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### One Lesson from the Six Monsanto Lectures on Tort Law Reform and Jurisprudence: Recognizing the Limits of Judicial Competence

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## Articles

### ONE LESSON FROM THE SIX MONSANTO LECTURES ON TORT LAW REFORM AND JURISPRUDENCE: RECOGNIZING THE LIMITS OF JUDICIAL COMPETENCE

J. CLARK KELSO\*

The editors of the *Valparaiso Law Review* graciously invited me several months ago to submit an article regarding some aspect of the five previous Monsanto Lectures and the sixth lecture held in November of 1991, titled "Tort Law Reform and Jurisprudence."<sup>1</sup> I have looked forward to the task with a mixture of excitement and trepidation. Both reactions result from the same circumstances, namely, the five Monsanto Lecturers are some of the most distinguished tort scholars in the country,<sup>2</sup> and the issue under discussion -- fundamental reform of the law of torts -- is as complex as it is important. I must put aside any self-doubts or misgivings, however, and plunge ahead into the fray.<sup>3</sup>

The Monsanto Five agree that tort law should be reformed. Beyond this, there is much disagreement about where the reforms will come from, if the reforms ever will come, and what sort of reforms are called for. For example, Priest<sup>4</sup> believes that fundamental reform of the tort system is necessary and inevitable (including reform of such institutions as the civil jury, the award of pain and suffering damages, and the contingent fee system).<sup>5</sup> Rabin doubts that fundamental tort reform will occur absent some broad-based crisis in society

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1. The transcript cited throughout this Article is on file with the Valparaiso University Law Review [hereinafter Tr.]. A modified version of the Sixth Lecture is printed elsewhere in this issue of the Review, at 26 VAL. U. L. REV. 701-64 (1992).

2. The Monsanto Five are, in the order in which they spoke at the 1991 Lecture: George Priest (Yale), Robert Rabin (Stanford), Ernest Weinrib (University of Toronto), Peter Huber (Manhattan Institute for Policy Research), and Richard Epstein (University of Chicago).

3. At the very least, I hope the views expressed in this Article will be "bad enough to be wrong." (Tr. 61, Huber, *quoting* Wolfgang Pauli, who was commenting upon a physics paper he had been asked to review).

4. In the remainder of this Article, for the sake of convenience and brevity, I shall refer to the lecturers by their last name only. See *supra* note 2.

5. Tr. 19, Priest.

which will sweep in tort reform on its "coattails."<sup>6</sup> Huber and Epstein hope for changes in the way experts and expert testimony will be handled, though Epstein is less sanguine than Huber about the prospects for change.<sup>7</sup>

Part of the reason for these divergent views lies in the definition (or lack of definition) for the term "tort." Does it refer only to the common law rules as declared and implemented by the courts whatever those rules happen to be? Or does it refer more specifically, as Weinrib contends, to the set of rules which, by recognizing the "normative bond that singles out and connects the particular parties to the litigation," creates a justification for requiring one party to pay for the other's injury?<sup>8</sup> Or does it refer much more broadly, as Rabin points out, to encompass other compensation and deterrence systems, such as workers' compensation and administrative regulation?<sup>9</sup>

Although the Monsanto Five have their share of disagreements, at various times in their articles and comments one can discern, somewhat obliquely, a recurring common theme: courts and the judicial process have defining characteristics which render them suitable to administer certain types of rules or systems and unsuitable to administer other types of rules or systems. Professor Priest, for example, argued that the fundamental principle of post-1960s tort law expansions, the doctrine of enterprise or strict liability,<sup>10</sup> as implemented by our traditional judicial system,<sup>11</sup> produced more harm than

6. Tr. 28, Rabin. See Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociological Change*, 23 VAL. U. L. REV. 1, 32 (1988).

7. Tr. 67-68, Huber; Tr. 87, Epstein. See Peter W. Huber, *On Law and Sciosophy*, 24 VAL. U. L. REV. 319 (1990).

8. Tr. 54, Weinrib. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 490-91 (1989).

9. Tr. 24, 29, Rabin.

10. He expressed the idea as follows: "Now, as we all know, in the mid-1960s a change was made. . . . The change was the introduction of a new idea. The idea that the goals of tort law ought to be accident reduction in the provision of insurance; and to expand liability first through the doctrine of strict liability, later through other changes in the regime, to expand liability on a broader scale. That was the best way to achieve those basic goals." Tr. 14-15. Priest For Priest's complete treatment of the historical development of enterprise liability and products liability, 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); George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

11. Characterized by Priest as follows: "[N]ow, these characteristics are familiar to all of us. Vague standards of liability indeed in the early 1960s, these are — were very limited standards; but that's one of the characteristics. A second is trial by jury, civil jury. Third, unconstrained contingency fee armament for the full compensatory damages for loss and its worth regarded as the unlimited pain and suffering damages. Again, implemented with nearly unbounding authority by a lay jury." Tr. 12, Priest.

good in society.<sup>12</sup> Professor Rabin characterized our present system, with its "open-textured liability rules, personalized damage judgments, and nonexpert jury administration" as being "designed for dealing with the horse-and-buggy era, two-party inter-personal conflicts that bear very little resemblance to the context in which accidental harms occur today."<sup>13</sup> Professor Weinrib noted that tort law, in contrast to a system of public compensation or insurance, relies fundamentally upon the idea that *in the context of a litigation between particular parties*, one can discover a "normative bond" connecting the parties which would justify making one party pay for another's injury.<sup>14</sup> Peter Huber focused his fire upon the use and misuse of expert witnesses and the demise of the *Frye* rule,<sup>15</sup> a demise which led to the introduction into evidence of increasingly attenuated causation theories for the non-expert jury's consideration, particularly in medical injury cases (such as cancer, fear of cancer, and obstetrics litigation).<sup>16</sup> Professor Epstein agreed with Huber that the need to rely upon expert witnesses creates problems for the tort system, and reiterated his proposals for an increasing reliance upon external standards (such as industry custom) in place of reliance upon a jury's "free-range discretion" to balance costs against benefits in light of conflicting expert testimony.<sup>17</sup>

Each of these arguments suggests that pushing the judicial system beyond its natural competence and expertise has created part of our problem in the law of torts. This is not a novel idea, of course. The Monsanto Five have written persuasively about institutional constraints under which the common law system labors and the need for developing rules of law that are well suited to the

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12. Priest ultimately suggested that modern tort reform would succeed by altering the structure of the judicial system, by "challeng[ing] basic measures of damages," by "challeng[ing] the institution of the contingency fee," by "challeng[ing] the institution of pain and suffering damages," and by "challeng[ing] the appropriateness of the civil jury." Tr. 18, Priest.

13. Tr. 38, Rabin. Rabin concluded that fundamental reform of the tort system was not politically possible in the near term and would have to await the sort of broad-based social and political crisis that led to the creation of Workers' Compensation systems. "[I]t seems to me that the lesson of history is that broad-based no-fault only comes on the coattails of more sweeping social reform movements." Tr. 28, Rabin. For Rabin's discussion of the "horse-and-buggy" tort system's difficulty in handling toxic and mass tort cases, see Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987).

14. Tr. 54, Weinrib. See also Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 683-85 (1985).

15. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

16. Tr. 63-70, Huber.

17. Tr. 75, Epstein. Epstein also proposed doing away with the practice of each side compensating and coaching his own experts, and replacing that system with a system of court-appointed experts (financed by the private litigants, but where the source of the funds is not disclosed to the expert). Tr. 76-78, Epstein.

abilities of the lay jury and non-expert judge.<sup>18</sup> One of the most complete discussions of the issue appears in Donald Horowitz's excellent book, *The Courts and Social Policy*, where he questions the courts' ability and competence to structure remedies in the context of institutional civil rights litigation.<sup>19</sup> I suggest in this article that some of our difficulties in products liability cases stem from a similar incompetence. In particular, the substantive rules of law that courts have adopted to resolve these cases would appear to be beyond the capacity of the judiciary which operates primarily as an adjudicative body focused upon resolution of individual cases brought before that body on an ad hoc basis.

