SOME PITFALLS OF FEDERAL TORT REFORM LEGISLATION

William Powers, Jr.*

I should begin by putting some cards on the table. I know very little about federalism. I certainly do not have a *theory* of federalism. I know very little about constitutional law. I certainly do not have a *theory* of constitution law.[1] I do claim to know something about tort law, but I do not have what would pass today for a *theory* of tort law, at least in the sense that tort law *really* is just a manifestation of some other normative theory, such as economics or corrective justice. In fact, I do not think tort law, or any other body of law for that matter, is in need of such a theory.[2] It should come as no surprise, then, that I do not have a theory about the intersection of federalism and tort law.

I do have some biases, however. On the issue of federalism, I generally favor devolving power and fiscal responsibility to states and local governments. On the issue of tort law, I am generally sympathetic with some tort reform legislation. There are exceptions to both of these biases,[3] so this picture is a cartoon. But the cartoon is a useful one, and I am happy to accept it for the purpose of this Conference, because it highlights some interesting issues surrounding federal tort reform legislation. Someone with my views seems to be caught in a dilemma. I favor tort reform, but I oppose giving more power to

---

* Hines H. Baker and Thelma Kelley Baker Chair in Law, The University of Texas School of Law. B.A., 1967, University of California (Berkeley); J.D., 1973, Harvard Law School.

1. My only professional contact with federalism or constitutional law is when I occasionally stumble across a question about the preemptive effect of a federal statute on a state common law tort claim. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). About the constitutionality of punitive damages award, see, e.g., Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); about the applicability of the state or federal version of Rule 407, which governs the admissibility of post-accident remedial measures to prove negligence or product defect, see, e.g., Olin G. Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371 (1977).

2. *See, e.g.*, Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994). I do not claim that we have unmediated access to reality. I agree we all have conceptual structures through which we construct a vision and version of reality. In this sense, we all use theories to construct a vision of law. But in this sense, doctrine is a theory of legal relationships. *See* William Powers, Jr., *On Positive Theories of Tort Law*, 66 TEX. L. REV. 191 (1987). What I do *not* have is a theory of tort law in the sense that we are well served by translating a doctrinal problem into the language of some *other* normative theory, solving it, and then translating the solution back into the theory of doctrine.

3. For example, I do not favor devolving primary authority over national defense or civil rights to states and local governments, and I think that proposals to abolish the collateral source rule—whereby a plaintiff's recovery from his or her own insurance does not reduce the defendant's liability—are simple-minded and pernicious. Moreover, I am not convinced that legislatures are the best place to resolve disputes about tort law.

the federal government. If I support tort reform efforts in Congress, I am caught in an inconsistency or, worse, I am guilty of hypocrisy. The cartoon makes me a good surrogate on this issue for the image most of you have of Newt Gingrich and Bob Dole. It's as good a role as any for me to play.

In fact, I am quite suspicious about federal tort reform legislation, but not because of any general views about federalism. Even from the perspective of a novice, there appears to be sufficient federal interest on some areas of tort law to justify federal action. For example, a perennial target of federal tort reform legislation is products liability law. Surely the market for most products is sufficiently national to justify a federal interest. Current regulation by the Food and Drug Administration (FDA) and the Consumer Product Safety Commission already suggests a federal interest. In fact, there are special reasons why federal products liability legislation may be appropriate. Any given state is much more likely to apply its own products liability law to one of its own citizens suing a business from another state than to a citizen of another state suing one of its own businesses. Thus, in a classic example of the tragedy of the commons, each state may have a bias in favor of products liability rules that increase recovery.[4] The federal government may therefore have an interest in keeping states from "racing to the top" with their domestic rules about products liability.

Arguments about the inconsistency of enlisting Congressional help on tort reform legislation while simultaneously urging the federal government to devolve power to states and local governments do not seem to be very persuasive. Even if I think the federal government currently exercises too much power in relation to states and local governments—or for that matter that government in general exercises too much power in relation to other institutions—it is a brute fact of our political lives that the federal government does exercise this power. Why should the fact that I would prefer the federal government to exercise less power cause me to forfeit my interest in having it use the power it does employ in favor of *my* goals. It is as though we would condemn an opponent of the home mortgage deduction for taking advantage of the deduction on his own taxes while the deduction is in existence.[5] None of this makes an affirmative case generally for federal tort reform legislation. A fortiori, it does not make any case for a particular piece of federal tort reform legislation. It does reflect my skepticism, however, that general theories about federalism are going to be very helpful.

