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An Economic Analysis of the Eggshell Plaintiff Rule

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Abstract: It is now a universally accepted rule of American tort law that a defendant takes the plaintiff as she finds her This article will explore the implications of the so-called "eggshell plaintiff" rule, focusing on the behavioral incentives created in both potential injurers and victims. I intend to argue for a refined version of the eggshell plaintiff rule that protects victims' need for compensation, while influencing injurers' private incentives to act in ways that are socially optimal.

Introduction

-- Explain eggshell plaintiff rule

-- Consequences: victim gets compensation, but injurer subject to unfair surprise

=> exercise excess caution, care level too high

I. Caselaw on Eggshell Plaintiff

Trace development of the law; famous cases, where does law stand today

II. Consequences

A. Eggshell P receives compensation (one of traditional tort law's primary goals, although econ analysis focuses on tort law's behavioral impact, not whether victim is compensated]

B. Injurer subject to Unfair surprise

Held liable for a tort that they could not reasonably foresee would cause injury

C. Injurer now led to take excess care => suboptimal result from social welfare perspective

III. A Better Approach to Putting Humpty Dumpty Back Together Again

A. Rule should be that eggshell P is treated like normal avg person

=> Injurers can only behave based on what they can reasonably expect a person to be; if injurers are held liable for injuries that they could not reasonably foresee, liability will not incentivize them to act differently. OR liability, coupled with risk aversion, will cause injurers to exercise excess care and treat every potential situation as if they are dealing with an eggshell P => leads to social welfare decline

[note: this problem would be avoidable if Eggshell P's could wear a sign identifying themselves as such so that injurers could take greater care only when necessary, i.e., when they see they are dealing with an eggshell P]

B. What about compensation for eggshell P if do away with traditional law protecting her?

No problem: well developed insurance markets (either private or social) could compensate eggshell P; don't need tort liability to take care of compensation goal [cite Shavell for this]

Admin costs of tort system are incredibly high

C. Private Insurance may fail b/c of Adverse Selection

If only eggshell P's are buying insurance, premiums will skyrocket, no eggshell P can afford insurance

Solution: Social Insurance: if society deems it a social obligation to ensure that eggshell P's are compensated for injury, and private insurance coverage proves too expensive, we could have some form of social insurance to accomplish the compensation function

D. Results: Actors act reasonably based on what they reasonably foresee as natural consequences of their actions; take socially correct amount of care

Eggshell P's remain compensated
Net: Social welfare up

Conclusion:

While eggshell P rule is based on egalitarian notion that all people should be compensated for injury, from an economic analysis perspective, it has perverse consequences on behavior.

Introduction: [preliminary research]

In contemporary American tort law a universally accepted rule is that a defendant takes the plaintiff as he finds him.[1] This article explores the meaning of that rule by first examining its structure and consequences and then by tracing the development of the rule from it's first appearance in American law in the late 1800s through it current status as a uniformly endorsed tort doctrine.

I. The Eggshell Plaintiff Defined

Restatement (Second) of Torts § 461 says, "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."[2] Also known as the "thin skull" or "eggshell plaintiff" rule[3] and first articulated in a 1901 English case,[4] this universally endorsed tort rule[5] applies not only where the condition which makes the plaintiff's injuries greater is not known to the defendant, but also where the defendant could not have discovered it by the exercise of reasonable care or even where the plaintiff, himself, is unaware of the condition he is suffering from until the harm is sustained.[6] Often, it is identified by the phrase, "The defendant takes his plaintiff as he finds him."[7] While the defendant must be negligent for the eggshell plaintiff rule to apply, once negligence is established the defendant becomes liable for all the plaintiff's

[1] *Thompson v. Lupone*, 135 Conn. 236, 239, 62 A.2d 861, 863 (Conn. 1948)
[2] Restatement (Second) of Torts § 461 (1965).
[3] Restatement (Third) of Torts: Liab. Physical Harm § 31(P. F. D. No. 1, 2005).
[4] *Dulieu v. White*, 2 K.B. 669, 670 (1901).
[5] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts § 43*, at 291 (5th ed. 1984).
[6] *Id.*
[7] *Benn v. Thomas, K-G, Ltd.*, 512 N.W.2d 537 (Iowa 1994)

injuries, even where the injuries were more extensive than ordinarily would have been foreseeable.[8]

The eggshell plaintiff rule also applies if the resulting injury the plaintiff received would have inevitably occurred regardless of the defendant's negligence. The negligence by the defendant does not have to be the only cause or even a substantial cause of the plaintiff's injury as long as the negligence supplies the situation that caused the injury.[9]

