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FORESEEABILITY IN CONTRACT AND TORT: THE PROBLEMS OF RESPONSIBILITY AND REMOTENESS

Banks McDowell*

The concept of foreseeability is used in rules and legal analysis as if its meaning is clear and nonproblematic. Many lawyers, teachers and judges, however, do not share this comforting conclusion. This Article presents a theoretical analysis of what foreseeability ought to mean and its implications for civil law. The author proposes that foreseeability actually functions similarly in contract and tort, even though the conventional doctrine of those disciplines points to the contrary. Foreseeability serves two purposes: first, in traditional fault-based theory, foreseeability implies some form of sanction, helping civil law fulfill its normative role; second, in areas where the search for fault has been abandoned, foreseeability serves the narrower function of identifying which party ought to be responsible for arranging compensation for harm.

INTRODUCTION

A COMMONPLACE observation in Anglo-American law is that one major difference between contract and tort is the degree to which foreseeability limits the amount of damages which the plaintiff may recover.1 In tort, the defendant is said to be liable for all

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1. See, e.g., W. P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 92, at 665 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]; Generally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases, if only because it will so often permit the recovery of greater damages. Under the rule of Hadley v. Baxendale, the damages recoverable for breach of contract are limited to those within the contemplation of the defendant at the time the contract was made, and in some jurisdictions, at least, to those for which the defendant has tacitly agreed to assume responsibility. (citations omitted); E. A. FARNSWORTH, CONTRACTS 874-75 (1982):

By introducing this requirement of “contemplation” for the recovery of consequential damages, the court imposed an important new limitation on the scope of recovery that juries could allow for breach of contract. The result was to impose a more severe limitation on the recovery of damages for breach of contract than that applicable to actions in tort or for breach of warranty, in which substantial or proximate cause is the test.
injuries proximately caused by his act. In contract, the plaintiff may recover only such damages as the promisor, at the time of contracting, could reasonably have foreseen would result from a breach of his contractual obligation.

This distinction has been thought so significant that plaintiffs' lawyers, when not constrained by a statute of limitations or difficulties in proving negligence, strive to persuade courts that borderline cases should be classified as tort in order to avoid the contract limi-

(citations omitted). This distinction is reflected in the Restatements of Law. Compare Restatement (Second) of Contracts § 351 (1981) (damages not recoverable where breaching party did not foresee them as reasonable result of breach at time contract made) with Restatement (Second) of Torts § 435 (1965) (fact that actor's conduct was substantial factor in other's injury is sufficient for liability, regardless of whether harm foreseen or foreseeable by actor). A ritual recitation of the distinction often appears in cases. E.g., Bay Gen. Indus., Inc. v. Johnson, 418 A.2d 1050, 1056 (D.C. Ct. App. 1980) ("[T]ortious need only be within the risk created by the action, whereas contract damages must be foreseeable.").

2. See Prosser & Keeton, supra note 1, §§ 41-45. Some authorities have imposed liability even if the damages could not be foreseen by the defendant. An extreme example of this position is the well-known case of Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891). An 11-year-old school boy kicked a 14-year-old classmate on the shin. Due to a pre-existing medical condition, this kick caused serious, yet unforeseeable, injury. The court held the defendant responsible in full, since "the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him." Id. at 530, 50 N.W. at 404. See also Dellwo v. Pearson, 256 Minn. 452, 107 N.W.2d 859 (1961) (liability found where propellor of boat operated by 12-year-old boy caught plaintiff's fishing line and caused fishing rod to injure plaintiff; foreseeability not the test of proximate cause).

3. This principle was first established in Hadley v. Baxendale, 156 Eng. Rep. 145 (1854):

Where two parties have made a contract which one of them had broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.


Respected judges have argued that "contemplation" translates into foreseeability, covering both branches of the rule in Hadley v. Baxendale. See Victoria Laundry (Windsor) Ltd. v. Newman Indus., [1949] 2 K.B. 528, 539 (Asquith, L.J.); Kerr S.S. Co. v. Radio Corp. of Am., 245 N.Y. 284, 288-91, 157 N.E. 140, 141-42 (1927) (Cardozo, C.J.). Foreseeability is widely accepted as the standard for both general and special damages. See, e.g., Restatement (Second) of Contracts § 351 and comments (1981); U.C.C. § 2-715 (1978) (using the standard "had reason to know").
tation on damages. In reality, the choice between the contract and tort actions may be less significant than assumed.

Both in contract and in tort, courts must face the question of remoteness. They must determine which consequences of the breach of duty are too remote to be assigned to the actor's responsibility and, therefore, must be borne by the party on whom they fell. Additionally, courts must define the scope of a defendant's duty: Was his obligation broad enough to encompass the plaintiff or the plaintiff's particular losses? A narrower question is whether there was any legal duty at all. The concept of foreseeability has been used in the analysis of each of these issues.

The standard theoretical formulations of the role of foreseeability in these two fields are: (1) In contract, foreseeability limits the ambit of damages for which a breaching party is liable, and (2) in tort, foreseeability defines whether the defendant owed a duty to the plaintiff, and whether the injury sustained flowed proximately from the defendant's tortious act.

The traditional analyses of foreseeability in contract and tort raise several questions. The initial question is whether foreseeability works the same in both contract and tort. Other questions follow: (1) If foreseeability does in fact operate differently in contract and tort, are there clear criteria controlling how particular transactions are classified? (2) In the expanding area of no-fault liability, particularly in that amalgam of tort and contract theories known as products liability, can foreseeability usefully and legitimately control scope and remoteness questions? (3) If foreseeability is central in fault theory but irrelevant in strict liability, is the fact that fore-

4. An interesting recent example is Young v. Abalene Pest Control Servs., 122 N.H. 287, 444 A.2d 514 (1982), where plaintiffs attempted to ground their action in tort in order to recover for emotional distress caused by a termite inspector who breached his contractual duty to inspect the house they were planning to buy. They were unsuccessful. The court determined that the action was contractual and the emotional distress was not foreseeable as a matter of law.

5. See generally Prosser & Keeton, supra note 1, § 43 (discussing remoteness in torts); E.A. Farnsworth, supra note 1, § 12.14 (effect of foreseeability in assessing contract damages).


7. See Prosser & Keeton, supra note 1, § 43; E.A. Farnsworth, supra note 1, § 12.14.


10. See Prosser & Keeton, supra note 1, § 43.
seeability is necessary for a normative standard a reason for selecting fault theories of liability over no-fault theories? (4) Should we retain foreseeability in the analysis of liability or breach questions but adopt a different approach to the problem of compensation or recovery? This Article will explore these questions.

None of these questions can be addressed until a working definition of foreseeability is articulated. Although foreseeability has been used in legal statements as if its meaning and scope are clear, the vastness of the case law, statutes, and scholarly discussion has produced confusion and contradictions. This Article will first define foreseeability as a theoretical concept and then develop the implications of that conceptual definition. Once that is accomplished the question of whether foreseeability is a valuable analytical tool for addressing issues of legal responsibility or remoteness of consequences can be addressed.

The conclusion reached is that foreseeability functions similarly in contract and tort. The significant difference instead lies between obligations which are based on strict liability and those arising under traditional fault-based contract and tort theories. Foreseeability has both a justificatory and a practical role. Its justificatory role is to legitimate the treatment of a defendant as one who has violated a legal duty. Its practical function is to provide a device to limit liability. Historically, foreseeability has performed, and continues to perform, both roles in fault-based liability. However, it cannot perform either function in strict liability. As a result, a strict liability system contains serious remoteness and cost

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11. One manifestation of this lack of clarity is the struggle of the English courts to face up to the ambiguities of foreseeability in the Hadley v. Baxendale rule. See Victoria Laundries (Windsor) Ltd. v. Newman Indus., Ltd., [1949] 2 K.B. 528; C. Czarnikov, Ltd. v. Koufos (Heron II), [1969] 1 A.C. 350; and J. Parsons (Livestock) Ltd. v. Utley Ingham & Co., [1978] 1 All E.R. 525. Their disagreements and discussion have illuminated the problems without furnishing clear solutions. American decisions have not yet reached that stage. See also Restatement (Second) of Contracts § 351 reporter's note (1981) (indicating that many of the cases on which the illustrative examples are based have counter-examples in the case law. The UCC permits the buyer to recover those consequential damages which the seller "had reason to know" would arise from the breach. U.C.C. § 2-715 (1979). But does "have reason to know" adopt the common law standard of foreseeability or is it another standard? If it is a new standard, is it more or less rigid than the common law provisions? When a concept is used in many different contexts without any attempt to indicate a meaning, there is bound to be uncertainty about not only the core meaning, but the peripheral limits on the applicability of the concept.

12. See infra notes 17-75 and accompanying text.

13. See infra notes 76-110 and accompanying text.

14. See infra notes 111-51 and accompanying text.
problems. To the extent that modern civil liability is purely compensatory, foreseeability may be superfluous. The concept, however, is so central to a normative approach to law that we cannot afford to view civil liability as solely a compensatory scheme.

I. FORESEEABILITY

One method of establishing the content of a concept is to determine its meanings in either colloquial or technical usage. Foreseeability is not merely a legal term. Foreseeability is used in everyday language to describe actual, subjective awareness of possible future occurrences. It carries a sense of prevision, a consciousness of the possibilities of future happenings, and also implies the ability to plan for those future possibilities. A foresighted person sees into the future and takes necessary precautions to protect himself and others while taking advantage of opportunities. Thus, foreseeability is an integral part of prudent human behavior. To the extent that we expect humans to be rational beings, they must be charged with some degree of foreseeability.

In the context of moral analysis, the meaning of foreseeability derives from its relationship to the concepts of choice and fault. If an actor foresees a possible consequence harmful to himself or others and, disregarding this foresight, acts in a way which allows the avoidable harm to occur, his action would be condemned as morally blameworthy. He would be said to be at fault. When we condemn someone for harming another, we may be saying he failed to foresee a happening when he should have, or he foresaw the event and made a bad choice.

15. See infra notes 111-34 and accompanying text.
16. Cf PROSSER & KEETON, supra note 1, § 1, at 6 (“[L]iability must be based on conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others.”). Foreseeability aids in establishing the standard of expected conduct by determining when responsibility will extend to consequences of one's conduct. See id. § 31, at 169-73.
18. “Foresee,” from which “foreseeability” is derived, is defined as the ability “[t]o see beforehand, have prescience of [or] to exercise foresight, take care or precaution, make provision.” 4 OXFORD ENG. DICTIONARY 440 (1933).
19. We might mildly condemn his failure to take advantage of his opportunities but would not consider his actions wrongful. See L. FULLER, THE MORALITY OF LAW 9-32 (1964) (distinguishing between the morality of duty and the morality of aspiration).
The legal construct of foreseeability takes the moral analysis and depersonalizes it. With the addition of that ubiquitous actor in both contract and tort, the "reasonable" person, to the related concepts of foreseeability, choice, and fault, foreseeability becomes an objective standard. The arguments for objective rather than subjective standards in law are well known. Among them are the administrative difficulties inherent in trying to prove subjective mental states, the necessity of establishing normative or generalized standards of conduct, and the desire to protect the reasonable expectations of others who form those expectations on the assumptions that the actor is a normal or average person and/or the actor's external behavior reflects his subjective state. The first and second reasons justify an objective standard in tort, while the third reason justifies an objective standard in contract.

