willing to accept some conduct by others, and if the law does not provide such a reasonable person with a remedy, he

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case may be whether the judge or the jury decides the issue. See *infra* Part VI.

28. See, e.g., *Foster v. ConAgra Poultry Co.*, 670 So. 2d 471 (La. App. 3d Cir.), writ denied, 672 So. 2d 674 (1996); *Miller v. Bailey*, 621 So. 2d 1174, 1184 (La. App. 3d Cir.), writ denied, 629 So. 2d 358 (1993) ("motorists have a duty to drive at a speed reasonable for the conditions of the road, the weather, the traffic and the time of day").

29. The difference in language between the first and second definitions may produce different results on the issue of who bears the burden of a reasonable mistake by the actor. The difference between the second and third definitions may produce a variance in whether the judge or jury decides the close cases and who bears the burden of persuading the one who decides. This is so because consent would be an affirmative defense in the second definition, while lack of consent becomes an element of plaintiff's cause of action according to the third definition.

30. Indeed, the Louisiana legislature, apparently mindful of a would-be rescuer's temptation to look the other way out of fear of being held liable for any harm resulting from the rescue, has extended protection from liability for negligent acts committed by persons who gratuitously render emergency care. See La. R.S. 9:2793 (1997).

or she is more likely to retaliate in kind. One must never forget that a major purpose of the civil law, as with the criminal law, is to keep the peace. Thus if the conduct is such that a reasonable person cannot be expected to turn the other cheek, tort law provides a substitute for vengeance by permitting an award of damages to the victim. This is the deterrent effect of tort law, which, although waning in importance, still remains a valuable societal policy.

An equally important goal of tort law is compensating the victim. We do not want to deter all accidents at any cost (if we did, we would ban automobiles, wouldn't we?). So, assuming that accidents will happen, another goal of tort law is to spread the accident losses which we allow in a way that will reduce the societal impact of those losses.<sup>31</sup> Here, of course, the best loss spreaders are governments, liability insurers, and manufacturers of injury-causing products, and it is not surprising that they are the most common defendants in tort litigation.

Other societal goals can be fostered by granting or withholding tort remedies. The classic nineteenth century example was the limited liability of railroads (it wouldn't make sense to give a company land to build a railroad and then impose staggering tort liability upon the company for operating the railroad, would it?). In the twentieth century, tort law was manipulated for such varying reasons as promoting the opening of private land to recreational use<sup>32</sup> and thwarting drug dealers.<sup>33</sup> There are those who hold that the societal policy of tort law in the second half of the twentieth century was a redistribution of the nation's wealth by allowing unlimited tort recovery against its deepest pockets.

Another important societal policy fostered by tort law is the satisfaction of the community's sense of justice, i.e., will it seem fair to the man on the street if society transfers this loss from this victim to this actor?<sup>34</sup> Note carefully that the standard against which the complained of conduct is gauged should be what is considered to be fair from the perspective of the disinterested man on the street, and not what is considered fair by the parties, since they make up their minds as to what is fair before the litigation begins.

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31. The law cannot make a loss "go away," but it can reduce the societal impact of the loss by spreading it among a larger group. Assume, for example, that a fire destroys a law student's apartment during the first semester of law school. The student now needs \$4,000 to purchase the necessities to continue law school. If, as often would be the case, the student could not come up with the funds immediately, a law career would be delayed or denied. But would an extra expense of \$50 delay or defeat the pursuit of a law degree? Assuming it would not, if each of the student's classmates chipped in \$50, there would be no interruption of any legal career. The loss would remain, but its destructive impact upon the quality of human life would be eliminated.

32. See, e.g., La. R.S. 9:2791, 2795 (1997).

33. See, e.g., La. R.S. 9:2800.61 (Supp. 2000).

34. This societal goal is perhaps the strongest argument for the continuation of the jury system. Jury systems are costly (both in imposition upon the citizenry and in judicial control). However, serving on a jury affords the average citizen the opportunity to participate in the governing of fellow citizens, a worthy goal for a democracy. More importantly, if one wants to determine and implement the community's sense of justice, is there any better way than to submit the matter to members of the community selected in an impartial manner and presented with the relevant facts?