There are four types of situations in which the eggshell plaintiff rule is normally employed.[10] First, when the plaintiff suffers from a "latent condition that is brought to life by the injury," the defendant may be liable for all of the damages that result from bringing to life that condition."[11] Second, when the plaintiff has a known pre-existing condition that has been treated and is under control so that it does not continue to bother the plaintiff, the defendant's negligence may be said to have "re-activated" the condition.[12] Third, when the plaintiff suffers from a known preexisting condition that is being treated and that condition is made materially worse as a result of the negligence of the defendant, the defendant may be liable for "aggravating" that pre-existing condition.[13] Fourth, when a plaintiff suffers from a condition that would inevitably result in future

[8] Phillips et al., *Tort Law: Cases, Materials, Problems*, at 434 (3rd ed. 2002).
[9] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. 1992).
[10] Stein on Personal Injury Damages Treatise § 11:1 (3rd ed. updated 2005)
[11] *Id*. "An illustration of this principle is a case involving a plaintiff with diabetes, who is apparently in good health prior to the defendant's conduct. When the trauma caused by the defendant's actions is followed shortly by the onset of the symptoms of diabetes, the defendant will be held responsible for the entire resulting damage. In this case, the injury may be said to have precipitated the disease."
[12] *Id*.
[13] *Id*. "For example, a patient who has been found to have an active case of diabetes can be treated with insulin. However, an injury may make the disease materially more difficult to control or may result in complications. Such a result is properly described as an aggravation of the preexisting condition."

disability or loss of life but the negligence of the defendant expedites that disability or loss of life, the defendant may be liable for the "acceleration of the condition."[14]

Because the purpose of tort law is to compensate a plaintiff for the injuries they have received due to the negligent conduct of another[15] an underlying policy rationale of the eggshell plaintiff rule is the shifting of the burden from the injured plaintiff to the tortuous defendant.[16] While this policy may be reasonable from a society's point of view, the defendant may think that it is arbitrary and unfair – as though liability has materialized from nowhere.[17] The pre-existing condition of the eggshell plaintiff exists prior to any contact with the defendant, yet the defendant, based on a policy rationale of burden-shifting, becomes liable for it.

One reason society may be willing to justify the shifting of the burden from the injured plaintiff to the tortuous defendant is based on a perception that it seems to be the fair thing to do.

> [I]t accords with society's general sense of justice that a tortfeasor should be liable irrespective of the unexpectedness of such harm. Thus where the defendant has negligently struck a person whose skull is so fragile that it is broken by the comparatively slight blow, all courts are agreed that the defendant is liable for the wholly unexpected breaking. This is true not only with reference to physical harm but also other forms of harm. If a person were negligently to incapacitate another who has a yearly earning capacity of a hundred thousand dollars, there is liability for the resulting loss though so great a loss could not have been anticipated.[18]

The result of the burden-shifting is that the amount of damages paid to the plaintiff approximately equates to the amount of harm caused by the defendant. If the defendant

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[14] *Id*.
[15] Keeton et al., supra note 15, § 1 at 6.
[16] *Id*., supra note 35, § 9 at 39-40.
[17] Eric Lotke, *Reflection and the Limits of Liability: Necessary Blindness in the Legal System*, 54 Ohio St. L.J. 1425, 1450 (1993). Using *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891) as an illustration. "One minute he was playfully kicking a classmate in the leg, the next minute he was indebted for the loss of a limb."
[18] Richard A. Epstein, *Cases and Materials on Torts* at 524 (7th ed. 2000).

was not made liable for the actual harm caused to the plaintiff, but instead was only liable for the harm that was foreseeable, not only would some plaintiffs be under-compensated for their injuries but potential negligent actors would have less incentive to prevent injuries.

> To illustrate, suppose that the average amount of harm done to the victims of a particular kind of accident is $100,000. This is the average of the harms done to victims of a particular kind of accident from a low of $1.00 (for a handful of resilient victims) to a high of $1,000,000 (for the rare victim with an "eggshell skull"). Proper deterrence requires that a potential [tortfeasor's] expected liability by $100,000. If there were no "eggshell [plaintiffs]", so that those injurers whose victims suffered $1,000,000 in damages had to pay only the expected damages of $100,000 or so, the average damage payment would be less than the average harm of $100,000. In a sense, holding [tortfeasors] liable for all of the harm suffered by unusually sensitive victims makes up for the benefits that some [tortfeasors] get when their victim turns out to be unusually hardy.[19]

Though the burden-shifting associated with the eggshell plaintiff doctrine may lead to liability for injuries that were not foreseeable to the defendant, it nevertheless provides incentive to potential negligent actors to prevent injuries, an incentive that might not otherwise exist.