## I. DEALING WITH HARM IN SOCIETY

### A. *The Broad Responsibilities of the Modern State*

The limited role of courts and the equally limited function of tort law can properly be understood only against the broad backdrop of public policy, defined loosely here to include any and all aspects of life legitimately of concern to public government.<sup>20</sup> Government has multiple responsibilities to the People.<sup>21</sup> It protects our national security, provides education, encourages economic growth, and provides a safety-net for those whose economic status warrants governmental intervention. These, along with many other responsibilities, make up the daily grist for the political mill.

18. George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 5 (1987) ("it is my view that, although the founders of our modern tort regime embraced the goals of accident reduction and compensation, the elaboration of modern law in recent years has lost sight of these goals, and has ignored what can and what cannot be effectively accomplished through common law rules"); Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 477 (1987) (arguing that trial courts and juries are ill equipped to handle the "spate of balancing tests that are so common today"); Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718 (1982) ("[t]he central theme of this Article is that the intellectual and institutional constraints on common law adjudication require one to be very cautious in attributing major social and economic consequences to common law rules"); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985) (arguing that the judicial system is largely incapable of dealing properly with "public risks," such as risks associated with mass produced products or drugs); Rabin, *supra* note 13.

19. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 17-19 (1977) (arguing that courts do not have the competence to engage in social policymaking). See also Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

20. For an excellent review of the many attempts to define "public policy" in the law, see Kojo Yelpaala, *Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California*, 2 TRANSNAT'L LAW. 379, 387-99 (1989).

21. I do not intend to suggest that government must, as a matter of theory, shoulder all of the responsibilities mentioned in the text. Rather, I mean only that, as a practical matter, the federal and state governments in the United States have actually assumed these responsibilities.

Traditionally, one of the most important functions of government has been to provide for public health, safety and morals. The goal of safeguarding public health, safety and morals justifies an enormous variety of state regulations, ranging from inoculation programs, to environmental protection, to criminal laws. The importance of regulations directed at public health and safety and the legislature's paramount role in safeguarding this interest is recognized by the courts in, among other ways, the extremely deferential standard of review (i.e., "rational basis") used in assessing the constitutionality of such regulations.<sup>22</sup>

Providing for the public health, safety and morals naturally includes dealing with the problem of "harm" in society. I will somewhat arbitrarily define "harm" to mean any actual negative change in physical, economic or emotional status.<sup>23</sup> As defined, "harm" includes quite a few things which courts and legislatures generally do not recognize as being worthy of governmental intervention (e.g., A breaks a lunch date with B). This of course does not mean that the proposed definition of "harm" is too broad. To the contrary, when defining "harm" it is better to err on the side of inclusion rather than exclusion because a narrow definition might cause us improperly and arbitrarily to exclude certain social realities from consideration. Moreover, a broad definition will not create confusion or lead us into error so long as we recognize, as we do, that not everything which constitutes a harm demands governmental intervention.

The question for government (including the courts) is, "What to do about harm in society?" There are two aspects of the problem to be dealt with. First, what to do when harm occurs? Second, how to prevent harm from occurring (either by reducing the number of accidents or reducing the severity of the consequences)? The first question directs our attention to treating and/or compensating the injured person for their injuries. The second question directs our attention to regulating and/or deterring conduct which creates risks of harm.

### *B. Compensating People for Harm Already Suffered*

Considering compensation issues first, government must decide what harm is compensable, who receives the compensation, how much the compensation should be, and how to finance the compensation. At the broadest level, we can imagine some sort of nationwide, universal health care and social insurance

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22. See, e.g., *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

23. This is roughly consistent with the definition of "harm" given in the RESTATEMENT (SECOND) OF TORTS § 7(2) (1965) ("[t]he word harm is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause"). *Id.* at 12.

system.<sup>24</sup> A slightly narrower variation would be to replace the tort system with a scheme of no-fault compensation for all injuries (which are to be distinguished from diseases). As Rabin noted, such a system has been in place in New Zealand for over a decade.<sup>25</sup> These systems often are financed out of tax revenues of one sort or another.<sup>26</sup>

Compensation in these no-fault schemes is generally less than what could be awarded by a jury applying tort damages principles. There are a variety of limits which may be imposed, such as denying recovery for temporary income loss, overruling the collateral source rule, setting a threshold of harm (e.g., serious disfigurement or impairment) before permitting recovery for pain and suffering, and imposing arbitrary ceilings on the recovery of pain and suffering.<sup>27</sup> Although denying a plaintiff compensation for pain and suffering or imposing ceilings on certain recoveries draws an arbitrary line between compensable and uncompensable harm, a legislature can constitutionally draw that arbitrary line, especially when the compensation system trades off quick and more certain recoveries of smaller amounts for the more generous (but less certain and less timely) awards permitted by the judicial system and common law of torts.<sup>28</sup>

The judicial branch, unlike the legislative or executive branches, exhibits a decided reluctance to draw arbitrary lines. Arbitrariness has traditionally been viewed more as a vice than a virtue in judicial reasoning and decision-making. Courts reason by analogy from prior cases and feel a responsibility to maintain

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24. Tr. 29, Rabin. See also STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* xv (1989) ("I favor doing away with personal injury law and replacing it with both new compensation arrangements for accident victims and new mechanisms for controlling unreasonably dangerous conduct. This book is an argument for that proposition.").

25. Tr. 30-31, Rabin. Stephen Sugarman's book concisely reviews the many no-fault compensation schemes which exist and have been proposed, including the New Zealand plan. SUGARMAN, *supra* note 24, at 101-23.

26. As could be expected when dealing with taxes, there are a wide range of proposals for financing no-fault systems, ranging from a broad-based, progressive national income tax to taxes or fines imposed on a firm-by-firm basis (in an attempt to achieve some measure of deterrence). SUGARMAN, *supra* note 24, at 110-13.

27. SUGARMAN, *supra* note 24, at 174-83.

28. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 85-86 (1978) (upholding arbitrary limit on recovery of damages from future nuclear power plant accidents in part because act would guarantee equal recovery to all claimants). There remains disagreement in the state courts concerning the constitutionality of arbitrary caps placed upon tort recoveries (where there is no trade-off between size of recovery and speed or ease of recovery). Compare *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (upholding constitutionality of \$250,000 cap on non-economic damages in medical malpractice cases) with *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (striking down cap on non-economic damages as violative of Due Process and Equal Protection). See Frank B. Morrison & John M. Morrison, *Constitutional Challenges to Tort Reform: Equal Protection and State Constitutions*, 64 DENV. U. L. REV. 719 (1988).

some coherence in the precedents; legislatures draw whatever lines are politically possible.<sup>29</sup> That is not to say that arbitrary lines are not in fact drawn by courts. But the arbitrary lines which are drawn tend to be of the "gatekeeper" variety.<sup>30</sup> The courthouse doors are simply closed to certain plaintiffs.

The California Supreme Court's recent series of cases limiting the class of plaintiffs who can recover for emotional distress absent physical injury are a good example of how important public policy concerns sometimes trigger judicially-crafted, arbitrary line-drawing.<sup>31</sup> In *Thing v. La Chusa*,<sup>32</sup> a bystander case in which a mother suffered emotional distress upon seeing her son lying in the street shortly after he had been struck by a car, the court recognized that it had to draw some concrete, arbitrary limits upon recovery for emotional distress "[i]n order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread."<sup>33</sup> The court denied recovery in *Thing* because, applying its three-part test, the plaintiff/mother was not actually "present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim."<sup>34</sup> The three-part test is arbitrary because it denies recovery to some people (e.g., a cohabitant) whose emotional distress is equal to similarly situated people who are permitted recovery (e.g., a legal spouse).<sup>35</sup>

Once a plaintiff has successfully navigated the judicial gatekeeper, courts become much less likely to restrict a plaintiff's recovery by erecting artificial barriers. That is why, for example, emotional distress damages (which include pain and suffering) are generally awarded when the plaintiff has suffered some physical injury even though the emotional distress, standing alone, may not be

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29. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4-5, 22 (1949).