Accommodating these policies in the allocation of losses through tort law has led to a judicial recognition of the general risks which, if engaged in by an actor, would justify transferring the loss from the victim to that actor. The actor's conduct in exposing another to harm from a general risk may be labeled as "fault,"<sup>35</sup> such as where the conduct is intentional or negligent, or may be treated as liability without fault, such as where vicarious or absolute liability is imposed. As noted before, if the actor's conduct does not violate a general risk, tort law will not impose liability, although liability may be imposed on some other basis, or the loss may be redistributed through some other law, such as Social Security disability benefits.

#### IV. THE SPECIFIC RISK

A determination that an actor's conduct falls within the scope of a general risk does not resolve the inquiry, however. The courts, and the judicial system, then must turn to the specific risk inquiry, i.e., assuming the actor's conduct exposes others to an impermissible general risk, do we nevertheless want to impose liability upon this actor to this victim for these damages occurring in this manner? This question must be asked to assure that transferring the loss in a particular case will achieve the best balance of the societal policies that initially led us to proscribe the general risk and condemn the actor's conduct. The specific risk question could be asked as one question, but, for a variety of reasons, some of which are purely historical, it is not. Instead, the judicial system has subdivided the question into subissues, the most important of which are causation and affirmative defenses.

Part of the "causation specific risk" inquiry is purely factual: did this actor's conduct have anything to do with this victim's loss? The answer is clearly "yes" if reasonable minds could conclude from the facts that "but for" the actor's conduct, the victim would not have suffered the loss. But in many cases (usually involving multiple actors or the coalescing improper conduct of the actor and the victim) one cannot comfortably infer causation through the use of the "but for" test. Nevertheless, where the actor's conduct could have played some part in causing the victim's harm and the actor's conduct exposed society to a prohibited general risk, it arguably is better policy (deterrence, loss allocation, fairness, etc.) to impose some or all of the liability upon that actor. Thus cause-in-fact has been expanded, for policy reasons, to include policy determinations, including a gradual alteration of the test for causation from "but for" to an inquiry into whether the actor's conduct was a "substantial factor" in bringing about the victim's harm.<sup>36</sup>

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35. Because of the Louisiana Civil Code's constraint (Article 2315—liability shall be based upon "fault"), our courts have been compelled to define as "fault" both the traditional common law fault (intent and negligence) and the common law liability without fault, i.e., strict liability and absolute liability. Implementing the third kind of liability without fault, vicarious liability, has required the courts to tiptoe around the express language of Louisiana Civil Code article 2320, which provides that a master is liable for the damage occasioned by a servant only when the master "might have prevented the act which caused the damage. . . ."

36. See Maraist & Galligan, *supra* note 16, at 86-90.

The other specific risk questions may be asked at different stages of a torts analysis, including the general risk level. Take the case of the imprudent victim. The impact of his or her conduct may defeat recovery at the general risk level or at the specific risk level. Thus, a victim who voluntarily encounters a potential batterer may be denied recovery because there was no battery (the act was not substantially certain to cause a touching which was offensive because of the consent) or could be denied recovery because of a specific risk inquiry (the victim consented to the battery, and consent is an affirmative defense defeating tort recovery). Courts divide on the method of handling some of the specific risk inquiries.

In negligence, the "this plaintiff" specific risk inquiry may be made at the general risk duty level, the general risk breach level, or at the specific risk level. Consider, for example, the imprudent plaintiff who slides down a hill backwards on a garbage can cover and strikes a parking lot light fixture. If he or she is the last best avoider of this accident, societal policy may dictate that the loss not be transferred to the actor (in this case, the person who maintained a parking lot with concrete light structures) from the victim-slider. Reaching this conclusion, a court may say one of the following: 1) the actor did not owe a duty, 2) the actor owed a duty but did not breach it, 3) the actor's conduct was not the legal cause of the harm, or 4) the victim's recovery is barred by an affirmative defense (assumption of the risk or contributory negligence).<sup>37</sup>

The victim's failure to timely pursue his claim against the actor or his unwillingness to abide by the judicial result, raises issues of judicial efficiency (how many courts will be needed) and fairness to the actor. These policies are reflected in specific risk principles that may bar the untimely<sup>38</sup> or repeated pursuit<sup>39</sup> of the victim's claim.

