

# Whence Knowledge Intent? Whither Knowledge Intent?

David J. Jung\* & David I. Levine\*\*

*This Article reconsiders the Restatement (Second) of Torts' position that an actor's knowledge that a particular result will occur is always to be treated as the equivalent of intent. The Article traces the evolution of the Restatement's definition of intent from the first Restatement, which included knowledge intent in the definition of intent only for certain, quasi-criminal torts, to the Restatement (Second), which made knowledge intent part of the definition of intent for all intentional torts. Turning to the cases, the Article discusses how some courts, perhaps disturbed because this universal definition of intent makes a wide range of economic behavior prima facie tortious, have returned to the first Restatement's position on knowledge intent. The Article concludes, however, that despite the weak historical and doctrinal support for the Restatement (Second)'s position, the intentional torts provide a useful analytical framework for judicial regulation of the kinds of relationships typically involved in cases of harm to economic interests, and therefore, that knowledge intent properly belongs in the definition of intent.*

## INTRODUCTION

According to the Restatement (Second) of Torts, one may be said to "intend" a result if she knows her acts are substantially certain to cause

---

\* Associate Professor of Law, University of California, Hastings College of the Law. B.A. 1975, Harvard University; J.D. 1980, University of California, Berkeley.

\*\* Associate Professor of Law, University of California, Hastings College of the Law. A.B. 1974, University of Michigan; J.D. 1978, University of Pennsylvania. The authors thank a number of their students, especially Wendy Downing and Eric Omstead, for their assistance in the research and preparation of this Article. We are also grateful for the suggestions on earlier drafts made by Marsha N. Cohen, Jennifer Hammett, Leo O'Brien, Louis B. Schwartz, and Samuel D. Thurman. The views expressed, of course, are our own.

that result.<sup>1</sup> Pressed to its logical extreme, however, this definition has startling implications. One who fires an employee,<sup>2</sup> fails to perform a contract,<sup>3</sup> or offers a customer a better deal than her competitor<sup>4</sup> knows with substantial certainty that her acts will harm others. If knowledge that a particular result will occur is "intent," and if harm to economic interests is a legally cognizable injury, all of these common occurrences begin to look like intentional torts.<sup>5</sup>

In *Seaman's Direct Buying Service v. Standard Oil*,<sup>6</sup> the California Supreme Court took a different approach to the definition of intent. The court held that liability for intentional interference with a contractual relationship requires "purpose" to cause the prohibited interference. "Knowledge intent" is insufficient, and therefore, it was error to instruct the jury that "a defendant is *deemed* to have acted intentionally if it knew that disruption or interference with an advantageous relationship was substantially certain to result from its conduct."<sup>7</sup>

---

<sup>1</sup> "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences [sic] of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965). In this Article, "desire intent" refers to the former concept and "knowledge intent" refers to the latter. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 34-35 (5th ed. 1984) [hereafter PROSSER AND KEETON].

<sup>2</sup> See, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employee stated cause of action in tort for wrongful discharge).

<sup>3</sup> See, e.g., *Commercial Cotton Co. v. United Cal. Bank*, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985) (upholding award of damages to bank customer for tortious breach of covenant of good faith and fair dealing).

<sup>4</sup> See, e.g., *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980) (upholding award to competitor for interference with existing contract, but not for interference with prospective advantage when no wrongful conduct was shown).

<sup>5</sup> See, e.g., Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 229 (1983) ("When [the definition of intent in § 8A of the Restatement] is applied to the discharge situation, it is apparent that no matter what the employer's purpose or motive may be [in firing an employee] . . . the requisite intent for prima facie tort can be met."); see also Dobbs, *Tortious Interference With Contractual Relationships*, 34 ARK. L. REV. 335, 346 (1980) (noting "complete absence of any principle that will explain . . . why it is that liability sometimes is and sometimes is not imposed").

<sup>6</sup> 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984). For discussion of *Seaman's*, see, e.g., Comment, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Into the Commercial Realm*, 86 COLUM. L. REV. 377, 386-91 (1986) [hereafter Comment, *Tort Remedies*] and commentaries cited *id.* at 387 n.59.

<sup>7</sup> *Seaman's*, 36 Cal. 3d at 765 (emphasis added). *Accord* Blatty v. New York Times

To reach this result, the *Seaman's* court relied upon the first Restatement of Torts,<sup>8</sup> without mentioning that the Restatement (Second) takes exactly the opposite position.<sup>9</sup> This *sub silentio* rejection of the widely recognized Restatement (Second)<sup>10</sup> prompted our reexamination

---

Co., 42 Cal. 3d 1033, 1046, 728 P.2d 1177, 1185, 232 Cal. Rptr. 542, 553 (1986) (Grodin, J., concurring and dissenting). The California court has taken the same position in a criminal case, *People v. Beeman*, 35 Cal. 3d 547, 560-61, 674 P.2d 1318, 1326, 199 Cal. Rptr. 60, 68-69 (1984) (correcting jury instruction for aiding and abetting); *see also* *Francis v. Franklin*, 105 S. Ct. 1965, 1977 (1985) (instruction that criminal defendant intends natural and probable consequences of his acts is permissible only if inference is clearly permissive).

Of course, even if desire intent is held necessary, evidence of knowledge intent will still be persuasive evidence of desire intent. For a very early statement of the point, see 1 F. HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 89 n.(c) (3d ed. 1866):

The intention of a rational agent corresponds with the means which he employs, and he intends that consequence to which his conduct naturally and immediately tends. This inference is usually one of *fact*, to be made by a jury; but where the inference *necessarily* arises from the facts, it is a conclusion of law.

*See also* Landes and Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127, 129 (1981):

The practical justification [for the equation of intentional with highly probable] is that the inability to peer inside a person's mind requires that inferences of intent be drawn from behaviour. When someone does something that is overwhelmingly likely to produce a specific result, we are properly sceptical when he denies that the result was intended.

The Restatement's position, however, is that knowledge intent is not just a rule of evidence. It is supposed to be an independent basis for liability. Intent is not, however, limited to consequences that are desired. If the actor knows that the consequences are certain, or substantially certain, to result from her act, and still goes ahead, she is treated by the law as if she had in fact desired to produce the result. RESTATEMENT (SECOND) OF TORTS §8A comment b (1965). This is not the language of permissive inference. So far as the Restatement (Second) is concerned, knowledge intent is sufficient. Neither desire nor an inference of desire is necessary.

<sup>8</sup> *See Seaman's*, 38 Cal. 3d at 765 (citing RESTATEMENT OF TORTS § 766 comment e (1934)).

<sup>9</sup> The *Seaman's* court simply quoted from a 1941 case that had relied on the first Restatement, *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 37, 112 P.2d 631, 633 (1941). *See Seaman's*, 36 Cal. 3d at 765, 686 P.2d at 1164, 206 Cal. Rptr. at 360.

According to the Restatement (Second), "the interference is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." RESTATEMENT (SECOND) OF TORTS § 766B comment d (1977).

<sup>10</sup> Professor Perlman has asserted that the definition of intent for purposes of intentional interference with economic advantage is in dispute, and that "an act that is substantially certain to lead to a contract disruption is not always actionable where the actor's motive is unrelated to the contract." Perlman, *Interference With Contract and*

of "knowledge intent." The increasing tendency to protect economic interests makes it particularly important to decide whether knowing that a result is substantially certain to occur should be treated as the legal equivalent of acting for the purpose of causing that result. This Article examines the two different understandings of "knowledge intent" in the first Restatement and the Restatement (Second). It concludes that while the first Restatement's justification for knowledge intent is in some ways superior, the Restatement (Second) correctly applies the same definition of intent to all of the intentional torts.

### I. WHENCE KNOWLEDGE INTENT?

"Knowledge intent" is the Restatement's creation. Until the Reporter for the first Restatement, Professor Francis Bohlen, drawing on the criminal law and the scholarly literature, introduced the concept, it did not appear at all under that name in the torts cases. Yet, once introduced, the definition gained prominence, and it is the most frequently cited definition of intent.<sup>11</sup>

So, why, according to the Restatement, is knowledge that a result is certain to occur sufficient to establish liability for an intentional tort? Surprisingly, the answer depends on which Restatement you look at.

#### A. *The First Restatement: Knowledge Intent and Culpability*

For Professor Bohlen and the drafters of the first Restatement, culpability was "an essential if not the predominate factor in determining liability," at least for those torts descended from the writ of trespass. Acting with knowledge that harm was certain to follow was the same as acting for the purpose of causing that harm because both reflected culpable states of mind. "One who embarks upon a particular course of action with knowledge that it involves as a necessary result an invasion of another's legally protected interest is as culpable as though the act were done for the very purpose of invading the interest."<sup>12</sup> Both actors

---

*Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 65 (1982). Nevertheless, the California court is the only court that expressly rejected the Restatement (Second)'s definition of intent. When courts have not imposed liability for acts certain to cause contract disruption, it has been by finding that the plaintiff has, and has failed to meet, the burden of showing that the disruption was also "improper." See *id.* at 67.

<sup>11</sup> For example, all of the major casebooks now cite the Restatement (Second)'s definition of intent as authoritative.

<sup>12</sup> ALI, TORTS: TREATISE 1A SUPPORTING RESTATEMENT NO. 1 34 (1925) [hereafter ALI, TORTS: TREATISE 1A].

were culpable because both made a subjective choice to act in a way that invaded the plaintiff's interests.<sup>13</sup> Moreover, the criminal law treated knowledge intent as the equivalent of desire intent, and the common history of criminal law and the trespass torts justified using the same definition.<sup>14</sup>

Not all of the intentional torts, however, descended from the writ of trespass. For torts closely related to the original trespass torts, such as batteries in which the harm was indirectly caused, knowledge intent would suffice.<sup>15</sup> But the newer intentional torts, such as intentional interference with economic advantage, required purpose or desire.<sup>16</sup> The connection between the law of torts and the criminal law had dissipated, and with it, the justification for equating "knowledge intent" with "intent." Consequently, the Restatement could not formulate a definition of intent that would "be universally applicable to all cases in which courts declare that intention is essential to the existence or extent of liability."<sup>17</sup> Instead, it defined intent anew for each nominate tort.<sup>18</sup>

---

<sup>13</sup> "[T]he concurrence of the will, when it has as it's [sic] choice either to do or to avoid the fact in question [is] the only thing that renders human actions either praiseworthy or culpable." 4 W. BLACKSTONE, COMMENTARIES 20 (1979).

<sup>14</sup> ALI, TORTS: TREATISE 1A, *supra* note 12, at 34 (citing *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N.E. 793 (1911)).

<sup>15</sup> RESTATEMENT OF TORTS § 13 comment d (1934).

<sup>16</sup> *Id.* § 766.

<sup>17</sup> Bohlen, *Discussion of the Tentative Draft, Torts, Restatement No. 1*, 3 A.L.I. PROC. 291 (1925).

<sup>18</sup> The definition of intent is found in the following sections of the first Restatement, RESTATEMENT OF TORTS (1934): § 13(a) comment d (harmful contact battery); § 18 comment f (offensive contact battery); § 21 comment d (assault); § 44 comment a (false imprisonment); § 218 comment a (trespass to chattel); § 825 comment a (intentional invasion); § 766 comment d (intentional interference with business relations); and § 870 (prima facie tort).

The treatment of intent in trespass to land is peculiar. The first Restatement repeatedly describes liability for trespass to land as resting on an intentional entry, but nowhere in the comments is the character of intent necessarily described. The only reference to intent is elliptical. Discussing liability for entry of a thing onto land, the first Restatement comments:

It is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done which will to a substantial certainty result in . . . entry. . . . Thus, one who close to another's boundary so piles sand that by force of gravity alone it slides down onto his neighbor's land or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands become thereby a trespasser on the other's land.

RESTATEMENT OF TORTS § 158 comment h (1934). This comment, and the illustrations that follow, suggest that the intent to do an act is sufficient to premise liability for

Sometimes the definition included knowledge intent, sometimes not. When knowledge intent did suffice, however, it was precisely because the defendant was aware of the consequences of her acts and, therefore, culpable.

