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THE ENTERPRISE LIABILITY THEORY OF TORTS

HOWARD C. KLEMME*

"The truth is, that the law is always approaching, and never reaching, consistency."
O. HOLMES, *THE COMMON LAW* 36 (1881).

For more than one hundred years the trend has been away from the concept of fault as the basis for determining liability in the law of torts.¹ More than a decade before Holmes² published his explanation and defense of fault as the unifying concept for determining tort liability, the concept had begun to crumble. The first notable crack was *Rylands v. Fletcher*³ with its embryonic concept of liability without fault for losses caused by ultrahazardous or abnormally dangerous activities.⁴ With the coming of workmen's compensation, liability for most industrial accidents moved from a fault to a no-fault basis.⁵ Recent times have seen the same movement for injuries caused by defective products⁶ and automobile accidents.⁷ Early signs indicate

*Professor of Law, University of Colorado. Several of my faculty colleagues, Professors Clifford Calhoun, Alfred McDonnell, Arthur Travers, Stephen Williams, and Visiting Professor James Henderson, have read one or more drafts of the manuscript and offered numerous helpful suggestions and criticisms. To them and my former students in torts who have provided so much assistance to me as I have formulated and reformulated the thoughts expressed in this Article, I would like to express my sincerest appreciation.

A special expression of gratitude is also due Professors Charles Gregory and Harry Kalven who through their extraordinarily superb casebook, *CASES AND MATERIALS ON TORTS* (1st ed. 1959, 2d ed. 1969), introduced me to most of the problems considered in this Article and to much of the law and legal literature relating to those problems.

1. Gilmore, *Edited Transcript of AALS-AEA Conference on Products Liability*, 38 U. CHI. L. REV. 117, 123 (1970): "[T]he developments that appear to have been going on in this isolated field of products liability have been a part of a much larger phenomenon with the same reversal of risks between active and passive parties. It has occurred across the whole spectrum of our law of civil obligations. It has been going on over a long period of time . . ."; Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 370-79 (1951) [hereinafter cited as Gregory, *Trespass*].

2. O. HOLMES, *THE COMMON LAW* 77-129 (1881).

3. 3 Hurl. & C. 774 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

4. "Ultrahazardous" was used in the RESTATEMENT OF TORTS §§ 519-24 (1938) and "abnormally dangerous" in the RESTATEMENT (SECOND) OF TORTS §§ 519-24A (Tent. Draft No. 10, 1964).

5. 1 A. LARSON, *LAW OF WORKMEN'S COMPENSATION* §§ 1.20, 2.10 (1972).

6. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT (SECOND) OF TORTS § 402A (1965). For a list of the jurisdictions which have adopted the theory of strict tort liability for defective products, see Annot., 13 A.L.R.3d 1057 (1967, Supp. 1975). Colorado joined the list relatively late. *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1973) (*cert. denied*, 1974).

7. Not all the liability for injuries is determined on a no-fault basis. See, e.g., COLO. REV. STAT. ANN. §§ 10-4-701 to -723 (1973), especially §§ 10-4-713, -714.

negligence concepts (fault) will soon cease to be the basis for determining liability for injuries resulting from deficiencies in rendering service⁸ or arising from the utilization of land.⁹ Extensions of vicarious no-fault liability, created by both courts and legislatures, have also been part of the trend.¹⁰

This trend away from the unifying concept of fault for determining liability for tort-like losses has long been recognized¹¹ and some-

8. Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661 (1974). An early sign of the trend in Colorado was the court of appeals decision in *Chutich v. Samuelson*, 33 Colo. App. 195, 518 P.2d 1363 (1973), holding the plaintiff had stated a valid claim for relief for property damages allegedly caused by the defendant's breach of a common law implied warranty in a service contract to do work in a workmanlike manner and produce a result reasonably "fit for its intended use." *Id.* at 199, 518 P.2d at 1366. On further appeal, however, the Colorado Supreme Court reversed: "We regard it as the better part of wisdom not to extend as a matter of law implied warranties from sales to service contracts." *Samuelson v. Chutich*, 529 P.2d 631, 633 (Colo. 1974) (emphasis in original). Presumably, there is an implied warranty to do the work in a workmanlike manner, but that apparently only means an implied promise to do the work in a non-negligent manner.

As Greenfield notes, *supra*, the analogies between the legal and other problems created by injuries caused by defective products and those caused by defective services are very close. I would add, moreover, that most defective products are in fact the result of defective services (design, construction, labeling, etc.) rendered by an employee to his employer in the manufacturing or marketing processes.

9. Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 U.C.L.A.L. REV. 820 (1975). Ursin persuasively argues that the abandonment by the courts of the old immunity-from-negligence liability rules which land occupiers enjoyed as against trespassers, licensees, and social guests is but one step away from abandoning fault, *i.e.*, negligence, as the basis for determining liability in these cases. Imposing liability using the "no-fault" principles of enterprise liability is a logical next step.

At least one court in deciding to follow the lead of the California Supreme Court (*Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968)), in abandoning the older immunity rules and substituting simply the general principles of negligence law justified its decision almost entirely in terms of the principles of enterprise liability:

The law of products' liability has become a field of strict liability, and there is continual movement away from *fault* as the governing principle for allocation of losses, in favor of enterprise liability or the distribution of losses over a larger segment of society through insurance. There is no sound reason to immunize land-owners from the community's perception of values.

Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) (emphasis in original).

Colorado has followed the trend and abolished the older special immunity rules. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971).

10. Judicial extensions of vicarious no-fault liability are illustrated by the "family car" doctrine and the "non-delegable duty" doctrine. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 71, 73 (4th ed. 1971). Illustrative legislative extensions are the "dram shop" acts (*e.g.*, ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Cum. Supp. 1975-76)) and "owner consent" statutes (*e.g.*, N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970)). An interesting legislative extension in Colorado is COLO. REV. STAT. ANN. § 13-21-107 (1973) (parent vicariously liable up to \$1,000 for property damage caused by "any minor under the age of eighteen years, living with such parent, who maliciously or willfully destroys [such] property.").

11. The prophetic words of two authors are worth noting:

times decried.¹² Perhaps this concern has been the result of the strong emotional attachment to the fault concept which the traditional study of the law of torts tends to produce. It may likewise stem from lawyers' quest for rationality and the troublesome sense of frustration, if not confusion, lawyers feel when such rationality appears to be lacking.¹³

The latter reason would explain why, since at least 1930,¹⁴ efforts have been made to suggest, in whole or in part, a "new rationale"—a new unifying theory of tort liability—which might explain why the tort law has been changing so rapidly and where it may be going. As far-sighted and imaginative, however, as most of these suggestions

[The incongruity of results under the common law fault theory and workmen's compensation statutes] is likely to lead, either to a movement in favor of repealing the statutes, or to a movement in favor of making radical changes in the common law.

J. Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914);

A community which accepts the principle of [a workmen's compensation statute] cannot be expected to find anything intrinsically unreasonable in the doctrine which seeks to throw upon the undertaker the full responsibility for harm arising from his enterprise, on the theory that the business should bear its losses in the first instance regardless of fault or proximate cause, and that ultimately, like any other overhead charge, they would fall on the consumer.

Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 802-03 (1916). Thayer overstated his case, obviously, in suggesting proximate cause was no longer expected to be a limitation.

12. See generally the articles of Smith and Thayer, *supra* note 11. For a more recent expression of concern, see the dissenting opinion of Justice Bryson in *Markle v. Mulholland's, Inc.*, 265 Ore. 259, 295, 509 P.2d 529, 545 (1973).

13. Though hardly confused, Professor Gregory, after ably discussing the trend of the tort law away from "fault" to "no-fault," eloquently expressed the sense of frustration a lawyer may feel.

Why should not the courts either adhere to the clear-cut principles of Shaw's day [the principles of fault], leaving any departure from them to the legislatures, or cut clean away from them with open acknowledgement of a modern theory of absolute liability without fault, bereft of all the moldy trappings of the ancient common law, if they are going to effect the change anyway, without benefit of legislation? Whether such a new theory should acknowledge absolute liability only for the consequences of extrahazardous conduct or should take the form of an outright *enterprise liability* analogous to that reflected in the Workmen's Compensation Acts is a matter "which wiser heads in time may settle." At least, the courage and wisdom of a Shaw in our times might tell us where we stand, and why, in a manner which would make the teaching and study of the law of torts—let alone its practice and administration—a far different thing from the venture into confusion it now presents.

Gregory, *Trespass*, *supra* note 1, at 396-97 (footnotes omitted; emphasis added). The reference to Shaw is Chief Justice Shaw of the Massachusetts Supreme Judicial Court and his opinion in *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), which Gregory takes as the leading American case firmly establishing fault as the basis for determining liability in torts.

Justice Traynor of the California Supreme Court, with his opinion in *Greenman*, *supra* note 6, proved to be, I would suggest, the latter day "Shaw" Professor Gregory was seeking.

14. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805 (1930).

have been, they have not satisfied altogether our lawyer's craving for rationality.

Imposing tort liability on the basis of who has the "deepest pocket,"¹⁵ or who can distribute a tort loss most widely among other members of the community,¹⁶ or who can insure against an expectable risk most inexpensively or realistically¹⁷ or who can avoid similar losses at the lowest cost¹⁸ are all theories which have, or appear to have, a ring of truth to them, but standing alone or in combination none of these bases seems to explain enough.

Of those authors who have offered fairly comprehensive theories,¹⁹ only one, Professor Guido Calabresi of Yale, has suggested a theory broad enough to encompass the rules of liability as well as those relating to actual and proximate cause and those relating to damages.²⁰ His theory, however, has been offered as a prescriptive one—it suggests what the courts and legislatures *should* be doing. In contrast, this Article seeks to provide a descriptive theory—one which seeks to explain more fully what courts and legislatures have *in fact* been doing. Notwithstanding this difference in approach, Professor Calabresi's keen, thoughtful analysis is of inestimable value to

15. This basis has not, to the best of my knowledge, been seriously proposed by anyone. It is a phrase, however, which critics of theories based on criteria other than fault have sometimes employed. See, e.g., Hatch, *Is the Pocket Deep Enough?*, 16 FOR THE DEFENSE 117-18 (1975).

16. "[T]he main functions of civil accident law . . . are (1) to provide compensation for victims and (2) to effect a wide and efficient distribution of accident losses." James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360-61 (1958) (footnote omitted). James' seminal and highly influential article on the relevance of loss distribution to tort liability rules is *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948) [hereinafter cited as James, *Accident Liability*].

17. C. Morris, *Hazardous Enterprise and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952) [hereinafter cited as C. Morris].

18. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). "The relevant question from the standpoint of economic analysis is who could prevent the loss at lower cost, not whose cost the damage 'really' is." *Id.* at 94. For Posner, this would also seem to be the relevant question from the standpoint of legal analysis. See Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). For a similar view, see Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 28 (1972).

19. James, *Accident Liability*, *supra* note 16; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 13.1-.7; 26.1-.5 (1956); A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); R. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

20. The development of Calabresi's theory may be traced through the following: *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter cited as Calabresi, *Risk Distribution*]; *COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter cited as CALABRESI, *COSTS*]; and, with Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) [hereinafter cited as Calabresi & Hirschoff].

one who seeks to offer a more comprehensive descriptive theory. My debt to his work will be readily apparent to those familiar with his writings.

The attempt in this Article to describe the "new unifying rationale" of tort law is based on the conviction that underlying the evolutionary development of the common law is an intuitive logic which, though seldom if ever implemented through a wholly consistent body of rules, does exist and is worthy of articulation if possible. Assuming such logic does underlie most of what has happened in the law of torts during the last one hundred years, an apt shorthand description for that logic is the "theory of enterprise liability."²¹

I. THE FUNDAMENTALS OF TORT LIABILITY THEORIES

Two fundamental facts²² and one value judgment have been implicit in the development of common law theories of tort liability. The first fact is that whether or not tort liability is used to shift the plaintiff's loss to the defendant, the plaintiff's loss is not eliminated. Labeling the defendant's conduct tortious and requiring the defendant to pay the plaintiff a common law judgment may "make the plaintiff whole," but looking at the plaintiff's loss as a diminution, however small, of part of the community's total resources, the loss has not been eliminated. It remains. The most the tort law has been able to do at this level is shift or reallocate the initial loss from the plaintiff to the defendant.

The second fact is that, with a few possible exceptions, whether the tort law imposes liability and shifts the loss to the defendant or leaves the loss on the plaintiff, either will be able to shift at least a portion of that loss to other persons. Even in the simplest society, if the defendant must pay, his personal resources will be reduced, with the result that those with whom he might have shared some of those resources will now share with him in the loss. Similarly, if the plaintiff is denied relief, any family members who must forego other activities in order to meet the plaintiff's needs will have shared in the loss the tort law has declined to shift to the defendant.

The fundamental value judgment, historically implicit in decid-

21. The phrase has been used by various writers for some time. See, e.g., quotation from Gregory, *Trespass*, *supra* note 13; C. Morris, *supra* note 17. Its use by the courts has become increasingly frequent, particularly in products liability cases. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1041 (Ore. 1974). Its use in opinions dealing with other areas of the tort law is also increasing. See, e.g., quotation from *Smith v. Arbaugh's Restaurant, Inc.*, *supra* note 9.

22. *Accord*, as to the facts described, James, *Accident Liability*, *supra* note 16, at 549-53.

ing whether to impose liability and thereby shift a loss from one segment of the community to another, has been that the law should not do so unless some "valid" social objective which transcends the interests of the immediate parties will be served.²³ Whether the social objective be one of preventing further losses to society in the form of breaches of the peace which might result if the law left too many plaintiffs unsatisfied, or whether it be to encourage the defendant to act more responsibly in the future and avoid causing similar losses to others, and hence to the community at large, this value judgment requiring a minimally rational basis for imposing tort liability is today, I think, unquestionably a constitutional mandate. The judicial imposition of a tort judgment without such a minimal basis would, of necessity, be a deprivation of the defendant's property without substantive due process of law. Absent a minimally rational connection with a public purpose, a tort judgment would be nothing short of a taking of private property for a private purpose, a governmental act surely as prohibited when done by a court as it would be if done by a legislative body.²⁴

II. THE THEORY OF ENTERPRISE LIABILITY STATED GENERALLY

In its broadest terms the theory of enterprise liability in torts is that losses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity.²⁵ Stated somewhat more precisely, the theory contemplates that losses historically recognized as compensable when caused by an enterprise, or activity, such as producing, distributing and using automobiles, ought to be borne by those persons who have some logical relationship with that enterprise or activity. The underlying justification for this theory, most ably articulated and illustrated by Guido Calabresi some years ago,²⁶ is a well known ethical premise of classical economics. This postulate is that, recognizing at any one point in time that the total resources available to a society are limited, the

23. *Id.* at 549. "[S]ociety does not benefit from the mere shifting of a loss. . . . Indeed, if the process of loss shifting costs anything—and it certainly does—society is poorer for the shifting since its cost is added to the original loss." James, *An Evaluation of the Fault Concept*, 32 TENN. L. REV. 394 (1965) [hereinafter cited as James, *Fault Concept*]. See also O. HOLMES, *THE COMMON LAW* 50 (1881).

24. *O'Neill v. Leamer*, 239 U.S. 244 (1915) (stating the basic rule, but finding a public purpose). See also *Berman v. Parker*, 348 U.S. 26 (1954).

25. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 13.1, at 760 (1956); Calabresi, *Risk Distribution*, *supra* note 20, at 500; James, *Accident Liability*, *supra* note 16, at 550; James, *Fault Concept*, *supra* note 23, at 399-400.

26. Calabresi, *Risk Distribution*, *supra* note 20, at 500-06. See also James, *Fault Concept*, *supra* note 23, at 400-01.

"best"²⁷ way for the members of a community to decide collectively how they want those limited resources to be used and distributed in order to satisfy most efficiently the greatest possible number of the members' individual wants and desires is through an open, competitive market system. The various competing uses to which the community's limited resources might be allocated in order to satisfy the maximum possible individual wants and desires will accordingly be determined through operation of the laws of supply and demand.²⁸

To illustrate: at any point in time, the steel available to a society will be limited. Whether more steel should be used to produce refrigerators rather than be used to produce cars will depend on whether or not those desiring more refrigerators are willing to pay a higher price for those refrigerators than others will be willing to pay for cars.

For the pricing mechanism of the market place to achieve this goal of the "best" allocation of the community's total limited re-

27. I have deliberately chosen to use the word "best" rather than the word "efficient," which most economists would probably prefer, for two reasons. First, the use of the words, "efficient" and "efficiency," though value words, tends to present a false picture of the values involved. When the statement is made that an open, free, competitive market is the most "efficient" method for allocating the community's limited resources, that statement is probably true if one also accepts the utilitarian value theory on which it is predicated—that it is "good" for people, as individuals, to maximize their personal desires. An open, free, competitive market is generally an "efficient" way of achieving that result. One may or may not accept, however, the underlying value premise that the greatest "social good" can be achieved by the maximization of such individual desires. The point is, the word "efficient," as it is typically used in the literature, does carry with it this more basic value premise and its accompanying assumptions about people's behavior and motives. I prefer to use the word "best" (a more obvious value word) in order that this point not be forgotten.

Furthermore, the market may not in all cases be "the," or even "an," efficient method for allocating resources even if one does take as a value premise, "the greatest good for the greatest number through the maximization of individual desires," particularly if one also believes there are other values in life worth worrying about which the market does not and cannot take into account. The fact that our society does use other methods for allocating resources and distributing wealth (principally, the judicial and legislative processes) is a recognition, or at least an indication, that even under a utilitarian value theory the market place is not always to be taken as the most efficient vehicle for dealing with such matters. See note 106 *infra*. Consequently, even my use of the word "best" should probably be qualified by a phrase like, "in most cases," or "for many purposes."

My second reason for using the word "best" is that I mean to connote not only the typical American economist's acceptance of the utilitarian value theory together with its traditional ideas of market place economics but also the law's and society's general acceptance of those ideas. While the economist's use of the word "efficient" manifests such assent among economists, it does not do as well manifesting such assent among others.

28. For an economist's description, see J. BAIN, *PRICE THEORY* 160-72 (1952) [hereinafter cited as BAIN]; R. HAVEMAN & K. KNOPF, *THE MARKET SYSTEM* 144-54 (2d ed. 1970); G. STIGLER, *THE THEORY OF PRICE* 14-16 (3d ed. 1966). For a discussion of some reasons why the market is never really fully "free," "open," and "competitive," see Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974).

sources, a supplier of goods or services must accurately reflect in the prices he seeks for his goods or services the "true" costs²⁹ of making them available.³⁰ If, for example, a druggist consistently sells his aspirin below his costs because of inaccurate cost accounting, but he nonetheless is able to stay in business because he more than offsets his aspirin-sales losses from the total profit he makes on his sales of other articles, the "best" allocation of the community's limited resources has not occurred. Ideally, the druggist should raise his price for aspirin. The labor and other resources allocated to the production of aspirin will be reduced because of a decrease in demand for the higher-priced aspirin. These resources will in turn become available for use in the production of other goods for which, at a lower price, there would be a greater demand. With the increased production of these other goods, the price at which they are sold should decline. As a consequence of all this, the community ends up with a better allocation of its limited resources (available labor, materials, etc.) than it had before, that is, one which does more to maximize the total individual desires of the society's members at less expense to them.

The distortions which can occur in this ideal pricing, resource allocation process are numerous and varied.³¹ Government tax policies and subsidies (whether to suppliers or purchasers) as well as its borrowing and expenditure practices and other monetary policies

29. "First," two economists suggest, "do not confuse expenditure with cost. Expenditure is the exchange of one form of wealth for another—usually money for nonmoney goods. *Cost* of an action is the consequent *reduction* in wealth." A. ALCHIAN & W. ALLEN, *UNIVERSITY ECONOMICS* 222 (2d ed. 1967) (emphasis in original). Even though expenditures are not the same as costs under this definition, if one expends more money to acquire non-money goods than that for which he sells them there is a reduction in his wealth and, hence, a cost. Therefore, in this Article I have used the word "cost" basically as a layman would, that is, either to refer to an immediate loss of a resource (a broken window) or to the outlay of a resource for the purpose of achieving a given result which, if not achieved, will mean that the expenditure (resource invested) will have been lost or wasted.

My layman's usage of the word "cost" is not, I hope, inconsistent with the economists' definition of opportunity cost. "The cost of using something in a particular venture is the benefit foregone (or opportunity lost) by not using it in its best alternative use." R. LIPSEY & P. STEINER, *ECONOMICS* 214-15 (2d ed. 1969).

I have added the adjective "true" simply to reinforce the questions this Article seeks to answer: when, how, and why will or does the law treat a compensable tort loss (a reduction in wealth) as a cost of one activity rather than another, especially when, but for either one of the activities, the cost would not have been incurred?

30. BAIN, *supra* note 28, at 169-70; Calabresi, *Risk Distribution*, *supra* note 20, at 505. For a discussion of how costs relate to pricing from an accountant's or businessman's point of view, see Greer, *Cost Factors in Price-Making*, in M. MOONITZ & A. LITTLETON, *SIGNIFICANT ACCOUNTING ESSAYS* 304 (1965). "Sound pricing usually involves quoting for each item an amount high enough to cover its direct cost, plus its share of variable costs, plus its maximum contribution toward fixed overhead and profit." *Id.* at 315.

31. BAIN, *supra* note 28, at 170; Calabresi, *Risk Distribution*, *supra* note 20, at 503-04.

have the potential for distorting the process. Unrealistic cost accounting by suppliers and irrational considerations influencing purchasers, whether induced by fair or unfair advertising³² or other similar causes, will result in a distortion. Monopolistic business practices, control over large amounts of investment capital, and the existence of corporate conglomerates (where the losses of an unprofitable division are in part written off against the more profitable operations of another division), likewise have the potential for distorting the process.

The relevance of these considerations to tort law is that virtually every kind of loss which tort law has historically considered compensable is a loss of part of the community's total, though limited, available resources. Whether the law shifts the loss to the defendant or leaves it on the plaintiff, the loss will (1) not be eliminated and (2) will not remain entirely on whichever party the law chooses to place the loss on, or leave it on, initially. Today, especially through one or more of the diverse public and private insurance systems available, the initial loss-bearer, whether it be the plaintiff or the defendant, will be able in most cases to pass on all or a significant part of the loss to other persons in society.

