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# The Fault Concept in Personal Injury Cases in Minnesota: Implications for Tort Reform

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# The Fault Concept in Personal Injury Cases in Minnesota: Implications for Tort Reform

## **Abstract**

Legislative tort reform proposals have attempted to restore what is perceived to be an imbalance in the tort-litigation system by limiting tort recoveries. One of the motivating factors behind tort reform proposals is a concern that tort law has deviated from a fault-based system of liability. It is this concern over the structure of the fault system in Minnesota that is the subject of this Article. This Article examines Minnesota Supreme Court opinions of the 20th Century to determine whether the court's decisions deviated from a fault-based system of liability. The focus is on change, accepted and rejected. The purpose is to determine whether the claim that the tort system is based on a primary judicial desire to compensate victims of accidents can be established, and what implications the court's decisions might have for determining what type of tort reform legislation should be enacted, at least insofar as claims are made that the deep-pocket or social insurance principle justifies change.

## **Keywords**

Minnesota torts, Minnesota tort reform, liability insurance, products liability, negligence, civil damages act, dram shop act, obvious danger, fault, personal injury

## **Disciplines**

Insurance Law | Torts

# THE FAULT CONCEPT IN PERSONAL INJURY CASES IN MINNESOTA: IMPLICATIONS FOR TORT REFORM

MICHAEL K. STEENSON†

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## I. INTRODUCTION

Perceived problems concerning the availability and affordability of liability insurance have made tort law the subject of increasing debate and legislative action. The debate has polarized, with consumer groups and plaintiff's attorneys arguing that any problems concerning the affordability and availability of liability insurance are due to insurance industry rating and business practices, and industry and insurance groups arguing that the primary problem is a tort system that has gotten out of control through the application of increasingly liberal tort rules and damages awards.

Tort reform bills have been introduced in virtually all state legislatures, as well as Congress, and legislation has been enacted in a significant number of states. The primary focus of the proposed and enacted legislation has been the tort-litigation system. The tort reform proposals address the perceived problems with the tort system in various ways. Some of the proposals are intended to modify primary behavior of attorneys and litigants by imposing restrictions that must be met before suit may be brought. Examples include certification that there is a basis for bringing a medical malpractice suit against health care providers and imposition of penalties when frivolous litigation is commenced.

A second type of proposal is intended to alter the substantive rules of liability in various areas of tort law. Examples of

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such proposals address the rule of joint and several liability or limit or eliminate specific causes of action. A third type of proposal is intended to limit the availability of tort recovery through restrictions on traditional tort remedies. Examples of such legislation are caps or limits on recoverable damages and limitations on the common law collateral source rule.

The legislative proposals are attempts to restore what is perceived to be an imbalance in the tort-litigation system by limiting tort recoveries. One of the motivating factors behind tort reform proposals is a concern that tort law has deviated from a fault-based system of liability.<sup>1</sup>

It is this concern over the structure of the fault system in Minnesota that is the subject of this Article. The Article examines Minnesota Supreme Court opinions to determine whether the court's decisions have deviated from a fault-based system of liability. The focus of this Article is on change, accepted and rejected. The purpose is to determine whether the claim that the tort system is based on a primary judicial desire to compensate victims of accidents can be established, and what implications the court's decisions might have for determining what type of tort reform legislation should be enacted, at least insofar as claims are made that the deep-pocket or social insurance principle justifies change.

## II. THE SUPREME COURT'S TORTS DECISIONS

In *Miller v. Monsen*,<sup>2</sup> the supreme court noted the flexibility inherent in common law rule making. The court made clear that the novelty of a claim and the lack of common law precedent to support the claim are insufficient justifications for denial of a claim. In the court's view, the common law does not consist of a system of "absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense."<sup>3</sup> The court viewed these principles as a function of the social needs of the community, and noted that the principles are adaptable to changing conditions,

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1. See, e.g., REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 2 (Feb. 1986) (copy on file at the William Mitchell Law Review office).