The movement from moral to legal analysis—from the subjective to the objective standard as a basis for ascribing liability—is problematic. Within either framework, a person is culpable who, although subjectively aware of a danger and capable of averting injury to another, failed to do so. Only under legal analysis, however, is a subjectively unaware person treated as if he had actually known of a danger when a reasonable person with normal faculties would have been aware of it. In this instance, moral blame and legal liability part company. By imputing foreseeability to an unaware defendant, legal analysis expands the justification of liability beyond personal wrongdoing.

Another type of foreseeability now widely used both in tort and contract analysis is the foresight of economic man. Economic man is a construct developed by economists to explain the functioning of people inside a market model of economic behavior. Rational

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21. See Prosser & Keeton, supra note 1, § 32, at 177.
22. See id. § 32, at 173-74.
23. See id. § 33, at 193, 198; see generally id. § 32, at 173-75.
24. See O. W. Holmes, *The Common Law*, 86 (M. Howe ed. 1963) ("The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason.").
26. Economic man marches across the pages of Posnerian analysis. See R. Posner, *Economic Analysis of Law* 3-14 (2d ed. 1977). Posner uses the concept of economic man—"a rational maximizer of his ends in life," id. at 3—to demonstrate three propositions: that a higher price will decrease the quantity demanded, since a rational purchaser will seek
economic behavior consists of maximizing benefits and minimizing costs by choosing the optimum or most efficient course of conduct.\(^\text{27}\) Foreseeability in the economic context requires projecting the costs and benefits of possible future courses of action measured in monetary terms.\(^\text{28}\) Economic man is commercially knowledgeable, possesses or can obtain all necessary information, experiences little difficulty in assessing the accurate monetary sum for each potential benefit or cost, and is coldly rational—unswayed by emotion, apprehension, generosity or caprice—not only in calculating the sum of these figures, but in choosing the most efficient maximization.\(^\text{29}\)

Neither economic man, moral man, nor reasonable (legal) man are descriptive of actual behavior, but rather are prescriptive, setting forth the various standards of behavior against which real human conduct can be measured. There is no inherent reason why legal man could not be equated with economic man or with moral man. Nevertheless, it is often assumed that the values of moral man and those of economic man conflict.\(^\text{30}\) If so, legal man might be equated with one or the other, but not with both. The legal con-

\(\text{id.}\) at 4-6; that a seller will not sell for less than the cost of the alternatives foregone to produce or obtain the product sold, since a rational seller would otherwise seek the more valuable alternative, \(\text{id.}\) at 6-10; and that resources will be used so as to generate the greatest value when resources may be freely shifted between uses, since a rational man will attempt to get the most of what he has, \(\text{id.}\) at 7. Economic man is the central character in the conflict between Professors Calabresi and Posner over strict liability versus fault liability. See Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055 (1972) (criticizing fault liability for its assumption that men have perfect understanding of future events in planning their behavior, so as to take the highest level of precaution consistent with the balancing of cost of harm against cost of precaution); Posner, *Strict Liability: A Comment*, 2 *J. Legal Studies* 205 (1973) (by imposing strict liability on the party best able to predict the consequences of an action, incentive for other parties to take precautions is removed, even if the cooperation of those other parties is needed to implement the precautions determined by the potentially liable party).

27. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977) (economic man is “a rational maximizer of his ends in life”).

28. The three postulates of economics discussed by Posner, *supra* note 27, require perfect knowledge of future events, since the rational purchaser must know all available substitutes in deciding on their behavior, so as to take the highest level of precaution consistent with the balancing of cost of harm against cost of precaution); Posner, *Strict Liability: A Comment*, 2 *J. Legal Studies* 205 (1973) (by imposing strict liability on the party best able to predict the consequences of an action, incentive for other parties to take precautions is removed, even if the cooperation of those other parties is needed to implement the precautions determined by the potentially liable party).


30. *See G. CALABRESI, THE COSTS OF ACCIDENTS* 266 (1970) (“The fault system is a poor system of market control even disregarding the fact that it decides who shall bear losses partly on the basis of moral considerations antithetical to pure market control of accident costs.”).
STRUCT, however, has its own specific meaning, since the lawyer is concerned with narrower issues than the moralist, and broader ones than the economist.31

Another way to increase understanding of a legal concept such as foreseeability is to determine its place in the web of relationships between other legal concepts. Foreseeability is related to the general concept of fault. Throughout the nineteenth century and well into the twentieth century, tort theory was based predominantly on fault concepts.32 Although not normally described in this way, nineteenth century contract theory was also fault-based. Under the freedom of contract theory of that period, the obligor was said to voluntarily assume the obligation.33 Once the contract was created, the obligor was required to perform exactly and completely; very few excuses for nonperformance were recognized by the courts.34 Failure to perform the voluntarily assumed duty was characterized as wrongful; that is, the breaching party was at fault.35

Fault was a pivotal notion in common law thinking during the nineteenth century.36 Prior to the emergence of welfare institutions and the widespread use of insurance, losses were borne by the per-

31. The law protects such intangible and non-quantifiable interests as family relations, freedom of press, freedom from mental or psychological damage, and personal reputation, which are difficult to fit into an economic framework without arbitrarily assigning dollar values to these interests. The law uses equitable injunctions to protect such interests because economic equivalents do not exist. Moral philosophy addresses issues which fall outside the purview of law, either because there is no social interest at stake or due to the administrative difficulty in establishing such an interest. Examples are the good samaritan problem in tort and the issue of personal virtue which is of so much concern in ethics.


34. See E.A. FARNSWORTH, supra note 1, § 17, at 21.

35. This analysis lessens the importance of an asserted distinction between fault in tort and contract—that fault in tort is the breach of duty, while fault in contract involves assuming a duty one cannot perform. To say that one must prove fault in tort but not in contract merely demonstrates that it is more difficult to prove the breach in tort than the assumption of the obligation in contract.

36. Basic pleading and procedure required an injured plaintiff to allege and prove some justification for transferring his loss to the defendant. For many centuries, the necessary justification was to allege and establish conduct on the part of the defendant which could well be categorized, without linguistic or philosophical distortion, as blameworthy. Legal historians have debated whether tort law, prior to the middle of the nineteenth century, was fault-based or was based on notions of strict liability. Compare O. W. HOLMES, supra note 23, at 5-33 (viewing legal liability as historically fault-based) with Wigmore, Responsibility for Torts: Its History, 7 HARV. L. REV. 315 (1894) (viewing strict liability as the basis of tort law prior to the mid-nineteenth century).
son on whom nature, fate or accident had caused them to fall, unless the sufferer could persuade the court to shift the cost to someone else.\textsuperscript{37} The most persuasive approach was to prove that the losses were not the result of fate or accident but were caused by the wrongful act of the defendant; that is, the defendant was at fault.\textsuperscript{38}

Fault, in both a legal and moral sense, occurs only when the actor has a choice. If he is compelled to act in a particular way,\textsuperscript{39} or only one course of action is open to him, his action cannot be characterized as wrongful. There should be no responsibility for an action, however harmful, absent an alternative course of action less dangerous than the one pursued.

Foreseeability is the concept used to address the issue of the scope of an actor's fault. If an opportunity for choice is necessary before ascribing fault to an actor, choices can only be made as to those consequences known to the actor before he committed himself.\textsuperscript{40} What must be foreseen? Is it that the action would be classified as wrongful by the legal system? Is it that someone would be injured in some way by the act?\textsuperscript{41} Is it that this particular person would be injured?\textsuperscript{42} Is it the occurrence of the particular damage alleged by the plaintiff in his legal action?\textsuperscript{43} The theoretical and

\textsuperscript{37} See O. W. Holmes, supra note 23, at 42, 76-77.

\textsuperscript{38} Id.

\textsuperscript{39} Upholding a defense based on necessity or duress requires a finding of compulsion. Compulsion is not a question of psychological reality, but a prescriptive judgment about what legally constitutes absence of choice. See Prosser & Keeton, supra note 1, § 24.

\textsuperscript{40} Holmes expressed this analysis:

[T]o a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid . . . Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.

O. W. Holmes, supra note 23, at 76-77 (citations omitted).

\textsuperscript{41} English contract law requires that the breaching party must have foreseen the serious possibility that his act would produce harm, but not that he had foreseen the particular harm. See H. Parsons (Livestock) Ltd. v. Utley Ingham & Co., [1978] 1 All E.R. 525, 540 (Scarman, L.J.).

\textsuperscript{42} This was the issue in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), which held that no duty was owed to an unforeseeable plaintiff. Id. at 345, 162 N.E. at 101. Analyzing the problem in terms of causation, the dissent would have held the railroad liable. Id. at 356, 162 N.E. at 105.

\textsuperscript{43} This question may be thought to divide contract and tort. Liability for special damages in contract requires that the breaching party, at the time of contracting, could have contemplated the particular losses. See, e.g., Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). The foreseeability limitation is not applicable in tort. See, e.g., Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).
practical answers to the question of what must be foreseen are unclear in both contract and tort. Given the objective nature of the inquiry, the law is not dealing with an empirical question, but a hypothetical construct. What the court expects a defendant should have foreseen is what the "reasonable man" would have foreseen.

The content of foreseeability may be further clouded because it is usually a factual issue to be determined by a jury. Because juries usually report only general verdicts, there is little empirical evidence concerning how the foreseeability issue is analyzed by the jury. The theoretical content of foreseeability is contained either in the judge's instructions and the rules on which they are based or in the judge's control over the jury by his ruling as to whether or not there exists a material factual issue to submit to the jury. Although summary judgment rulings often implicitly involve the foreseeability question, the standards employed are not frequently articulated, and thus the theoretical uncertainty remains.

In addition to identifying what the actor should be required to foresee and making the factual determination of whether he did foresee it, there is the element of the probability or likelihood of the event occurring. Although, as one court recently said, "[I]n retrospect almost nothing is unforeseeable," foreseeability is used in connection with choice. The actor should be liable if a reasonable person would have acted to avoid the foreseeable injury. A reasonable choice to act one way or another entails balancing the cost of the safer action times the likelihood of the perceived danger against the magnitude of the potential injury and the benefits of the riskier action. Thus, we expect reasonable operators of nuclear power plants to take stringent safety precautions, even if the likelihood of a serious leak of radiation is very slight, because of the enormous damage that could occur. On the other hand, we do not expect a film laboratory to inaugurate costly procedures to ensure that every snapshot on a roll of Kodak Brownie film will be perfectly developed, for, even if the likelihood of laboratory error is appreciable, the potential loss to a customer might merely be a bad print of the sixth shot of the family dog.

While this balancing calculation could be consciously made, it is for most actors a kind of intuitive, semiconscious judgment. It is

45. Recent English cases have used varying terminology while struggling to frame a standard of probability. See, e.g., Victoria Laundry (Windsor) Ltd. v. Newman Indus., [1949] 1 All E.R. 997, 1004 ("[T]he true criterion is surely not what was bound 'necessarily' to result, but what was likely or liable to do so . . . ."); Czarnikow Ltd. v. Koufos (Heron II),
presumably determined in much the same fashion by jurors or judges acting as factfinders. This matter of probabilities and balancing is subsumed under the "reasonable" qualifier in the standard, "what a reasonable person would have foreseen," yet its issues are distinct from those required in determining whether or not injury to persons or property is a possible outcome. As with many other common law concepts, the concept of foreseeability remains vague and open-textured, in spite of many cases involving foreseeability. This open-textured quality permits courts to apply rules of law containing the foreseeability concept to wide-ranging factual situations, thereby achieving individualized results without violating a predefined constraint.

