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CORRESPONDENCE

MUTUALITY OF ESTOPPEL: A QUESTION

To the Editors:

A recent Note, "A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel,"¹ made excellent use of elementary probability theory to demonstrate the extent to which relaxation of the mutuality requirement will increase the damages suffered by a defendant subject to multiple suits in which there is common issue (or correspondingly, will decrease the total recovery of a plaintiff who has several suits litigating a common issue against different defendants). Although the author made a number of useful points concerning the case law and the arguments advanced by proponents on each side of the controversy, the central thesis of the Note was an argument for retaining the mutuality requirement based on this difference in the anticipated losses of a given defendant. In effect, this thesis takes the distribution of risks given a mutuality of estoppel rule as presumptively correct, thus evading the principal issue. The issue really is the estimate of damages upon which the prospective participant in a litigation *should* be made to act.

Consider, for example, a particular type of case that often entails multiple suits involving a common issue: product liability suits. Suppose "the Company" manufactures a product with a putative defect. Assume this putative defect could be "remedied" at a cost of S dollars, reducing injuries from the use of the product by R dollars. Assume, further, that it is desirable to attempt to assure that the "defect" is remedied if and only if S is less than R .² The Company, however, will make its decision whether to remedy the defect on the basis of a different comparison: The cost

1. 76 MICH. L. REV. 612 (1978).

2. This assumption concerning the goal of tort law is made for convenience of exposition, and is not intended to be a denial of the validity of other goals or concerns of tort law. In particular, a decision not to remedy a defect where the avoidance cost is only slightly higher than the accident cost, although justified under the assumption above, will result in the transfer of wealth from plaintiffs to attorneys and other intermediaries if the defendant's litigation costs are set equal to the plaintiff's accident costs. Whether this redistribution of wealth is acceptable depends upon what classes the plaintiffs are likely to be from as well as upon who the determining agency is.

of remedying, S , against the Company's expected litigation cost, L . But L depends upon the rules respecting collateral estoppel, as the Note demonstrated, since — if strict liability law is not applicable — each suit by a plaintiff against the Company will entail a common issue of whether the defect should have been remedied, in addition to separate issues of the causal relation of the alleged defect to the injury. As the Note showed, given the existence of a mutuality of estoppel restriction, the Company's expected litigation cost, L_m , is less than its expected litigation cost in the absence of such limitation on collateral estoppel, L_o . If $L_m < L_o < R$, it would be preferable to impose a mutuality restriction on collateral estoppel in order to reduce the incidence of occasions on which the Company would make the decision that society does not wish it to make. The Company will wrongly decide not to remedy the defect only when S is more than the litigation cost L but less than the real cost R . When $L_m < L_o < R$, forcing the company to use L_o rather than L_m reduces the size of that zone of error. Thus, whenever the Company would decide wrongly by considering its litigation costs on the basis of no mutuality restriction on collateral estoppel (that is, whenever S is between R and L_o), S will also be between R and L_m , so the Company would also have made the wrong decision if it had acted on the assumption that there was a mutuality restriction upon collateral estoppel. On the other hand, whenever S is between L_m and L_o , the Company would decide correctly if it assumed there was no mutuality restriction but would decide incorrectly if it assumed there was a mutuality restriction.

Thus the critical question is whether it is more reasonable to anticipate that for this category of cases R will be greater than L_o , in which event there should not be a mutuality restriction on collateral estoppel, or that R will be less than L_m , in which event there should be a mutuality restriction. (If R is between the two estimates of litigation cost, the question turns upon which estimate of litigation cost is "closer" to R in a sense which depends on the probability distribution of safety costs and is beyond the scope of a letter.)

Further analysis indicates that in general R will be greater than L_o . If

C is the collection of all cases c that might be brought alleging injury as a result of the defect,

$D(c)$ is the damages suffered in case c , and

$P(c)$ is the probability that the evidence that could be presented in case c indicates the needed causal relation between defect and injury,

then the true cost of not remedying the defect is

$$R = \sum_{c \in C} D(c) \times P(c).$$

At the same time, if

$D'(c)$ is the damage award that a jury would give in a case presenting the evidence available in case c , were it to decide for the plaintiff,

$J(c)$ is the probability that the issue of causation will be decided in favor of the plaintiff in any given case, and

p is the probability that the issue of liability for failure to remedy the defect will be decided in favor of the plaintiff in any given case,

and if p is independent of the other two variables, then the expected litigation cost given a mutuality restriction under collateral estoppel is

$$L_m = \sum_{c \in C} p \times D'(c) \times J(c),$$

which can be rewritten as

$$L_m = p \times T$$

where T is the anticipated cost of litigation if the issue of liability for failure to remedy the defect were foreclosed against the defendant *ab initio*.

In these terms, the Note demonstrated that the expected litigation cost on the assumption that there is no mutuality restriction on collateral estoppel would be $L_o = k \times T$, where k is less than one but larger than p . Where there are numerous suits, k is exceedingly close to one.

