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LIABILITY FAILURE

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Negligence liability is our most basic form of safety regulation. It creates accident prevention and, as an unavoidable incident, insurance. When the insurance becomes too unmanageable, courts have eliminated negligence liability. The result is a gap in accident prevention.

INTRODUCTION

Negligence liability always creates two effects: useful prevention and unuseful insurance. The reason that the negligence rule bundles the two comes from significant judicial measurement costs—difficulties courts would have to limit people to a reasonable number of errors. A related point is that most negligence liability does not consist in someone’s failure to hire a bargee or to bury water pipes sufficiently deep, as some classroom accounts suggest. Instead, it consists in the failure to use routine, repetitive, “nondurable” precautions, such as looking for pedestrians, looking for oncoming traffic before making a

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turn, inspecting and, if need be, repairing a piece of equipment, counting the sponges before closing the patient, and so forth.

Why do people speak of negligence as if it is usually a judgment error or the failure to use better safety equipment? The reason probably comes from the way courts themselves state the negligence rule. For instance, one historical Massachusetts case held that doctors were negligent according to the standard of practice in their local area.¹ A later case famously overruled that case stating

The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community in which the physician carries on his practice.²

Such rules have invited many people to suppose that the most common type of malpractice arises when a defendant has used a little less skill or judgment than the average (“reasonable”) practitioner.

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1. Small v. Howard, 131 Mass. 131 (1880).
2. Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968).

Others have inferred that a common type of negligence arises when the doctor had fewer medical resources than most doctors possessed. To be sure, these are all cases that the rule quoted above makes marginal. Economists sometimes accuse noneconomists of thinking that the average is the marginal. In this context, however, the error consists in thinking that the marginal is the average.

Think of another standard, this one economic. Suppose that the rule is that one should hire up to the point at which the wage equals the marginal value product of labor. This rule obviously does not suggest that most hires are cases in which the wage is close to the marginal value product. The same is true of a legal rule. We propose “the marginal fallacy” as a name for this common mistake of reasoning from the nature of the legal standard to a prediction—often implicit—of the types of cases that are commonly decided under that legal standard.

It will be clear to most readers that we are not criticizing the courts when they define their most general rules to separate a zone of liability from a zone of no liability and with a view toward the types of cases that exist around this margin. This margin, after all, is where appellate

litigation will be centered.³ Instead, we are criticizing the common logical error of supposing that an entire population of cases can be known by the type of rule that appellate courts develop to separate cases on one side of the legal margin from those on the other. It is more often theoreticians than courts who make this error.

In fact, you could make the same error in economic reasoning, but it is less damaging. If you were thinking about any particular hire, you could make sense out of it by asking whether the wage was greater or less than the marginal value product of adding that worker. Whether the gap between the two values is great or small, each worker can be known better by his or her relationship to the margin. Similar reasoning fails for many legal problems, including the present one. Suppose that the most common type of negligence is when a doctor unaccountably lapses or forgets to do something that he normally does. Maybe she (or her scrub nurse) forgets to count the sponges and leaves one in the patient. Perhaps he prescribes double the dose of medicine that he meant to prescribe. When a doctor forgets to count the sponges, it is true that she “exercised [less than] the degree of care and skill of the average qualified practitioner,” but for most people, perhaps especially

3. Cite to Priest-Klein.

for most economists, this is an odd way of thinking about the case. The reality is that she did something that even a totally unqualified person would see as a mistake. We cannot tell from the way the court has stated the rule which type of case is more common: the case in which the doctor did not possess the most approved type of stethoscope (a marginal case) or the case in which the doctor just made a plain mistake, like failing to count the sponges before she closed the patient.

Consider which type of case is more common—in a more familiar setting. In the realm of automobile driving the legal test of negligence is similar to the one prevailing in the area of medical malpractice: one must exercise the care that a reasonably prudent driver of normal ability would exercise under the same or like circumstances as the driver in question. The reader can judge from common experience whether the more common type of driver negligence is the failure to see something that a driver with 20-20 vision would have seen (when the actual defendant's vision was a little less than 20-20) or whether a far more common type of negligence is committing an obvious mistake that the driver in question would not normally commit but did commit on this occasion (failed to look for pedestrians, failed to check the blind spot before changing lanes, etc.) Medical malpractice seems to be the same.

