Justice luck in negligence law

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1 Introduction

In the principal article in this Symposium, Professor Gregory Keating argues that cost–benefit analysis is an improper safety standard in settings in which accidental harm can inflict devastating losses on people. Such losses can wreck human autonomy and destroy human agency, and therefore they exist in a realm incommensurate with the expenditures necessary to avoid these losses. Keating argues that when an actor has inflicted, or may inflict, “unrepairable” harm upon another, the cost–benefit standard fails to require adequate precaution. He proposes that negligence law should require more precaution than cost–benefit analysis would justify because harms are asymmetric with benefits; harms have greater moral value than the often–monetary benefit that must be sacrificed to avoid them.

Keating’s theory is normative, but this comment is not. Instead, I will provide a novel positive description of U.S. negligence law. The now–standard account originated with Oliver Wendell Holmes and is inaccurate in various respects. I will show that modern U.S. negligence law often uses cost–benefit analysis to establish an upper bound on juries’ breach of duty determinations. More specifically, many cases are dismissed before going to juries and many jury verdicts for plaintiffs are rejected because a court judges that no precaution undertaken by the defendant plausibly cost less than the expected benefit by way of reduced risk. Nevertheless, cost–benefit analysis cannot be practically applied to some types of precaution. As I will develop in more detail below, these are largely “nondurable precautions” that must be used repetitively to be effective. Examples include a driver’s checking his blind spot before changing lanes or a surgeon’s ensuring that all the sponges placed in a patient have been retrieved. These nondurable precautions are usually cheap on a one–time basis and often highly productive of safety. Yet, the cost of perfection in these simple tasks can evidently be significant because, despite drivers’ wishes to check blind spots and surgeons’ desires to retrieve all sponges, quite a few failures exist in both realms. How would a court apply cost–benefit analysis to these precautions? One way
would be to judge that the cost was low, and the avoided risk high, on the particular occasion that led to the accident. This one-time method, however, excludes the evidently high cost of perfect consistency, which seems to be the most parsimonious explanation for why so many of these accidents occur. Thus, cost–benefit analysis is a practical upper bound on durable precaution as well as “precaution plans,”3 which are similar, but not fully an upper bound on nondurable precaution. A jury can find a driver or surgeon liable even when the driver’s or surgeon’s error rate was well below average and even well below the efficient limit on “perfection” that an economist might estimate.

Further complicating this picture is a feature of U.S. negligence law that legal academics have largely ignored, possibly because it is diametrically opposed to Holmes’s conception of the negligence rule. Courts often allow juries to “forgive” negligence, that is, to find no liability even in some of the most obvious cases of negligence. Thus, an accurate conception of the U.S. negligence rule is that cost–benefit analysis is an effective upper bound on many jury determinations (or potential determinations) of liability. This feature is contrary to what Keating proposes because Keating would impose liability beyond the requirements of cost–benefit analysis. In addition, however, U.S. juries possess broad discretion to forgive negligence, even negligence that resulted from the omission of a cost–beneficial precaution. This feature of the negligence rule is even more inconsistent with Keating’s proposal.

If we lay my new description of the negligence rule beside Keating’s normative proposal, to some extent it is apples and oranges. The comparison is nevertheless useful because it shows that the U.S. courts have evolved a doctrine strongly opposed to Keating’s ideas, not just incidentally or accidentally opposed to them. Keating can also draw some support from my account. When it comes to unsafe lane changes, unretrieved sponges, and similarly omitted nondurable precautions, courts do indeed allow juries to impose liability on individual defendants who have established efficient compliance rates and who have therefore committed economically efficient errors. This seems precisely what Keating proposes so long as the error caused unrepairable harm. Nevertheless, in indistinguishable cases courts also allow juries to forgive defendants for their efficient and inefficient compliance errors.4

Thus, if we think of the relationship between my positive description and Keating’s normative proposal, it emerges that Keating’s proposal is far-reaching. To implement it the courts could not do anything as simple as move the required level of precaution a little beyond the economic optimum. Instead, to get us to the rule Keating wishes, U.S. courts would also need to prevent juries from forgiving negligence and might need to eliminate juries altogether to prevent their forgiveness of negligence because the impulse to forgiveness seems strong in some cases. Nevertheless, Professor Keating might agree to these reforms, and, if so, at least we will clarify the changes he would need to advocate to implement his reform.

The subsequent sections will clarify and develop the ideas just summarized.

2 “The trouble with negligence”

The logical start for my comment is a famous article by Kenneth S. Abraham entitled “The trouble with negligence.”5 As Abraham recounts, Oliver Wendell Holmes’s ideas remain central to modern understandings of the negligence rule, if only as a departure point.
Holmes stressed that civil negligence is substandard conduct, most emphatically not a 
careless state of mind, a rival conception promoted by Sir John Salmond.⁶

One way to see “the trouble with negligence” is to parse the function of the jury in breach 
of duty cases. The normal conception of a jury’s function is to find “empirical facts” and 
then to apply the judge–stated law to them. These are the two steps, as Holmes stressed in 
The Common Law: “fact finding” and “law application.”⁷ As Abraham again recounts, a 
famous passage in The Common Law grapples with the possibility—Holmes probably knew 
it was the reality—that different juries given essentially the same definition of negligence 
(“the care a reasonable person would use”) might decide highly similar cases differently. 
Holmes’s own example was whether a worn-down brass nosing on a heavily travelled 
London Underground staircase was a breach of duty to a passenger who slipped on it.⁸ 
Holmes thought that an experienced “nisi prius” judge should resolve this difficulty by 
ultimately deciding as a matter of law whether the failure to replace such a nosing was or 
was not negligence and thus prevent the possibility of inconsistent verdicts. In this way 
the breach of duty issue in negligence cases would become precedent–bound as much 
perhaps as the “consideration” question in contract cases. As is well–known, Holmes’s 
advice has not been embraced by the courts.⁹

What now to think of inconsistent (and appeals–court–affirmed) jury verdicts in highly 
similar negligence cases? As Abraham says, a common solution is to suppose that what 
appears to be the same case decided differently, and each affirmed by an appellate court 
in the same jurisdiction, are minutely different in their facts and in ways that might 
rationalistically justify their different results. For reasons that will soon appear, this “solution” 
seems unviable. A second view asserts that in negligence cases juries possess a “legislative 
power” on the breach of duty issue. The meaning of this phrase, which is not typically 
spelled out, is that on the breach of duty issue a jury is practically as free as a legislature. 
No consistency across matters is required so long as the body acts within its broad legal 
limits, and these limits include ample space for inconsistent decisions.