30. Richard Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1721 (1982).

31. The entire line of cases and associated secondary literature is carefully reviewed in Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1 (1992).

32. 771 P.2d 814 (Cal. 1989).

33. *Id.* at 826.

34. *Id.* at 829. The other two requirements for recovery are that the plaintiff be "closely related to the injury victim" and that the plaintiff "as a result [of witnessing the accident], suffers serious emotional distress — a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." *Id.*

35. *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (denying recovery to cohabitant).



so readily compensable.<sup>36</sup> Once the physical injury establishes the plaintiff's entitlement to be in court, an artificial limitation on the plaintiff's recovery of full compensation (including pain and suffering) is anathema to the courts.<sup>37</sup>

As for financing awards of compensatory damages, the path of least resistance for a court in the context of a private dispute is to require a transfer from defendant(s) to plaintiff in the full amount of the compensatory damages. Courts may have power to compel public financing of private remedies in some circumstances, but are understandably reluctant to exercise that quasi-taxing power,<sup>38</sup> especially when the court has jurisdiction over a defendant with money or insurance whose wrongful conduct caused the harm.

### C. Preventing Harm in the Future

On the deterrence side of the equation, government must decide which activities should be deterred, how those activities can best be deterred (e.g., whether by penalties, fines, imprisonment, or incentives), and what procedures should be implemented to achieve the deterrence which is sought.

Reducing the number and severity of accidents and resulting harm is a worthy social goal. It is not, however, a social goal that we pursue with limitless vigor. In particular, if the cost of avoiding a particular type of accident is too great when compared to the utility of the conduct which created the risk of harm, the government may rationally determine that the conduct should *not* be deterred. As a general matter, government should seek to deter conduct (both defendant and plaintiff conduct) which creates a risk of harm only if the social cost of reducing the risk is less than the social cost of the harm.<sup>39</sup>

36. The general rule in California and other jurisdictions is that a person who suffers "physical injury" is entitled to recover as parasitic damages the pain and suffering or emotional distress which results from that physical injury. See generally 6 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 1409, at 879 (9th ed. 1988). The "physical injury" test has traditionally served as a screening device to separate tort claimants into different categories for purposes of further analysis. WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 54, at 362-65 (5th ed. 1984). Those plaintiffs who suffer physical injury are permitted to recover consequential emotional harm subject only to usual rules of proof. *Id.* at 363 ("[w]ith a cause of action established by the physical harm, 'parasitic' damages are awarded"). Those plaintiffs who suffer emotional harm but no physical injury are ordinarily required to satisfy additional legal requirements in order to avoid limitless liabilities and problems of judicial administration.

37. The judicial reluctance artificially to limit a plaintiff's recovery of damages once in the courthouse was noted by Priest as a prime target for tort reform. Tr. 12, 18, Priest.

38. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (reversing district court's order imposing local tax to finance desegregation plan as an abuse of discretion).

39. Calabresi expresses this same idea in stating that the overall function of accident law is to "reduce the sum of the costs of accidents and the costs of avoiding accidents." GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26 (1970).

Most governmental deterrence is achieved through the imposition of statutory fines or penalties. There is in theory an economically most-efficient size for these fines: the minimum amount of money which would cause the person paying the fine to conform his conduct to the governmentally imposed standard. Any amount less than this minimum would result in the safer conduct not being followed; anything more would constitute an inefficient transfer of wealth with no corresponding improvement in safety. The question in each case should be, "how much will it take to teach this wrongdoer (and others like him) a lesson?"

In the context of a lawsuit, courts apparently assume that requiring the defendant to pay full compensatory damages is likely to achieve the right amount of deterrence, or, more likely, that a compensatory award does not do a worse job of setting the right amount for purposes of deterrence than a court would do on its own. Posner and others have argued that compensatory damages are in fact the exact right amount of money to require the defendant to pay and will achieve the right amount of deterrence.<sup>40</sup> The courts do not seem to recognize this principle, however, and the availability of punitive damages in appropriate cases suggests that compensatory damages only *roughly* reflect the right amount of deterrence.<sup>41</sup>

#### *D. The Role of the Law of Torts*

With this broad background, we may now refocus our attention more narrowly upon the law of torts. For purposes of this article, the law of torts can conveniently be defined as that body of rules by which courts adjudicate and resolve claims by one or more persons against other(s) for compensation arising out of harm suffered by the claimant(s) (other than for breach of contract). There is no great magic in this particular definition, and I make no claim that this definition is the "right" definition, or that there even is a "right" definition.<sup>42</sup> It is a definition which appears to reflect common understanding and usage, and that is its only real claim to validity.

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40. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 143 (2d ed., 1977) ("[a]s it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. Were they forced to pay more . . . some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred.").

41. It seems much more plausible that courts award compensatory damages because (1) anything less than full compensatory damages will leave the injured plaintiff undercompensated, and (2) anything more than compensatory damages will constitute a windfall to that plaintiff. These reasons have nothing to do with whether compensatory damages achieve the right amount of deterrence.

42. I THOMAS A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* xxv-xxix (1909) ("[n]o definition of tort at once logical and precise can be given.").

As defined, the law of torts is only one small part of government's overall response to the problem of harm in society. Thus, when we speak of tort law reform and tort jurisprudence, we should keep in mind that we are not talking about solving the entire problem of harm in society. The law of torts was never intended to shoulder that burden, and it would, by virtually all accounts, be hopelessly inadequate to the task if asked to shoulder that burden.<sup>43</sup> The question for thought and analysis is not whether the law of torts can solve the problem of harm in society, but, rather, how the law of torts may be changed to do a better job of handling its own relatively narrow part of the government's overall response to the problem of harm in society. Even more specifically, since torts is the body of laws which *courts* use, the question is how courts can change the law of torts to help courts do a better job of handling their part of government's response to the problem of harm in society.

## II. THE LIMITS OF THE JUDICIAL FUNCTION AND JUDICIAL COMPETENCE

Courts have as their principal function the resolution of disputes among members of society in accord with present-day notions of law, justice, fairness and public policy. There are many ways of resolving disputes, of course. Divine intervention,<sup>44</sup> compurgation,<sup>45</sup> duels and torture were historically permissible means of resolving disputes, and war is still a legal means of resolving disputes among sovereigns.<sup>46</sup> State sponsored terrorism and torture still exists, but the practice is widely condemned as illegal under international law.<sup>47</sup>

Our modern judicial system rejects these forms of dispute resolution in favor of an essentially Aristotelian model in which the ultimate conclusion is "judgment for plaintiff" or "judgment for defendant."<sup>48</sup> In this model, rules

43. By some estimates, the tort system manages to direct almost two-thirds of the money taken from wrongdoers to someone *other than* the injured person. J. S. KAKALIK ET AL., VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii, 84 (1984). See also SUGARMAN, *supra* note 24, at 1-72 ("The Failure of Tort Law").

44. The accused (e.g., an alleged witch, Tr. 57, Huber) was given the choice of killing herself (e.g., by drowning in a lake) or saving herself (by coming out of the lake) only to be found guilty and put to death for failing to trust in divine intervention to save her from drowning.

45. The accused could avoid punishment by giving an oath of innocence and procuring oaths from eleven neighbors that they believed the accused's oath.

46. Compare U.N. Charter art. 51 (regarding self-defense) with art. 33 (regarding pacific settlement of disputes).

47. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that state sponsored torture violates customary norms of international law).

48. Other forms of dispute resolution, such as mediation or negotiation, may draw upon other paradigms of reasoning. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). For purposes of this Article, however, our focus is upon the court system where inductive and deductive reasoning

of law (which are the formal expression of a particular society's concepts of justice, fairness and public policy) function as the major premises in a series of syllogisms leading to the ultimate conclusion. Facts (or characterizations of facts) constitute the minor premises in the chain of reasoning. Judges — who are experts in the law — determine what the major premises will be. The parties must prove what the facts are by presenting evidence to the fact-finder (either the judge or the jury), and the fact-finder must generally determine what the facts are by relying only upon the evidence that has been presented. Except for those facts of which the court may take judicial notice, our system generally presumes that the fact-finder is *not* an expert with respect to any factual question and thus must be “educated” by the introduction of relevant evidence.

