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Introduction

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Symposium

THE STATE OF TORT LAW AT THE TURN OF THE MILLENIUM—AN INTRODUCTION

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The Monsanto Lecture has become well recognized as a "major outlet for torts scholarship in the United States."[1] This year, four distinguished Monsanto Lecturers from prior years—Ernest Weinrib,[2] George Priest,[3] Richard Epstein,[4] and Ian Ayres[5]—were invited to return to Valparaiso and reflect on the state of tort law at the turn of the millennium. In a well-attended symposium moderated by Judge Guido Calabresi, another Monsanto alumnus,[6] all four speakers concluded that there are substantial grounds for concern over the state of tort law. However, they did so for four very different reasons. The four lectures are reported in this issue of the *Valparaiso University Law Review.*

Professor Weinrib, in *Does Tort Law Have a Future?*[7], is deeply troubled by the impact of instrumentalism on tort law. He sees "internal corruption of tort law's conceptual scheme" and, in his lecture, examines instrumentalism's impact on core notions of duty and proximate cause. Professor Weinrib begins his analysis with the proposition (argued for in his other writings) that tort liability is necessarily "bipolar." By this he means that it links the defendant and plaintiff to each other as "doer and sufferer of the same injustice." Because of this bipolarity, any justification for imposing tort liability must consider both parties and must focus on

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[1] Richard A. Epstein, *Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres*, 32 VAL. U. L. REV. 833, 833 (1998).

[2] Ernest J. Weinrib, *Thinking About Tort Law*, 26 VAL. U. L. REV. 717 (1992); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

[3] George L. Priest, *The Inevitability of Tort Reform*, 26 VAL. U. L. REV. 701 (1992); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. LAW. REV. 1 (1987).

[4] Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757 (1992); Richard A. Epstein, *A Clash of Two Cultures: Will the Tort System Survive Automobile Insurance Reform?*, 25 VAL. U. L. REV. 173 (1991).

[5] Ian Ayres, *Protecting Property With Puts*, 32 VAL. U. L. REV. 793 (1998).

[6] Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859 (1996).

[7] 34 VAL. U. L. REV. 561 (2000).

their injustice-based relationship. Classical tort law does impose liability on the basis of this type of justification. Classical tort law, moreover, is a structure whose concepts gain their meaning from a view of the parties as related by an injustice. For example, the notion of foreseeability, under classical tort law, is a concept that "links the plaintiff's injury to the reason for characterizing the defendant's action as wrongful." Because classical tort law is based on justifications and concepts that consistently build on the notion of a plaintiff and defendant related by an injustice, it forms a coherent and fair framework for the imposition of liability.

This is not so in modern negligence law. In Professor Weinrib's view, instrumentalism has radically altered the concepts and justification practices of tort law. While contemporary tort law purports to use the same concepts as classical tort law, it does so in name only. Concepts such as foreseeability are emptied of their normative content. Social goals that center on one or the other party in isolation replace bipolar, justice-based reasons for imposing or not imposing liability. To illustrate this transformation, Professor Weinrib describes a test for duty of care that has been adopted by Canadian courts. At the critical step in this test, a court determines whether a prima facie duty of care (whose existence is established at an earlier stage) should be negated or limited by policy considerations that focus on one party only. Professor Weinrib argues that this test is analytically incoherent and disconnected from the underpinnings of tort law. In the end, Professor Weinrib argues, tests such as this, and more generally the move to instrumentalism, deprive tort law of any claim to be a "fair and coherent justificatory enterprise."

Professor Priest, in *The Culture of Modern Tort Law*,[8] is equally troubled about the future of tort law. However, his reasons emerge from an examination of strict liability, rather than negligence, and from an economic, rather than justice-based approach.

Professor Priest begins with the observation that, from an economic standpoint, negligence and strict liability standards differ very little. Hence, the evolution in tort law from negligence to strict liability standard should have had little impact on the overall pattern of case outcomes. Yet, clearly, tort law over the last several decades has been marked by tremendous change. Most notably, there has been "a vast increase in the number of suits, in the number of settlements, and in the magnitude of liability payouts and insurance premiums." How can this puzzle be explained?

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[8] 34 VAL. U. L. REV. 573 (2000).

Professor Priest's insight is that there is a culture of tort law. By culture he means "a set of attitudes and expectations embedded in the conceptual basis," which can promote and channel the growth of legal doctrines. Strict liability law, according to Professor Priest, is not based solely on economic efficiency; rather, it is more deeply rooted in a cultural attitude that "repeat defendants . . . are in a vastly superior position than consumers to protect and insure against injury and loss." This cultural justification explains many features of the law that are inexplicable from an economic perspective.