### B. Knowledge Intent and Constructive Intent

The cases, however, reveal an alternative explanation of knowledge intent. In the early cases, liability for "intentional" wrongdoing in tort did not always turn on the defendant's awareness of her acts' consequences:

Many a wrongdoer has found himself responsible in law for consequences which he not only did not 'desire' in the layman's sense of the term, but to which he did not even advert. This results from the rule that 'a party must be considered in point of law, to intend that which is the necessary or natural consequence of that which he does.'<sup>19</sup>

As Sir John Salmond put it, "the known consequences of an illegal act are always imputed as intentional."<sup>20</sup>

The fiction that allows the presumption that the natural consequences of an illegal or wrongful act are intended is called "constructive intent."<sup>21</sup> In the constructive intent cases, the courts are not really

trespass to land. They do, however, hint that the character of intent remains "desire or knowledge to a substantial certainty."

<sup>19</sup> P. WINFIELD, A TEXTBOOK OF THE LAW OF TORT 23 (1937).

<sup>20</sup> J. SALMOND, JURISPRUDENCE 339 (6th ed. 1920) [hereafter J. SALMOND (6th ed.)]. Salmond and Winfield rely on the same case for the point, *Rex v. Harvey*, 107 Eng. Rep. 379 (1823). *Harvey* was a criminal libel case, in which two men were convicted for printing that the King was insane. The issue was whether "malicious intent" was needed for conviction, and the court upheld a charge to the jury that intent could be inferred from the statement's tendency to cause harm. Other language in the court's opinion, however, suggests that the court was talking about a rebuttable inference.

At least one early American treatise took the same position. See F. HILLIARD, *supra* note 7, at 90-91. The doctrine also appears in early American cases. See, e.g., *Mercer v. Corbin*, 117 Ind. 450, 20 N.E. 132 (1889); *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891). By the time of the drafting of the Restatement (Second), references to constructive intent could be found in secondary sources such as *Corpus Juris Secundum*, 86 C.J.S. *Torts* § 20 (1954). They can still be found in some secondary sources. See, e.g., J. DOOLEY, MODERN TORT LAW § 48.17 (1984).

<sup>21</sup> See, e.g., R. PERKINS, CRIMINAL LAW 747 (2d ed. 1969). Perkins actually identifies two uses for "constructive intent." Sometimes constructive intent refers to a court inferring intent from recklessness. The first Restatement expressly rejected this usage; in the ALI's Treatise on Torts, Professor Bohlen discussed *Mercer v. Corbin* and concluded that insofar as the case appears to say that recklessness is a sufficient premise for liability for battery, it simply reflects the fact that even negligence will suffice if there has been physical injury. ALI, TORTS: TREATISE 1A, *supra* note 12, at 35 n.7.

concerned with the actor's intent at all. Rather, constructive intent operates as a legal fiction, a sort of shorthand for a rule that a tortfeasor is liable for all the results of her tortious acts.<sup>22</sup>

Constructive intent and knowledge intent are inextricably intertwined in the cases and commentary.<sup>23</sup> For example, both of the cases Professor Bohlen cited as supporting his equation of knowledge intent and desire intent are arguably constructive intent cases.<sup>24</sup> They use language characteristic of constructive intent cases, and their facts are typical "constructive intent" facts: both involve charging as intentional injuries the unintended consequences of "wrongful" conduct.<sup>25</sup>

More frequently, constructive intent referred to "imputing" the known consequences.

<sup>22</sup> Indeed, the fact situations used to illustrate the doctrine of knowledge intent frequently were situations in which the doctrine of transferred intent would achieve the same result. In the second Restatement's "mad bomber" illustration, liability would attach regardless of the bomber's knowledge as to the secretary's presence. *RESTATEMENT (SECOND) OF TORTS* § 8A, illustration 1 (1965).

<sup>23</sup> For example, *Mercer* can also be explained as a case of constructive intent in the latter sense:

If we are right in holding that the appellant, while riding his bicycle along the sidewalk, was engaged in the performance of an unlawful act, another important element is added to the appellee's case, making his right of recovery entirely clear; for a man who does an unlawful act is liable for the consequences, although they may not have been intended.

*Mercer*, 117 Ind. at 455, 20 N.E. at 134 (citations omitted).

<sup>24</sup> See *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N.E. 793 (1911); *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 100 S.E. 602 (1919).

<sup>25</sup> The instruction given in *Singer* was a constructive intent instruction:

The jury are instructed that every one is presumed to intend the natural and probable consequences of his own wrongful acts. So in this case, if you believe from the evidence that Beach tipped up the machine while the plaintiff was sitting on it, and thereby throwing plaintiff off and down to the floor, injuring her, then the said Beach is presumed to have intended the consequences of his acts.

*Singer*, 49 Ind. App. at 124, 94 N.E. at 796. Such a presumption was possible because the court had already determined that the defendant had acted wrongfully, without considering his intent: the defendant "was not justified in using force to retake the machine from the possession of appellee . . . . The owner of an article of personal property . . . cannot regain possession by force . . . [h]is remedy lies in the courts." *Id.*

*Kirkpatrick* is a remarkably similar case. There, the defendant sought to remove plaintiff's cattle from his land. The plaintiff believed she had the owner's permission to graze her cows on the property. The defendant grabbed a chain by which one of the cows was tethered, and according to the plaintiff's allegations, in attempting to take possession of the cow, dragged plaintiff along the ground. Plaintiff suffered a miscarriage. The trial court's instructions nowhere mentioned intent; nor did the court of appeals, whose opinion rested on the wrongfulness of the defendant's conduct. Because

If, however, the legitimacy of the doctrine of knowledge intent derives from the constructive intent cases, it hangs by a slender thread. First, because the "natural" consequences that the defendant is presumed to intend are not necessarily known or even foreseeable to the defendant, the logic of constructive intent makes not only intent, but fault, irrelevant.<sup>26</sup> To contemporary sensibilities, even when the defendant is clearly a wrongdoer, to treat all consequences of an act as intentional threatens a liability out of proportion to the wrong and unrelated to it.<sup>27</sup> More importantly, a danger of circular reasoning inevitably accompanies constructive intent. Thus, in cases in which no independently unlawful act occurs, how does one determine whether the defendant acted "illegally"? For example, in an early case that bears a strong resemblance to a fact situation often used as a prototypical instance of knowledge intent, the defendant threw a lit torch into a crowded market. After being tossed from hand-to-hand in self-defense, the torch struck the plaintiff.<sup>28</sup> The court imposed liability because the

---

the cows were tethered and not running free, the defendant had no right to impound the cattle at all, thus it was "a forcible trespass." *Kirkpatrick*, 178 N.C. at 351, 100 S.E. at 605.

See also *Citizens St. R. Co. v. Willowby*, 134 Ind. 563, 33 N.E. 627 (1893) (train conductor used force to expel passenger from train). The first Restatement does not directly rely upon *Citizens*. It is cited as authority, however, in *Singer*, on which the first Restatement in turn relies.

<sup>26</sup> The true rule is that intent is the gist of the action [of battery] only where the battery was committed in the performance of an act not otherwise unlawful. . . . If the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer is irrelevant. . . . If the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequence [sic] which naturally and directly resulted from the conduct, even though he did not intend the particular injury that followed.

*Lopez v. Surchia*, 112 Cal. App. 2d 314, 318, 246 P.2d 111, 115 (1952).

<sup>27</sup> Thus, the criminal law has rejected the notion of constructive intent. See *supra* note 7. Professor Epstein has a particularly strong critique of this sort of logic in his discussion of *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891).

There is an alternative account of the opinion whose logic is even more difficult to follow. [That account would have held the schoolboy who kicked a classmate and caused unexpected harm liable because his act was unlawful: it violated a school rule about behavior after class was called to order]. [T]he violation of the school rule is quite complete whether or not the defendant hurt the plaintiff. In either case (harm or no harm), school discipline is the appropriate sanction for the violation of the school rule.

The reliance on that rule, moreover, does not make the harm intentional. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 395 n.11 (1975).

<sup>28</sup> *Scott v. Shepard*, 96 Eng. Rep. 525, 528 (1773).

plaintiff's injury was a natural consequence of the defendant's wrongful act. How did the court know the act was wrongful? Because injury to another was its natural consequence. The answer begs the question.

Yet, there is a way to defend constructive intent. Perhaps both constructive intent and knowledge intent are ways of expressing an objective standard of liability — that a defendant will be held to know the substantially certain results of her acts. Such a construction is an alternative to Professor Bohlen's explanation of why knowledge intent is a sufficient premise for liability. Knowledge intent, like negligence, would suffice because, in effect, it indicates that the defendant created a substantial, unreasonable risk of harm.

Most commentators would reject out-of-hand the idea that knowledge intent effectively imposes an objective standard of liability for intentional torts.<sup>29</sup> However, tort theorists as central as Justice Holmes and Dean Prosser have been attracted to just that idea, and that attraction is clearly evident in the Restatement (Second)'s treatment of knowledge intent.

### C. *The Restatement (Second): Knowledge Intent and the Objective Standard*

The Restatement (Second) cites *Garratt v. Dailey*<sup>30</sup> as the exemplar of knowledge intent. In *Garratt*, the trial court found that Brian Dailey, a five-year old who caused an elderly neighbor to fall by moving her chair, did not have the intent requisite for a battery. The appellate court remanded because the trial court had not adequately considered knowledge intent.

On remand, the trial court was to determine whether five-year old Brian Dailey "knew with substantial certainty that the plaintiff would

---

<sup>29</sup> See, e.g., PROSSER AND KEETON, *supra* note 1, at 36 (intent defined as state of mind); see also R. KEETON, *COMPUTER-AIDED AND WORKBOOK EXERCISES ON TORT LAW* § 1.2 (1976).

On the other hand, others would argue that civil liability must be divorced from state of mind, and that when state of mind is relevant, it should be objectified precisely in order to eliminate subjectivity, thus resisting the tendency to judge "character or the defendant's whole being, not merely his conduct." According to this understanding, liability must be based on conduct, with state of mind relevant only as an excuse, to relieve a defendant of liability when his conduct is otherwise unlawful. Dobbs, *supra* note 5, at 347-48; see also Epstein, *supra* note 27, at 395 (in the criminal law, *mens rea* operates to limit criminal responsibility for harms caused by defendant's conduct).

<sup>30</sup> 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956).

attempt to sit down where the chair which he moved had been. . . ."<sup>31</sup> The trial judge found that little Brian had the requisite intent, and then explained that his findings in the first trial "had been made in the light of his understanding of the law, i.e., that the doctrine of constructive intent does not apply to infants, who are not chargeable with knowledge of the normal consequences of their acts."<sup>32</sup>

Did the trial court in *Garratt* simply not recognize, even on remand, the distinction between charging the defendant with the reasonable person's knowledge that a result was certain to occur (an objective standard) and concluding that, given the certainty of the consequences, the defendant's denial of actual knowledge is not credible (a subjective standard)?<sup>33</sup> This is a fine line; one can understand if the trial court strayed across it. Certainly, cynics would argue that knowledge intent becomes de facto an objective standard because juries won't observe the distinction.

Justice Holmes, however, was more direct in his advocacy of an objective standard for intentional torts:

If common experience has shown that some such consequence was likely to follow the act under the circumstances known to the actor, he is taken to have acted with notice, and is held liable, unless he escapes upon the special grounds to which I have referred. . . . The standard applied is external, and the words malice, intent and negligence, as used in this connection refer to an external standard. If the manifest probability of harm is very great, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently, if there is no apparent danger, we call it mischance.<sup>34</sup>

Holmes was attracted to a standard that defined intent solely by reference to probability that harm will follow for two reasons. First, it was empirical: its application turned on verifiable, measurable consequences.<sup>35</sup> Second, the standard formed a link between intent and negli-

<sup>31</sup> *Garratt*, 46 Wash. 2d at 205, 279 P.2d at 1095.

<sup>32</sup> *Garratt*, 49 Wash. 2d at 501, 304 P.2d at 682.

<sup>33</sup> PROSSER AND KEETON, *supra* note 1, at 36.