The purpose of the foreseeability concept is to define the point on the continuum between responsibility and remoteness beyond which the defendant has no liability. In tort, this is the point where there is no duty because the defendant could not foresee that his act would cause injury; in contract, this is the point where no obligation is assumed because the defendant could not foresee that anyone would treat his actions as creating an obligation. If that point is placed at the beginning of the continuum, the actor would bear no obligation. Instead, society would bear the burden of protecting itself from all injury, either remote or proximate, resulting from the actor's behavior. If the boundary is placed at the other end of the continuum, the actor would be responsible for all damages causally linked to his actions. This would constitute an intolerably expan-

[1967] 3 All E.R. 686, 694 ("It has never been held to be sufficient in contract that the loss was foreseeable as 'a serious possibility' or 'a real danger' or as being 'on the cards.'"); H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] 1 All E.R. 525, 526 ("What amounted to a 'serious possibility' [is] a question of fact to be decided by the application of common sense to the particular circumstances."). Among the terms considered throughout these cases are: "serious possibility," a "real danger," "liable to result," "on the cards," "very substantial degree of probability," and "foreseeable as a likely result." American courts, less interested in linguistic precision, address probability as a component of reasonableness and foreseeability to be determined by the factfinder without any more precise guidance. E.g., Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 101 (1928); Mieher v. Brown, 54 Ill. 2d 539, 544, 301 N.E.2d 307, 309 (1973).

46. This is the effect of linking foreseeability to duty. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 342, 162 N.E. 99, 99-100 (1928). A similar result is achieved by categorizing a controversy as contractual rather than tortious and then applying privity concepts. See, e.g., Winterbottom v. Wright, 152 Eng. Rep. 402 (1842) (plaintiff injured while driving unsafe mail coach; defendant not liable to plaintiff because contract to provide and maintain coaches was between defendant and plaintiff's employer).

47. This issue arises in cases where the plaintiff alleges an implied contract based on the defendant's conduct. This may also explain those cases where the court finds that the plaintiff's services were gratuitous because the defendant receiving those services reasonably felt the plaintiff had no expectation of payment.
sive burden upon the actor. Generally, the boundary is drawn somewhere in the middle of the continuum, separating remote consequences for which there is no liability from proximate consequences for which the defendant is liable. While such limits might be drawn based on actual or constructive foresight, foreseeability may merely be a mask for policy decisions.

One policy at work is to protect certain defendants and enterprises. The original policy of protecting developing entrepreneurial activity in the early stages of industrialization is no longer applicable to our developed industries, but, in a sense, the problem is still with us. All human activity carries risk. Given the destructive potential of modern technology, the prospective ambit of that danger can be enormous. Drawing the liability boundary to include all outcomes bearing simple cause-in-fact relationships to the defendant will have dire economic consequences. If defendants must pay judgments from personal assets, many individuals and small businesses may be forced out of the market or into bankruptcy. Fear of this possibility may compel entrepreneurs and individuals to act very cautiously, becoming risk-averse rather than risk-preferring.

One policy choice can be to weigh the societal desirability of the defendant's activity against the harm done to the injured plaintiff or, stated more broadly, to weigh the advantage of having daring, creative and unconventional personalities against the costs of their experimental activity. Drawing the line close to the act in order to minimize liability will favor creative, risky activity over victims. Drawing the line far from the act to include liability for most losses caused by the action will encourage cautious, conventional, risk-averse activity.

A related policy choice arises from the fact that the best protection against ruinous liability is the defendant's size or wealth. The larger the business or the wealthier the individual, the better its ability to survive the impact of a single, very large damage award. Drawing the line to increase the extent of liability will more ad-

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49. This has become a standard criticism of expanded medical malpractice liability. Many doctors are reportedly practicing defensive medicine by avoiding risky procedures and by scheduling expensive and detailed preliminary tests to prepare a record should there be litigation. See, e.g., Altschule, Bad Law, Bad Medicine, 3 Am. J. L. & Med. 295, 296 (1977) ("Now, the malpractice crisis often is forcing even those physicians whose own good judgment formerly would have prevented them from utilizing excessive laboratory tests to resort to such tests in self-defense.").
versely affect moderately wealthy individuals and smaller enterprises. Such a demarcation inherently favors magnitude and centralization of wealth and power.

Transferring the risk to professional insurers may seem to alleviate these problems, but insurance is, nevertheless, a cost. The high risk associated with certain activities may force any rational actor to carry large amounts of insurance. Because the cost of insurance may exceed the price which the market will pay for the activity, the activity may cease to be provided.\textsuperscript{50}

At this stage in the inquiry, one might ask: why not abandon

\textsuperscript{50} A good example is the cost of medical malpractice insurance. In the early 1970's, substantial increases in the number of malpractice claims and awards caused many insurance companies to completely withdraw from the medical malpractice market. Wasman, \textit{Spiraling Costs: A Health Care Slide}, 11 Trial 23 (1975). Companies still willing to provide insurance raised their premiums and simultaneously reduced their coverage of doctors in "high-risk" specialties, leading to a crisis in the availability and cost of insurance coverage. \textit{See, e.g.}, Note, \textit{Medical Malpractice Legislation: The Kansas Response to the Medical Malpractice Crisis}, 23 Washburn L.J. 566, 566-68 (1984).

Recent increases in the number of malpractice actions filed and in professional liability premiums have led some to believe that the U.S. again faces a medical malpractice "crisis" similar to the one experienced a decade ago. Korcok, \textit{Curbing the U.S. Medical Malpractice Crisis}, 131 Canadian Med. A.J. 645, 645 (1984). A growing number of doctors are said to be leaving "high-risk" specialties such as obstetrics and neurosurgery in response to skyrocketing liability premiums. \textit{Id. See also Kiss, Doctors Need Protection}, N.Y. Times, Aug. 31, 1983, at A27, col. 5; \textit{cf.} Sullivan, \textit{Two State Hospital Officials Say Insurance Rates Threaten Their Departments}, N.Y. Times, Apr. 10, 1985, at B3, col. 1 (neurosurgical chairmen at two university medical centers fear that increased malpractice insurance premiums will force them to disband their departments and leave the teaching profession). \textit{But see Again the Malpractice Crunch}, N.Y. Times, Feb. 4, 1985, at A18, col. 1 (underlying problem of the recent crisis is number of frivolous suits filed, estimated to be one-third of total number of claims).

Insurance premiums have increased more than 131% in the last ten years. Korcok, \textit{supra}, at 645. In some areas, a neurosurgeon can pay as much as $63,000 per year in liability insurance premiums. Obstetricians and gynecologists pay at least $15,000 per year, with some paying more than $70,000 annually. \textit{Id.}. These high premium costs are causing some doctors to leave these areas of practice. \textit{Id.} at 648-49.


Legislative efforts have attempted to guarantee the availability of insurance by creating joint underwriting associations and by modifying the tort law applicable to malpractice actions. Grossman, \textit{supra}, at 7-10. One of the most controversial measures is the imposition of a ceiling on the amount of damages recoverable by medical malpractice victims. For a discussion of these statutes, see Note, \textit{Statutes Limiting Medical Malpractice Damages}, 1982 Fed. Ins. Q. 248; Note, \textit{Patient Compensation Funds: Legislative Responses to the Medical Malpractice Crisis}, 5 Am. J. L. & Med. 175 (1979).
foreseeability altogether and make liability the subject of an open policy analysis? The counter-argument is that foreseeability is an important concept in its own right. It forces a court to consider, from the defendant's perspective, whether the actor should have been aware of the future risks and could have avoided harm. This requires an assessment of how rational, prudent, and free from blame the defendant's actions were. Unless the factors of rational expectations, fault—whether legal or moral—and normative goals are to be disregarded in determining civil liability, foreseeability must remain a central inquiry.

In addition to definition by usage, location by conceptual context, or explanation by policy objectives, the content of foreseeability may be controlled by the legal element with which it is connected. To impose liability in tort, the complaining party must establish: (1) a legal duty, (2) a breach of that duty, (3) damage to the complaining party, and (4) a causal connection between breach and damage.\(^{51}\) Contract litigation and doctrine focus, however, primarily on the first and third of these elements;\(^{52}\) tort litigation and

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51. Traditional theory in both fields assumes that these are necessary elements. See Green, Foreseeability in Negligence Law, 61 Col. L. Rev. 1401 (1961). Much of the struggle in the development of tort theory in the twentieth century has concerned ways in which the elements, particularly the breach, may be established. The res ipsa loquitur doctrine allows breach to be established by inference. See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (plaintiff can recover under res ipsa loquitur if able to prove that defendant had exclusive control over production of the instrumentality and the instrumentality had not changed after it left defendant's possession); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (patient injured while unconscious on operating table may recover under res ipsa loquitur doctrine although unable to identify which members of surgical team caused the injury). Modern products liability theory goes one step further, allowing breach to be established primarily from the fact that the injury occurred. See 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).

52. Much early contract litigation, focusing on the elements of offer, acceptance, consideration, or implied contract, concerned whether or not a contractual obligation had been assumed. See, e.g., L. Fuller & M. Eisenberg, Basic Contract Law 1-47, 318-51 (4th ed. 1981) and cases cited therein. Breach is usually a straightforward factual question. Modern contract litigation is more often concerned with the type and magnitude of remedies available to the plaintiff. A complex body of legal rules governs such matters as general and special damages, expectation, restitution and reliance formulae, stipulated damage clauses, and specific performance. These damage problems have produced the bulk of modern scholarly discussions in contract. See id. at 168-317 and cases cited therein.

The final element—the causal connection between breach and damage—is rarely treated in litigation or scholarly discourse. Were courts to focus on causation in contract litigation, they would analyze cases in terms of proximate cause, as in tort. Since proximate cause, however, is the element used to eliminate liability for remote consequences, that purpose is adequately achieved in contract by the principle of Hadley v. Baxendale. Denial of recovery for unforeseen special damages has rendered the causation issue largely superfluous in contract.
rules emphasize the second and fourth.\textsuperscript{53}

If foreseeability is connected to damages, it offers the greatest flexibility in dealing with the remoteness problem. Under this approach, some injuries or losses are not recoverable because they are not foreseeable. If foreseeability is connected to causation, it is more difficult to separate a particular plaintiff's losses into recoverable and nonrecoverable if the wrongful act, in fact, caused all losses. If foreseeability is attached to the duty, it may determine whether a particular plaintiff was within the range of harm but not whether all of the plaintiff's damages are recoverable. Thus, the contract doctrine approach appears to give the court more flexibility and control over the specifics of remoteness questions than do the choices made in tort.\textsuperscript{54}

Foreseeability's attachment to damages in contract and to causation in tort was not an historical accident. Until the turn of the century, contract theory specified that the only party who could enforce a contractual obligation was the promissee or obligee in whom the right to the obligation was created; in other words, the plaintiff

\textsuperscript{53.} Several standards are generally applicable to the tort element of duty, depending on the cause of action. For instance, in negligence cases, the standard is ordinary reasonable care. Given the general, nontechnical nature of the duty standard, establishing the breach generally entails factual issues to be resolved by a jury. Damages are usually more straightforward, merely requiring the factfinder to assess the extent of plaintiff's losses.