2. 228 Minn. 400, 37 N.W.2d 543 (1949).

3. *Id.* at 406, 37 N.W.2d at 547.

interests, relations, and uses as societal progress requires.<sup>4</sup> The court, in *Miller*, recognized the judicial prerogative to formulate and alter common law rules depending on the court's perception of changing societal needs.<sup>5</sup> A variety of principles may be brought to bear in resolving torts cases, leaving the court substantial latitude to extend, limit, or maintain the right to recover for personal injuries.

The supreme court's other decisions bear out the statements made in *Monsen*. The court's reasoning in critical torts cases varies from decision to decision. There is no consistent adherence to any specific principle as a driving force behind the decisions. The court has supported its decisions by reliance on factors suggesting the importance of compensation and the availability of liability insurance to cover personal injuries. The court has also emphasized the ability of a defendant to avoid an injury or to spread the cost of injuries it causes, the difficulty in limiting liability, or simply the fact that a common law rule is outmoded and ripe for change because the historical justifications are no longer valid.

In determining whether the court has adhered to the fault concept in deciding torts cases, it is important to assess the potential impact of the court's decisions, as well as viewing its policy justifications. The two may or may not coincide. There are various ways in which the supreme court's decisions could be viewed as deviating from the fault concept, either through the elimination of specific limitations on recovery or the expansion of strict liability theory.

One of the observable trends in torts cases in general has been a tendency to place greater reliance on jury resolution of cases. The result has been accomplished by the elimination of specific tort duties in favor of general duties, as in the owners and occupiers duties area, and through the elimination of specific immunities, such as charitable, state and municipal, and parent-child tort immunities. In a sense, the movement liberalizes the law because specific judicially imposed impediments to recovery have been removed, but abrogation of immunities does not signal imposition of liability without fault. The supreme court's subsequent expressions of concern about the impact those decisions might have occasionally leads to deci-

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4. *Id.*

5. *Id.*

sions that either impose new limitations on the right to recover or cut back the liberalizing decisions in other ways.

There are other indications that the liability without fault concept is being stretched, but there are also counterindications. There is, of course, strict liability theory, both for defective products and for abnormally dangerous activities. But the Minnesota Supreme Court has questioned and limited the scope of the strict liability theory. In general, the picture that emerges from the court's decisions is one of a balanced decision-making process. The following discussion fills in that picture.

The supreme court chose not to adopt immunity for charitable organizations over sixty years ago.<sup>6</sup> More recently, the court abolished municipal tort immunity in 1962, in *Spanel v. Mounds View School District*,<sup>7</sup> and state tort immunities in 1975, in *Nieting v. Blondell*.<sup>8</sup> In both *Spanel* and *Nieting*, the court abolished the immunities primarily because the historical justifications for the immunities were no longer valid, and because of the court's perception that financial burdens that would be imposed because of the abolition of the immunities would be manageable.

In 1968, in *Silesky v. Kelman*,<sup>9</sup> the supreme court substantially limited the prior rule of parental tort immunity, holding that parents could be held liable in actions by their children unless the negligent act involved "an exercise of reasonable parental authority over the child"<sup>10</sup> or "an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care . . . ."<sup>11</sup> In 1980, in *Anderson v. Stream*,<sup>12</sup> the court erased those exceptions to parental tort liability. The exceptions were erased because of the difficulties involved in applying the subjective exceptions and because of the arbitrary line-drawing required by the exceptions, because of the court's perception that a reasonable parent standard would provide sufficient flexibility for parents

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6. See *Mulliner v. Evangelischer Daikonniessenverein*, 144 Minn. 392, 396, 175 N.W. 699, 700 (1920).

7. 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

8. 306 Minn. 122, 131, 235 N.W.2d 597, 602-03 (1975).

9. 281 Minn. 431, 161 N.W.2d 631 (1968).

10. *Id.* at 442, 161 N.W.2d at 638.