II. History and Development of the "Eggshell Plaintiff" Rule

The eggshell plaintiff doctrine began its evolution into its current form in the late 1800s. An 1891 case from Wisconsin, *Vosburg v. Putney*, [20] involved a 14 year-old plaintiff who had been playfully kicked in the leg by the 12 year-old defendant while the two boys were in school. The kick resulted in the aggravation of a previous injury (the plaintiff's leg had been injured the month before in a sledding accident) and eventually led to permanent incapacitation. Even though the defendant was unaware of the plaintiff's previous injury, he was nonetheless held liable for all the damage that resulted

[19] Johnson & Gunn, *Studies in American Tort Law* at 416 (2nd ed. 1999).
[20] *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891)

from his kick. The court said "that the wrongdoer is liable for all the injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."[21] *Vosburg* established the foundations of the eggshell plaintiff doctrine by explicitly establishing that foreseeability is not a requirement for a finding of liability to occur.

Eight years later, in 1899, the Supreme Court of Minnesota reiterated that a negligent defendant is responsible for injuries caused even if he could not have foreseen the particular results that followed his actions.[22] In *Keegan v. Minneapolis & St. L. R. Co.* a train passenger sprained his ankle while exiting from a train, developed inflammatory rheumatism because of the sprain and subsequently died of inflammation of the heart. The Court noted that the victim might have been predisposed to rheumatism but ruled that any predisposition was immaterial. The Court also ruled that the fact that the rheumatism was not foreseeable to the defendant was also immaterial. The only salient question, the Court asked, is whether the negligence of the defendant was the cause of the ankle sprain. The defendant is responsible for all "consequences which follow in an unbroken sequence, without an intervening efficient cause, from the original act . . . even though he could not have foreseen the particular results which did in fact follow."[23] *Keegan* not only recognized, as *Vosburg* did that foreseeability is not a requirement for liability to occur, it also identified that an eggshell plaintiff could possibly recover even if the unforeseeable condition was only part of a sequence of events that led to the ultimate injury.

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[21] *Id*
[22] *Keegan v. Minneapolis & St. L. R. Co.*, 76 Minn. 90, 78 N.W. 965 (Minn. 1899)
[23] *Id*. 91, 965

The eggshell or thin skull plaintiff was formally recognized in the 1901 case, *Dulieu v. White & Sons*,[24] in which the plaintiff, who was pregnant at the time, was behind the bar of her husband's public house when the defendant's servant negligently drove a horse-van into the public house. As a result the plaintiff sustained severe shock, became seriously ill and gave premature birth to an idiot child. The Divisional Court noted that a plaintiff could be identified as having fragile characteristics and that this fragility did not alleviate a defendant of liability for an injury caused to such a plaintiff. "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."[25] This reference to a "thin skull" became the identifying description of a fragile, or eggshell, plaintiff.

The 1911 case, *McCahill v. New York Transportation Co.*,[26] extended the eggshell plaintiff doctrine to a situation where a plaintiff suffered from a condition that would have inevitably resulted in future loss of life. The negligence of the defendant, however, expedited the plaintiff's death. In *McCahill* one of the defendant's taxicabs negligently struck the plaintiff, who had a recognized alcoholic condition. As a result of the accident, the plaintiff suffered a broken leg and an injured knee. However, shortly after being taken to the hospital, he died of delirium tremens (a condition associated with alcoholism). A physician testified at trial that the injuries caused by the accident precipitated the attack of delirium tremons[27] and that in his opinion the leg and knee injuries "hurried up" the

[24] *White* at 670.
[25] *Id*. at 679.
[26] *McCahill v. New York Transportation Co.*, 201 N.Y. 221 (1911).
[27] *Id*. at 223.

delirium tremons[28] but it was recognized that the man might have had the delirium tremons regardless of whether or not the accident occurred.[29] The defendant was still held liable for the injuries and the subsequent death because, the court ruled, "that one who has negligently forwarded a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency."[30]

In 1948 the Supreme Court of Connecticut reiterated that the eggshell plaintiff rule applied even in situations where the fragile condition of the eggshell plaintiff existed because of the lifestyle of the plaintiff herself. In *Thompson v. Lupone*[31] a waitress negligently spilled hot coffee on a customer, a woman weighing 261 pounds, who was seated on a stool at the counter of defendant's restaurant. Not only did the plaintiff suffer first-degree burns on her thigh and leg, she also injured her knee when she instinctively jumped up and hit her knee against another stool. In the days following the initial injury, the plaintiff's knee, the one she hit against a stool, grew progressively worse. The injury was finally diagnosed as neuritis of the nerve at the knee joint. Upon treatment her knee injury failed to improve, and the plaintiff became upset and nervous. The trail court awarded the woman $2000 damages for her injuries, including the suffering related to the knee, but on appeal the defendant claimed that the amount was excessive because the plaintiff's suffering was, in part, due to her obesity.[32] However, the Connecticut Supreme Court ruled that the defendants took the plaintiff as they found her.[33] Therefore, a

[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Lupone* at 236, 861.
[32] *Id*. at 239, 863.
[33] *Id*.

judgment could not be claimed to be excessive because the suffering by the plaintiff was a result, in part, of her lifestyle that led to her obesity.