In short, the theories of liability which the tort law uses for the purpose of deciding whether the loss should be left on the plaintiff or reallocated to the defendant will also determine how such losses, or costs, are to be distributed among various segments of the society. In almost all instances these losses will be reflected as costs in the pricing mechanism of the market place and ultimately in the allocation of the community's resources and in the distribution of its wealth among its members.³³

32. By "irrational," I do not mean that the want or desire which a purchaser may be seeking to satisfy is irrational. I mean, rather, that any thoughtful person would normally realize that the want or desire he seeks to satisfy cannot be satisfied by the purchase being made. Consider, for example, the numerous advertisements which suggest that a particular brand of product is superior because it will better enhance one's chance of success with a member of the opposite sex. Often, of course, anyone purchasing the product on this assumption is likely to be disappointed.

To the extent advertising presents accurate information only, it is not likely to be distortive. To the extent it becomes "advocacy," it tends to become distortive, and particularly when it creates false expectations, whether conscious or unconscious.

33. Demsetz, *supra* note 18, at 13. "The questions with which we shall be concerned are whether and under what conditions a legal decision about liability affects the uses to which resources will be put and the distribution of wealth between owners of resources." *Id.* at 22. See also McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 5, 57 (1970).

III. THE THEORY OF ENTERPRISE LIABILITY STATED GENERALLY AND THE RULE OF ACTUAL CAUSE

The rules of liability and nonliability of the tort law therefore function in most instances as cost accounting, *i.e.*, cost distribution rules. In large measure they determine who will ultimately, through the pricing mechanism of the market place, bear the costs of the tort losses generated by the numerous activities people carry on in society.

Looking at the tort liability rules as cost accounting rules and then trying to fit this idea into the theory of enterprise liability as one which says the costs of an activity ought to be borne by the activity which creates or causes them immediately presents a problem. The problem is: no compensable tort loss is ever the "but for" result of only one enterprise or activity. It is always the result of an infinite number of "but for" causes or activities.³⁴ But for the plaintiff's grandparents immigrating to this country; but for his parents meeting, marrying and conceiving him; but for the plaintiff's decision to get out of bed in the morning; but for his decision to walk to the post box to mail a letter, etc., the plaintiff would not have been struck and injured by the defendant's car, regardless of whether the defendant's driving is characterized as good or bad. To which, if any, of the plaintiff's "but for" activities, or to which one of the comparable universe of "but for" activities of the defendant, should the plaintiff's losses (as well as those of the defendant) be assigned?³⁵ All these infinite "but for" activities "created" the loss in the sense that "but for" any one of them the losses would probably not have occurred. How should the tort law through its rules of liability and nonliability "cost account" for these losses? On what rational basis should the law decide which particular enterprise the loss should be treated as a cost of having engaged in?

One thing is clear. The theory of enterprise liability as it is usually put does not provide a rational answer to this basic question.³⁶ An infinite number of enterprises created the loss, and the general statement of the enterprise liability theory alone provides no rational criteria for making an intelligent selection among them.

The general statement of the theory that the costs of an activity or enterprise ought to be borne by the activity or enterprise which created them should not, however, be rejected as devoid of analytic value. It has at least two uses. First, the underlying economic assump-

34. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.1, at 1108 (1956).

35. For another illustration of the dilemma, see CALABRESI, *COSTS*, *supra* note 20, at 133.

36. W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS* 61 (1965).

tions and values of the general statement of the theory also underlie the specific criteria of the theory, which will be considered later. Second, these assumptions and values also provide an explanation for why, as long as the tort law has been around and regardless of the changing theories of liability upon which the courts have shifted losses from plaintiffs to defendants, it has been "elementary policy that a defendant should not be held liable for the harm the plaintiff complains of unless the plaintiff can at least show that the defendant in fact caused the harm."³⁷

Why should this "elementary policy" of the tort law—the "but for" rule-of actual cause—have been so constant? Throughout the development of tort law, theories and rules for labeling conduct tortious have changed. So, too, the law governing the kinds of losses the courts have been willing to consider compensable, that is, worthy of being shifted, has changed. With but a few recently developed and very limited exceptions,³⁸ however, the rule has been: no matter how tortious the defendant's conduct may have been and no matter how long or how strongly a given loss has been considered compensable, unless the plaintiff is able to persuade the fact finder by a preponderance of the evidence that the defendant's activity was at least *one* of the infinite "but for" causes of his losses, the plaintiff cannot recover.

This requirement of "but for" cause cannot be explained on the ground that it is essential to having a tort judgment provide a deterrent effect on the defendant's future conduct. On the contrary, exactly the opposite seems true. A more valid explanation of the rule lies in the theory of enterprise liability and its rationale of using the market place as a tool for "best" allocating the community's limited resources. A case illustrating this point is *New York Central Railroad*

37. C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 5 (2d ed. 1969).

38. See, e.g., the rule of *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), stated and more fully explained in *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). Where the plaintiff has established a prima facie case of (1) tortious conduct on the defendant's part toward the plaintiff and (2) that the conduct might *possibly* have caused plaintiff's loss, but (3) the plaintiff has not been able to establish a prima facie case of probable cause because the very nature of defendant's tortious conduct has made it extremely difficult, if not impossible, for the plaintiff to do so, and (4) the plaintiff has otherwise done all that could reasonably be expected to establish such a case, then the burden of proof shifts to the defendant to prove that his conduct was not in fact an actual cause of the plaintiff's loss.

Following similar principles, the Colorado courts have recognized another exception. Where a subsequent independent tortfeasor has aggravated a "pre-existing condition," even one caused by a prior tortfeasor against whom the plaintiff has recovered, the subsequent tortfeasor may be held liable for all damages the jury is unable to apportion on a "but for" cause basis between those attributable to the events which caused the "pre-existing condition" and those attributable to the subsequent tortfeasor's conduct. *Newbury v. Vogel*, 151 Colo. 520, 379 P.2d 811 (1963); *Hylton v. Wade*, 29 Colo. App. 98, 478 P.2d 690 (1970).

v. *Grimstad*.³⁹ In that case the court held, notwithstanding the probable negligence of the railroad in not providing adequate life saving equipment on one of its barges, the trial court should have granted what today would be a motion for a directed verdict against the plaintiff, because the plaintiff, as the widow of a deceased employee who had drowned, had not offered sufficient evidence from which a jury could reasonably have found that "but for" the defendant's negligent omission the deceased would not have died.

Now if deterrence is the rationale behind the "but for" rule, the *Grimstad* result is wrong because, whether or not the defendant's conduct caused the loss, had liability been imposed the defendant would have understood it was being imposed because of his doing a tortious act, that is, because of his having engaged in a socially undesirable, risk creating act. That would have provided the deterrence, except for the possible dysfunctional effect which might have arisen because the defendant might have felt it "unjust" to hold him liable without adequate proof of actual cause. Aside from this consideration, however, the objective of deterrence would seem to have little to do with "but for" cause.

Consider though what might have happened in *Grimstad* if the law had not required proof of actual cause, but only proof of tortious conduct by the defendant (towards anyone) and proof of compensable loss by the plaintiff (loss of her husband's financial support). Mrs. Grimstad could then have sued, say a negligent cab driver (and his employer), and recovered simply upon proof of his negligence and her loss. Having been negligent, the cab driver is fairly in need of deterrence; having him understand he was being required to pay Mrs. Grimstad because of that negligence would provide the deterrence. I have little doubt that if the tort law were to abandon the "but for" rule, the risks of tort liability would become so much greater that the tort law would have a far greater, rather than lesser, deterrent effect on human behavior.

The theory of enterprise liability suggests a more plausible explanation for the "but for" rule. Suppose, not being burdened by a "but for" rule, Mrs. Grimstad was allowed to shift her loss to the negligent cab driver who in no way was a "but for" cause of her otherwise compensable loss. Who, ultimately, would pay for the loss? The likely answer is the cab owners (through smaller profits), the cab drivers (through lower wages), or the cab users (through higher fares). In any event, a significant distortion would occur in the pricing mech-

39. 264 F. 334 (2d Cir. 1920).

anism of the market place as it relates to cab services, with a consequent distortion in the "best" allocation of the community's total, limited resources.

While the general statement of the theory of enterprise liability does not tell us from among all the infinite "but for" causes which may have brought about the plaintiff's loss *which particular* "but for" activity or enterprise the loss should be assigned to, it does tell us we ought not assign it to an activity which had no "but for" causal relationship with that particular loss at all.⁴⁰

IV. THEORIES OF TORT LIABILITY PRECEDING THE DEVELOPMENT OF ENTERPRISE LIABILITY

Because every tort loss is the "but for" result of an infinite number of enterprises, the need is readily apparent for one or more specific theories of tort liability by which it is possible to determine when a tort loss should be considered a cost of engaging in one activity rather than another. In broad, historic terms, in addition to the newer theory of enterprise liability, two such theories, plus one spurious one, are identifiable. Except perhaps during the earliest stages of modern tort law development it does not appear that any one of these theories was ever an exclusive theory in the sense that at any point in time the theory could be used to explain rationally all the then-existing tort rules of liability. Neither are the theories exclusive in the sense that only one of them can be used to provide an acceptable rationalization for a particular tort rule today.

40. For one court's recognition of the proposition that rules of "but for" cause do have an impact on the allocation of resources and the distribution of wealth, and that therefore such matters should be taken into account, particularly the "fairness" question of who ultimately should bear the costs of tort-like losses, see *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). In justification of the exception to the normal rules of "but for" cause which the court was articulating (see note 38 *supra* for the rule), the court observed:

This result is also consistent with the emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them. See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts* (1961) 70 Yale L.J. 499. In the instant case the defendant motel owner, and more generally the entire class of those who frequent defendants' motel, were, in an economic view, the beneficiaries of the "cost savings" accompanying the non-employment of a lifeguard. It is better that this entire group bear the burden of the loss resulting from the "economy," rather than to require one particular guest to absorb the entire loss. By assigning liability to the motel in those cases in which no direct evidence establishes causation, we make sure that all motel guests bear their fair share of these damages, since the motel owner is likely to treat either the costs of liability insurance, or the actual costs of litigation, as a direct expense of its business and establish its fees accordingly.

Id. at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Rptr. at 757 n.20.

A. *The Theory of Force*

The oldest Anglo-American theory of tort liability is the theory of force, based on the old writ of trespass *vi et armis* (force and arms) and its many progeny.⁴¹ Under this theory, liability is dependent upon the doing of an affirmative act, setting in motion a force which, before it comes to rest, fairly directly causes a loss⁴² the law otherwise considers compensable. Under this theory the loss is assigned to the "but for cause"—the enterprise—in furtherance of which the affirmative act was done, and which act also appears to have been the most prominent or substantial "but for" cause, that is, the most "direct" cause. The apparent underlying value rationale for this theory is that those actors carrying on enterprises during which they engage in affirmative acts which disturb the normally expected status quo ought to bear the costs, at least where the act is closely linked causally to that loss in time and space. Not to impose liability in such cases might encourage too much retaliatory self help on the part of the unsatisfied plaintiff or his family members, with a subsequent increasing escalation of losses (through subsequent breaches of the peace and feuds) not only to the immediate parties but to the parties' family and friends as well.⁴³ In the end, the already limited available community resources would be further reduced.

A typical illustration of the force theory of liability is the tort of trespass to land as it still survives in some states.⁴⁴ Here, regardless of the social desirability or lack of social desirability of the defendant's conduct (his enterprise),⁴⁵ if the defendant acted affirmatively and that act fairly directly caused the harm, "broke the close," the defendant is liable.⁴⁶ In Holmes' phrase,⁴⁷ the defendant acts "at his peril." The only limitations on the imposition of liability are that the defendant must have voluntarily intended to do the act which caused

41. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 525-27, 564 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]; 3 T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 224-35 (1906) [hereinafter cited as STREET].

42. 2 F. HARPER & F. JAMES, *TORTS* § 12.2 (1956); 1 STREET, *supra* note 41, at 1-5.

43. Bohlen, *The Rule in Rylands v. Fletcher (III)*, 59 U. PA. L. REV. 423, 450 n.145 (1911). See also 2 POLLOCK & MAITLAND, *supra* note 41, at 526; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 7, at 28, and § 75, at 492 (4th ed. 1971); 3 STREET, *supra* note 41, at 235.

44. For a brief description of the historical development of the tort, see 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.3 (1956).

45. Of course there may be an exception to the extent the social desirability of the defendant's conduct has been recognized in the form of a privilege. *Id.* at §§ 1.11-20.

46. *Id.* at § 1.4.

47. O. HOLMES, *THE COMMON LAW* 79-89 (1881).

the injury,⁴⁸ and the act must have been a fairly "direct" cause of the injury. Specific intent or motive is irrelevant.⁴⁹

The enterprise to which the loss is assigned under the trespass liability rule is the enterprise of walking, for example, or, if one desires to be even more specific, the enterprise of hunting, fishing, bird watching or whatever other pursuit may have prompted the defendant's "forceful" act. The loss could be treated, of course, as a cost of the enterprise of possessing land, but usually is not.

Being based on the two touchstones of affirmative act and direct cause, the force or trespass theory of tort liability does provide more specific criteria for discriminating among all the "but for" activities which caused the compensable tort loss. The spatial and temporal limitations of the direct cause concept, together with its built-in proximate cause limitation, immediately circumscribe among all the infinite "but for" causes to which the loss might be assigned those which are deserving of further consideration. Consistently with the theory of enterprise liability, it operates upon the premise that no enterprise which was not an actual cause should bear the loss, but it carries that premise one step further by limiting liability only to "direct but for" causes.

The circle of "direct but for" causes (enterprises) is further reduced by the requirement that causes included within that circle must be traceable through a chain of continuous motion back to an affirmative or "forceful" act. Taking these two limitations together, the force theory provides a cost accounting technique which in most instances is able to narrow down from among all the infinite range of possible enterprises to which the loss might be assigned, the one or two enterprises on which it ultimately is cast.

The force theory, bottomed as it is on a conservation of resources principle (avoiding losses through private retaliation) thus shares the same broad objective as the theory of enterprise liability—effective utilization of the community's limited resources. But, while sharing this broad social objective and the implicit recognition of actual cause as an economic imperative, the force theory does not contain within itself an adequate explanation of why "affirmative act" and "direct" should be the cost accounting criteria for determining when a compensable tort loss will be considered a cost of engaging in one particular activity rather than another.

48. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.4 (1956).

49. Today, although apparently not uniformly, the defendant specifically must have intended to project himself or some other object onto the land. *Id.* at § 1.4. See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 13, at 63-66 (4th ed. 1971).

As with any other cost accounting criterion, the formulation of the force theory necessarily involved a value judgment that "this loss *ought* to be considered a cost of this activity for this or that reason." As has been suggested, the "ought" reason typically given for the "affirmative act" and "direct" cause criteria of the force theory is the preservation or conservation of resources by discouraging retaliatory self help⁵⁰ which might lead to a further diminution of the community's limited resources. Though that may adequately state the law's value objectives and assumptions about human behavior for most purposes, one further observation is warranted. Underlying this rationale are the more fundamental assumptions that most people value the status quo and are most disturbed, and hence likely to want to retaliate, when they have been injured by a significant change in the status quo, and they are able to perceive fairly clearly, because it was "direct," the visible, affirmative act which changed that status quo.

For a relatively simple, static society which views the primary function of the tort law as that of "keeping the peace," the criteria of the force theory and its rationale are well suited.⁵¹ As life, however, becomes more complex and social values begin to change, these cost accounting criteria become less acceptable.

Setting aside for the moment the intellectual and practical difficulties the courts often had when applying the criterion of "direct cause,"⁵² the fairly straightforward application of the criteria of the force theory resulted in decisions of no liability in two types of cases which did not comport well with changes occurring in the dominant social values. First, by requiring an affirmative act, the force theory did not normally result in the imposition of liability when the conduct of the defendant was in the form of an omission, rather than a commission.⁵³ For example, a person would not normally be held liable in battery for having failed to prevent a falling rock from hitting another person on the head. This was so even though the omission was a but for cause, and the imposition by the courts of an affirmative duty in many circumstances would not have shocked the "sense of the community." Such impositions could frequently have been justi-

50. See note 43 *supra*.

51. Holmes, being the advocate of the fault theory, referred derogatorily to these years as "that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction." O. HOLMES, *THE COMMON LAW* 89 (1881).

52. See, e.g., *id.* at 90-92.

53. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56, at 338-40 (4th ed. 1971); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

fied as a means of mitigating the adverse consequences a change in the status quo might otherwise bring about.

The second generic type of case which was not covered by the criteria of the force theory involved injuries caused by a change in the status quo, but occurring after the change had been completed, that is, after the force set in motion had come to rest and a new status quo had been established. To use Charles Gregory's illustration:⁵⁴ suppose a workman working on the roof of a building adjacent to the public way carrying a plank accidentally dropped the plank on the head of a passer-by. That, under the force theory would historically have given the passer-by a cause of action in trespass (battery). After all, the workman voluntarily intended to do the affirmative act (carry the plank) thereby setting in motion a force (the moving plank) which before it came to rest (on the ground) fairly directly caused a loss the law has long considered compensable (the blow to the body). Suppose, however, the passer-by had happened by somewhat later, after the falling plank had come to rest. He trips and sustains substantially identical injuries. No relief could be had under the force theory, for though the workman had changed the status quo, the change had been completed, a new status quo had been established and, if any one was then engaged in an affirmative act which was changing the status quo, it was the passer-by, not the workman. Hence even though many people might still think it appropriate to consider the passer-by's loss a cost of the activity of constructing or repairing the building, the force theory would allocate it to the activity of being a pedestrian because that activity was, under the circumstances, a more "direct" cause.

Another problem with the force theory goes back to the illustration of the pedestrian being hit by the falling plank. That illustration suggests some of the intellectual and practical difficulties involved in the application of the "direct" cause criterion. Both the workman and the passer-by were engaged in affirmative, forceful conduct—one moving the plank, the other moving his body. Both acts were necessary "but for" causes of the plaintiff's loss; both were in motion; and, before either had come to rest, each had fairly directly caused the loss. Are the criteria of the force theory really that helpful in deciding which but for activity should bear which compensable losses? Doubtless, the force theory would hold only the workman liable.⁵⁵ But why? Is it because his act was more forceful; was less expected; or because

54. Gregory, *Trespass*, *supra* note 1, at 362-63.

55. See, e.g., *Hopper v. Reeve*, 7 Taunt. 698, 129 Eng. Rep. 278 (1817).

his act was part of an activity which was intended to, and would in fact, make a greater change in the status quo?

Finally, of course, had the passer-by decided to bring his forceful motion (walking) to rest for awhile and stand by passively watching the construction or waiting for a friend, the force theory could be used to impose liability on the workman with considerably less intellectual difficulty. But even in such a case, in a society which had begun to put more stock in "progress" and less on the maintenance of the status quo, was it desirable to impose such liability, considering the added costs which would thereby, of necessity, be allocated to persons like the workman who were seeking to bring about such "progress" by their various new kinds of affirmative acts?⁵⁶

B. *The Theory of Fault*

It was in response to these kinds of problems, changing values and the increasing diversity of human activities that the tort law began to seek new cost accounting criteria and new rationales (whether explicit or not) to justify those criteria. Briefly stated, the theory of fault liability says: one who engages in socially undesirable conduct will be held liable if such conduct is a "but for" cause of a loss otherwise considered compensable. This theory, unlike the force theory, allowed the law to take into account omissions as well as commissions. True, the law still had some problems with "direct" cause and it took some time before the law evolved a workable theory of proximate cause⁵⁷ to avoid imposing liability on a "but for" activity which, though socially undesirable, was so far removed from the plaintiff's loss in time and space that it seemed somehow unwise or unfair to treat the plaintiff's loss as a cost of that activity.

In any event, the newer touchstone cost accounting criterion of tort liability became in most cases the concept of fault, or socially undesirable behavior. In common with the theory of enterprise liability and the force theory, the fault theory continued to hang on tenaciously to the fault idea in the sense of *causal* fault, that is, "It's his fault. He caused it." "Fault," for the fault theory, however, means not only that the defendant caused it, but he caused it by "faulty" behavior—behavior which was itself socially undesirable.

In the marvelously pragmatic, evolutionary, and usually intui-

56. *Brown v. Collins*, 53 N.H. 442 (1873); *Gregory*, *Trespass*, *supra* note 1, at 365, 368, 382; *J. Smith, Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 239-40 n.13 (1914).

57. The modern theory, based on the test of foreseeability, is that contributed by Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), and *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

tive way of the Anglo-American common law system, the courts set about giving meaning to this new cost accounting criterion of social undesirability (fault), and they did so in such a neutral way that its acceptance became assured. Using two basic techniques, the courts succeeded in converting the bulk of the tort law from the cost accounting criteria of "affirmative act" and "direct" cause to the criterion of "socially undesirable" behavior. The first technique was the development of the law of negligence under the writ of trespass on the case.⁵⁸ Here, in a masterful stroke, the courts avoided a too-obvious, not-so-neutral role of lawmaking. Rather than using the law of negligence to define specifically socially undesirable behavior, they delegated that function to the jury and used the law of negligence (primarily the reasonably prudent person standard) as a way of shaping and containing the specific rules of negligence individual juries might create and apply in individual cases.⁵⁹ This technique for creating the specific rules put the courts in a less visible law making role. Moreover, the specific rules could be created by a group of people whose values and factual assumptions about life more accurately reflected perhaps the values of the community at large. Finally, the law of negligence provided a system wherein the social desirability of almost every conceivable type of human activity could be determined.⁶⁰

The second technique⁶¹ for converting the tort law's cost accounting rules from those of the force theory to those of the fault theory was to change the concept of what was meant by an affirmative act. Under the older theory the only intent required for an affirmative act was an intent sufficient to demonstrate the act was volitional. Hence, it was adequate if the plaintiff proved the defendant's

58. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 12.3 (1956). This technique, unlike the second, see text accompanying note 61 *infra*, expanded the scope of potential liability to which a person might be subject for harms caused by his conduct.

59. L. GREEN, *JUDGE AND JURY* 161-64 (1930).

60. There were and, to some extent, still are two basic types of limits: first, limitations on the types of losses for which a jury may award damages, *e.g.*, emotional distress, losses of enjoyments of life, and non-proximately-caused losses, and second, the various special rules of liability the courts created when they were willing to play a more dominant role in deciding the negligence issue, *e.g.*, deciding the negligence issue as a matter of law through their powers to direct verdicts or through the doctrine of negligence *per se*, the creation of the various immunity rules, and the establishment of special standards by which the negligence issue is to be decided, as in a case involving a child or a doctor.