In a system built upon principles of syllogistic reasoning, the content of the major premise completely determines what the content of the minor premise must be in order to reach the conclusion (and, of course, the major premise also determines what the conclusion must be). Taking account of the respective roles of judge and fact-finder, we may say that the particular rules of law constructed by the judge determine what type of findings the fact-finder must make in order to reach a conclusion. In other words, the substantive rule of law determines what sort of information the fact-finder needs to complete the syllogism.

A well-crafted rule of law will take into account the ability of the fact-finder properly to make whatever determination is required by the rule. As an example of a poorly crafted rule of law, consider an instruction to a jury that “the plaintiff should receive a favorable judgment if that result is in accord with accepted notions of justice, fairness and public policy” (the “JFPP” rule). From a purely formal perspective, this is a perfectly acceptable rule of law — it could easily serve as the major premise in a syllogism or chain of syllogisms leading to an ultimate conclusion. It is nevertheless a poorly crafted rule because it vests in the jury the function of determining what is just, what is fair, and what is the public policy, and we generally do not believe the jury is capable of making those very general and, at times, delicate determinations (whereas the court is generally viewed as being competent to make precisely those determinations).

A better rule focuses the fact-finder's attention upon something more precise and within the competence of the fact-finder. The jury may be instructed, for example, to determine whether the defendant acted as a reasonably prudent person in the circumstances (the “RPP” rule), and the court may give the jury some broad hints about what the reasonably prudent person would do (e.g., is aware of and follows relevant customs which may be proved

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remain paramount.

by plaintiff or defendant).

It is somewhat less obvious, but nevertheless true, that a well-crafted rule of law should also take into account the *rule drafter's own limited competence* correctly to determine what is just, what is fair, and what is consistent with good public policy. The Supreme Court has recognized, for example, that its judicial competence and role does not extend to the resolution of political questions.<sup>49</sup> The Court has also disclaimed a competence to determine what federal expenditures serve the general welfare.<sup>50</sup> State courts frequently observe that the resolution of particularly important public policy issues is more properly a task for the legislative branch.<sup>51</sup>

It was noted above that the RPP rule is probably better crafted than the JFPP rule because it takes account of the fact-finder's limited competence. An even more specific rule than RPP, which would reduce the fact-finder's role to that of determining the existence of only "underlying" or "operative" facts, would be that "if the light were red when the defendant entered the intersection, the defendant should be held responsible for the plaintiff's injuries." Conceivably, courts could construct such detailed rules of law or "rules of thumb" to deal with a wide range of recurring issues in personal injury actions.<sup>52</sup> The courts have generally eschewed these narrow rules of law, however, in part because of a concern about impinging upon the jury's function and in part because of a recognition that judges — the rule makers — lack the practical competence to anticipate every circumstance in formulating rules of law. Sometimes a general standard applied by the fact-finder is to be preferred to a series of ad hoc judgments by the rule-maker. The dispute between Holmes and Cardozo over the "stop, look, and listen" rule is a good example of the tension between very specific rules of thumb and more general standards of care.<sup>53</sup>

As a generality, judges and juries have certain characteristics and operate under certain limitations that render them unsuitable for the resolution of certain

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49. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that evaluation of the training of the Ohio National Guard under the Fourteenth Amendment was a political question because, in part, "it is difficult to conceive of an area of governmental activity in which the courts have less competence").

50. *Buckley v. Valeo*, 424 U.S. 1 (1976).

51. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988) (denying existence of cause of action for wrongful termination in part because, given the complexities and public policy consequences of creating such a cause of action, "the problem is one for the Legislature").

52. Epstein, *supra* note 18, 48 OHIO ST. L.J. at 470.

53. Compare *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (Cardozo, J.) with *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927) (Holmes, J.).

types of issues (either because the judge cannot formulate an appropriate rule or because the jury is unable fairly to resolve disputes under whatever rule is adopted). The characteristics and limitations are well known and need only be touched upon here.<sup>54</sup>

First, judges, and especially appellate judges, are generalists. The system as presently constituted — where the appellate courts are responsible for overseeing the development and application of all aspects of the law within a state and where assignments of cases to trial courts is random — could not function any other way. It is, indeed, a source of pride to both trial lawyers and trial judges that, notwithstanding their lack of expertise on any particular subject (other than the process of adjudication), they are competent to try and decide virtually any case on the docket.<sup>55</sup>

Second, although the judiciary's independence from the legislative and executive branches and insulation from the electorate is a source of strength when it comes to resolving individual cases,<sup>56</sup> those same characteristics make the judiciary the least likely branch of government to represent the views of the people. In a representative system such as ours, public policy is shaped in large part by what the people demand. The distance between the people and the judiciary suggests that judges should exercise great caution in attempting to declare public policy absent direction from the other branches of government.

Third, courts generally do not set their own agendas. Cases are initiated by others, and when a case is properly before a court, its constitutional obligation is to proceed to judgment. Intermediate courts of appeal likewise have no choice but to hear appeals when they are brought. The highest courts in many states and the Supreme Court of the United States exercise more control over their dockets and their agenda by granting or denying writs of certiorari. But even here, the choice for these courts is only to hear or not to hear a case brought before the judiciary by a third person. The courts have no power to initiate their own processes.

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54. See generally HOROWITZ, *supra* note 19, at 22-67.

55. It might be more precise — but less flattering — to say that a trial lawyer and trial judge are just as competent to try and decide any particular case on the docket as they are to try and decide any other case on the docket.

56. Even where judges are elected, there is generally a tradition when running for a judgeship of largely avoiding politics. A judiciary that violates this tradition is subject to professional and public scorn. There are of course notable exceptions to the general proposition that members of the judiciary are insulated from the voting public. One of the more dramatic examples in recent times is the remaking of the Supreme Court of California in 1986 where people refused to reconfirm three justices largely because of the public perception that these justices were an obstacle to enforcement of the death penalty. See Anthony Paonita, *Voters in Three States Reject Chief Justices*, NAT'L L.J., Nov. 17, 1986, at 3.

Fourth, juries are supposed to be the quintessential *tabula rasa*, people chosen largely because of what they *do not* know about the subject matter of the case. In practice, juries are not a blank slate, of course; they bring with themselves a certain amount of common sense. Unfortunately, that common sense may well be grounded in unfounded myths, biases, rumors or other irrelevancies. As everyone knows, the deliberations of the jury are generally kept inviolate. One reason for this rule is to protect the jury from outside influences. Another reason – and perhaps a more important reason – is that the deliberations of a jury are very likely to be infused with errors and misunderstandings.<sup>57</sup> Our judicial system simply could not operate if jury deliberations were subject to analysis and appellate attack.

Fifth, the judge and jury have no independent power to educate themselves or to employ the services of an expert accountable only to the judge and jury. Rather, they must depend upon the litigants to provide the necessary education. The result is a battle of expert witnesses with the spoils going to the side whose expert gives the most convincing story. The expert witness's credibility – rather than the truth or falsity of the expert's conclusions – may be the most critical factor. The battle of experts is most pernicious in those cases where science has not yet caught up with litigation.

Sixth, because the adjudicative process is built upon a foundation of Aristotelian logic, adjudication does not easily lend itself to other forms of dispute resolution or problem solving. The balancing of interests that may be achieved through negotiation and compromise (which lies at the very core of the legislative process) is difficult to attain in a judicial proceeding when the ultimate result must be either “plaintiff wins” or “plaintiff loses.” Negotiation and compromise are made even more difficult by the judiciary's reluctance to draw the sort of arbitrary lines that often are the result of negotiation and compromise.