The eggshell plaintiff rule also applies to injuries that aren't an immediate effect of negligence by a defendant. In 1964, *Lockwood v. McCaskill*[34] showed that injuries that developed three months after a negligent incident could still lead to liability for the defendant. In *Lockwood* a truck driven by the defendant rear-ended the plaintiff's car while he was waiting at a traffic light. Three months later the plaintiff had a severe headache and had an attack of amnesia that lasted for a day. While he had never had a bout of amnesia before, a psychiatrist testified that the plaintiff was more prone to suffer from an amnesic condition than an ordinary person because of his insecurity and susceptibility to worry.[35] The Supreme Court of North Carolina verified not only that a defendant takes the plaintiff as he finds him but also that the injury sustained by the plaintiff does not have to exhibit itself at the time the negligence occurs.

Lockwood also indicated that courts could apply the eggshell plaintiff rule to harm that results from the mental or psychological condition of a plaintiff. The North Carolina Supreme Court ruled that a jury could infer that "the physical injuries suffered by the plaintiff were the direct cause of his intense mental distress, worry and sense of insecurity, and that the mental distress and sense of insecurity, were a factor in producing the amnesia."[36] Other courts have also applied the eggshell plaintiff rule where the injury is mental or emotional rather then merely physical. In 1972, *Bonner v. United States*,[37] said a defendant was liable for a plaintiff's emotional problems that were brought on by

[34] *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (N.C. 1964)
[35] *Id*. at 670, 546.
[36] *Id*.
[37] *Bonner v. United States*, 339 F.Supp. 640 (1972).

an auto accident. The plaintiff, a 51 year old woman, suffered severe whiplash as a result of being in an auto accident in which she was rear-ended on a United States Air Force base. Following the initial accident the plaintiff developed several ailments that ultimately led to her permanent disability. A psychiatrist who treated the plaintiff reported that "the auto accident did not, in and of itself, cause any of the psychiatric difficulties . . . [but] coming at a time in her life when it did, might have set in motion a series of events which because of her own existing personality structure and past [history] led to the overt psychiatric illness."[38] The District Court decided that since the plaintiff was healthy prior to the accident and that following the accident she developed "one symptom after another that progressively worsened until she became totally disabled,"[39] the accident was the precipitating cause of the emotional distress that disabled her.[40]

In *Vaughn v. Nissan Motor Corp. in U.S.A.*,[41] a District Court applied the eggshell plaintiff rule to a woman who admitted that she had psychiatric illnesses resulting from abuse she had received as a child. In that case the plaintiff claimed that a voltage regulator on the car she was driving malfunctioned causing the fluid in the car's battery to boil. According to the plaintiff, toxic fumes entered the car via the ventilation system, and when she inhaled the fumes she developed a severe form of asthma. The defendant presented evidence that the plaintiff suffered from somatization disorder, a disorder that causes sufferers to exhibit illnesses that have no apparent physiological cause. The District Court did not allow the argument that the plaintiff's severe psychological

[38] *Id*. at 647.
[39] *Id*. at 650.
[40] *Id*.
[41] *Vaughn v. Nissan Motor Corp. in U.S.A.*, 77 F.Supp. 736 (1996).

problems barred her from recovery saying that if the defendant had breached its duty of care, it must take its victim as it finds her.[42]

The Eighth Circuit Court of Appeals was no less clear about the application of the eggshell plaintiff rule in cases of emotional distress when it ruled in *Jenson v. Eveleth Taconite Co.*[43] in 1997. In that case several female employees of a Minnesota mining company brought a class action suit against their former employer for sexual harassment and gender discrimination. The District Court stated that in Minnesota a defendant is liable for all the consequences of its negligence including injuries caused to a plaintiff who happens to have a "fragile psyche."[44]

Courts are also willing to apply the eggshell plaintiff rule to plaintiffs who have been physically injured by a defendant but whose emotional distress was aggravated by negligent treatment from a third party. In *Stoleson v. United States*,[45] the plaintiff, a 48 year old woman, developed chest pains characteristic of a coronary disease after working for a few months in federal munitions plant in Wisconsin. The pains only affected her on the weekends but continued with increasing frequency until she left the plant four years later. While working at the munitions plant the plaintiff was required to regularly handle nitroglycerin, and she alleged that her contact with the nitroglycerin was the cause of her heart disease. However, none of the doctors she consulted with would verify her