61. This technique, unlike the first, had the effect of curtailing the potential liability to which a person might be subject. It was not a coincidence that at about the same time the courts were developing this technique, they were also developing and refining the doctrines of contributory negligence and assumption of risk to curtail the expanded potential liability the development of negligence had brought about.

general intent to do the act which caused the injury. It was not necessary that the plaintiff prove a purposeful intent to cause the specific injury. Today, of course, the law of intent is quite different.⁶² For example, in the law of battery, it is no longer adequate for the plaintiff to prove the defendant intended to throw the ball which hit the plaintiff; he must prove that when the defendant threw the ball the defendant intended, or knew he was very likely, to hit the person of another.⁶³ With but few exceptions, the social undesirability of conduct under any of the old force theory torts is now determined by whether the defendant, when he did his forceful or affirmative act, intended to bring about the kind of specific harm the law seeks to prevent or discourage.

This transition from the force theory to the fault theory did not constitute an abandonment of the tort law's concern for conserving the community's limited available resources. The fault theory of tort liability is frequently justified on the basis that the imposition of a tort judgment for a compensable harm caused by socially undesirable behavior will deter the actor or others in the community who may learn of it from engaging in similar resource destructive conduct in the future.⁶⁴ Unlike the force theory, however, which aimed at preventing the injured party and his family from engaging in resource destructive conduct through self-help, the deterrence objective of the fault theory aims at deterring future socially undesirable conduct of the actor.

To the extent the fault theory is seeking deterrence of the actor himself it is not internally consistent.⁶⁵ First, the justification of specific deterrence assumes the actor is educable, yet the fault theory in general is objective, not subjective. The fault theory does not ask: was

62. For the American history of this development, see Gregory, *Trespass*, *supra* note 1, at 365-82.

63. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 3.2-.3 (1956).

64. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 4, at 23 (4th ed. 1971); James, *Accident Liability*, *supra* note 16, at 557.

65. These inconsistencies can be explained as being the result of the tort law's pursuit of several purposes and the necessity to compromise them when they conflict. As pointed out in the text, the policy of deterring "bad" conduct often conflicts with the policy and logic of full compensation for the victim. I would agree that this no doubt explains why the inconsistencies exist, but it does not *justify* them, particularly when one observes that under both the force and enterprise liability theories such conflicts and inconsistencies arise much less frequently. The "fault" theory has never been able satisfactorily to reconcile economically, legally or politically, its rules governing liability and its rules governing damages. On this score, both the force and enterprise liability theories have done a better job, and for this reason, the fault theory of liability may prove, in historical terms, to be the shortest-lived theory our common-law judges ever developed. See generally Gregory, *Trespass*, *supra* note 1, and the quotation from that article, *supra* note 13.

the defendant personally, morally, at fault in the sense that he knew better and could have done better? On the contrary, in a negligence case the questions are: would a reasonably prudent person have done better, and, if so, did the defendant fail to do that which such a person would have done? The fact that the defendant's limited intellectual capacities might well have made it impossible for him to have done better does not, theoretically, relieve him of liability.⁶⁶ Similarly, a defendant accused of an intentional fault tort may not have been personally, morally, at fault because, for example, his insanity caused him to have the socially undesirable specific intent when he acted. Nonetheless, under the usual view if he had the requisite specific intent when he acted, he is liable for the tort.⁶⁷

In a similar vein, if either specific or general deterrence were the basic social objectives of the tort law, as the fault theory of liability seems to presuppose, the plaintiff's actual damages would be measured, as in the case of punitive damages, in terms of how much it would take to keep the defendant and people like him from engaging in similar resource destructive behavior in the future. The traditional measure of actual damages—making the plaintiff whole—is more consistent with either the force theory of liability (how much it would take to keep the plaintiff from engaging in a breach of the peace) or with the purposes and criteria of the enterprise liability theory discussed below.

Another internal inconsistency between the fault theory and its deterrence rationale lies in the rule allowing a tortfeasor to insure against the actual damages he may incur as a result of having engaged in faulty, tortious conduct.⁶⁸ Of course, to the extent one suffers an increase in his liability insurance premiums and he knows the increase is the result of his tortious conduct, some specific, and possibly general, deterrence can be expected. But because the economic impact of an increase in insurance rates on any one insured is almost always likely to be less than the amount of any tort judgment, the amount of individual deterrence achieved by imposing this financial burden on the actor is likely to be substantially diminished.⁶⁹

66. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 12.1 (1956).

67. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 135 (4th ed. 1971).

68. Not all risks of tort liability can be insured against, but the most frequent and often the most damaging, namely those caused by ordinary negligence, can be. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 82, at 543-44 (4th ed. 1971).

69. R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.13, at 85 (1972); James, *Fault Concept*, *supra* note 23, at 398-99. The fact that a judgment may exceed policy limits or that insurance may not, because of an excessively bad accident record, be available in the future may have deterrent effects.

C. *Strict or Absolute Liability*⁷⁰

The theory of strict or absolute tort liability is not, I would suggest, a theory at all. It does not provide any general unifying criteria or rationale which can be used to account for why the tort law has developed any of its various rules of liability and nonliability.⁷¹ Strict liability does nothing more than describe a result in certain limited cases.⁷² Under strict liability, the defendant is a tortfeasor simply because he engaged in a particular type of activity for which the law imposes liability without regard to fault. Basically, strict liability simply means that among the several reasons why we may wish to treat the defendant as a tortfeasor and, as a consequence, treat the plaintiff's loss as a cost of the defendant's enterprise, none of those reasons is because we consider his acts socially undesirable. At most, strict liability is but another way of generally stating the theory of enterprise liability, that is, losses created by an enterprise ought to be borne by that enterprise. Like the enterprise liability theory, strict liability does require the enterprise be one of the "but for" causes, but also like the general statement of the enterprise liability theory, strict liability does not provide us any cost accounting criteria which can be used generally. Neither does the theory offer any common rationale to explain why strict liability makes sense in terms of one or more identifiable social objectives. Again, in essence, all strict liability says is, the defendant is liable, notwithstanding the fact that his conduct was not "bad."

If one wants an explanation of why a trespasser may be strictly liable, one must look to the force theory of liability. Comparably, if one wants an explanation of why, under the doctrine of *respondeat superior*, an employer may be held strictly liable, or why the logical inconsistencies of the fault theory exist, one must look to the theory of enterprise liability.⁷³

For a discussion of other ways by which the liability insurance industry has been and is able to help prevent accidents, see 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 13.5 (1956).

70. For an excellent discussion of the games the courts have played trying to reconcile strict liability with fault, see Gregory, *Trespass*, *supra* note 1.

71. A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* § 16, at 55 (1951).

72. Probably the most significant rules of strict liability which remained after the fault theory had been fully developed were those imposing liability vicariously, e.g., the doctrine of *respondeat superior*. For discussions of other areas of "strict liability" which developed before the theory of fault and persisted thereafter or which developed subsequently, see 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 14.1-16 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 75-81 (4th ed. 1971).

73. See, e.g., *McGuire v. Almy*, 297 Mass. 323, 8 N.E.2d 760 (1937), holding the defendant liable for battery, notwithstanding the claim that the defendant's "bad" intent to strike the person of another was the result of insanity. The court's use of an enterprise liability

V. THE PURPOSES, CRITERIA AND BASIC RATIONALE OF THE THEORY OF ENTERPRISE LIABILITY

As noted earlier, the general statement of the theory of enterprise liability does not provide any criteria for rationally selecting from among the infinite number of "but for" causes of an otherwise compensable tort loss the particular enterprise or "but for" cause to which the loss should be assigned. Nonetheless, as a result of both legislative and judicial action, the theory has been a part of the tort law for some time.⁷⁴ The analytical problem has been one of providing an adequate description of the theory's basic purposes, criteria and rationale.

Though only implicitly at first, the theory is now being used explicitly by courts to decide questions of tort liability.⁷⁵ The theory is rapidly becoming, if it is not already, the dominant theory of tort liability and its application accounts for most of the changes which have been occurring apace during the last few decades.⁷⁶

A. *The Purposes of the Theory*

The enterprise liability theory, like the force and fault theories of liability, is concerned with conservation of the community's limited resources. All are intended to discourage the future destruction of resources. Basically, however, the force and fault theories sought to prevent the destruction of resources only when the failure of the

rationale is obvious.

Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for this support, if he is financially able, so he ought to pay for the damages which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided

Id. at 327, 8 N.E.2d at 762.

74. As an operational, though unarticulated theory, I would date the theory from about 1868 and *Rylands v. Fletcher*, *supra* note 3. Others would apparently do the same. *See, e.g.*, Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970); Gregory, *Trespass*, *supra* note 1.

75. For what appears to be a fairly early explicit statement, see *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924), holding the city strictly liable for damages caused by a break in a large high-pressure water line.

In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, *the whole community benefited by the enterprise*, should stand the loss rather than the individual. It is too heavy a burden upon one.

Id. at 511, 197 N.W. at 972 (emphasis added). For more recent illustrations of the courts' explicit use of the theory, see cases cited in note 21 *supra*.

76. For some examples, see text accompanying notes 4-10 *supra* and preceding note 154 *infra*.

law to take action might lead to the destruction of resources having significantly greater value than those the defendant had destroyed or endangered. Thus, under the force theory damages were awarded when it was thought that the failure to do so was likely, under the circumstances, to lead to a further loss of resources through the plaintiff's use of self-help.⁷⁷ Under the fault theory damages were awarded when it was determined that what the defendant had sought to achieve by his conduct was of less value than the resources his conduct destroyed or endangered and, consequently, the failure to award damages might result in the defendant's continuing to engage in his less valuable resource destructive conduct.⁷⁸ Imposing liability in such cases was viewed as an effective way of discouraging such conduct.⁷⁹

The enterprise liability theory takes a broader view of conservation. It seeks to achieve greater or more effective preventive action than did the force and fault theories. It also seeks, when possible, more effective utilization of existing resources by encouraging the more rational use by individual members of the community of their available resources and by making more effective use of the market place as a tool for "best" allocating the community's limited resources.

The opportunity to develop tort rules to achieve these broader purposes came about as a result of the wider distribution among society's members of the ultimate economic burden of tort losses. This wider distribution was in turn brought about by the growth of liability and casualty insurance⁸⁰ and the evolution of a vast number of welfare and subsidy programs.⁸¹

77. See note 43 *supra*.

78. See note 64 *supra*.

79. See, e.g., *Morse v. Auburn & Syracuse Ry.*, 10 Barb. 621 (N.Y. Sup. Ct., App. Dist. 1851), reasoning that if damages for pain and suffering were not recoverable in a negligence action, the remaining damages, being so low in the typical case, would not have an adequate deterrent effect.

80. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 82, at 542 (4th ed. 1971), notes that while liability insurance provisions were not unknown before 1880, it was after that date that separate liability insurance policies began to appear in England to provide protection against liability under employers' liability and workmen's compensation statutes. See also James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958).

For an early judicial recognition of the availability or unavailability of insurance as a factor in shaping tort liability rules, see *Ryan v. New York Central R.R.*, 35 N.Y. 210 (1866), limiting liability under the doctrine of proximate cause for property losses caused by negligently set fires. The court specifically noted the availability of casualty insurance to property owners and the unavailability to negligent defendants, at that time, of what today would be liability insurance.

81. Although such programs are not a unique phenomenon of the twentieth century, their pervasiveness probably is.

With this wider distribution of the costs of tort losses through insurance and the like also came a new question of fairness—the fairness of imposing the ultimate burden of tort-like losses on one segment of the public rather than another. At the time of the development of the force and fault theories, whether an otherwise compensable tort loss was placed on the defendant or left on the plaintiff, relatively little shifting of that loss to other members of the community was likely to occur. For the most part the ultimate economic burden of the loss remained on one of the immediate parties and persons close to them. While this result affected the distribution of wealth as between these small groups, it had little effect on the distribution of wealth as between others in the community. The fairness of imposing both the initial and ultimate burden of a tort loss on one party or the other was found fairly simply in the determination of whether a reallocation of the loss from the plaintiff to the defendant was advisable in order to protect against the possible future destruction of resources.

In today's world the effect of tort rules on the distribution of wealth is quite different. How the tort law allocates a tort-like loss between the immediate parties will affect not only the distribution of wealth between them, it will also affect the distribution of wealth between the various segments of the public to which each of the immediate parties will be able to pass the cost by way of the market place, insurance or welfare and subsidy programs.⁸² The allocation of tort losses, therefore, involves establishing standards or criteria for fairly determining both the questions of how the *initial* burden should be allocated between the immediate parties as well as how the *ultimate* burden should be allocated among various segments of the public.

The judicial and legislative response to the wide distribution of most tort-like losses has been the development of the cost accounting, cost distribution criteria of the enterprise liability theory. Together these criteria are expected to achieve four interrelated purposes: (1) preventing as many tort-like losses as is economically feasible;⁸³ (2)

82. See quotation from Demsetz, *supra* note 33.

83. For the proposition that the prevention of tort-like losses is an avowed goal of the enterprise liability theory as the courts have been applying that theory in the area of strict tort liability for defective products, see, e.g., *Tucson Indus., Inc. v. Schwartz*, 108 Ariz. 464, 501 P.2d 936 (1972); *Elmore v. American Motors Corp.*, 70 Cal. 2d 978, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

For more general discussions of the policy of prevention, see CALABRESI, *COSTS*, *supra* note 20, at 26-31, 68-69; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 12.4 at 755-57, § 13.5, at 771, § 26.5, at 1373. It is basically this policy which Calabresi characterizes as the "general deterrence approach" and which he analyzes in great depth in chapters 5, 7, and 10 of his book.

distributing as fairly as possible among various segments of the consuming public the costs of such prevention or, alternatively, the costs of insuring against the tort-like losses which will nonetheless occur;⁸⁴ (3) encouraging individual members of the community to make decisions about the use of their personally available resources as rationally as possible;⁸⁵ and (4) avoiding the creation of distortions in the use of the market place as a tool for otherwise "best" allocating the community's total limited resources.⁸⁶

84. By "fair" I mean that the criteria by which the distribution is determined and the distribution which in fact results are socially and politically acceptable. A "fair" manner for distributing losses is one which will be readily accepted by the community's members because the criteria used and the distributions which result are based on widely shared values of the community members themselves. As to the propriety of using this pragmatic approach to the question of "fairness" or "justness," see *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 102 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

Most writers, whether lawyers or economists, have recognized that there is a question or problem of "fairness" or "justness" involved in the development of tort rules which transcends the problems of the "best" or "most efficient" allocation of resources. Most of these writers also recognize that this fairness question relates to the fairness of the effects tort liability rules may have on the distribution or redistribution of wealth between various segments of society. While recognizing this latter question of fairness, however, several of these writers would disregard it, and measure the "fairness" or "justness" of tort liability rules primarily or exclusively in terms of the degree to which those rules functioned to bring about the most economically efficient reduction of accidents and, thus, the most economically efficient allocation of resources. See, e.g., Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 27 (1960); Demsetz, *supra* note 18, at 28 ("[I]t is difficult to suggest any criterion for deciding liability other than placing it on the party able to avoid the costly interaction most easily."). Generally in accord, but arguing for a strict liability test, Calabresi & Bass, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74 (1970); Calabresi & Hirschhoff, *supra* note 20. Also accord, but arguing for a negligence test, Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

Other writers would seem to agree with the position taken in this Article, namely, that it is not enough for tort liability rules to be "fair" in terms of their effect on the allocation of resources; they must also be "fair" in terms of their effect on the redistribution of wealth. See, e.g., Dorfman, *The Economics of Products Liability: A Reaction to McKean*, 38 U. CHI. L. REV. 92 (1970); McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 *passim*, especially at 39, 42 (1970); Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427 *passim*, especially at 437 (1972). These authors would reject the proposition that once it is recognized tort liability rules do have effects on the allocation of resources, "it no longer follows that wealth distribution is the main or even an important consideration in choosing the liability rule." Demsetz, *supra* note 18, at 25 (emphasis added). Courts and legislatures have also rejected this proposition. See note 107 *infra*.

85. This goal has not been articulated as clearly by courts and legislatures as have the goals of prevention and "fair" distribution. Nonetheless, it is the goal which best explains why, under the theory of enterprise liability, the criterion of "normal expectations" is used to determine which enterprise (and, consequently, which consumers) ought *ultimately* to bear what losses. For other illustrations of the law's policy of protecting invested resources when made on the basis of one's normal or reasonable expectations, see note 196 *infra*.

86. As with the third goal, this fourth goal is not usually articulated by the courts or legislatures when using the enterprise liability theory. As illustrated and discussed later in the

B. *The Criteria of the Theory*

To achieve these purposes three criteria are used. The first criterion—which enterprise failed to meet normal expectations?—determines to which enterprise or activity the *ultimate* burden of the loss ought to be assigned. The application of this criterion also determines which more specific group in society ought or will ultimately bear the cost of that burden. The second and third criteria of the theory determine which individual, as a representative of the various categories of participants⁸⁷ within the enterprise (e.g., user, manufacturer, or distributor), should be considered the superior risk bearer⁸⁸—the category of person upon whom the *initial* burden of the loss should be placed or left. The criteria for determining who is the superior risk bearer are: (1) who is probably in the most effective position to cause preventive action to be taken within the enterprise, if any such action is now or might ever prove to be possible in the future, and (2) who is probably in the most effective position to cause the costs of such preventive action or in the alternative, the costs of insurance, to be passed on most efficiently, economically, to the con-

text, the fact that the results obtained under the theory are usually those which the market place theoretically would itself produce, if it could, does suggest that this fourth goal is being pursued, at least intuitively.

87. Under both the force theory and the fault theory, the purposes which the law sought to achieve could be obtained by referring to conduct of the plaintiff or the defendant simply as individuals, that is, "who hit whom in the nose?", "who engaged in conduct which created an unreasonable risk of harm to others?" To achieve the purposes of the enterprise liability theory, however, the courts and legislatures must view the parties in categorical terms because, while it is still the individual behavior of immediate parties in a law suit which the law seeks to influence, the law is no longer seeking to influence that behavior for the sake of changing that behavior alone. Instead, under enterprise liability the law is seeking to influence individual behavior for the sake of the effects that behavior will, or is likely to, have on other people. Thus, for example, we impose liability vicariously on the head of the household for the negligent driving of a member of the household not because the head of the household has demonstrated a personal, individual need for deterrence, but rather because, as the head of the household, he is probably in an effective position to influence, for the better, the ways others in the family will drive the family car. Put another way, because the purposes of the enterprise liability theory contemplate that the imposition of a tort judgment will or should have certain *ultimate* effects on particular categories of participants within an enterprise, those categories of participants who should bear the *initial* burden are those who are most likely to bring those *ultimate* effects about. For other discussions of this point, but from a different perspective, see Calabresi & Hirschhoff, *supra* note 20, at 1067-70; C. Morris, *supra* note 17, at 1176-77.

It is, of course, abundantly clear that in using the enterprise liability theory the law does speak in terms of categories. Under *respondeat superior*, for example, we see such categories as "master," "servant," "independent contractor," "borrowed servant." Under strict liability in tort for defective products, we see "manufacturers," "retailers," "sellers," "consumers," "users," "bystanders," etc.

88. Although using a different test for determining who the superior risk bearer is, I have chosen to use the same descriptive language others have. See, e.g., C. Morris, *supra* note 17; C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS ch. 10, at 694-781 (1969).

suming purchasers or other economic beneficiaries of the enterprise which failed to meet normal expectations.

1. The Criterion of Normal Expectations.⁸⁹ The enterprise liability theory starts with the proposition that as people go about living their ordinary lives they ought to be permitted and encouraged to rely on their normal expectations as to how their activities and those of others will or may interrelate. One of the most basic of these normal expectations is that all enterprises or activities will be carried on in a manner which will not disrupt the normally expected status quo by causing tort-like losses which will in turn frustrate⁹⁰ the realization of other normal expectations community members may have. Under the first criterion of normal expectations, therefore, the *ultimate* burden of an otherwise compensable tort loss is assignable to that particular enterprise which, among all the infinite number of "but for" enterprises which may have caused the loss, failed to function as most people would normally have expected and which thereby disturbed the normally-to-be-expected status quo.

Because of the basic expectation that those carrying on an enterprise or activity should and will seek to avoid causing tort-like losses to themselves and others, the enterprise which is identified as the one which failed to function as would normally be expected will usually, if not always, be the one in which the most effective preventive action could probably have been taken to avoid the loss, if any such action could have been taken at all.⁹¹ For the enterprise to which the ulti-

89. The development of this criterion is discussed later in part VIII.

90. Professor Page Keeton used this phrase several years ago in his article, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1 (1953):

Certainly it can be said without fear of contradiction that both case law and legislation during the past fifty years evidence an ever-widening recognition of the idea that reasonable expectations of purchasers should not be frustrated [that is,] the idea, that in general, the risk of loss should be on the seller if it appears after the sale has been consummated that the subject matter of the transaction is not in all respects as valuable or not as satisfactory for the purchaser's purpose as expected.

Professor Keeton has repeated the same language and ideas in some of his more recent articles dealing with products liability. See, e.g., *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 561 (1969), and *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1332 (1966).

91. The enterprise chosen as the one in which the most effective preventive action could be taken, if any could be taken at all, will probably also be the enterprise in which, in most cases, such action could be taken most inexpensively. This is likely to be the case simply because in forming their normal expectations most community members are very likely to be influenced by the notion that resources, when expended, whether for accident prevention or otherwise, ought to be spent wisely and frugally. Even so, it does not follow that in all cases the enterprise which is in the most effective preventive position must also be the one in which such prevention can be obtained most cheaply. The reason for this is that "most cheaply" is likely to take into

mate burden of a tort loss is thus assigned under this criterion, the imperative of the enterprise liability theory is: take appropriate preventive action to avoid similar losses in the future and in addition, or in the alternative, insure against those losses which will nonetheless occur.

In the typical case, the enterprise to which the loss will be assigned is the enterprise which the ordinary person would say went "wrong," or "awry" or "miscarried."⁹² Often, as the illustrations in the next principal section demonstrate, the failure of one enterprise to function as people would normally have expected it to will cause other enterprises to fail to meet normal expectations as well; but the key is to identify that particular enterprise which failed in the sense that had it proceeded as people had come to expect it to, nothing untoward would probably have happened.

