

Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (tied for fifteenth).

## I

Commentary by Guido Calabresi,  
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Note Editor, *The Yale Law Journal*, 1957-58.

*[T]he failure to have all the relevant tests described in one place, at the time when product liability law was exploding, has probably meant that judicial language in the area will never achieve the kind of lucidity one might have wished for and expected.*

*Guido Calabresi*

When Jon Hirschoff and I set out to write *Toward A Test for Strict Liability in Torts*, we had, I think, several objectives in mind. The first was to point out the fundamental difference between cost-benefit based tests for liability (such as the Learned Hand Fault test) and tests (such as the one we called the Strict Liability test) in which the decisionmaker eschewed cost-benefit judgments. Second, we wished to point out that the recent move to strict liability in torts could not be explained predominantly on wealth distribution or spreading grounds, as was commonly stated, but was likely to stem from dissatisfaction with the meager accomplishments of fault type tests in reducing the sum of accident and safety costs.

Third, we wanted to emphasize the importance of practical over theoretical issues in determining which approach to tort liability ought to predominate. In particular, we wanted to explore the effect that (a) the level of generality at which a liability rule worked best, (b) the existence of insurance, and (c) the presence of third party victims, would have on whether fault or strict liability tests were likely to be most effective in achieving optimal degrees of safety. Fourth, we hoped to give courts some guidance in product liability cases by helping them see how strict product liability fit with older examples of non-fault liability (such as extra hazardous activity liability and assumption of risk), and how they might approach the question of whom to hold strictly liable. Finally, we wished to indicate the relationships and tensions between those goals which focused on yielding an optimal degree of safety and other goals, like those concerned with distribution of wealth.

While I believe the article succeeded very well in much that it set out to do, several changes would have made it stronger. First, the article took for granted that readers and courts would understand that strict liability, as we used it, did not mean *injurer* liability, but meant a way of determining when injurers

and when victims should bear losses regardless of fault. Most of the criticisms of the piece, including Richard Posner's,<sup>146</sup> center on this simple (and, if I may say so, simplistic) misreading of the article. I still believe that our meaning should have been obvious. How else could one explain the extended discussion of assumption of risk (which placed losses on faultless victims) as a paradigm, albeit an often misapplied one, of a strict liability rule? How else could one deal with the then predominant legislative effort toward what was universally termed strict liability: first party automobile liability laws, which assigned losses primarily to the injured party?

Nevertheless, many critics failed to see the point, and therefore necessarily failed to see the more subtle, and crucially important point, that strict liability tests, no less than fault tests, could, and often should, divide losses among injurers and victims in order to optimize safety. This point was explicitly made in various places (e.g., p. 1068, where the limited liability of a steel mill for the hand of a worker who is also a great violinist is discussed). But, like the fact that strict liability could mean victim liability, it should have been emphasized more.

Second, the article missed the fact that courts, especially in product liability cases, were sometimes using a *non-fault* test which *was* based on a cost-benefit analysis and hence differed both from the true fault tests (Learned Hand and reverse Learned Hand) and what we termed strict liability tests. The definition of this *ex-post*, or *non-fault* Learned Hand test, and its significance, especially in product liability and nuisance cases, had to wait years for fuller examination in an article by Calabresi and Klevorick.<sup>147</sup> This delay inevitably made the Calabresi-Hirschhoff article less useful to courts than it might have been. Indeed, the failure to have all the relevant tests described in one place, *at the time when product liability law was exploding*, has probably meant that judicial language in the area will never achieve the kind of lucidity one might have wished for and expected.

Finally, while a short piece like the Calabresi-Hirschhoff article could not have done much more than it did, I nevertheless today find the discussion of

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146. See, e.g., Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 205 n.1, 208, 213-15 (1973); Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 327-28, 338 (1973); England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 49 (1980); see also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 160-67 (3d ed. 1986); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 (1972). Scholars are apt to misread the article on this point, even when they do not criticize it. Shavell, *Strict Liability versus Negligence*, 9 J. LEG. STUD. 1, 3 (1980). See, e.g., Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1170 n.77 (1981); Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions*, 37 AM. U.L. REV. 285, 287 & n.5 (1988); Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 550 n.118 (1983); Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 862 n.66 (1987); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 865 nn.62 & 63 (1984); Winter, *Economic Regulation v. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890, 899-900 n.25 (1973).

147. Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

the relationship of the strict liability and fault-based tests to goals other than safety optimization to be inadequate. The lumping of all other goals together under the rubric of distribution is not helpful. It combines issues as different as taste or value shaping with notions of just desert and decisions based on wealth and class or caste differences. That is not only not useful but inevitably tends to understate the significance of the goals that are lumped together.

The principal point, that courts and juries have a role to play as to these, was correct then, and is still. But had we not been so concerned with rebutting Fletcher's recent article,<sup>148</sup> I think we could have said it, and more, more profoundly.

## II

Commentary by Jon T. Hirschoff,  
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*If negligence and strict liability could be subsumed in a new doctrinal structure in which information about risks and ability to act with respect to risks are central, it would be worth asking whether we can afford the administrative complexity, jury confusion, and other costs of having accident cases pleaded and tried simultaneously in negligence and strict liability.*

*Jon T. Hirschoff*

Guido Calabresi's comment looks back on the objectives we had in mind when we set out to write *Toward a Test for Strict Liability in Torts*. I would like to consider instead some implications of our article which I am not sure we had in mind.

We suggested that in formulating a test for strict liability for product defects, courts should look to factors such as knowledge of the risk (and thus adequacy of warning) and appropriateness of use to determine who was in the best position, with respect to the accident risk, to make a cost-benefit analysis and act upon it. Such factors, we pointed out, are commonly mentioned in assumption of risk cases and in traditional strict liability cases. In many of these cases, liability turns not on whether the defendant and plaintiff *ought* to have acted as they did, but rather on who was in a better position to perceive the risk, make the cost-benefit analysis, and act upon it.

A question worth examining, I think, is whether a test like ours could serve as a more general test for liability for accident risks, facilitating the eventual

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148. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).