<sup>34</sup> Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894); *see also* *White v. Duggan*, 140 Mass. 18, 20, 2 N.E. 110, 111-12 (1885) (Holmes, J.) ("the difference between 'intent' and 'negligence,' . . . is ordinarily nothing but the difference in the probability under the circumstances"). *But see* O. HOLMES, *THE COMMON LAW* 53 (1881) ("intent . . . will be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act"). Thus, Holmes has also been cited as believing there was a necessary connection between liability for an intentional tort and a "malicious" state of mind. *See Dobbs, supra* note 5, at 347 & n.56.

<sup>35</sup> Professor Herbert Hovenkamp has described the attraction that this empiricism

gence, reducing the difference between them to one of degree, not kind. In this, it furthered what Professor G. Edward White has called Holmes' most significant contribution to tort law, isolating negligence as a comprehensive, philosophical principle justifying tort law as a system of liability based on fault, in which fault was determined objectively, by reference to the "felt necessities of the times."<sup>36</sup> If the underlying rationale of tort liability is to require compensation for exposing the plaintiff to a foreseeable, unreasonable risk of harm, then when the defendant has exposed the plaintiff to substantially certain harm, the justification for compensation is obvious.<sup>37</sup>

As for Dean Prosser, certainly he recognized that common understanding treated intent as an actual state of mind, subjectively tested.<sup>38</sup> Yet, an objective test also appealed to him. Particularly revealing is a comment Dean Prosser made in explaining the difference between negligence, recklessness, and intent at the 1957 ALI Proceedings. Dean Prosser said:

You can illustrate that by a man driving a car down a street . . . If he is going five miles an hour over the speed limit, he may be negligent. If he is going 40 miles over the speed limit he is reckless, because . . . the probability that he will hurt someone . . . has become very high. If he is going 60 miles an hour over the speed limit, you have got a substantial certainty, and it is to be classified as intent.<sup>39</sup>

---

had for Holmes and the Pragmatic Realists. Thus, Nicholas St. John Green, who profoundly influenced Holmes' thinking, "was famous at the Harvard Law School for ridiculing questions about motive or intent. One cannot measure intentions, he insisted, but only consequences." Hovenkamp, *Pragmatic Realism and Proximate Cause in America*, 3 J. LEGAL HIST. 3, 15 (1982).

<sup>36</sup> G. WHITE, *TORT LAW IN AMERICA* 13 (1980).

<sup>37</sup> This is, in essence, the approach taken by Professor Landes and Judge Posner in their attempt to explain the intentional torts in economic terms. For them, the treatment of intentional torts, like negligence, "can be explained on the hypothesis that the common law attempts to promote efficiency." Landes and Posner, *supra* note 7, at 127.

<sup>38</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 31 (4th ed. 1971).

<sup>39</sup> 34 ALI PROCEEDINGS 294 (1957). The comment was made in the context of an exchange between Dean Prosser, Judge Charles Claflin Allen, and Professor Laurence Eldredge. Under discussion was whether § 46 (intentional infliction of emotional distress) would cover harm negligently inflicted as well as harm intentionally inflicted. A few minutes later, Eldredge suggested that there is a difference between the "I don't give a damn" state of mind and callous disregard of a very high probability of harm absent the "I don't give a damn" state of mind. Eldredge seemed to suggest that there would be liability for intentional infliction of emotional distress when the former state of mind is present, but not the latter. Prosser said he thought that both "I don't give a damn" and "a calculated disregard of the consequences, . . . a feeling of 'I have weighed this and decided to go ahead' . . . may be reckless, because it is a cold blooded, deliberate disregard of the interests of other people." But, when pressed by

Dean Prosser's remarks equate the car's speed — an empirical, observable fact — with the driver's intent. The driver's actual state of mind is not an issue. Dean Prosser expressed the same idea in the Restatement (Second) in his comment explaining section 8A; there he again describes intent as primarily a function of probability.<sup>40</sup> His authority:

---

Eldredge, he equivocated with a promise to consider the issue further. *Id.* at 296-97. Of course, the Restatement (Second)'s general definition of intent does not admit of such flexibility. Only § 46 itself permits liability to be predicated upon either intentional or reckless conduct.

<sup>40</sup> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence. . . . All three have their important place in the law of torts, but the liability attached to them will differ.

RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965). Dean Prosser had the opportunity to comment on the nature of knowledge intent because he had elevated the definition to the status of a separate section. Professor Bohlen's skepticism as to the existence of such a universal definition prevented him from assaying one, though he did once express the "hope that ultimately we will be sufficiently sure of our ground to make a definition which we will regard as valid throughout all of the law of Torts or, at least, as valid for determining liability for invasions of interests of personality." Bohlen, *supra* note 17, at 291. Though the appearance of section 8A apparently fulfilled Professor Bohlen's hope, it cannot really be accounted for by any significant doctrinal developments. The Restatement (Second) cited only two cases as support for the new definition; neither is particularly significant. *Burr v. Adam Eidemiller, Inc.*, 386 Pa. 416, 126 A.2d 403 (1956); *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956). Certainly neither represents the kind of thorough investigation necessary to persuasively rebut Professor Bohlen's conclusion that intent was defined according to the context in which it was used.

Why did the Restatement (Second) add a universal definition of intent when so little in the way of doctrinal development had occurred? One reason may have been that the absence of a universal definition of intent had been noted, and criticized, in two law review articles following the first Restatement's publication. Goodhart, *Restatement of the Law of Torts*, 83 U. PA. L. REV. 411, 415 (1935); Winfield, *The Restatement of the Law of Torts — Intentional Harms*, 12 N.Y.U. L. REV. 557, 560 (1935).

A better explanation for the appearance of an all-purpose definition of intent in the Restatement, however, simply may be the style of the new Reporter, Dean William L. Prosser. Above all else, Dean Prosser's genius lay in reconciling the evanescence of tort doctrine — the ability of tort law to shift and change with the times — with the possibility of stating general principles that lent order and a degree of stability to the subject. G. WHITE, *supra* note 36, at 155, 163, 177. Dean Prosser's emphasis on classification and synthesis mandated that a concept such as intent could not go undefined in the

Justice Holmes.<sup>41</sup>

Thus, Dean Prosser used knowledge intent to forge a conceptual link between negligence and the intentional torts.<sup>42</sup> Intent and negligence

---

Restatement (Second). To admit that so basic a concept possessed such variability of meaning would largely undercut Dean Prosser's idea that intelligible generalizations about tort law were possible. *Id.* at 155, 163.

<sup>41</sup> Dean Prosser does not cite any authority in the comment itself. In his treatise, however, Dean Prosser cites Holmes. See W. PROSSER, *supra* note 38, at 32 n.34 (quoting Holmes, *supra* note 34).

<sup>42</sup> Our colleague, Samuel D. Thurman, who was an Adviser on the Restatement (Second) of Torts, tells us that there was no discussion of whether the new definition of intent codified in § 8A and the accompanying comments in any way altered the definition or, in particular, its subjective character. Personal communication, Jan. 27, 1987. Dean Prosser's characterization notwithstanding, the language of the Restatement (Second) does not necessarily make intent solely a function of probability. Both the language of § 8A, and of the "continuum" comment formally maintain a requirement of subjective knowledge. Thus, according to Dean Thurman's construction, when the comment notes that the characterization of the actor's conduct will change as a function of the probability of the result, the comment is simply saying that very high probability is necessary to intent, not that it is a sufficient condition. That is, the comment is saying that even when there is subjective awareness, as the probability of the result decreases, the act loses the character of intent.

With all deference to Dean Thurman, we adhere to our position that the Restatement (Second) introduced an unwarranted objective element into its definition of intent. Dean Prosser's comment at the ALI meeting provides some evidence, although of course his opinion cannot be read as that of the Institute. Further, comment b to § 8A cross-refers to § 500 for its definition of recklessness when it says "As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent and becomes mere recklessness, as defined in section 500." RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965). Section 500 points out that

In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

*Id.* § 500 comment e (1965). Thus, the standard for recklessness is highly objective; the only real difference between recklessness and negligence is the degree of probability. *Id.* comment g.

Of course, it could still be maintained that the Restatement (Second) was insisting on a purely subjective standard for intent, since there is no equivalent to section 500's comment e for the definition of intent. Effectively, by this construction, the Restatement (Second) would be saying: "Your behavior is negligent if it creates an unreasonable risk of harm, whether you know it or not. Your behavior is reckless if it creates a very high risk of harm, whether you know it or not. Your behavior is intentional if it is certain to cause harm, but only if you know it." Thus, the Restatement (Second) would recognize

are on a "continuum;"<sup>43</sup> the difference between them is a matter of degree, not kind.<sup>44</sup> The intentional torts are, like negligence, primarily concerned with compensating for actual injuries to rather narrowly defined interests, with liability primarily determined by balancing the in-

---

the discontinuity between intent and the other standards. We do not think that this is the case. One piece of evidence to that effect is the treatment of the tort of intentional infliction of emotional distress in § 46, in which the Restatement (Second) added recklessness as a sufficient ground for liability, again incorporating § 500 by reference. As discussed above, recklessness is determined by probability, not culpability or state of mind. This is evidence that it was probability, not culpability, that concerned the Restaters.

Obviously, we cannot claim that the Restatement (Second) expressly proclaimed an exclusively objective standard for the intentional torts. What we are saying is that maintaining the subjective element was not important to the drafters of the Restatement (Second), given their vision of tort law as primarily a compensation system. Certainly it was not important to Dean Prosser, judging by his statements at the ALI meeting. As a result, the Restatement (Second) characterized intent in such a way as to blur the distinction between an objective and subjective standard, creating a grey area subject to manipulation in the courts.

<sup>43</sup> Prosser also described the relationship as a "penumbra":

Such intermediate mental states, based upon a recognizable great probability of harm, may still properly be classed as negligence, but are commonly called reckless, wanton, or even willful: They are dealt with, in many respects, as if the harm were intended, so that they become in effect a hybrid between intent and negligence, occupying a sort of penumbra between the two.

*Id.* § 31, at 146.

The Supreme Court of the United States recently described the relationship as a "spectrum." *Daniels v. Williams*, 106 S. Ct. 662, 667 (1986) ("The difference between one end of the spectrum — negligence — and the other — intent — is abundantly clear."); see also Comment, *A Comparison of the Conduct Required in Trespass to Chattels and Negligence*, 33 ROCKY MTN. L. REV. 323, 327 (1961) (tracing "spectrum of conduct" concept back to Holmes).

<sup>44</sup> That negligence and intent differ in degree, not kind, is a necessary consequence of defining intent solely as a function of probability. "The difference between intent and negligence, in a legal sense, ordinarily is nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act." 65 C.J.S. *Negligence* § 1(7), at 451 (1966) (citing *White v. Duggan*, 140 Mass. 18, 20, 2 N.E. 110, 111-12 (1885) (Holmes, J.)). Neatly anticipating much of the difficulty with this conceit, the C.J.S. comment continues: "The words 'negligence' and 'intention' are contradictory; negligence is not synonymous with intentional action." *Id.* While it is true that under any construction, negligence and intent are not synonymous, if the difference between them is a matter of probability — of degree — neither can they be contradictory. Rather, with the narrow exception of one who acts out of private necessity, anyone who is liable for intentionally inflicting harm would, by definition, have created an unreasonable risk of harm and thus be negligent.

terests of the plaintiff, the defendant, and society in light of the probability, or foreseeability, of harm.<sup>45</sup>

The notion that the difference between intent and negligence is one of degree has no equivalent in the first Restatement. Professor Bohlen, ironically, felt that the inclusion of knowledge intent in the first Restatement was mandated by precisely that aspect of intentional torts that set them apart from negligence — their criminal law heritage. It was not the extremely high probability of harm, but rather, the actor's awareness that was significant in cases of knowledge intent.<sup>46</sup> The relationship between intentional tort liability and negligence was discontinuous: the former rested on a subjective standard; the latter on an objective standard. Thus, while the two Restatements use the same definition of intent, they offer nearly opposite justifications in support of this definition.