11. *Id.*

12. 295 N.W.2d 595 (Minn. 1980).

in the exercise of parental functions but avoid the pitfalls associated with the *Silesky* exceptions, and because of the court's desire to take advantage of available insurance to compensate injured minors.<sup>13</sup>

The ostensible impact of an abolition of the immunities is to completely remove judicial control over cases that would otherwise not have been filed or could have been readily dismissed if they were filed. There are situations, however, where the court has expressed some concern over the scope of tort liability imposed on the state and its municipalities. One example concerns the liability of governmental units for breach of a statutory duty, one of the issues in *Cracraft v. City of St. Louis Park*<sup>14</sup> and *Hage v. St. Louis Park*.<sup>15</sup> In both cases, the court imposed significant hurdles for plaintiffs seeking to impose liability on governmental units for failure to carry out a statutory duty.<sup>16</sup>

The owners and occupiers duties area provides another indication of an elimination of specific limitations on liability in favor of general negligence principles, and of judicial reaction to the removal of those limitations. Until 1972, the court followed the traditional approaches to owners and occupiers duties cases. Entrants on land were classified according to their status, with the highest duty owed to invitees and the lowest to trespassers. In 1972, in *Peterson v. Balach*,<sup>17</sup> the supreme court eliminated the distinctions between invitees and licensees in favor of a general negligence standard of care as the standard by which to measure the obligation of owners and occupiers of property.<sup>18</sup>

There are several interesting points about *Peterson*. First, it does not represent a departure from the fault concept in the sense that facilitating compensation is the primary purpose of the decision. *Peterson*, and similar decisions in other jurisdictions,<sup>19</sup> has been motivated by a realization that the common law classification scheme resulted in a rigid, complex, confus-

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13. *Id.* at 599-600.

14. 279 N.W.2d 801 (Minn. 1979).

15. 304 N.W.2d 283 (Minn. 1981).

16. *See id.* at 288 (requiring that the municipality have actual knowledge of dangerous conditions to be held liable); *Cracraft*, 279 N.W.2d at 806-07 (adopting a four factor test for determining when a duty should be imposed upon a municipality).

17. 294 Minn. 161, 199 N.W.2d 639 (1972).

18. *Id.* at 164, 199 N.W.2d at 642.

19. *See, e.g.*, *Rowland v. Christian*, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); *Mounsey v. Ellard*, 363 Mass. 693, 706-07, 297 N.E.2d 43,

ing, inequitable, and nonuniform application of the law. The reasons are much the same as the court's reasons for eliminating state and municipal tort immunity. Abolition of the common law distinctions between licensees and invitees in favor of general negligence principles, however, has not completely erased judicial concern over the abandonment of the specific rules that clearly defined the duty of an owner or occupier of property. General negligence principles apply but, on occasion, the court may apply other limiting principles to bar or limit recovery.

There are illustrative Minnesota decisions. In *Armstrong v. Mailand*,<sup>20</sup> a case arising out of the deaths of three firefighters who died while attempting to extinguish a fire at a propane storage tank, the court applied primary assumption of risk principles to hold that the landowner on whose property the tank was located was not liable to the firemen. The court first applied *Peterson v. Balach* to determine that the duty owed by landowners to entrants on land would not be restricted other than by general negligence principles, and that firefighters would not be treated as *sui generis*.<sup>21</sup> The court then reformulated the duty of a landowner to entrants so as to carve out an exception to liability in cases where the danger is not known and should not have been known by the landowner and was not known by the entrant.<sup>22</sup>

In a second case, *Bisher v. Homart Development Co.*,<sup>23</sup> the plaintiff was injured when she fell over a planter at a shopping mall. The jury found the plaintiff forty-three percent negligent and the defendant fifty-seven percent negligent. The trial judge granted the defendant judgment notwithstanding the verdict and the supreme court affirmed, finding that there was simply no evidence of negligence in the design or construction of the planter, and that the "planter was in plain view, obvious in its presence, and had presented no problem for the heavy customer traffic . . ." in the mall.<sup>24</sup>

Decisions such as *Armstrong* and *Bisher*, relying basically on

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51 (1973); *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 856-57, 236 N.W.2d 1, 11 (1975).