Abraham offers a modern twist on the second view. He writes that in breach of duty 
cases, juries, besides finding “empirical facts,” more distinctively create “norms” for 
whatever cases that come before them. Here he inventively distinguishes two types: 
“norm–bounded” breach of duty cases and “unbounded” breach of duty cases. The former 
cases involve customs applicable to the breach of duty issue raised (in his example the 
absence of a GPS system on a vessel that sinks or crashes) or professional standards, say, 
in a medical malpractice case. The unbounded cases are the residual and more common 
cases in which the jury’s norm creation power is at its maximum.

Abraham’s idea of jury “norm creation” is an important contribution, but it does not play 
out exactly as he says. As we will soon see, the main distinction in breach of duty doctrine 
is whether a case was tried to a jury or not. Juries possess the power to forgive obvious 
breaches of duty, whereas judges lack this power.

3 Holmes’s legacy

Although Oliver Wendell Holmes was certainly one of our greatest legal theorists, at the 
time he wrote the modern negligence system was undeveloped. When the courts rejected 
Holmes’s recommendation to create a precedential standard of breach of duty, his 
negligence theory suffered a fatal blow. If the courts had created a precedential breach of
duty doctrine, then that body of law would look the same as other more conventional doctrines of common law, such as for instance the doctrine of contractual consideration, the doctrine of negligence duty, assumption of the risk, and so forth. A critical symmetry exists with respect to these conventional legal doctrines: judgments for the plaintiff as a matter of law are about as common as judgments for the defendant as a matter of law. Here is the way Holmes expressed how he hoped this symmetry would work out in breach of duty cases:

If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation.

Despite what Holmes said, if we look closely at U.S. common–law breach of duty cases, we find an astounding asymmetry. Appellate cases holding that a trial judge should have entered judgment as a matter of law for the defendant are exceedingly common, but those holding that a trial judge should have entered judgment as a matter of law for the plaintiff are extremely rare. With common law negligence cases, which in the U.S. remain jury–eligible, judges are extremely reluctant to enter judgment as a matter of law for plaintiffs. Such cases do exist in the various states, but they seem idiosyncratic across jurisdictions, though regularities do exist within jurisdictions. In all jurisdictions, however, judgments as a matter of law for plaintiffs are rare.

It would be easier to see this asymmetry in breach of duty cases if casebooks were compiled differently. Torts casebook writers continue to be highly influenced by Holmes’s theory of breach of duty even as they may recognize that an important part of it did not play out. Therefore, when we read a Torts casebook, we often see Holmes’s theory validated, as it were, by legerdemain. The main method is to include in the breach of duty chapter several admiralty cases and Federal Tort Claims cases interlaced with common law cases. Admiralty and FTCA cases are ineligible for jury trial, but are instead tried to judges. When the breach of duty issue is always tried to judges, they develop a legal standard of the type that would exist more generally if U.S. courts had followed Holmes’s recommendation. A good example is the casebook standard, The T.J. Hooper, one of many admiralty cases decided as a matter of law for the plaintiff. It is highly misleading to include admiralty and FTCA cases as examples of a rule that is supposedly applicable equally to jury–eligible common law cases. In fact, the rules for the common law cases are quite different, as the following section will explore.

4 The surprising reality of common law adjudication

4.1 One-way boundedness

Kenneth Abraham has theorized that breach of duty decisions by juries are remarkably “unbounded,” in the sense that they are not controlled by any generally accepted norm or legal standard. This theory is important, but some breach of duty decisions are even more unbounded than Abraham has suggested. These are jury decisions that find no
liability. On the other hand, at least some jury decisions and potential jury decisions finding a defendant liable are strongly bounded by a cost–benefit standard that is effectively the Learned Hand formula. In this section, I provide some examples of the unbounded decisions juries can make rendering a party not liable. For many readers, this discussion may prove to be the most surprising aspect of breach of duty doctrine. I have intentionally sought out the most obvious examples of negligence and will then show that our common law gives juries the power to forgive even these. Moreover, to come back to our principal author, all the cases described below entail instances in which a defendant positively harmed the plaintiff so they all fall within the category of cases that Professor Keating says should be governed by a standard of care more demanding than cost–benefit analysis. In fact, juries are permitted absolutely to acquit the authors of these harms. Indeed, when the jury does forgive such an actor, the trial judge will often order the accident victim to pay “court costs” to the acquitted defendant thus creating compensation running in the opposite direction of what theories of corrective justice require.

4.2 Retained foreign objects

16 A common type of malpractice is for a surgical team to leave sponges (sometimes called laparotomy or “lap” pads) and other foreign objects in the patient.12 A representative case is Tams v. Kotz,13 where the jury was permitted to forgive a surgeon who left a laparotomy pad in his patient, and the court determined that the jury’s finding that hospital nursing staff was also innocent was consistent with this verdict. Some of these “retained” sponges have been quite large. A relatively recent Illinois case allowed a jury to forgive a surgeon who had left a 12-inch by 12-inch lap pad in his patient.14

17 For a long time, juries have been allowed to forgive these errors,15 even in cases in which the plaintiffs have suffered significant and unreparable damage.16 Over the relatively recent past, courts have become more encouraging of jury forgiveness in this area. The trend has been to move away from jury instructions that emphasized that the plaintiff’s mere proof of a left object raised a prima facie case against the surgeon and that the chief surgeon was vicariously liable for miscounting nurses and assistant surgeons. These instructions upholding an objective view of breach of duty have been largely replaced by more forgiving instructions that ask the jury to consider whether a surgeon who has left a foreign object in his patient may still have complied with the standard of care.17 Partly under the influence of medical malpractice reform statutes, many courts now require that a patient whose surgeon left a foreign object in him must find a local surgeon to testify that this conduct fell below the standard of medical care prevalent in the community.18

18 There is evidence of an older rule in which some courts awarded judgment as a matter of law to patients whose surgeons inadvertently left objects in them. In Russell v. Newman,19 an older case, the Kansas Court adopted something like a corrective justice approach to left sponges. The plaintiff suffered one, and the court held that it was wrong for the jury to have awarded her judgment and then only one dollar in damages. The Kansas Court considered the case analogous to the intentional tort of false arrest. Nevertheless, the Russell case was later overruled,20 and courts that may have once adopted negligence per se in retained object cases now regularly give juries the power to forgive surgeons who have left foreign objects in their patients.21
4.3 Misfilled prescriptions

Pharmacists often make errors in dispensing prescriptions. Either they dispense the wrong dose or the wrong drug entirely. From an early date, the courts have held that juries possess the power to forgive these errors even when they have caused serious harm. The juries need not forgive. They can find the pharmacist liable for negligence, and often do so, but they may forgive, just as in the retained foreign object cases.