## II. KNOWLEDGE INTENT SINCE THE RESTATEMENT (SECOND)

These two different understandings of knowledge intent have very different implications. If, as the Restatement (Second) appears to suggest, knowledge intent is simply an aggravated form of negligence, the justification for maintaining a separate category of liability for intentional wrongdoing disappears.<sup>47</sup> On the other hand, if the key to knowledge intent — and to intentional torts — lies not in the high probability of harm, but in the actor's awareness of the consequences of her acts, as the first Restatement suggested, the defendant's state of mind becomes a central issue. Indeed, courts would attach consequences to the defendant's awareness even when the probability of harm was less than certain. The distinction between intent, recklessness, and negligence might begin to blur, but only in cases in which the actor was aware of the consequences.

There is some support for the view of tort liability implicit in the Restatement (Second)'s treatment of knowledge intent. For one, from the postwar years to the early 1970's, the use of punitive damages —

---

<sup>45</sup> Thus, according to the Restatement (Second), the same process of balancing interests determines liability in negligence, strict liability, and the intentional torts. RESTATEMENT (SECOND) OF TORTS § 870 comments c and d (1979).

<sup>46</sup> See *supra* notes 12-16 and accompanying text.

<sup>47</sup> Thus, for a "law and" economist, the intentional torts simply demarcate cases in which the cost of avoiding harm is low or negative, while negligence cases involve positive costs of avoidance. There is no principled distinction between the two. See, e.g., R. POSNER, TORT LAW 7-8 (1982).

earmark of the civil law's concern with culpability — declined.<sup>48</sup> Further, as Dean Leon Green argued, a finding of intent frequently indicated less about the defendant's state of mind than about the court's desire to impose liability on a negligent defendant who might otherwise avoid it on a technicality.<sup>49</sup> Thus, courts could invoke knowledge intent to save a plaintiff from the effects of poor pleading,<sup>50</sup> her own contributory negligence,<sup>51</sup> or the defendant's immaturity.<sup>52</sup>

The Restatement (Second)'s commentary on knowledge intent created a framework that fit intentional torts into the mainstream of the tort law of its time. That mainstream viewed tort law as a vehicle of a specific public policy — compensation based on an objective standard of liability.<sup>53</sup> Inquiring into the defendant's state of mind was simply inconsistent with the notion of civil compensation that dominated tort law.<sup>54</sup> Indeed, from Bohlen's observation that the intentional torts were "branches that had ceased to flower" through the drafting of the Restatement (Second), the notion that tort law operated on principles of admonition or culpability, that its function was to attach consequences to particular states of mind, was distinctly out of favor.

But tort law "swings, like a pendulum do."<sup>55</sup> Since the Restatement (Second), the notion that the defendant's state of mind is a legitimate subject of inquiry has undergone a renaissance. Courts are increasingly viewing tort law as an instrument of admonition, and, correspondingly,

---

<sup>48</sup> See, e.g., Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 n.6 (1982).

<sup>49</sup> See Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 587-88 (1935).

<sup>50</sup> Thus, in *Mercer v. Corbin*, 117 Ind. 450, 20 N.E. 132 (1889), the defendant was clearly negligent, but the plaintiff brought his action in trespass for battery.

<sup>51</sup> In *Lambrecht v. Schreyer*, 129 Minn. 271, 152 N.W. 645 (1915), the court avoided the effects of contributory negligence by relying on "constructive intent."

<sup>52</sup> Many of the knowledge intent cases involve children who might otherwise be considered too young to be capable of negligence. See, e.g., *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956).

<sup>53</sup> See G. WHITE, *supra* note 36, at 149-50 ("With the addition of liability insurance tort law had become primarily a compensation system designed to distribute the costs of injuries throughout society efficiently and fairly; it should no longer be regarded principally as a system designed to deter and punish blameworthy conduct.").

<sup>54</sup> See Note, *The Tie that Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362, 365 (1962). The extent to which notions of compensation had come to dominate tort law can be seen in a remarkable observation by Professor Glanville Williams in an article on the purposes of tort law: "Judging by the falling off of reported cases on the subject, the practice of awarding punitive damages seems now to be practically discontinued, except in defamation." Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137, 148 n.27 (1951).

<sup>55</sup> *England Swings*, words and music by Roger Miller, Tree Publishing Co. 1965.

becoming much more concerned with determining the defendant's state of mind. As a result, the first Restatement's understanding of knowledge intent may have increasing relevance for the future. In contrast, the Restatement (Second)'s emphasis on probability seems to be of less continuing relevance.

Punitive damage awards demonstrate some of the resurgent focus on culpability. The use of punitive damages has increased tremendously. The decline in punitive damage awards that apparently began in the postwar years and continued through the early 1970's has reversed, and the end is not yet in sight.<sup>56</sup> Courts have also increasingly allowed large punitive damage awards when the actual damage to the plaintiff is minimal or even nominal.<sup>57</sup> A court that is willing to award punitive damages when the plaintiff's injury is minimal clearly is primarily concerned with the defendant's conduct and state of mind.

Finally, as expected from the emphasis on culpability, courts have attached liability to the actor's awareness of the consequences, even when those consequences are not certain to follow. Thus, the touchstone of a punitive damage award has become whether the defendant was aware of the potential for harm that she created, without any real concern for whether the result was certain, highly likely, or merely unreasonable.<sup>58</sup>

---

<sup>56</sup> See, e.g., Ellis, *supra* note 48, at 2 n.6 (1982) (citing sources).

<sup>57</sup> A rather remarkable example is *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y.), *rev'd on other grounds*, 800 F.2d 298 (2d Cir. 1986) (jury awarded \$1.6 million in punitive damages while only \$1 was awarded in actual damages); see also *Commercial Cotton Co. v. United Cal. Bank*, 163 Cal. App. 3d 511, 517 n.2, 209 Cal. Rptr. 551, 555 n.2 (1985) ("[E]xemplary damages ordinarily cannot be assessed without a showing plaintiff sustained actual damages from defendant's wrongful conduct, although only nominal actual or compensatory damages are required."); *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984) (award of compensatory damages is not necessary to support an award of punitive damages in an intentional tort action when there is some injury, loss or detriment, but plaintiff is unable to prove he is entitled to compensatory damages); cf. *Oliver v. Raymark Indus.*, 799 F.2d 95 (3d Cir. 1986) (*Nappe* applies only to intentional torts; if complaint is based on negligence or strict liability, compensatory damages must be awarded or punitive damages are not available).

<sup>58</sup> To establish a claim for punitive damages, the plaintiff must show that the defendant "is aware of the probable consequences of his conduct and willfully and deliberately fails to avoid those consequences." *Weisman v. Blue Shield*, 163 Cal. App. 3d 61, 61, 209 Cal. Rptr. 169, 169 (1984); see, e.g., *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1455-56 (10th Cir. 1985) (lackadaisical attitude towards handling plutonium); *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (drunk driving); *Nolin v. National Convenience Stores, Inc.*, 95 Cal. App. 3d 279, 288, 157 Cal. Rptr. 32, 37 (1979) (inattention to danger of slip and fall on oily

The same development has occurred in cases in which the definition of intent was directly at issue. Though very few intentional tort cases since *Garratt v. Dailey*<sup>59</sup> have had liability turn on the Restatement (Second)'s concept of knowledge intent, courts have confronted cases requiring them to define "intent" as used in a statute, an insurance policy, or the like. These cases provide a useful analogy. The question posed is basically the same question decided in section 8A of the Restatement (Second): Is knowledge intent the equivalent of desire intent?

The answer these cases offer is complex. Frequently, treating knowledge intent as the equivalent of desire intent leads to labelling as "intentional" results that were far from certain to follow. This leads to the conclusion that courts invoke knowledge intent to compensate plaintiffs in the face of rules that would deny compensation for negligence. Yet, more is going on in these cases than a simple, result-oriented manipulation. While these courts have played fast and loose with the substantial certainty element of knowledge intent, they have shown restraint in strictly adhering to the requirement of actual awareness.<sup>60</sup> While the

---

service station driveway); *Seimon v. Southern Pac. Transp. Co.*, 67 Cal. App. 3d 600, 607, 136 Cal. Rptr. 787, 791 (1977) (conscious indifference to the probable harm created by a dangerous railroad crossing).

A similar development is the extension of liability for intentional infliction of emotional distress to include recklessness. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); see also *Mahoney v. Carus Chem.*, 102 N.J. 564, 510 A.2d 4, (1986) (fireman's rule doesn't apply to intentional harms, and for purposes of this rule, recklessness is equivalent of intent).

<sup>59</sup> 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956). *Seaman's Direct Buying Serv. v. Standard Oil*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) and *DeVoto v. Pacific Fidelity Life Ins.*, 618 F.2d 1340 (9th Cir. 1980) are examples of cases in which knowledge intent was at issue.

<sup>60</sup> A good recent example that illustrates this point is *Rost v. United States*, 803 F.2d 448 (9th Cir. 1986). In *Rost*, the court held the United States liable as a land owner under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982) [hereafter FTCA] because the plaintiff was impaled on an extending piece of a steel road enclosure gate as his pickup truck passed by. Following California law, as it was obliged to do under the FTCA, the court held that the failure to guard against or to warn of the danger was not just negligence but was "willful misconduct." This in turn was defined as "intentional wrongful conduct." *Rost*, 803 F.2d at 450 (quoting *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 912, 159 Cal. Rptr. 125 (1979)). The *Rost* court explained that under California law there are "three essential elements which must be presented before a negligent act becomes wilful misconduct: '(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.'" *Id.* at 451 (quoting *Morgan v. Southern Pac. Transp. Co.*, 37 Cal. App. 3d 1006, 1012, 112 Cal. Rptr. 695, 698 (1974)

effect of knowledge intent in these cases seems to blur the lines between intended and accidental harm, the real concern is with creating and maintaining a distinction between those who are aware of the risks they create and those who are not. In the final analysis, these courts seem to be invoking knowledge intent in an attempt to find the right mix of compensation and deterrence for cases involving an aware actor.

A case in point is *Jackson v. Brantley*.<sup>61</sup> In *Jackson*, the plaintiff was injured when his car struck a horse that bolted into the road. The defendant was leading bridled and unbridled horses on the shoulder of the road. Two unbridled horses bolted when plaintiff's car approached. An Alabama statute provided that there could be no liability for collisions between animals and cars unless the animal owner "knowingly" or "willfully" placed the animals on the road.<sup>62</sup> The defendant contended that he had intentionally placed the animals on the shoulder, not on the road. In response, the court first noted that the defendant had intentionally put the horses in a position where they could cause damage to the plaintiff. Second, the court referred to the doctrine of knowledge intent, and noted evidence in the record that the defendant knew that horses were likely to bolt if frightened by a car's lights.<sup>63</sup>

*Jackson* can be explained in two ways. It is plainly nonsensical to find knowledge intent on the facts before the *Jackson* court. The statute required the plaintiff to show that the defendant knowingly placed the horses on the highway itself. The most the evidence showed was that the defendant knew there was some risk a horse might run onto the road. This was far from substantially certain to occur; at best, the defendant was reckless or negligent. At first blush, this looks like the sort of result-oriented manipulation that Dean Green thought made the distinction between intent and negligence spurious.<sup>64</sup> The court appears to use knowledge intent to find intent in the existence of a risk, thus avoiding the operation of an outdated statute,<sup>65</sup> and preventing a careless defendant from escaping liability. At the same time, however, the

---

(emphasis supplied)). The dissent contended that at most the government had been negligent in failing to fix a gatepost deep in a national forest where there was light traffic and no evidence of similar injury from that gatepost in its eight-year existence or from any other gatepost in the huge forest. *Id.* at 454 (Kozinski, J., dissenting).

<sup>61</sup> 378 So. 2d 1109 (Ala. Civ. App.), *aff'd*, 378 So. 2d 1112 (Ala. 1979).

<sup>62</sup> *Id.* at 1110 (citing ALA. CODE § 3-5-3 (1975)).

<sup>63</sup> *Id.* at 1112.