Here is a different type of rule statement about medical malpractice that is not emphasized as much. In a case which the doctor did forget to count the sponges, and for some reason appealed all of the way to his state supreme court, that court said: “The physician bears the responsibility for removing sponges from the patient’s body and cannot, by delegating the task of counting, relieve himself from liability for injury to a patient caused by leaving a sponge in the body.”⁴ If one is looking for the kind of rule that describes the population of medical malpractice cases, as opposed to the legal margin between liability and no liability, this second type of rule is the better candidate. (This type of rule is not popular with casebook and treatise writers because it is narrow, but it captures the true nature of negligence liability much better than the more popular general statements.)

Courts adopt a harsh and, some would say, uneconomic view of human lapses. To commit one of these lapses—a “compliance error”—even once in a lifetime, is to incur potential liability. Oliver Wendell Holmes once defended this system as follows:

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no

4. Ravi v. Williams, 536 So. 2d 1374, 13xx (Ala. 1988).

doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.⁵

The doctrine is even more radical than Holmes admitted: It is not just an actor's "personal equation" that the courts refuse to take into account; it is human nature itself. To err is human, but when a negligence duty exists, human errors almost invariably yield potential liability, not just for "those born hasty and awkward," but for all of us. The English legal satirist A.P. Herbert famously lampooned this system by characterizing the law "reasonable man"—quite accurately—as someone "who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither star-gazes nor is lost in meditation when approaching trap-doors or the margin of a dock"⁶

The basic justification for this harsh treatment of compliance errors is the cost a court would face to establish a more thoroughgoing negligence rule. Holmes went to the heart of the matter when he

5. Oliver Wendell Holmes, Jr., *The Common Law* 86 (1881).

predicted that heavenly courts would possess more information than their earthly counterparts. It might be possible to conceive of a system in which courts would judge not simply whether someone had committed a negligent lane change, but whether the dangerous lane change in question was the last in an excessive series of dangerous lane changes by the same defendant. Such a negligence system (some economists have told us it would be a “true negligence system”) would be much more costly to administer than the actual negligence rule.

The actual negligence system does not distinguish between efficient and inefficient compliance errors. As a consequence, every imposition of negligence liability always has two potential effects: it can create a useful example of the defendant and thereby deter others from similar inefficient compliance errors or it can simply make a defendant who was behaving efficiently an insurer of the person who was harmed by his efficient error. Since it rarely becomes clear in the course of litigation whether a given human error was efficient or inefficient, it is impossible to separate the “prevention effect” from the “insurance effect.”

Some commentators have argued that the courts’ propensity to

6. A.P. Herbert, *Uncommon Law* 2 (?) (7th ed. 1950).

bundle insurance with prevention is a telling criticism of the negligence system.⁷ Contrary to what these critics have written, however, it is not so easy to separate the two. Moreover, much negligence law, perhaps most of it, can be seen as an attempt by the courts to mitigate the bad consequences of making people involuntary insurers of their own efficient compliance errors.

The purpose of this article is to explore an extreme paradox at the center of negligence law. When the bad effects of involuntary insurance become too severe, courts adopt the extreme palliative of either eliminating negligence liability or sharply constraining it to circumstances under which no one could be liable for an efficient compliance error. Thus, in distinct areas of human activity, no tort rule limits the commission of compliance errors; these are the areas of “liability failure.” We will depend on the reader to remember that in some of these areas contract liability or public safety regulation becomes a substitute. In fact, it is often because of the availability of contract liability that the courts eliminate tort liability. Moreover, as we will see, it is not just negligence liability that the courts eliminate, but sometimes also the negligence rule’s sibling, products liability.