"Normal expectations" for the purposes of enterprise liability theory does not mean, as it tended to mean under the fault theory, that some misfortunes must be accepted and tolerated as part of life because some accidents are inevitable. What "normal expectations" means for the injured party is what one usually means by the word "accident."⁹³ When one drives a car, he can expect someday to have an accident—a mishap. But when the accident actually occurs, that event, on that day, for that person, will have been outside the range

account only costs which are fairly direct and evident, for example, the additional expense involved in making the soles of everyone's shoes more slip resistant as compared to the labor costs involved for property owners in keeping commonly travelled pathways free of ice or snow or other slippery substances. The standard of normal expectations allows other costs and values to be taken into account which a law maker, searching for the "cheapest preventive enterprise" might otherwise be inclined to disregard or discount, for example, the desire of purchasers of shoes, for many reasons, to have a wide range of choice in styles of shoe soles and the materials used in making them.

92. See, e.g., RESTATEMENT OF TORTS § 519 (1938), dealing with the enterprise liability tort of strict liability for harms caused by the "unpreventable miscarriage" of an ultrahazardous activity. Although the proposed revision of this section would eliminate the language of "miscarriage," the concept of liability for accidental, i.e., unexpected, losses caused by the activity in a particular case remains. RESTATEMENT (SECOND) OF TORTS § 519, particularly comment *d* at 53 (Tent. Draft No. 10, 1964).

93. In the enterprise liability area of workmen's compensation recovery is conditioned on "personal injury accidentally sustained or death resulting therefrom," COLO. REV. STAT. ANN. § 8-52-102(1) (1973), and "accident" is defined in § 8-41-108(1) as "an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause being known, an unprecedented consequence of it."

Similarly, under Colorado's "no-fault" automobile liability, recovery is conditioned on "accidental bodily injury sustained . . . in an accident involving any motor vehicle . . ." COLO. REV. STAT. ANN. § 10-4-707(1) (1973).

For a discussion of the standard of "normal expectations" as applied in the enterprise liability area of strict liability for defective products, see note 160 *infra*.

of his "normal expectations." For all those, including the injured person, whose activities were "but for" causes of the accident, "normal expectations" means all those typical, normal expectations ordinary persons carrying on those activities would have of each other as to how each of their activities might interrelate. Thus if one of the "but for" causes of the injured party's auto accident was a tire blow-out, a dog suddenly darting in front of the car, or an unusually large pothole in the middle of the street, the activity which brought that cause into being, because it failed to function as most people would normally have expected, will be the activity the ordinary person would say "went wrong."

As unrealistic as it may at first appear, the world of "normal expectations" is one which is expected to be accident free because activities when carried on normally are not expected to cause the destruction or waste of the community's limited resources. Consequently, even though it may be realistic to expect that in any given number of instances a Coke bottle will explode, a recapped tire will lose its new tread, a user of a drug will have a strong allergic reaction, or a blast will shatter windows, none of these events nor their ensuing physical harms are ones which an ordinary person would normally expect to occur if the activities involved were carried on as the community at large had come to expect.

As previously noted, the application of this criterion of normal expectations also determines which group in society ought most fairly, ultimately, to bear tort-like losses. Ideally, that group will be the segment of the consuming public which purchases the goods or services being provided by the enterprise.⁹⁴ Should market conditions be such that these losses as costs cannot be passed on entirely through the market place to purchasers, the economic burden is likely to fall or be shared with employees or investors in the enterprise. In any event, the ultimate economic burden is placed on those who derive or are seeking to derive some fairly direct economic gain or benefit from carrying on the enterprise which proved to be disruptive of the normally-to-be-expected status quo.⁹⁵

94. That this group is increasingly being identified specifically as the "ideal" group, see quotation from *Haft v. Lone Palm Hotel*, *supra* note 40. See also *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251-52, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 182 (1970); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1041 (Ore. 1974); *Dippel v. Sciano*, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967).

In workmen's compensation, the purchasing consumers have long been recognized as the group which would bear the ultimate burden. See, e.g., quotation from *Thayer*, *supra* note 11.

95. Professor Robert Keeton would ground the fairness of this result on the general principle of unjust enrichment. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L.

2. The Criteria of the Most Effective Preventer and the Most Efficient Cost Distributor. While the application of the first criterion of normal expectations determines which enterprise a tort-like loss ought to be assigned to and consequently which segment of the public ought to bear the *ultimate* burden of the costs of future prevention or, alternatively, insurance, the second and third criteria determine which category of participants within the enterprise, for example, manufacturer, distributor, employee, user, is the superior risk bearing group—the category of persons on whom the *initial* burden of a tort-like loss in any law suit should be placed or left. The superior risk bearer in any case will be that person who is a member of that group of participants which is probably in the most effective position to bring about two results within the enterprise: (1) cause more preventive action to be taken to avoid similar losses in the future, if possible, or to seek to discover more effective means for avoiding such losses,⁹⁶ and (2) cause the alternative costs of prevention or insurance to be passed on most efficiently, economically, to the purchasing consumers of the enterprise.⁹⁷

REV. 401 (1959). The Minnesota Supreme Court would apparently do the same. See quotation *supra* note 75.

96. The category of participants chosen as the most effective preventers need not necessarily be the participants who are also the "cheapest cost" preventers. For example, a user of a defective product, or a workman, might in any given case have been able to avoid his injuries by making a relatively inexpensive inspection. His failure to do so, however, will not normally bar recovery under strict products liability or workmen's compensation. This result would follow even if it were demonstrated that the total resources all users or workmen would need to expend to make such inspections would be less than that required of the manufacturer or employer to prevent such losses or insure against them. For the reasons why users are seldom chosen to be the most effective preventers, though in many cases, they may arguably be the most "inexpensive preventers," see part IX *infra*.

97. One of the most articulate statements of these criteria of the enterprise liability theory as applied in the context of strict liability for defective products is that of the Wisconsin Supreme Court in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967):

[T]he seller is in the paramount position to distribute the costs of the risks created by the defective product he is selling. He may pass the cost on to the consumer via increased prices. He may protect himself either by purchasing insurance or by a form of self insurance. In justification of making the seller pay the risk, it is argued that the consumer or user has a right to rely on the apparent safety of the product and that it is the seller in the first instance who creates the risk by placing the defective product on the market. A correlative consideration, where the manufacturer is concerned, is that the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer.

Id. at 450-51, 155 N.W.2d at 58. That effectiveness as preventers and cost distributors are the basic criteria for choosing superior risk bearers among the various categories of participants in the products liability area is now generally well recognized. See, e.g., *Tucson Indus., Inc. v. Schwartz*, 108 Ariz. 464, 467-77, 501 P.2d 936, 939-49 (1972); *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586-87, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969); *Kirkland v.*

In most cases, the superior risk bearer will meet both criteria. In some, however, one group of participants may be in the most effective preventive position but another group will be in the most effective position to cause the costs to be distributed most efficiently, economically, to purchasers of the goods or services produced by the enterprise. How the courts and legislatures have tended to resolve this problem will be considered later.⁹⁸

C. *The Basic Rationale of the Enterprise Liability Theory*

1. Encouraging the Efficient Use of Existing Resources Without Distorting the Market Place. The enterprise liability theory puts significant emphasis on protecting the normal expectations of ordinary persons for at least two reasons. The first relates to the purpose of encouraging members of the community to use their personally available resources as efficiently and rationally as possible. In order rationally to plan the efficient utilization of one's own limited resources, one must be able to rely on the activities of others being carried on in their normally-to-be-expected manner. In the absence of one's ability to rely on such expectations, one would be less inclined to invest his resources or invest them in a way he otherwise might for fear of having to bear the burden of their unexpected loss. Alternatively, of course, he might still choose to invest, but in doing so, he would probably feel the need to invest an even greater amount of resources in order to hedge his bet against the risk of loss he might sustain should another causally related enterprise fail to meet normal expectations. By protecting normal expectations, the enterprise liability theory thus enhances the productivity of the resources available to the community's members.

A second reason for providing some security to ordinary people in their reliance on their normal expectations relates to the purpose of protecting the pricing mechanism of the market place as a tool for "best" allocating the community's total limited resources. When one goes to the market place to buy goods or services, the price one is willing to pay is largely dependent on what one expects to be able to do or accomplish with his purchase—what desires or needs he expects to be able to satisfy. When those expectations are frustrated either

General Motors Corp., 521 P.2d 1353, 1360-61 (Okla. 1974); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1041-42 (Ore. 1974).

1 F. HARPER & F. JAMES, *THE LAW OF TORTS*, xlii-xliv (1956), though they emphasize the criterion of efficient cost distribution, suggest the same criteria have been used in workmen's compensation and in the creation of doctrines expanding the application of strict vicarious liability.

98. See part IX *infra*.

because what is purchased fails to meet normal expectations (the law of warranties and strict liability for defective products) or because another causally related enterprise fails to meet expectations and thereby diminishes the utility of the goods or services purchased (the shattered window pane in a blasting case), the market place has been distorted. At least one consumer will have paid more than he otherwise would have. If the cost of any physical losses caused by such failures are left on the purchaser,⁹⁹ then the demand which he and others like him created for such goods will have been higher than it otherwise would have been, and, consequently, more of the community's limited resources were, and in the future may be, allocated to the production of such goods or services than the market place would ideally allocate.¹⁰⁰

What the enterprise liability theory assumes is that the use of the market place as a tool for "best" allocating the community's limited resources and the productivity of individual members of the community, particularly in the use of their available resources, is dependent on the ability of individual members to rely on their ordinary expectations as they go about purchasing goods and services in the market place and otherwise using their available resources to satisfy their individual wants and desires. By the tort law's willingness to shift losses under the criterion of normal expectations to those enterprises which fail to function as would normally be expected and which thereby frustrate the normal expectations of others, it is assumed the tort law will be able to permit others to use their available resources more rationally and efficiently than they otherwise could.

Using the standard of "ordinary" or "normal" to judge the validity of the expectations individuals may have of each other as they engage in their various causally interrelated enterprises or activities is probably the most realistic, practical standard the law can use. It is, after all, the standard most people use every day when making most of their decisions. Just as the manufacturer of a hammer will normally expect a user to be aware of the risk of hitting his thumb

99. This is true except in those cases where the purchaser, as a user, retailer, etc., may himself be a superior risk bearer. See, e.g., part VI *infra*.

100. Theoretically such a misallocation of resources should be short lived because prospective purchasers are expected to learn quickly of such deficiencies and, on the basis of such information, be less inclined to purchase such goods at all or to purchase them at the same price. It has not been unknown, however, for an industry or a manufacturer deliberately to discourage the dissemination of such information. Consider, for example, the efforts of the cigarette industry to avoid having to warn of the health hazards involved in smoking cigarettes. Similarly, consider the reluctance of the manufacturer of the DC-10 airplane, even when taking corrective action, to allow the risks of crashes caused by a defective design of a hatch-closing mechanism to become generally known.

when using the hammer to drive a nail, the user will normally expect the handle of the hammer not to break and cause him physical injuries when using the hammer to drive an ordinary nail into an ordinary piece of wood.

2. Preventing Losses Without Distorting the Market Place.¹⁰¹

While seeking greater efficiency in the utilization of resources by allowing individuals to rely on their normal expectations, the enterprise liability theory also seeks to encourage as much prevention of tort-like losses as is economically feasible. Both the force and fault theories tended to discourage conduct only when it was thought necessary to prevent the future destruction of resources having greater value than those already destroyed. Consequently, for example, under the force theory unless the defendant's affirmative act was a direct enough "but for" cause, and hence likely to lead to a retaliatory breach of the peace, the defendant was not liable, even though by only a slight, inexpensive, easy-to-accomplish change in the defendant's conduct the plaintiff's loss might have been avoided. Comparably, under the fault theory, particularly in negligence cases, no determination of the social disutility of the plaintiff's conduct was normally made until after a loss had occurred. At the time the defendant acted, he could only speculate as to the extent he had to engage in preventive action before a jury would say he had done as much as a reasonably prudent person would have. A competitive market would tend, of course, to cause a defendant to aim on the short side in taking preventive action in order to save costs. Even after a defendant had been found negligent in one case, a cost-conscious enterpriser might still be inclined to gamble on winning future cases relying on differences in the facts of the cases, the abilities of his lawyers, and the attitudes of the juries who would hear the later cases.¹⁰²

The enterprise liability theory assumes that by assigning the *ultimate* economic burden of a tort-like loss to the economic beneficiaries of the enterprise which fails to meet normal expectations and by assigning the *initial* burden to that category of participants within the enterprise which is in the most effective position to cause the enterprise to take preventive action and to pass on most efficiently the alternative costs of prevention or insurance to the purchasing consumers of the enterprise, more thoughtful decisions concerning

101. See generally CALABRESI, COSTS, *supra* note 20, at 68-75.

102. This risk may, of course, be offset by such factors as the possible adverse effect publicity of the prior tort judgment may be thought to have on prospective sales of the defendant and the degree to which competitors are willing and able to emphasize truthfully the greater safety of their products in comparison to the defendant's.

the wisdom of taking preventive action will be made.¹⁰³ This basic assumption is premised on several subsidiary assumptions. One is that a person, for example a manufacturer, is generally better able, in advance of a loss, to make a more realistic judgment about the normal expectations others may have of his enterprise or activity than he is able to make about whether a jury will label his conduct negligent after a loss has occurred.¹⁰⁴

Another assumption is that a person having some control of his activities and understanding the normal expectations others may have of those activities will take into account, when considering preventive action, a broader range of possible losses and the means by which such losses might come about than he would under a negligence test. Under a negligence standard, one need only worry about those risks he thinks a reasonable jury might later conclude a reasonable person would have considered; under enterprise liability he must think of all the possible ways his activity might fail to function as others would normally expect and, by causing a tort-like loss, disrupt the normally-to-be-expected status quo.

While the enterprise liability theory may thus encourage one to gamble more realistically about the relative worth of investing more resources in taking preventive measures in light of this broader range of losses for which one may be held liable, one must still gamble. He must still decide whether, under the standard of normal expectations (as opposed to the standard of reasonable care), it would be less expensive for him and ultimately for his customers to take preventive action rather than obtain additional insurance, or vice versa. Which-ever choice is made, if he is in a competitive market and wishes to stay in business, that choice will be reflected in the asking price of the goods or services he offers to the consuming public. A competitive market pricing system will tend to encourage the choice which will result in the lowest total cost, and this result will be consistent with using the market place as a tool for "best" allocating the community's limited resources. If it would be more efficient (less costly) to invest additional resources in prevention, that will occur, and it will occur up to the point of maximum economic feasibility—the point at

103. For other views of the relative merits of a strict liability theory as opposed to a fault theory as a means of preventing accidents, compare CALABRESI, *COSTS*, *supra* note 20, at 244-65, and Calabresi & Hirschhoff, *supra* note 20, at 1075-76, with Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 209-12 (1973).

104. In the design, manufacturing, and marketing of a product, the manufacturer will of necessity have made numerous assumptions about the normal expectations purchasing consumers are likely to have about his product, and, indeed, in his advertising he is very likely to create or reinforce many of them.

which the costs of prevention begin to exceed the cost of insurance.

Using the market place as a way of determining how "best" to allocate the community's limited resources between an investment in more preventive efforts (the costs of accident avoidance) as opposed to just letting accidents happen and covering their costs through insurance (the costs of accidents) requires, however, that these costs be accurately reflected in the prices of goods and services sought by those carrying on the enterprise. If such costs are not accurately reflected in the asking price and consequently the asking price for the goods or services is lower than it otherwise would be, the demand for such goods or services will be higher and more of the community's limited resources will be allocated to their production than the market place would otherwise allocate.

Avoiding this kind of distortion is one of the principle functions of the criterion of the efficient cost distributor. In addition to being the most effective preventers, the category of participants chosen as the superior risk bearer should also be, whenever possible, the persons within the enterprise who are best able to calculate as accurately and inexpensively as possible the costs of prevention or, alternatively, insurance and to cause such costs to be reflected most accurately in the pricing structure of the goods or services produced by the enterprise. If the cost distributor chosen by the court is unable to effect such a distribution, the costs properly assignable under the normal expectations criterion to the purchasers of particular goods or services may be distributed more generally to the purchasers of other goods or services produced by the enterprise or to others having little or no connection with the enterprise at all. The resulting higher prices and lower demand for other goods or services will cause the market place to allocate fewer resources to their production than it otherwise would.

To the extent the market place is to be used as a "voting" place to permit the community at large to determine by the prices its members are willing to pay for goods and services how much preventive action they are willing to pay for, such costs must of necessity be reflected as accurately as possible in the prices they are asked to pay.

Imposing the initial burden on the participant who is the most efficient cost distributor is also important if the goal of obtaining the maximum prevention which is economically feasible is to be achieved. If, for example, as can happen under a negligence test, the costs of any effective preventive action would be borne by say a manufacturer and eventually his customers, but insurance costs can be shifted to

or left on others (users or bystanders), the manufacturer is not as likely to elect to take preventive action. Suppose, for example, a certain drug is known to cause loss of sight in 1% of the cases in which it is administered, yet it eliminates the risk of dying from a certain disease in 95% of the cases. Suppose further that there is no known way to avoid the 1% risk of loss of sight nor to determine which of the users of the drug are likely to suffer the adverse reaction. The drug manufacturer gives all appropriate warning of the risk of sight loss so that a person using the drug knows of the risk involved. A plaintiff knowing of the risk takes the drug, but he turns out to be one of the unfortunate members of the 1% group. Under a negligence standard, no jury is likely to find, or be permitted to find, the manufacturer liable. Consequently the plaintiff's loss (or a substantial portion) will be spread by way of casualty insurance or welfare among a very large group of the members of the public. In such cases under the negligence system there is considerably less economic incentive for the manufacturer (and through the market place for his customers) to consider investing more resources in research and development to discover, if possible, more effective techniques for preventing the occasional adverse drug reaction.

By contrast, the enterprise liability theory would put the economic burden of both prevention and insurance on the manufacturer and ultimately his customers.¹⁰⁵ The use of the drug was the activity which failed to meet normal expectations. The normal expectations of an ordinary user would be that the drug would cure the disease

105. While the theory logically could be extended this far, it is clear the courts have been reluctant to do so in developing the rules of strict liability for defective products. Where the product, such as a life saving drug, has a resource conserving value, but its use entails a known, but unpreventable danger, the courts are reluctant to impose strict liability on the manufacturer or other supplier by labeling the product "defective" so long at least as an adequate warning of the risk has been given. See generally RESTATEMENT (SECOND) TORTS § 402A, comment k (1965); 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 33.02[4] (1975). Two recent cases supporting this view are *Hines v. St. Joseph's Hosp.*, 86 N.M. 763, 527 P.2d 1075 (N.M. App. 1974) (blood infected with hepatitis virus); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1975) (polio vaccine). For a sophisticated analysis, however, in enterprise liability terms as to why strict liability in tort should be applied in the hepatitis cases, see *Brody v. Overlook Hosp.*, 121 N.J. Super. 299, 296 A.2d 668 (1972), *rev'd*, 127 N.J. Super. 331, 317 A.2d 392 (1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975), *citing Hines v. St. Joseph's Hosp.*, *supra*.

For other discussions of the problem and citations to various cases, see Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 324-29 (1967); Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439 (1972); James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550 (1966); P. Keeton, *Products Liability—Drugs and Cosmetics*, 25 VAND. L. REV. 131 (1972); Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 267-71 (1960).

without loss of sight. By imposing the initial cost of the plaintiff's loss of sight on the manufacturer on the basis of his being the participant who is probably in the most effective preventive position, if prevention is possible or might ever prove to be possible, and because he is also probably in the best position to pass on the costs of preventive efforts or insurance to the purchasers of the drug, the enterprise liability theory is expected to generate more preventive action than the fault theory. Admittedly the amount generated will, again, be only that which is economically feasible in terms of what the market place reveals is the optimum balance between investing more resources in preventive efforts as opposed to simply taking the risk and paying for the "unpreventable" losses with insurance. Even so, more preventive action is likely to be taken than it would be under the negligence standard.

3. Achieving the Purpose of "Fair" Distribution. The fairness of ultimately distributing tort losses to the purchasing consumers or other economic beneficiaries of the enterprise which fails to meet normal expectations is thus based on two concepts of economic efficiency: (1) allowing people to rely on their normal expectations and, hopefully, thereby use their individual resources as rationally, and hence productively, as possible, and (2) preventing in advance as much destruction of resources as is economically feasible. In seeking these efficiencies, the enterprise liability theory also seeks to realize more effectively the "efficiency" the market place is theoretically expected to provide in the ultimate allocation of the community's limited resources. As the illustrations in the following section demonstrate, application of the criteria of the enterprise liability theory usually produces the same results, in terms of allocating resources and distributing wealth, as the market place itself would theoretically produce but which, for various reasons, the market place cannot produce or cannot produce efficiently.¹⁰⁶

106. There are at least two reasons why the market place cannot always be expected to produce the "best" allocation of resources and the consequential redistributions of wealth. One reason is that in some circumstances the costs of entering into a market place transaction to achieve a given result may be so high in comparison to the value of what would be achieved that no one is willing to invest the necessary resources to cover them. Consider, for example, the high transaction costs facing a resident of a neighborhood seeking to enter into a bargain with a noise polluting industrial plant to effect a reduction in the neighborhood noise level. He would need to invest substantial resources (1) to learn of the extent to which other residents would be benefited, (2) to organize those benefited and arrange for them to agree on the basis on which they would each contribute to the price to be paid the operator of the industrial plant, (3) to identify the sources within the plant of the high noise levels, and (4) to discover, for bargaining purposes, the alternative techniques and their relative costs and effectiveness for reducing the noise level from those sources. Because high transaction costs will preclude the

While the fairness of the criteria of the enterprise liability theory for allocating the ultimate burden of tort-like losses to various segments of the public can thus be found alone in the law's effort to achieve the purposes of efficient allocation, utilization and conservation of existing and future resources, their fairness can also be justified in terms of their effect on the distribution of wealth between various segments of the consuming public. In these terms what the enterprise liability theory says is that when members of a segment of the consuming public seek in a common way to use their individual resources (wealth) to satisfy commonly held individual wants and desires, they must be willing to share on a common basis the risks of a reduction in wealth which may result to themselves individually or to others if the enterprise through which they seek to satisfy those common individual desires fails to function as would commonly or normally be expected. From this perspective, the redistribution of wealth which occurs under the criteria of the enterprise liability theory is in essence the same as that which typically occurs with insurance through the pooling and sharing of common risks.¹⁰⁷

parties using the market place to adjust their conflicting interests, the law has intervened through the law of nuisance, zoning, and planning to effect an adjustment. The leading article dealing with transaction costs and discussing the relevance of such costs to the creation of tort liability rules is Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

A second reason why the market cannot always be expected to produce the "best" allocation of resources is that there are certain recognizable human values for which there simply is no market. Often this is because high transaction costs preclude market place bargaining as to such matters, for example, freedom from automobile exhaust pollution. In other cases, the value is so personal, for example, the love and affection a parent may feel for a child, that no one else would be able to possess it by purchasing it.