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[42] *Id*. at 739.
[43] *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997).
[44] *Id*. at 1295. The opinion goes on to quote several cases from different circuits, including *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 506 (1st Cir. 1996) (defendant must "take the victim as [defendant] finds [the victim], extraordinarily sensitive or not"); *Wakefield v. NLRB*, 779 F.2d 1437, 1438 (9th Cir. 1986) (administrative agency held that plaintiff's predisposition towards mental illness relieved defendant of responsibility for plaintiff's psychological disability, ignoring "time-honored legal principle" that a wrongdoer takes a victim as the wrongdoer finds the victim); (*Shimman v. Frank*, 625 F.2d 80, 100 (6th Cir. 1980) (defendant liable for plaintiff's psychological injury where the "personality structure" of plaintiff, who was victim of intentional beating, may have made plaintiff more vulnerable to psychological harm).
[45] *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983).

allegations until one doctor, Dr. Lange, became convinced that her exposure to the nitroglycerin had caused her arteries to expand and that the sudden withdrawal of the nitroglycerin on the weekends caused the arteries to contract, causing her chest pains. After ending her employment at the plant, the plaintiff's health did not improve. She suffered from high blood pressure, had coughing spells the caused vomiting and she became extremely obese. Her own testimony showed that she was convinced that "her health was ruined and that she could no longer work full time."[46] However several psychiatrists testified at trial that the plaintiff suffered from hypochondria, and they claimed that the plaintiff's hypochondria had been induced by her heart disease at the plant but had been aggravated by Dr. Lange "having incorrectly advised her that she had serious, permanent heart damage."[47] One psychiatrist even testified that the plaintiff "had probably been [a hypochondriac] all her adult life."[48] The Court of Appeals ruled that even if the initial heart problems did not trigger the plaintiff's hypochondria, the defendant might still be liable if the hypochondria was activated by Dr. Lange's assessment of her condition whether or not he was negligent in evaluating the extent of her injury. "The law in Wisconsin makes a [defendant] liable for aggravation of the injury he inflicted, even aggravation brought about by the treatment – even the negligent treatment – of the injury by the third party."[49]

The eggshell plaintiff rule also may apply where an injury to a plaintiff's economic interests is increased by the unforeseen or unknowable value of the property damaged. In

[46] *Id*. at 1220.
[47] *Id*.
[48] *Id*.
[49] *Id*.

Colonial Inn Motor Lodge, Inc. v. Cincinnati Insurance Co.,[50] the owner of hotel brought a suit against a motorist who crashed his car into the building. As a result of the crash, the hotel caught fire and exploded, damaging the property and causing the hotel to lose income because of its closure. The Illinois appellate court first recognized that if a defendant's negligence is a substantial factor in bringing about an injury, "it is not necessary that the extent of the harm or the exact manner in which it occurred could reasonably have been foreseen."[51] The court then applied the eggshell plaintiff rule, a defendant must take a plaintiff as he finds him,[52] but applied the rule to property. "Here, the evidence suggests that a building rather than a person may have had an 'eggshell skull.' That possibility alone does not foreclose liability for the injury."[53]

Overall, courts have taken and continue to take a broad view of what constitutes a preexisting condition in an eggshell plaintiff. A preexisting condition may be physical. In *City of Scottsdale v. Kokaska*[54] a police car negligently driven by an officer collided with a car driven by the plaintiff. The plaintiff, who had congenital anomaly that caused her to have an abnormal spine, developed serious back injuries as a result of the accident. The jury, concluding that the accident was the precipitating cause of her injuries, noted that the defendant must take the plaintiff as they find her and couldn't complain that "the plaintiff was more seriously injured by the collision than another person would have been."[55] The Arizona Court of Appeals affirmed that the plaintiff's physical condition

[50] *Colonial Motor Lodge, Inc., v. Cincinnati Insurance Co.*, 288 Ill.App.3d 32, 680 N.E.2d 407, 223 Ill.Dec. 674 (1997).
[51] *Id*. at 45, 416, 483.
[52] *Id*.
[53] *Id*.
[54] *City of Scottsdale v. Kokaska*, 17 Ariz. 120, 495 P.2d 1327 (1972).
[55] *Id*. at 128, 1335.

made her an eggshell plaintiff even though her preexisting injury was that she had an "anatomically different spine than that of a normal person."[56]

As was discussed previously, a preexisting condition may also exist because of an emotional instability. In *Reck v. Stevens*[57] the plaintiff, a 31 year-old woman, was physically assaulted by her 48 year-old uncle following an argument between the plaintiff and her aunt. As a result of the assault the plaintiff suffered temporary brain damage, hearing and balance loss and emotional instability. The assault aggravated the plaintiff's non-specific psychiatric illness. The Supreme Court of Louisiana, recognizing that a negligent defendant takes his victim as he finds her, held the defendant liable for the plaintiff's aggravated emotional instability because, even with her instability, the plaintiff, prior to the accident, was functioning in a productive manner. As a result of the incident, however, her underlying emotional instability was activated and "she was certainly not able to be productive in a meaningful way."[58]