7. Cite to George Priest, Liability crisis Yale article where he disguises insurance and

In this article we present a positive theory “liability failure.” These pockets of no liability present a puzzle for the positive economic theory of negligence which tends to predict liability whenever a defendant’s precaution level was less than the due care level. In areas of liability failure, however, a defendant can flunk the Learned Hand test and still be immune. The question is whether these pockets of immunity for admitted violations of the Learned Hand formula can be explained by economic considerations. We believe that they can. Some of our examples of liability failure will be familiar to most torts students, and we will start with these, but others are less obvious and have not previously been described. They are unnoticed pockets of no liability in a surrounding fabric of liability.

The following section will detail the considerations in which the insurance component of the negligence rule is especially costly from a social point of view. These considerations will then become the criteria for understanding those situations in which courts carve out areas of no liability. We will then review the important instances of these liability failures, moving from the familiar to the less familiar. It is remarkable how from an early date courts stressed insurance considerations in

limiting liability.

I. INSURANCE CONSIDERATIONS IN THE DEFINITION OF THE NEGLIGENCE RULE

An earlier era of tort scholarship saw the provision of insurance as the basic purpose of tort liability; it was a reason to extend liability, not to contract it.⁸ More recent scholarship has explored how insurance considerations could explain limitations on tort liability, notably, products liability.⁹ Through their work we have realized that the now-familiar obstacles to conventional insurance are relevant to involuntary insurance imposed on individuals through the negligence system. These insurance obstacles are moral hazard, adverse selection, and correlated losses. Rather than describe these considerations in their native insurance form, we propose to describe them as they appear in the context of negligence cases.

Economists have analyzed and detailed the obstacles to market insurance, not surprisingly, taking as a given the customary institutional context of market insurance, most conventionally when the insured has a contract of insurance with the insurer. By this contract, the insurer

8. See, e.g., Albert Ehrenzweig, *Enterprise Liability* (19xx).

9. Cite to Richard Epstein's early to mid-1980's JLS article on the thresher case and insurance effects.

can charge the insured a premium that is scaled to the risk insured. In some negligence scenarios, but not in others, the defendant has a contract or other relationship with its insured. For instance, doctors do have contracts with their insured patients, whereas automobile drivers do not have contracts or, typically, any other relationship with the people they involuntarily insure through the negligence system (other drivers on the highway). The absence of a contract or similar relationship between a negligent injurer and its victim is an insurance consideration just as the potential for moral hazard is an insurance consideration. The reason we don't normally see it as an insurance consideration is because contracts are universal when it comes to market insurance. In this same spirit, we can develop a list of the insurance considerations that are relevant to negligence cases, a list that is somewhat different from the one that economists have devised for market insurance.

Before we get to that list, however, we would like to assure the reader that this approach does have a strong foundation in legal doctrine.

The common law of New York once provided that someone who negligently started a fire was liable only for the first building burned and

not for the subsequent buildings to which the fire spread. Many commentators have seen the New York fire rule as aberrational. Nevertheless, the same considerations that prompted the New York Court of Appeals to adopt a special rule for fires still create liability limitations in other settings even as fire liability became broader as brick, stone, and cement replaced wood as an urban construction material. The New York Court of Appeal understood these insurance considerations very well as its opinion in the famous case of *Ryan v. New York Central R.R.*¹⁰ indicated:

Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. . . . To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some

10. 35 N.Y. 210 (1866).

extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offense committed.¹¹

Although most commentators have neglected to stress this aspect of the opinion, by saying that "it is impossible that the most vigilant prudence should guard against the occurrence of . . . negligent fires," the court certainly suggested that some negligence is efficient in the sense earlier described. In the presence of possibly efficient negligence, the question becomes whether a defendant could reasonably insure that risk or whether the obstacles to insurance would substantially undermine the insurance function. (The courts certainly don't insist that tort defendants be efficient insurers; they create immunity only when it appears that there are substantial impediments to a defendant offering insurance through the tort system.) For negligent fires inadvertently started by railroads, several insurance problems exist, but the biggest in 1866 was the possibility of correlated losses, that an inadvertently negligent error by an engineer or inspector would cause a

11. Id. at xxx.

whole city to burn down. The one-building limitation of the New York fire rule eliminated the correlated insurance book that a railroad would otherwise be obliged to carry for the benefit of the building owners of the wooden cities through which its tracks ran.