20. 284 N.W.2d 343 (Minn. 1980).

21. *Id.* at 349-50.

22. *Id.* at 350.

23. 328 N.W.2d 731 (Minn. 1983).

24. *Id.* at 734.



obviousness of a danger as a basis for finding no duty, may not be successful as tools of continuous limitation of tort liability, but they do, at a minimum, reflect continued judicial concern over restraining liability rules within proper limits.

Fault principles are least likely to be applicable in cases where the court appears to impose liability primarily because of the presence of insurance or because strict liability principles are applied. In some cases, such as *Anderson v. Stream*,<sup>25</sup> involving parent-child tort immunity, the availability of liability insurance is a critical factor in the court's decisions.

In *Anderson*, the court considered the prevalence of liability insurance as a relevant and significant factor in subjecting parents to suits by their children. The court stated that "our paramount objective is to compensate the child for his or her injuries, and the widespread existence of homeowner's and renter's liability insurance will help effectuate this goal."<sup>26</sup> There were other reasons for the court's decision to erase the limitations it had previously placed on parental liability<sup>27</sup> but the insurance factor stands out because it appears to provide the basis for the conclusion that the court is primarily concerned with compensation in cases involving injuries to minors, and that fault is therefore irrelevant. Use of the insurance factor as a reason for one decision, however, must be separated from the insurance factor as a possible standard for the resolution of future torts cases. The standard for determining liability is still negligence. That standard applies regardless of the presence or absence of insurance.

The insurance issue also has a negative influence, as is illustrated in *Herrly v. Muzik*,<sup>28</sup> a recent case in which the court considered the defense of complicity in dram shop cases. As initially formulated, complicity meant participating knowingly and affirmatively in the illegal sale, bartering, or gift of intoxicating liquor to another. Complicity is a complete bar to a dram shop action against the commercial vendor of intoxicating liquor. The defense was first formulated in 1968. In 1977, the dram shop act was amended to provide for the application

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25. 295 N.W.2d 595 (Minn. 1980).

26. *Id.* at 600.

27. The court cited faith in the jury system and the public policy of affording a remedy to those who have been injured by the conduct of another as additional reasons behind its decision. *See id.* at 599-600.

28. 374 N.W.2d 275 (Minn. 1985).

of comparative fault principles to dram shop claims. In *Herrly*, the issue concerned the 1977 amendment which made the defense of complicity subject to apportionment under the comparative fault act. The supreme court held that the 1977 amendment had no impact on the defense of complicity, and that complicity, therefore, remained a complete defense to dram shop claims.<sup>29</sup>

The court had previously noted two objectives of the 1977 amendments of the dram shop act. One was to alter the method of apportioning fault among wrongdoers who illegally furnished intoxicating liquor to others, by substituting comparative fault principles for allocation of liability on an aliquot basis. The second objective was to reduce the recovery of certain claimants by their percentage of fault, a reversal of the former rule that an innocent third person's negligence would not affect an award under the dram shop act. The court's reasons for retaining the defense of complicity are as follows:

In light of more recent legislation, we cannot help but attach some significance to the fact that the effect of the second objective of the 1977 amendment was to reduce the liability of liquor vendors under the Civil Damage Act. Although subsequent legislative history as a source of divining earlier intent must be employed with caution, we cannot blind ourselves to the legislature's concern over the rising cost and reduced availability of dram shop insurance and the resultant 1985 amendments to section 340.95, which significantly lessen potential recoveries . . . . Adopting *Herrly's* view of the 1977 amendment, however, would increase liability—a result at odds with the second objective of the 1977 amendment and a consequence we do not believe was intended.<sup>30</sup>

The second area where the courts have appeared to impose liability without fault is in strict liability cases involving products liability claims and cases involving abnormally dangerous activities. In 1967, the Minnesota Supreme Court adopted strict liability in tort in *McCormack v. Hanks Craft Co.*<sup>31</sup> The court relied on the standard justifications for the adoption of strict liability:

This rule of strict tort liability, as it is appropriately called,

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29. *Id.* at 278.