Some of the most difficult legal problems in tort occur in the element of causation. If the conduct of the defendant was tortious and there was damage suffered by the plaintiff, was that damage proximately caused by the wrongful act? Although the precise meaning of proximate cause is the subject of some dispute, see Dellwo v. Pearson, 259 Minn. 452, 453-54, 107 N.W.2d 859, 860 (1961) ("There is no subject in the field of law upon which more has been written with less elucidation than that of proximate cause.")., the determination of proximate cause turns on a combination of cause-in-fact, foreseeability of ensuing events, and the existence of independent intervening causes occurring between defendant's breach of a tort duty and plaintiff's damage. See Texas & Pacific Ry. v. McCleery, 418 S.W.2d 494, 497 (Tex. 1967) (using "but-for" test to determine whether or not a train's excessive speed was proximate cause of collision).

\textsuperscript{54.} The perspective from which foreseeability is judged distinguishes contract from tort. Contract is concerned with true foresight, examining those consequences which the promisor could have foreseen at the time of contracting. Tort is concerned with hindsight, an evaluation of an event after it has happened. Dellwo v. Pearson, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961). The Dellwo court held that foreseeability is not the proper test for proximate cause, but rather that proximate cause turns on whether the loss was the natural and probable result of the tortious act. Nevertheless, foreseeability remains a dominant aspect of tort analysis. Negligence is premised upon the existence of a duty, which is in turn premised upon whether the actor could have foreseen the likelihood of injury. There is, however, a more fundamental objection to this purported distinction between contract and tort. To a reasonable person, foreseeability is always a prescriptive standard to be used after the event to judge the defendant's action. A prescriptive evaluation carries with it a hindsight judgment. All human actors know the inevitability of being so judged by events as well as by other humans.
had to be in privity with the defendant. If a court felt there were policy reasons for limiting the promisor's liability while permitting the promissee some recovery, it had to distinguish among the various kinds of damages suffered by this single promisee.

Nineteenth century tort litigation had a different quality, since many people could be injured in a chain begun by a single tortious act. The negligence of a manufacturer of a stage coach could cause a wheel to break, injuring the driver, a passenger, the horses owned by the stage coach owner, a driver of a passing carriage struck by the stage coach, a bystander who was struck by a trunk thrown off the roof, the bystander's pregnant wife who suffers emotional distress at seeing her husband injured, and the baby born prematurely because of the mother's distress. If a court desired to limit a tortfeasor's liability to something less than all the damage caused, the duty element was a convenient and natural place to draw the line. Some injured parties could recover; others could not.

In the twentieth century, more people can enforce a contract obligation. This was accomplished in part by using third-party beneficiary concepts, and in part by abandoning the privity defense in breach of warranty actions. Thereafter, solving remoteness issues for all contract cases by looking only to the damage element became unnecessary. In those situations where the cause of action could be classified as tort or contract, the remoteness problems seem to call for a similar treatment.

Based upon the foregoing discussion and various approaches to conceptual formation, I propose the following definition of foreseeability: Foreseeability is such awareness of the serious possibility

55. With the acceptance of the third-party beneficiary doctrine, the issue of remoteness of parties became serious. Liability was limited by examining the intent of the promisee and promisor to determine whether a particular person was intended to have a right to enforce the contract. E.g., Isbrandtsen Co. v. Local 1291 of Int'l Longshoremen's Ass'n, 204 F.2d 495 (3d Cir. 1953). The analysis bears strong similarity to the scope of duty analysis in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

56. This is an expansion of the fact situation in the classic case of Winterbottom v. Wright, 152 Eng. Rep. 402 (1842), in which the Court of Exchequer severely limited the potential liability by classifying the action as contractual and using the privity defense to cut off all liability except to the contracting party.

57. The process began with Lawrence v. Fox, 20 N.Y. 268 (1842), in which the Court of Exchequer severely limited the potential liability by classify the action as contractual and using the privity defense to cut off all liability except to the contracting party.

58. The case most cited for this development is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), in which an automobile manufacturer was held liable for injuries resulting from a defective vehicle, despite the fact that the manufacturer had contractually prohibited such liability. The same result is dictated by U.C.C. § 2-318 (1977), although three variations with differing reaches are offered for selection by state legislatures. See id. comments 2 & 3.
that harmful consequences would ensue from a projected action that a reasonable and decent person would either choose to act in a way that avoids such harm or else could not voluntarily accept responsibility for the consequences of such harm.

This is formulated to clearly state the conditions of knowledge upon which we should ascribe legal blame. "Serious possibility" is used to recognize that this is not merely a matter of simple perception or awareness, but involves balancing all observations. It is ultimately not a perception but a judgment. "Decent" modifies reasonable person to make explicit that this is more than an economic cost-benefit analysis, since moral and legal interests which may not be purely utilitarian or efficient are a part of any such judgment. The alternative "avoid such harm" or "voluntarily accept responsibility for the consequences" is to build in both generalized tort obligations and individualized contract duties, in order to suggest that the concept is the same in both fields. The most problematic part of the formula is "choose to act," and it is now necessary to discuss what is meant by choice.

II. CHOICE

Both legal and social attitudes about the meaning of choice have shifted markedly from the nineteenth to the late twentieth century. Nineteenth century legal, social, and moral systems relied heavily on the values of individuality, personal responsibility, and fault. Contractual duties were assumed to arise from a voluntary undertaking by an autonomous, rational, and prudent adult of adequate economic means. A person reluctant to accept responsibility for meticulously carrying out a contractual undertaking had four choices: (1) refuse to assume the obligation, (2) condition his undertaking in such a way that all or part of the risk would be assumed knowingly by the other party, (3) charge more for the additional or unusual risk, or (4) insure against the risk. Had the

59. While I view this as essentially a nineteenth century view, it is very similar to contemporary attitudes of neo-classical economists and of Posnerian legal analysis. My characterization of these views as nineteenth century, and therefore outmoded, may well reflect my personal biases about these contemporary thinkers.

60. See supra notes 33-35 and accompanying text.


62. See Kerr S.S. Co. v. Radio Corp. of Am., 245 N.Y. 284, 157 N.E. 140 (1927) (amount charged is evidence for determining whether a normal or unusual risk was assumed by the defendant).
risk not been foreseeable, however, none of these options could have been selected by a rational planner. Without an opportunity for such election, a contract theory of liability based on choice and consent should logically conclude that the risk was not a part of the duty assumed.  

Because tort duty is imposed by law, the conclusion drawn by the preceding analysis—that foreseeability should limit consensual liability—initially appears to have no application in tort law, but potential tortfeasors did have three choices. The most obvious option for the nineteenth century actor occurred at the point of potential wrongdoing. Tort duties do not require impossible conduct. The cost of acting so carefully that little or no risk of harm is created may often be very high. Choosing not to act carefully because the cost of prudent action is too expensive is an autonomous choice, analogous to the contractual act.

A second choice is the possibility of an exculpatory contract. If the legal system permits a possible victim to waive in advance his right to sue for legal negligence, the potential tortfeasor can only negotiate such a waiver or release for those actions which could foreseeably produce such injury.

The third option is to purchase insurance. The more one elects to lead a risk-preferring lifestyle, the wiser it is to insure against those risks. The choice as to type and amount of insurance can only be made, however, for those risks which are foreseeable.

In nineteenth century tort and contract analysis, the defendant was regarded as having made choices. If he made bad choices leading to foreseeable harm to the plaintiff, then the defendant was at fault. This personal responsibility for the wrong choice was a sufficient, and perhaps the only, acceptable ground for making him pay the injured plaintiff.

Attitudes about choice are very different in the late twentieth century. Complex and interdependent social organizations have made most human activity collective rather than individual. Psychoanalytic and psychological theory as well as ongoing biological

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63. A similar conclusion with regard to tort duty was reached in Palsgraf v. Long Island R. R., 248 N.Y. 339, 342, 162 N.E. 99, 99 (1928) ("If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming . . . did not take to itself the quality of a tort because it happened to be a wrong . . . .").

64. This is not solely an economic or cost-benefit analysis. It can refer to lifestyle and personality values. A person who is risk-preferring obviously pays a higher psychological cost in living a prudent, safe life than one who is risk-averse.


66. Two studies which argue that this is the inevitable result of modern technological
research have cast doubt on the degree to which human choices are rational or controllable. Rapidly evolving technology with unpredictable side effects causes unexpected and immense losses. All of this combines to leave modern commentators uncomfortable when talking about personal fault. If they feel uneasy about ascribing moral blame to complex interdependent actions with unpredictable consequences, then they are even less sure about using blame as a basis for transferring losses from the victim to an actor. This uneasiness about personal autonomy and personal blame has contributed to the attitude that modern tort theory is less concerned with minimizing harmful activity and more interested in compensating victims.

The de-emphasis of personal fault still leaves the twentieth century actor with the important choice of insuring against risks. While a person may not be blamed for injuring another, he will surely be blamed if he does not have the foresight to insure against a known possibility. A person may occasionally drive carelessly without being regarded as abnormal or dangerous. If, however, he drives uninsured, he will be regarded as foolish and seriously blameworthy.

In order to prudently insure against risks, a certain level of foresight is necessary. A reasonable person should not only foresee the "serious possibility" of an injury, but should know enough to be able to buy the type of coverage needed and set the policy limits high enough to cover losses. The foresight to insure should often be

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67. Perhaps the best known modern exponent of this position is B.F. Skinner. See B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953); J. ELLUL, supra note 66, at 318-87.

68. Manifestations of this shift include the widespread use of liability insurance to eliminate personal cost to the tortfeasor, the increasing use of no-fault insurance concepts, which eliminate any pretense of responsibility by the actor, and expansion of no-fault theories, such as products liability. See J. HENDERSON & R. PEARSON, THE TORTS PROCESS 32-37 (2d ed. 1981).

69. See Keeton, Conditional Fault in the Law of Torts, 72 HARV. L. REV. 401, 427-28 (1959), which suggests that there is a community sense of morality which ascribes blameworthiness in the following fashion:

It is the moral sense of the community that one should not engage in this type of conduct, because of risk or certainty of losses to others, without making reasonable provision for compensation of losses. But if he makes such provision, his conduct is permissible.

70. "Serious possibility" is a term taken from the opinion of Scarman, L.J., in H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] 1 All E.R. 525, 536 ("[I]n an action for damages for breach of contract the plaintiff's loss must be such as may reasonably be supposed would have been in the contemplation of the parties as a serious possibility had their attention been directed to the possibility of a breach which has, in fact, occurred.").
expected of the victim as well as the actor. Assuming the availability of insurance for the quantifiable risks of both actors and potential victims, four theoretical situations are possible:

1. The actor has or should have adequate liability insurance, and the victim is uninsured;
2. The actor has no liability insurance, but the victim has or should have adequate accident or property insurance;
3. Both foresaw or should have foreseen the risk, and both carry insurance;
4. The risk was not foreseeable to either party, and neither has insurance.

