

FOREWORD: THE TENSION BETWEEN INTERVENTION AND RESIGNATION

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In a deep sense, tort law exhibits a tension between intervention and resignation. In certain contexts, the law optimistically attempts to restore the victim to the *status quo ante*. In others, it chides that legal institutions can only partly avert the tragedy of the human condition. This schizoid agenda has particularly characterized the development of the law of product liability.

Prior to Cardozo's opinion in *MacPherson v. Buick Motor Co.*,¹ the possibility of recovery generally lay locked behind the doors of privity. Conceptualizing product liability in contract terms, courts routinely denied recovery to victims who were not immediate buyers.² After *MacPherson*, courts repeatedly blocked recovery for product victims by invoking mechanical and arbitrary formulations of negligence theory.³ Even when product liability blossomed during the 1960s, the tension between intervention and resignation survived. The warranty provisions of the 1962 draft of the Uniform Commercial Code expanded contractual recovery for product harms but retained substantial limitations, of which the most notable was vertical privity.⁴ Section 402A of the Restatement (Second) of Torts scythed a much broader path to recovery, the precise limits of which were left indefinite by amorphous language. Following closely on the heels of the Restatement, the 1966 proposed revisions of the U.C.C. relaxed the vertical privity requirement to liberalize contractual recovery.⁵

These changes in the law paved the way for increased recoveries. By

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1. 217 N.Y. 382, 111 N.E. 1050 (1916).
2. 3 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* 705-08 (2d ed. 1986); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 681-82 (5th ed. 1984).
3. See, e.g., *Tyson v. Long Manufacturing Co.*, 249 N.C. 557, 107 S.E.2d 170 (1959); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950). For the classic history of early movement toward strict product liability, see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960).
4. See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 399 (2d ed. 1980). Vertical privity excludes recovery from remote product sellers. This version of the Code did, however, relax horizontal privity to permit guests and members of the buyer's household to recover from the product's immediate seller. See *id.*
5. See J. WHITE & R. SUMMERS, *supra* note 4, at 399-405; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *MINN. L. REV.* 791 (1966).

the mid-1970s, the federal government commissioned a task force on product liability.⁶ That task force proposed to the states the Model Uniform Product Liability Act, which sought to diminish the size and number of product recoveries.⁷ Initially, the states paid comparatively little attention to calls for change, and Congress introduced assorted bills.⁸ To date, Congress has failed to enact uniform legislation; instead, the states recently have begun to curtail the possibility and amount of recovery.⁹

Thus has the pendulum swung back and forth. Sometimes, we resolve to do more; other times, we understand that we can only do just so much. Tort scholars have tried to reconcile this tension between intervention and resignation by accentuating autonomy or utility paradigms of tort law. The unanticipated catastrophies of product accidents profoundly infringe on both the freedom and happiness of victims. A compassionate product liability system should be responsive to both of these interests. In my view, the approach to product liability that most ably advances utility and particularly autonomy was developed by Dean Guido Calabresi of Yale Law School.¹⁰

The scheme that Dean Calabresi formulated during the 1960s and perfected during the early 1970s conceptualizes accident costs as part of the total costs of a particular product, which should be internalized into product price. Accident costs attributable to product assembly, design or warning should be borne by the manufacturer, who, in turn, can generally spread its losses to consumers of that product through higher prices.¹¹ This sharing of accident costs alleviates the burden of liability on the manufacturer while advancing victim compensation. Moreover, at the margin, higher product prices effected by internalization will reduce product consumption and, concomitantly, accidents.¹² Internalization does not unfairly constrain the autonomy to consume a given product; without it, accident costs might have to be shouldered partly by general tax revenues with the remainder absorbed by victims. In contrast to these arbitrary burdens, internalization fairly allocates accident costs to those consumers who benefit from a particular product.

Besides internalization of accident costs, the other revolutionary idea of Calabresian theory is the "best-decider" approach. Specifically, tort law should ascribe liability for product accidents to the party who has

6. See FINAL REPORT, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (1977) (National Technical Information Service—Report No. 273-220).