In *Peavy v. Hardin* the plaintiffs gave the defendant pharmacist a doctor’s prescription for coca quinine, but the pharmacist erroneously dispensed coca *quinidine* instead, which unfortunately killed the plaintiffs’ small child. The trial court instructed the jury on negligence, but the jury acquitted the defendant, forgiving the pharmacist’s error. On the plaintiffs’ appeal the court stressed that negligence is ordinarily a question of provable fact, not law, and that here the jury had acted within its province in finding the pharmacist not liable. Nevertheless, if a jury does find the pharmacist guilty of negligence, the jury may award very substantial damages. Situations in which this occurs seem legally indistinguishable from those in which a jury’s total acquittal of the pharmacist was affirmed.

4.4 Traffic violations causing harm

In jury–eligible common law cases the main arena for negligence as a matter of law is compliance errors that also amount to traffic violations. The state of New York possesses an especially rich jurisprudence of these cases dating from the famous Cardozo opinion in *Martin v. Herzog*. In *Smith v. Omanes*, the plaintiff assumed that the defendant would stop at a stop sign, but he instead ran the stop sign and collided with her. The court upheld partial summary judgment for the plaintiff on the issue of liability, stressing that the defendant had violated the New York vehicle code and that the plaintiff possessed the statutory right of way. This is a standard result reached by New York courts in these cases so long as the plaintiff can show that she was free of comparative negligence, as when she was entitled to assume that the defendant would obey the statute and had only seconds to react to his violation of it. Nevertheless, the picture is far from simple. Even in New York, many statutory violations yield defense verdicts that appeals courts affirm.

California and many other states allow juries to forgive statutory violations of all kinds. For instance, in *Minnegren v. Nozar*, the plaintiff again possessed the statutory right of way when the defendant ran a stop sign and collided with her. Two independent witnesses testified that the defendant ran the stop sign and even accelerated through the intersection. The defendant himself admitted on the stand that he caused the collision, but not “intentionally,” and that he was “only human” and “made a mistake.” The investigating officer found that the collision was caused by the defendant’s failure to yield at the stop sign, and that the defendant was the “the party at fault,” and that a contributing cause was the defendant’s speed in running the stop sign.

The jury nonetheless found for this same defendant. The plaintiff appealed on the ground that the evidence showed that the accident was caused by the defendant’s negligence as a matter of law. Even if the defendant himself maintained he did not run the stop sign, which was the only testimony to that effect, all agreed that the defendant had failed to yield the statutory right of way to the plaintiff, who was driving through an intersection.
that was uncontrolled in her direction. The California Court of Appeals nonetheless affirmed the defense verdict and stressed that “not every mistake equates to negligence” and that it was the jury’s role to determine whether this mistake should yield liability or not. In California and most states, juries can forgive compliance errors, even compliance errors that violate traffic statutes designed to protect the type of plaintiff who sued and from the kind of harm she suffered. The Minnegren trial court even ordered the plaintiff to pay the defendant $23,172.53 in court costs, and when the appeals court affirmed the defense judgment it additionally ordered that the plaintiff pay the defendant for his appellate costs.

Cases like Minnegren v. Nozar are inconsistent with Holmes’s conception of negligence. He stressed that negligence was conduct and not a state of mind. Holmes admitted that if someone was on the wrong side of the road, he could still avoid liability by proving an “excuse” or “justification.” Nevertheless, the idea that a simple “mistake” could be an excuse is inconsistent with Holmes’s thinking.

5 Contrasting admiralty and FTCA cases

Many textbooks and casebooks have assumed that the negligence rule is much the same whether a case arises under the common law of negligence, where in the U.S. a jury is involved, or under a statute or other body of law in which judges are mandated to decide cases without juries. The principal examples of the latter are admiralty cases that involve collisions between ships, and the Federal Tort Claims Act, which governs accidents caused by the federal government’s negligence. Here there can be no jury forgiveness of negligence because juries are not involved. These cases are well modeled by Holmes’s theory of negligence because here the breach of duty standard is as objective as he said. When a federal government surgeon leaves a foreign object in his patient, and there is no issue of whether the plaintiff’s damages were caused by the negligence, the case results in judgment as a matter of law for the patient. Indeed, that is the only kind of plaintiff’s judgment we get in an FTCA matter. I know of no instance in which an FTCA trier of fact has acquitted a surgeon in such a case. Similarly, judges in FTCA cases based on misfilled prescriptions routinely order judgment as a matter of law to plaintiffs when harm was caused by error. These cases stand in sharp contrast to those decided under the common law.

6 Cost-benefit analysis as a constraint on juries’ breach of duty determinations

Many commentators have noticed that cost–benefit analysis and the Learned Hand formula are absent in negligence jury instructions. They have thereby inferred that both are irrelevant to the common law of negligence. That is incorrect. It is true that in negligence cases judges do not ask juries to do cost–benefit analysis, but cost–benefit analysis is still the most important general principle defining common law breach of duty. The true role of cost–benefit analysis is to limit the cases in which juries can find liability. The most important ways in which courts use cost–benefit analysis are to dismiss a case before trial and to reject a jury verdict that reflects the jury’s view that the defendant should have used precaution beyond the demands of cost–benefit analysis.
From a very early point in the history of the modern negligence rule courts, and therefore litigants, have focused on specific untaken precautions.\(^{27}\)

Although available space prevents me from fully developing here how cost–benefit analysis can operate as ceiling on jury impositions of liability, I can give several examples of this practice.

\(^{28}\) Adams v. Bullock\(^{42}\) was a famous case that used the Learned Hand formula’s reasoning well before the formula existed. The case was decided by Judge Cardozo in 1919 and concerned a young plaintiff who sued the defendant for injuries he sustained when a wire that he was swinging came into contact with the defendant’s trolley wires.