A. Introduction to Negligence Rule Insurance Considerations

1. Absence of a Contract or Relationship Between Insurer and Insured

As previously noted, a contract or at least some kind of relationship between the insurer and the insured reduces the cost of providing insurance. From a transaction cost point of view, the cheapest way for an insurer to compensate itself for the cost of insurance is to charge its insured a premium. If no relationship, contractual or otherwise, exists between the parties the insured must often turn to more costly substitutes for ex ante indemnification. Another value of a relationship between the parties is that it allows the insurer better to estimate the risk that the insured brings to the pool. What kinds of motor skills does the driver in the next lane possess? What is her earnings potential? These are questions to which an insurer would like answers, but the absence of a relationship between the parties can increase the costs of acquiring this information, often to

prohibitive levels.

2. The Presence of a Contract or Relationship Between the Insurer and a Vendor to Insureds

Suppose a potentially negligent defendant possesses a relationship with an intermediate seller who in turn contracts with potential tort plaintiffs. The intermediate seller, let us suppose, is not capable of negligent behavior. This situation, which is common when a potentially negligent manufacturer deals with insureds (consumers) through independent resellers, creates a large insurance problem. The intermediate seller has an incentive to sell to the most risky purchasers unless limited in some way by the manufacturer (insurer). Situations in which fate, as opposed to conscious business decision, links insurers and their insureds are often far less problematical from an insurance point of view because they do not require the controls and policing that contractual situations can require.

3. Inability of the Insurer to Control the Amount of Insurance Offered

When negligence liability turns on conduct by the defendant, as when a defendant drives a car, insurance problems can be less problematical than when negligence liability arises merely from the

defendant's status, for instance, as a landowner. A driver can reduce the insurance that he must offer through the tort system by reducing the amount of driving. A landowner may not be able to control as effectively the amount of insurance he offers, for instance, to trespassers.

4. Inadvertent vs. Deliberate Negligence by the Insurer

Civil negligence is always conduct, as opposed to a state of mind. The essence of negligent conduct is the failure of the actor to use some reasonable precaution. When we think of negligence liability from an insurance point of view, the most important perspective on these untaken precautions is the actor's state of mind. Whether the actor inadvertently failed to use a precaution or deliberately failed, it is the same breach of duty. Nevertheless, the actor can usually reduce deliberate breaches to zero, but becomes an involuntary insurer for his inadvertent breaches. Hence, insurance considerations are orders of magnitude more significant for inadvertent breaches of duty than for their deliberate counterparts.

5. Heterogeneous vs. Homogeneous Losses

An involuntary insurer can usually deal more easily with a stream of

homogeneous losses than with a stream of heterogeneous losses. With homogeneous losses the insurer can more easily calculate its exposure and charge for it. Also, homogeneous losses do not lead as readily to a process of adverse selection in which someone the insurer's goods or services become especially attractive to those who will sustain large losses.

6. Large Losses

Perhaps most obviously, insurance considerations will be more prominent when losses are large as opposed to small.

7. Correlated Losses

The insurance function depends on a lack of correlation between losses. Thus, a market insurer of auto casualty losses can reduce risk (in the economic sense) by building a book of uncorrelated losses. All of the cars will not crash on the same day, but under the law of large numbers will crash in a predictable flow. By contrast, a market insurer of earthquakes faces higher costs in offering insurance. Those exposed to negligence liability are in a similar situation.

8. Maliciously Created Losses

Sometimes a defendant becomes liable for malicious losses created

by another, as when a common carrier or innkeeper fails to protect a guest. Maliciously created losses can be more difficult for actuaries to predict than random losses, and the problem becomes more difficult when the same malicious act produces multiple losses.

