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Symposium:

A Tribute to Professor David Fischer

Foreword: David Fischer, the Fox^(a)

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It is my great pleasure to pen a few words in honor of my friend and fellow laborer in the torts vineyard, Professor David Fischer. Professor Fischer has been an intellectual force in the modern development of tort law. He has made us think hard about the implications of tort rules. He is in the intellectual tradition of a splitter, and not a lumpner, in his scholarship.¹ Most of scholarship in modern tort law falls into the “lumpner” camp. It is scholarship that looks at tort rules as encapsulating wider models that serve certain instrumental ends, or as part of a non-consequential system of norms; for example, law and economics has taken tort rules to reflect a system of rules that serve efficiency. Others view the rules as part of a system of private law that instantiates corrective justice.² Contrary rules are diminished and common themes emphasized. Even when discussing discrete aspects of tort law, most modern scholars are lumpners in applying broad theoretical frameworks to fit those aspects.³ The most talked of aspect has been the duty concept in negligence. While the debate can be traced to the *Palsgraf* case, it has been given

(a) I refer to Isaiah Berlin’s essay on Leo Tolstoy, “The Hedgehog and the Fox.” ISAAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* (1966). This title refers to the Greek poet Archilochus fragment, “The fox knows many things, but the hedgehog knows one big thing.”

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1. See, e.g., David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277 (2005-2006).

2. See generally Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002).

3. See generally PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* (1st ed. 1991); Heidi M. Hurd, *Nonreciprocal Risk Imposition, Unjust Enrichment, and the Foundations of Tort Law: A Critical Celebration of George Fletcher’s Theory of Tort Law*, 78 NOTRE DAME L. REV. 711 (2003).

new life by the scholarship of Keating, Goldberg and Zipursky. The issue that separates these scholars derives from their views about the function of tort liability.

David Fischer is a splitter. He takes present or evolving doctrines and puts them under a powerful analytical microscope for examination. In so doing, he reveals differences, internal flaws, paradoxes and problems, and revels in the complexity. David Fischer, although not without strong views about the theoretical groundings of tort law, proposes no meta-theories. Instead, he does the hard work on the inside that, in the end, uncovers the problems and dilemmas for courts as they go about their business of ascribing responsibility for wrongful acts.⁴ He is the fox of tort law.

I. THE FOX AND CAUSATION

Glen Robinson said once that every serious torts scholar eventually comes to causation. And, having arrived at that terminus, the scholar soon concludes that challenges abound. Causation is at the center of tort law. Old conundrums are to be found, and with the phenomena of enterprise liability and mass tort, we see causation in new manifestations. No modern scholars have taken on the task of unfolding the mysteries of causation, old and new, as thoroughly as David Fischer.

Every student in first year torts has been subjected to the difficulties of causation. From an apparently clear distinction between proximate cause and causation-in-fact, a professor will confound her students by showing that the distinctions are fluid. She will show that the *but for* test is simply a beginning point; she will challenge students with the *Wagon Mound* cases, in drawing principled limits to tort liability. The role of policy is critical in those limits, although students will have problems in comprehension, as have courts and juries.⁵ Some students will come to the first-year torts class armed with some knowledge of the philosophy of causation.⁶ Most will not have thought about these issues. It is the strength of the case method with its allied Socratic teaching that students, through the cases, are pressed to go beyond causation easily determined to those situations where either logic breaks down or traditional doctrine is found too confining to accommodate the ends of tort law.

David Fischer's scholarship on causation has come at a critical time for tort development. In a unique process to American law, the doctrine is examined through the American Law Institute's Restatement Process. Under

4. Jane Stapleton is a splitter, but also a lumpner, in some of her work. Compare Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529 (2006), with Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 *VAND. L. REV.* 941 (2001).

5. Studies have shown that juries do not understand proximate cause instructions. See, e.g., Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 *N.C. L. REV.* 77, 90-94, 110-11 (1988).

6. Some will have studied David Hume, for example.

the First and Second Restatement on Torts, causation was a centerpiece. This was the same, if not more so, for the Third Restatement, now on foot. Under the Third Restatement, early drafts threw the entire burden of confining liability on causation. The duty issue served as a limiting and as an auxiliary limiting factor.⁷ Mainly due to some incisive scholarship of Goldberg and Zipursky, the role of duty was restored. Yet causation remains something of a “dog’s breakfast.”⁸ The scholarly efforts of Jane Stapleton, Richard Wright, and David Fischer will bring order to that messy breakfast. Perhaps the courts will never find causation a “gentlemen’s repast,” but some order will reign if the work of David Fischer is properly noted.

As in the life of all scholars, the stream of intellectual discourse can be traced in retrospect. In each field of tort inquiry, David Fischer has asked hard questions that others would not broach. The contribution of a splitter comes in this way. It is by way of painstaking analysis that is highly detailed and perhaps too finicky for lumpers, who hanker after the broad meta-theory unencumbered by contrary data. David Fischer’s work describes a development from his ability to perceive the hard questions, to writing that is uncompromisingly clear in uncovering the issues, and to insights showing the reader ways of coping with the dilemmas of causation in the modern setting, where the law’s job is so demanding.