The defendant ran a trolley line in the city of Dunkirk, New York, employing an overhead wire system. At one point, the road was crossed by a bridge that carried the tracks of the Nickle Plate and Pennsylvania railroads. Pedestrians often used the bridge as a short cut between streets, and children played on it. On April 21, 1916, the plaintiff, a 12–year–old boy, came across the bridge, swinging a wire about 8 feet long. In swinging it, he brought it in contact with the defendant’s trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet eighteen inches wide. Four feet seven and three–fourths inches below the top of the parapet, the trolley wire was strung. The plaintiff was shocked and burned when the wires came together. The trial court sent the case to the jury, which returned a verdict for the plaintiff. The defendant appealed on the ground that the evidence was insufficient to support the verdict.

The New York Court held for the defendant that there was insufficient evidence to support the plaintiff’s verdict. It is unclear from the reports whether the plaintiff had proceeded on a specific negligence theory or based on more general allegations of negligence. In rejecting liability, Judge Cardozo performed a cost–benefit analysis based on the low probability of the accident, given the precautions the defendant had already taken, and the impracticality of guarding the wires. He stressed that that the trolley wires needed to be uninsulated in order to power the trolleys and that guards would be very costly because the actual location of the accident was not that much more likely than anyplace else along the trolley line. Given the low probability of any accident of the type that occurred, the potential reduction in risk from any further precaution would be small relative to the large cost of guarding the trolley wires throughout the system.\(^{43}\)

\(^{31}\) Cooley v. Public Service Co.\(^{44}\) was a similar case, but with a twist, that also used the objective standard of cost–benefit analysis to reject the plaintiff’s alleged untaken durable precautions. The plaintiff suffered trauma from a loud noise that came over her telephone line; the most immediate cause was a power company’s high voltage line breaking in a storm and making contact with the telephone wire over which the plaintiff was speaking. She sued both the electric company and the power company. The plaintiff suggested two durable precautions as untaken and as alternatively constituting both defendants’ breach of duty. The first was the power company’s failure to insulate its power wires and the second was both defendants’ failure to place a mesh basket underneath the power wires at places where they were close to the telephone wires so that if the power wires broke they would not touch the adjacent telephone wire. The jury returned a verdict for the telephone company, but against the power company, which appealed based on insufficiency of the evidence of breach of duty.

\(^{32}\) The New Hampshire Supreme Court rejected both untaken precautions under a cost–benefit analysis. The court reasoned, based on the evidence, that both precautions would
have increased the risk of electrocution to pedestrians underneath the power lines because they would have tended to keep the power lines live after they had been breached so that a pedestrian would more likely become the ground that would break the circuit and cut off the electricity. Since the increased risk of electrocution would have been greater than the reduction in the risk from noise trauma neither precaution was cost–beneficial and was therefore rejected. The court stressed that some cost–beneficial untaken precaution might have existed, but that it was the plaintiff’s burden to offer and prove it.

The Cooley case is interesting from at least two points of view. First, the court used a more sophisticated economic analysis of breach of duty than did Judge Hand when he announced his formula seven years later in the Carroll Towing case. The Cooley court understood the cost of precaution in its full economic sense, which is the “opportunity cost.” The cost of a precaution, or of anything, is the value forgone by having it. The value forgone by having mesh baskets is not just their expense but also and mainly the lives that would be lost from electrocution if the mesh baskets were installed, just as the court reasoned. Second, Cooley seems in tension with at least some corrective justice theories of tort. The Cooley decision required the power company to use telephone subscribers as a means of providing benefits for pedestrians. Immanuel Kant might be concerned about this aspect of the case because he argued that one’s first duty is to treat other humans as ends only and not as means to improve others’ welfare.

A more recent case embracing cost–benefit analysis is Parsons v. Crown Disposal Co. The defendant’s trash collector clamorously emptied his bin near the Griffith Park Equestrian Trail when the plaintiff was nearby on his horse. The driver could not easily see the plaintiff behind his truck. When the bin emptied, the horse bolted and threw the plaintiff causing the injuries for which he sued. Untaken precautions suggested by the plaintiff were very burdensome. These included changing the hours of collection, temporarily blocking off the trash collection zone with warning signs, and providing collection schedules to equestrians. The trial court granted summary judgment to the defendant, which was affirmed by the California Supreme Court. The California Supreme Court basically performed a Learned Hand formula analysis. It stressed that the burden would be great to use any of the precautions that the plaintiff alleged as untaken.

Although in this case, there was “no duty,” the court made clear that if the trash truck driver had seen the equestrian and his horse before dumping the load, the case would have been decided differently because then the burden of merely delaying the dump into the truck would have been low.

One modern use of cost–benefit analysis by California courts is the opposite of what Professor Keating recommends, albeit in situations in which the defendant was not the active author of the plaintiff’s harm, which are the scenarios Keating stresses. These are the modern cases that limit a landlord’s duty to protect visitors to the land by making only relatively cheap untaken precautions eligible for the plaintiff’s allegations of breach of duty. Thus, in one case a plaintiff could recover for a crime when she alleged that a fifteen–dollar window pane would have prevented it, and in another case a plaintiff was unable to recover when it became apparent that only a costly second shift of security guards might have saved the day.
7 When can cost-benefit analysis be a ceiling on precaution requirements?

Cost–benefit analysis can establish a ceiling for precaution requirements only when the untaken precaution alleged as the breach is susceptible of it. Some have argued that this point relates to the impossibility of measuring the value of human life, but instead it more fundamentally concerns the difficulty of seeing whether an actor was adopting an efficient rate of very common precautions that must be used repeatedly. When a surgical team leaves a sponge in a patient or a pharmacist misdispenses a drug, it does not necessarily follow that the pharmacist has behaved inconsistently with cost–benefit analysis. Indeed, the surgical team or pharmacy may have exceeded the requirements of cost–benefit analysis. NASA rockets crash because of human errors even when tens of millions, perhaps hundreds of millions, have been spent to avoid them. The same can be true in an operating room or pharmacy, albeit on a much smaller scale.