The "this defendant" specific risk inquiry also may be made at the general risk level, but more frequently it is made at the specific risk level as an affirmative defense. The most significant bar to recovery considered at the specific risk level is so-called tort immunity, which absolves the actor from the consequences of all or part of his conduct toward a victim. The most common type of immunity is sovereign immunity, which relieves the governmental actor of liability to any

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37. At one time, the actor's recovery in such a situation would have been barred by the affirmative defense of assumption of the risk. The actor also would be contributorily negligent. When contributory negligence served as a bar to recovery in tort, a distinction between the two affirmative defenses rarely was made. With the advent of comparative negligence, it has become necessary to redefine the role of assumption of the risk. The Louisiana Supreme Court has abolished it. See *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988). Nevertheless, the abolition of one specific risk category does not resolve the issue of whether the loss should be transferred to the actor from the victim. That battle is being fought at other levels, such as duty, breach and legal cause. See, e.g., *Pitre v. Louisiana Tech Univ.*, 673 So. 2d 585 (La. 1996).

38. A stale claim may be barred by the affirmative defense of laches or by a statute of limitations (in Louisiana, liberative prescription).

39. Repeated litigation of the same issue may be barred by the doctrines of *res judicata*, collateral estoppel and law of the case. See, e.g., La. R.S. 13:4231 (1991). See also *Lejano v. Bandak*, 705 So. 2d 158 (La. 1997).

person for certain activities which violate a general risk proscription and cause loss to a victim. Other immunities encompass both "this plaintiff" and "this defendant," such as the family and workplace immunities.

Both at common law and in Louisiana the "these damages" specific risk inquiry frequently is made at the duty level. The answer to this inquiry may be that one does not owe a duty to protect against harm to an unforeseeable plaintiff, or that one does not owe a duty to protect against causing mental anguish unaccompanied by contemporaneous physical injury, or that one does not owe a duty to guard against a family member's loss of society with a trauma victim. The "these damages" inquiry also may be made at the causation level, a fact that has perplexed students of the law at every level. Treating the issue at the causation level has led to the development of two separate causation elements—causation-in-fact, discussed above, and legal or proximate cause. Thus, a jurisdiction which determines that the better balance of societal policies (overdeterrence, fairness, interference with contract law, etc.) dictates that a victim should not recover economic loss unless his person or his tangible property is damaged, may express that conclusion in terms of "no duty" to protect against certain economic harm, or may conclude that the defendant's breach of his duty was not the "legal cause" of the economic harm. In either case, the outcome for the litigants is the same. Not so for the judicial system, as law students and lawyers struggle to comprehend why sometimes there is no duty and sometimes there is no legal or proximate cause. This "limited duty," "duty/risk" and proximate or legal cause inquiry is the favorite of law professors,<sup>40</sup> probably because it affords the best opportunity to confound law students.<sup>41</sup>

Perhaps the easiest of all the specific risk inquiries to categorize is the "this manner" risk, i.e., do we want to impose liability for damages occurring in a particular manner? When the inquiry reaches this level, the major societal policy at play is fairness, although arguably there is a deterrence/overdeterrence consideration in many of these cases. It is here that foreseeability-in-fact plays another important role. There is a compelling logic to the argument that if we require members of society to act reasonably in the light of the harm they can foresee, it is fundamentally unfair to hold them liable for damage occurring in a manner which they could not foresee. Dissatisfaction with this potential for unfairness has led to the emerging rule that the scope of the risks for negligent conduct is limited to the damages that the actor in fact could have foreseen when he acted. However, there are at least two problems with this conclusion. One is the fairness argument. What if the actor could not foresee the manner in which his or her conduct would cause damage, but if he had acted to avoid the harm that he could have foreseen, it also would have avoided the unforeseeable harm that occurred? Fairness, then, seems to point toward imposing liability upon the actor

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40. The "love affair" between law professors and proximate cause is evidenced by the length of the chapters on that subject in Torts casebooks.