<sup>64</sup> See, e.g., Green, *The Thrust of Tort Law: Part I*, 54 W. VA. L. REV. 59, 63-64 (1961).

<sup>65</sup> The statute dates from at least 1940. See *Ex parte Jackson*, 378 So. 2d 1112, 1114 (Ala. 1979).

critical fact in the court's opinion is the defendant's actual awareness of the risk he created. The decision draws a line between those who act knowing the consequences of their behavior, and those who act carelessly, but without awareness.

*Jackson* is not an aberration. The same pattern arises in cases that cite section 8A while construing insurance policy clauses that exclude coverage for intentionally caused injuries, and in opinions deciding whether an injured plaintiff is limited to relief under worker's compensation. These are the areas in which section 8A is used most frequently. The courts have used the doctrine of knowledge intent to classify as "intended" results that were hardly certain to follow, so long as the defendant was aware of the risk she created.

### A. Insurance Exclusion Clauses

*Pachucki v. Republic Insurance Co.*,<sup>66</sup> a leading insurance exclusion case, illustrates the point. The defendant "shot" the plaintiff with a greening pin<sup>67</sup> and put out his eye. The issue facing the court was whether the defendant's homeowner policy covered the loss. The policy contained a clause that would negate the insurer's liability if the insured "intentionally" caused plaintiff's injury.

Obviously, the insured had committed a tort. He shot the pin intentionally; he even desired to hit the plaintiff. In construing exclusion clauses, however, courts usually look not just to whether an intentional tort was committed, but to whether the injury itself was intended.<sup>68</sup> Although some courts read out the intent requirement by relying on the fiction of constructive intent, the *Pachucki* court declined to take this route.<sup>69</sup> Instead, the court used knowledge intent to achieve the same result.<sup>70</sup> Even though there was "no direct evidence to support a finding that the [insured] intended to inflict any harm other than to 'sting'

---

<sup>66</sup> 278 N.W. 2d 898 (Wis. 1979).

<sup>67</sup> Greening pins, used in the printing trades, can be "shot" like a paper clip with a rubber band. *Id.* at 899.

<sup>68</sup> In contrast, cases construing the intentional tort exclusion under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1982), do not make this distinction. *Lambertson v. United States*, 528 F.2d 441, 445 (2d Cir. 1976) (citing cases).

<sup>69</sup> "The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's act." *Pachucki*, 278 N.W.2d at 901; see also Note, *Intentional Injury Exclusion Clauses — What is Insurance Intent?*, 32 WAYNE L. REV. 1523 (1986) (discussing confusion in the courts and advocating a focus on the policyholder's desire in insurance context).

<sup>70</sup> See *Pachucki*, 278 N.W.2d at 901.

the plaintiff,"<sup>71</sup> the court found evidence that "the boys [had] actual knowledge based upon prior experience that a greening pin will cause harm when it strikes, especially when fired at the close range of six feet."<sup>72</sup> Therefore, the court upheld the trial court's determination that the injury was caused intentionally.

The *Pachucki* court did not fall into the error of treating knowledge intent as an objective standard, that is, as nothing more than constructive intent. The court did examine the defendants' actual knowledge: "There was testimony supporting the fact that each of the defendants has prior knowledge that being struck with a greening pin will result in injury. Boeschke stated on one occasion after being hit by a greening pin he suffered an injury and bled."<sup>73</sup> The problem is that the evidence did not support the court's conclusion concerning the certainty of the harm. Testimony that an injury — a minor injury at that — occurred on one occasion hardly shows that blinding was substantially certain to occur.<sup>74</sup>

This was not an intended injury; it was an accident — the result of horseplay gone awry. Why did the *Pachucki* court strain to find that the injury was intended? After all, the public policy of compensating the injured suffers when an injury is not covered by insurance. Evidently, the *Pachucki* court was more concerned with deterrence than with compensation. If the consequences of such behavior were insurable, there would be less incentive to avoid them.<sup>75</sup> Attitudes toward knowledge intent in exclusion clause cases depend primarily on a court's notion of the proper balance between compensation and deterrence.<sup>76</sup>

An opinion on a related issue confirms that the decision to include knowledge intent in the definition of intent is influenced by the impor-

---

<sup>71</sup> *Id.* at 903.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> If there was more persuasive evidence in the record, the court does not refer to it in the opinion. It strains credulity to think that a practice ritualized as "a greening pin war" would be engaged in if serious injury was substantially certain to follow every "hit." *See id.* at 899.

<sup>75</sup> In fact, in some cases, the courts have read in an exclusion clause even when the policy has none as a matter of public policy. *But see* *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 489-91, 388 A.2d 603, 610 (1978) (citing cases, but refusing to read in an exclusion clause).

<sup>76</sup> For an example of a court that found compensation more compelling than deterrence, see *Rambin v. Wood*, 355 So. 2d 561 (La. App. 1978) (plaintiff's injuries held covered despite exclusion clause because insured did not know injury would result when he pushed plaintiff off moving lawn tractor).

tance attached to deterring and punishing aware wrongdoers. In *First Jersey National Bank v. Dome Petroleum*,<sup>77</sup> the issue facing the Third Circuit in a diversity case was whether an actor with knowledge intent could claim indemnity despite an exculpatory clause covering intentional wrongdoing. An earlier New Jersey decision had narrowly construed an exclusion clause by defining intent as desire intent only, excluding knowledge intent.<sup>78</sup> The state court reasoned that the necessary deterrence could be achieved by allowing the insurance company subrogation. With deterrence taken care of, policies favoring compensation demanded a construction of the exclusion clause that favored coverage. Therefore, the plaintiff in *First Jersey* contended that because he had not acted with desire intent, he should be able to enforce the indemnity agreement.

The Third Circuit distinguished the earlier case. In the earlier state court case, an injured person sought coverage from the insurance company for the acts of a culpable insured; the question in the federal case was whether the allegedly culpable actor could recover under an indemnity agreement. In the latter context, when the innocent third party would in any case be compensated and when allowing indemnity would so obviously undercut policies of deterrence, the Third Circuit reasoned that the more expansive definition of intent in Section 8A of the Restatement applied.<sup>79</sup> When the balance between deterrence and compensation shifted, the definition of intent changed.

### B. Worker's Compensation

Cases dealing with the exclusivity of the worker's compensation remedy reveal that, just as with insurance exclusion clauses, courts alter the definition of intent to suit their notions of how to balance compensation and deterrence. In general, worker's compensation is the exclusive remedy against employers available to workers who suffer accidental injuries on the job. Several jurisdictions, however, allow an injured employee to bring a civil suit against her employer when she is injured by the employer's intentional tort.<sup>80</sup> At the same time, the majority of

---

<sup>77</sup> 723 F.2d 335 (3d Cir. 1983).

<sup>78</sup> See *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 482-85, 388 A.2d 603, 606-08 (1978).

<sup>79</sup> See *First Jersey Nat'l Bank v. Dome Petroleum Ltd.*, 723 F.2d 335, 340-42 (3d Cir. 1983).

<sup>80</sup> In some jurisdictions, the exception is statutory. See, e.g., MONT. CODE ANN. § 39-71-411 (1986). In other jurisdictions, it is a judicial creation. See, e.g., *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 611, 433 N.E.2d 572, 576

those jurisdictions reject the idea that the employer has intentionally harmed an employee if she acted knowing that harm was substantially certain to occur.<sup>81</sup>

By contrast, Louisiana<sup>82</sup> and Ohio<sup>83</sup> have used section 8A to expand the definition of intent to include knowledge intent for purposes of defeating the worker's compensation statutes' exclusivity provisions. In those two jurisdictions, the same development described in the insurance exclusion cases is apparent. Courts use knowledge intent to classify as "intentional" harm that was only statistically certain, highly likely, or even merely probable.<sup>84</sup> The result has been to define as "intentional" harms that are distinctly accidental — *i.e.*, the harm was far less than substantially certain to occur.<sup>85</sup>

Why have these courts manipulated the definition of intent in this fashion? For harms that are intentional in the sense of desired, fairness suggests that courts should allow recovery of more than just workers compensation benefits. None of the parties to the arrangement — employer, insurer, nor employee — fairly expects that the intentionally injured worker will be restricted to the worker's compensation remedy.<sup>86</sup> And, in the worker's compensation context, both compensation and deterrence militate in favor of an expansive reading of intent. Worker's compensation schedules undercompensate notoriously; the employee may have a much better chance at full compensation by suing her employer directly.<sup>87</sup> Finally, charging the employer with all damages she actually causes creates more incentive to take due care and

n.9 (1982) (citing cases). *But see, e.g.*, *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) (exclusive remedy of worker's compensation cannot be avoided by characterizing employer's decisions as for the purpose of causing emotional distress).

<sup>81</sup> See *Noonan v. Spring Creek Forest Prods., Inc.*, 42 Mont. 759, 762, 700 P.2d 623, 625 (1985): "[T]he 'intentional harm' which removes an employer from the protection of the exclusivity clause . . . is such harm as it maliciously and specifically directed at an employee, or class of employee . . ." Knowledge "that harm is a 'substantially certain' consequence of the unsafe workplace" is not sufficient. (quoting *Great Western Sugar Co. v. District Court*, 188 Mont. 1, 7, 610 P.2d 717, 720 (1980); see also 2A A. LARSON, *WORKMEN'S COMPENSATION LAW* § 68.13 (1983).

<sup>82</sup> See *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

<sup>83</sup> See *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1984).

<sup>84</sup> See *id.* (citing cases).

<sup>85</sup> A. LARSON, *supra* note 81, § 68.13.

<sup>86</sup> See, *e.g.*, *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 613, 433 N.E.2d 572, 576 (1982) ("No reasonable individual would . . . contemplate the risk of an intentional tort as a natural risk of employment.").

<sup>87</sup> Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1642-45 (1983).

prevent harm.<sup>88</sup> Thus for these courts, the question is "how to determine when an employer's conduct is sufficiently willful that the only effective deterrent is the tort system."<sup>89</sup>

Thus, in both the insurance exclusion clause cases and in the worker's compensation cases, courts have included "knowledge intent" in the definition of intent because of a perceived need for deterrence, a desire to respond to the actor's culpability. Sometimes, as in the *Pachucki* case or in the worker's compensation cases, defining knowledge intent as intent has also furthered the policy of compensation. But at other times, as in the exclusion clause cases, courts have chosen to pursue deterrence by including knowledge intent even at a cost to the policy of compensation. Often, equating knowledge intent and desire intent has blurred the distinction between the accidental and the intended, because these courts have frequently ignored the distinction between certain harm and a risk of harm. In a very important way, however, these courts have reinforced the distinction between intent-based liability and negligence by insisting that the actor actually be aware of the risk created before her behavior is deemed "intentional."

### III. WHITHER KNOWLEDGE INTENT?

#### A. *The Problem with the Restatement (Second)*

The two Restatements offer two different justifications for the conclusion that one who acts with knowledge intent has committed an intentional tort. For the Restatement (Second), the extremely high probability that harm will follow is the key to liability for an intentional tort. The following illustrates its concept of knowledge intent: the actor fires a gun into a crowd, desperately hoping that no one will be hit. She has committed a battery if someone is hit and there were so many people in the crowd that it was substantially certain someone would be hit. Although the Restatement (Second) nominally insists on the actor knowing that the result was substantially certain, what matters is the high probability that harm will follow.

The degree of certainty or probability alone is not a very compelling reason to call the action of firing into a crowd a battery. Focusing so

---

<sup>88</sup> *Id.* at 1646-48. Moreover, punitive damages may be available against the employer. See, e.g., *Blankenship*, 69 Ohio St. 2d at 614-15, 433 N.E.2d at 575-76.

