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Monsanto Lectures

THE INEVITABILITY OF TORT REFORM

GEORGE L. PRIEST*

This Symposium convenes at an important moment in the history of modern tort reform. The helpful legislation in many states that resulted from vigorous efforts to reform the law during the late-1980s is now reaching the level of constitutional review. The academic efforts to reexamine the law -- which I shall describe in more detail below -- appears to be beginning to evidence demonstrable effects on judges and perhaps juries as the expansive trend toward extension of the law subsides.¹ At the same time, the road to remaining reform remains difficult. A prominent American Law Institute Report group that, after years of study, recommended only modest changes in the law, has encountered fierce opposition.² Panglossian celebrations of the vague standards of our modern law of expanded liability still appear.³ And there are dangerous efforts to cement in a revised Restatement a law now in extraordinary flux.

Despite present uncertainty, however, I believe that the serious and systematic reform of modern tort law is inevitable. In order to appreciate the forces that will generate reform, it is important to understand that modern tort law comprises more than a set of individual rules or propositions, it constitutes a "regime" or perhaps better a "culture." Indeed, I would characterize modern tort law today as comprising what I will call the "culture" of enterprise liability.

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1. For a description of these effects, see Theodore Eisenberg & James Henderson, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

2. COMPENSATION AND LIABILITY FOR PRODUCT AND PROCESS INJURIES, FINAL REPORT (A.L.I. 1991).

3. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, GA. L. REV. (forthcoming) (manuscript on file with author).

In its simplest form, enterprise liability is the concept that enterprises or activities ought to be responsible for all of the costs that they generate, especially injury costs.⁴ But enterprise liability is more than a single idea. It comprises a “culture” with its own cultural foundations and cultural icons, which I will describe in more detail below.

In my view, this “culture” of enterprise liability as we currently know it will progressively decline and fall; its fall is inevitable. It will fall as a consequence of the operation of two powerful forces. It will fall *not* simply because our courts will come to recognize that current law, at base, harms the society and diminishes social welfare -- though it surely does. Those harmful effects will contribute to fall of enterprise liability, but their demonstration will not be sufficient in themselves to generate the fall.

Instead, enterprise liability will fall, first, because of reasons relating to the internal intellectual coherence of enterprise liability. One might invoke a metaphor to claim that the system contains the seeds of its own destruction, or that it is built upon a foundation so weak that it will necessarily crumble. These metaphors, however, do not exactly capture my point. Enterprise liability will fall, instead, because of forces related to the internal development and growth of the culture. Modern tort law today stands in a form that is extremely crude. As the underlying philosophy of enterprise liability matures, as it surely must, it will change in dramatic ways and even reverse its current direction toward tort reform. Perhaps the better metaphor is that modern tort law is the pupa; tort reform, the butterfly.

The second reason that what I am calling the “culture” of enterprise liability will fall relates to the increasing internationalization of commerce and, in turn, of the law. Here again, this reason is not that our courts will recognize that modern law impairs U.S. competitiveness, wreaking yet further harm upon our economy -- though that is true as well. My point, rather, is that the increasing and, I think, irreversible internationalization of commerce challenges fundamentally the distinctively cultural features of every nation’s legal system. Because the culture of enterprise liability is surely idiosyncratic to the U.S. in comparison to other legal cultures of the world, enterprise liability will be engulfed in the wave of the rationalization of law across the nations.

Allow me to explain these points in somewhat greater detail:

Prior to the 1960s, tort law was a field of extraordinary stability, in which

4. For a fuller description of the regime and of its founding, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) [hereinafter cited as Priest, *Invention*].

there had been only minor, marginal developments for at least five decades before the 1960s and, excluding the special case of workers' compensation, for an additional five decades before that.⁵ This great stability engendered the growth of what I am calling the "culture" of tort liability, consisting of a set of cultural characteristics or foundations that came to be embraced -- and more than embraced, absorbed or internally assimilated -- by those working within the culture, leading these various foundational characteristics to be regarded as essential to the system. These characteristics are familiar to us all: vague standards of liability -- in the early 1960s, very limited standards; unconstrained contingency fee arrangements; full compensatory damages for loss; including unlimited pain and suffering damages; all implemented with nearly unbounded authority by a lay jury.