41. As Professor Bill Corbett, one of my Torts colleagues, so aptly puts it, "using proximate cause to baffle students is like hunting deer with a machine gun."

for the unforeseeable harm, particularly where the victim's conduct was not improper. The second problem is that societal policy may dictate a limitation on damages that are foreseeable-in-fact, such as when a railroad engine starts a fire which spreads over a large area and causes catastrophic damages. What if, as in the nineteenth century, the societal policy was to limit the damages for which a railroad was responsible although such damages were foreseeable-in-fact when the actor (the railroad) acted? If the test in the particular jurisdiction for the scope of the risks was foreseeability, a court, in denying recovery beyond the first building, could state confidently that the burning of the second building was "not foreseeable." In such a case, foreseeability becomes a term of art. Although the result may be acceptable as a matter of societal policy, it leaves in its wake generations of law students and lawyers who are puzzled by the concept of foreseeability.

#### V. THE BOTTOM LINE

The "bottom line" is that in every case in which an actor's conduct causes harm to another (the victim) and in which there is no statute or valid contractual agreement which determines where the loss should fall, the judicial system, applying "tort law," must decide whether the loss should be transferred from the victim to the actor or should stay with the victim. This determination should be made by balancing the competing societal policies (values, if you will). The balancing cannot be made *de novo* in the resolution of every dispute that sounds in tort; such a result would undercut one or more of the relevant policies. Without established rules, one could not predict with reasonable accuracy whether certain conduct will trigger the imposition of liability for any damage caused. Without some degree of predictability, there would be either over-deterrence or a loss of deterrence, an inability to properly spread the unavoidable losses through insurance, and, most importantly, society probably would perceive that "the law is an ass." Thus, more precise guidelines have been developed by the lawmaker (which, in tort law, is primarily the jurist). Those guidelines take the shape of general risks which, if not avoided, can lead to the imposition of liability. Where the actor does not avoid the general risk, tort law makes a second inquiry into whether the better balance of societal policies dictates that a particular loss to a particular victim occurring in a particular manner should be transferred from this victim to this actor. All of this has led to operative principles such as battery, negligence, legal cause, immunity and contributory negligence. These principles, when applied to the myriad fact patterns that emerge in a crowded society, may evolve into hard and fast rules of liability or no liability. The result is a "rule," such as one which provides that the driver of a rear-ending automobile is presumed negligent vis-a-vis the driver of the preceding vehicle. Students of the law must constantly be cognizant of the three "levels" of law—the competing societal values, the operative principles that spring from a balancing of those policies, and the rules that develop from the application of an operative principle to a frequently recurring factual scenario. The lawyer should know the operative principles and the rules, but should

be ever mindful of their origin as a perceived proper balance of competing societal values. And the lawyer should appreciate that as society changes, its values change, and that there eventually will be a concomitant change in the tort rule or the tort principle or both.

## VI. THE ROLES OF JUDGE AND JURY IN THE PROCESS

There is one other issue which dominates tort law as we enter the twenty-first century: who will make the choice between competing societal policies? In a society which reveres the jury system, jurors must play some role. But a case by case determination (which is the only thing a jury can produce) is antithetical to the predictability of results that tort law often demands. Thus, another battleground for tort principles is the role the jury should play in resolving a tort case.

Generally, juries are as capable at fact-finding as are judges, particularly where trained legal minds (opposing counsel) present the evidence. Thus where trial is by jury, the jurors are adequate for the task of determining questions of pure fact, although they sometimes may need the opinions of others more qualified, i.e., expert witnesses. However, jurors cannot determine what will be the applicable principles and rules of law in the case, as the very nature of this inquiry requires consistency of result and a broad knowledge of law. Thus judges determine questions of law. But what about the third level of abstraction in the law process: the application of the facts to the law? If a person fails to act in a reasonably prudent manner under the circumstances, he or she is negligent. This is a pure law question, established by the jurisprudence and not subject to change except by the legislature or the jurisprudence. Whether a particular defendant was driving 35 miles per hour in a school zone at 3:15 p.m. while rushing a bleeding hemophiliac to a hospital is a pure fact question, and a jury of lay persons is adequate for this fact-finding task. But the application of pure fact to pure law, i.e., whether a particular defendant's conduct under particular circumstances is unreasonable (negligent), is a mixed question of law and fact, since the answer requires the application of the facts to the rule of law. In the American legal system, this mixed question, though generally assigned to the jury, is subject to judicial oversight, meaning that if the judge determines that reasonable minds could only reach one conclusion by applying these facts to this law, then there is either negligence or no negligence as a matter of law, and the decision is taken from the jury.<sup>42</sup>