Perhaps the primary merit of the law's use of the criterion of normal expectations for assigning liability among various enterprises under the enterprise liability theory is that it permits the law to incorporate such non-market values into the law-making process when creating tort liability rules. The law thus avoids limiting itself only to those values which would be recognized in the market place.

107. Related to this concept of "fairness" is another which some authors have taken as the central one, but which I would suggest is only a subsidiary one. I have taken the position that, at least today and probably for some time, the courts and legislatures have implicitly recognized that whether a loss was shifted to the defendant or left on the plaintiff, the loss (or a major portion of it) could and would be shifted by the plaintiff or the defendant to other members of the community. Hence the basic "fairness" question is: which group in society ought *ultimately* to bear the loss—the persons to whom the plaintiff would shift it through his casualty insurance (Blue Cross, employer's sick leave, social security benefits, veteran's benefits, unemployment compensation, welfare programs and the like) or the persons to whom the defendant would shift it through his liability insurance, the market place, or, in some cases, a government subsidy program.

This is not the way some text writers and courts have viewed the question of "fairness." See, e.g., James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360, 362-63 n.9 (1958). They have started with the theory of the declining marginal utility or value of wealth, that is, the more money a person has, the less valuable *to him* is each additional dollar, because, having already satisfied many personal

wants and desires with his other dollars, he will have increasing difficulty discovering other wants or desires to satisfy. The fact that he has to search for other wants he would like to satisfy is some indication that these "sought after" wants are not, even if found and satisfied, as important or as valuable to him as those more basic desires, for example, food and clothing, which he quickly determined and satisfied with his earlier dollars.

Using this basic notion, text writers have suggested that it is "better" or "fairer" for a loss (tort-like, or otherwise) to be distributed among many people rather than leaving it entirely on the person who sustains it. It is "better" or "fairer" in terms of both allocating resources and distributing wealth for two reasons: (1) if an accident victim goes uncompensated, the loss to him in terms of his inability to satisfy his individual wants and desires *will be greater than* the total of those unsatisfied wants and desires others will sustain if, instead, they are required to compensate the victim by contributing one of their last, less valuable, marginal dollars; (2) providing compensation, especially prompt compensation to an accident victim of his "primary" losses (lost wages, medical expenses and pain and suffering) reduces what Guido Calabresi has called "secondary" accident costs. CALABRESI, *COSTS*, *supra* note 20, at 27-28, 39-67. By this he means, the more quickly and adequately a victim is compensated, the more quickly will the victim and his family members be able to return to their normal roles as productive members of the community and the "dislocative" effects in their lives and the consequent need to expend additional resources (time and money) to adjust to them will be substantially reduced.

While some economists object to this kind of analysis on the grounds that there is no rational way of comparing the value to a wealthy person of what he buys with his last dollar out of \$100,000 with that which a poorer person buys with his last dollar out of \$10,000, the fact is that most people do accept this analysis. If they did not, why would so many people be so willing to buy insurance, whether it be casualty or liability insurance?

Up to this point in the analysis my position as to what is the basic question of fairness in distributing losses is consistent. Where my position diverges from those of many text writers and some courts is on the further assumption that, generally, defendants (actors) are more likely to be carrying liability insurance through which tort losses can be distributed than are accident victims likely to be carrying casualty insurance through which the loss could also be distributed. When Justice Traynor, for example, wrote in *Greenman*, *supra* note 6, that it is better to have a loss caused by a defective product distributed via the manufacturer's liability insurance to the members of the public than to leave it on the victim who is "powerless" to protect himself, he could have been thinking either that Mr. Greenman was "powerless" to prevent such losses or that he was "powerless" to provide adequate insurance protection against such losses. My impression of what many text writers and courts have been thinking is the latter, namely, that in most cases involving tort losses, the accident victim is less likely to be covered by casualty or welfare benefits, and therefore it is generally "fairer" to impose liability on actors (who are more likely to be insured) than leave it on victims (who are more likely to be uninsured).

If this is what is considered to be the basic "fairness" justification for distribution of losses under the enterprise liability theory, then a major determinant in establishing liability rules should be: which participants in an enterprise are most likely to be carrying adequate insurance to cover the kind of loss involved, the actors (*e.g.*, manufacturers, wholesalers, and retailers) or victims (*e.g.*, consumers, users, or bystanders)? In short, who is most likely to be able to distribute the loss most widely as well as most efficiently? Probably today in many, if not most, cases the answer to this question, with the exception of losses for pain and suffering, will be that the victim is, through his casualty insurance, employment benefits, and various welfare programs. *But see*, as to insurance, CALABRESI, *COSTS*, *supra* note 20, at 55-64.

While admittedly when using the criteria of enterprise liability, many courts, legislatures and text writers have undoubtedly made the assumption that casualty insurance was not as pervasive in our society as liability insurance and therefore concluded that liability should be imposed generally on those most likely to be able to distribute the loss through liability insurance, most of them have not knowingly, I think, ever disregarded the questions (1) of what group in society will *ultimately* bear the loss, and (2) is it "fair" to impose it on them. *See, e.g.*, quotation from the 1924 decision of the Minnesota Supreme Court in *Bridgeman-Russell*

Co. v. City of Duluth, *supra* note 75. Furthermore, I do not doubt that when legislatures were developing workmen's compensation and owner consent statutes, and courts were elaborating the strict liability rules governing abnormally dangerous activities, they assumed actors were more likely to be carrying liability insurance than victims were to be carrying casualty insurance, and therefore, for the purposes of increasing efficiency in the allocation of resources and reducing secondary accident costs, it was generally "fairer" to impose liability on the actor than leave it on the victim. Courts and legislatures did not, however, make these judgments without realizing, at least implicitly, that consumers of goods and services would be paying more to cover the costs of industrial accidents, owners of automobiles to cover more of the losses caused by bad driving, and consumers of blasting services for such services in order to pay for more broken windows. Implicitly, our law-makers must have had other reasons for concluding that it would be "fairer" for these particular segments of society ultimately to bear such losses rather than leaving them on the public at large, either by having uncompensated accident victims and their families bear them as members of the public or by having an even larger segment of the public share them by way of whatever casualty insurance such victims might happen to have.

My contention is that our courts and legislatures in dealing with the distribution of tort losses through the market place, insurance, and the like have not been concerned with distribution simply because distribution per se is a fairer way to deal with such losses by spreading them among the many instead of leaving them on the few. Rather, they have been at least equally as concerned about the fairness of distributing particular losses through insurance, etc., to one group in society rather than another, and with the independent question of the "fairness" of the criteria by which that ultimate question should be determined.

This analysis of what the basic question of "fairness" is explains two things: (1) why the courts and legislatures have not sought the "widest possible distribution" of tort-like losses through the use of enterprise liability theory, and (2) why, notwithstanding the fact that casualty insurance and other similar devices are quite pervasive today, courts and legislatures have continued to impose liability generally on actors, rather than leaving losses on victims, even though such victims through their casualty insurance and the like, could usually effect (except for pain and suffering losses) a far wider distribution of such losses and do so more efficiently. Today, both courts and legislatures are being more explicit in recognizing that the basic "fairness" question is not *whether* a loss will or can be distributed, but rather to *whom* it will be distributed. For an illustration of a judicial recognition of this view of the "fairness" question, see the quotation, *supra* note 40, from the California Supreme Court in the *Haft* case. See also *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 379, 161 A.2d 69, 81 (1960), in which the court in holding privity was no longer a limitation on a breach of warranty claim for physical injuries caused by a defective product stated: "In [this] way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur."

Similarly, for a legislative recognition of this view, see Colorado's "no-fault" automobile insurance statute, in which the General Assembly made it quite clear they expected most medical expenses arising out of automobile accidents to be paid by automobile owners, not by the public at large through the general medical casualty insurance policies victims might own. COLO. REV. STAT. ANN. § 10-4-709 (1973).

In sum, while the courts and legislatures have been encouraging and justifying the wider distribution of losses on the grounds that it is "fairer" and helps to reduce "secondary" losses, distribution per se, wide or otherwise, has not been a primary goal. Rather, as suggested in the text, courts and legislatures have tended to take some sort of distribution as a fact which will occur in any event, and consequently have viewed the fundamental question to be: how can tort-like losses be distributed in a way which, while not distorting the market place, will result in more prevention of future losses, better utilization of existing resources, and the imposition of the ultimate burden of the costs of prevention or insurance on that segment of society which, using some socially well-accepted criterion of "fairness," ought most fairly to be expected to bear them. Only as a subsidiary goal, then, have the courts and legislatures, by encouraging the distribution of losses, been seeking to reduce "secondary" accident costs, that is, those added "dislocative" costs an uncompensated victim and his family *might* have to bear if the

Before considering some of the other assumptions and values which underlie the criteria of normal expectations, most effective preventer and most efficient cost distributor, some illustrations of the courts' use of these criteria may be helpful.

VI. TWO ILLUSTRATIONS OF ENTERPRISE LIABILITY

A. *The Bernardi Case*

Two cases will serve to illustrate in detail the application of the three cost accounting criteria of the enterprise liability theory. The first case, *Bernardi v. Community Hospital Association*,¹⁰⁸ was an action by a child and her parents for damages for permanent injuries sustained by the child as a result of the negligent administration by a nurse, employed by the hospital, of a post-operative shot which had been ordered by the attending physician. The physician was not employed by the hospital, having been independently engaged by the child's parents. He was not present when the shot was administered, but had left a written order on the child's medical chart in the usual fashion. The plaintiffs sued the nurse, the doctor and the hospital. The trial court granted the doctor's motion to dismiss on the grounds that the doctrine of *respondeat superior* was not applicable to the doctor. The trial court also granted a summary judgment in favor of the hospital, dismissing the claim against it on the ground that while the nurse was an employee of the hospital, the specific act of negligence alleged was a "professional" one and, because under the applicable state statutes the hospital could not legally engage in "professional nursing," the hospital could not be held liable under the doctrine of *respondeat superior* for the "professional" negligence of its employee, the nurse.¹⁰⁹

On appeal, the supreme court upheld the dismissal as to the doctor.

It is apparent from the record that the Doctor did not have the control necessary to apply the doctrine of *respondeat superior* to him. He did not know what nurses would give the injection. The Nurse had been employed by the Hospital and

victim was inadequately covered by casualty insurance and other similar devices. That legislatures and courts do pursue this subsidiary goal is illustrated by the very generous rehabilitation insurance provisions in Colorado's "no-fault" automobile liability statute, COLO. REV. STAT. ANN. § 10-4-706(1)(d) (1973), and by two common law rules of damages—"you take the plaintiff as you find him," and "by his damages the plaintiff is to be made whole."

108. 166 Colo. 280, 443 P.2d 708 (1968).

109. As the court noted, *id.* at 285, 443 P.2d at 710, under the rule of prior cases, a non-profit charitable corporation was not immune from liability under the doctrine of *respondeat superior*. The doctrine of charitable immunity extends only to protecting the trust assets against levy and execution after a judgment has been obtained.

was under its control and direction. The Doctor, not being present when the injection was given, had no opportunity to control its administration. His instructions that injections were to be given did not give rise to a master-servant relationship.¹¹⁰

As to the hospital, the supreme court reversed, pointing out that this was not the typical "surgery room" case where the attending physician had taken over the responsibility of supervising the assisting hospital nurses, and everyone understood, including the hospital administrators, that during that period of time, the doctor was to be looked to for direction, not the hospital's administrators.

The Hospital was the employer of the Nurse. Only it had the right to hire and fire her. Only it could assign the Nurse to certain hours, certain areas and certain patients. There was no choice in the Doctor or the plaintiffs as to the identity of the nurses who would serve [the child]. In this day and age a hospital should be responsible for the acts of its nurses within the scope of their employment, irrespective of whether they are acting "administratively" or "professionally."¹¹¹

The ways in which the court deals with the *respondeat superior* problems in the case illustrate the cost accounting criteria of the theory of enterprise liability upon which the doctrine of *respondeat superior* is based.¹¹² The loss to the child could have been assigned to the doctor as a risk of the general practice of medicine. It could have been assigned (as it of course was under the fault theory) to the enterprise of professional nursing. Had the negligent nurse been judgment proof and no relief allowed against the doctor or the hospital, the loss would, effectively, have been assigned to the plaintiffs as a risk of having engaged originally in whatever activity it was which caused the child to be hospitalized in the first place. Finally, as it was on appeal, the risk could also be assigned to the hospital, treating it as a cost of engaging in that enterprise.

In terms of the enterprise which failed to meet normal expectations, each of these four activities or enterprises could be viewed as ones which failed to proceed as expected, and, as a result, disrupted the normally-to-be-expected status quo. The activity which went awry and brought the child to the hospital in the first place was clearly one.

110. 166 Colo. at 294, 443 P.2d at 715.

111. *Id.* at 291, 443 P.2d at 713.

112. *Accord*, as to *respondeat superior* being based on enterprise liability, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.5 (1956).

That enterprise, however, could be and was treated as irrelevant since no effort was being made by the plaintiffs to shift the losses caused by the "miscarriage" of that enterprise to any other enterprises.¹¹³ The plaintiffs were seeking relief only for the additional losses brought about by the further disruption of the then normally-to-be-expected status quo resulting from the failure of the succeeding activities of "nursing," "doctoring" and "providing hospital care."

As to these additional losses, both the activities of "doctoring" and "providing hospital care" failed to proceed as would normally have been expected. They did so, though, only because they were dependent on the activity of "nursing" and that activity by definition (*i.e.*, negligence) was the one which most clearly failed to proceed as all those involved might reasonably have expected. Under the first criterion of the enterprise which failed to meet normal expectations, therefore, the activity of nursing would be identified as the enterprise to which the loss should be assigned, with the ultimate economic burden being borne by the consumers of that service.

The next question is which of the categories of participants should be considered the superior risk bearer on whom the initial loss

113. This statement is not quite accurate. These *additional* losses sustained by the plaintiffs were in fact the result of two activities which failed to meet normal expectations— (1) the activity which brought the child plaintiff to the hospital, and (2) the activity of nursing. The problem is very much like that presented in the water company cases, *e.g.*, *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), where one activity fails to meet expectations by starting a fire and the activity of providing water service also fails, through negligence, to make adequate water available to extinguish the fire and prevent the additional losses. Those courts, as the New York Court of Appeals did in *Moch*, which relieve the negligently failing water company of liability for such additional losses are in fact applying (though they may use different legal reasoning) the criteria of the theory of enterprise liability. In these cases, whether the additional losses are viewed as a cost of the activity of owning property or of the activity of operating a domestic waterworks, the same basic group in society will usually bear them. The application of the prevention criterion is not determinative since property owners are probably in as good a position to prevent fires in the first place as the water company is to prevent a loss of water pressure. Also, property owners usually have a substantial amount of political control over the quality of their domestic water service.

What really accounts for the refusal in these cases to impose liability under normal negligence principles is the conclusion, based on the principles of enterprise liability, that it is simply more efficient to have the property owners, who are also water users, bear these additional losses as a risk of the activity of property ownership rather than as a risk of operating a domestic water system.

In *Bernardi*, though the problem is very much like that in the water company cases (how to pick between two enterprises both of which failed to meet expectations, and together caused a loss) the two situations are distinguishable in at least two significant regards. In *Bernardi*, assigning the additional losses to the activity which brought the child to the hospital, as opposed to assigning it to the activity of nursing, will not result, as in the water company cases, in placing the additional loss on the same segment of the consuming public. Also, as to these additional losses, unlike in the water company cases, the application of the most effective preventer criterion points more clearly to a different conclusion.

should be placed or left?

The participants before the court were the plaintiffs themselves, the nurse, the doctor and the hospital. Each of them, in one way or another, was a participant in the activity of nursing. The nurse was a participant as an employee. The plaintiffs were economic beneficiaries and participants as ultimate consumers. Finally, though not in the same way, the hospital and the doctor, by having made their enterprises dependent upon the activity of nursing, had become "consumer-participants" in the enterprise as well. As users of professional nursing services to further their own activities both the hospital and the doctor had sought some fairly direct economic gain from the services of the nurse.¹¹⁴

Comparing these participants in terms of who is probably in the most effective position to prevent similar losses in the future, both the nurse and the hospital are superior risk bearers. The court's emphasis on the existence or nonexistence of control for the purpose of deciding whether or not to apply the doctrine of *respondeat superior* is simply a way, I would suggest, of determining whether or not the actor against whom the doctrine is sought to be applied was probably in the most effective preventive position. As the doctrine itself is usually put, the tortfeasor whose conduct is sought to be imputed to another must at least have been a temporary servant of that person; but, as the *Bernardi* case illustrates, the question of *whose* servant the tortfeasor was invariably turns on the issue of control.¹¹⁵ It does so, because of the most effective preventer criterion of the theory of enterprise liability.

Just as the nurse and the hospital are superior to the doctor as risk bearers for purposes of trying to prevent similar losses in the future, so, too, are they superior risk bearers in terms of distributing costs to the relevant group—consumers of nursing services. Were the loss placed on the doctor, the loss would be distributed more generally by way of his malpractice insurance to all his patients,¹¹⁶ whether or not they consumed nursing services. Moreover, were the doctor required to calculate and include in his malpractice insurance the

114. As technology advances and the specialization of labor increases, everyone becomes a participant, in one way or another, in an ever-increasing number of activities or enterprises. For example, one reading this footnote is a user or consumer of the paper on which it is printed and, as a result, is also a user or consumer of the myriad of activities or enterprises which had to coalesce in order to bring the paper into being. Similarly we are consumers of the myriad of activities or enterprises which had to coalesce to bring into being the shoes and other clothing we are wearing, the furniture we are sitting on, the energy (as light or heat) we are using, etc.

115. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 26.11 (1956).

116. Of course, the loss would also be shared by the patients of other doctors who purchase their medical malpractice insurance from the same insurance company.

risks of loss created by a "miscarriage" of hospital nursing services, he would very likely either over or under insure against the risk. Over insurance on his part would be an economic waste; under insurance on his part would result in an insufficient distribution of costs.

The doctor's relatively inferior position as a cost distributor illustrates why the law of *respondeat superior* requires, before the master can be held vicariously liable, that the person whose conduct is sought to be imputed must have been a servant and the conduct must have been within the scope of his employment. Without the master-servant relationship and the degree of control that relationship normally involves, the putative master is not likely to be in a superior preventive position nor in a superior cost calculation—cost distribution position. The "scope of employment" requirement serves the dual functions of determining first whether the master's activity was causally related to the loss at all (and therefore is one to which the loss might properly be assigned, to be borne by his consumers) and secondly whether or not the putative master was in a reasonably good position to have calculated the risks as part of his enterprise and distributed the costs of prevention or insurance with some degree of economic efficiency to those who ought ultimately to bear them under the criterion of normal expectations.¹¹⁷

As between the doctor and the hospital, whether one applies the traditional legal rules of *respondeat superior*, as the court did explicitly, or applies the most effective preventer and efficient cost distributor criteria of the enterprise liability theory, as I believe the court did implicitly, the hospital is the superior risk bearer. Thus, even though both the doctor and the hospital had incorporated the enterprise of nursing within their own respective enterprises of doctoring and providing hospital care, thereby becoming participants in it, and even though the "miscarriage" of the nursing enterprise caused the other two enterprises also to "miscarry," vicarious liability was imposed only on the participant which better met the prevention and efficient cost distribution criteria of the enterprise liability theory.

For similar reasons, as between the plaintiffs, the hospital, and the nurse, the plaintiffs are inferior risk bearers. They are not in a position to prevent similar losses occurring in the future to persons similarly situated. While the plaintiffs would probably be able via their casualty insurance (Blue Cross and Blue Shield for example) to pass a substantial portion of their losses on to other people with fair economic efficiency, not all the losses which under traditional dam-

117. See generally 2 F. HARPER & F. JAMES, THE LAW OF TORTS, §§ 26.7-9 (1956).

age law would be considered assignable losses (pain and suffering, lost future wages, etc.) could be so shifted. More importantly, of those which could be shifted, principally additional medical expenses, these would be shifted to a far larger group of people—all persons buying such medical casualty insurance to protect against medical expenses incurred from many diverse causes—disease, accident and old age. The effect of such a shift would be to treat the losses, contrary to the normal expectations criterion, as a general risk of the activity or enterprise of living¹¹⁸ rather than a risk of consuming nursing services.

The more complicated problem to explain is why, under the doctrine of *respondeat superior*, the hospital and not the nurse is the superior risk bearer or, more accurately, the hospital is treated as an equally superior risk bearer against whom recovery can be had as a joint tortfeasor. If there were no doctrine of *respondeat superior*, the nurse alone under the fault theory (negligence or battery) would be held to be the only superior risk bearer. Admittedly with regard to her own individual conduct, the nurse may be in a better preventive position than the hospital, although the hospital through its supervisory control over her work, reinforced by its control over her economic well being, is still in a significant preventive position. Looking at the problem of prevention, however, as not just one of keeping this particular nurse from repeating her error but of taking steps to prevent other nurses from making similar errors, the hospital is in a better preventive position. All its personnel policies, from recruitment to firing, can be used to raise the quality of nursing services within the hospital. For example, in the *Bernardi* case, simply reducing the work load expected of well trained nurses might be sufficient to avoid or reduce such errors in the future. While from an individual deterrence point of view, the nurse may be in a better preventive position, the hospital is in a better preventive position generally with regard to the kind of loss involved.

In terms of what group in society ought most fairly to bear the loss, using the criterion of which enterprise failed to meet normal expectations, it might appear that placing the loss on the hospital will

118. If the plaintiff is carrying casualty insurance which covers the loss and the policy is not written so as to treat the casualty coverage as secondary, the plaintiffs will recover twice under the collateral benefits rule and the double coverage of the loss will be treated as a cost of the activity of living and shifted to a broad group of the consuming public. Allowing the plaintiff to retain the casualty benefits is generally inconsistent with the goals of the enterprise liability theory, though less so than allowing the defendant to receive the benefit by a reduction in damages. For a brief discussion of the inconsistency, see text accompanying notes 186-91 *infra*.

cause it to be borne by a somewhat different group of people—hospital patients, rather than the consumers of nursing. Nursing, after all, was the enterprise which failed to meet normal expectations. Because of the typical employment relation requirement of *respondeat superior*, however, this loss will, at least theoretically, fall ultimately on the same group: hospital patients.