7. 44 Fed. Reg. 62,714 (1979).

8. See, e.g., H.R. 1115, 100th Cong., 1st Sess. (1987); S. 2760, 99th Cong., 2d Sess. (1985); S. 44, 98th Cong., 2d Sess. (1983). See also Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575, 575-78 (1985).

9. See, e.g., NATIONAL CONFERENCE OF STATE LEGISLATURES, *RESOLVING THE LIABILITY CRISIS: STATE LEGISLATIVE ACTIVITIES IN 1986* (1987); Strasser, *The States of Tort Reform*, Nat'l L.J., Feb. 16, 1987, at 36, col. 1.

10. See Atanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. (forthcoming 1988).

11. See Calabresi & Hirschhoff, *Toward a Test for Strict Liability*, 81 YALE L.J. 1055, 1057 & nn.10-11 (1972). This seminal idea of Calabresian theory is more extensively propounded in G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

12. See G. CALABRESI, *supra* note 11, at 150-52.

superior knowledge with which to decide whether to avoid an accident or allow it to occur. For example, a manufacturer often has the most information with which to decide whether it is cheaper to design a safer product or to forgo a particular safety measure and compensate accident victims. Conversely, if a consumer sticks his hand into a running power mower to unclog it, the consumer has the best information to decide whether to take the chance of inserting his hand or to unclog the mower in a less direct manner.¹³

In many ways, Calabresian theory appeals to utility. It seeks to address the deep utility incursions suffered by accident victims and to avert only those accidents that are cheaper to avoid than to insure against.¹⁴ In a more distinct way, the theory appeals to autonomy. It seeks to decrease and redress the severe autonomy infringements caused by product accidents without unfairly constricting the autonomy of product consumers.¹⁵

Catalyzing the drive toward intervention, Calabresian theory has powerfully influenced the courts toward strict product liability. Reacting to perceived excesses, many recent legislative proposals have tended to emphasize resignation. Some have tried to reject the Calabresian approach altogether; generally, more successful measures simply have sought to refine its implementation. Three important categories of reform have emerged. First, many measures would reimpose a fault standard to determine liability. A second tack has involved limiting damages, particularly punitive damages and damages for pain and suffering. A third thrust focuses on reducing transaction costs: proffered solutions range from spurring settlement to eliminating joint and several liability.¹⁶

Unfortunately, some of these categories of reform conflict. For example, substituting a fault hurdle for a relatively simple strict liability approach likely would increase transaction costs. My own view is that liability should be strict, but certain noneconomic damages, such as pain and suffering, should be contained. The costs of product liability might be reduced by promulgating a simple strict liability system, enacting a national law to advance uniformity and placing some limits on noneconomic damages and attorneys' fees. Elsewhere, I elaborate how some of these ideas might be codified.¹⁷

In an effort to advance debate in this important and controversial area, the *Journal of Legislation* devotes this symposium issue to product

13. For further discussion, see Calabresi & Hirschhoff, *supra* note 11, at 1062-67.

14. Attanasio, *supra* note 10.

15. *Id.*

16. See, e.g., *Focus on "Tort Reform" Shifts to the States*, *Insurance*, 1 *Liab. & Ins. Bull.* (BNA) No. 23, at 6-7 (Jan. 12, 1987); *Fault-Based Product Liability Rule Included in Measure Sent to Governor*, 1 *Liab. & Ins. Bull.* (BNA) No. 19, at 1-2 (Dec. 8, 1986); Strasser, *Both Sides Brace for Tort Battle*, *Nat'l L.J.*, Feb. 16, 1987, at 1, col. 3; 39, col. 3; Strasser, *supra* note 9, at 36, 40.

Indeed, litigation costs may be consuming almost as much money as victim compensation. See J. KAKALIK & N. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986) (Rand Corporation Study).

17. See Attanasio, *Codifying the Calabresian Approach to Products Liability: The Contours of a Model* (forthcoming).

liability. Consistent with the mission of the *Journal*, its staff has invited prominent policy makers to examine an important question at the cutting edge of law and public policy. In addition, the symposium contains two student projects in which members of the *Journal* staff analyze topics central to informed decision making.