Nevertheless, I am skeptical about most federal tort reform legislation. I am skeptical for mundane, pragmatic reasons. Federal tort reform proposals purport to address particular theories of liability or particular types of defendants, leaving the rest of a state's tort law undisturbed. No one has

4. Of course, this bias might be overcome by a state's interest in being hospitable to out-of-state businesses or in otherwise being influenced by their political power.

5. The argument from inconsistency—or even hypocrisy—is a common one. It is used against judges who oppose judicial "activism" who then are themselves "active". It is used against proponents of the market who then seek subsidies from the government. It is used against free trade advocates who then advocate tariffs to retaliate against another country's tariffs. The supposed inconsistency disappears when we characterize the claim as being, for example: "I would like a smaller (federal) government, and I think we should work across the board toward that end. I am willing proportionally to forego my favorite projects, but I am not willing to forego them unilaterally." One of the problems with some theories about these issues is that they do not address what an actor should do when other actors do not follow the rules.

proposed that Congress enact a comprehensive code of tort law. Thus, a federal proposal to reform an aspect of products liability law is not designed to alter a state's law with respect to medical malpractice. The problem, however, is that the existence of multi-party, multi-theory litigation and of comparative responsibility makes this type of surgical reform extremely difficult.

An example from state law is instructive. In 1973, Texas adopted a comparative negligence statute.[6] The statute also provided that a defendant who was assigned a percentage of responsibility smaller than the plaintiff's was relieved from joint and several liability.[7] By its own terms, the statute applied only to causes of action for negligence. In 1967, the Texas Supreme Court recognized the type of strict products liability embodied in section 402A of the Restatement (Second) of Torts.[8] Under Texas products liability law from 1967 until 1984, a plaintiff's negligence did not constitute a defense, either as an absolute bar or as a comparative reduction, to strict products liability.[9] Thus, from 1973 until 1984, comparative negligence in Texas applied to negligence claims (even negligence claims against product manufacturers) but not to claims based on strict products liability or breach of warranty.

In 1977, the Texas Supreme Court noticed the problem.[10] The court recognized that, under this bifurcated scheme, it would be very difficult for a court to conduct a trial involving both a product manufacturer being sued under strict products liability (and also possibly for negligence) and another defendant who was not a product manufacturer and who was being sued for negligence. Did the plaintiff's negligence count against the other defendant (or even the product manufacturer on the negligence claim) but not against the product manufacturer on the claim of strict products liability? And if the comparative negligence scheme did not apply to the strict products liability claim—and therefore the jury did not assign a percentage of negligence to the manufacturer—how could we tell whether the other defendant's percentage of negligence fell below the plaintiff's, so we could determine whether the other defendant was subject to joint and several liability? The basic problem was that it is difficult to apply different schemes to different parts of the same lawsuit.

The actual case the Texas court faced did not raise this problem directly because the cause of action arose prior to the effective date of the comparative negligence statute. By pointing out the problem, however, the court hoped that the legislature would provide a solution by amending the comparative negligence statute to include cases based on strict products liability. The hope was unfulfilled, and in 1984, in *Duncan v. Cessna Aircraft Co.*,[11] the court faced the problem for real. The court's solution is especially instructive for our inquiry.

---

6. 1973 Tex. Gen. Laws ch. 28, § 1.
7. *Id.* § 2(d).
8. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).
9. *Compare* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) (recognizing some form of a plaintiff's negligence as a defense in strict products liability and warranty cases), *with* Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975) *and* Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974), *overruled by* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984) *and* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967) (all rejecting any form of a plaintiff's negligence as a defense in strict products liability).
10. *See* General Motors v. Simmons, 558 S.W.2d 855 (Tex. 1977), *overruled by* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 427 (Tex. 1984).
11. 665 S.W.2d 414 (Tex. 1984).