That these characteristics of the tort system came to be regarded as cultural foundations or cultural icons, explains, among other things, why, upon any mention of reform that involves a change in any of these characteristics, groups such as the trial lawyers raise virulent opposition. The opposition often exceeds the bounds of mere self-interest, though that surely is a powerful factor as well. But the anti-conceptual and often unreasoning form of the opposition suggests that something beyond rational calculation of interest is operative here. Put slightly differently, to the rational analyst, there is nothing sacrosanct about trial by jury, the contingency fee, some particular damages measure, especially unlimited damages for pain and suffering. My colleague Guido Calabresi demonstrated twenty years ago that these characteristics of the legal system are simply implements of some particular public policy and should be subject to change as public policy changes.⁶ The distinctive form of Calabresian policy "flexibility" or "relativism" is alien to much of the opposition to modern tort reform. To certain groups who view themselves as the guardians of the culture of enterprise liability, considering change in any of these features of the culture of tort law is heresy.

Take the institution of the civil jury. To groups such as the trial lawyers, to even raise the question whether a group of twelve persons picked randomly from some list, such as those with registered autos or voters, often selected for service in particular because they know nothing about the law and have never attended a trial -- to even raise the question whether in a sophisticated society a group like this is singly best able to resolve a complicated issue of product design is equivalent to full-scale assault on the Lincoln Memorial. That response does not show measured consideration of an idea or thoughtful

5. This history is reviewed in Priest, *Invention*, *supra* note 4.

6. This is the central theme of GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970), a lesson often forgotten in citations to the book's more particular and time-bound endorsement of cost internalization and risk spreading as specific policies.

evaluation of policy alternatives, it shows unreasoning reaction to the altering of a culture.

As we all know, in the mid-1960s there was a change made within the culture of tort law, not to the central features of the culture itself, but to one seemingly minor characteristic: the introduction of the policy of strict liability. This doctrinal change was meant by its drafters to have modest effect,⁷ and in terms of the central foundations of the culture of tort law, it did: It did not challenge trial by jury; nor did it challenge the contingency fee; nor full compensatory damages for loss; nor the institution of unfettered pain and suffering damages.

Nevertheless, the adoption of the rule of strict products liability surely instituted a change in the law and one that has had far-reaching effects. The change was the introduction of a new idea -- the idea that the goals of tort law ought to be accident reduction and the provision of insurance -- and that this new strict liability rule was the best way to achieve those goals.⁸ Obviously, this is an extremely important idea, but it is an idea that could be implemented and was implemented without changing the basic foundations of the culture in any way.

My point is that this idea itself constitutes the seed of destruction for the culture of enterprise liability. Put differently, this idea is the larvae or the pupa that remains to be developed, and when developed will lead to tort reform. In my first Monsanto Lecture, I tried to explain how that process would occur, how, if one takes the idea of employing the law to best achieve the goals of accident reduction and the provision of insurance, one is led to embrace massive tort reform.⁹ I do not want to repeat that demonstration, but I do want to emphasize, in response to concerns about the future of tort reform, that we can observe already that the process of internal reform is at work, and we can confidently predict that the process will be irreversible. This idea that tort law should enhance the functional goals of accident reduction and insurance is developing and is attacking fundamentally the foundations of the culture of enterprise liability. This process makes the triumph of tort reform inevitable.

What is the evidence supporting this claim?

1) With the single exception of the articles written by my dear friend, Ernest Weinrib, there are few articles within the last ten years and no articles

7. See George L. Priest, *Strict Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

8. See *id.*; Priest, *Invention*, *supra* note 4.

9. George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987).

of importance within the last five years written about modern tort law that have not addressed, either as the principal thesis or as the subject to which the thesis of the article is responding, the functional economic analysis characteristic of this new approach to the law.

2) This trend is highly likely to continue for the future. Again, with the single exception of Ernie, I know of no classes being taught today in the Torts or Products Liability field that ignore the functional economic analysis of this new approach. I would hazard that there is not a student graduating from an American or Canadian law school that can believe that one can adequately understand modern tort law without taking seriously the economic analysis of its effects. This means, by definition, that there is no future lawyer, no future academic, no future judge that can believe that one can adequately understand modern tort law without taking seriously the economic analysis of its effects.