A preexisting condition may also result from a plaintiff's lack of health due to her own bad habits.[59] In *Raino v. Goodyear Tire and Rubber Co.*[60] the plaintiff was seriously injured in a single car accident and alleged that the tires on the car, manufactured by the defendant, caused the accident. The plaintiff also contended that the accident led to her addiction to pain medication. During trial the defense tried to introduce evidence concerning the plaintiff's use of alcohol in attempt to prove that her alcohol use was the actual cause of the accident and to contest the claim concerning the addiction to the

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[56] *Id*.
[57] *Reck v. Stevens*, 373 So.2d 498 (La. 1979).
[58] *Id*. at 504.
[59] 22 Am.Jur.2d *Damages* § 282 (1988). "As a general rule, liability for the consequences of one's tortuous act is not lessened by reason of the fact that the injuries were aggravated by the plaintiff's unhealthy conditions due to his own bad habits.
[60] *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 422 S.E. 98 (1992).

medication. The Supreme Court of South Carolina ruled the evidence inadmissible and stated that the defendant takes the plaintiff as he finds her.[61] The defendant was, therefore, liable for the aggravation of the plaintiff's preexisting addictive behavior even though that behavior was a product of her own bad habits.[62]

The courts' broad view of what constitutes a preexisting condition even includes a plaintiff's inability to resist an impulse to commit suicide. In *Fryermuth v. Lutfy*[63] the plaintiff had a preexisting involutional psychosis that had been in remission for a number of years until she was involved in an auto accident with the defendant. Several years prior to the accident the plaintiff had been hospitalized for a mental disorder. However from the time of her release from the hospital until the day of the accident her illness was in remission. Following the accident she was completely psychotic and ultimately committed suicide. The Supreme Judicial Court of Massachusetts recognized that the accident precipitated a recurrence of the plaintiff's involutional psychosis[64] and ruled that the defendant was liable for the plaintiff's suicide because she had a preexisting irresistible impulse to commit suicide and because of the accident was "incapable of resisting the impulse to destroy herself."[65]

A historical analysis of the eggshell plaintiff rule demonstrates that the idea that a defendant takes his defendant as he finds him is universally accepted in courts throughout the United States. Over the years courts have expanded the doctrine to include many different types of plaintiffs who can demonstrate that they have some type of preexisting condition that resulted in greater harm than a defendant might have thought was

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[61] *Id*. at 259, 100.
[62] *Id*.
[63] *Freyermuth v. Lutfy*, 376 Mass. 612, 382 N.E.2d 1059 (1978).
[64] *Id*. at 620, 1065.
[65] *Id*.

foreseeable, and courts have consistently taken a broad view of what constitutes those preexisting conditions.

III. Current Thought on the "Eggshell Plaintiff" Rule

While the general rule that a defendant takes a plaintiff as he finds him[66] is universally endorsed, its expansion into certain areas of law has not been without controversy. One area of the law that lacks unanimity with regard to the application of the eggshell plaintiff rule concerns harm that results from the mental or psychological condition of a plaintiff. It was noted earlier that some jurisdictions have chosen to treat mental or psychological harm in the same way they treat physical harm. These jurisdictions have applied the eggshell plaintiff rule and held defendants liable for mental or psychological injuries even where those injuries were more extensive than ordinarily would have been foreseeable. Not all jurisdictions, however, follow this model. In his article, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*,[67] J. Stanley McQuade says that mental harm is not always treated the same as physical harm. He suggests that many jurisdictions place restrictions on recovery for mental harms, stating that the only types of mental harms for which a defendant will be held liable are those that would be expected to occur in an ordinary person[68] or those that were "reactivated" or "exacerbated" when there was notice on part of the defendant that an eggshell condition existed prior to the negligence.[69] McQuade contends that mental harm, especially harm that results from some sort of psychological trauma, is

[66] *Lupone* at 62, 863.
[67] J. Stanley McQuade, *The Eggshell Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 Campbell L. Rev. 1 (2001).
[68] *Id*. at 6.
[69] *Id*. at 7.

almost always the result of a "prior predisposing condition,"[70] and he resists the lack of uniformity within the different jurisdictions, arguing that "the legal community should face up to the fact . . .that prior predisposing conditions produce . . .mental harm."[71] McQuade offers three possible responses to the application of the eggshell plaintiff rule to mental or psychological harm. First, he says jurisdictions can continue with the rule that the only mental harms that are recoverable are those a normal person would sustain.[72] Second, he suggests that the law could fully apply the eggshell plaintiff rules without restrictions, in the same manner it applies to physical harms. McQuade prefers this solution because, he say, it is the fairest rule.[73] The third alternate, he offers, is a compromise solution in which the jury would be allowed to "deduct any harms attributable to the predisposing conditions from the plaintiff's recovery."[74]