If we abandon fault analysis, cases one and two are easy to resolve. The insurance compensates the injured party, and that closes the matter.\[71\]

Case three is a situation of inefficiency, since more insurance is or ought to have been purchased\[72\] than is needed for compensation. Foreseeability cannot adequately eliminate this inefficiency. Some form of social consensus or legal regulation should decide the responsibility of each party in the situation where foreseeability of harm and foreseeability of danger overlap, and both the actor and victim are insured.\[73\] One argument for placing the obligation on the victim is based on efficiency, asserting that potential victims can insure themselves for the least cost, since they can best assess the value of their property, health, or life.\[74\] Actors, however, must purchase sufficient liability insurance to compensate the most ex-

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71. To avoid the necessity of establishing fault through litigation requires barring the first-party insurer of the victim from subrogating itself to the victim's rights against the tortfeasor. Discussions about abolishing the analogous collateral source rule so that the tortfeasor may be credited with collateral benefits, including first-party insurance, require barring the right of subrogation in the provider of the collateral benefit. See Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 CALIF. L. REV. 1478 (1966).

72. Case three, which demonstrates overinsurance, poses a clear theoretical choice. If a person has the responsibility of insuring against a risk and elects to take the chance of carrying no or insufficient insurance, he may be left with the consequences of that choice. This situation seldom occurs, since many actors and many victims are underinsured. The limited insurance of a liability policy and the limited insurance of an accident policy may have to be combined to fully compensate the victim.

73. Some worry that an injured party might actually profit from an injury. The goal of both tort and contract should be to award full compensation, but no more, to an injured plaintiff. This goal may be reinforced by the operation of the collateral source rule in tort. See RESTATEMENT (SECOND) OF TORTS § 920A(2) (1965) and comments. Permitting subrogation in favor of the collateral benefit providers is designed to avoid overcompensation to the injured party. The problem in tort, much more so than in contract, is the practical difficulty of determining exactly what is full and fair compensation.

74. One view suggests that the Hadley rule in contract functions to place the risk on parties who can best be informed about a potential problem and can avoid its consequences at
pensive potential risks.\textsuperscript{75}

In case four, no particular legal result is clearly appropriate. This could be resolved by the common law principle that the loss should fall on the victim. Since the loss was not foreseeable, the actor was under no obligation either to act carefully or to buy insurance. Thus, the actor did not have the kind of fault that would justify transferring the loss to him to be paid out of his personal assets.

III. Categorization

Classifying the plaintiff's cause of action as tort or as contract may invoke different concepts of foreseeability. This raises difficulties in borderline cases. The area of overlap in which borderline cases occur may be narrow or broad, depending largely on the conceptual definitions of tort and contract.\textsuperscript{76} A willful breach of contract, where the promisor knows or should know it will cause harm, could well be analyzed as tort. Every contract breach where the failure of performance was caused by negligence might be treated as a borderline case.\textsuperscript{77} Protection of the reliance interest, originally done primarily in tort,\textsuperscript{78} but now widely protected in contract under promissory estoppel notions,\textsuperscript{79} also could be viewed as an overlap least cost. See \textit{Evra Corp. v. Swiss Bank Corp.}, 673 F.2d 951, 955-59 (7th Cir. 1982) (Posner, J.).

\textsuperscript{75} The widespread adoption of no-fault automobile insurance, the suggestion that no-fault insurance might be used in medical malpractice, and the trend towards abolition of the collateral source rule in medical malpractice actions indicate that the social process of making this choice in favor of first-party protection rather than third-party liability insurance is well under way.

\textsuperscript{76} \textit{Cf.} K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 346 n. 315b (1960):

One recalls also from the Legal Apocrypha: "And the Lord said: Let there be contracts and let there be torts. And it was so. And He divided contracts from torts. And darkness, etc." How apocryphal this notion of the nature of things is, our small samplings show: Washington, 1940, shows tort and contract merging in regard to bad food; Washington, 1958, builds a principle of proof of damages which covers contract and tort alike; Ohio, 1957, is breaking the warranty action loose from "privity" in regard to an electric cooker; New York, 1958, is spreading actionable misrepresentation over into the field of contract formation—not with respect to out-of-pocket "reliance" damages, but with respect to lost-bargain damages, as well.—Yet the Legal Apocrypha still wield vicious power.

If this passage is read broader than discussing penumbral or borderline problems, then it seems wrong. Tort and contract are not one. They are two different fields of legal liability with different problems and different sources of obligation. See \textit{infra} text accompanying notes 103-12.


\textsuperscript{78} \textit{See} 3 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 173-75 (1906); Ames, \textit{The History of Assumpsit}, 2 HARV. L. REV. 1, 2-4 (1888).

\textsuperscript{79} \textit{See} RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
An example of overlap is the compulsory contract situation where a customer sues a public utility or a common carrier for harm caused by negligently providing service. The New York Court of Appeals faced such an issue in Kerr S.S. Co. v. Radio Corp. of America. The plaintiff, a ship owner, cabled a coded message through the defendant to the plaintiff's agent in Manila. This message contained instructions about loading freight. Because of the defendant's negligence, the message was not delivered, and the plaintiff lost the substantial freight charges it would have collected from the shipper. The plaintiff failed to persuade the court that this loss of freight was sufficiently foreseeable at the time of accepting the message so as to meet the standard of Hadley v. Baxendale. The plaintiff then contended that his cause of action was really tort and that therefore the contract limitation did not apply. Justice Cardozo, writing for the court, rejected this argument, stating:

Though the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty . . . . [T]here is little trace of a disposition to make the measure of the liability dependent on the form of action. A different question would be here if the plaintiff were seeking reparation for a wrong unrelated to the contract, as e.g., for a refusal to accept a message . . . .

Thus, faced with a case in the area of overlap, Cardozo chose to categorize it as contract and apply the more limited liability.

Products liability is an increasingly important borderline area. In a typical products liability action, the injured party sues the retailer, wholesaler, or manufacturer of goods to recover for injuries or losses caused by a defective product. Products liability theory is a blend of warranty liability from contract, and negligence rules from tort.

80. 245 N.Y. 284, 157 N.E. 140 (1927).
81. Id. at 286, 157 N.E. at 140.
82. Id. at 287, 157 N.E. at 141.
83. Id.
84. Id. at 288, 157 N.E. at 141.
85. Id. at 292, 157 N.E. at 142.
86. Id., 157 N.E. at 143.
88. For an overview of products liability theory, see PROSSER & KEETON, supra note 1, §§ 95A-98.
A recent English case demonstrates the joint operation of tort and contract elements in products liability litigation. The plaintiff, a farmer, purchased a hopper (a grain storage device) manufactured and installed by the defendants. The defendants installed the hopper with its ventilator taped closed. Because of improper ventilation, the feed stored in the hopper became moldy, and some animals contracted an intestinal infection. The resulting loss of the livestock was valued at 36,000 English pounds.

After a complex and difficult trial, the plaintiff recovered his entire loss. In rendering judgment, the trial judge found that: (1) the plaintiff's action was contractual, brought to recover for a breach of an implied warranty of fitness for a particular purpose; (2) the animals' illness was caused by the moldy food; (3) the plaintiff could not have foreseen that the food would cause the illness; and (4) the defendant manufacturer did not foresee the possibility of harm under the formulation.

The Court of Appeals affirmed the trial court's judgment. In view of the fact that the plaintiff's action was contractual, the finding that the defendant's knowledge did not meet the test of posed a serious problem. Lords Denning and Scarman agreed that "the amount of damages recoverable does not depend on whether the plaintiff's cause of action is breach of contract or tort for, in principle, the test of remoteness of damage is the same in contract as in tort...."

Lord Denning discerned from prior cases an emerging rule that recovery of lost profits was limited by the contract rule while recovery for physical injury to a plaintiff's person and property were governed by tort principles. Lords Orr and Scarman found no such distinction but reached the same result by construing the Eng-

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90. Id. at 529.
91. Id.
92. Id.
93. Id. at 530.
94. Id.
95. The trial judge found that defendant manufacturers could not at the time of contract reasonably have contemplated that there was either a very substantial degree of possibility or a real danger or serious possibility that the feeding of mouldy pig nuts in the condition described by Mr. Parsons would cause illness in the pigs that ate them, even on an intensive farm such as that of the plaintiffs.
96. Id. at 541.
97. Id.
98. Id. at 532-34.
99. Id.
lish law on contract damages to require only that the defendant foresee, at the time of contracting, the serious possibility that an injury—for example, that illness caused by consumption of moldy food—would be caused by a breach. It was not necessary that the defendant foresee the type, degree or extent of the injury. This formulation is close to accepting the tort standard in contract.

Both the New York and English courts agreed that the standard limiting damages should not differ whether the action is viewed as contract or tort. The courts differed, however, when faced with the problem of categorizing a borderline fact situation; the New York court chose the contract measure, while the English court opted for the tort standard.

One major problem in contemporary contract and tort theory is the issue of whether there are two separate fields of liability or only one. When important consequences depend on whether a case is classified as tort or contract, it might seem obvious that we are dealing with two separate fields. If, however, theoretical analysis says the two fields are essentially only one, then the differing consequences flowing from the meaningless categories should be abandoned. Must we maintain two separate regimes of liability just because the statute of limitations period is longer for one than for the other? Perhaps we should instead ask whether it makes sense to have differing limitation periods.

Foreseeability poses a similar question. Should we maintain

100. Id. at 534-41.
101. See supra note 86 and accompanying text.
102. See supra notes 99-100 and accompanying text.
103. One school of contemporary contract theorists, the so-called “tort-theorists,” argue that the theories of liability based on reliance notions are essentially the same in both contract and tort. Major figures in this school are Grant Gilmore and Patrick Atiyah. See, e.g., G. Gilmore, The Death of Contract 87 (1974) (contract becoming reabsorbed into tort); P. Atiyah, The Rise and Fall of Freedom of Contract 750-64 (1979) (stressing movement away from consent as basis of liability even in situations classified as contractual). For a criticism of this position and an argument that the two fields are separate in theory, see Levin & McDowell, supra note 33, at 58-61.
104. In addition to foreseeability as a limitation on damage recovery, other distinctions between contract and tort include shorter statutes of limitations in tort, the availability of punitive damages in tort but not in contract, the degree to which liability can be waived or exculpated, and the existence of strict liability in contract contrasted with the requirement that fault must be proven in negligence.
105. The English bar and bench have been much concerned with whether the remoteness test is the same in contract and tort. In a fascinating line of cases, the English courts have tried to define foreseeability in contract and tort. See Victoria Laundry (Windsor) Ltd. v. Newman Indus., [1949] 2 K.B. 528 (foreseeable that breach of contract to deliver a boiler on a set date would result in lost profits to the buyer); Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (Wagon Mound I), [1961] A.C. 388 (not foreseeable that oil spilled from
tort and contract as separate fields simply because the foreseeability test results in a different amount of recoverable damages in each? Or should we examine whether foreseeability and remoteness issues should be treated the same because the theory might be the same? That cannot be answered without first determining whether the theory of tort liability should differ from that of contract obligation, and then exploring whether the differing theories call for different uses of foreseeability.