In particular, it explains why courts determine the liability of a manufacturer, not by reference to the conduct of the manufacturer and consumer, but by reference to an ideal product that the manufacturer could have marketed. Under this approach, the central question for liability in products cases is whether the manufacturer could have done anything to prevent the injury—a question that, on its face, seems to compel a "yes" answer. Professor Priest then notes that this test for liability is not logically limited to products cases. The result is that the general question for tort liability has become whether "some change in corporate behavior could have prevented the harm suffered by the injured plaintiff in this case."

The consequence, according to Professor Priest, has been an unfettered expansion of tort liability. That might not be objectionable if the expansion had been accompanied by a corresponding increase in consumer safety resulting from the change in the law. But in fact it has not: Professor Priest argues that the increase in consumer safety in the last half-century stems from non-legal factors. The upshot of the evolution in tort law, thus, has been a massive shifting of resources—to attorneys, experts, and individual plaintiffs—"for no clear productive end." Professor Priest concludes with a warning that the redistributive culture of tort law threatens our nation's economic growth.

Professor Epstein is concerned about yet another problem: the threat to our nation's healthcare system posed by efforts to interfere with the current system of vicarious liability (or, more precisely, non-liability) for managed care organizations (MCO's). In *Vicarious Liability for Health Plans for Medical Injuries*,[9] Professor Epstein describes this current structure as contractual and urges that we allow it to continue to evolve.

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[9] 34 VAL. U. L. REV. 581 (2000).

To explain the current system, he draws parallels between recent developments in healthcare law and the history of workers compensation. He first makes the important point that our modern, statutory workers' compensation system largely adopts systems that had been voluntarily established by employers. As he explains, these systems arose from employers contracting out of vicarious liability for harms caused by one worker to another. Vicarious liability law, he argues, is a system of default liability terms. In the case of workers' compensation, the parties contracted around the terms to reach efficient solutions.

Professor Epstein then draws an analogy between workers' compensation law and the current law on vicarious liability for MCO's. The foundation of the latter is ERISA preemption of a wide range of tort liability of MCO's.[10] Professor Epstein argues that preemption creates a "*default* contractual provision which could be waived by the health plan if it so chose." Unlike as with workplace injuries, the default position is absence of liability, rather than liability. Nonetheless, it is a default regime of vicarious liability, which the parties could contract around. In fact, they do not, and Professor Epstein argues that MCO's do not waive the default contractual position because "it is more efficient to channel tort liability . . . through direct actions against the physician or hospital."

Professor Epstein then reviews current efforts to displace this contractual resolution of vicarious liability with legislative solutions such as patient bills of rights and direct actions against MCO's. He finds that they threaten the system under which MCO's serve as necessary gatekeepers of limited healthcare resources. Professor Epstein concludes that it is best to allow the present system to continue to evolve. Yet, in the end, he fears that legislative or other non-contractual interference may be politically inevitable.

The fourth symposium participant, Professor Ayres, is concerned with a very different kind of development in tort law, *viz.*, state settlements of mass tort litigation that can be used to cartelize a market. More specifically, he is concerned with settlements that cartelize markets transcending the state's borders. In *Using Tort Settlements to Cartelize,*[11] Professor Ayres describes how recent settlements of cigarette litigation brought by states have been structured so as to raise prices toward monopoly levels, share monopoly profits between the

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[10] ERISA § 514(a), 29 U.S.C. § 1144(a)(2000). *See generally* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).
[11] 34 VAL. U. L. REV. 595 (2000).

manufacturers and the settling state, and deter new entrants into the market. He expresses concern that a market for settlements of this type could emerge, where states compete with each other for the right to participate in a carteliz. They would compete by offering to take, as part of the settlement, a smaller share of the monopoly profits than other states. A "race to the bottom" becomes a real possibility.

Professor Ayres then notes that "[i]f such shenanigans do not violate federal law, we are potentially in a lot of trouble." Yet, as he shows, there probably is no basis under current law for invalidating such cartelizing agreements. He thus urges legislation that would directly attack the problem and prohibit "state settlements which condition payments on future out of state sales."

These four lectures serve as an impressive introduction to the conceptual, jurisprudential, and political challenges facing tort law at the turn of the millennium. The Valparaiso University School of Law is pleased to be able to host their publication. These excellent works reflect our continuing commitment to providing, through the Monsanto Lecture, a public forum for inquiry into the most challenging and significant issues in tort law and tort jurisprudence. We hope you benefit from the lectures as much as did the faculty, students, and lawyers who attended the symposium.