Cost–benefit analysis can be an effective ceiling for untaken durable precautions, such as the absent wire guards in Adams v. Bullock and Cooley v. Public Service Co., discussed above. One simply estimates the cost of the untaken precaution as well as the reduction in risk produced by it and compares the two. That is what the judges seem to have done in those two cases, and many other examples can be given. Similarly, cost–benefit analysis can be an effective ceiling for untaken “precaution plan,” such as the absent and unrequired plan in Parsons v. Crown Disposal Co. for the driver to look for equestrians nearby before dumping a load of trash into the truck. Nevertheless, cost–benefit analysis cannot easily be performed in a case in which the principal evidence was that the pharmacist misdispensed a prescription or a surgical team left a sponge in the patient. One needs to know how much costly effort they put into avoiding the error. The normal rule in such cases is to give the error to the jury and ask them to find it negligent or not. The pharmacist or surgeon will testify self–servingly that he or she was extremely focused on safety, and the jury will look such a defendant in the eye and either forgive the error or not. We cannot easily tell from these cases whether liability was imposed based on substandard precaution, reasonable precaution, or even excessive precaution.

8 Justice luck

The negligence system as it exists in the U.S. creates for injurers and victims the possibility of “justice luck” or the opposite. It is very difficult to square the mechanics of this system with the corrective justice ideas of Jules Coleman and Ernest Weinrib, whose theories Professor Keating has also criticized for being excessively concerned with reparation. For reasons Professor Keating stresses, reparation is impossible in many cases in which the harm to the victim has been devastating. Nevertheless, it is not obvious how any corrective justice or even civil recourse theory can explain the main body of negligence cases, which mainly entail lapses in nondurable precautions, such as failing accurately to count the sponges before closing the patient or failing to yield the right of way to another driver. Undoubtedly some of the lapses for which juries impose liability are not even “wrongs” because society would sacrifice significantly more to prevent them entirely as compared to dealing with them under the current system, which basically imposes a “stochastic tax” on them. The randomness of the tax arises both from “justice
“luck,” as I have called it, and from what John Goldberg and Benjamin Zipursky have called “compliance luck.”

Although many intentional trespasses can be conceived as “wrongs,” much negligence cannot be. The negligence system could be the principal example for Holmes’s argument in *The Path of the Law* that it is dangerous to move uncritically from the law’s moral terminology to a moral judgment about the underlying behavior.

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**BIBLIOGRAPHY**


NOTES

1. See Keating 2018. This piece extends his earlier work, e.g., Keating 2003. See also Shiffrin 2012.
3. A “precaution plan” is typically a plan to use nondurable precaution at reasonable intervals or when a risk of harm is evident. The famous case of Pokora v. Wabash Ry., 292 U.S. 98 (1934) held that a jury would not be allowed to find a driver negligent because he failed to adopt the precaution plan of getting out of his car and looking down railroad tracks when he possessed a foreshortened view of these tracks from the driver’s seat. I think of this case as one in which the court could use cost–benefit analysis to establish an upper bound on nondurable precaution. Nevertheless, when a precaution plan passes cost–benefit analysis, each individual nondurable precaution cannot be effectively subjected to it, especially at high rates of consistency.
4. Courts allow juries to forgive failures of durable precaution, too, especially when the omission was not willful and wanton.
8. The case Holmes used to illustrate his theory was Crafter v. Metropolitan Ry., L.R. 1 C.P. 300 (1866) (in slip–and–fall case, court held, despite jury verdict to contrary, that defendant was not required to install handrail on staircase; replace the worn–out brass nosing on this staircase; or to have installed a nosing made of a more durable material than brass).
10. Holmes 1881: 128–129. The example was prescient because later, when he was a Supreme Court justice, Holmes sought to implement his thinking by making someone struck by a train contributorily negligent as a matter of law. See Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) (per Holmes, J.) (driver had to get out of car to check whether defendant’s railroad tracks were clear). The case was ceremoniously limited by a later court in Pokora v. Wabash Ry., 292 U.S. 98 (1934) (per Cardozo, J.) (driver did not have to get out of car to check whether defendant’s tracks were clear).
11. 60 F.2d 737 (2d Cir. 1932) (defendant committed breach of duty as a matter of law when it failed to equip its tugboats with radio receiving sets). Two other admiralty cases that are often included in casebooks are United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Conners Co. liable as a matter of law for failing to have bargee on board on day of accident) and Smith v. Lampe, 64 F.2d 201 (6th Cir. 1933) (judgment for defendant as matter of law because he was reasonably ignorant of customs of sea). The T.J. Hooper and Carroll Towing are much more misleading for an understanding of common–law negligence doctrine because judgments of nonliability as a matter of law, as in Smith v. Lampe, are equally usual in common law cases,
whereas judgments of liability as a matter of law are much more common in admiralty and FTCA cases than they are in common law cases.


14. Willaby v. Bendersky, 891 N.E.2d 509 (Ill. App. 2008) (jury allowed to forgive surgeon who left 12-inch-by-12-inch laparotomy sponge in patient). See also Deuel v. Surgical Clinic, PLLC, No. M2009-01551-COA-R3-CV, 2010 WL 3237297 (Tenn. App.) (defendant surgeon left lap sponge in patient during pancreatic surgery; parties cross-moved for summary judgment; court denied both motions; appeals court affirmed and made clear that jury possessed power to acquit surgeon or not), after remand, Estate of Deuel v. Surgical Clinic, PLLC, 2013 WL 11021322 (Tenn. App.) (jury did indeed forgive surgeon, and appeals court held that jury was properly instructed and again stressed that jury possessed power to acquit surgeon as jury had done).

15. See, e.g., Akridge v. Noble, 41 S.E. 78 (Ga. 1902) (defendant left lap pad in patient during surgery; trial court instructed that jury needed to decide whether this was below the standard of care; jury acquitted surgeon, and trial court entered judgment accordingly); Rayburn v. Day, 268 P. 1002 (Or. 1928) (jury allowed to forgive surgeon who left surgical sponge in patient). See also Milson 1981: 283–313 and 392–400; cited and discussed in Kelley & Wendt 2002: 588–590.

16. See, e.g., Dickerson v. Fatehi, 484 S.E.2d 880 (Va. 1997) (although plaintiff had suffered severe pain for 20 months, jury possessed power to forgive surgeon and surgical nurses who during diskectomy left hypodermic needle and plastic marker of it in plaintiff’s neck); Easterling v. Walton, 156 S.E.2d 787 (Va. 1967) (during cesarean childbirth defendant surgeon left lap pad in plaintiff’s abdomen; although lap pad caused plaintiff injury and a 14-day hospital stay, jury was entitled to forgive and acquit surgeon).