The theoretical distinction between contract and tort should be based on the source and nature of the legal obligation. The obligation in tort is imposed generally and is intended to fairly control the relations among people. Tort obligations are normative or average standards of conduct.\textsuperscript{106} The contract obligation, by contrast, is voluntarily assumed.\textsuperscript{107} The duty created may be highly individualized. It may also be unfair when measured by the normative standards of that model of socially conforming conduct, the reasonably prudent person.\textsuperscript{108} The regime of contract must be kept separate from tort in order to provide machinery for the creation of nonconforming and unusual duties.\textsuperscript{109}

Does a distinction between tort and contract based on the

\begin{itemize}
\item ship would catch fire and damage wharf); Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. (Wagon Mound II), [1967] A.C. 617 (foreseeable that spilled oil would catch fire and damage nearby ships, even though risk was slight); C. Czarnikow Ltd. v. Koufos (Heron II), [1969] A.C. 350 (foreseeable that breach of contract to deliver sugar would result in lost profits when sugar prices fell during delay); H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] 1 All E.R. 525. In these cases, the barristers argued that the test of remoteness is the same in both contract and tort. In the Heron II case, the House of Lords seemed to conclude that the test of remoteness is different for the two fields, with the test for contract being whether the loss was in the contemplation of the defendant at the time of contracting, and the test for tort being whether the injury was foreseeable as the natural and probable result. In Parsons, a later case, Lord Denning said:

\begin{quote}
I find it difficult to apply those principles universally to all cases of contract or to all cases of tort, and to draw a distinction between what a man 'contemplates' and what he 'foresees.' I soon begin to get out of my depth. I cannot swim in this sea of semantic exercises—to say nothing of the different degrees of probability—especially when the cause of action can be laid either in contract or in tort. I am swept under by the conflicting currents.
\end{quote}


\textsuperscript{106} See O.W. Holmes, supra note 24, at 86-89.

\textsuperscript{107} For a detailed argument that contract must be founded on voluntariness, see Levin and McDowell, supra note 33, at 28-43.

\textsuperscript{108} This is not to say that fairness is not an important aspect of the contractual obligation. For an explanation of the relationship between fairness and voluntariness of a contract obligation, see id. at 31-33.

\textsuperscript{109} Most contractual relations are now so standardized in adhesion contract situations that a standardized definition of obligation at first appears to work as well in contract as in tort. There are two reasons for rejecting that proposition, however. The first is that important contractual arrangements are not standardized. The second is that the system ought to
source of the obligation require distinctive concepts of foreseeability? The extent to which a contracting party intends to assume an individualized and atypical obligation indicates the foreseeability that breach of that duty will cause consequences differing from breach of a standardized or conventional duty. The Hadley v. Baxendale distinction between general damages, or conventional foreseeability, and consequential damages, or particularized foreseeability, may not be essentially a contract distinction but rather, a distinction between tort and contract. If the routine standardized transaction, carrying standard obligations and giving rise to standard damages which are imputedly foreseen, could be viewed as more tortious than contractual in nature, then finding the foreseeability which is real and based on consent to an additional or atypical obligation and risk would identify this obligation as belonging to the realm of contract.

A final theoretical problem is the lack of criteria to use in making choices about whether to categorize a case as contract or tort. No theory, however complete, can totally avoid the borderline classifications problem, but the area of uncertainty should be kept to a minimum. Consistent with the theoretical distinctions between the two fields, the criteria for categorizing should relate to the primary source and nature of the defendant’s obligation. Because the source of the obligation in borderline cases can often be traced to either field, the courts should develop rules which allow weighing the voluntariness of a defendant’s action against social policies and generalized expectations. If the voluntariness is the more important ground of liability, the case should be analyzed under contract theory; if the infringement of generalized expectations is paramount, the case should be categorized as tort.

There are problems inherent in collapsing the fields of contract

provide the parties in a routine situation with the power to individualize it by contracting out of all or part of the standardized provisions.

110. Another problem must be faced in a serious reconsideration of contract and tort theories. What issues traditionally analyzed as belonging to one field really belong to the other? Two sub-areas normally classified as contract and thus controlled by contract rules are quasi-contractual recovery and reliance recovery, particularly promissory estoppel. If contract is defined as the voluntary assumption of an obligation, neither sub-area is genuinely contractual. Rather, they are tort theories taught as contract partly due to historical developments and partly for pedagogical convenience. Foreseeability is important in reliance theory in deciding whether there is an obligation at all. The defendant must have reasonably expected (foreseen) that his promise would induce reliance before there is any liability. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Remoteness is not usually a problem in reliance theory, since the plaintiff is limited to recovering reasonable reliance expenses. "Reasonable" functions in this context as the remoteness controller.
and tort simply because there is no clear theory or criteria for distinguishing between them. These problems are evident in the ongoing development of products liability jurisprudence, in which there has been increasing movement away from fault concepts and toward reliance on strict liability theory.

IV. STRICT LIABILITY AND PRODUCTS LIABILITY

Strict liability theory presents serious remoteness issues. Since liability is not based on fault, there is no opportunity for choice, which in fault-based liability makes foreseeability a defensible element in differentiating those injuries for which the defendant is responsible from those whose costs the victim must bear.

Strict liability theory has evolved from the early cases of keeping dangerous animals or nonnatural substances likely to escape and cause harm,\(^1\) through cases involving blasting or dispensing inherently dangerous commodities\(^2\) to modern products liability.\(^3\) Thus, the products liability concept moved from situations amenable to the use of fault notions based on the defendant's choice to engage in extraordinarily risky conduct to cases where the defendant's activity was increasingly common, socially useful, and sufficiently complex to make proof of real fault difficult, if not impossible. Strict liability theory abandons the inquiry into whether the defendant has violated a legal duty; instead, emphasis is placed on compensating the injured plaintiff.

One formulation of products liability theory now widely used is section 402A of the Restatement (Second) of Torts.\(^4\) Nowhere in

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113. PROSSER & KEETON, supra note 1, §§ 75-81 & 95-104A.

114. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*RESTATEMENT (SECOND) OF TORTS* § 402A (1965).
this section or the comments is the concept of foreseeability discussed. This is appropriate, since the linking concepts of fault and choice have been abandoned. Yet, although foreseeability has disappeared from the theory of products liability, it is still manifest in cases requiring a causal connection between the defective product and the injury suffered by the plaintiff.\textsuperscript{115} This connection is measured by the traditional tort standard of proximate cause and encompasses the notion of foreseeability.\textsuperscript{116} If the use was not a foreseeable one, either because the use was outside the anticipated risks,\textsuperscript{117} or because the consumer failed to read or follow the warnings or instructions,\textsuperscript{118} the manufacturer will not be liable. The degree to which foreseeability has been used or can be used to limit liability for remote consequences is much more limited than in traditional fault analysis.

Products liability is not a system of legal liability based upon wrongdoing, but a judicially imposed insurance scheme for the protection of injured consumers.\textsuperscript{119} The manufacturer or the dominant

\textsuperscript{115} \textit{See} Prosser & Keeton, \textit{supra} note 1, § 102.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{See}, e.g., Schwartz v. American Honda Motor Co., 710 F.2d 378 (7th Cir. 1983) (evidence supported claim that plaintiff misused vehicle he was riding when he lost control and sustained severe burns; no definitive proof was offered that such misuse was reasonably foreseeable by the defendant); Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) (neither brewer nor manufacturer liable for injuries sustained by eight-year-old child who threw a bottle against telephone pole, since such an act is clearly beyond the ordinary use intended for product); American Optical Co. v. Weidenhamer, 457 N.E.2d 181 (Ind. 1983) (force exerted on the right lens of a pair of safety glasses far exceeded what was reasonably foreseeable and what the lens was designed for; manufacturer held not liable for lathe operator's injuries sustained when an object struck and shattered the lens).

\textsuperscript{118} \textit{See} e.g., Dugen v. Sears, Roebuck & Co., 73 Ill. Dec. 320, 454 N.E.2d 64 (Ill. App. 1983) (manufacturer and seller of a lawn mower not liable for injuries suffered by plaintiff when mower picked up one ejected object which blinded plaintiff's right eye because the operator ignored warning about mowing near bystanders); Levin v. Walter Kidde & Co., 51 Md. 500, 248 A.2d 151 (1968) (user of siphon bottle read instructions for bottle's use but ignored them; court denied recovery for injuries from bottle because of failure to use reasonable care).

\textsuperscript{119} \textit{See} Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) ("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."); \textit{see also Restatement (Second) of Torts} § 402A, comment c (1965) ("On whatever theory, the justification for the strict liability has been said to be . . . that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained."); Klemme, The Enterprise Liability Theory of Torts, 47 U. COLO. L. REV. 153, 227-28 (1976) ("The purpose of enterprise liability theory of tort is to permit inevitable losses to be shifted to the economic beneficiaries of the enterprise which brought them about. . . . ").
person in the marketing chain becomes the administrator of an insurance plan; that party can most effectively spread the cost of defective or injurious products among all users. The cost allocated to each consumer for the projected losses will become a part of the price. This scheme conceals a serious remoteness problem.

An example of the limitless liability which can be imposed appears in *Ilasky v. Michelin Tire Corp.* There, the plaintiff's father, after purchasing a used car with two Michelin radial tires on the rear wheels, had the rear tires switched to the front and purchased two conventional snow tires for the rear. While driving the car, the plaintiff lost control, crashed into a utility pole, and was severely injured. Her theory of liability was that the mixing of conventional and radial tires created a danger of oversteering, and that the product was defective unless adequate warning was given. Michelin had publicized the danger and warned every direct purchaser but had not warned purchasers of used tires. Plaintiff contended that the warning should have been affixed to the tire. The West Virginia Supreme Court affirmed a jury verdict of $500,000. Thus, for the price of two radial tires, and despite all reasonable efforts to warn of the danger, Michelin (and its other customers) must be prepared to pay a half-million-dollar verdict.

When an individual at risk purchases protection from a private insurer, each party has options for limiting potential liability. The insured selects the amount of coverage he desires; should his

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120. The statement in the text refers to insurance in its modern form, as a system of transferring risks to an insurer who can spread them over a pool of people subject to that risk. Insurance has been used in some cases in an older sense to mean that the “insurer” is absolutely liable without any fault and not subject to any qualifications or defenses. In some cases and scholarly discussion there is the statement that it is firmly established that a manufacturer does not have the status of an insurer as respects the products in which he deals. Enterprise liability requires that the claimant establish that the product was defective, that claimant's injury was caused by the defect, and that there was no assumption of the risk by the claimant. When these defenses are not available, the manufacturer either must have liability insurance or use insurance techniques to collect the reserves out of which losses will be paid.

121. 307 S.E.2d 603 (W. Va. 1983).
122. *Id.* at 607.
123. *Id.*
124. *Id.*
125. *Id.* at 608.
126. *Id.*
127. *Id.* at 614.
128. See R. Keeton, *Basic Text on Insurance Law* 329 (1971) (discussing the ability of insured or insurer to limit recovery to a dollar amount); see also W. Young & E. Holmes, *Cases and Materials on the Law of Insurance* 141-236 (2d ed. 1985) (discussing insurer's ability to refuse to accept unusual risks).
subsequent loss exceed the selected limits, he bears the excess. The insurer also has substantial control over the extent of his liability. For instance, the insurer can refuse to extend coverage if the perceived risk is too great. Alternatively, the insurer can agree to insure but only up to a certain dollar limit. Under governmental insurance schemes such as Social Security, unemployment compensation, or workers' compensation, the legislature can fix limits by setting eligibility requirements and maximum benefits. Failure to set realistic limits, as may arguably have happened with cost of living clauses in entitlement programs, is correctable by subsequent legislative action.