Thus, it would be sufficient to know that T is less than — or not much more than — R .³ But if jury awards are approximately equal to actual damages and if juries decide the causation issue in favor of plaintiffs approximately as often as the plaintiffs are in fact correct in their assertion, then T is less than

3. The critical situation is where the outcome of the "defect" question is not substantially certain. If the probability of plaintiff winning the defect issue is nearly 100%, the collateral estoppel rule is essentially irrelevant since the difference between the two estimates of litigation cost are very small. But if the chance of any given plaintiff succeeding on the "defect" issue is, say, 50% then L_m is only $\frac{1}{2}$ of T , so L_o is a better estimate of R even if T were, say, 20% higher than R .

R, since those assumptions imply that T differs from R only insofar as there are some injuries upon which no suit is brought.⁴

To dispute the conclusion that T is less than or equal to R, and hence to dispute the conclusion that the probability analysis favors no mutuality restriction upon collateral estoppel in this category of cases, it is necessary to show either that the damages awarded by juries in this category of lawsuits are significantly higher than real damages or that juries favor plaintiffs too often on the causation issue. Although such contentions have been made, based on the award of "pain and suffering" and on assumptions about jury behavior in regard to insurance coverage, none of those arguments have indicated that the average cost of a litigated suit includes a sufficient "premium" to overcome the underestimation resulting from situations where the plaintiff's chance of winning on the "defect" issue is significantly less than 100%. Accordingly, the probability analysis of the Note is actually favorable to arguments for elimination of the mutuality restriction on collateral estoppel with respect to this category of cases rather than being favorable to arguments for retention of the restriction.

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Reply:

Mr. Millman makes two points in his letter: first, that my thesis is based upon the presumptive validity of the distribution of outcomes under the doctrine of mutuality of collateral estoppel and thus assumes its conclusion, and second, that my own analysis argues for the abandonment of mutuality (a point that is illustrated by the long example in his letter). I disagree on both counts.

My appeal for the retention of the mutuality requirement is made on two levels. First, there is an appeal to common sense: It is not sensible that a litigant's likelihood of success on the issue of his negligence should depend on the number of persons injured as a result of that alleged negligence. When trying the issue of a bus driver's negligence we would not (under any normal set of

4. This assumes that the marginal legal fees and court costs of the defendant are small in relation to the expected damage awards. One reason for not using strict liability may be the possibility that T is, in fact, somewhat greater than R. As indicated in note 3 *supra*, however, the "premium" included in T over R would have to be extremely large for the mutuality restriction to be preferable.

circumstances) consider it probative that there were fifteen rather than four people on the bus and would not admit into evidence testimony to that effect. It is equally ridiculous that our procedure should embody a presumption to that effect.

By demonstrating that, when the mutuality requirement is abandoned, a party's average chances for success on *any and every issue* vary with the number of his opponents, I hoped to show that mutuality makes sense. My assumption was only that the number of parties on a given side of an issue is generally irrelevant to the question of which view of the facts is correct, an assumption that appears so self-evident that stating it explicitly sounds absurd.

My second approach was to look to the internal consistency and coherency of legal procedure. My assumption in the second instance was that judicial fact finding is the proper subject of decision analysis — that a trial is a situation, like any other in which human beings confront choice, where facts may be known with a greater or lesser degree of certainty and where different outcomes are assigned a greater or lesser degree of desirability.

I then went on to show that the conventional statement of the burden of persuasion embodies certain assumptions about the relative value of different outcomes and that the abandonment of mutuality is inconsistent with those values. If I take anything as presumptively correct, it is not mutuality but the burden of persuasion. Even there, however, I think it can be argued (and was argued in the text at notes 29-33) that the burden of persuasion is more than presumptively correct: a general statement of the appropriate standard of certainty, without regard to the facts of any case, in a system whose stated goal is fair compensation must necessarily be that the finder of fact must find that which is more likely than not.

As for Mr. Millman's example, although it is not so stated, his essential premise is that the issue of negligence (*i.e.*, whether a defect "should have been remedied") should not be tried at all. (His mathematics shows that, given his stated premises, the outcome is wrong unless the defendant loses on this issue 100% of the time.) By aligning the issues and parties in his example so that the abandonment of mutuality tends to result in the preclusion of the negligence issue, he thus makes it appear that the abandonment of mutuality is generally appropriate.

Mr. Millman's example can readily be refuted by setting up a slightly different set of facts: A consumer is injured by taking a medication produced by several manufacturers. Each manufac-

turer's version of the drug suffers from the same defect. In separate lawsuits against each manufacturer, the consumer must establish that the defect should have been cured. If there is no mutuality requirement, it is much less likely that the consumer will, on average, succeed on this issue. Thus, in my example (given Mr. Millman's assumptions about the desirable distribution of outcomes), mutuality leads to better results. The point is not, however, that in some cases mutuality is desirable and in other cases it is not. The lack of mutuality only results in a better outcome if it results in preclusion of an issue that should not be tried in the first instance.

The legal solution responsive to Mr. Millman's problem (given his premise that strict liability results in a better distribution of outcomes) is simply to avoid the issue of negligence by imposing strict liability. To abandon mutuality, which is by itself a neutral principle, is not an appropriate response.

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