<sup>89</sup> Finlay, *Message to Employers*, 6 CAL. LAW., Aug. 1986, at 24. The comment was made by a lawyer discussing a case in which the issue was whether fraudulent concealment of a dangerous condition allows for a tort suit by the affected employee, and, if so, whether punitive damages are available.

exclusively on the degree of probability obscures the salient feature of both desire and knowledge intent: the actor's awareness of the harm she may cause. If intent means anything at all, it refers to the actor's state of mind, not to the vagaries of probability and causation. Neither can one justify the emphasis upon probability by arguments that because intent, as a state of mind, is unprovable, the objective, empirical notion of probability must suffice. Legal consequences turn so frequently on mental states that this sort of rigid empiricism seems completely out of date.<sup>90</sup>

Most importantly, the Restatement (Second)'s understanding of knowledge intent fails to provide a useful framework for the future development of tort law. The most rapidly expanding area in tort law is the regulation of economic relationships such as that between employer and employee; or insurer and insured.<sup>91</sup> In such cases, certainty of harm is hardly an issue. Rather, the question facing the courts is: what is the significance of an act undertaken with actual awareness of its harmful consequences? In light of these developments, the Restatement (Second)'s approach to knowledge intent as primarily determined by probability is not helpful.

### *B. The Problem with the First Restatement*

The first Restatement, with its emphasis on culpability as the justification for treating knowledge as "intent," is apparently more in accord with the growing emphasis in the case law on attaching consequences to a defendant's actual awareness of the potential for harm she creates. There are a number of problems, however, with the first Restatement's position. First, if deterring the aware actor is the goal, why is the awareness not sufficient? Why must the harm be certain to follow before liability for a battery, an assault, or another "intentional" tort will attach? For example, the actor who shoots into a crowd without a reason, according to the first Restatement, has only committed a battery if she was aware that someone certainly would be hit. Certainly she is also culpable if she knows someone is very likely to be hit. By the Re-

---

<sup>90</sup> The argument would be associated with Holmes and the pragmatic realists. See also Hovenkamp, *supra* note 35, at 15 n.26 and accompanying text. Cf. *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885) ("The state of a man's mind is as much a fact as the state of his digestion."). For a discussion based on more contemporary philosophers, see Comment, *Direct Evidence of State of Mind: A Philosophical Analysis of How Facts in Evidence Support Conclusions Regarding Mental State*, 1985 Wis. L. Rev. 435.

<sup>91</sup> See, e.g., Comment, *Tort Remedies*, *supra* note 6.

statement's logic, if culpability is the essence of battery, she, too, should be liable for a battery.

The person who acts knowing that harm is very likely to result is sometimes denominated reckless; the person who acts knowing that harm is unreasonably likely to occur can be called advertently negligent.<sup>92</sup> The reckless or advertently negligent defendant's actions would seem to be potentially culpable — the plaintiff's injury is a product of choice — and should be treated as possible "intentional" torts. Yet, in the Restatement, neither recklessness nor advertent negligence is generally treated as the equivalent of intent.

Another version of this problem becomes apparent in attempting to explain why the defendant who acts knowing that harm is statistically certain to occur is not treated as a potential intentional wrongdoer. For example, if a field marshal sends troops into battle, knowing it is substantially certain that a number of them will be killed, hasn't the marshal intentionally caused their deaths? The field marshal has made a deliberate choice; a choice that would seem indistinguishable from one made by an actor with knowledge intent. Yet neither in ordinary usage nor under the first Restatement is the field marshal said to intend the deaths of the troops. Unfortunately, the first Restatement is not much help with either of these problems.

### 1. Recklessness, Advertent Negligence, and the First Restatement

Recklessness and advertent negligence were problems facing Professor Bohlen in drafting the first Restatement. Professor Bohlen relied on the criminal law for his definition of intent. Criminal intent at that time could include criminal recklessness and negligence as well as de-

---

<sup>92</sup> A defendant who actually knows of a very high risk of harm to the plaintiff's interests, and acts regardless of the risk, is characterized as reckless. *RESTATEMENT (SECOND) OF TORTS* § 500 comments f & g (1965). A defendant who is aware of a risk that she knows is unreasonable, and acts despite of this, is called "advertently negligent." Professor Hart attributes the distinction between advertent and inadvertent negligence to G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 100 (2d ed. 1961), and to the ALI, *MODEL PENAL CODE* § 2.0.2 (Tent. Draft No. 4 1955). H. HART, *PUNISHMENT AND RESPONSIBILITY* 137 (1968). According to Professor Hart, even inadvertent negligence can support a judgment that the defendant has behaved culpably, so long as it can be said that the defendant failed to take precautions that the reasonable person would have taken, *and* the defendant, given her mental and physical capacities, could have taken those precautions. *Id.* It is the latter, subjective component that provides the culpability that the criminal law requires. *But see* J. TURNER, *THE MODERN APPROACH TO CRIMINAL LAW* 195 (1945).

sire intent and knowledge intent.<sup>93</sup> If an analogy to the criminal law supported the introduction of knowledge intent, there would seem to be no reason to exclude liability for "intentional" torts based on recklessness or negligence.

The first Restatement does not directly explain how or why it distinguishes among recklessness, advertent negligence, and intent. Rather, Professor Bohlen merely asserted that no case had held that recklessness would suffice.<sup>94</sup> A marginal comment in a preliminary draft of the First Restatement, however, indicates that the definition of intent equating knowledge intent and desire intent was "based on Cook's article on intent, etc."<sup>95</sup> The reference is to Professor Walter Wheeler

---

<sup>93</sup> R. PERKINS, CRIMINAL LAW 745-47 (2d ed. 1969); see also *In re Turner*, 403 A.2d 1346, 1348 (Pa. Commw. 1979).

<sup>94</sup> See ALI, TORTS: TREATISE 1A, *supra* note 12, at 35 n.7.

<sup>95</sup> RESTATEMENT OF TORTS (Prelim. Draft No. 4, Mar. 26, 1924 (Fiche No. 0040)). The reader may find useful a brief description of the way in which the Restatements were prepared. The Reporter prepared preliminary drafts (P.D.) and presented them to the Advisors. Preliminary drafts were submitted to the Council after the Reporter and the Advisors had worked on them. After discussion and amendment by the Council, the P.D. was submitted to the membership at an annual meeting as a tentative draft. The tentative draft was then revised to reflect the comments at the annual meeting. Finally, a proposed final draft (P.F.D.) was submitted to the membership at an annual meeting for approval. This summary of the process was taken from the first Restatement. See 1 RESTATEMENT OF TORTS xiii (1934).

A secondary purpose of this Article has been to explore the utility of a new reference tool. In 1984, the ALI released, in microfiche form, all of the preliminary drafts and tentative drafts of the Restatements. Access to this material, much of which was once confidential, has made it possible for the first time to trace the development of particular sections of the Restatement in very close detail. A disclaimer, however, is required:

This material was distributed by the Institute to a limited group of individuals as part of the Institute's process for consideration of drafts prior to publication and distribution to its membership. As such it is not deemed to have had the imprimatur of the Institute. Limited distribution in any Institute project of materials that are drafts usually embraces distribution to and consideration by a group of Advisers or Consultants, or both, and by the Council of the Institute; or may be of material that consists of memoranda prepared by Reporters for consideration by officers of the Institute and others prior to submission to Consultants and Advisers or the Council. These materials are now being made available for historical purposes to such individuals as may find them useful in their research efforts. They may be cited or quoted now only if their character is explicitly stated.

RESTATEMENT (SECOND) OF TORTS (Prelim. Draft No. 1, July 15, 1955 (Microfiche No. 2930)).

Serendipitously, the microfiche was prepared from drafts actually used by ALI members. Frequently, the fiche contain marginal annotations. Thus, a marginal annotation in the first preliminary draft of the Restatement (Second) suggests that "intent" and

Cook's 1917 article, *Act, Intention and Motive in the Criminal Law*.<sup>96</sup>

Cook framed the issue by offering three examples. In the first, A shoots at B, knowing that he is just as likely to hit C. In the second, A causes an explosion, desiring to kill B but knowing that the explosion will necessarily injure C. In the third, A shoots at C, hoping that the bullet will pass through C and kill B. Three views could, according to Cook, be discerned in the literature. One view limited intent to desired consequences, and would therefore find intent only in example three.<sup>97</sup> The second view included all contemplated probable consequences, and would find intent in all three examples.<sup>98</sup> In resolving the problem, Cook selected the third view, which included not only desired consequences, but also any consequence the actor "advert[s] to . . . as one which will necessarily result from the act." That view would find intent in the last two examples, but not the first.<sup>99</sup> Thus, Cook included knowledge intent in his definition, but excluded advertent negligence.

Cook justified his decision to include knowledge intent and desire intent on the familiar ground that choice renders actions culpable.<sup>100</sup> As for his decision to omit advertent negligence,<sup>101</sup> Cook treated the matter as definitional, describing the issue as "one of choosing a convenient terminology," and justifying his choice as favored by "the balance of convenience . . . as the narrower use here advocated compels us to discriminate more carefully between states of mind that are in fact different, and involve different legal consequences in many [though not all]

"consent" be added to the general definitional section. *Id.* Section 8A itself does not appear until the Council Draft. RESTATEMENT (SECOND) OF TORTS (Council Draft, Oct. 27, 1956 (Fiche No. 2460)).

<sup>96</sup> Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917).

<sup>97</sup> *Id.* at 654 (citing J. MARKBY, ELEMENTS OF LAW § 220 (6th ed. 1905)).

<sup>98</sup> *Id.* at 654-55 (citing J. AUSTIN, 1 JURISPRUDENCE 424 (5th ed. 1875) and J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, chap. viii (1823)).

<sup>99</sup> *Id.* at 657 (citing J. SALMOND, JURISPRUDENCE 337 (4th ed. 1913)) [hereafter J. SALMOND (4th ed.)].

<sup>100</sup> Again he relied on Sir John Salmond, whom he quoted:

With respect to all circumstances which I know or believe to exist, and with respect to all consequences which I know or believe to be inevitable, my act is intentional, however undesirable those circumstances or consequences may be in themselves. I choose them deliberately and consciously as necessary incidents of that which I desire and intend for its own sake.

*Id.* (quoting J. SALMOND (4th ed.), *supra* note 99).

<sup>101</sup> A position, intriguingly, he identified with constructive intent: "The common statement that a person is 'presumed by the law to intend the natural and probable consequence of his acts' seems, at least in some cases, to be a somewhat loose way of stating Austin's definition of intent." Cook, *supra* note 96, at 658.

cases.”<sup>102</sup> The first Restatement accepted Cook’s choice without any further examination.

## 2. The Field Marshal and the First Restatement

The first Restatement’s view was that knowledge intent was an independent and sufficient premise for liability. One who is aware that her acts will cause harm has exercised choice, and therefore potentially has acted culpably. Once that position is taken, it becomes very difficult to understand why a field marshal ordering troops into battle, or a manufacturer introducing a product into the marketplace that will certainly cause injuries, has not intentionally caused those injuries. The problem is not easily solved. Although modern scholars as different as Professor Epstein and Judge Posner can agree that such a distinction is necessary, they are not able to offer persuasive reasons why. Professor Epstein, for example, simply uses the case of the manufacturer as an example of how easy it is to make the basic distinction between deliberate and accidental harm.<sup>103</sup> To explain why, however, Professor Epstein must rely on ordinary usage, not reason. He simply argues that injuries connected with products have always been seen as accidents, not intentional harms.

In contrast, Judge Posner has concluded that harm is simply “an undesired by-product” of the field marshal or manufacturer’s act.<sup>104</sup> Thus, Judge Posner takes the position that desire must be present to have intent. Because he relegates knowledge intent to mere evidence of desire,<sup>105</sup> his position on the field marshal and the manufacturer is consistent with his definition of intent. It is not very persuasive, however, in the context of the Restatement, which takes the position that knowledge intent alone is sufficient, without the need to infer desire. Judge Posner also suggests that one cannot convert an accident into an intentional tort simply because the activity’s scale made it certain that accidents would happen.<sup>106</sup> Again, why not is unclear, since the manufacturer has chosen to operate on such a scale, and considering that just a few years earlier Judge Posner himself came to the opposite conclusion.<sup>107</sup> A final distinction Judge Posner offers is that neither the field

---

<sup>102</sup> *Id.*

<sup>103</sup> Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 392 (1975).

<sup>104</sup> Landes & Posner, *supra* note 7, at 127-28.