A comparison between governmentally imposed insurance and products liability can be illuminating. Two classes are subject to the substantial risk of injuries caused by modern industrial production: employees injured by the productive machinery and consumers injured by defective products. Employees are protected by workers' compensation acts which impose absolute liability on employers for injuries arising out of the course of employment but limit compensation to specified amounts for various types of injuries. Consumers injured by defective products generally recover under the strict liability theories within the Uniform Commercial Code's implied warranties or under section 402A of the Restatement (Second) of Torts. Unlike the workers' compensation statutes, the implied warranty and strict liability in tort theories do not set maximum dollar limits on damage awards.

In 1913 Jeremiah Smith questioned whether the preferential treatment under the newly enacted workmen's compensation acts for injured workers whose damages were not caused by anyone's fault could be justified when compared with the fate of bystanders or of paying customers who were injured in the same accident but could recover nothing. Given the evolution of products liability since that time, his question can be reversed. Can we justify the privileged position granted to consumers who are injured without fault when compared to the limited compensation of workers injured without fault in the course of producing consumer products?

Because products liability theory does not permit the parties to set maximum liability limits, the only choice the manufacturer may have is to go out of business. When the activities in question are not

rare and dispensable enterprises around which strict liability arose, but activities vital to our economic system, such as the pharmaceutical, chemical, building materials, and automobile industries which are the subject of the bulk of product liability litigation, eliminating the activity is no longer an acceptable choice to society. Yet, this is the potential result of a liability system which ignores the issue of remoteness.

The choice is also not the original one in tort of acting so carefully that there is no liability. Products liability losses under section 402A or the UCC implied warranties fall into three groups: (1) those which are unavoidable despite the strictest care, (2) those which result from avoidable carelessness, and (3) those which arise from intentional cost-benefit choice, where managers determine that the total cost of compensating the losses caused by the product is less than the cost of altering the product to prevent the losses. A manufacturer has little motive to identify which defective products fall in the second group and then try to minimize or eliminate that group when he does not have to pay the losses out of his pocket.

The costs are passed on to the consumer.

The market also does not effectively control the cost of this insurance. It is an unpredictable, but fixed, cost. It is unpredictable because it is subject to the irrational and uncontrollable process of jury awards. If a competitor has fewer losses and thus a lower cost of insurance, the producer in question must cut costs in other ways because this is an unavoidable cost. It appears, ironically, that jury awards indicating that one producer is causing more injuries than his competitor would force that producer to cut quality even more in order to be price competitive.

132. One of the best known and most egregious examples of this was the memorandum showing that Ford managers expressly decided not to make a six-dollar-per-car alteration on the location of gas tanks in the Pinto automobile because it would cost more than paying a few wrongful death judgments which they anticipated would come from this design defect. See Ex-Ford Aide's Testimony Called Key to Pinto Trial, N.Y. Times, Feb. 9, 1980, at A6, col. 5.

133. "His" and "manufacturer" are used here analytically, not descriptively. Most manufacturers are corporations, and actions taken are those of corporate managers. Their actions may affect profits and thus impact on stockholders, or affect price, and thus impact on consumers. Normally, corporate managers do not pay the cost of their bad decisions. This has eroded the element of personal responsibility which, along with the concepts of fault, choice, and foreseeability, exerted an effective limitation on careless conduct.

134. As a possible consequence, the fortunate competitor with fewer products liability losses might raise prices to meet those of the unfortunate producer, thus increasing profits.
V. THE CONNECTION BETWEEN RESPONSIBILITY AND COMPENSATION

When traditional contract and tort theories were being formalized in the nineteenth century, liability of the defendant-actor and compensation for the plaintiff-victim were essentially two sides of a single coin. In every two-party litigation of the common law paradigm, it seemed obvious that a defendant who had violated a legal duty should pay full compensation to any innocent party he had injured. This necessary connection between the responsibility for injury and the duty to compensate continues to be an unexamined assumption of our civil law.135

Certain conditions must exist for the connection to be defensible. The defendant must be the actor who was at fault in violating the legal standard, the plaintiff must not be responsible for the loss, and the defendant must not be able to shift the duty to pay the judgment to someone else. Twentieth century social and legal developments raise serious doubts as to whether these conditions are present in the bulk of current civil litigation.

The first of these developments is the movement away from legal liability grounded on clear fault toward theories of liability with only tenuous connections to blameworthy conduct. In cases of intentional torts and willful breaches of contract, compelling the perpetrator to compensate the victim for all injuries caused, regardless of cost, is both morally and socially defensible.136 Liability based on negligence (carelessness) carries a lesser degree of fault and consequently a less compelling obligation for the actor himself to make full compensation.137 Where the legal system permits the requisite carelessness to be established by inference, as in res ipsa loquitur, or eliminates the necessity of establishing any wrongdoing, as in products liability, the connection between violation of duty138

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135. This assumption is also gaining acceptance in our criminal justice system, where repeated demands have been made to incorporate restitution to the victim as part of the criminal sanction. Since, however, most criminal acts that would give rise to a restitution claim would permit a civil action for such recovery, such demands are redundant and evidence confusion between criminal and civil aims.

136. This idea is attributable to Aristotle, whose concept of corrective justice required the wrongdoer to restore to the victim all losses caused by his wrongful act. Both Aristotle's discussion and his illustrations indicate that the wrongdoing had to be intentional. See ARISTOTLE, NICOMACHIAN ETHICS, Bk. V, Ch. IV (T. Taylor trans. 1918).

137. This explains in part why liability insurance may always be purchased to indemnify against negligence liability, but in many states it is against public policy to indemnify an intentional tortfeasor. See, e.g., Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

138. As one gets closer on the continuum to no-fault liability, it seems incongruous to
and obligation to pay full compensation becomes even less self-justifying.

A second and related development is the rapid increase in the use of liability insurance to transfer the duty to compensate from the person who breached the legal duty to a professional risk spreader, the insurance company. A property owner always has his assets at risk because some of his actions might be careless and cause injury. That risk is much greater now, given modern technology's increased potential for damage. Assuming the legal system has a policy against making property interests highly uncertain because of the ever-present danger of civil liability, there is a dilemma about how best to achieve that goal.

One approach dominant in the nineteenth century was to tighten the scope of liability through the use of foreseeability and such other remoteness controllers as the privity requirement. Outside of these devices, some means of providing compensation had to be found to prevent the bankrupting of responsible actors whose wrongdoings were only some form of carelessness or misjudgment. Liability insurance has generally been the answer; of course, the more widespread the use of liability insurance, the more the legal system could relax tight controls on remoteness recovery.

A third development is the increased degree to which the party responsible for the injurious action is a corporate enterprise. If the activity in question was within the realm of the corporation's business, the duty to compensate is on the corporation. Choices, however, are made by real, not artificial persons. It is often difficult to identify which corporate agents are responsible for the harmful decisions or injurious activity because corporate decisionmaking is usually collective. Even if the person or persons responsible for the wrongful act are identifiable, placing the duty to compensate on those individuals may be very difficult if they were engaged in cor-

139. See supra note 56 and accompanying text.
140. For the poor, this has not presented a problem; they are not likely defendants in civil suits due to their inability to respond in money damages. Nevertheless, the poor are subject to various forms of harassment inflicted by creditors seeking to secure payment of debts. The legal system has generally responded by restricting the more egregious collection tactics. A well-known example is Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (consumer sales security agreement which took unfair advantage of the seller's bargaining power held unconscionable and thus unenforceable).
141. See Prosser & Keeton, supra note 1, § 69.
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porate business. In the case of corporate action, there are strong incentives to concentrate on the issue of compensation and avoid the problem of personal responsibility for obeying the law.

To the extent that the compensation duty is carried by an insurer or by a corporate enterprise, and the triggering condition for that duty is conduct only tenuously connected with blameworthy conduct by an identifiable person, there has been a damaging impact on the normative side of the civil law. From the perspective of the defendant, a judgment for damages which must be paid out of his assets is a fine for violating a legal norm. Once an actor can purchase indemnity insurance and budget the premiums as a regular cost of living or of doing business, there is no personal cost exacted for acting carelessly. If the aim of the civil law is merely to compensate the victims for injuries, the loss of normative effectiveness may not be serious, although the reduced incentive to act with reasonable care might lead to increased total costs for compensation.

VI. FORESEEABILITY AND THEORY

An analysis of the concept of foreseeability in our civil law will not be complete until a choice is made between fault-normative theories of law and compensatory, no-fault theories. That choice is forced because foreseeability does and should operate differently under each approach.

If the dominant purpose of contract and tort law is normative, the content given to foreseeability must aid in answering the question of whether the defendant has violated a legal duty. How much awareness of the potential harm is necessary before a rational and decent person would choose to act in such a harm-avoiding manner must also be determined. Within this theoretical framework, foreseeability has a justificatory role. It legitimates the condemnation of the defendant as a lawbreaker and permits society to impose unpleasant consequences upon him. Much of the discussion in the cases has carried this connotation, as would be expected in a sys-

142. If there is joint liability between the corporation and an employee, an injured plaintiff will usually seek to enforce the judgment against the corporation's "deep pocket." Moreover, the corporation will often have liability or indemnity policies protecting their employees against personal liability while they are acting for the corporation.

143. In tort cases, more clearly even than in contract ones, foreseeability is the criteria which is used to distinguish the permissible or acceptable kinds of conduct from those which are violations of a legal duty and therefore condemned as wrongful or improper. Eg., J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979): In each of the above cases, the court determined that defendants owed plaintiffs a
tem which has traditionally regarded itself as fault-based.

If our civil law's dominant aim has become compensatory, intended to provide adequate monetary protection for the injured party, foreseeability functions to identify the amount and sources of the injured party's recovery. This role of foreseeability can be specified only in light of what compensatory schemes are available in the legal-economic-social system.

Compensatory systems could be totally private. In theory, the defendant could always be required to compensate the injured plaintiff from his own resources. Alternatively, the defendant could be allowed to transfer that responsibility to a private insurer by purchasing liability insurance. Finally, the victim could have purchased accident insurance prior to the harm.

Compensatory schemes could be totally governmental, as in a complete welfare state; all persons in need, due to accident, fate, natural processes, negligent activity, or intentional wrongdoing, would receive necessary assistance from governmental programs.144

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duty of care by applying criteria set forth in Biakanja v. Irving . . . . Those criteria are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm . . . .

Rather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability: "While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct . . . . [F]oreseeability of the risk is a primary consideration in establishing the element of duty."

Id. at 804-06, 598 P.2d at 63-64, 157 Cal. Rptr. at 410-11 (citations omitted); Markowitz v. Arizona Parks Bd., 706 P.2d 364 (Ariz. 1985):

The first question presented, therefore, is whether the state as a possessor of land is under any duty of care with respect to the safety of those it has invited to use the particular parcel of state land. Arizona recognizes that a possessor of land "is under an affirmative duty" to use reasonable care to make the premises safe for use by invitees . . . . In the case of invitees, the law generally recognizes that this standard of reasonable care includes an obligation to discover and correct or warn of hazards which the possessor should reasonably foresee as endangering an invitee.