These characteristics combine to produce an institution whose main expertise is in resolving relatively simple, individual disputes between litigants on the basis of pre-existing public policy as expressed in the common or positive law. The judiciary gets close to (or crosses over) the edge of its competence when the resolution of a dispute involves setting far-reaching public policies, resolving complex technical or scientific disputes, or engaging in a balancing of social interests with an eye to compromise.

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57. A judge's deliberative process, if opened up for review, may be just as likely to contain false starts and errors. The difference is that a judge must ordinarily explain his or her ruling publicly and, often, in a written opinion. The process of producing that public explanation helps focus a judge's attention away from irrelevancies and towards the real issues in the case.

### III. STRICT PRODUCTS LIABILITY: AN EXAMPLE OF HOW TORT LAW WAS EXPANDED BEYOND THE JUDICIAL COMPETENCE

The ordinary slip-and-fall personal injury case or automobile accident is the perfect sort of dispute for resolution by the judiciary. These cases arise out of everyday activities and conduct well within the understanding and experience of both judge and jury. The cases usually do not involve highly complex scientific disputes.<sup>58</sup> The rules of law which govern resolution of such cases are well established in both common law and statutes. Finally, because the number of litigants is small, whatever decision is reached in the individual case will have virtually no public policy implications.

The law of strict products liability and the ordinary strict products liability case do not share these characteristics and do not present the perfect sort of dispute for resolution by the judiciary. In the first place, moving from negligence and/or warranty to strict liability in products cases (at least to the extent that strict liability was intended to be something different from negligence or warranty) involved the adoption by the judiciary of untested and largely unstated public policies. Second, because the resolution of an individual case could effectively doom entire product lines (as well as companies), the resolution of many products cases depends upon a balancing of social interests far beyond the narrow interests of the particular litigants before the court. Third, many cases have involved complex scientific issues about which there is little agreement even in the scientific community. Fourth, because the nominal focus is upon the safety of the product (rather than upon the reasonableness of the defendant's conduct), the jury is not permitted to consider the one thing about which it may be an expert: human conduct and the reasonableness of human conduct. Instead, it must attempt to decide how safe the product is and should be (which is a little like asking how high is up).

It is precisely because judges and juries lack the competence to administer a strict liability system with respect to all products that strict products liability appears to be on its death-bed, or at least quite ill.<sup>59</sup> An empirical study by

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58. This is not to say that accident reconstruction is not a complex subject. But the laws of physics at the macroscopic level are well understood and agreed upon; there is no *scientific* dispute. The dispute in accident reconstructions revolves not around the science, but around the *factual* assumptions which are made in attempting to reconstruct the accident.

59. "Strict products liability" is only one species of "products liability," and the failure of strict products liability in no way reflects upon the strength of products liability as an independent field in the law of torts. No one should doubt that special considerations come into play when a consumer is injured in the normal use of a mass-produced product. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). The ultimate result of the strict products liability movement may be nothing more than to shift the burden of proof in a negligence action from plaintiff to defendant, an important, but still not earth shattering, development. See Robert L.



Professors Eisenberg and Henderson dramatically demonstrates that courts have been retreating -- albeit somewhat quietly -- in products actions throughout the 1980s.<sup>60</sup>

From a purely theoretic standpoint, imposing strict liability upon manufacturers for injuries resulting from their products has never received an internally consistent and logically satisfactory justification. The four most often cited reasons for strict products liability -- the difficulty of proving negligence, a public policy favoring the production of safer products, the protection of consumer expectations, and a public policy favoring risk-spreading,<sup>61</sup> are both underinclusive (because they do not necessarily call for strict liability as opposed to negligence or breach of warranty) and overinclusive (because they would support absolute, rather than merely strict, liability).<sup>62</sup>

From a practical standpoint, the cases around the country are hopelessly in conflict concerning even the most basic issues, and within many jurisdictions, we have witnessed such rapid advances and retreats that both bar and bench act at their peril.<sup>63</sup> Moreover, the court-made expansions have at least partly

Rabin, *Indeterminate Risk and Tort Reform: Comment on Calabresi and Klevorick*, 14 J. LEGAL STUD. 633, 634-36 (1985).

60. James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

61. The original (or at least most often cited) statement of these reasons appears in William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966). See also William C. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 811-13 (1983); W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34-35 (1973); W. Page Keeton, *Products Liability -- Inadequacy of Information*, 48 TEX. L. REV. 398, 399 (1970); W. Page Keeton, *Products Liability -- Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966); John Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965). See also RICHARD EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 40 (1980).

62. J. Clark Kelso, *Brown v. Abbott Laboratories and Strict Products Liability*, 20 PAC. L.J. 1, 5-10 (1988).

63. Some might object that the law of products liability is relatively well settled in each jurisdiction. It is, for example, a relatively trivial matter to restate the law of products liability in California. That should come as no surprise, however, since after thirty years, most of the major issues in products liability have been before the Supreme Court of California at least once.

The fact that the law in a jurisdiction can be easily stated at any particular moment in time is not, however, the test of a well-functioning judicial system. The proper question -- and the minimum requirement -- is whether the substantive law remains relatively stable over (at the very least) relatively short periods of time (e.g., ten to fifteen years). This is where products liability has failed. The Supreme Court of California, for example, has changed the law in products cases every ten or fifteen years. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (adopting strict products liability); *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972) (rejecting "unreasonably dangerous" requirement); *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978) (defining "defective"); *Brown v. Superior Court (Abbott Laboratories)*, 751 P.2d 470 (Cal. 1988) (rejecting strict liability for prescription drug manufacturers); *Anderson v. Owens-Corning Fiberglas*,

contributed to a perceived crisis and legislative response which undermines public confidence in the judiciary and creates its own social problems.

There is nothing inherently difficult about the law of tortious responsibility that makes such confusion necessary. For example, the reasonably prudent person standard commands near universal adherence.<sup>64</sup> The elements of the intentional torts have changed little over hundreds of years, and most jurisdictions use the same vocabulary to describe the elements of these torts. Defamation and misrepresentation have also remained relatively constant, with the only seriously debated questions relating to constitutional concerns, in the case of defamation, and limited duty concerns, in the case of misrepresentation. Even more modern torts, such as interference with prospective business advantage and invasion of privacy, have received a relatively consistent treatment around the country, with only relatively minor variations and nuances from jurisdiction to jurisdiction.

Strict products liability has been another story altogether. Although there appears to be some general agreement that there are three categories of defects--manufacturing, design, and failure to warn -- that is where the agreement ends. Indeed, some jurisdictions do not even recognize three types of defect and treat a failure to warn as simply one type of design defect, while other jurisdictions treat failure to warn as a separate and distinct theory of recovery. Most jurisdictions agree with the Restatement that a defect must be unreasonably dangerous in order for strict liability to apply.<sup>65</sup> But some major jurisdictions, such as California, have rejected the unreasonably dangerous requirement.<sup>66</sup> The burden of proof in many jurisdictions is on the plaintiff,<sup>67</sup> but in other jurisdictions it is put on the defendant.<sup>68</sup> Some jurisdictions impute knowledge of the dangerous propensity of the article as of the time of manufacture and distribution; others impute knowledge as of the time of trial.

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810 P.2d 549 (Cal. 1991) (partially rejecting strict liability in failure to warn cases).

64. There remains only a residual of cases in which the standard is not used, those being the cases where the objective standard of care is rejected in favor of a standard that takes account of the limited ability of particular persons in particular circumstances to satisfy the objective standard of care. See Warren F. Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L. REV. 241 (1989).

65. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).

66. *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972).

67. See, e.g., *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 523 N.E.2d 489, 493 (Ohio 1988).

68. *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984). See Robert L. Rabin, *Indeterminate Risk and Tort Reform: Comment on Calabresi and Klevorick*, 14 J. LEGAL STUD. 633, 634-36 (1985).