17. See, e.g., Breaux v. Thurston, 888 So. 2d 1208 (Ala. 2003) (in first trial jury forgave defendant for leaving surgical clamp in plaintiff; trial judge sua sponte ordered new trial because of his own perceived error in instructing jury; jury found defendant liable on second trial, and he appealed; Alabama Supreme Court ordered third trial because of failure of trial judge to give a sufficiently forgiving instructions under Alabama tort reform statute; court made very clear that third jury would possess the power again to acquit the surgeon); Houseman v. Garrett, 902 So. 2d 670 (Ala. 2004) (defendant surgeons left lap pad in plaintiff while undoing prior fallopian tube ligation; jury returned verdict for plaintiff; appeals court reversed because jury should not have been told that the left lap pad was prima facie evidence of the surgeons’ negligence when jury could have properly forgiven surgeons based on surgeons’ reliance on a nurse’s faulty count of the lap pads used and removed during operation), overruling Ravi v. Williams, 536 So. 2d 1374 (Ala. 1988) (proper to instruct jury that, to find surgeon liable, jury had to find only that surgeon left sponge inside plaintiff and that she suffered damage from it).

See also Ales v. Ryan, 64 P.2d 409 (Cal. 1936) (jury forgave surgeon for leaving laparotomy sponge in patient’s abdomen during routine gall bladder operation; patient died from peritoneal infection due to retained pad; California Supreme Court remanded for new trial based on errors in jury instructions favoring surgeon, but made it clear that jury possessed power to absolve surgeon of any negligence); Warner v. Stewart, No. F037392, 2002 WL 1970072 (Cal. App.) (defendant left surgical retractor behind plaintiff’s heart during bypass operation; court stressed that jury possessed power to acquit defendant of any negligence); Baumgardner v. Yusuf, 51 Cal. Rptr. 3d 277 (Cal. App. 2006) (jury forgave surgeon for leaving lap sponge in patient’s leg during vascular surgery; appeals court reversed and remanded because of incorrect jury instructions, but made clear that a properly instructed jury possessed the power to acquit defendant); Miller v. Tongen, 161 N.W.2d 686 (Minn. 1968) (jury allowed to absolve surgeon who left sponge in patient); Rayburn v. Day, 268 P. 1002 (Or. 1928) (jury allowed to absolve surgeon who left surgical sponge in patient); Kissinger v. Turner, 727 S.W.2d 750 (Tex. App. 1987) (jury allowed to absolve surgeon who...
left surgical clamp in patient); *Hutchins v. Fletcher Allen Health Care, Inc.*, 776 A.2d 376 (Vt. 2001) (jury allowed to absolve defendant hospital whose doctor–employees left surgical sponge in patient).

18. See *Cobb v. Fisher*, 20 So. 3d 1253 (Ala. 2009) (defendant surgeon left cement in patient’s knee during reconstructive surgery; hospital and surgeon moved for summary judgment based on affidavits that surgeon had complied with standard of care; plaintiff submitted no statement of expert testimony under Alabama tort reform statute that surgeon had failed to comply with standard; trial court dismissed complaint, and Alabama Supreme Court affirmed); *Kennedy v. Holder*, 1 S.W.3d 670 (Tenn. 1999) (defendant obstetrician inadvertently left three lap pads in patient’s vagina after childbirth; trial court denied doctor’s motion for summary judgment, but held that, to qualify for trial under Tennessee tort reform statute, plaintiff needed an expert affidavit stating that doctor’s conduct fell below standard of care).

19. 226 P. 752 (Kan. 1924).

20. See *Rule v. Cheeseman*, 317 P.2d 472 (Kan. 1957), which held that evidence showing that a surgeon left a gauze pad in his patient raised only a prima facie case of negligence against the surgeon and that a jury would possess the power to acquit him of liability.

21. See *Chi Yun Ho v. Frye*, 865 N.E.2d 632 (Ind. App. 2007) (defendant surgeon left lap pad in plaintiff during hysterectomy; jury found for defendant; intermediate appeals court entered judgment as a matter of law for patient on ground that surgeon said only that he relied entirely on nurse’s count of pads), rev’d, *Chi Yun Ho v. Frye*, 880 N.E.2d 1192 (Ind. 2008) (case remanded for new trial on ground that jury possessed power to acquit surgeon of any negligence); *Laws v. Harter*, 534 S.W.2d 449 (Ky. App. 1975) (trial court directed verdict in favor of surgeon who closed patient after inaccurate nurses’ sponge count, but appeals court held that surgeon was negligent as a matter of law), rev’d, *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009) (defendant left Durahook in plaintiff’s brain cavity; he suffered pain and $11,900 in subsequent surgery expenses to remove it; trial court denied plaintiff judgment as a matter of law on issue of liability, and jury then acquitted surgeon of negligence; on appeal Kentucky Supreme Court overruled Laws case and held that jury acted within its proper discretion in acquitting surgeon); *Baxter v. AHS Samaritan Hosp., LLC*, 328 S.W.3d 687 (Ky. App. 2010) (trial court properly denied plaintiff’s motion for summary judgment against surgeon who had left sponge in her during prior caesarean operation and when plaintiff’s evidence indicated that sponge had killed her second child, because question of breach of duty was for the jury in this type of case).

22. See generally Annot., Timothy E. Travers, Druggist’s Civil Liability for Injuries Sustained as Result of Negligence in Incorrectly Filling Drug Prescriptions, 3 A.L.R.4th 270 (1981); Annot., Liability of Druggist for Injury in Consequence of Mistake, 31 A.L.R. 1336 (1924); Annot., Liability of Manufacturer or Seller for Injury Caused by Drug or Medicine Sold, 79 A.L.R.2d 301 (1961); see *Faulkner v. Birch*, 120 Ill. App. 281 (1905) (pharmacist who dispensed atropine instead of prescribed codeine, seriously injuring plaintiff, entitled to jury instruction fairly apprising jury of their right to acquit pharmacist of negligence); *Ohio County Drug Co. v. Howard*, 256 S.W. 705 (Ky. 1923) (pharmacist is not “insurer” of accuracy of his dispensing, and question of his negligence is for jury), overruling, *Fleet & Semple v. Hollenkemp*, 13 B. Mon. 219, 1852 WL 1716 (Ky.); *Dunlap v. Oak Cliff Pharmacy Co.*, 288 S.W. 236 (Tex. Civ. App. 1926) (jury could find defendant pharmacist negligent or not after he substituted poisonous drug for requested nonpoisonous drug). See also *Johnson v. Smolinsky*, 81 S.W.2d 434 (Mo App. 1935) (jury given instruction favorable to plaintiff, but was still entitled to find for defendant). The favorable plaintiff instruction given in *Johnson v. Smolinsky* seems inconsistent with the later *Missouri case of State ex rel. Malan v. Huesemann*, 942 S.W.2d 424 (Mo. App. 1997) (issue of pharmacist’s breach of duty was for jury).