Our respect for the jury system perhaps has led us to give juries too much to do at too great a societal cost. For example, determining some mixed questions (such as whether a product is unreasonably dangerous under the circumstances or whether an activity should be subject to absolute liability) may involve an understanding and require an application of societal policies which are beyond the ken of the average

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42. This generally is done at the trial level by means of a directed verdict or a judgment notwithstanding the verdict (a "judgment as a matter of law" in federal court). It also may be done by the judge prior to trial if there is no dispute as to the facts (summary judgment), or if the facts, if proved, would not "trigger" the application of the rule of law (demurrer or no cause of action).

juror. Nevertheless, we have given those issue to juries, despite the claim of some who say that jury determinations of these issues have led to a tort "crisis" and the resulting tort reform that pervaded the last third of the twentieth century. Certainly, it has generated a procedural "sub-culture" in which expert testimony is essential and courts are forced to screen jurors from the "flakes" who saturate the system.<sup>43</sup> An argument can be made that juries should be allowed to resolve tort claims only in those cases in which the dominant issue is fundamental fairness between the parties, i.e., what does the community's sense of justice dictate should be done with this particular loss? Such cases generally can be identified as those in which other societal policies are less important because the decision to impose liability will not have far-reaching implications.

### VII. SUMMATION

This rambling writing perhaps proves that the legend's comment was somewhat accurate: the general outline of tort law can be written on the back of an envelope, as can the general outline of contract law. But like contract law, tort law devolves into thousands of rules which are applied to specific factual situations by a judge or jury. The law student seeking to comprehend the law and the lawyer and judge seeking to apply it, should be eternally cognizant of the general outline—what is the general risk involved, and what specific risks are implicated? He or she also should be eternally cognizant that the general risk and specific risk principles which they learn and apply merely represent a certain balance of certain competing societal policies at a certain time. As times change, society's values change, and the lawyer and judge (and perhaps the law student, particularly on that final examination) must always ask whether the better balance of societal policies at this time under these circumstances dictates that the principle and, where appropriate, the particular rule, should endure and apply.

### VIII. THE FUTURE

What changes in society and its values will have the heaviest impact upon tort law in the twenty-first century? Certainly the decline in the "nuclear family" and the growing acceptance of some substitutes, such as concubinage and homosexuality, will impact some of the "specific risks" in the analysis of tort law. One also may predict an impact from other changes, such as (to name a few) genetic engineering, advances in health services, the widening of the gap between the well educated and the poorly educated, the increase in the elderly population, and society's desire to use civil law to protect the economically powerless. The general risks play the major role in the use of tort law to redistribute wealth; thus, one may expect an alteration in such risks, depending upon the legislative and judicial

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43. Thus a trial judge must exercise his or her "gatekeeping" function to prevent a jury from hearing expert testimony which is unreliable. See, e.g., Frank L. Maraist, Evidence and Proof § 11.3, at 196-204, in 19 Louisiana Civil Law Treatise (1999).

philosophies which prevail at a given time. The general risks also may be altered to accommodate the globalization of the American economy.

There are three societal changes which threaten the viability of the "general risk/specific risk" tort analysis. One is the continuing growth of "big government," whose presence already has been felt in the large number of special statutes governing tort liability. A second is the breakdown in the homogeneity of the American society, a breakdown which has forced the legal system to referee disputes which formerly were resolved by peer pressure or community values. The third is the escalating cost of administering an adversarial torts system. Alternate procedural measures, such as arbitration and mediation, may be successful in reducing the cost to society of dispute resolution. Regardless, legislatures now engaged in "micromanaging" tort law may move toward a system of absolute liability for limited damages, administered through a government agency. However, unless such a system becomes a pure governmental dole, it will be required to delineate the general and specific circumstances in which the "victim" will be compensated. Thus the two basic questions will remain, and the legend's twentieth century observation will survive the dawning of the new millennium.