II. LOSS OF CHANCE

In choosing to place the “loss of chance” theory under his microscope, David Fischer has characteristically taken on an intellectually challenging and important topic. He provides a comprehensive analysis of tort law, in “Recovery of Loss of Chance.”⁹ As is refreshingly usual, David titles his article modestly, yet the issue engaged is fundamental. He examines the American law against developments in the Commonwealth.¹⁰ In discerning that Commonwealth courts are willing to apply recovery for loss of chance in economic loss cases, while the American courts will apply that approach in medical malpractice cases, Fischer shows the power of appropriate comparative anal-

7. For early drafts, see John C. P. Goldberg & Benjamin Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 692-736 (2001) (discussing the Restatement’s then-critical attitude toward the duty concept).

8. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1223 (2008) (citing David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 AM. J. COMP. L. 171, 193 & n.104 (1997)).

9. David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605 (2001).

10. See *id.*; see also Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory”*, 50 UCLA L. REV. 531 (2002).

ysis.¹¹ David's examination of the Commonwealth cases shows an impressive ability to synthesize cases from England, Australia, and Canada. When tort law deals with economic loss, it is close to the border of contract law, and thus the courts are willing to value expectations, since a breach of contract, at its heart, deprives the promisee of proper expectations. David's scientific background and instincts are a great aid in his scholarship. In his analysis of probabilistic causation proportional damage cases, he provides an analysis building on David Kaye's article, "The Limits of the Preponderance of Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation."¹² To the same extent, he is at his limpid best in describing Levmore's, "Recurring Miss" thesis, as justifying, in these cases, recovery that goes beyond the bounds of ordinary proof of damage.¹³ He is willing to examine and criticize a major theorist like Stephen Perry, who proposes an autonomy basis for recovery, perceiving its effectiveness, and yet its limitations. When I am together with David next, I will let him know how I think he has clarified my thinking by this article. I must quibble here, for David loves argument. I would question his assertion that Commonwealth law "places primary emphasis on corrective justice, regarding deterrence as a secondary consideration." For this proposition, he cites the august authority of Peter Cane in that scholar's major work, *Tort Law and Economic Interests*.¹⁴ I think this is rather too broad. It is certainly the case that in Commonwealth law, law and economics has not held sway; thus deterrence is less an overt factor in analysis, but I regard the Commonwealth courts, rather than adopting a corrective justice theory, as rather more pragmatic in using theories in particular circumstances to base liability.

It is remarkable that no scholars other than David Fischer have asked so directly the question about the limits of proportional liability. David Fischer is quite correct that, once accepted, the logic extends to many cases. In the Prosser case book, we include the case of *Perkins v. Texas & New Orleans Rail Co.*¹⁵ The case illustrates the *but for* principle. The defendant's train collided with a car, in which the plaintiff's husband was a passenger. It was conceded that the driver of the automobile was negligent. In examining the liability of the railroad for the death of the husband, it was also conceded by the railroad that the train had travelled in the town of Vinton at an excessive speed, and that constituted negligence per se. But that left the prime issue of

11. See Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J. TORT L., iss. 3, art. 6 (2007) (describing the appropriate limits of comparative law analysis).

12. David Kaye, *The Limits of the Preponderance of Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487.

13. Fischer, *supra* note 9, at 632.

14. CRANE, *supra* note 3, at 406-07.

15. 147 So. 2d 646 (La. 1962). The case is the first in the section on *sine qua non* in Causation and Fact.

whether the excessive speed of the train was the cause in fact of the fatal collision. Evidence made it clear that even if the train had been travelling at a safe speed at the intersection – in other words, proceeding at the speed limit – it would nevertheless have collided with the car. This leads the alert student to raise a hand in objection. She will say that the accident would have been avoided if the train had been travelling at the speed limit while in the township because the train would not have arrived at the intersection at the moment the automobile was upon the tracks. This leads to a robust conversation, for the excessive speed elsewhere in the township did not make the conduct wrongful vis-à-vis the plaintiff. This is like the example of a driver driving at excessive speed through a forest and having a tree fall upon the vehicle. Could it be said that here the excessive speed caused the collision with the tree, since if he had been going the speed limit, the tree would have fallen innocuously? The question always is, then, whether what eventuated was within the risks run by the wrongful conduct, and this scope of risk inquiry begins to look like the later proximate cause issue.

If that were not enough for the students, then take them to the next issue, for the automobile was in motion, and accordingly, the driver may have been able to take evasive action if the speed were not excessive – that is, if the train driver had not acted negligently in driving his train at an excessive speed. Here the student is introduced to the evidentiary requirements of proof. The court says that the deficiencies of evidence were such that the court could not draw a reasonable inference of causation; the argument is “pure conjecture.” Now, as David Fischer acutely recognizes, with the adoption of the loss of chance theory, could we evaluate that chance of avoiding the accident and provide proportional recovery? He shows that there is a respectable argument for that conclusion, that is, that there is a “general theory of probabilistic causation.” He says rightly that such a conclusion would undermine the foundations of tort liability. Granted that there are good reasons for allowing recovery for loss of a chance, where can the limits be drawn? The careful conclusion after exhaustive discussion is both parsimonious and convincing in using case-specific policy considerations. Still, David Fischer finds that statistical uncertainties make recovery problematical. This is why medical malpractice is the sole recognized harbour of probabilistic causation in the United States. Scientific medicine has produced data of this kind that can be introduced into court and leads to reasonable conclusions on certainty.