The Texas Supreme Court decided that it could not reasonably read the comparative negligence statue to cover strict liability. It then noted again that it would be very difficult to apply different schemes—in terms of defenses based on a plaintiff's conduct and in terms of joint and several liability—to different parties and different causes of action in the same lawsuit. Consequently, refusing to apply comparative principles to strict products liability would create a nightmare in hybrid cases. The court also noted that several other states had applied comparative negligence to strict liability.[12] Consequently, it adopted a common-law comparative negligence scheme for strict products liability.

Unfortunately, the Texas court did not like the content of the statutory comparative negligence scheme for negligence cases, so it adopted different rules for strict products liability. Specifically, the new common-law scheme used pure comparative negligence rather than modified comparative negligence, and it used joint and several liability in all situations, not just in situations in which a given defendant had a percentage of negligence equal to or greater than the plaintiff. Moreover, the court followed the rule in comment n to section 402A of the Restatement (Second) of Torts by holding that, in a case based on strict products liability, a plaintiff's negligence that is no more than a mere failure to discover or guard against a product defect does not count against the plaintiff at all. Finally, and most importantly for our purposes, the court returned to the difficulty of applying different schemes to different parties in the same lawsuit. To avoid these difficulties, the court held that the new scheme applied to the entirety of any case in which the jury found *any* defendant liable on a products liability theory other than negligence—mainly strict products liability and breach of warranty.

This last feature of the *Duncan* scheme, which was necessary to avoid the nightmare of applying different schemes to different parts of the same lawsuit, had two important consequences. First, it provided that the parties to the lawsuit did not know the ground rules about the effect of a plaintiff's negligence or about joint and several liability until after the jury returned the verdict! The court could construct the judgment after the verdict, based on the applicable rules about joint and several liability. But the jury had to be instructed in advance, and therefore contingently, about the type of plaintiff's negligence it could take into account. Second, and most importantly for our purposes, the court's decision about the appropriate rules for strict products liability cases were in the end applied to causes of action other than strict products liability. A dispute between a patient and his doctor or between two motorists would also be governed by the new rules, depending just on whether these claims were associated with a dispute between the plaintiff and a product manufacturer. In other words, different rules applied to, for example, medical

12. *See, e.g.*, Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979); Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Trust Corp. of Mont. v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Safeway Stores, Inc. v. Nest-Kart, 579 P.2d 441 (Cal. 1978); Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Haw. 1982); Kennedy v. City of Sawyer, 618 P.2d 788 (Kan. 1980); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979); Sandford v. Chevrolet Div. of General Motors, 642 P.2d 624 (Or. 1982); Starr Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982); Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967).

malpractice cases depending on whether the medical malpractice claim was or was not part of a hybrid products liability claim.

In fact, the consequences of this scheme were even more problematic. The Texas Supreme Court's decision to follow comment n, and thereby exclude a plaintiff's negligent failure to discover or guard against a product defect from the calculation of a plaintiff's negligence, sub silentio changed the treatment of a buyer's conduct under Texas' version of the Uniform Commercial Code. Comment 13 to section 2.314 provides that a buyer cannot *recover at all* under an implied warranty of merchantability if he is given an opportunity to inspect the goods and fails to find a defect that a reasonable inspection would have revealed.[13] But *Duncan*, which says it governs causes of action for breach of warranty, held that a buyer's mere failure to discover a defect does not *count at all* against the buyer.

Of course, the court could have avoided all of these problems. It could have applied the principles of the comparative negligence statute, if not the statute itself, to claims of strict products liability. It could have adopted a rule for strict products liability that ignored comment n and counted all forms of a plaintiff's negligence. The point here, however, is not that the court made substantively correct or incorrect decisions. It is that the court could not surgically make substantive judgments about these issues in strict products liability without affecting the similar issues in other causes of action. Similarly, if Congress were to address these issues in strict products liability cases, it would necessarily affect the same issues in other causes of action.