See also *Brown v. Marshall*, 11 N.W. 392 (Mich. 1882) (in case in which pharmacist dispensed wrong drug and plaintiff suffered damages therefrom plaintiff’s verdict must be reversed and case remanded for new trial because trial judge failed to instruct jury that negligence issue was theirs
and verdict and judgment would depend on their finding pharmacist was negligent); MacKay v. Crown Drug Co., 420 P.2d 883 (Okla. 1966) (pharmacist dispensed ten times dose of anti-hypertensive drug, but jury acquitted him and was upheld); Crozier v. Henry Ford Hospital, No. 279924, 2008 WL 5197153 (Mich. App.) (plaintiffs did not require expert testimony on standard of care after plaintiff injured by pharmacist’s dispensing ten times prescribed dose of medicine; jury could find either way on this evidence); Drury v. Connecticut CVS Pharmacy, No. CV126028814S, 2012 WL 5519612 (Conn. Super.) (negligence question was for jury when defendant mistakenly dispensed very harmful Pregisone, instead of doctor-prescribed Pregabalin, for plaintiff’s seizure disorder); Ex parte Rite Aid of Alabama, Inc., 768 So.2d 960 (Ala. 2000) (issue of whether pharmacist who dispensed twice prescribed dose was negligent was for jury even when plaintiff’s decedent died from error).

The rule allowing juries to forgive pharmacist errors runs so contrary most people’s understanding of the negligence rule that federal courts, trying to apply state law, may sometimes get it wrong. Compare Franklin v. K-Mart Corp., 997 F. Supp. 2d 453 (W.D. Va. 2014) (citing supposed general principles of Virginia law to conclude patient entitled to partial summary judgment on issue of pharmacist’s liability for dispensing error) with Gressman v Peoples Service Drug Stores, Inc., 10 Va. Cir. 397 (Va. Cir. Ct. 1988) (pharmacist not “strictly liable” for dispensing injurious “chlorpropamide” instead of prescribed “chlorpromazine,” but jury would decide whether to acquit pharmacist or not).

24. Peavy v. Hardin, 288 S.W. 588 at 589–90 (Tex. Civ. App. 1926). The appeals court also stressed that the jury found that the plaintiffs had failed to incur any “pecuniary expense,” which was an additional reason to bar their negligence action. It seems hard to credit this finding, however, because at minimum the plaintiffs must have incurred some sort of burial cost as a result of the defendant’s negligence, and of course they also incurred a purely pecuniary expense from purchasing the drug that killed their child. See also Bean v. Dempsey, 233 S.W.2d 417 (Ky. 1950) (on evidence strongly favoring plaintiff’s claim that defendant pharmacist erroneously dispensed wrong substance, jury still would have been entitled to find for the defendant); MacKay v. Crown Drug Co., 420 P.2d 883 (Okla. 1966) (when defendant pharmacist erroneously dispensed ten times prescribed dose, jury allowed to absolve pharmacist on ground that plaintiff was contributorily negligent in failing to notice unusual effects of misdispensed drug); Moresi v. Evans, 572 S.E.2d 327 (Ga. App. 2002) (harmless error to tell jury that pharmacist committed breach of duty as a matter of law when other instructions invited jury to assess whether there was breach of duty and when jury acquitted pharmacist). Increasingly, a victim of a pharmacist who has mistakenly dispensed the wrong drug must comply with a malpractice reform statute that requires him to produce an expert’s report asserting that the error violated the “standard of care” observed by health care practitioners. See, e.g., Rendon v. Walgreens, 144 F. Supp. 3d 894 (N.D. Tex. 2015). Cases indicate that it will not be obvious to many experts that a dispensing error, even one that produced serious damages, did violate the standard of care. But see Morgan v. Publix Super Markets, Inc., 138 So. 3d 982 (Ala. 2013) (Alabama malpractice reform statute does not require expert report in case in which pharmacist has dispensed wrong drug, but it is still a jury issue whether such a pharmacist was negligent).

26. 126 N.E. 814 (N.Y. 1920) (plaintiff contributorily negligent as a matter of law for violating statute requiring his buggy to show a light after dark).
29. Even in New York, when two defendants have each committed traffic violations, the jury can forgive one of them on proximate cause grounds. See Gibson v. Singh Towing, Inc., 64 N.Y.S.3d 233

30. 208 Cal. Rptr. 3d 655 (2016).
31. Minnegren v. Nozar, 208 Cal. Rptr. 3d at 664.
32. See, e.g., Spristerbach v. Holland, 155 Cal. Rptr. 3d 306 (Cal. App. 2013) (defendant without statutory right of way ran directly into bicyclist with right of way; after accident plaintiff rudely complained to defendant; defense jury verdict affirmed even with concededly erroneous instructions unfavorable to plaintiff, determined by appeals court to be “harmless error”); Safirstein v. Nunes, 241 Cal.App.2d 416 (Cal. App. 1966) (car without statutory right of way ran directly into car in which plaintiff was passenger; defense verdict affirmed).
California courts often stress that “mistakes are made even in the exercise of ordinary care” and even with respect to statutory duties. This doctrine seems originally seems to have arisen as a means of forgiving the plaintiff’s contributory negligence. This doctrine is now applied to primary negligence.

34. Minnegren v. Nozar, 208 Cal. Rptr. 3d at 655, 666.
35. Holmes (1881: 110) wrote: “A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rest as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.”