I hope David in retirement will continue to examine this issue and give us the benefit of his uncompromising and acute analysis, as the courts continue to probe probabilistic causation and recovery for loss of chance.

III. CAUSATION IN OVER-DETERMINED CASES

The case law on loss of chance is relatively new in the law. It has become critical, as liability is moved to consider more fully medical malpractice, recovery of economic loss, and recovery for toxic tort. Professor Fisch-

er's other scholarship goes back further, to the logical dilemmas of *but for* causation. The students, once having come to an understanding of *but for* causation, are challenged to see that the test fails where multiple causes are sufficient (the so-called "over-determined causes"). Further, they perceive that a claim is always subject to the vicissitudes of proof where the burden falls on the plaintiff to establish cause in fact. David Fischer has shown us that rather than being an isolated phenomenon, the problem of over-determined causes is quite common. The courts simply have failed to recognize that a host of circumstances, particularly in negligent omissions, implicate the problem. The prototypical case is that of merging fires: if each fire was sufficient to destroy the plaintiff's property, it cannot be said that either fire was the *but for* cause of the property damage. The courts and the Second Restatement resort to the ploy of "substantial cause," to overcome the logical conundrum. Richard Wright has made important contributions in this area of the law by proposing a solution to the logical problem building on the work of Hart and Honore.¹⁶ As David Fischer acknowledges, the Wright NESS test provides an extremely helpful way of conceptualizing the nature of causal problems, and it offers a rational process for identifying causes in over-determined cases.¹⁷ To state it shortly, the NESS test states that a "particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence."¹⁸

Professor Fischer does not flinch from the challenge of examining the complexities of the NESS test and finding it wanting in providing a universal solution. In the end, a resolution must rely not on logical analysis, but considerations drawn from policy imperatives of tort ability. This is not the place to dilate upon Professor Fischer's argument; it is enough to give a glimpse into the thorough use of hypothetical examples and close reasoning. He uses the hypothetical of the rental car with defective non-functional brakes that is rented to a driver. The plaintiff is injured while crossing the street when the driver negligently does not apply the brakes. Who is responsible, the rental company or the driver? Professor Fischer shows that it is not an isolated example and that the NESS case does not solve it. It is not possible to describe the causes as duplicative or to identify one cause as preemptive. A preemptive cause may be, for example, a flood of water that extinguishes a fire that is about to destroy a claimant's house. The flood destroys the house. A per-

16. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001).

17. Fischer, *supra* note 1.

18. *Id.* at 281 (quoting Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1790 (1985)).

son falls from the top of a building, and when falling past the fortieth floor, is shot. The flood and the shot, I presume, are both preemptive causes. Richard Wright asserts that the failure to apply the brakes has “causal priority” and therefore is the cause.¹⁹ But what gives this “causal priority”? It cannot be just an intuition that would guide us. That is surely fickle and very much in the eye of the beholder. Professor Fischer is right to reject that and to take us back to the roots of liability. The rules are designed to ascribe responsibility. As he says, “[t]he cases illustrate the way difficult causation in fact issues blend into questions of duty and proximate cause.”²⁰ Here, as in damages for loss of chance, Professor Fisher, by dint of careful, exacting, and insightful analysis, comes to a conclusion that liability rules are, in the end, subject to policy prescriptions in the law. All the rules bend to the requirement that they are designed to be used by courts to resolve disputes.

IV. A CHAT WITH THE FOX

I recall an afternoon in Chicago more than a decade ago when David and I chatted about torts, looking over the river. We had just attended an advisory committee meeting of the Torts and Insurance Section of the ABA. He drew me into his complex web of causation questions. They involved multiple omission issues based on his reading of the cases. “What is the cause of death in this case?” he asked. “The captain of a boat falls off it and into the water; the boat has no life buoy; the captain cannot swim.” “The failure to stow the buoy,” I said too quickly. He had me. “How can that be the cause when the captain could not swim? And then was that the cause? Not in a *but for* sense because even if he had been able to swim, he would have drowned because there was no life buoy.” We repaired to a bar for a beer.

All of us who have been privileged to chat with David will have had similar conversations. This is the high life of torts talk. It is comforting to know that David will continue to labor in the vineyard for many years, even as he steps down from his post at the University of Missouri. He will continue to be the “fox” – the splitter – who will ask hard questions in a world of “hedgehogs” – the lumpers. We will all continue to benefit greatly from his erudition.

19. *Id.* at 311.

20. *Id.* at 317. The same point is made by ROBERT STEVENS, TORTS AND RIGHTS 141 (2007) (“The claim that we can produce a scientific or value-free test for ‘factual’ causation which is different in kind from the normative questions of selection raised by ‘legal’ causation again proves to be a chimera.”).

APPENDIX

Publications of David A. Fischer

BOOKS

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