There is also no agreement as to the importance of state of the art. Some jurisdictions treat it as an absolute defense; others treat it as a factor that a jury is somehow supposed to weigh in the balance (although what weight should be given to it is never made particularly clear); some jurisdictions ignore state of the art altogether. In New Jersey, state of the art is apparently irrelevant in asbestos cases but is a factor to consider in all other cases.<sup>69</sup>

There have been questions about whether failure to warn should be treated as a strict liability concept or a negligence concept. Although the commentators have almost uniformly argued that failure to warn should be treated more like negligence than strict liability, some courts have held that failure to warn should be treated in a strict liability fashion, and manufacturers can thus be held liable for failure to warn about a danger that they were unaware of, had no reason to be aware of, and even could not, by the exercise of all available scientific judgment at the time, have been aware of.<sup>70</sup>

In our common law system, with its more than fifty jurisdictions, we have come to expect a certain amount of conflict between jurisdictions. The conflicts we see in the area of strict products liability, however, are an order of magnitude greater than what we ordinarily see. The conflicts relate to the most fundamental questions, and the conflicts have created a crazy-quilt patchwork in which manufacturers are held to widely divergent standards from state to state. The state of the law is so pitiful that proposals at the federal level to make the law of product liability uniform must be taken seriously despite the fact that such reform would federalize what has traditionally been the province of state law -- personal injury.

What went wrong? Why does the law of strict products liability remain so tangled after so much thought has been given to the subject by so many thoughtful scholars, courts and commentators? The confusion cannot be from a want of intelligence or attention. Why haven't the courts and commentators settled upon something -- anything? I propose that strict products liability has not worked because holding a products manufacturer strictly liable for product related harms involves precisely the sort of delicate balancing of public policies and resolution of complex scientific disputes that judges and juries are largely incompetent to undertake. In a phrase, strict products liability has failed because *courts* are not competent to administer such a system in the context of ad hoc, case-by-case adjudication.

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69. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 546 (N.J. 1982) (state-of-the-art irrelevant in asbestos case); *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984) (state-of-the-art relevant in failure to warn cases other than asbestos).

70. See generally *Feldman*, 479 A.2d 374.

In the two sections which follow, I shall focus upon only two aspects of the problem: (A) the original adoption of strict liability in the context of product-related harms; and (B) the continuing debate over whether strict products liability is or should be substantially different from negligence.

### *A. Strict Products Liability: Its Illegitimate Conception*

The historical development of strict liability in the context of products was vastly different from the development of traditional strict liability. Probably the most obvious difference is that traditional strict liability had been applied to particular, recurring fact patterns with which the courts had great experience, and the courts were careful to make their judgments narrowly tailored to the facts before them. Courts developed over the years special rules for dealing with injuries caused by specific categories of animals.<sup>71</sup> Ultrahazardous or abnormally dangerous activities generated their own distinct line of equally specific cases.<sup>72</sup> We are fairly certain, for example, that blasting operations conducted in an urban or residential area are subject to a strict liability rule.<sup>73</sup> We are also fairly certain that an uncontrolled blowout during drilling for an oil well is subject to strict liability.<sup>74</sup>

These cases and rules reflected an understanding developed over time by the courts that these particular activities could not be made safe by the exercise of reasonable care and were substantially certain to cause harm.<sup>75</sup> Strict liability worked in these cases largely because the courts were careful to keep their holdings narrow. No fundamental public policies needed to be changed to determine that blasting in town was ultrahazardous. No delicate balancing of interests was involved in the determination that the owner of a leopard kept the animal at his own risk.<sup>76</sup> Courts stayed well within the bounds of their own competence.

Strict liability was applied to mass produced products at an entirely different level of generality. Instead of applying strict liability to particular products, such as explosives, the courts and commentators simply lumped all products together under the strict liability tent and then carved out a few narrow

71. RESTATEMENT (SECOND) OF TORTS §§ 504-518 (1965) (Liability of Possessors and Harbors of Animals) (1965).

72. RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1965) (Abnormally Dangerous Activities).

73. See, e.g., *Colton v. Onderdonk*, 10 P. 395 (Cal. 1886); *Balding v. Stutsman*, 54 Cal. Rptr. 717 (Ct. App. 1966).

74. *Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928).

75. The complete list of factors can be found in RESTATEMENT (SECOND) OF TORTS § 520 (1965).

76. *Opelt v. Al G. Barnes Co.*, 183 P. 241 (Cal. Ct. App. 1919).

exceptions for special interest groups (notably, drugs, tobacco, and alcohol). Unfortunately, the implicit and explicit fact finding that preceded the adoption of traditional strict liability (e.g., for explosives) did not occur in any systematic way when it came to applying strict liability to all products. No one claimed (because no one could plausibly claim) that *all* products were unsafe, unreasonably dangerous, or posed substantial risks of harm to society. Yet the adoption of strict liability for all product-related harms would seem to require such a finding, at least under the approach followed in the traditional strict liability cases.<sup>77</sup>

Absent such a factual finding, a general shift away from negligence and towards strict liability would appear to require the adoption by the judiciary of a fundamentally different and new set of public policies than had previously been applied to such cases. One would have expected to see the courts carefully articulating those policies before applying strict liability to product-related harms. One would have expected to see the courts considering the harm to society which could be caused by applying strict liability to product-related harms. One would have expected some caution.

In fact, courts did not become convinced that strict liability should be applied to products on the basis of empirical fact-finding or by a careful consideration of relevant public policies. Instead, the courts followed the path laid out for them by a few well-respected commentators, particularly Dean William Prosser. That path was forged not by reliance upon empirical data, but by reliance upon rhetoric and reasoning, with an emphasis on the rhetoric. In particular, Dean Prosser convinced the American Law Institute and the courts that strict liability was already being applied by the courts through the use of warranty principles and certain negligence principles (such as *res ipsa loquitur*), and that since we already were doing strict liability under a different name, we should simply recognize what already was happening in the courts by adopting strict liability for products generally.<sup>78</sup> When the California Supreme Court

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77. Prosser did not claim that all products were unsafe, and he recognized that strict liability could not be applied to all product-related harms. The slightly narrower proposition that Prosser offered to the American Law Institute was that *defective* products were unreasonably dangerous and posed a substantial risk to society. Although this statement may appear to have substantive content, in fact, there has never been an adequate definition of "defective" that does not make the statement tautologically true. Reed Dickerson made this exact point when section 402A was being considered by the American Law Institute, but his proposal to delete the word "defective" from the section was defeated. 38 A.L.I. Proc. 87, 89 (1962). For an analysis of the drafting history of Section 402A of the Restatement (Second) of Torts, see Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 860-72 (1983); J. Clark Kelso, *Brown v. Abbott Labs. and Strict Products Liability*, 20 PAC. L.J. 1, 13-15 (1988).

78. See William Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

issued its decision in *Greenman v. Yuba Power Prods., Inc.*,<sup>79</sup> which contained as an alternative holding the adoption of strict products liability, Prosser had all the authority he needed to ensure the adoption of Section 402A.

Strict products liability thus came into existence notwithstanding the absence of either (1) a relevant factual finding that all products were unsafe or (2) a careful consideration and explication of public policies which, if adopted, would support the application of strict liability for all product-related harms. It was conceived neither in the crucible of experience nor in the halls of representative government. The result has been a doctrine grounded neither in factual reality nor in firmly established public policies. Bereft of such moorings, it has drifted to and fro for thirty years.

That the critical underpinnings for strict products liability were missing is not very surprising. Judges have neither the experience nor the competence to make the determination that all (or even most) products are unsafe. After all, the courts never have all products before them; they have only one product at a time before them. And even when all products cases are lumped together, the courts have before them only a small portion of the total number of products manufactured and sold in this country. Moreover, since the only products which appear in court are products which some plaintiff thinks can be linked to an injury, the court's experience with products and product-related harms is likely to be biased in the direction of a finding that many products are dangerous.<sup>80</sup> In these circumstances, courts are in a poor position to determine the overall dangerousness of products. This sort of broad-based empirical question should have been left to the legislative branch.