Id. at 367 (emphasis in original); Gruetzemacher v. Billings, 348 S.W.2d 952 (Mo. 1961):

In any event liability to an invitee does not result alone from (1) ownership or occupancy, (2) invitation, express or implied, and (3) injury, because the owner or occupant is not an insurer of the safety of even a business invitee . . . . "The basis of his liability is his superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know . . . .""}

Id. at 957 (citations omitted).

144. That such an approach is not impossible in our political system is evidenced by the proposals for a negative income tax or a system of minimum family income which were discussed with some seriousness during President Nixon's administration. See generally D.
If government support is high enough, there would be little or no need for a tort system or for private insurance.

The present system is a hybrid, relying largely on private insurance and personal judgments against defendants, but supported by a floor of governmental programs. If compensation is the goal, the definition of foreseeability must relate to responsibility for guaranteeing compensation. A threshold issue is identifying those relationships in which the potential victim should insure through first-party insurance and those situations in which the actor should carry third-party liability insurance. Foreseeability is of little use in this inquiry because, in most situations, foresighted victims will carry accident or property insurance and foresighted actors will carry liability insurance. If our civil law system is truly compensatory, fault is no longer a factor, and the responsibility for providing compensation could well be placed on the victim.

If the responsibility to provide compensation rests with the victim and he has sufficient resources to purchase private insurance, foreseeability has an important cutoff function, akin to traditional remoteness analysis or to contributory negligence defenses. If the victim should be aware of both the need to protect himself and of the potential range of injury but elects to purchase no insurance or to underinsure, he should accept the consequences of that choice. There is no justification for transferring the result of this bad judgment onto the defendant, once traditional fault analysis is abandoned. Presumably, the imprudent victim would still be entitled to the minimum protection of the governmental floor which society provides for those who could not adequately insulate themselves.

If the duty is on the actor to carry third-party insurance, he would probably fulfill this responsibility by carrying the types and amounts of insurance a reasonable person in his shoes would foresee as appropriate. This sounds very much like the Hadley v. Baxendale formulation. The actor must provide insurance for conventional damages unless he could foresee special damages, in which event he ought to insure against those special circum-

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145. Among the governmental programs are: worker's compensation, Social Security, unemployment insurance, Medicare, Medicaid, Aid to Families with Dependent Children, and general welfare. Perhaps private charity, including family and neighborly assistance, should be included in a complete listing of compensatory schemes.

146. The move to no-fault insurance in automobile injuries may well be a recognition of the appropriateness and effectiveness of using first-party insurance in a compensatory scheme.

147. See supra note 3.
stances. Thus, under a compensatory approach, tort and contract foreseeability are comparable.

It may be unnecessary to choose between a fault-normative view of civil law and a compensatory, no-fault view. Increasingly, compensatory solutions are the dominant ones. Allowing the compensatory approach to occupy the entire field could be described as recognizing an existing reality. A natural consequence would be the complete jettisoning of the fault-normative residue of nineteenth century solutions. Perhaps normative questions should be left to criminal law regulation, while the civil law should be concerned solely with compensatory matters.

This proposition is problematic, however. Criminal law has historically dealt with severe violations of very important norms; it addresses conduct more egregious than the violation of civil law norms. The most common civil law violations are: (1) breaches of contract which, while not willful or malicious, result from factors which the breacher should have anticipated and guarded against, and (2) careless conduct, fitting within the rubric of negligence, which produces harm. The typical contract and tort breaches tend to have the same quality of norm violation—conduct which is neither intentional nor malicious but which falls below the level of

148. The proper consequences for failure to insure when to do so was a foreseeable duty remain undetermined. One obvious consequence would be to require the actor to compensate the victim out of his property to the extent to which he should have insured. Often, however, the choice not to insure is made for reasons of economy and is likely to go hand-in-hand with being judgment-proof. This necessitates mechanisms within first-party insurance, such as the uninsured motorist provision in comprehensive automobile policies, to assure compensation against insolvent defendants. This furthers the argument that compensatory schemes should focus on first-party insurance purchased by prospective victims.

149. There is a practical, but not theoretical, difference. In contract, when the parties specify individualized, rather than standardized relations, foreseeability is heightened. Furthermore, contract provides the opportunity to allocate risks and the consequent responsibility to insure. The terms of a contract and the process of negotiation may make it easier in contract than in tort to determine who accepted the responsibility of a risk and the duty to compensate or provide insurance.

150. See Prosser & Keeton, supra note 1, § 85, at 608-15; Klemme, supra note 119, at 153 ("For more than a hundred years the trend has been away from the concept of fault as a basis for determining liability in the law of torts."); see also Manzanares v. Bell, 241 Kan. 589, 604, 522 P.2d 1291, 1304 (1974):

[A]ll studies concluded that the risk of tort liability based upon negligence is not a significant factor in inducing vehicle operators to drive more carefully; that the tort system of reparations based upon fault is excessively expensive and inefficient as a means of compensating automobile crash victims; that compensation distribution to accident victims under the tort system is inequitable in that it commonly results in overpayment for minor injuries, gross underpayment for those more seriously injured, and long delays in receipt of compensation.
action in which a rational, prudent, foresighted person would engage.

Can self-interest or nonlegal mechanisms such as the economic market produce the desired level of careful conduct? Is it permissible to "buy" the right to act carelessly or imprudently by paying for such action directly or through insurers, so long as that conduct is not criminal? Foreseeability, when used normatively, defines the area below acceptable conduct yet above criminal misconduct. Indifference to this area and acceptance of the compensatory aim as the dominant role of the civil law relegates foreseeability to the limited function of defining the amount of recovery.

Even if the normative function is retained as an important aim in the civil law, there is a final problem: determining the legal consequences which should attach to the breach of duty. The sanction of full compensation is often dysfuctional; in some instances, it would be too little, while, in severe injury cases, it could be much too large. To achieve normative ends, it is important that a sanction be paid out of the wrongdoer's pocket and not be transferable to an insurer. If, however, the severity of the civil sanction is measured by the magnitude of compensation, the anomaly may arise where penalties for mild civil violations are more severe than those statutorily mandated serious criminal violations. One possible solution could be to prohibit actors from transferring a specific portion of the damages to their insurers. The amount need not be large in most cases, since it is only intended to give bite to the normative standard. It might operate analogously to the deductible in first-party insurance. Thus, an insured who violated a civil legal duty would have to pay a specified amount out of his pocket before the insurer would be obligated to pay anything.

The content of foreseeability is controlled by theory, not so much contract or tort theory, but rather fault or compensatory theory. Foreseeability has always had two different formulations and two different functions. One formulation is the normative objective of the civil law, relevant to the issues of responsibility and obligation, manifest in the duty element in tort and in formation of the agreement in contract. The role of foreseeability at this level is justificatory. It seems improper to impose a tort duty on one who did not or should not have had sufficient knowledge of the potential harm to avoid it. It seems equally improper to say a party has voluntarily assumed a contractual duty for consequences he did not or could not foresee.

Where the search for fault has been abandoned, as in implied
contractual warranties and strict liability in tort, administrative difficulties of proving fault are probably responsible. Nevertheless, to say that it is administratively inconvenient to search for fault is different from holding that fault is unimportant. For instance, the law does not condone deliberate breach of an oral contract within the Statute of Frauds; instead, legal enforcement is denied because the administrative difficulties and potential for overreaching are so great.\textsuperscript{151} This distinction is of critical importance. Responsibility to conform to legal norms is always central to the civil law, even though we make a secondary judgment in certain areas of conduct that it is not practicable to pursue inquiry into that obligation.

Foreseeability in the compensation context is a very different formulation. There, foreseeability functions to identify upon whom the compensation duty falls and to set the level of compensation. This formulation is related to the concept of remoteness and is generally tied to the issues of damages in contract and causation in tort. As long as responsibility and compensation issues were seen as interlocking, so that the wrongdoer had the responsibility to compensate, the two conceptions of foreseeability could easily be fused or confused. Where this connection has been broken, as in those areas where fault is not a relevant issue, only the question of compensation remains. Removing the moral content of foreseeability leaves pure compensation theory at a loss to address the difficult issues of our time—the remoteness question in no-fault liability and the problems of normative responsibility in civil law.

VII. CONCLUSION

Legal liability which must be paid for by an individual defendant out of his personal assets has historically been based on fault concepts.\textsuperscript{152} Fault implies choice which in turn implies foreseeability. As the theories of contract and tort evolve from their currently confused states, each ought to retain the traditional notions of personal responsibility, fault and choice. The advantage of fault theory is that it reinforces those two fundamental prescriptive statements: People should not injure each other if they can avoid it, and promises ought to be kept. This prescriptive quality of law makes relevant the foreseeability approach which defines whether a legal obligation exists.

The problems of remoteness of consequences and limitation on

\textsuperscript{151} See E.A. Farnsworth, \textit{supra} note 1, § 6.1, at 370-73.
\textsuperscript{152} See \textit{supra} notes 32-45 and accompanying text.
the amount of damages for which a civil defendant should be responsible present issues separate from the prescriptive aspect, although the distinction is not generally perceived. The foreseeability concept which makes logical and ethical sense in ascribing obligation has been used as a device to solve remoteness issues.\textsuperscript{153} The dubiousness of that usage has led many commentators to see foreseeability as a mask or rationalization for cutoff lines drawn on policy grounds.\textsuperscript{154}

In the areas where fault search has been abandoned and strict liability imposed, specific focus on the compensatory objective, utilizing the narrower formulation of foreseeability is justifiable. Foreseeability has utility in identifying which party ought to have the responsibility of arranging for compensation and what levels of compensation would satisfy that duty.\textsuperscript{155} Responsibility can be satisfied by obtaining liability insurance of the type and amount which a reasonable person could foresee as sufficient.\textsuperscript{156} Should the responsible individual elect to underinsure, he should have to bear the consequences of that decision.

Thus, two concepts of foreseeability with different purposes are at work in our civil law. Foreseeability in traditional fault-based liability should carry with it some form of sanction. It is this sanction which preserves the normative role of the law. Because costs can be covered by insurance, the mere duty to make full compensation is often dysfunctional within the normative aim. One solution is to say that some portion of the actor’s responsibility cannot be transferred to an insurer, operating much like a deductible in an insurance policy.

This analysis leaves open the serious problem of remoteness in products liability cases. Neither conception of foreseeability can be used to deal with that problem. Products liability is not a regime of civil liability, but rather a legally imposed insurance scheme.\textsuperscript{157} The issue of appropriate types and levels of compensation involves matters of social justice, public policy, and welfare economics and is thus beyond the competence and techniques of courts. It is an urgent matter for legislatures and one which has not yet been appropriately addressed.

\textsuperscript{153} See supra notes 45-47 and accompanying text.

\textsuperscript{154} See supra notes 48-50 and accompanying text.

\textsuperscript{155} See supra notes 51-65 and accompanying text.

\textsuperscript{156} See supra notes 66-75 and accompanying text.

\textsuperscript{157} See supra notes 111-33 and accompanying text.