If liability is imposed on the hospital, the patients will pay for the loss through the higher fees they will pay to cover the hospital's additional expenses for liability insurance. If the nurse is held liable and she has been prudent enough she will have independently purchased liability insurance. In theory she will have bargained to include this expense in her wages to be paid by the hospital, and the hospital in turn will have included this cost as an expense of operating the hospital, to be paid for from patients' fees. The market place itself would theoretically, therefore, narrow the group of consumers which ultimately would pay from those consuming nursing services generally to those consuming nursing services in hospitals.

The fact that this latter market place operation is not likely to occur, however, explains why under the doctrine of *respondeat superior* the courts have, from the plaintiff's point of view, chosen to treat the hospital and the nurse as equally superior risk bearers. Under the criterion of prevention the hospital and the nurse are about on a par, but with regard to the criterion of efficient distribution to those who ought ultimately to bear the loss—the consumers of nursing services—the hospital is superior. The odds of the nurse being prudent enough to provide herself with insurance, let alone the right amount and at a comparable price, and then being able to bargain this added cost into her wages, are simply too slim. Far more efficient, if this cost is one which theoretically the market would impose on hospital patients in any event, is a legal doctrine which encourages the hospital to obtain the insurance or self insure.¹¹⁹ Without *respondeat superior*, the likely facts would be that the nurse would be judgment proof and the loss, if redistributed at all, would be redistributed by the plaintiffs through their casualty insurance to the public at large.

In sum, what the doctrine of *respondeat superior* is designed to do, using the criteria of the theory of enterprise liability, is to assure that at a minimum the "faulty" losses created by an enterprise are

119. It should be clear from the text that I believe the courts' understanding of employees' conduct and of what they are able to bargain for in their wages, at least on an individual basis, comports more with reality than the behavioral assumptions made by some economists. See, e.g., Demsetz, *supra* note 18, at 22.

prevented as much as possible, while also assuring that when such losses do occur, they are redistributed as efficiently as possible, to a smaller, more relevant group, rather than to the public at large.

It is therefore the theory of enterprise liability which best explains why the doctrine of *respondeat superior*, from the plaintiff's point of view, holds the "non-faulty" master to be a joint tortfeasor—an equally superior risk bearer—along with the "faulty" servant. The theory does not, however, explain the related rule that, while the master and the servant are joint tortfeasors for the purpose of allowing the plaintiff to seek recovery against either one or both, the master still has a right of indemnification against the "faulty" servant for judgments the master has been required to pay because of the servant's tortious conduct.¹²⁰ When the servant's conduct has only been negligent, as opposed to being "willful and wanton" or intentional,¹²¹ the enterprise liability theory analysis, as outlined above, would suggest that, as between the master and the servant, the master is likely to be the superior risk bearer and consequently should be denied his claim for indemnification.¹²² The fault theory of tort law, however, together with its objective of individual deterrence, has been sufficiently strong to perpetuate the rule.¹²³

B. Another Illustration: The Kollsman Case

The second case I have chosen to illustrate the application of the cost accounting criteria of the enterprise liability theory is *Goldberg v. Kollsman Instrument Corp.*¹²⁴ In this case the plaintiff's intestate, a fare-paying passenger, had been killed in the crash of an airplane owned and operated by American Airlines. The plane had been built and assembled by Lockheed, using an altimeter manufactured and supplied by Kollsman. The crash was attributed to a defect in the altimeter. The plaintiff had sued all three parties for negligence—the

120. I F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.2, at 723-25 (1956).

121. When the servant's conduct is "willful and wanton" or intentional, the criterion of prevention would probably, in most cases, justify preserving the master's right of indemnification.

122. *Accord*, based on arguments for "a wide and efficient distribution of accident losses," James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360, 368-72 (1958). See also Williams, *Vicarious Liability and the Master's Indemnity*, 20 MOD. L. REV. 220 (1957).

The effect proposed in the text also is obtained when, as in the usual case with auto liability insurance, the servant is covered as an insured under the master's liability policy.

123. This seems to be true at least of the courts, see, e.g., *Fireman's Fund American Ins. Co. v. Turner*, 260 Ore. 30, 488 P.2d 429 (1971), but not necessarily of legislatures, see COLO. REV. STAT. ANN. § 24-10-110 (1973) (denying by necessary implication in certain cases a governmental employer's right of indemnification against a governmental employee).

124. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

airline, the assembler and the component manufacturer or supplier. These claims were not, however, the subject of the appeal. The appeal related to the additional claims of the plaintiff against Lockheed and Kollsman for breaches of implied warranties of merchantability and fitness. The trial court had dismissed these claims on the traditional ground of lack of privity between the plaintiff's intestate on the one hand and Lockheed and Kollsman on the other. The propriety of this ruling, which had been affirmed by the appellate division, was the only issue on appeal before the court of appeals.

In an interesting but surprisingly brief opinion the four-member majority avoided the privity issue by adopting the California Supreme Court's theory of strict liability¹²⁵ in tort for physical injuries caused by defective products.¹²⁶

A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.¹²⁷

Implicitly recognizing two of the three cost accounting principles of the theory of enterprise liability, the court observed:

[T]he purpose of such a holding is to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves. . . .¹²⁸

Having thus set the stage, the court, with an O. Henry twist, reversed the action of the trial court and the appellate division dismissing the claim against Lockheed, but affirmed the lower courts' dismissal as to Kollsman.

125. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), as first espoused by Justice Traynor in his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

126. In a subsequent 4-3 decision, the New York Court of Appeals disavowed having adopted the theory of strict liability for defective products as a tort rather than a warranty theory. *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). It now appears, however, the court may be backing water from this disavowal. Compare *Mendel with Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973) (reaching the remarkably illogical conclusion that if a seller has excluded a warranty, a bystander may nonetheless recover damages from the seller for physical injuries which were caused by what would have been a breach of warranty had there been no exclusion), and *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (though tried as a warranty case, the opinion reads almost entirely as one grounded in tort).

127. 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963).

128. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

[F]or the present at least we do not think it necessary so to extend this rule [of strict liability in tort] as to hold liable the manufacturer (defendant Kollsman) of a component part.¹²⁹

The only explanation the majority offers for its decision holding Lockheed to be a superior risk bearer to Kollsman is the conclusory statement:

Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.¹³⁰

In his dissenting opinion¹³¹ for the three member minority, Judge Burke had two contentions. First, he disagreed with the majority decision to adopt the strict liability tort rule. Second, he criticized the majority's failure to apply that rule so that "any claim in respect of an airplane accident that is grounded in strict enterprise liability would be fixed on the airline or none at all."¹³² As among the three defendants, the dissent viewed the airline to be the superior risk bearer.

While disagreeing in part with the cost accounting criteria of the enterprise liability theory suggested above, the dissenting opinion is significant for its early explicit recognition of enterprise liability as a separate theory of tort liability and its articulation of what is expected to happen under the theory.

Inherent in the question of strict products or enterprise liability is the question of the proper enterprise on which to fasten it. Here the majority have imposed this burden on the assembler of the finished product, Lockheed. The principle of selection stated is that the injured passenger needs no more protection. We suggest that this approach to the identification of an appropriate defendant does not answer the question: Which enterprise should be selected if the selection is to be in accord with the rationale upon which the doctrine of strict products liability rests?¹³³

Disregarding entirely the "best preventive position" criterion which Justice Traynor and others have very clearly viewed to be a part of the enterprise liability theory,¹³⁴ the dissenting opinion justi-

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 441, 191 N.E.2d at 86, 240 N.Y.S.2d at 599.

133. *Id.* at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.

134. See note 125 *supra*. See also note 97 *supra*.

fies the selection of the airline as the superior risk bearer in these terms:

The purpose of such liability is not to regulate conduct with a view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service. As applied to this case we think the enterprise to which accidents such as the present are incident is the carriage of passengers by air—American Airlines. . . . Here, the dominant enterprise and the one with which plaintiff did business and relied upon was the airline.

If the carrier which immediately profited from plaintiff's custom is the proper party on which to fasten whatever enterprise liability the social conscience demands, enterprises which supply the devices with which the carrier conducts its business should not be subject to an action based on this theory. This seems most persuasive where the business that deals directly with the public is not merely a conduit for the distribution of the manufacturer's consumer goods but assumes the responsibility of selecting and using those goods itself as a capital asset in the conduct of a service enterprise such as common carriage. In such a case the relationship between the assembler of these goods and the air traveller is minimal as compared to that obtaining between the traveller and the carrier. In a theory of liability based, not on the regulation of conduct, but on economic considerations of distributing the risk of accidents that occur through no one's neglect, the enterprise most strategically placed to perform this function—the carrier, rather than the enterprise that supplies an assembled chattel thereto, is the logical subject of the liability, if liability there is to be.¹³⁵

Despite the lengthy explanation the dissenting judges do not seem to end up with any better explanation for their selection of a superior risk bearer than did the majority.

Applying the criteria of the enterprise liability theory however,

135. 12 N.Y.2d 432, 440-41, 191 N.E.2d 81, 85, 240 N.Y.S.2d 592, 598 (1963) (footnote omitted).

it appears that from among the four possible risk bearers who were parties to the action—the plaintiff, the manufacturer, the assembler, and the airline—the entire court managed to designate the two most likely candidates—the assembler and the airline.

Again, as in the preceding case, we find that while each of the parties before the court was engaged in seemingly different enterprises they were also involved, as participants, in the enterprise which failed to meet normal expectations—the enterprise of producing, distributing and using (consuming) airplane altimeters.

Under the criterion of most effective preventer both opinions agree that the plaintiff (and, of course, her intestate) was not in a meaningful position to prevent similar mishaps from occurring in the future. As to the other three, all could probably develop more effective quality control techniques to avoid similar accidents in the future. Assuming the three to be about equal under this criterion,¹³⁶ who is the most efficient cost distributor? Comparatively, what are their respective abilities to pass on the costs of additional quality control techniques or, in the alternative, to calculate an appropriate amount of liability insurance to cover adequately the risks involved, and include in their asking prices for their goods or services, a fair proportion of these additional expenses?¹³⁷ Kollsman produces several types of instruments for many diverse purposes, some of which are unrelated to airplanes.¹³⁸ Consequently, as compared to Lockheed and

136. Had the criterion of most effective preventer been considered by the court, a different result might have been reached. The majority did not discuss prevention, and the minority (see quotation in text accompanying note 135 *supra*) thought it irrelevant. In a subsequent opinion, *Codling v. Paglia*, 32 N.Y.2d 330, 341, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 468-69 (1973) (tried as a warranty case, but sounding in tort), the court made it quite clear that prevention is relevant:

Pressures will converge on the manufacturer . . . who alone has the practical opportunity, as well as considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production

137. For a general discussion of some of the techniques and problems of cost accounting, see Ferrara, *Production Costs*, in S. DAVIDSON, *HANDBOOK OF MODERN ACCOUNTING* ch. 38 (1970); H. BARDEN, *THE ACCOUNTING BASIS OF INVENTORIES* ch. 5, *Unit Production Costs in Manufacturing*, at 43-73, and ch. 9, *Recommended Restatement of Principles*, at 144-48 (American Institute of Certified Public Accountants, Inc., Accounting Research Study No. 13, 1973).

138. Kollsman Instrument Corporation was the "principal subsidiary" of Standard Kollsman Industries, Inc., and, in addition to producing flight instruments for commercial aircraft, was engaged in the production, and/or research and development, of celestial guidance systems, satellite tracking and missile control systems, ordinance control systems, computer applications to submarine control and antisubmarine warfare and the like. *STANDARD KOLLSMAN INDUSTRIES, INC., 1960 ANNUAL REPORT* 6 (1961).

By 1963, the year in which the New York Court of Appeals rendered its decision, Kollsman, with its expertise in optics, had broadened its activities to include work in satellite

the airline, Kollsman may have a more difficult time determining the scope of the physical risks its products may create should they prove defective, that is, fail to meet normal expectations.¹³⁹ Similarly, Kollsman may have a more difficult time cost accounting for the additional production expenses, in terms of allocating them proportionately to the risks involved to each of their various products. While Lockheed may, in these terms, be a superior risk bearer to Kollsman, Lockheed has not traditionally sold all its aircraft to airlines for the purpose of transporting passengers. Nonetheless, having assembled the airplanes and knowing its customers and the uses to which those customers are likely to put the airplanes, Lockheed could probably determine more easily and accurately what the scope of the physical risks might be. Consequently, Lockheed should be better able to avoid overinsuring or underinsuring, allocate the cost of such insurance more accurately in relationship to the risks involved (depending on the expected use of the airplane), and include the proportionate cost of the insurance in the price sought for each airplane.

But it is probably the airline with its more complete records concerning the number of passengers carried, cargo carried, miles traveled, airport safety, airplane maintenance records, etc., which is probably in the best position to determine the scope of the risks, insure against them and distribute the cost of the insurance among its customers, in a proportion which will fairly reflect in the price charged each customer, the added insurance cost required to cover the risk involved for each of them.¹⁴⁰

Theoretically, if the risks could be efficiently calculated and costs of additional quality control or of insurance accordingly assigned to the relevant products, the added cost airline passengers would pay for the extra quality control or insurance would be the same no matter which defendant was held liable. If Kollsman had an accurate picture of the risks and could accurately cost account its additional quality control or insurance expenses among its various

astronomical observational equipment and aerial photographic equipment for mapping and reconnaissance. STANDARD KOLLSMAN INDUSTRIES, INC., 1963 ANNUAL REPORT 3-5 (1964).

The annual reports of Kollsman's parent corporation do not reveal what portion of Kollsman's business was derived from its production of flight instruments for aircraft in contrast to that derived from its other research and production activities.

139. Although Lockheed, too, was engaged in fairly diverse activities (aircraft, missiles, satellites, etc.) slightly more than half of its business in 1963 was derived from its aircraft production. LOCKHEED AIRCRAFT CORP., 32D ANNUAL REPORT 5 (1963).

140. Obviously, even the airlines could do their calculations only in general or gross terms. The airlines could not, except at extraordinary expense, determine even in approximate terms the amount of loss each individual passenger (or their survivors) would incur, should an airplane crash.

products and include such costs in the price of those products, Lockheed would cover that cost when it purchased the altimeter and would then pass it on to the airline which would, in turn, pass it on to the airline passengers. The probabilities are, of course, as suggested above, that Kollsman and Lockheed are not, unlike the airline, in as good a position to calculate the risks, make the wisest economic choices between quality control or insurance, or both, and reflect such costs in the prices at which they seek to sell their products. In short, using the criterion of who is the most economically efficient distributor of the costs of the risks involved to airline passengers when the enterprise of producing, distributing and consuming airplane altimeters fails to meet normal expectations, the airline is probably the superior risk bearer. This analysis may have been what the dissenting judges were trying to articulate.¹⁴¹

If so, the dissenters would apparently have created a conflict between the application of the normal expectations criterion and the criterion of the most efficient cost distributor. Application of the criterion of which enterprise "went wrong" tells us it was the enterprise of producing, distributing and consuming altimeters to which the loss should be assigned, and consequently the consumers of that enterprise who should ultimately bear the loss. The dissenting judges, by selecting the airline as the superior cost distributor, would appear to be selecting a different enterprise—commercial aviation, and a different group of consumers—commercial airplane passengers. While that enterprise did fail to meet normal expectations, it did so only because it was dependent upon the enterprise of producing, distributing and consuming airplane altimeters.

Again, however, whether the initial loss is put on Kollsman, Lockheed or the airline, the cost would theoretically be borne by the same ultimate group—airline passengers. But, as has been noted, because of lack of knowledge and the probably extraordinary expense which would be required to obtain the requisite knowledge, neither Kollsman nor Lockheed are likely to do the internal cost accounting necessary to distribute the costs of additional quality control or insurance expenses proportionately among their customers.¹⁴² As a consequence, if Kollsman is held liable, while airline passengers will pay part of the costs, a large portion would be paid by purchasers of

141. See 12 N.Y.2d at 442-43, 191 N.E.2d at 86-87, 240 N.Y.S.2d at 599-600, where they explain the economic reasons as to why they would be reluctant to hold the airline strictly liable in any event.

142. See note 137 *supra*. Quality control costs, aimed at prevention, would probably be easier to assign than insurance costs.

other Kollsman instruments who, in their use of these products, may be employing them in activities and enterprises having nothing to do with airplanes. Presumably more of Lockheed's customers will be engaged in using airplanes, and consequently Lockheed would be more likely to distribute the costs of the risks to persons who are at least consumers of the activity which "went wrong."

The airline, too, would distribute the cost of the loss among consumers of airplane altimeters. They would not, however, distribute them among as many classes of airplane-altimeter consumers as Lockheed. To the extent all consumers of airplanes (hence of airline altimeters) run a common risk of some kind of loss, should an altimeter fail to meet expectations, the majority's broader distribution of the loss among consumers is not altogether lacking in "fairness" in terms of allocating the ultimate loss. There is a commonality of risk; the "fairness" is the same kind people accept everyday when buying insurance. In these terms, however, the minority would seek even greater "fairness" by using the airline to distribute the loss to a more discrete group of consumers—airline passengers. Both the majority and the minority seem to agree, consistently with the normal expectations criterion, that those who ultimately pay the costs should at least be purchasing consumers of the enterprise of manufacturing, distributing, and using airplane altimeters. What they do not seem to agree on is whether the efficient cost distributor criterion should be used not only to achieve an efficient distribution of losses among that general group, but also to identify within that general group of consumers a more particular subgroup who should ultimately bear the costs.

As will be suggested later,¹⁴³ the use of the criterion of efficient cost distribution in this manner is not inappropriate, at least when that group is also, as in *Bernardi*, the superior risk bearer under the criterion of most effective preventer. Of significance here is that both the Colorado court in *Bernardi* and the New York court in *Kollsman* would seem to agree that imposing the loss on the doctor in *Bernardi* or the manufacturer in *Kollsman* would, in all probability, have put some of the loss on too many members of the consuming public who were not consumers of the enterprise which "went wrong." Both courts, including the *Kollsman* minority, would seem therefore to agree with the principle and application of the normal expectations criterion—a purchasing consumer of goods and services should not be expected to bear the costs of losses caused by an enterprise which

143. See text accompanying notes 149-50 *infra*.

fails to meet expectations, and thereby disrupts the normally-to-be-expected status quo, unless he is a purchasing consumer of that enterprise. Not all members of both courts would agree, however, whether a consumer should share the loss with all others in that general group, or share it only with that subgroup of consumers who share a more specific, identifiable common risk. Both the Colorado court by selecting the hospital and the *Kollsman* dissenters by selecting the airline would, when possible, place the cost on an identifiable subgroup of consumers.

VII. ADDITIONAL ASSUMPTIONS UNDERLYING THE CRITERIA FOR DETERMINING THE SUPERIOR RISK BEARER

As the preceding discussion of the *Bernardi* case illustrates, the enterprise liability theory shares with the force and fault theories of liability the value judgment that because the community's resources are limited, they ought to be conserved. To the extent the destruction of those resources can be minimized by the common law's theories of tort liability, that ought to be done, whether it be by shaping the tort rules to minimize losses by discouraging breaches of the peace, imposing liability to deter risk-creating activities which lack an overriding social value or by encouraging people to become more risk-conscious and engage more consciously in efforts to reduce those risks. The most effective preventer criterion of the enterprise liability theory represents the tort law's long standing concern with the conservation of the community's resources.

As noted earlier, the use of this criterion further assumes that it will be possible to raise the awareness of enterprisers of the risks of their activities and encourage them to consider safer alternative means.¹⁴⁴ These assumptions seem no more questionable than similar assumptions made to justify the individual and general deterrence rationales of the fault theory, especially as applied in negligence. Another factual assumption of the most effective preventer criterion is that the goal of conservation can be achieved without regard to fault and, at the same time, not seriously deter innovation and the investment of risk capital required to develop such innovation. The fault theory, by contrast, especially as developed in the law of negligence, assumed the possibility of stifling progress was a significant risk which had to be recognized.¹⁴⁵ Today, the general availability of liability insurance probably accounts for the courts' general lack of concern about this risk.¹⁴⁶

144. See quotation *supra* note 136, from *Codling v. Paglia*.

145. See, e.g., *Brown v. Collins*, 53 N.H. 442 (1873).

146. See, e.g., quotation from *Dippel*, *supra* note 97.

Another assumption the courts are making when using this criterion is that they will know the ways of the enterprise involved or can be readily educated as to such ways so that they will be able to identify accurately the category of participants which is in the most effective preventive position. Often, as in *Bernardi*, courts will have adequate knowledge based on common experience alone. But what of a case like *Kollsman* which may require a level of sophistication not ordinarily expected of courts? When the comparable problem arises in a negligence case, we solve it by presenting expert testimony to the jury and letting them decide the matter as part of the general issue of negligence. Which category of participants is the best risk-preventing group within a given enterprise, however, is a question for the courts. In many cases the fact cannot be determined without more "expert" knowledge. When and how to present such data may require additional thoughtful ingenuity as to procedural techniques on the part of both lawyers and judges.¹⁴⁷

It is in the application of the criteria of the most efficient cost distributor to the economic beneficiaries of the specific activity which failed to meet normal expectations, however, that the enterprise liability theory departs most drastically from the older theories of force and fault. The use of these criteria is a clear recognition of the fundamental facts that a tort loss is a diminution of the community's limited resources and that shifting a loss from the plaintiff to the defendant will not eliminate it. Moreover, whether, initially, the loss is left on the plaintiff or shifted to the defendant, in most cases the loss will be shifted by the initial loss bearer to other persons in society through casualty or liability insurance, or through one or more welfare or subsidy programs.

The theory of enterprise liability simply acknowledges that rules of tort liability and nonliability do function in today's society as cost accounting, cost distribution rules. It is unrealistic any longer to hold the simplistic view that how the tort law resolves a dispute between the immediate parties will have no significant economic impact on other people. Thus, while the enterprise liability theory, like its predecessors, is concerned about the community's limited resources and seeks to conserve them, it recognizes that people are human, "accidents will happen," losses will occur, and when they do occur, some-

147. This is not a unique problem. When asked to create any rule of law, a court must decide on the basis of some perceptions of the real world (the "legislative" facts). For the purpose of seeking to understand the real world as accurately as possible, should the court depend on its own "common sense," the experience of experts presented by way of argument and Brandeis-type briefs, or should the court hold a "trial within a trial" and have evidence presented to it in a manner similar to the way a legislative committee would?

one will have to pay for them. The "most effective cost distributor" to "the economic beneficiaries of that enterprise which failed to meet normal expectations" are the criteria by which the law, through the enterprise liability theory, seeks to distribute among society's various members, in a fairly acceptable, rational way, these never-to-be-completely-avoided losses.