<sup>105</sup> *See id.* at 129.

<sup>106</sup> *See id.* at 149.

<sup>107</sup> *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 119 (2d ed. 1977). In the latest edition of this work, Judge Posner distinguishes “real” intentional torts (such as as-

marshal nor the captain of industry has acted for the purpose of increasing the probability of harm. However, this distinction contradicts his earlier premise that intent can be determined without recourse to mentalistic tests.<sup>108</sup> In effect, this distinction returns to a definition of intent limited to desire.

The desire intent solution is also supported by Sir John Salmond. Salmond originally took the position that knowledge intent was equivalent to desire intent. That view, as expressed in 1913 in the fourth edition of Salmond's *Jurisprudence*,<sup>109</sup> was extremely influential in the drafting of the first Restatement. Professor Cook relied on it for his definition of intent, and the first Restatement in turn relied on Cook.<sup>110</sup>

By *Jurisprudence*'s sixth edition, published in 1920, Salmond had changed his mind. After contemplating the problem of distinguishing between knowledge that a result is substantially certain and the statistically certain injury,<sup>111</sup> Salmond rejected the view that all consequences known to be necessary were to be treated as intentional.<sup>112</sup> Years before the first Restatement was drafted, Salmond decided that intent should be limited to consequences that were desired, for themselves or as means to an end.<sup>113</sup>

sault) from others (such as statistically certain injury) on the grounds that the former are "a coerced transfer of wealth to the defendant occurring in a setting of low transaction costs" while the latter are "a conflict between legitimate (productive) activities." *Id.* at 192 (3d ed. 1986).

<sup>108</sup> Landes & Posner, *supra* note 7, at 127.

<sup>109</sup> J. SALMOND (4th ed.), *supra* note 99. Salmond was also the author of a treatise on torts. See J. SALMOND, *THE LAW OF TORTS* (14th ed. 1965).

<sup>110</sup> See Cook, *supra* note 96, at 657. Interestingly, the illustration the Restatement (Second) used for knowledge intent is derived directly from Salmond's fourth edition. Compare RESTATEMENT (SECOND) OF TORTS, § 8A, illustration 1 (1965) with J. SALMOND (4th ed.), *supra* note 99, at 337. Dean Prosser used the example in the same form as Salmond — the mad anarchist and the bomb in the carriage. See W. PROSSER, *supra* note 38, at 31-32 (citing J. SALMOND (4th ed.), *supra* note 99). The illustration was modernized (the location was shifted to an office) for the Restatement (Second), but that is the only change.

<sup>111</sup> Salmond framed the problem with a Biblical allusion: "When King David ordered Uriah the Hittite to be set in the forefront of the hottest battle, he intended the death of Uriah only, yet he knew for a certainty that many others of his men would fall at the same time and place." J. SALMOND (6th ed.), *supra* note 20.

<sup>112</sup> *Id.* at 337 n.1: "In former editions I expressed a contrary opinion which further consideration has now led me to reject. I treated as intentional all consequences known to be necessary."

<sup>113</sup> To be sure, a thing may be desired and therefore intended, not in itself or for its own sake, but merely as the means to an end. If I desire and intend

The first Restatement did not tackle this problem head on, although aspects of its treatment of intent bear on the issue. For one, early drafts of the first Restatement insisted that the result be known to be inevitable in order to be intended. The use of the word "inevitable" instead of "substantial certainty" goes a little way toward eliminating the statistically certain harm from the sphere of intentional misconduct. In other provisions, the first Restatement introduced an element of what might be called "particularity" to the definition of intent, which also indirectly addresses the statistical certainty problem. Both the first Restatement and the Restatement (Second), in a comment to section 776, which addresses the tort of intentional interference with contract, noted that to be actionable the interference must be intended to affect a *specific* person.<sup>114</sup> Such a requirement applied to all intentional torts would effectively eliminate the statistically certain harm from the sphere of intentional misconduct.<sup>115</sup>

### 3. Punitive Damages as an Alternative to the Intentional Torts

The first Restatement is only of limited assistance in explaining why one should distinguish among defendants who know it is substantially certain that harm will follow from their acts, defendants who know harm is statistically certain to follow, and defendants who know of an unreasonable risk of harm. Indeed, good reasons may exist for treating all these defendants similarly. So long as there is actual awareness of the risk to which others are exposed, there is a potential for culpability; there may also be a need for a greater deterrent than the law of negligence provides.

But is there any reason to label actual awareness "intent" in order to

---

a certain end, I also desire and intend the means by which it is to be obtained, though in themselves those means may be indifferent or even objects of aversion. If I kill a man in order to rob him, I desire and intend his death, even though I deeply regret, in his interests or in my own, the necessity of it.

*Id.* at 337.

<sup>114</sup> See RESTATEMENT OF TORTS § 766 comment k (1934); RESTATEMENT (SECOND) OF TORTS § 766 comment p (1965). Both Judge Posner and Professor Epstein also rely on a requirement of "particularity" to handle the problem of statistical certainty. See Landes & Posner, *supra* note 7, at 129; Epstein, *supra* note 103, at 392.

<sup>115</sup> Cf. *Bradley v. American Smelting & Ref. Co.*, 104 Wash. 2d 677, 681, 709 P.2d 782, 786 (1985) (intent established because defendant "had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere").

achieve this deterrence? *Peterson v. Superior Court*<sup>116</sup> is instructive. Prior California cases had extended liability for punitive damages to include cases in which a defendant "intentionally performs an act from which he knows, or should know, it is highly probable that harm will result."<sup>117</sup> In *Peterson*, the question was whether an insurer was required to cover a loss caused by an insured, who had been held liable for punitive damages.<sup>118</sup> The *Peterson* court held that although public policy disallows indemnification for punitive damages, in this case the insurer was liable for the compensatory portion of the award. Although the insured had been held liable for punitive damages, he had not committed an intentional tort, and therefore the loss was covered. The deterrent effect of punitive damages could be used to advantage without the need to invoke intent.

From the standpoint of culpability, knowledge intent may indeed be indistinguishable from desire intent. Then again, so are knowledge that harm is statistically certain to occur, recklessness, and advertent negligence. All are potentially culpable, all may require the additional deterrent that punitive damages provide. But, as *Peterson* recognizes, that goal may be achieved by the simple expedient of making punitive damages available for some nonintentional harms. Deterrence does not require blurring the line between intended harms and accidents through an unconvincing manipulation of the concept of knowledge intent.

### C. *The Argument for Knowledge Intent*

So far, a persuasive argument could be made for eliminating the Restatement (Second)'s definition of knowledge intent from the law of torts. Its doctrinal roots are suspect; outside of the discredited notion of "constructive intent" there is little support for it in the case law. Perhaps the defendant who is aware of the consequences of her acts, whatever the degree of risk, should be treated differently from the defendant who has acted unreasonably but unknowingly. This result can be achieved, however, without recourse to intentional torts, by allowing punitive damages in an action based on advertent negligence. Perhaps, then, the definition of intent should be limited to desire or purpose.

This was the first Restatement's position, at least outside the context

---

<sup>116</sup> 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).

<sup>117</sup> *Nolin v. National Convenience Stores, Inc.*, 95 Cal. App. 3d 279, 286, 157 Cal. Rptr. 32, 36 (1979) (citing *Donnelly v. Southern Pac. Co.*, 18 Cal. 2d 863, 869-70, 118 P.2d 465, 468 (1941)).

<sup>118</sup> See *Peterson*, 31 Cal. 3d at 158, 642 P.2d at 1311, 181 Cal. Rptr. at 790; see also CAL. INS. CODE § 533 (West 1972).

of the original trespass torts. It is also the California Supreme Court's position in *Seaman's Direct Buying Service v. Standard Oil*<sup>119</sup> with regard to intentional interference with contract. The problem is that narrowing the intentional torts to include only purposive invasions of the plaintiff's interests will not make the cases in which knowledge intent is present disappear. It will simply change the terms on which the cases are argued.

Consider, for example, the facts of the *Seaman's* case. Standard Oil denied in bad faith that it had an obligation to supply Seaman's with oil, knowing that the denial would cause Seaman's to lose an advantageous lease with a third party. Standard's purpose was to enable itself to use the oil to supply other customers. The California Supreme Court held that to establish a cause of action for intentional interference with economic advantage, Seaman's would have to show that Standard acted for the purpose of causing Seaman's to lose the lease.

To overcome the obstacle created by the California Supreme Court's insistence that Seaman's show desire intent, Seaman's might simply have turned to another theory of liability. Most often, the available alternative is negligence.<sup>120</sup> Thus, the anarchist who explodes a bomb to kill the king, knowing the king's companion will also die<sup>121</sup> may be sued for negligence instead of battery, and punitive damages sought based on her conscious disregard of the consequences of her acts. The music lover who turns her stereo to full volume, honestly regretting that it will awaken her neighbor, may be accused of negligence or nuisance, rather than intentionally disturbing the neighbor's sleep.<sup>122</sup> For Sea-

---

<sup>119</sup> 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984). A problem with the *Seaman's* decision is that the court does not give any guidance as to whether its rejection of knowledge intent is to apply to all intentional torts, to some intentional torts and not others, or only to the tort of intentional interference with contract.

<sup>120</sup> In *Seaman's*, a contract theory would also have been available. The plaintiff in *Seaman's* could have claimed the loss of the lease as an element of consequential damages. The plaintiff would have to argue that it was foreseeable that the loss of a reliable supplier would cause them to lose the lease. The argument is complicated by the fact that at the time of contracting, it may not have been foreseeable that Seaman's would be unable to recover in the event of breach. A good argument can be made, however, that because of the nature of the contract and Standard's breach, foreseeability of the loss should be measured at the time of the breach, not the time of contracting. See Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 283 (1975).

<sup>121</sup> RESTATEMENT (SECOND) OF TORTS § 8A, illustration a (1965). This illustration of knowledge intent can be traced to J. SALMOND (6th ed.), *supra* note 20.

<sup>122</sup> The example is Professor Hart's. See H. HART, PUNISHMENT AND RESPONSIBILITY 120-21 (1968).

man's, the alternative theory would be negligent interference with economic advantage,<sup>123</sup> and the primary issues would be whether Standard behaved unreasonably and whether Standard owed Seaman's a duty.

This raises the question, however, of whether the duty/due care analysis of negligence or the analytical framework of the intentional torts provides a better way to address the potential liability of the actor with knowledge intent. We think that the analytical framework of the intentional torts offers the better approach. To treat a case like *Seaman's* as a case of negligence affronts ordinary usage; it implies that the loss of the lease was an accident, which it was not.<sup>124</sup> More importantly, turning cases in which knowledge intent is present into negligence cases ignores the very different purposes that negligence and the intentional torts serve:

[T]he difference between the purpose of an intentional interference cause of action [and a negligent interference cause of action is that] . . . [t]he former cause of action tends to restrain impermissible behavior in the marketplace between competitors: it sets forth the ground rules of competition to confine business rivalry within acceptable limits. . . . [In intentional interference cases,] the inquiry focuses on the inherent and relational quality of the wrongful act rather than on the foreseeability of its consequences.<sup>125</sup>

Professor Bohlen excluded knowledge intent from the definition of intent for torts such as interference with economic advantage because

---

<sup>123</sup> Before the California Supreme Court, counsel for Seaman's argued that the creation of a cause of action for negligent interference with economic advantage in *J'aire Corp. v. Gregory*, 24 Cal. 3d 799, 805, 598 P.2d 60, 63-64, 157 Cal. Rptr. 407, 410-11 (1979), had rendered the intent element in the intentional interference tort obsolete. The court rejected that argument, saying "[i]t is sufficient to note that, regardless of the possible merits of an action for negligent interference on these facts, Seaman's neither pled nor proved nor submitted to the jury any such theory of liability." *Seaman's*, 36 Cal. 3d at 767 n.5, 686 P.2d at 1165 n.5, 206 Cal. Rptr. at 361 n.5.

<sup>124</sup> See Halperin, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7, 15 (1957) (arguing that when "harm [is] intentionally inflicted . . . liability ought to be rested squarely upon that ground, both in the interest of sound analysis and in order to enable the plaintiff to recover punitive damages in an appropriate case.").