In fact, if a state court under these circumstances came to the sensible conclusion that it is unfair to use different rules to govern medical malpractice cases or lawsuits between automobile drivers depending on whether they are coupled with a products liability case, a state might end up grudgingly acquiescing to the federal rule even in cases that did not have a product manufacturer. What started out to be a surgical federal incision into products liability law would ultimately have altered other areas of state law, not because the state was convinced about the wisdom of the federal approach, but because it was too difficult for the state to go its separate way.

The issues raised in this example are not entirely typical. They are issues involving the apportionment of loss among multiple parties who joined to cause a single injury. They are the very issues where applying different rules to different parties in the same lawsuit are most problematic. Not all issues raise such acute problems. For instance, a federal rule that defines the substantive standard of liability for a product manufacturer—for example, by holding that a drug approved by the Food and Drug Administration cannot be found defective—would not create similar havoc in multi-party, multi-theory litigation.[14] But even with this type of rule, other parts of the litigation would still be affected. At the very least, a decision by Congress to insulate the drug manufacturer from liability would place more of the liability on other

13. *See* TEX. BUS. & COM. CODE ANN. § 2.314 cmt. 13 (West 1994).

14. In this respect, rules about a plaintiff's conduct are different from rules about a defendant's conduct. Under a comparative responsibility scheme, a plaintiff's conduct is compared to all of the defendants' conduct, so it is difficult to have different rules govern a plaintiff's conduct with respect to different defendants. An individual defendant, however, can stand or fall on his or her own standard of conduct.

defendants, such as doctors, who otherwise would have been able to share some of the liability with the drug manufacturer.

Rules that affect the entire liability of a particular type defendant, such as statutes of limitation, would have a similar effect. Rules that partially affect the liability of a particular type of defendant, such as caps on damages, would have the same effect proportionately, and would raise the additional problem of how the excess share of the protected defendant's liability should be allocated. Should it be treated as a form of partial immunity? And if so, how should the state allocate the share of negligence assigned to a party with a full or partial immunity? Rules that affect a fact finder's *deliberations* about liability, such as a rule that a drug manufacturer is at least entitled to have the jury take FDA approval into account, also have a proportionate effect on the liability of other parties to the lawsuit, including the plaintiff, because any rule that tends to make the fact finder reduce the percentage of responsibility of one party will necessarily increase the percentage share of other parties.

Each type of rule must be judged on its own merits. Some rules are virtually impossible to apply to part of a lawsuit without applying them to the entirety of a lawsuit. For example, a rule that requires the court to instruct the jury about a certain fact—such as the effect of certain findings on liability[15]—cannot effectively be applied to some causes of action but not others. Other rules, such as the factors a fact finder should take into account to determine whether one type of defendant is negligent, can theoretically be limited with an instruction. But the fact remains that it is at least *difficult* to surgically affect one cause of action in a multi-party lawsuit without also affecting, sometimes indirectly, other causes of action.

Comparative responsibility has still another effect on tort law. Many tort issues are predicated at least partially on a binary conception of tort doctrine, that is, on a conception of tort doctrine that gives "yes" or "no" answers to questions of liability.[16] For example, questions of proximate cause, especially questions of superseding cause, often dictate whether a defendant is either fully liable or not liable at all. If a court uses comparative principles, it might make more sense to have some of these doctrines affect the amount of responsibility assigned to a party rather than affect liability like an on/off switch.[17] A particularly interesting example of this effect is the doctrine of negligence per se. Jurisdictions that use violation of statue as negligence per se rather than as mere *evidence* of negligence have developed complex rules about when a