The relevance of the criterion of the most efficient cost distributor to the purposes of achieving the maximum, economically feasible preventive action possible and of avoiding the creation of distortions in the market pricing mechanism has been discussed previously. There are additional reasons, however, for imposing the *initial* burden of a tort loss on those participants who will probably be the most efficient in passing on the costs of prevention or insurance. Once it has been determined which enterprise (and consequently which general consuming group in society) should bear the loss, it must be recognized that some of the community's limited resources will be further consumed in calculating and transferring these costs within the enterprise itself. A manufacturer will necessarily consume additional resources in his efforts to determine and distribute the costs of prevention or insurance to his customers. As with other resources, it makes sense for the courts to be concerned about the conservation of these resources as well as those which may be endangered should the product itself prove to be defective.¹⁴⁸

This consumption of resources to effect a transfer within the enterprise will also necessarily be reflected in the cost of doing business and hence in the price consumers of the goods or services produced by the enterprise will be asked to pay. Should the courts choose an inefficient cost distributor, the court itself will have injected a distortion in the pricing mechanism.

It is this concern with protecting the market place which may account for why the courts, when applying the most efficient cost distributor criterion, may use it to augment the criterion of normal expectations in order to distribute a loss not among all the consumers of the enterprise which "went wrong," but only among a more particular subgroup of such consumers. In *Kollsman*, the dissenting judges would have imposed liability on the airline, rather than the airplane manufacturer, with the result that only passengers of airlines using altimeters which failed to meet expectations would bear the loss,

148. "Even when it is possible to change the legal delimitation of rights through market place transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out." Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 19 (1960).

rather than all consumers of altimeters. Similarly, in *Bernardi*, the Colorado court imposed liability on the hospital, with the probable result that the loss there would be borne by hospital patients consuming nursing services in hospitals, not by those consuming nursing services generally.¹⁴⁹

The fact is that people buy goods and services for all sorts of purposes. One group of consumers buying a product may put it to a use which may cause substantially greater loss to themselves or to others, should the product fail to meet normal expectations, than another group of consumers buying the same product but using it in a different way. Both groups share a common risk in that the product may fail to meet expectations and thereby cause them loss. But, depending on what uses the product is put to, the scope of the risks in terms of the amount and kinds of losses which may result can vary greatly. Should those consumers whose use is less risky contribute the same amount to a "prevention-compensation" fund, via the purchase price they pay for the product in the market, as those consumers whose use is more risky? All are likely to have paid about the same price for the product since, even if the manufacturer is to be held liable, the manufacturer is not likely to cost account his expenses of prevention or insurance in such a way that significant differences in the scope of the risks consumers may create by their varying uses will be reflected in the price they pay.¹⁵⁰

Even though the market place is not likely to take such differences into account, the courts are. As we have seen, unless the most effective preventer criterion suggests a different result, the participant selected as the superior risk bearer is likely to be the one who will not only distribute the loss among the purchasing consumers of the enterprise which failed to meet expectations, *and no further*, but who is also likely to distribute the loss with economic efficiency among that subgroup of consumers whose more particular, identifiable common use of the goods or services may involve a substantially greater risk.

149. Not all hospital patients consume nursing services to the same extent or in exactly the same way. Nonetheless, it is difficult to imagine a hospital patient (except, perhaps, an outpatient) who does not consume some nursing services while in a hospital, and, that being the case, all hospital patients share, to some extent, the common risk of suffering an injury as a result of a hospital nurse negligently rendering them service.

150. Even if a manufacturer were to try to engage in such differential pricing, the market place would be likely to defeat his efforts, unless the goods were being produced and sold on a "tailor made" basis for each customer. If the goods were being produced, and sold on a mass production basis, any purchaser seeking to avoid a manufacturer's price surcharge, imposed on purchasers who planned to use the product in ways which would be unusually risky if the product proved to be defective, could simply have the purchase made by another whose anticipated use would not appear to involve such risks.

The ultimate distributional "fairness" of the enterprise liability theory lies, therefore, in its ability to distribute among society's members, on the basis of the most specifically identifiable, shared, common risks, the costs of losses caused to themselves or others by the failure of their activities to meet normal expectations.

A further assumption involved in the use of the most efficient cost distributor criterion, as is involved in applying the enterprise liability theory itself, is that the pricing mechanism of the market place is not so badly distorted already by other factors that it is worthwhile to invest the time and energy of courts, lawyers, and litigants to remove the distortions brought about through the development of the fault theory of tort law. Are the "hidden subsidies" of the fault theory¹⁵¹ of having others bear the costs of losses caused by an unexpected, but "non-faulty," change in the status quo so significant that the added costs of revision are worth expending?

As with the criterion of the most effective preventer, are the courts sufficiently knowledgeable (or could they be made so fairly inexpensively) so that they can understand the facts involved in a particular case well enough to apply the most efficient cost distributor criterion accurately? Deciding correctly, in a case like *Kollsman*, which of the three defendants—the manufacturer, the assembler or the airline—is the most efficient cost distributor will often require a highly sophisticated understanding of business practices and economics. Who is in the best position to calculate the risks involved most accurately and obtain the necessary insurance coverage most cheaply? Who is able to do most cheaply the needed cost accounting work in order to allocate in a rational way the added insurance costs to the costs of making the enterpriser's various goods or services available? Who, because of the market structure in which each competes, is in the best position to have these added costs accurately reflected in the prices they actually will receive for their goods and services in the market place?

Not only does the most efficient cost distributor criterion assume both judges and lawyers will be able to obtain the data they will need to answer such questions, it also assumes that, having such data, they will be able to use it with sufficient understanding to answer the questions correctly.

151. If subsidies to developing industries seem sensible, it is best to give them openly, with visible decisions as to who should pay rather than through a system which removes some or all of the costs of accidents from the activities causing them and hides this subsidization by placing costs on undefined or unrepresented groups.

CALABRESI, COSTS, *supra* note 20, at 32 (footnote omitted).

Finally, this criterion assumes the use of highly sophisticated cost accounting techniques on the part of enterprisers and highly sophisticated actuarial techniques on the part of insurance companies. If an enterpriser insists on manufacturing and selling certain products below cost because another line of products is a "great money maker," there may be little the courts can do about it.¹⁵² Similarly, if an insurance company uses its profits from its life insurance activities, consciously or unconsciously, perhaps because of inadequate cost accounting techniques, to underwrite its losses in its medical casualty insurance activities, there is, again, little the courts can do about it.¹⁵³

As complex and difficult as the problems have been for the courts and legislatures to develop the two superior risk bearer criteria of the theory of enterprise liability (prevention and efficient cost distribution), they do not compare in difficulty to the problems the courts have had developing the normal expectations criterion of the theory. The more apparent relation between prevention and efficient cost distribution to the fundamental value of conserving resources—a widely shared value which has been an underpinning for every tort theory of liability—has made it considerably easier for the courts to use these criteria whether or not further efforts were made to justify or explain them.

It is the criterion of normal expectations, however, which seeks to answer the toughest question—what segments of the consuming public ought, ultimately, to bear the costs of accidents or the alternative costs of avoiding accidents? If the "fault" or "force" criteria which previously served this function are to be rejected, what alternative criteria are to be substituted? Under the "fault" and "force" theories the enterprise and those who ought most fairly, ultimately, to bear an otherwise comparable loss was the enterprise (and its economic beneficiaries) which was in fact, or was potentially, simply too destructive of community resources. If that basic test for allocating to a particular enterprise a loss caused by an infinite number of enterprises is to be abandoned, what other test is to be used?

The principal challenge for the courts has been, therefore, to develop and justify an acceptable criterion for selecting the particular enterprise to which any given tort loss should be assigned.

152. Some control may be possible through the administration of such laws as the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1970).

153. Again, some control may be possible through the various state laws regulating the insurance industry.

VIII. THE DEVELOPMENT OF THE CRITERION OF NORMAL EXPECTATIONS

Prior to the emergence of the standard of normal expectations, the courts and in most instances legislatures appear to have relied on two other criteria for determining under the enterprise liability theory which enterprises and consequently which segments of the consuming public ought ultimately to bear what losses. Both these earlier developed criteria are encompassed, however, within the criterion of normal expectations. For ease of description and illustration, though, they will be treated separately.

The first criterion is: in which, if any, of the many enterprises which were "but for" causes of the plaintiff's loss did a "faulty" act occur. The premise of this criterion is that whether the plaintiff was a participant in the enterprise or a bystander, if the loss was caused by a "faulty" act and that act was one arising out of the carrying on of an enterprise, the costs of such loss ought to be borne by the economic beneficiaries of that enterprise—consumers, workers or investors. This is the premise which underlies the strict liability rules of the doctrine of *respondeat superior* and which accounts for the abolition of the various doctrines of immunity from liability under the *respondeat superior* doctrine for charities and governmental units. This same premise accounts for the vicarious liability imposed under "owner consent" statutes, "dram shop" acts, the "nondelegable duty" doctrine, and the family car doctrine together with its newer corollary rule that minors driving motor vehicles should be judged by the standard of the reasonably prudent person, not by the standard of the reasonably prudent child of the same age, intelligence and experience. This premise also explains why, even under the fault theory, social undesirability is measured objectively and not subjectively.¹⁵⁴

What all these rules tell us is that losses caused by a "faulty" act while carrying on an enterprise ought not to be borne by the public at large through the plaintiff's casualty insurance or through the public's welfare tax dollars but rather by those members of society who receive a more significant benefit from the operation of the enterprise or activity. If they are not, less preventive action than is

154. It is apparent that if the standard for determining negligence liability were fully subjective fewer plaintiffs would recover in negligence cases. Contrast, for example, the more objective standard of the reasonably prudent person acting in the same or similar circumstances with a more subjective standard such as, "did the defendant, considering all his personal physical and mental abilities and characteristics, including his knowledge, experience, and maturity, do that which he reasonably could have?"

economically feasible will occur. In addition, more of the community's limited resources will, because of lower prices, be allocated to such enterprises than would otherwise be allocated if the "true" costs of providing the goods or services of the enterprise were more accurately reflected in the asking prices for such goods or services.

In using this criterion and premise to impose strict, vicarious liability upon one person for the "faulty" conduct of another, the law obviously has not moved that far away from the fault theory of tort liability. The fault theory, however, does not explain the additional imposition of liability on a vicarious basis. The theory of enterprise liability does, using this criterion to determine which enterprise and consequently what group in society ought most fairly, ultimately, to bear the losses.

The second criterion apparent in some of the tort liability rules based on the enterprise liability theory is: whether or not the loss was caused by "faulty" conduct, in which enterprise does it appear the plaintiff was primarily engaged as a participant at the time of the loss and "but for" such participation the loss would not have occurred? The premise of this criterion is that if the loss was created by the enterprise and was sustained by a participant in that enterprise primarily because of his participation, the loss, again, ought to be borne by the beneficiaries of the enterprise—consumers, workers, investors—rather than the public at large. The classic illustration of the legislative use of this criterion is workmen's compensation and its companion employers' liability legislation which eliminated in most industrial accident cases the defenses of the fellow servant rule, assumption of risk and contributory negligence.¹⁵⁵ All these prior common law defenses had the effect of reducing consumer costs by shifting the costs of many industrial accident losses to the individual workman, his family members, or to the public at large via casualty insurance or various charitable and welfare programs. They did so simply because the market did not function as it was supposed to.¹⁵⁶ The legislature thought it wiser that these costs be borne by the

155. See, e.g., COLO. REV. STAT. ANN. § 8-42-101 (1973).

156. In *theory*, of course, these prior common law defenses did not result in lower consumer prices because, again in *theory*, when bargaining for his wages, each workman, having taken due account of these rules, bargained to include in his wages an amount sufficient to compensate him for taking such risks. See generally Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 44-46 (1972).

Common sense tells us the theory is in large measure nonsense because it makes too many assumptions contrary to fact about what people know and how they actually behave. For a discussion of some of these assumptions in employment as well as other contexts, see CALABRESI, COSTS, *supra* note 20, at 161-73.

consumer-participants of the enterprise, and if not borne fully by them, because of imperfections in the pricing system, then more generally by the other participants in the enterprise—the investors or other workmen.

A judicial counterpart to workmen's compensation which appears to utilize the same criterion for answering the question—which enterprise and thus what group in society ought most fairly to bear the loss?—is Justice Traynor's theory of strict liability in tort for defective products. As formulated by Justice Traynor, one does not have much difficulty recognizing his use of the enterprise liability theory.

In my opinion it should now be recognized that a manufacturer incurs absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant and general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.¹⁵⁷

What is not so clear from Justice Traynor's view is the criterion he would use to select, in effect, the members of the public who ought ultimately to be expected to pay for the loss. The quotation above only acknowledges the cost of a loss caused by a defect will be distributed "among the public as a cost of doing business." Harry Kalven noted the implicit principle in this comment on Justice Traynor's views:

157. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (concurring opinion).

The economist would tell us that if we put liability strictly on the manufacturer we are in effect compelling the consumer through increased prices to buy accident insurance for himself.¹⁵⁸

Imposing costs upon the beneficiaries of the enterprise in which a "faulty" causal act occurred or in which the plaintiff was primarily involved as a participant seems to provide an acceptable basis for selection. Intuitively, both seem "just," if you will, whether or not additional justification is offered to explain their "fairness."

The cases which better demonstrate the need for a broader, more carefully articulated criterion are those in which a bystander was injured because of an act done in furtherance of an enterprise, but the act was only one of an infinite number of "but for" causes and was not a "faulty" one. Suppose, for example, because of a defect in a rotary lawnmower (but not a defect which was the result of any negligence on the manufacturer's part), a rock flies out from beneath the mower and injures the person or property of a passer-by. "But for" the activity of the manufacturing, distributing and using rotary lawnmowers, the loss would not have occurred; likewise, "but for" the activity the passer-by was engaged in, his loss would not have occurred. We now see why the courts did not find it easy to decide whether bystanders, unlike consumers and users, should be able to avail themselves of the strict liability rules for defective products. Why should the "non-faulty" caused loss to the bystander be treated as a cost of lawnmowing and borne by the people who buy and use such products, rather than by the public at large or the people who engage in driving cars, assuming that was the activity the bystander was then engaged in? This same problem comes up repeatedly in the cases involving strict liability for injuries caused by carrying on abnormally dangerous activities. Why should a nonnegligent blaster be liable for vibration damage to another person's home? Put another way, why should customers of nonnegligent blasting activities be required to bear as part of the price they pay for such services, the cost of the losses caused to persons carrying on other activities? Why not treat the property owner's loss as simply one of the risks of property ownership, like fire or flood, and have it paid for through casualty insurance by the people who carry on the same activity of owning or using tangible property?

Most courts, of course, allow the bystander to recover in these

158. Kalven, *Torts: The Quest for Appropriate Standards*, 53 CAL. L. REV. 189, 206 (1965). The California Supreme Court would now agree. See quotation from their opinion in *Haft*, *supra* note 40.

cases,¹⁵⁹ but on the basis of what criterion? These cases provide us the more general criterion: tort-like losses caused by an infinite number of "but for," causally related enterprises, ought to be borne by the economic beneficiaries of that enterprise which failed to function in the way most people had come to expect it to. The criterion for selecting the particular enterprise to which the loss should be assigned is thus the enterprise which, had it functioned as most people would normally have expected it to, the loss would not have occurred—the normally-to-be-expected status quo would not have been disrupted. The enterprise must not only have been a "but for" cause of the loss in the sense that if the enterprise had not been engaged in at all, the loss would not have occurred, it must also have been a "but for" cause in the sense that "but for" its failure to function as others would normally have expected it to, the loss would not have occurred.

This broader criterion does encompass the two criteria developed earlier. An enterprise carried on negligently ("faultily") which causes loss is one which, by definition, failed to function as people would normally have expected it to. It is the one in which more effective preventive action could and therefore should have been taken. As to those cases which come under the second criterion, for example, injuries to users or consumers caused by defective products or to workmen covered by workmen's compensation, we see this criterion operating again, though slightly differently in each instance. In products liability cases, liability is dependent upon the product's being "defective," and "defective," of course, is measured essentially in terms of a failure to meet normal expectations.¹⁶⁰ Similarly in a

159. For a collection of the cases, see Annot., 33 A.L.R.3d 415 (1970).

160. Dickerson noted and ably demonstrated this fact nearly a decade ago. Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967). Whether liability for physical harm caused by an allegedly "defective" product is being determined under the implied warranty of merchantability provisions of the U.C.C. or § 402A of the RESTATEMENT (SECOND) OF TORTS (1965),

[c]onsideration of the reported cases strongly suggests that the factors defining compliance with minimum [legal] standards of consumer use (and, conversely, the non-compliance inherent in the idea of legal defect) are closely identified with the normal, reasonable expectation patterns of buyers and sellers. This is not surprising, because the protection of, or reluctance to disturb, established patterns of expectation motivates much of the law.

Id. at 305. Dickerson proceeds to consider the "several ways" "legally defective products can frustrate reasonable expectations." *Id.*

The principal definition of "defect" under the typical U.C.C. provisions governing implied warranties of merchantability speaks in terms of normal expectations. See, e.g., COLO. REV. STAT. ANN. § 4-2-314(2) (1973): "Goods to be merchantable must be at least such as . . . (c) [a]re fit for the ordinary purposes for which such goods are used." Similarly, under comment g to § 402A of the RESTATEMENT, a product is defective if "at the time it leaves the seller's hands, [it is] in a condition not contemplated by the ultimate consumer" and the condition is one which makes the product "unreasonably dangerous." Again speaking in terms of normal

workmen's compensation case when an employee has an accident while at work, the enterprise in which he is working would at least initially appear to be the one which has failed to function as would normally be expected.¹⁶¹

Recovery can, however, be had in some workmen's compensation cases where it was not the employing enterprise which failed to meet expectations, but another one. For example, suppose a cab driver is injured while on duty when another driver negligently collides with the employee's cab. It is the enterprise of driving cars which failed to meet the test of normal expectations, not the activity of providing cab services, yet under most statutes, the cab driver would be covered by workmen's compensation.¹⁶² This would seem to violate the ultimate distributional criterion of the enterprise which failed to meet normal expectations. In view of the typical subrogation provisions of workmen's compensation statutes, however, it does not. The employing enterprise normally has a statutory cause of action by which it can shift the ultimate burden from its consumers to the consumers of the enterprise to which the loss is more properly assign-

or ordinary expectations, comment *i* of the RESTATEMENT defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This additional requirement of "unreasonably dangerous" was included by the drafters of § 402A in an effort to rule out a finding, for example, that butter is defective because it contains cholesterol or that gasoline is defective because it can explode and burn.

Because the function of this added requirement has not always been understood, it has led to some confusion. See, e.g., *Brown v. Western Farmers Ass'n*, 268 Ore. 470, 521 P.2d 537 (1974). The Oregon Supreme Court's misconception of what the drafters of § 402A meant by this requirement is discussed at length in Note, *A Gilding Called "Unreasonably Dangerous": Property Damage and Restatement Section 402A*, 47 U. COLO. L. REV. 115 (1975).

The Supreme Court of California flatly rejected the additional requirement as being redundant or, if not redundant, inconsistent with the purposes of the enterprise liability theory of torts on which the *Greenman* rule was based. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

Other authors have agreed with Dickerson that the criterion of normal expectations is the primary standard by which "defect" is defined. See, e.g., P. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1332 (1966); Shapo, *A Representational Theory of Consumer Protection; Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1324-25 (1974); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). But see Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

Cases more recent than Dickerson's article, *supra*, also indicate the existence of a "defect" should be determined primarily in terms of normal expectations. See, e.g., *Rix v. Reeves*, 532 P.2d 185 (Ariz. App. 1975); *Dunham v. Vaughn & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); *General Elec. Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972). For a collection of the cases, see Annot., 54 A.L.R.3d 352 (1973).

161. The basic condition to recovery under workmen's compensation is that the events be accidental. See, e.g., quotations from Colorado's statute, *supra* note 93.

162. E.g., COLO. REV. STAT. ANN. § 8-52-102 (1973).

able under the criterion.¹⁶³

The judicial use of this criterion of normal expectations for answering the ultimate "ought" question of the enterprise liability theory is further illustrated by the law governing the rights of a bystander to recover for losses caused by carrying on an abnormally dangerous activity.¹⁶⁴ Almost all the requirements for the application of this doctrine as codified by the Restatement, especially the rule that the bystander's loss must have been the result of the risk which made the activity abnormally dangerous,¹⁶⁵ are explicable in terms of the criteria of enterprise liability.¹⁶⁶ The requirements proposed for inclusion in the second draft of the Restatement¹⁶⁷ make it quite clear the provisions are intended to avoid "subsidization" of highly dangerous activities unless such "subsidization" is justifiable because the benefits of the activity are widely spread among the members of the public.

What did not make sense about the abnormally dangerous activity rules as set out in the original Restatement was the rule that a participant in the enterprise (consumer or workman) could not claim strict liability under the doctrine "if he [had] reason to know of the risk which [made] the activity ultrahazardous."¹⁶⁸ The effect of that rule was to shift the cost of these non-fault caused losses of the abnormally dangerous activity to the public at large, rather than shifting them to the beneficiaries of the enterprise itself. This result as to participants was contrary to the result the application of the criterion of normal expectations, as we have seen it applied in workmen's compensation and products liability cases, would usually bring about. This oddity might explain why the tentative draft of the Restatement Second would appear to be proposing a change in the rule.¹⁶⁹

The criterion of normal expectations represents the law's renewed concern for protecting the status quo and much could be said about the social, economic and political history of the last one hundred years which might account for the tort law's reversion to this concern, reminiscent of the basis of the earlier force theory. It is possible, of course, to account for any change in the law in terms of

163. *E.g.*, COLO. REV. STAT. ANN. § 8-52-108(1) (1973).

164. RESTATEMENT OF TORTS § 519 (1938).

165. *Id.* § 519, comment *b*.

166. *Id.* § 520.

167. RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

168. RESTATEMENT OF TORTS § 523 (1938).

169. See RESTATEMENT (SECOND) OF TORTS § 523 (Tent. Draft No. 10, 1964). A reading, however, of proposed comments *d*, *e*, and *g* suggests no significant changes are intended.

changes in either the law-makers' perspectives of how the real world functions or in their values, or both, and such is doubtlessly the case in the shift in the law of torts from the theory of fault to the theory of enterprise liability.¹⁷⁰

The kinds of activities now carried on, the ways in which they are carried on, and how we think of them as interrelating are markedly different than they were a hundred years ago. Similarly, so many broad and varied social, political and economic events have occurred during the past one hundred years that, whether they are viewed as causes or effects, they indicate that a major shift of emphasis has occurred in the dominant values of American society. "Progress," "change" and "innovation" are not the same rallying cries they once were. The notion on which the fault theory was predicated, that certain physical losses are inevitable (the "reasonably" caused ones) and therefore should be accepted without complaint, is simply not as viable as it once was. "Job security," "land use planning," "a stable economy" and other similar concerns, all of which appeal to a different set of human desires, have become more important. Protecting the status quo and people's normal expectations from unexpected disruptions is a broadly accepted social goal not unique to the thinking of the courts.