30. *Id.* at 279 (citations and footnotes omitted).

31. 278 Minn. 322, 154 N.W.2d 488 (1967).

qualifies as a tested legal theory along with the traditional theories of negligence and breach of warranty where the latter meet the purpose for which liability should be imposed upon a supplier of a product. However, in our view, enlarging a manufacturer's liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.<sup>32</sup>

The public policy reasons were broad enough to justify the development of various strict liability standards and to permit the expansion of strict liability to various claims, transactions, and losses. The court, however, has taken a relatively conservative approach in its subsequent products liability cases.<sup>33</sup>

In 1984, in *Bilotta v. Kelley Co.*,<sup>34</sup> the supreme court clarified the standards applicable to design defect cases by adopting a "reasonable care balancing approach" as the standard to be used in deciding design defect cases. The court rejected the consumer expectation standard, which is drawn from the Restatement (Second) of Torts,<sup>35</sup> as the applicable standard because, in the court's opinion, that standard inhibited a jury's evaluation of the reasonableness of a manufacturer's design choices.<sup>36</sup> Adoption of the reasonable care balancing ap-

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32. *Id.* at 338, 154 N.W.2d at 500.

33. The supreme court's products liability decisions have not resulted in any significant expansions of strict liability theory. For example, in 1976, in *Halvorson v. American Hoist and Derrick Co.*, 307 Minn. 48, 57, 240 N.W.2d 303, 308 (1976), the court adopted the obvious danger limitation from *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), a restrictive doctrine. The doctrine was repudiated by the supreme court six years later in *Holm v. Sponco Manufacturing, Inc.*, 324 N.W.2d 207 (Minn. 1982). More recently, in *S.J. Groves and Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985), the court refused to apply strict liability theory to a claim by S.J. Groves for property damage and economic loss arising out of a helicopter crash, even though the pilot died in the crash.

34. 346 N.W.2d 616 (Minn. 1984).

35. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

36. 346 N.W.2d at 622.

proach, in which the trier of fact balances the likelihood that harm will occur and the gravity of the harm if it occurs against the burden of taking precautions to avoid the harm, substantially eliminates any major distinctions between strict liability and negligence cases in design defect cases. Coupled with a previous decision covering failure to warn, *Bigham v. J.C. Penney Co.*,<sup>37</sup> in which the court stated that there are no sharp distinctions in Minnesota between strict liability and negligence,<sup>38</sup> the supreme court has moved away from the strict liability principle toward negligence principles for the resolution of products liability cases involving design defect and warning issues. While the court has not taken the final step and held that strict liability is simply unavailable in design defect and failure to warn cases, the *Bilotta* case comes close.

While the court, in *Bilotta*, preserved strict liability under the Restatement's consumer expectation standard for cases involving manufacturing flaws, the decision appears, in a sense, to represent a retreat from the rule of strict liability in design defect cases. Policy justifications for the rule of strict liability aside, the supreme court's products liability decisions make the rule appear not quite so strict.

Strict liability theory has also been limited in cases involving liability for abnormally dangerous activities. In *Mahowald v. Minnesota Gas Co.*,<sup>39</sup> the supreme court refused to apply strict liability principles to a distributor of natural gas in a case where personal injuries arose from an explosion caused by a gas line leak. The court's refusal to apply strict liability to the defendant was based in part on a rejection of the cost-spreading rationale for strict liability. The court acknowledged the attractiveness of the rationale, insofar as strict liability, if adopted, would mean that ratepayers of the company would pay the damage for the few who sustain damage to person or property.<sup>40</sup> On the other hand, the court noted that, given the widespread availability of insurance, a rule making the gas company or distributor an insurer would allow subrogation insurers in a great majority of cases to shift the risk for which they have collected premiums to the gas company and its rate-

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37. 268 N.W.2d 892 (Minn. 1978).