15. *See, e.g.*, COLO. REV. STAT. § 13–21–111.5(5) (1989); HAW. REV. STAT. § 663–31(d) (1985); IOWA CODE ANN. § 668.3(5) (1987); MINN. R. CIV. P. 49.01(s) (Supp. 1991); OR. REV. STAT. § 18.480(2) (1991); WYO. STAT. §1–1–109 (1991); Seppi v. Betty, 579 P.2d 683, 692 (Idaho 1978); Reese v. Werts Corp., 379 N.W.2d 1, 3 (Iowa 1985); Thomas v. Bd. of Township Trustees, 582 P.2d 271, 280 (Kan. 1978); Wing v. Morse, 300 A.2d 491, 501 (Me. 1973); Thurston v. Ballou, 505 N.E.2d 888, 891 (Mass. App. Ct. 1987); Martel v. Mont. Power Co., 752 P.2d 140, 146 (Mont. 1988); Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980); Schabe v. Hampton Bays Union Free Sch. Dist., 480 N.Y.S.2d 328, 336 (1984); Smith v. Gizzi, 564 P.2d 1009, 1013 (Okla. 1977); Peair v. Home Ass'n of Enola Legion No. 751, 430 A.2d 665, 671–72 (Pa. Super. 1981); Dixon v. Stewart, 658 P.2d 591, 596–97 (Utah 1982); Adkins v. Whitten, 297 S.E.2d 881, 884 (W. Va. 1982) (all requiring the trial court to instruct the jury about the effect of modified comparative negligence).

16. Obviously, issues of damages are an exception because they cannot be answered simply "yes" or "no".

17. *But see* Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1813 (1996).

violation actually constitutes negligence per se[18] and when it is excused.[19] The idea is that, if it does constitute negligence per se, the jury cannot second-guess the legislative judgment. Under comparative responsibility, however, the jury can then partially flout the legislative judgment by assigning the violating party a low percentage of responsibility.

A jurisdiction's views about joint and several liability might also affect its views about rules of liability. For example, a jurisdiction might be more willing to hold a defendant liable on an attenuated theory of liability—such as not preventing a third person from injuring the plaintiff—if the resulting liability is only for the defendant's proportional percentage share of responsibility, not for the entire harm under joint and several liability. Similarly, a jurisdiction might have a different view about a corresponding theory of liability if it had a cap on damages than it would if it did not have such a cap.

These last examples are simply reflections of the interdependence of various aspects of tort doctrine, even in a single cause of action. A jurisdiction's views about one element of a specific cause of action might reflect a tradeoff for a different view on a different element. A federal statute that affects one element—such as damages or the standard of liability—might upset such a compromise. This problem has long been recognized in choice of law theory as the problem of *depecage*—a reluctance to borrow another state's law on one issue of law if it was part of a compromise in conjunction with another issue.[20]

Multi-party, multi-theory litigation and the widespread use of comparative responsibility schemes raise practical problems for Congress' ability to surgically affect one part of one cause of action against one party without also affecting other parts of other causes of action against other parties. But these problems are not *merely* practical problems raised by comparative responsibility schemes and multi-party litigation. The basic structure of comparative responsibility substantially alters the basic fabric of tort doctrine. Tort law is balkanized into various torts primarily because of two bits of information: the defendant's state of mind and the nature of the plaintiff's injury. This structure implicitly reflects an attitude that as the defendant's state of mind changes, so too do the social policies and appropriate doctrinal solutions. Doctrinal solutions adopted for one tort may be inappropriate for another tort. It is this structure that invites surgical federal intervention into particular causes of action.

Comparative responsibility cuts across this structure. Various parties in the same lawsuit might be subject to liability under different tort theories, but apportionment of loss under a comparative responsibility scheme requires a coordinated set of rules that transcend the boundaries between the various torts. Comparative responsibility takes as its organizing unit a single injury, not a single cause of action. Consequently, the boundaries between various causes of action are more porous than they used to be. This is just what makes attempts at

18. *See, e.g.*, Potts v. Fidelity Fruit & Produce Co., 301 S.E.2d 903 (1983); Gorris v. Scott, 9 Ex. 125 (1874).

19. *See, e.g.*, Freund v. DeBuse, 506 P.2d 491 (1973); Tedla v. Ellman, 19 N.E.2d 987 (1939); Krebs v. Rubsam, 104 A. 83 (1918).

20. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW § 3.4 (2d ed. 1980).

surgical changes in a particular cause of action so difficult.

I stop short of saying that federal attempts to work these surgical changes—and no one is suggesting comprehensive federal tort legislation—are impossible, or that none of the problems I have discussed are manageable. I merely suggest that Congress should be cautious. At the very least, Congress should be aware that what purports to be surgical changes in one area of tort law may affect more areas of state tort law than Congress anticipated.