B. Examples of Zero Negligence Liability

The following major sections will explore actual instances of liability failure, situations in which one would normally expect negligence (or products) liability, but where this liability does not exist. In some but not all of these situations, other forms of liability or market incentives exist to ensure positive precaution. The most problematical are those in which effectively no incentives exist for people to use precaution that is socially valuable relative to its cost. A good modern example is the lack of incentive a university possesses to use precaution against the possibility that its mainframe computers will become bases for denial-of-service attacks mounted by malicious actors. Lately there have been proposals to exempt sellers of antiterrorist services and products from tort liability. These proposal, though they may be wise, may also be unnecessary, for as we will see, liability for security services is already radically limited.

II. PUBLIC UTILITY NEGLIGENCE

In *H.R. Moch Co. v. Rensselaer Water Co.*,¹² Cardozo held that a water company with a city contract to supply water to fire hydrants was not liable to the owners of a warehouse that burned down because the defendant negligently allowed the pressure to sink. The defendant's negligence was possibly efficient, which was the key to the decision. Cardozo said that if the defendant's negligence had been clearly inefficient, as if it had acted intentionally or recklessly, it would have been a different case.¹³ In the actual case where the plaintiff had been able to show only that the defendant's negligence was inadvertent, and therefore possibly efficient, Cardozo denied liability after reciting how broad the class of insureds would be.¹⁴ If the water company expected to be liable for its efficient negligence, it would have to charge this risk back to the insureds. This would be difficult because its contract for hydrant service was with the city. Moreover, even if we assume that the

12. 159 N.E. 896 (N.Y. 1928).

13. He wrote for the court:

We do not need to determine now what remedy, if any, there might be if the defendant had withheld the water or reduced the pressure with a malicious intent to do injury to the plaintiff or another. We put aside also the problem that would arise if there had been reckless and wanton indifference to the consequences measured and foreseen.

Id. at xxx.

14. He wrote: "[If there were liability in this case] [e]very one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun." *Id.* at xxx.

water company could charge the property owners directly, unless it scaled its insurance premium to the value of their property, the insurance offered would be subject to adverse selection. Given the difficulties that the defendant would face as an insurer of its efficient negligence, it apparently seemed better to Cardozo to eliminate liability, even for conceded Learned Hand omissions. Of course, some deterrence is lost by this approach, but maybe not much because the city was still able to enforce the water company's performance, through legal means or through letting the contract to another supplier. In a nutshell, the insurance problems with the liability outweighed the deterrence benefits, especially when it seemed that the negligence could have been efficient. If the defendant's negligence had been clearly inefficient, as with a pattern of reckless omissions, Cardozo made clear that he would have decided for the plaintiff.

Some have seen the *Moch* case as a unique decision by a great judge who may have lapsed. In the words of Justice Musmanno of the Pennsylvania Supreme Court: "Homer nodded."¹⁵ Nevertheless, the *Moch* result was widely replicated in a vast array of jurisdictions,¹⁶ and

15. Doyle v. South Pittsburgh Water Co., 199 A.2d 875, xxx (Pa. 1964).

16. See, e.g., Wainwright v. Queens County Water Co., 28 N. Y. S. 987 (App. Div. 1894); German Alliance Ins. Co. v. Homewater Supply Co., 226 U. S. 220 (1912); Boston Safe Deposit &

some courts identified the economic basis of the doctrine better than Cardozo. For instance, in *Ancrum v. Camden Water, Light & Ice Co.*,¹⁷ the court stressed the adverse selection problem that waterworks liability would create:

It may well be doubted whether it has the right to apply the public funds to a larger compensation, which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril.¹⁸

Just as in *Ryan* (the New York fire case), the court plainly suggested that a water company could not efficiently avoid all instances of negligence. Other courts developed the adverse selection theme in even more detail:

The property owner installing a hydrant available for the protection of property owned by him of the value of a few thousand dollars would pay the same rate under the