<sup>125</sup> *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1350 (9th Cir. 1980) (citing *W. PROSSER*, *supra* note 38, at 952-62). In *DeVoto*, the defendant allegedly stopped selling its list of mortgagors to insurers who were clients of plaintiff, a broker, and sold it instead to a mortgage insurer with whom defendant had corporate affiliations. The plaintiff claimed that the defendant violated the Sherman Act and intentionally interfered with the plaintiff's expected commissions. The court affirmed the dismissal of plaintiff's claim on summary judgment, and also rejected plaintiff's attempt to recast his claim as negligent interference with economic advantage.

those torts lacked the quasi-criminal character of the trespass torts.<sup>126</sup> In fact, the modern intentional torts still have more in common with the criminal law than with negligence, if the above description is correct. As the description suggests, the intentional torts — like the criminal law — focus on the character of the defendant's conduct, while the law of negligence is concerned primarily with compensating the plaintiff. Second, the intentional torts — again like the criminal law — seek to set out rules and ensure that defendants follow them. Thus, while the law of negligence determines liability through a case-by-case balancing of the interests of the defendant and society, the intentional torts seek to set more specific standards of behavior through an articulated system of justifications, privileges, and excuses. Finally, as the work of Professor Givelbar has shown, the intentional torts have their primary role in regulating relationships, while the law of negligence concerns itself chiefly with accidents, the interactions of strangers.<sup>127</sup>

A comparison of the analytical structure of the law of negligence and the analytical structure of the intentional torts shows why the intentional torts are well-suited to regulating relationships. Two of the differences have already been mentioned: that the intentional torts focus on the defendant's conduct, and that defenses and excuses are set out in specific rules, rather than by a case-by-case adjudication of reasonableness. The third significant difference is in the distribution of the burden of proof: in the law of negligence, the burden of showing unreasonableness is on the plaintiff, while in the intentional torts, once intent is demonstrated, the burden of showing a justification falls on the defendant. The plaintiff is not required to show that the defendant behaved unreasonably. When the parties are in a relationship that allows the defendant to plan to harm the plaintiff, the procedural incidents of intentional tort liability make sense. The defendant is in a better position to supply evidence of the justifications that support her actions, particularly because she knows in advance that a justification will be required.<sup>128</sup> Because planning is involved, the courts have some basis to

---

<sup>126</sup> See *supra* text accompanying note 46.

<sup>127</sup> Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982) (showing how the tort of intentional infliction of emotional distress has "become an instrument for judicial tinkering with traditional legal relationships on behalf of the less powerful party in that relationship," creating "a form of private due process"); see also Pedrick, *Intentional Infliction: Should Section 46 be Revised?*, 13 PEPPERDINE L. REV. 1, 22 (1985) (discussing how the tort of intentional infliction of emotional distress serves the "civilizing function" of tort law).

<sup>128</sup> See, e.g., *Valdez v. Abney*, 182 Cal. App. 3d 909, 915, 227 Cal. Rptr. 707, 710

believe that their efforts to set out specific "ground rules" will be availing, since these are players who presumably have an incentive to learn the rules, and who can plan to abide by them.<sup>129</sup> The intentional tort framework can function as a sort of common law due process, bringing to some kinds of relationships a requirement that actions certain to cause harm be considered with the interests of the other in mind, and according to established standards rather than ad hoc.<sup>130</sup>

Focusing on the way in which the intentional torts function differently from negligence provides a reason to treat the defendant who acts knowing that harm will result as a potential intentional tortfeasor. Most defendants who have knowledge intent are likely to be in a relationship with the plaintiff that is in need of this sort of regulation. To have knowledge intent, a defendant must be in a position to know what harm will befall the plaintiff, and to decide to sacrifice the plaintiff's interests to purposes of her own, under circumstances in which the plaintiff is likely to sue. Indeed, most of the relationships that have come increasingly under scrutiny are relationships in which this sort of knowledge is possible, such as the relationship between employer and employee or insurer and insured. Finally, this focus helps explain why the reckless or advertently negligent defendant is not treated as an intentional tortfeasor. Although such an actor is perhaps culpable, the unplanned quality of her acts, and the absence of a preexisting relationship, makes the procedural incidents of intentional tort liability inappropriate.

Two final arguments for excluding knowledge intent from the definition of intent, at least for the tort of intentional interference with economic advantage, must be considered. In the traditional trespass torts, the harm that befalls the plaintiff — a battery, an assault, an imprisonment — is one that is usually unjustified and wrongful in itself. Therefore, one who inflicts that harm intentionally can be presumed to have

---

(1986) (in an action against a police officer for battery, "considerations of practicality and public policy require the police officer to bear the burden of proving the force used in an arrest was reasonable"); *see also* *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 592, 595 P.2d 975, 982-83, 156 Cal. Rptr. 198, 205-06 (1979) (in suit for false arrest, defendant must show justification because "[t]he existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant.").

<sup>129</sup> *See, e.g.*, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 106 S. Ct. 2295, 2304 (1986) (noting, in discussion of effect of establishing negligent interference with economic advantage claims on damages recoverable in strict products liability, that foreseeability as test does not allow enough certainty for planning).

<sup>130</sup> Givelber, *supra* note 127, at 43; *see also* J. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 243-76 (1969).

acted culpably. On the other hand, economic harm is frequently a consequence of accepted behavior. Thus, intent alone will not always be sufficient to justify imposing liability for intentional interference with economic advantage. The Restatement has recognized this by requiring that a defendant's actions be both intentional and improper before a cause of action arises. In this light, knowledge intent could be eliminated from the definition of intent for this tort if desire intent was necessary to find that an interference was culpable.

Other than *Seaman's*, the only case directly discussing the intent requirement for intentional interference with contract, *Devoto v. Pacific Fidelity Insurance*,<sup>131</sup> suggests that culpability is the key: "Tortious interference requires a state of mind and purpose more culpable than intent under the Restatement definition, however. The fact of a general intent to interfere, under a definition that includes imputed knowledge of consequences, does not alone suffice to impose liability."<sup>132</sup>

But is it accurate to say that one who acts with knowledge that her conduct will interfere with another's prospective economic advantage has never acted culpably? The case law is certainly broader than that. For example, one of the earliest cases of prima facie tort, *Advance Music Corp. v. American Tobacco Co.*,<sup>133</sup> imposed liability when the defendant allegedly deliberately omitted plaintiff's songs from defendant's list of hit songs, causing plaintiff a loss of profits because orchestras and others were influenced by defendant's listings. Although the plaintiff alleged that the defendant intended injury, nothing in the report indicates a desire to injure the plaintiff. Rather, the allegation was that the defendant was selecting songs arbitrarily, or as the result of "other considerations foreign to a selection based on . . . popularity."<sup>134</sup> The court found the plaintiff's conclusory allegation of intent sufficient because the "defendants are wantonly causing damage to the plaintiff by a system of conduct on their part which warrants an inference that they intend harm of that type."<sup>135</sup> If, on remand, no desire to injure the

---

<sup>131</sup> 618 F.2d 1340 (9th Cir. 1980) (applying California law).

<sup>132</sup> *Id.* at 1347.

<sup>133</sup> 296 N.Y. 79, 70 N.E.2d 401 (1946).

<sup>134</sup> *Id.* at 402.

<sup>135</sup> *Id.* In a recent reprise of these facts, the California Supreme Court rejected a claim by an author who alleged his book was intentionally left off a best seller list on the grounds that the list was not "of and concerning" his work. *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 549 (1986). The majority ignored a dissent that would permit the plaintiff to recover if "the defendant acted for the specific purpose of injuring the particular plaintiff." *Id.* at 1036 (Grodin, J., concurring and dissenting).

plaintiff was shown, but only a desire to avoid the expense of actually calculating the top ten, would defendant's behavior not have been tortious?

The *Devoto* court actually seems to have contemplated that knowledge intent might on some occasions be culpable, and, therefore, sufficient. Thus, the court qualified its conclusion: "Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure. . . ." <sup>136</sup> Given aggravating circumstances, perhaps knowledge intent would suffice. Essentially, that is the Restatement (Second)'s position with regard to some intentional torts. It requires the plaintiff show something in addition to intent, *i.e.*, "intent-plus" — intent plus impropriety <sup>137</sup> or intent plus culpability <sup>138</sup> — in order to recover.

This brings us to the last argument against knowledge intent. Knowledge intent complicates things immensely. If the plaintiff must show "intent-plus," what elements of proof are allocated to the plaintiff and what to the defense? Which issues go to culpability, and which to justification? Eliminating knowledge intent makes things much easier. Without knowledge intent, once the plaintiff has shown desire intent, all questions of a justifying motive or excuse are to be raised by the defendant. <sup>139</sup> Desire intent, after all, usually will be culpable.

Unfortunately, the simplicity of this approach is illusory. Again, the *Seaman's* case provides a good illustration. In the face of a requirement that Seaman's allege purposeful interference, Seaman's could still argue that Standard in fact acted for the purpose of causing them to lose their lease, albeit as a means to an end, not as an end in itself. Seaman's could certainly find authority for the proposition that desire intent usually includes both desired means and desired ends. To use Professor Cook's example, *A's* death is desired when *B* shoots him, whether *B* intends to kill only *A*, or whether *B* regrets the necessity of killing *A*, but desires it as a means of killing *C*, who is standing behind *A* and will be felled by the same shot. <sup>140</sup> The California Supreme Court implicitly rejected the argument that Standard "shot" the lease in order to "kill" its obligation to sell oil to Seaman's, by saying that the breach of

<sup>136</sup> *Devoto*, 618 F.2d at 1347.

<sup>137</sup> RESTATEMENT (SECOND) OF TORTS § 766 (1979).

<sup>138</sup> *Id.* § 870.

<sup>139</sup> This is essentially the position the *Seaman's* court took. See *Seaman's*, 36 Cal. 3d at 766-67, 686 P.2d at 1165, 206 Cal. Rptr. at 361.

<sup>140</sup> See Cook, *supra* note 96.

the lease was "merely an incidental, if foreseeable, consequence of Standard's action."<sup>141</sup> The court, however, did not explain why it characterized the loss of the lease as "incidental." Unless the court meant to limit the definition of intent to those specific ends that are desired, its decision to eliminate knowledge intent from the definition of intent thrusts upon the courts the difficult job of sorting "ends" from "means" and "means" from "incidental effects." Once again, the issues raised by knowledge intent have not disappeared; they have simply been placed into a different conceptual framework.

The question, then, is which framework processes the issues most usefully and with the least distortion. We believe that the intentional torts provide the right analytical framework. As we have argued, the way in which the intentional torts focus attention on the character of the defendant's conduct comports with the courts' desire to denominate what is and is not legitimate business behavior. Further, the way in which the intentional torts handle questions of excuse and justification and allocate the burden of proof allows the evolution of clear standards of behavior in a way the law of negligence does not.

#### CONCLUSION

The expansion of tort law to include economic harms poses a challenge to the concept of knowledge intent. The threat is that all economically self-interested actions undertaken with the knowledge that harm will result will apparently be tortious. The *Seaman's* court responded to this threat by requiring a showing that the defendant acted for the purpose of causing the harm. This result is unsatisfactory. Knowledge intent, generally, represents the courts' desire to treat aware actors differently from those who act without awareness of the potential for harm they create, and economic actors who cause harm in the marketplace are certainly aware actors. Furthermore, the courts use the intentional torts to regulate precisely the kinds of relationships typically involved in cases of harm to economic interests. On final analysis, although actions known to cause economic harm may frequently be justified, the analytical framework of the intentional torts is the appropriate framework for sorting out the difficult, but unavoidable, issues that attend judicial regulation of economic behavior. Thus, despite the weak doctrinal support for the Restatement (Second)'s definition of knowledge intent, it has proven to be a useful concept that should not be eliminated.

---

<sup>141</sup> *Seaman's*, 36 Cal. 3d at 767, 686 P.2d at 1165, 206 Cal. Rptr. at 361.