In this issue, we are honored to feature Christopher Dodd, Victor Schwartz and Alan Morrison. Dodd, the junior Senator from Connecticut, has proposed several widely discussed bills on product liability. Schwartz is former chairman of the Federal Interagency Task Force on Product Liability and co-author of Prosser, Wade and Schwartz, *Cases and Materials on Torts*. Morrison is director of the litigation department for Public Citizen and was a member of the recent American Bar Association Action Commission to Improve the Tort Liability System.

Each of these authors is a prominent representative of what are perhaps the three most influential and best developed positions on product liability reform. Accentuating resignation, Schwartz's position reflects a widely held perception that excess characterizes the current product liability system. Those sharing this impression often favor fault-based liability, cutbacks in damages and reduced transaction costs through uniform federal legislation. Schwartz's article focuses on the need for federal legislation. Transcending differences of opinion on specific reform packages, many would concur with Schwartz's arguments for national regulation of an area that so vitally affects interstate commerce. Many who in principle favor federal legislation, however, profoundly disagree on what measures should be enacted. Ironically, the uniformity that federal legislation would effect can intensify disagreement by increasing the importance of whatever measures are promulgated.

Contrasting with Schwartz's position is the stance of Morrison. In his commentary, Morrison rehearses the recommendations of the ABA Action Commission on which he served. This Commission—which addressed more than product liability—eschewed broad-ranging change. Instead, it sought to tinker with the existing tort system, including product liability. Accordingly, its approach would largely leave intact the basic innovations that Calabresian theory has inspired in many states. Morrison's commentary reflects the procedural thrust of the Commission's package. Many of the adjustments proffered by the Commission would reduce transaction costs. When combined with its more substantive suggestions, such as reducing punitive damages, these proposals would decrease the total cost of product liability. Although the ABA Action Commission advances many sound recommendations, its package may prove inadequate to address problems with the existing product liability system. A potential advantage to the ABA approach is incremental change; however, the pace of reform must adequately and deliberately respond to the problems at hand.

Dodd articulates an approach that, at one level, lies between the resignation toward which Schwartz would like to move and the intervention that Morrison would like to retain. In another sense, the Senator's position might be fashioned to spark even greater intervention than the current

approach to product liability. By any standard, the Senator's ideas recast the product liability debate in a dramatic way. After outlining some problems with the present system, the Senator's article recounts the principal thrust of his reform efforts, which have focused on alternative compensation schemes. His most important efforts have sought to reduce transaction costs and foster quick and certain victim compensation through prompt settlement of disputes. The self-avowed theoretical predicate for the Senator's proposals, again, is Calabresian theory.

The Senator's scheme holds the potential to bypass the tort system and treat victims' problems with greater speed and certainty. Many bills proffering compensation systems, however, have dramatically curtailed damages and, more importantly, have incorporated substantial elements of a fault approach. The Senator's article grapples with these criticisms of past proposals. It may, however, neglect the problem of accurately assessing product damages while continuing to incorporate substantial elements of fault. It also continues to struggle with the predictable problems of etching a boundary line between the tort system and an alternative compensation mechanism.

Turning to the student projects, one focuses on how product liability affects the vital insurance industry. Offering an historical perspective, this project examines how our current system of insurance regulation evolved. It then analyzes the continuing merits of that system. Another student project focuses on some of the most important reforms being debated in state legislatures. Included are sections on theories of recovery, the state of the art defense, comparative responsibility, statutes of limitation and of repose, punitive damages, joint and several liability, and various measures to control litigation costs. These student projects are timely. Increasingly, reform measures are embracing insurance regulation. Moreover, the present focus of efforts to modify the law clearly lies in state legislatures.

The symposium illuminates the tension between intervention and resignation which characterizes so many policy debates. How we as citizens might help those who have suffered accidents and on whom we should ascribe this burden test our value commitments. These questions, and the tension between resignation and intervention that they engage, expose the tragic side of life together with our capacity and will to respond.