The necessary public policy declarations -- which would relate to such things as a policy favoring safer products, risk-spreading, and internalization of costs -- are likewise beyond the competence of the judiciary. Everyone can agree that, in the abstract, we would like to have safer products, we would like to see risks spread most efficiently throughout the economy, and we would like to see an appropriate internalization of costs so that the price of goods reflects the true cost of their production to society. The problem is not with the abstract statement of these goals; the problem is that the pursuit of each of these goals

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79. 377 P.2d 897 (Cal. 1963).

80. The non-representativeness of litigated cases (and especially appellate decisions) was colorfully expressed by Karl Llewellyn when he argued that litigated cases bear the same relation to reality "as does homicidal mania or sleeping sickness, to our normal life." KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 58 (1960). For a more recent debate on whether litigated cases are representative, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Donald Whittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Whittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985).

may create conflicts with other equally important or more important social objectives. For example, having safer products is a worthy goal, but everyone agrees that there must come a stopping point somewhere. No product can be made absolutely safe, and a good argument can be made that requiring unreasonably extraordinary efforts to make products safe is counterproductive.

Likewise, risk-spreading and internalization of costs may be worthy ideals, but they come at a significant cost to American industry and to the consumer. The far -- reaching consequences that may result from the pursuit of these goals strongly suggests that their pursuit and adoption is a matter for legislative, rather than judicial, action. As Priest points out, this is especially so in the context of an international market where United States' companies must compete on price (as well as quality). Burdening United States' companies with internalization of costs when companies in the rest of the world are not required to shoulder that burden undermines our international competitiveness. Courts are in an exceptionally poor position to balance incremental safety to the consumer against the health of our international competitiveness.

When all is said and done, the adoption by the courts of strict liability for product-related harms was an abuse of judicial power. As will be seen in the next section, the original abuse has haunted the courts for thirty years as they have struggled to make sense out of their creation.

*B. What, If Anything, Makes Strict Products Liability So Strict?*

Although courts generally believed they were supposed to be utilizing principles of strict liability to resolve cases involving product-related harms (because that is what Section 402A and Prosser said), in the absence of the necessary fact-findings or declaration of public policies in support of that position, we have seen in the development of strict products liability an on-again/off-again commitment to strict liability. From the very beginning, the problem has been to give substantive content to the idea that manufacturers would be held strictly liable for physical injuries which their products have caused.

Section 402A did not resolve this most fundamental problem. There was liability under 402A only if the product was "in a defective condition unreasonably dangerous to the user or consumer."<sup>81</sup> The inclusion of the phrase "unreasonably dangerous" made Section 402A sound a lot like negligence. Was 402A saying nothing more than that a manufacturer would be held strictly liable if it had been negligent? Surely not, but what then to make

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81. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

of the black-letter?

The comments to 402A only made matters worse. "Defective condition" was defined in comment g to mean that the product was "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."<sup>82</sup> Comment i then defines "unreasonably dangerous" to mean "dangerous to an extent beyond that which would be contemplated by the ordinary consumer."<sup>83</sup> The definitions are hopelessly circular, and as defined, "defective condition" and "unreasonably dangerous" apparently meant the same thing.<sup>84</sup>

The Supreme Court of California recognized that section 402A as drafted did not clearly provide for strict liability. In *Cronin v. J.B.E. Olson Corp.*,<sup>85</sup> the court considered whether the jury instruction in a products liability action should include the requirement that the product be "unreasonably dangerous." In explaining 402A, Prosser contended that the "unreasonably dangerous" requirement was intended only to prevent products liability from becoming absolute liability; it was not intended to make products liability negligence-based.<sup>86</sup>

The Supreme Court of California would have none of this, however. It complained that "[t]he result of the limitation . . . has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence."<sup>87</sup> In order to distinguish strict products liability from negligence, the court held that plaintiffs in California would henceforth be relieved of the "unreasonably dangerous" requirement; it would be sufficient to prove that the product was defective.<sup>88</sup>

Deep-sixing the phrase "unreasonably dangerous" from the black-letter did not solve the problem, however, because the phrase "defective condition" still needed to be defined (and, as noted above, comment g to 402A included the "unreasonably dangerous" requirement in its definition of "defective condition"). Scholars tried to fill the gap by providing definitions of "defective" that would distinguish strict products liability from negligence. The proposed

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82. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

83. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

84. Reed Dickerson was right. See *supra* note 77.

85. 501 P.2d 1153 (Cal. 1972).

86. William Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

87. *Cronin*, 501 P.2d at 1161-62.

88. *Id.* at 1163.



definitions were, at first glance, little more than a rehash of the same risk / utility test used in negligence actions. Wade proposed seven factors which the trier of fact could consider.<sup>89</sup> Keeton proposed more simply that "[a] product is defective if it is unreasonably dangerous as marketed,"<sup>90</sup> a test which explicitly incorporates a risk / utility analysis. Notwithstanding *Cronin* and the similarity between the proposed definitions and negligence, the Supreme Court of California embraced the risk / utility test in *Barker v. Lull Eng'g Co.*<sup>91</sup>

The problem after *Barker* was that strict products liability did not look very much like strict liability; it looked like negligence. Keeton, among others, proposed that the products risk / utility test be distinguished from negligence by focusing in the products case upon the state of knowledge *at the time of trial* rather than at the time of sale of the product (which would be the appropriate time under a negligence analysis).<sup>92</sup> A corollary of Keeton's approach is that state-of-the-art evidence would be irrelevant and inadmissible. This really was strict liability, and Keeton is to be commended for at least taking seriously the notion that strict products liability was supposed to be strict liability.

89. These factors include:

(1) The usefulness and desirability of the product — its utility to the user and to the public as a whole. (2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe. (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions. (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

John Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

90. W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973)

91. 573 P.2d 443 (Cal. 1978). The court in *Barker* recognized that the definition of "defective" made relevant the same considerations "typically presented in a negligent decision case," and to make strict products liability different from negligence, the court held that "once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective." *Barker*, 573 P.2d at 455. Under this approach, a design defect case in California is really nothing more than a negligence case where the defendant has the burden of proof.

92. Keeton, *supra* note 90, at 38 (a product "is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed") (emphasis in original); W. Page Keeton, *Products Liability — Inadequacy of Information*, 48 TEX. L. REV. 398, 407-08 (1970). See generally John Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 761-64 (1983) (reviewing Keeton's position).

Some courts followed Keeton's advice to the letter. Thus, we have the now infamous decision in *Beshada v. Johns-Manville Prods. Corp.*,<sup>93</sup> where the court rejected state-of-the-art as a permissible defense in a failure to warn / asbestos case.<sup>94</sup> The *Beshada* court did nothing more than live up to the strict liability label, but its decision triggered a storm of protest,<sup>95</sup> and the New Jersey Supreme Court beat a hasty retreat in *Feldman v. Lederle Labs.*,<sup>96</sup> where it limited *Beshada* to its facts and returned to a negligence standard in failure to warn cases.<sup>97</sup> When scholars and the court came face-to-face with strict liability for product related harms — true strict liability — they did not like what they saw.

In two relatively recent decisions, the California Supreme Court has struggled with the even more fundamental question of whether strict liability should apply at all to certain products and certain types of defects. In *Brown v. Superior Court (Abbott Labs.)*,<sup>98</sup> the court considered whether strict liability should apply in a design defect / failure to warn case involving the prescription drug DES. In rejecting strict liability in favor of negligence, the court (per Justice Stanley Mosk) explained that the social importance attached to the development and marketing of drugs outweighed the risk of harm inherent in the product. Specifically, the court held that "the broader public interest in the availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use."<sup>99</sup> In other words, when the court finally faced the consequence of imposing strict liability upon the drug industry, it realized that strict liability would cause more harm than good.

Mosk was well aware when he drafted the *Brown* opinion that its analysis

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93. 447 A.2d 539, 546 (N.J. 1982).

94. The court relied extensively in its analysis upon Keeton's 1970 article in the *Texas Law Review*, Keeton, *supra* note 92.