Trust Co. v. Salem Water Co., 94 F. 238 (N.D. Ohio 1899); *Coy v. Ind. Depot*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *City Council of Montgomery v. Montgomery Water-Works*, 79 Ala. 233 (1885); *Metropolitan Trust Co. v. Topeka Water Co.*, 132 F. 702 (D. Kan. 1904); *Ellis v. Birmingham Waterworks Co.*, 65 So. 805 (Ala. 1914); *Cole v. Arizona Edison Co.*, 86 P.2d 946 (Ariz. 1939); *Collier v. Newport Water, Light & Power Co.*, 139 S.W. 635 (Ark. 1911);

17. 64 S.E. 151 (S.C.,1909).

18. *Id.* at xxx.

ordinance for water and hydrant charges as would the owner of property worth hundreds of thousands of dollars, so that it cannot for a moment be claimed that these hydrant rates had any relation to the risk which it is claimed the water company assumed. . . . The various factories or mills in which hydrants are placed and connections with the public water system made may represent property worth millions of dollars which is subject to danger of destruction by fire,Of course, if the position of the respondent is correct, then in all these instances a public water company is assuming liability practically as an insurer of millions of dollars' worth of property, upon which, either from the nature of the business conducted on the premises or the locality in which the property is situated, an insurance company itself would not think of assuming the risk.¹⁹

Finally, some courts stressed the correlated nature of the potential liability stream and how difficult it would be for a water company to insure against its own negligence,²⁰ which presumably would not be a problem if a waterworks could efficiently reduce the amount of its negligence to zero.

19. Niehaus Bros. Co. v. Contra Costa Water Co., 113 P. 375 (Cal. 1911).

20. In Eaton v. Fairbury Waterworks Co., 56 N. W. 201 (Neb. 1893) the court said:

To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk.

Id. at xxx.

III. SECURITY COMPANY NEGLIGENCE

Companies providing security face a highly limited amount of tort liability. A good example of this largely unglossed legal doctrine is *Einhorn v. Seeley*,²¹ a case in which the plaintiff sued a locksmith for negligence. The plaintiff had moved in with her fiancé. The lock on the front door of the building was broken so that it would open with a firm push, even when locked. In response to tenant complaints the landlord hired the defendant Seeley and his firm, Rem Discount Security Products. The plaintiff's complaint alleged that the locksmith fixed the door so negligently that an assailant was able to enter the building and assault her. She sued the landlord, too. The trial court denied the locksmith's motion for summary judgment, and the locksmith appealed. The New York Appellate Division held for the locksmith and stressed the absence of a relationship between the defendant and the victim.²²

21. 525 N.Y.S.2d 212 (App. Div. 1988)

22. The court said:

Said the court: "[L]iability of the landlord who has a direct relationship with the tenant, even as compared with defendant locksmith, has itself been seriously limited, as a matter of public policy. [...] [I]t seems clear that the locksmith, defendant Rem, did not undertake a duty to plaintiff Lori Einhorn when it entered into its relationship with the defendant landlord. Here we are concerned with a possible liability for an injury to a mere guest of a tenant caused by an unlawful act of a third party. Under these circumstances, to hold a locksmith responsible for the alleged consequences of an allegedly defective lock would be to enlarge the obligations of such artisans far beyond the existing law and beyond sound public policy."

A similar set of cases involves security companies that contract with a plaintiff's employer to provide security services and then negligently fail to provide these services so that the plaintiff is hurt by criminals. These cases consistently result in no liability. A good example is *Hill v. Sonitrol of Southwestern Ohio, Inc.*²³ At approximately 11:15 p.m. on December 1, 1983, Mrs. Hill telephoned Sonitrol's office to inform Sonitrol that she was leaving. She then left the building, but was accosted by a stranger, who forced her at knife point to return inside the store. Once inside, the assailant produced a gun. Shortly thereafter, Mrs. Hill's husband, Michael, arrived to drive Mrs. Hill home. At the assailant's demand, Mrs. Hill called her husband into the store. For nearly an hour, the Hills were held at gunpoint, while Mrs. Hill was raped by the assailant. During this period, another employee called about five times to inquire as to the reason for Mrs. Hill's delay in delivering the evening's receipts to him at another store. However, Mrs. Hill was unable to communicate her peril to him. At about 12:20, the Sonitrol operator called, and Mrs. Hill was able to alert the operator that there was a problem. Sonitrol called the police, who arrived at the

23. 521 N.E.2d 780 (Ohio 1988).

bookstore within minutes, and the Hills escaped.