38. *See id.* at 897.

39. 344 N.W.2d 856 (Minn. 1984).

40. *Id.* at 861.

payers, even if the company was free from negligence.<sup>41</sup>

Aside from the limitations on the scope of strict liability, the court has also held the line on liability in a variety of other cases. The following discussion illustrates the court's reasoning in two cases in which it was asked to expand a liability rule and the right to recover damages.

In 1892, the Minnesota Supreme Court recognized the right of a person within the zone of danger of physical impact who suffers severe emotional distress and resultant physical injury arising out of fear for her own safety to recover for the distress and injury.<sup>42</sup> In *Stadler v. Cross*,<sup>43</sup> the supreme court considered whether the zone of danger rule should be expanded to permit recovery by a bystander suffering emotional distress and resultant physical symptoms, even though not in the zone of danger. Although the court acknowledged the adoption of bystander recovery in other jurisdictions, the court refused to expand liability, based in part on the following reasons:

A person's liability for the consequences of her or his actions cannot be unlimited. The limits imposed must be as workable, reasonable, logical, and just as possible. If the limits cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious. Consequently, the cause of just apportionment of losses would suffer.<sup>44</sup>

The court noted other factors that are frequently considered in such cases, but which were not dispositive, were the possibility of a proliferation of claims, the potential for fraudulent claims, the foreseeability of the injury, and unduly burdensome liability.<sup>45</sup>

*Salin v. Kloempken*<sup>46</sup> is a second example of the court's rejection of a liberal argument for expanded damages. In *Salin*, the court considered the issue of whether children could recover for loss of parental consortium in a case where their father was paralyzed as a result of an automobile accident. Although Minnesota permits claims for loss of spousal consortium, the court saw clear distinctions between loss of spousal and parental

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41. *Id.* at 861-62.

42. *See Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N.W. 1034 (1892).

43. 295 N.W.2d 552 (Minn. 1980).

44. *Id.* at 554.

45. *Id.* at 555 n.3.

46. 322 N.W.2d 736 (Minn. 1982).

consortium claims, given the differences in the components of those claims. The court also noted that actions by children for loss of parental consortium create problems of multiplication of damages and permit the recovery of damages that are not present in loss of spousal consortium claims. In addition, the intangible nature of the loss to the child makes assessment of damages difficult. That difficulty, in turn, leads to a risk of double recovery because the child may already be compensated for lost economic support through an award to the parent. The court was also concerned about the distribution of costs associated with such claims:

We also cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the negligent defendant or his insurer. Realistically, the burden of paying damage awards will be borne by the public generally in increased insurance premiums or, alternatively, in the enhanced danger that accrues from the greater number of people who choose to go without insurance. Moreover, we must take into account the cost of administration of a system to determine and pay consortium awards. Since virtually every injury to a parent with minor children would be accompanied by a claim for loss of parental consortium, the expenses of settling or litigating these claims would be sizable. The social cost resulting from the expenditures of valuable judicial resources in litigating these claims would be substantial.<sup>47</sup>

Decisions such as *Stadler* and *Salin* provide a clear indication that the formulation of tort rules is subject to limits. While the limits may not always be clearly defined, it is quite clear that the court does not automatically rush to adopt the latest in liberal tort law thinking.

The court may resist the adoption of developing tort rules, and it may retreat from established tort rules, as in *Bilotta v. Kelley Co.*,<sup>48</sup> but no wholesale judicial reform of tort law is likely. The same common law inertia that resulted in retention of state and municipal tort immunity for so long operates to prevent the court from reconsidering established rules. There also may be line-drawing problems in determining whether a rule should be modified. The same inability to deal with the

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47. *Id.* at 741 (citation omitted).