It is important to note in this regard that the functional economic analysis being taught in our law schools and that is the subject of law review articles is not the economic analysis of the efficiency of the law,¹⁰ which though once innovative, is now a simplistic anachronism. At the same time, this new functional, economic analysis is not monolithic: there are many different views generating many different results.

But this new economic analysis -- however diverse -- is united in one central characteristic critical to future tort reform: It is relentlessly functional and utilitarian, and it has no respect for what I have described as the foundations of the culture of enterprise liability. This new analysis challenges every liability standard -- and there are now hundreds of articles on appropriate standards of liability to achieve appropriate economic effects.¹¹ This scholarship challenges basic measures of damages -- and there are increasing numbers of articles on the benefits and costs of full compensatory damages.¹² It challenges the institution of the contingency fee. It challenges the institution of pain and suffering damages.¹³ It challenges the appropriateness of the civil jury.¹⁴

10. *E.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985).

11. *See, e.g.*, Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1981); George L. Priest, *Internalizing Costs* (forthcoming 1992).

12. *See, e.g.*, GEORGE L. PRIEST, *JUSTIFYING TORT REFORM IN OUR CONFUSED SYSTEM OF ACCIDENT LAW*, Program in Civil Liability Working Paper # 142, Yale Law School.

13. Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985).

14. George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161 (1990).

These multiple challenges have had and will have increasingly a cumulative effect. And whatever the ultimate consensus, the effect necessarily will be broad and dramatic reform of our system of modern tort law. For when the culture of enterprise liability is exposed: When, for example, it is realized that the term "full compensatory damages" does not appear in the Constitution; when the linkage is broken between Lexington-Concord-Gettysburg-and pain and suffering damages; when the institution of the civil jury is pulled out from behind the American flag, then careful attention will be given as to how best to structure modern tort law to help, rather than to harm consumers, and to benefit rather than to burden our economy. And I am confident that the answer to that concern is modern tort reform.

There is a second and somewhat broader force pressing toward the same end. Within the past ten years, we have been witness to an extraordinary effort of the nations of Western Europe to rationalize their economies and their legal systems under the broad imperatives known as "1992." 1992 is the date set for the elimination of all barriers to trade among the members of the European Community, including both legal and economic barriers.

The success of the European effort necessarily implies that the 1992 impulse -- the removal of all legal and economic barriers to trade or commerce-- will be extended to the U.S. as well. Today, many nations -- Japan especially - - are carefully studying the European efforts with plans to rationalize local law with European law to better facilitate international trade and commerce. If the new great European market and the Japanese market achieve rationalization, the United States must pay close attention. Necessarily, this impulse toward rationalization will further increase the forces undermining the modern culture of enterprise liability in the United States.

The European effort toward 1992 represents the triumph of a functional, in contrast to a moral or distinctively national, conception of European organization. As a consequence, the conception of a unified European legal system strikes at the heart of the individual moral legal foundations of the separate European nations. It is simply not possible to reconcile completely the Kantian foundations of the Germanic countries with the common law foundations of Britain with the natural law foundations of the Romantic countries, except at the highest level of abstraction. And at high levels of abstraction, the distinctively moral characteristics of each individual nation's legal culture disappear as those individual legal cultures are submerged beneath a functional approach to law.

These developments will necessarily draw in the United States and, just as in Europe, will necessarily change the idiosyncratic characteristics of our legal culture, and submerged them beneath the functional economic approach to law.

Put more simply, tort reform will necessarily prevail.

Thus, in my view there is little merit to debating the inevitability of tort reform. Tort reform is inevitable because the basic idea motivating modern enterprise liability must develop and mature. Tort reform is inevitable as the U.S. comes to grip with the fact that its economy must be reconciled with the economies of Western Europe and beyond.

I am convinced enough of this inevitability that I do not believe that, even were these wonderful Monsanto Lectures aimed in the opposite direction -- were they the Monsanto Lectures in Maintaining the Status Quo -- the progress toward tort reform would be halted. Of course, that the Monsanto Lectures are committed to reform and improvement of our legal system only hastens that eventual end.