The plaintiffs maintained that the defendant should have reasonably detected that the Mrs. Hill was still in the store and should have sent help. The Ohio Supreme Court held that even if the plaintiffs' allegations were true the defendant owed the plaintiffs no duty. It would be very costly to bundle insurance with security contracts. Maliciously created losses occur so routinely in the security business that a company would have to charge for them ex ante if it were liable in tort for every inadvertent error made in preventing them. In order to prevent unraveling of the market for this tort insurance, through adverse selection, a security company would have to estimate the losses from its own breaches of duty, which would vary from time to time and from neighborhood to neighborhood.

Other cases make clear that it is the potential for adverse selection—not the malicious character of intervening act—that determines the immunity. For instance, in *Russo v. Grace Institute*,²⁴ the defendant construction company erected a scaffold next to the building in which the plaintiffs rented an apartment. The complaint alleged that armed robbers used the scaffold to gain entry onto the terrace of the

plaintiffs' apartment and from thence into the apartment itself. Once there they stole the plaintiffs' goods and bound and gagged the infant plaintiff, causing serious psychological injuries as a result of being bound and gagged. The defendant moved for summary judgment, but in this case, unlike in *Sonitrol*, the trial court held for the plaintiffs. Holding a nonsecurity company liable for its negligence creates less of an insurance problem because malicious acts will yield liability less regularly; hence, the market is correspondingly less subject to unraveling through adverse selection. Another distinction between this case and *Sonitrol* is that the *Russo* breach of duty was somewhat more deliberate if only because the opportunity to correct the placement of the scaffold existed over a longer period of time than the opportunity to notice that the *Sonitrol* plaintiff was still in the store. As already noted, punishing a defendant for deliberately omitting reasonable precaution raises less of an insurance problem because deliberate breaches can almost always be efficiently avoided.

Even in security cases, deliberate breaches of duty can yield negligence liability to persons without a contract with the defendant.

24. 145 Misc. 2d 242, 546 N.Y.S.2d 509 (N.Y. Sup. Ct. 1989).

For instance, in *Elizabeth E. v. ADT Security. Systems West, Inc.*²⁵ the Nevada Supreme Court overruled the defendant security company's motion for summary judgment on facts virtually identical to *Sonitrol* except that one of the defendant's employees did receive and notice an "unscheduled entry" alarm but did not call the police.

The *Sonitrol* doctrine of immunity for negligence in the provision of security services is general. Usually the seller will disclaim contractual liability to the immediate seller (unless the buyer purchases a separate contract of insurance), and courts refuse to create tort liability to third parties even when these third parties were highly predictable victims of the defendant's negligence, which is a normal test of liability.²⁶

IV. SECURITY PRODUCTS

Products liability is usually broad and extends to persons out of

25. 839 P2d 1308 (Nev. 1992). In addition, one of the defendant's employees negligently told a supervisor at the plaintiff's location that the defendant's system possessed an panic button feature, which the plaintiff tried to use, a fact that probably acquired greater significance given the defendant's employee's deliberate omission.