95. See, e.g., Joseph A. Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 877-82 (1983); Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901-05 (1983); John Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 754-56 (1983); William R. Murray, Jr. Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983); Robert D. Casale Comment, *Beshada v. Johns Manville Products Corp.: Adding Uncertainty to Injury*, 35 RUTGERS L. REV. 982, 1008-15 (1983); Robert D. Towey, Note, *Products Liability — Strict Liability in Tort — State-of-the-Art Defense Inapplicable in Design Defect Cases*, 13 SETON HALL L. REV. 625 (1983).

96. 479 A.2d 374 (N.J. 1984).

97. *Feldman*, 479 A.2d at 388. Just as the California Supreme Court did in *Barker*, the New Jersey Supreme Court in *Feldman* put the burden of proof on the defendant. *Id.*

98. 751 P.2d 470 (Cal. 1988).

99. *Id.* at 478-79.

could rather easily be applied across the board to all products. After all, is there not an important public interest in the availability of most products at an affordable price? Attempting to head off this line of argument, Mosk proposed in *Brown* two reasons for limiting the case to drugs: (a) prescription drugs "may be necessary to alleviate pain and suffering or to sustain life," and (b) "harm to some users from prescription drugs is unavoidable."<sup>100</sup> Mosk hoped that reason (a) would distinguish prescription drugs from products such as construction machinery, lawnmowers, and perfumes, products which only are "used to make work easier or to provide pleasure."<sup>101</sup> Mosk hoped that reason (b) would distinguish prescription drugs from other life saving or pain avoiding devices, such as wheelchairs.<sup>102</sup>

I have previously argued that Mosk's attempt to limit *Brown's* holding to prescription drugs was likely to fail.<sup>103</sup> In short, many products other than drugs are just as important to society, and harm to users from all products is unavoidable to a certain extent. At the very least, because the court's social fact-finding powers are so limited, the court has little *empirical* basis for distinguishing products on this basis. Moreover, Mosk in *Brown* focused primarily upon the *direct* benefits and risks of prescription drugs (i.e., they often save lives but sometimes harm the patient), a focus that ignores other important indirect consequences which result from applying strict liability (such as impairing the competitiveness of American industry, a matter of important public concern).

In *Anderson v. Owens-Corning Fiberglas*,<sup>104</sup> the court extended *Brown's* reasoning to a failure to warn/asbestos case, over Mosk's lone dissent.<sup>105</sup> The majority explained that, although *Brown's* "holding applies only to prescription drugs, . . . [its] logic and common sense are not limited to drugs."<sup>106</sup> This recognition holds out the promise that the court will begin to consider more completely the consequences and public policy implications of holding manufacturers strictly liable for product related harms, or, at least, will begin to realize that it lacks the competence to make the far-reaching determinations necessary to support strict products liability. Significantly, footnote fourteen of the court's opinion appears to deliver a death-blow to the risk-spreading rationale of strict products liability, one of the critical underpinnings of

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100. *Id.* at 478.

101. *Id.*

102. *Id.*

103. J. Clark Kelso, *Brown v. Abbott Laboratories and Strict Products Liability*, 20 PAC. L.J. 1, 25-28 (1988).

104. 810 P.2d 549 (Cal. 1991).

105. *Id.* at 561 (Mosk, J., dissenting).

106. *Id.* at 556.

enterprise liability.<sup>107</sup>

Yet the *Anderson* court did not follow *Brown* entirely. Unable to accept the full consequences of *Brown*'s logic, the majority attempted to limit its holding to the failure to warn context (leaving design defect cases untouched). According to the majority, "[t]he 'warning defect' relates to a failure extraneous to the product itself. Thus, while a manufacturing or design defect *can be* evaluated without reference to the conduct of the manufacturer . . . the giving of a warning cannot. The latter necessarily requires the communicating of something to someone. How can one warn of something that is unknowable?"<sup>108</sup>

This reasoning is unconvincing. Warnings may be practically and conceptually separable from the product, but the warnings and packaging which accompany the product remain part of the product, and *Beshada* shows that it is a simple matter to consider the adequacy of a warning without considering the manufacturer's conduct. Moreover, the court's rhetorical question -- "how can one warn of something that is unknowable" -- can just as easily be asked in design defect cases: "How can one design a product to be safer with respect to unknowable risks?"

The court was apparently not convinced of its own argument, because it then explained that "despite its roots in negligence, failure to warn in strict liability differs markedly from failure to warn in the negligence context."<sup>109</sup> In particular, "the fact that a manufacturer acted as a reasonably prudent manufacturer in deciding not to warn, while perhaps absolving the manufacturer of liability under the negligence theory, will not preclude liability under strict liability principles if the trier of fact concludes that, based on the information scientifically available to the manufacturer, the manufacturer's failure to warn rendered the product unsafe to its users."<sup>110</sup>

This attempt to distinguish strict liability failure to warn from negligence failure to warn is reminiscent of the California Supreme Court's decisions in *Cronin* and *Barker*, where the court abandoned "unreasonably dangerous" in favor of an undefined term, "defective," and then was forced to define

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107. The footnote reads in part as follows: "The suggestion that losses arising from unknowable risks and hazards should be spread among all users to the product, as are losses from predictable injuries or negligent conduct, is generally regarded as not feasible. Not the least of the problems is insurability." *Id.* at 559 n.14.

108. *Id.* at 558.

109. *Anderson v. Owens-Corning Fiberglas*, 810 P.2d 549, 558 (Cal. 1991).

110. *Id.* at 559.

"defective" in a way that reintroduced the concept of "unreasonable danger."<sup>111</sup> Like the *Cronin* court, the *Anderson* court was unwilling simply to adopt negligence as the standard for failure to warn (which is what comment i to 402A rather clearly does), and substituted in its place a vague and very likely unworkable standard: whether the failure to warn of a scientifically knowable risk renders the product unsafe to its users.

Just as *Cronin* left us wondering what it means to be "defective," *Anderson* leaves us wondering what it means to be "scientifically knowable?" Must the specific risk actually be known at the time of sale, or is it enough that, given the state of scientific knowledge, someone *might* have discovered the risk? If the latter is the test, how will a jury determine what was "scientifically knowable?" Will courts permit so-called experts to testify as to what scientists might have discovered twenty years ago? And what does it mean to be "unsafe?" Is an "unsafe" product the same as a "defective" product (which is the same as an "unreasonably dangerous" product)? Or does the mere fact that the product caused harm mean that it is "unsafe?"

It is unfortunate that the court did not follow *Brown's* lead and declare that failure to warn cases would henceforth be decided under negligence principles. This would have clarified the law and set the groundwork for the next logical step: the extension of *Brown* to all design defect cases and a return to negligence/warranty. *Anderson* shows that the court still has one foot firmly planted on the wrong side of the fence. The court still considers itself and the jury competent to administer a strict products liability system notwithstanding the absence of either factual support or clearly articulated and agreed upon public policies.

#### IV. CONCLUSION

The Judicial Branch must guard against demanding too much from judges, juries and the judicial process. "Courts of Justice do not pretend to furnish cures for all the miseries of human life."<sup>112</sup> Nor should they. Courts must especially guard against the temptation to use the adjudicatory process -- with its focus upon the individual plaintiff and individual defendant -- as a tool to achieve substantial social change. The adjudicatory process is a blunt tool for implementing such changes, and in a representative democracy, social change should, at least in the first instance, be the prerogative of the Legislative Branch.

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111. See *supra* notes 84-91 and accompanying text.

112. *Evans v. Evans*, Consistory Court of London (1790).

When the courts embarked upon the strict products liability adventure some thirty years ago, they threw caution to the wind. Untested and debatable public policies (such as risk spreading) were given play by the courts, and judges and juries arrogated to themselves the power to make in individual cases decisions implicating far-reaching public policies. The recent trend of the cases is decidedly away from strict liability and towards negligence. What is needed now is for some courageous jurisdiction to take the next step and declare that the strict products liability experiment has been a failure and is at an end.