Mark I. Levy & Saul E. Rosenberg disagree with the idea that mental harm should be treated the same way as physical harm. In their article, *The Eggshell Plaintiff Revisited: Causation of Mental Damages in Civil Litigation*,[75] the authors argue, "It is an example of logical fallacy of post hoc reasoning to assume that the defendant's conduct, simply because it preceded the plaintiff's injury, caused or substantially contributed to that injury – it is to confuse subsequence with consequence."[76] They suggest viewing the causation of mental or psychological symptoms, not simply as the ultimate result of negligence by a defendant but as a complex set of behavioral interactions.[77] Using Post Traumatic Stress

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[70] *Id*. at 8.
[71] *Id*. at 39.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] Mark I. Levy & Saul E. Rosenberg, *The Eggshell Plaintiff Revisited: Causation of Mental Damages in Civil Litigation*, 27 Mental & Physical Disability L. Rep. 204 (2003).
[76] *Id*. at 206.
[77] *Id*.

Disorder (PTSD)[78] as an example, Levy & Rosenberg argue that the eggshell plaintiff rule is inadequate to explain the "complex constellation of interdependent factors that contribute to actual, as well as alleged, mental damages."[79] Instead of simply relying on the idea that a defendant takes a plaintiff as he finds him, each plaintiff should undergo a thorough investigation of his life, both prior to and after the injury incurred because of the negligence of the defendant, in order to determine whether the injury was the product of the plaintiff's mental illness or developed after the defendant's conduct. "By viewing 'causation' of mental symptoms as being the net result of developmental biological, psychological, and social factors that interact with the . . .alleged stressful event, experts may achieve a far more scientifically accurate model of the causation of mental injuries, thereby better serving the interests of justice."[80]

The difference in perspective between McQuade and Levy & Rosenberg illustrates the lack of uniformity in the law with regard to the application of the eggshell plaintiff rule to mental or psychological injuries. Another area of controversy, although currently more uniform in application of the eggshell plaintiff rule, concerns religious beliefs.

In her article, *"Blood and Judgment": Inconsistencies Between Criminal and Civil Courts When Victims Refuse Blood Transfusions*,[81] Beth Linea Carlson first states that the eggshell plaintiff rule does not incorporate religious beliefs because they do not qualify

[78] *Id*. "PTDS may develop 30 days or so after a person experiences a life-threatening event that engenders extreme feelings of helplessness, fear, or horror. PTSD is the only psychiatric diagnosis where causation is implied by the diagnosis, that is, the condition is assumed to be a reaction to the life-threatening event that preceded it. Consequently, it is one of the few psychiatric conditions where the concept of a mentally fragile plaintiff possessing particular vulnerabilities or 'risk factors' may indeed apply."
[79] *Id*.
[80] *Id*. at 206.
[81] Beth Linea Carlson, *"Blood and Judgment": Inconsistencies Between Criminal and Civil Courts When Victims Refuse Blood Transfusions*, 33 Stetson L. Rev. 1067 (2004).

as either physical or psychological conditions.[82] She then offers two reasons why religious beliefs are not protected conditions under the eggshell plaintiff doctrine. "First, religious beliefs are based on voluntary and conscious reasoning, unlike physical conditions. Second, there may be some dispute as to whether the religious belief is preexisting."[83] Carlson notes that a religious belief would not be considered a mental or psychological harm either because a person's religious beliefs do not make him more psychologically vulnerable to injury.[84] While Carlson is adamant that the eggshell plaintiff rule should not include religious beliefs, others are less sure.

In *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*,[85] Jeremy Pomeroy contends that the fairness in applying the eggshell plaintiff rule to religious beliefs depends on whether religious beliefs can be seen as analogous to physical or psychological harm. The answer, he suggests, "hinges on whether we treat religious beliefs like the color of one's skin, an immutable characteristic from which an actor cannot escape, or as a kind of 'clothing.'"[86] Pomeroy theorizes that religious beliefs are an integral part of the human psyche, arguing that "religious beliefs exist at a level psychologically prior to that of rationality, that reason arrives at justifications for conclusions already reached through primal religious impulses."[87] Religious beliefs are an inherent part of a persons being and, therefore, injuries that are exacerbated because of religious beliefs should be incorporated into the eggshell plaintiff doctrine just as physical and psychological injuries have been. "From a policy standpoint

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[82] *Id*. at 1081.
[83] *Id*. at 1082.
[84] *Id*.
[85] Jeremy Pomeroy, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. Rev. 1111 (1992).
[86] *Id*. at 1152.
[87] *Id*. at 1153.