26. See, e.g., *Young v. Tri-etch, Inc.*, 773 N.E.2d 298 (Ind. App. 2002) (affirming summary judgment granted to security company that failed to alert police when liquor store employee was being killed); *Maier v. Serv-All Maintenance, Inc.*, 705 N.E.2d 1268 (Ohio App. 1997) (no duty owed by security company to employee who was murdered at work); *New Focus Sportswear, Inc. v. Fabrico, Inc.*, 561 N.Y.S.2d 570 (App. Div. 1990) (sprinkler alarm company owed no duty to customer of building tenant whose goods were destroyed in fire); *Bernal v. Pinkerton's, Inc.*, 382 N.Y.S.2d 769 (App. Div. 1976) (security company owed no duty to customer's employee who was shot by intruder who entered building because of guard's absence); *Paradiso v. Apex Investigators & Security Co.*, 458 N.Y.S.2d 234 (App. Div. 1983) (security company owed no duty to protect supermarket manager who was shot during robbery); *Hoisington v. ZT-Winston-Salem Associates*, 516 S.E.2d 176 (N.C. App. 1999) (no duty).

privity with the defendant, who can be either a manufacturer or a reseller. Nevertheless, *security* products liability is unusually constricted, which is unsurprising given that these products are economically similar to security services. A good example is *Castorino v. Unifast Building Products Corp.*,²⁷ a case in which the defendant either negligently installed security windows on a building or else properly installed defective windows. In either case, the negligence or defect allowed a murderer to enter and murder one of the tenants. The New York Appellate Division denied that the defendant owed the plaintiff's deceased a duty and cited *Einhorn v. Seeley*, the locksmith case described above, as precedent. Again, it would seem that the only possible distinction between *Castorino* and *Russo*, the case in which the defendant was liable for building a scaffold in a way that allowed criminals to enter the plaintiff's apartment, is that the *Castorino* defendant was in the security business whereas the *Russo* defendant was in a business less subject to security risks and the unraveling effects that they can produce in a market that cannot scale prices to risk.

Consistently, the liability of safe manufacturers and sellers is

27. 555 N.Y.S.2d 350 (App. Div. 1990).

unusually constricted. For instance, in *Butler v. Mutual Safe Co.*²⁸ the plaintiffs were partners who owned and operated a jewelry store in Columbia, South Carolina. In the summer of 1990, they bought a security safe from Anchor Safe Company. On August 6, 1990, the store was burglarized and the 2300-pound safe was taken. The safe, open and minus most of the jewelry that had been stored in it, was found by the police a few days later about two or three miles from the store. Butler and Parker brought this action against Mutual Safe Company, which the storeowners claimed was both the manufacturer and seller of the safe; Anchor, which was not named as a defendant, was alleged to have been Mutual's distributor. The complaint contained state-law contract and tort causes of action based on the allegedly defective design and manufacture of the safe.

In their motion for summary judgment, the plaintiffs included an affidavit from one of the burglars, who swore that the safe came open when it fell off the back of his pickup truck. The plaintiffs argued that the safe was warranted to withstand appreciably greater force than a three to five foot drop without opening and, but for an apparent design or manufacturing defect in the safe, the safe would have remained intact

28. 35 F.3d 555 (Table), 1994 WL 463416 (4th Cir.) (applying South Carolina law).

upon falling from Darby's truck and the contents would not have been lost. The district court denied the plaintiffs' motion for summary judgment and sua sponte granted summary judgment to the defendants.

The Fourth Circuit affirmed the defense judgment ostensibly on cause-in-fact grounds holding that the burglars would have somehow opened the safe, even (presumably) given that this one that was lying in plain view on a public highway. Rather than accept this stated rationale, which seems inconsistent with the cause-in-fact doctrine, it seems more logical to see this case as a part of a more general pattern of immunity for the manufacturers of security products.²⁹

[More examples will be developed.]

29. See, e.g., Kleen v. Homak Mfg. Co., 749 N.E.2d 26, (Ill. App.2001) (reversing trial court's order denying summary judgment for firearm safe manufacturer and safe retailer when plaintiff's child broke into safe and used firearm to commit suicide); Eggert v. Mosler Safe Co., 730 P.2d 895, (Colo. App. 1986) (affirming trial court verdict for defendant who failed to secure the ventilation device in safe as there was nothing defective, unreasonably dangerous or unsafe about ventilating device which had been installed in burglarized commercial vault facility so as to render manufacturer liable in strict liability to owner and operator of the facility).