

SYMPOSIUM

Products Liability: Economic Analysis and the Law

Foreword

In 1966 the American Association of Law Schools and the American Economic Association formed their first Joint Committee to consider some problems of common interest to lawyers and economists. It was hoped that economists might become more aware of the current intellectual problems faced by lawyers and that lawyers might become more aware of the contributions that the discipline of economics could make to solving these problems. With the generous financial assistance of the Walter E. Meyer Institute of Law, a project was developed to serve these dual purposes.

A legal area which had not been the subject of extensive economic analysis, products liability, was selected to be surveyed by a leading economist. His responsibility was to prepare a critique of the implicit and explicit economic content of the more important legal literature. This paper would then be distributed for comment to two economists and two law professors, and finally a group of interested economists and law professors would meet to discuss these five papers.

The Committee was fortunate to secure the services of Professor Roland N. McKean to prepare the initial paper. Professor McKean reviewed the legal history of the shift from the older *caveat emptor* philosophy to the nearly strict liability of producers today. He analyzed the market effects of the various liability rules and examined a whole range of issues in modern welfare economics. Transaction costs and information costs implicit in various legal rules were considered, as were wealth redistribution effects.

As commentators on McKean's paper, the Committee selected economists James Buchanan and Robert Dorfman and law professors Guido Calabresi and Grant Gilmore. Each of these commented on a different aspect of the McKean paper, and each comment in itself is a fairly integrated piece of legal-economic scholarship. The results of these efforts and the ensuing meeting held at Stanford University in March, 1968 are now made available in the succeeding pages.

The editing of the meeting transcript raised special problems. At-

tributions were frequently missing, and some important statements were lost to the static of the recording tape. But, more telling, the materials had to be pared down considerably to meet the space demands of this *Review*. Special editorial effort was made to ensure that what remained of the transcription would follow logically and with continuity upon the five papers, would add some important new thoughts to the subject, and, hopefully, would clarify the areas still left to be explored.

It is interesting in retrospect to see how close the discussion sometimes came to an intellectual resolution of issues, even though this was probably not apparent to the participants. There was, for instance, a general acceptance by the participants of the critical importance of transaction costs. Had the group pursued more carefully Dean Keeton's explicit probing of the meaning of that phrase, both the economists and the lawyers might have sharpened their communications with each other. Further, had the group pursued Professor Calabresi's efforts to compare explicitly the transaction costs with a rule of *caveat emptor* and those under a rule of *caveat venditor*, they may have developed a better understanding of the empirical issues involved.

The group probably spent too little time discussing various aspects of the market for insurance and its relation to products liability. Probably the most pregnant thought along that line was Professor Reder's suggestion that every sale is in effect a tie-in of the product and some implicit agreement about liability. Transaction costs, he assumed, prohibit a more specific sale of insurance with the sale of every product, though this does occasionally occur.

For some reason the group did not discuss the economics of private litigation and the potential effects of a broader use of class actions in this area. Nor were alternatives to private litigation considered, except perhaps in a passing reference to workmen's compensation.

No matter how all the issues might be resolved logically, there would still remain the nagging demurrer of Professor Gilmore that it really does not make any difference since legal change is more related to sociology, psychology and politics than it is to economics. Perhaps this is so, but most of the participants seemed to feel that desirable legal effects would ultimately flow from sound economic analysis. And hopefully the exercise published here will have intellectual influence well beyond the small question of what a judge may do with his next products liability case.

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