Admittedly, the concept of status quo which the enterprise liability theory seeks to protect by the use of the criterion of normal expectations is somewhat different than that with which the "force" theory was concerned. Under that theory, the concept of status quo contemplated circumstances that were virtually static and the legal techniques for protecting it were different. Hence the emphasis on affirmative acts and "direct" causes. Under the theory of enterprise liability, the concept of status quo is used in a more dynamic sense, but yet one which connotes some stability and certainty. The status quo in this context is an evolutionary one. It seeks to be a workable compromise between the values of the static society which fostered the force theory and those of a society engrossed in an industrial revolution which fostered the fault theory.

IX. CONFLICTS BETWEEN THE APPLICATION OF THE CRITERION OF EFFECTIVE PREVENTION AND THE CRITERIA OF EFFICIENT DISTRIBUTION TO CONSUMERS

In many cases governed by the theory of enterprise liability, such

170. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1361 (Okla. 1974).

as *respondeat superior* and defective products, the category of participants chosen by the courts to be the superior risk bearer has generally met well both the criterion of the most effective preventer and the criteria of the most efficient cost distributor of tort-like losses to the purchasing consumers of the enterprise which failed to meet normal expectations.¹⁷¹ Not infrequently, however, the criterion of the most effective preventer has suggested that one category of participants (for example, users) should be the superior risk bearers while the most efficient cost distributor has suggested another (for example, manufacturers).

One need not look far in the law of torts for an illustration of the problem. The intellectual struggle involved in deciding whether contributory negligence and assumption of risk should be defenses to the strict liability torts of defective products¹⁷² and abnormally dangerous activities is illustrative.¹⁷³ To allow these defenses as generously as the courts had under the fault theory would have the effect of shifting losses caused by an enterprise which failed to meet normal expectations from the purchasing consumers of that enterprise to a far larger group of society's members by way of the injured party's casualty insurance or society's public and private welfare programs.

At present, of course, just as the legislatures did long ago in workmen's compensation,¹⁷⁴ the criterion of who could have pre-

171. One notable exception is the bland assumption the drafters of § 402A of the RESTATEMENT made, and which some courts follow almost blindly, that a retailer or a wholesaler as a seller of a defective product is a superior risk bearer in terms of prevention and efficient cost distribution. In some circumstances, as in the case of new car dealers, the retailer may indeed be at least a fairly good secondary superior risk bearer in terms of causing the manufacturer to take greater preventive action and in causing the costs of losses caused by defects in new cars to be passed on to purchasing consumers of new cars. *See, e.g., Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). Consider the owner, however, of a relatively small drug or grocery store who is held strictly liable under § 402A to a customer or user who has been injured by a defect in a product sold by the druggist or grocer in a sealed container. His position as an effective preventer or as a distributor of the loss to the purchasing consumers of such products is substantially less. True, he may be able to go back against the manufacturer on a breach of warranty claim, but if he is unable to do that, then the loss, instead of being distributed to the consuming purchasers of defective products, will be distributed generally to the druggist's or grocer's customers whether or not they are purchasers of such products. *Compare Keller v. Eagle Army-Navy Dept. Stores, Inc.*, 291 So. 2d 58 (Fla. App. 1974) (following § 402A as to retailers), with *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242 (Miss. 1972) (refusing to apply § 402A to a retailer). *See also Dunham v. Vaughn & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969), applying § 402A to a wholesaler with no apparent understanding of the possible distributional consequences of such a rule.

172. For a collection of the cases, see Annot., 46 A.L.R.3d 240 (1972).

173. For a discussion of these defenses in cases involving abnormally dangerous activities, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 79, at 522-24 (4th ed. 1971).

174. *See, e.g., COLO. REV. STAT. ANN.* § 8-52-102 (1973) (no benefits if injuries are

vented the injuries in the particular case most easily or inexpensively, for example, by the user's making a simple inspection, does not usually prevail over the criteria of which enterprise failed to meet normal expectations and which group of participants within that enterprise is likely to be the most effective *in the long run* in inducing that enterprise to take more general preventive action. The law currently tends to pick the injured party, for example as a participating user, to be the most effective preventer only in those instances where such a choice seems necessary to avoid excessive economic waste. Thus, the basic defense to liability caused by a defective product is not contributory negligence, but the unreasonable, knowing use of a product known to be defective.¹⁷⁵

Other types of cases from the products liability field also illustrate areas of conflict between the application of the criterion of which enterprise, and consequently which consumers, a loss should be assigned to, and the application of the criterion of which category of participants could most effectively have avoided the kind of loss involved in the particular case. One type of case, similar to the unreasonable, knowing use cases, is that involving products like gasoline, dynamite, or hunting knives, in which the utility of the product to consumers requires that the product possess a dangerous quality. The danger is one, however, which the ordinary user is expected to know and can avoid fairly easily without destroying the particular product's utility.

Suppose a consumer accidentally injures himself or a bystander by an explosion when using gasoline as a solvent or using dynamite to blast out a tree stump; or suppose while cleaning fish with a hunting knife one accidentally cuts himself. In these situations the criterion of prevention will prevail over the criteria of distribution, with the user

"intentionally self-inflicted") and § 8-52-104 (1973) (benefits reduced 50 percent if injuries are the result of employee's intoxication or "willful failure" to use safety devices provided by employer or to obey a reasonable safety rule).

175. *Luque v. McLean*, 8 Cal. 136, 145-46, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972); *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974); *Findley v. Copeland*, 265 Ore. 300, 509 P.2d 28 (1973). See also Annot., 46 A.L.R.3d 240 (1972); RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

Abnormal use has also been recognized as a separate defense. See, e.g., *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1367 (Okla. 1974). Often, however, as suggested by comment *h* to § 402A, the plaintiff's abnormal use will simply mean the product was not defective because it was "safe for normal handling and consumption." Moreover, if a careless or thoughtless use by a user or consumer, though not intended by the manufacturer, is expectable and it is also expectable that the careless or thoughtless user will not appreciate the risks involved in such "abnormal" use, the product may nonetheless be defective because of inadequate warning and the manufacturer consequently held liable. See, e.g., *Anderson v. Klix Chem. Co.*, 256 Ore. 199, 472 P.2d 806 (1970). See also comment *j* to § 402A, *supra*.

typically being held to be the superior risk bearer, not the manufacturer. As a result, rather than the loss being treated as a charge against the activity which failed to meet normal expectations (use of gasoline, dynamite or knives) it will be treated as a charge against the activity of cleaning, tree stump removal, or fishing. The loss will ultimately be borne by the purchasing consumers of that activity or, if the user is not using the product as part of his business enterprise, by himself, his family and the public at large.

The results in these cases can again be justified in terms of preventing obvious economic waste not only of those resources endangered by the use of the product but of those the manufacturer would otherwise probably have expended futilely if, instead of being able to rely on his normal expectations as to how his goods will be used by his customers and with what knowledge, he was expected to take preventive action to avoid such risks.

The user becomes the superior risk bearer not so much, however, because there may be no effective way for the manufacturer to prevent such losses but because the known means of prevention are so clearly ones the user can most effectively implement. The risks and the techniques of avoidance being so obvious, the manufacturer is allowed to rely on his normal expectations that the ordinary user will be aware of those risks and take appropriate preventive action. Thus, it is the *user* of dynamite whose enterprise (building roads, etc.) will be viewed as having failed to meet normal expectations when a blast causes vibration damage rather than the enterprise of manufacturing and consuming dynamite.

On the other hand, the fact that there is no known way available to either the manufacturer or the user (except abstention) to avoid totally a risk associated with a certain product, for example the risk of contracting polio from the use of a polio vaccine, does not necessarily relieve the manufacturer initially or his customers ultimately from the burden of liability.¹⁷⁶ The normal expectation is that one taking the vaccine will not become stricken with polio. If any more effective preventive techniques are ever to be discovered, they are more likely to be discovered by manufacturers than users, especially if the manufacturers and their customers, through the market place, will be required to bear the economic burden of such unexpected

176. This is the category of products the RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965), refers to as "unavoidably unsafe products." According to the RESTATEMENT, if adequate warning of the "unavoidably unsafe" risk is given, the product is not defective. *Accord*, *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1975). For other authorities discussing liability for such products, see note 105 *supra*.

losses.¹⁷⁷

Another type of case in which the courts have had difficulty resolving conflicts between the application of the most effective preventer criterion and the application of the distributional criteria are those involving products like cigarettes and alcohol which involve commonly known dangerous risks, such as lung cancer or alcoholism. The risks are not ones users can easily avoid, except by abstention or by otherwise destroying the utility of the product. Unlike such products as gasoline and dynamite, where the user will normally be able to avoid the commonly known dangers associated with the product and at the same time be able to "get his money's worth" from his use of the product, a user cannot get "his money's worth of enjoyment" from smoking cigarettes or consuming alcohol and at the same time avoid the risks of contracting lung cancer or becoming an alcoholic.¹⁷⁸

Analytically, the cases involving these kinds of products are more akin to the blood transfusion-hepatitis and polio vaccine cases where the initial liability has, at least in some cases, been imposed on the manufacturer not the user, even though there may be no known way for the supplier or manufacturer to prevent the loss.¹⁷⁹ One would expect that when a user contracts lung cancer from smoking or becomes an alcoholic, the losses incurred would be imposed ultimately on the customers of the risky products¹⁸⁰ by imposing the initial burden on the manufacturer, rather than having these costs borne by the public at large by imposing the initial burden on the user.

The reluctance on the part of the courts to impose liability on the manufacturers in such cases, which would be consistent with the distributional criteria of the enterprise liability theory, cannot be explained in terms of their seeking to avoid obvious economic waste by imposing the initial burden on users who are in a markedly superior preventive position. Unlike the cut on the hand from a sharp knife, the risk, though known, is not one which can fairly easily be avoided by the user. One explanation for the usual result in these

177. Calabresi & Hirschoff, *supra* note 20, at 1071.

178. While the RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965), would not impose strict liability in such cases, others have recognized the problems are not as simple as the RESTATEMENT would suggest. James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 370-72 (1965).

179. See note 105 *supra*.

180. Such costs would at least include those resulting from the plaintiff's use of the product before he became aware he was a victim.

cases may simply be that in the typical case the user over the years will have consumed several different brands of cigarettes or alcohol. Therefore imposing his entire loss on the manufacturer of only one brand does not fit well with the law's traditional notions of "but for" cause. Because of these problems, imposing enterprise liability might be better handled by the legislature's adopting a user tax—insurance compensation scheme.

Aside from these latter cases, however, the courts' general handling of the conflict problems reinforces two basic notions about enterprise liability. First, courts do seem to be concerned about encouraging as much long run preventive action as is possible. Second, in their efforts to encourage such preventive action, the courts do give significant weight to the normal expectations they assume most ordinary people have about their own activities and those of others.

X. SOME POSSIBLE FUTURE IMPACTS OF THE ENTERPRISE LIABILITY THEORY

In addition to the continued expansion of the enterprise liability theory in areas of the tort law previously governed by the law of negligence, the theory has already had some influence, and is likely to have even more, in bringing about changes in the law of intentional torts and the law of tort damages. To discover such influence in the area of intentional torts one need only apply the criteria of the theory to the rules governing liability for deceit¹⁸¹ or intentional infliction of emotional distress.¹⁸²

In the law of damages, two major changes have or are likely, eventually, to occur. The standards of "making the plaintiff whole" and "taking the plaintiff as you find him" are not likely to change, but what the plaintiff is allowed to recover, or to retain in the form of collateral benefits, is.

If the central purposes of the enterprise liability theory are to discourage disruptions in the ongoing, normally-to-be-expected status quo of people's everyday lives, but permit the losses which will nonetheless occur to be shifted to the economic beneficiaries of the enterprise which brought them about by failing to meet normal ex-

181. For example, in Colorado, the recent change in the older rule that a promise or statement of future intention could not constitute a misrepresentation of a present fact even though at the time the promise or statement was made the person making it did not in fact intend to carry it out. *Compare* *Stalos v. Booras*, 34 Colo. App. 252, 528 P.2d 254 (1974) (*cert. denied*), with *Hart v. Zaitz*, 72 Colo. 315, 211 P. 391 (1922).

182. The recognition of this tort, *see, e.g., Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970), is based, I would suggest, on the simple premise that while some intentional infliction of emotional distress is within the range of the normal expectations of everyday life, "extreme and outrageous" infliction of such distress is not.

pectations, measuring the amount of a specific person's loss in those same terms—the amount or extent of his disruption—makes sense. Several damage rules, however, fail to measure damages by this standard. Two such rules are those allowing relief for pain and suffering and those governing collateral benefits.

Pain and suffering are not themselves losses, though they are indeed often the most significant causes of losses, such as lost wages and losses of enjoyments of life. The principles of enterprise liability suggest the law ought to reject pain and suffering damages—relief which was originally punitive in nature and based on the “fault” theory¹⁸³—and substitute, instead, damages for the losses of enjoyments of life.¹⁸⁴ The historic reluctance of the courts to allow such damages, with some interesting exceptions,¹⁸⁵ is no doubt in part based on a concern with preventing double recovery. Suppose an automobile accident victim can no longer play golf because of a pain in his arm caused by an accident. Should he recover damages for the pain as the fault theory would justify; for the loss of his enjoyments derived from playing golf, as the enterprise liability theory would justify; or for both, in which case damages would be allowed for both the cause and the effect.

The collateral benefits rule¹⁸⁶ poses a different problem. Should the injured party recover more than the amount needed to restore him to his previous normally-to-be-expected status quo? Should he be allowed, for example, to recover lost wages not only from the defendant's liability carrier but also from his own casualty insurance underwriter? In cases involving tortious injury to property the courts,

183. See note 79 *supra*. See also the dissenting opinion of Justice Traynor in *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 509, 511-12, 364 P.2d 337, 344, 345, 15 Cal. Rptr. 161, 168-69 (1961).

For discussions of some other “problems” regarding pain and suffering damages, see Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958). Clarence Morris would leave any significant changes to legislatures. Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959).

184. As a separate element of damages in personal injury cases, losses of enjoyments of life were specifically rejected in *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938), but specifically recognized in *Hildyard v. Western Fasteners, Inc.*, 33 Colo. App. 396, 406, 522 P.2d 596, 601 (1974).

185. *E.g.*, the loss of society and companionship as part of a spouse's loss of consortium, H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 10.5 (1968), and, in some states, damages in wrongful death actions for loss of society and companionship, S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.49 (2d ed. 1975).

186. The rule is discussed in 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 25.22, (1956). See also Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

through the law of subrogation, have generally prevented such double recovery.¹⁸⁷ Under workmen's compensation¹⁸⁸ and in some "no-fault" auto accident jurisdictions¹⁸⁹ legislatures have done the same. Increasingly, private personal injury casualty insurance underwriters are also saying no.¹⁹⁰ The question is: when will the courts develop a body of subrogation law applicable to personal injury casualty insurance underwriters which is consistent with the theory of enterprise liability but which also avoids the adverse consequences the courts sought to avoid by the old prohibition against the assignment of personal injury claims.¹⁹¹

CONCLUSION

The many changes in the rules of tort liability which have come about over the last hundred years have not been the result of law makers seeking the "deepest pocket"—*i.e.*, seeking to use the tort law as a subtle means for redistributing wealth. Nor has the effort been one of seeking the widest possible distribution of losses without regard to what segments of the public might ultimately bear such costs and what effects such distribution might have on the allocation of the community's limited resources. Instead, the effort simply has been to take the world as it has come to be, both in terms of how it

187. E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* § 33, at 147-49 (2d ed. 1957); 16 G. COUCH, *INSURANCE* §§ 61:4, 61:98 (2d ed. R. Anderson 1966).

188. *E.g.*, COLO. REV. STAT. ANN. § 8-52-108(1) (1973).

189. *E.g.*, COLO. REV. STAT. ANN. § 10-4-713 (1973), requiring a deduction from any damage award received against an insured tortfeasor of any insurance benefits payable under the applicable automobile insurance policy, whether it be that of the injured party or the tortfeasor. The statute does not, however, require any deductions for benefits received from other collateral sources. Instead, the Colorado statute treats other collateral sources, *e.g.*, general medical and accident insurance, as providing only secondary coverage, and directs or encourages the underwriters of such insurance to draft their coverages accordingly, thus reducing premiums. COLO. REV. STAT. ANN. § 10-4-709 (1973).

190. For an indication of the extent to which private casualty insurance underwriters, particularly those providing medical expense insurance, are seeking to avoid double recovery by the insured by including express subrogation or reimbursement provisions in their casualty insurance policies, see Annot., 19 A.L.R.3d 1054 (1968); Annot., 43 A.L.R.2d 1177 (1955). The first annotation also indicates the relative success these underwriters have had in avoiding the charge that such provisions violate public policy as an improper assignment of a personal injury claim.

191. For a discussion of some of the other pitfalls involved in developing such a body of law, see Procaccia, *The Effect and Validity of Subrogation Clauses in Insurance Policies*, 1973 *INS. L.J.* 572 (1973). Suppose, for example, a medical expense insurer, suing on its subrogation claim, takes away most of the tortfeasor's available assets for paying a tort judgment to the victim. From whence would come the funds for compensating the accident victim for his other losses? *Id.* at 585.

For an extensive discussion of alternative ways by which the problem of a plaintiff's double recovery under the collateral benefits rules might be avoided, see Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 *CALIF. L. REV.* 1478 (1966).

functions and the dominant values which presently exist, and remold the tort law to make it more consistent with those facts.

We of course continue to live in the age of the industrial revolution. During the nineteenth century society was largely concerned with the exploration, uses, and development of energy in nature and man.¹⁹² Twentieth century society has sought to have its cake and eat it too—to take and enjoy the benefits of the industrial revolution while at the same time containing what are thought to be its excesses and abuses. The “fault” theory which reached its heyday in the last century was just one of the law’s contributions to the broad social objectives of that century. The enterprise liability theory is simply one of the law’s contributions to the “taming” objective of this century.

The market place serves at least two broad social functions: the allocation of resources and the continuing redistribution of wealth.¹⁹³ In performing such functions, one of its excesses or abuses is (or is thought to be) its failure to take due account of all the values of individual members of society. There are many individual values for which there is no market, or with which the market simply cannot deal efficiently.¹⁹⁴ The enterprise liability theory is the tort law’s response to these realities. The theory seeks to achieve what the market place would probably do if it could. It seeks to allocate resources and distribute wealth in the same manner the market place would, but for the fact that, because the transaction costs of some bargained-for exchanges would be so high, either no bargained-for exchanges can or will be entered into, or they can be entered into only at such high costs that it is not “efficient” to try to use the market place for that purpose.¹⁹⁵

These are the reasons, I would suggest, why courts have consciously added to the historic goal of resource conservation a second goal of “fair” distribution among society’s members of the costs of accidents or accident-prevention. This second goal was implicit in both the “force” and the “fault” theories, but primarily only in the law governing damages and the rule of “but for” cause. With the possible exception of negligence law, the “fair” distribution of accident costs was not a goal, independent of the conservation goal, to be used in shaping the various tort rules of liability. Under the enterprise liability theory, not only does the goal of conservation continue to shape the rules, but the goal of “fairly” distributing losses when

192. J. BRONOWSKI, *THE ASCENT OF MAN*, ch. 8, *The Drive for Power*, at 259 (1973).

193. See note 33 *supra*.

194. See note 106 *supra*.

195. See note 106 *supra*.

they nonetheless occur has also come into play. As it works out, under the enterprise liability theory, the goals of conservation and fair distribution are not wholly independent, for the standard used to achieve the goal of fair distribution—the standard of “normal expectations”—is itself based on the goal of conserving the resources people use to meet the wants and needs of their everyday lives. This use of the criterion of “normal expectations” in the tort law gains support when one considers how extensively the same basic criterion has been used elsewhere in the law for the same purpose of protecting against the unexpected loss of invested resources.¹⁹⁶

With its return to a concern for protecting the status quo, the enterprise liability theory shares a common base with the “force” theory. With its assignment of legal responsibility on the basis of the failure to meet normal expectations, the theory carries with it a connotation of “fault,” though one quite different from the traditional “fault” theory. With its recognition of the economic, social and political interdependence of human activities, and the consequent problems of “fair” distribution, however, the theory stands alone.

The changes brought about in the tort law when the law moved from the old “force” theory to the later “fault” theory took considerably more time to evolve than did those brought about by the law’s shift from the “fault” theory to the enterprise liability theory. The ensuing rapidity of changes in the tort law has been disquieting for many people, especially well-trained, “fault”-oriented lawyers. Thus, while the tort law has been placing increasing emphasis on the “normal expectations” of other enterprises, it appears to have failed to

196. Examples include (1) the doctrine of promissory estoppel under § 90 of the RESTATEMENT OF CONTRACTS (1932); (2) the doctrine of *Goldberg v. Kelly*, 397 U.S. 254 (1970), that a governmental privilege once granted becomes a right of property which cannot be divested subsequently without affording procedural Due Process rights. See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964); (3) the “Sunburst” doctrine of prospective overruling of prior judicial decisions. See generally Currier, *Time and Change in Judge-Made Laws: Prospective Overruling*, 51 VA. L. REV. 201, 212-16, 234-52 (1965); (4) the rules governing the retroactive application of newly created constitutional rules governing the trial of criminal cases. *Id.* at 252-72; (5) the law of de facto officers and de facto incorporation. See, as to municipal corporations, C. RHYNE, *MUNICIPAL LAW* §§ 2-23, 8-12 (1957); as to private corporations, N. LATTIN, *CORPORATIONS* §§ 57, 76 (1970); (6) in the law of compensable “takings.” See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1208-18 (1967), discussing the relevance of normal expectations to the question of when governmental action should be considered a taking, and Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437, 449-54 (1962), arguing for compensation of more consequential damages on the grounds that it would result in a “fairer distribution” of more of the costs involved in condemnation and other types of governmental actions among those who share the risks and benefits of such actions.

meet its own standard. However, as lawyers and judges become more adept in articulating the fundamental goals of the tort law, and their accompanying criteria and standards, perhaps future changes will be less unexpected.