36. On this point, Holmes (1881: 113–114) wrote: “No doubt, a defendant could justify or excuse being on the wrong side [of the road] under some circumstances. The difference between alleging that a defendant was on the wrong side of the road, and that he was negligent, is the difference be between an allegation of facts requiring to be excused by a counter allegation of further facts to prevent their being a ground of liability, and an allegation which involves a conclusion of law. and denies in advance the existence of an excuse. Whether the former allegation ought not to be enough, and whether the establishment of the fact ought not to shift the burden of proof, are questions which belong to the theory of pleading and evidence, and could be answered either way consistently with analogy. I should have no difficulty in saying that the allegation of facts which are ordinarily a ground of liability, and which would be so unless excused, ought to be sufficient. But the forms of the law, especially the forms of pleading, do not change with every change of its substance, and a prudent lawyer would use the broader and safer phrase.” When the Minnegren defendant claimed he was “only human” and “made a mistake,” he was not “counter alleging further facts.” It was already clear from the plaintiff’s complaint that the defendant was human and had made a mistake. If a pleading analog is needed, it is as if the Minnegren defendant pleaded an ancient and opaque “not guilty” and “threw himself on the country,” which then acquitted him.

committed breach of duty as a matter of law by leaving metal clamp in patient’s chest). Cf. Prindle v. United States, No. 4:10–CV–054–A, 2011 WL 1869795, n.1 (N.D. Tex.) (opines that judgment as a matter of law would be given for plaintiff in FTCA case in which plaintiff suffered from surgeon leaving a foreign object in this body). But see Callahan v. Cho, 437 F. Supp. 2d 557 (E.D. Va. 2006) (FTCA plaintiff whose Veterans Administration surgeon left small needle tip in his body because it could not be easily removed needed to comply with West Virginia malpractice reform statute which required expert statement to create triable issue of fact). See also McCubbin v. Hastings, 27 La. Ann. 713 (La. 1875) (Louisiana Supreme Court ordered judgment as a matter of law to plaintiff who sued for pharmacist dispensing error when case had been tried to judge); Dietze v. King, 184 F. Supp. 944 (E.D. Va. 1960) (diversity case tried to bench resulted in judgment as a matter of law for plaintiff where surgeon had left small sponge in patient).

38. See Zuchowicz v. United States, 140 F.3d 381 (2d Cir. 1998) (per Calabresi, J.) (plaintiff entitled to judgment as a matter of law in FTCA case when Navy hospital pharmacy dispensed twice recommended dose to her decedent); Boyle v. United States, 948 F. Supp. 2d 570 (D.S.C. 2012), related proceeding, 948 F. Supp. 2d 577 (D.S.C. 2012) (after Navy pharmacist accidently dispensed ten times prescribed dose to plaintiff’s deceased, they sued under FTCA and got judgment); Espinosa v. United States, No. 00 C 3435, 2001 WL 1518536 (N.D. Ill.) (in FTCA case, Veterans Administration pharmacist committed breach of duty as matter of law by filling prescription with incorrect dose of drug, but also held incorrect dose was not cause in fact of injury), aff’d, 47 Fed. Appx. 402 (7th Cir. 2002).


41. See Blyth v. Birmingham Water Works Co., 156 Eng. Rep. 1047 (Exch. 1856) (court held that cleaning frost off fire plug was not required, despite jury verdict to contrary, because no experience demonstrated that precaution was useful); Crafter v. Metropolitan Ry., L.R. 1 C.P. 300 (1866) (court held, despite apparent jury verdict to contrary, that defendant was not required to install handrail on staircase; replace the worn-out brass nosing on this staircase; or to have installed a nosing made of a more durable material than brass).

42. 125 N.E. 93 (N.Y. 1919).

43. Cardozo wrote: “The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance (Nelson v. Branford L. & W. Co., 75 Conn. 548, 551; Braun v. Buffalo Gen. El. Co., 200 N.Y. 484). But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it (Green v. W.P. Rys. Co., 246 Penn. St. 340). If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril.” (Adams v. Bullock, 125 N.E., at 93) Cardozo also said: “There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible.” (Adams v. Bullock, 125 N.E., at 94)

44. 10 A.2d 673 (N.H. 1940).

45. The court said: “In the case before us, there was danger of electrocution in the street. As long as the Telephone Company’s safety devices are properly installed and maintained, there is no
danger of electrocution in the house. The only foreseeable danger to the telephone subscriber is from noise—fright and neurosis. Balancing the two, the danger to those such as the plaintiff is remote, that to those on the ground near the broken wires is obvious and immediate. The balance would not be improved by taking a chance to avoid traumatic neurosis of the plaintiff at the expense of greater risk to the lives of others." (Cooley v. Public Service Co., 10 A.2d, at 676)

46. The case is also interesting because there had been a custom to install wire baskets, but the court used cost–benefit analysis to reject this custom.


48. Our principal author, Professor Keating, also adopts this view.

49. Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001) (landlord not liable for crime when even a second shift of security guards might not have prevented it); Casteneda v. Olsher, 162 P.3d 610 (Cal. 2007) (landlord not liable for crime when only socially costly eviction of “suspicious” individuals might have prevented it).

50. See Vasquez v. Residential Investments, Inc., 12 Cal. Rptr. 3d 846 (Ct. App. 2004) (landlord liable for crime when cheap replacement of window pane would have prevented it); Delgado v. Trax Bar & Grill, 113 P.3d 1159 (Cal. 2005) (landlord liable for crime when cheap changes in procedures would have prevented it); Morris v. De La Torre, 113 P.3d 1182 (Cal. 2005) (landlord liable for crime when cheap 911 call would have prevented it).

51. See Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001) (landlord not liable for crime when even a second shift of security guards might not have prevented it); Casteneda v. Olsher, 162 P.3d 610 (Cal. 2007) (landlord not liable for crime when only socially costly eviction of “suspicious” individuals might have prevented it).

52. Cf. A.C. ex rel. Cooper v. Bellingham School District, 105 P.3d 400 (Wash. App. 2004) (first–grade teacher able to win jury’s forgiveness and appeals court’s affirmance of that verdict after she testified that she was totally focused on safety when she let piñata bat slip from her hands, injuring one of her pupils; parents also testified that she was safety–minded teacher).


54. Holmes (1897: 459–460) wrote in this famous article: “The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other [that is, from the moral realm to the legal realm] without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.”

ABSTRACTS

U.S. juries possess the power to forgive even obvious negligence and frequently exercise it. Judges and courts facilitate this disposition of cases by regularly affirming juries’ decisions to forgive negligence. This practice creates a problem for corrective justice theories of negligence, which commonly assert that the purpose of negligence law is to repair harm. This reparative purpose is not achieved in the many cases in which juries forgive negligence. In addition, juries impose negligence liability on many acts and omissions that are not wrongs in any moral sense. Negligence liability is best understood, not as a moral system, but as a “stochastic tax.” Someone whose negligence has been forgiven by a jury has experienced “justice luck.”
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