. . .a victim of another's tortuous conduct – whose religion constrains her from taking what others might deem reasonable, ameliorative steps – ought not be forced to choose between being spiritually or financially whole."[88] While the eggshell plaintiff rule does not currently incorporate religious beliefs, some, like Pomeroy, have made the argument that it would be fair for the rule to do so.

Controversy concerning the expansion of the eggshell plaintiff rule is not limited to the areas psychological injury or religious beliefs. Some argue that use of the doctrine could enable liability for websites that encourage or incite destructive behavior. For example, in her article "*Stick a Toothbrush Down Your Throat:" An Analysis of the Potential Liability of Pro-Eating Disorder Websites*[89] Annika Martin advocates the use of the doctrine as a means of holding pro-eating disorder websites accountable for the exacerbation of eating disorders among its website visitors. Martin presents data the indicates the proliferation of pro-eating disorder websites[90] and notes that, up to this point, no suit has ever been brought against one of these websites for the injuries they may incite in victims of eating disorders. She then explores the various causes of action which could potentially be brought against these sites.[91] Among the causes of action she details are incitement, intentional infliction of emotional distress and successfully soliciting another to commit suicide, but she settles on negligence, specifically the eggshell plaintiff doctrine, as one cause of action likely to be successful in a trial. Recognizing that the psychological state of the victim has been considered in other media

[88] *Id*. at 1156.
[89] Annika K. Martin, "*Stick a Toothbrush Down Your Throat:" An Analysis of the Potential Liability of Pro-Eating Disorder Websites*, 14 Tex. J. Women & L. 151 (2005).
[90] *Id*. at 155.
[91] *Id*. at 156. As part of her argument she assumes that "eating disorder sufferers are victims who do not choose their disease but fall prey to them because of mental susceptibility triggered by family and/or social pressures."

tort cases,[92] Martin suggests that the eggshell plaintiff rule could apply to holding pro-eating disorder website liable for injuries caused to site visitors in the "psychological vulnerability" context[93] because a jury would be likely to find that a victim's reaction to the website was influenced by a psychological abnormality to the extent that the website intensified an existing condition. She recognizes that it would be difficult to determine precisely what harm was caused by the website and what harm was do to a preexisting condition or due to some other source. "Nevertheless, 'if the fact finder cannot separate injuries caused or exacerbated by the [defendant] from those resulting from a pre-existing condition, the defendant is liable for all such injuries.'"[94] Martin hopes that the preexisting disorders already affecting the victims would not protect the pro-eating disorder websites from liability for the harm caused by the sites content. Although Martin's proposition concerning the eggshell plaintiff rule is merely a theory because it has never been utilized in a claim against a website, it demonstrates the way the eggshell doctrine is being conceptualized in modern tort law.

Finally, an interesting article by Alfred Aman, Jr. attempts to treat the earth itself as an eggshell plaintiff. In *The Earth as an Eggshell Victim: A Global Perspective on Domestic Regulation*[95] Aman suggests that the eggshell plaintiff rule is a "productive starting point for a dialogue on the place of law in any effort to control (or reverse) the cumulative damage to the planet's ecosystem."[96] He argues that the earth has become an eggshell plaintiff, suffering harm exacerbated by industrialization, population growth and

[92] *Id*. at 173.
[93] *Id*. at 174.
[94] *Id*. quoting *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 603 (1st Cir. 1996).
[95] Alred C. Aman, Jr., *The Earth as an Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 Yale L.J. 2107 (1993).
[96] *Id*. at 2107

the expansion of the consumer society[97] and that viewing the earth as an eggshell plaintiff will have three important implications.

> The image of the earth as [an] eggshell victim redirects attention from the cause of harm to the impact of injury . . . The eggshell image also transcends propositions that focus on how individual corporate entities or countries should achieve short-term economic success or environmental soundness . . .Finally, the eggshell victim image underscores a less obvious long-term assumption inherent in the global perspective: that the historical process of the "first-world's" economic development cannot be replicated by the developing world in the environment is to be preserved.[98]

Aman hopes that by treating the earth as an eggshell plaintiff there will be an impact on the creation and development of new regulatory approaches to the environment throughout the world. While his analogy may not fit perfectly into the traditional eggshell plaintiff rule, it again demonstrates how the understanding of the doctrine has continued to expand over time.

IV. Conclusion

The eggshell plaintiff rule, that a defendant takes his victim as he finds him, is a universally accepted doctrine. The rule's application has expanded over the years to reach beyond merely physical harm and its use continues to evolve in an effort to hold more and more defendants liable for the harm they cause their victims, harm that was not foreseeable to the defendants when there negligence occurred.

[97] *Id*. at 2108.
[98] *Id*. at 2111.