48. 346 N.W.2d 616 (Minn. 1984).

effects of the proposed modification that prevent the adoption of a new tort rule may also prevent the modification of an established tort rule.

*Hueper v. Goodrich*,<sup>49</sup> in which the supreme court was asked to modify the collateral source rule, provides a good example of the limitations on a court's ability and willingness to recast personal injury law. *Hueper* arose out of injuries sustained by the minor plaintiff in an automobile accident. The minor plaintiff was treated for those injuries at the Shriner's hospital. The policy of the hospital was not to charge patients for care provided or to accept insurance proceeds from a third party. The defendants argued that the plaintiff should not be entitled to recover from them the reasonable value of the free medical care provided to the plaintiff. Noting the justifications for the collateral source rule, Justice Simonett argued that the rule should be modified to preclude recovery for medical care furnished gratuitously and not as a specific gift. The majority of the court, however, refused to modify the rule:

We are being asked to review the policy considerations involved in our long-standing support of the collateral source rule. The facts of this case present this issue in a light most favorable to those advocating abandonment of the collateral source rule. However, the rule in its application is broader than the facts of this case. To begin limiting the application of the rule is to invite an unlimited flow of litigation seeking ad hoc determinations with the confusion that would necessarily follow. Considering the rule in its broadest sense and reviewing all of the considerations involved in such an evaluation, we decline to abandon the collateral source rule or to create limitations on its application.<sup>50</sup>

*Hueper* provides an insight into the problems involved in achieving any major reform of the common law through judicial decision.

### III. CONCLUSION

The Minnesota Supreme Court's tort decisions do not establish that the court has deviated from the fault principle in deciding cases. The court has not consistently relied on the

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49. 314 N.W.2d 828 (Minn. 1982).

50. *Id.* at 731.

deep-pocket principle in deciding cases and, in one instance, specifically rejected that principle as a basis for decision. A defendant's ability to insure against a particular set of risks may, on occasion, be a relevant factor in the court's decisions but it is not the exclusive factor; nor does it provide a standard for decision-making in ordinary torts cases involving the application of negligence principles.

In fact, the court has demonstrated some reluctance to expand strict liability theory and appears to have retreated from the rule of strict liability as initially formulated in *McCormack v. Hanksraft Co.* Decisions such as *Bilotta v. Kelley Co.* acknowledge the *de facto* merger of the two theories, with negligence theory the apparent survivor.

While decisions such as *Bilotta* provide some indication of the court's ability to recast tort doctrine, it should be clear that wholesale reform of the common law by the court is not probable. The problems that were raised by the court in *Hueper v. Goodrich* are indicative of the difficulties that would be involved in substantially reforming the law. The court may, on occasion, acknowledge the problems involved with the tort-litigation system, as in *Herrly v. Muzik*, and express concern over the impact its decisions will have on liability insurance availability, but it is not likely that wholesale reform of the common law will result. The same inertia that inhibits the rejection of established common law doctrine in favor of more liberal tort rules also inhibits changes that restrict existing rules. If there is to be significant change, the change will have to be legislative.

Legislative consideration of the tort-litigation system should not proceed upon unwarranted assumptions, however. If tort rules are to be modified, then there should be identifiable, supported reasons for the modifications. If the justification for tort reform is that tort law has abandoned the fault principle, or that tort law is based primarily on the deep-pocket principle, then there should be a detailed analysis of the tort system to determine whether the claim is really true, rather than assuming it as a given.

Many of the claims concerning the tort-litigation system have not been clearly substantiated. Claims concerning excessive litigation, excessive jury verdicts, or the abandonment of the fault principle, if established, may call for specific reforms,



but cumulative statements concerning problems implying the bankruptcy of tort law as a whole are not helpful in determining what legislative action, if any, should be taken.

At the very least, solutions should be tailored to demonstrated problems. If the specific justifications cannot be established, then the reforms should be rethought.

