

CONCLUSION

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The articles in this symposium represent explorations and sophisticated analyses of some of the unresolved problem areas of products liability today. Mr. Epstein and Mr. Klein's article about expert testimony goes to the practical front in an area that troubles all litigators. Mr. Edell's piece about risk utility analysis in inherently dangerous products contains strong opinions in an area in which products liability has been pushed to the edge—the question of whether liability should ever be imposed for the *design* of products that simply cannot be made better. Judge Dreier's thoughtful analysis attempts to impose a judicial resolution of the non-identification problem. Mr. Burke's piece about DPT vaccines directly confronts an area of concern to legislators in the arena of our nation's capital: legislation affecting the liability of DPT vaccine manufacturers has already passed Congress, but still needs to be funded. This is a highly specialized area, again on the borderline of products liability law. Mr. Bromberg's observations about the relation between product warnings and strict liability also gives an insightful perspective on an unclear area of products liability law.

Symposiums of this type are useful because they press the thinking of products liability specialists, courts, and legislators, all of whom are evaluating the topic of products liability. The articles do not, however, step back from the overall picture of the subject and discuss fundamentals. Has products liability law, in its modern evolution beginning with the 1965 *Restatement (Second) of Torts*, reached a level where some degree of stabilization is needed? All of the articles appear to accept basic classifications of liability among design, warnings, construction defects, and express warranty or misrepresentation. None of them appear to indicate that fault should be totally obliterated from products

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liability law. Can some of the borderlines, at long last be transcribed into predictable, sound and easy-to-understand legislation, without compromising the right of and need to have scholars explore “the edges?” I think this can be done, and it will bring about significant benefits.

With the core of products liability law stabilized in a legislative framework, a framework that outlines the basic cause of action and defenses, we will help abate the enormous instability that has entered this area of the law. The past decade has seen *two* major products liability crises that have snuffed out some businesses and discouraged innovation. Because the core of products liability law has become unpredictable, the sound efforts of products liability loss prevention has been weakened. One cannot advise clients about safety paths that will assure that liability will *not* be imposed. While *any* aspect of products liability law can provoke debate among scholars, the benefits of stability in key areas prevails over continuing chaos for another two decades. The benefits of stability outweigh the risks!

If the legislature is to enter the products liability arena, it should be at both the state and federal levels. State legislation will be needed until the federal government decides to act. Considering overall public policy, if one had the choice, it is probably best to have the federal government legislate in this area because products move in interstate commerce. Today, if the State of North Dakota enacted a products liability law, there could be little assurance that North Dakota manufacturers would benefit from the stability brought by that particular law. Moreover, instability is more likely to have been brought about by states with more “active” courts. A federal law will address this aspect of interstate commerce by providing for harmonious rules throughout this nation.

Once statutory products liability law is a reality, there still will be scholastic debates about topics that arise anew. There may even be debates about modifying or amending the statute itself. But we will at least have a core, a basis that we can call “Products Liability Law,” rules that manufacturers and consumers alike can rely on, rules also that can be looked at by actuaries in our insurance companies. They, in turn, will be less likely to “panic” the next time there is a disruption in financial markets. Products liability crises will then be modified or abated.

These thoughts go to the nitty-gritty of products liability law in our society. In a sense, this conclusion breaks away from its

content—a content that focuses “on the edge.” For “the edge” to have meaning as an area of speculation, analysis, and examination of the future, we need a core of products liability law. It should be legislative, and it should be enacted now.