

SATISFYING THE MULTIPLE GOALS OF TORT LAW

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There are good reasons that the reform of tort law has commanded the extraordinary attention it has during recent years. We are only now beginning to perceive how consumers have been affected by the tremendous expansion of tort liability since the mid-1960s. The effects on consumers seem uniformly adverse. For liability reasons, product and service prices have been substantially increased.¹ Large numbers of products have been withdrawn from markets altogether.² Commercial services have similarly been withdrawn.³ Even services provided by municipal or governmental entities have been suspended or withdrawn.⁴ These same liability reasons have led large numbers of municipalities, as well as manufacturers, doctors, and other groups to retreat from commercial insurance markets into mutual self-insurance pools, leaving the insurance base against which injured consumers might raise claims extremely fragile⁵ and, in some cases, nonexistent.⁶ These various problems have arisen despite mounting evidence that the underlying accident rate generating these legal claims has been declining.⁷ Yet the decline in the accident rate appears to be unrelated to expanded tort liability. With respect to accident control, modern tort law seems largely ineffective.⁸ Thus, the current public policy issue is hardly

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1. For a recent review, see U.S. JUSTICE DEPARTMENT, AN UPDATE ON THE LIABILITY CRISIS (1987).

2. N. WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE 4-7 (Conference Board 1987).

3. See, e.g., Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) [hereinafter Priest, *Insurance Crisis*].

4. *Id.*

5. For a discussion of the fragility of self insurance, see *id.* at 1578-82.

6. E.g., Melton, *Va. Survey Shows Liability Insurance is Still Too Costly for Some Firms*, Washington Post, Nov. 20, 1987, at C4, col. 1.

7. See G. PRIEST, DIAGNOSING THE LIABILITY CRISIS (Program in Civil Liability, Working Paper No. 68, Yale Law School, 1987).

8. See Priest, *Modern Products Liability Law: Its Development and Its Influence on the Accident Rate*, in THE LIABILITY CRISIS: SOURCES, ECONOMIC CONSEQUENCES, AND POLICY OPTIONS (R. Litan & C. Winston, eds. 1987) (forthcoming) [hereinafter Priest, *Influence on the Accident Rate*].

whether the disruptions of product, service and insurance markets are worth the increased prices being paid,⁹ but whether the disruptions are worth any price.

These problems generated by modern tort law directly affect large numbers of consumers. Those consumers injured by products or services in contexts in which the injury could have been prevented would be clear beneficiaries of more carefully defined legal rules. Similarly, those consumers — most importantly, the poor and low income, who are forced by modern tort law to pay product or service insurance premiums whose benefits are worth far less than their costs — also stand to gain from a more careful analysis of the weaknesses of tort law insurance.¹⁰ The great attention to the reform of modern tort law represents an effort to find solutions to aid these sets of consumers. The urgency of the tort reform movement is only commensurate to the immediate injuries and losses being suffered. The tort reform message is that these losses and injuries should be minimized as much as possible, as quickly as possible.

Professor Blomquist's criticisms¹¹ of my analysis of modern tort reform must be evaluated in the context of the need to solve these current problems. Blomquist's principal complaint is that my approach fails to take into account all of the multiple potential goals of tort law. My article argued that there are two central economic effects of any tort liability rule: an effect on the rate of accidents that can be prevented, and an effect on insurance for accidents that cannot be prevented.¹² My argument is not that these are the only goals that tort law can or should achieve.¹³ My point, rather, is that regardless of the nature of the moral or functional objectives of some court or some legal rule, tort liability will affect consumers chiefly in terms of accident reduction and insurance. This argument is hardly novel. The legacy of Roger Traynor in products liability is that the law should be better designed (than was the previous negligence regime) to reduce accidents and provide compensation insurance for consumers.¹⁴

9. The reference to increased prices includes the price or cost of lost product and service utility.

10. The poor and low-income are harmed by tort law insurance because they pay a premium equal to the lost income and correlated pain and suffering of the average consumer, but actually receive much less in tort law damages.

11. Blomquist, *Goals, Means, and Problems for Modern Tort Law: A Reply to Professor Priest*, 22 VAL. U.L. REV. 621 (1988).

12. Priest, *Modern Tort Law and its Reform*, 22 VAL. U.L. REV. 1 (1987) [hereinafter Priest, *Modern Reform*].

13. Professor Blomquist mischaracterizes this point. Blomquist, *supra* note 11, at 621-23.

14. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (en banc). For an elaboration of the conceptual background of this decision, see Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

My work, faithful to the Traynor agenda, has attempted to bring the more rigorous techniques of modern analysis to the design of a legal system that will most effectively create incentives to reduce the accident rate and provide insurance for accidents that cannot be prevented. In this and other works I have shown that Traynor and his intellectual colleagues imperfectly understood the operation of insurance and the effects of providing compensation insurance through tort law.¹⁵ Tort law, in fact, is a disastrous method for providing insurance for unpreventable losses. Tort law insurance provides benefits in the wrong amounts,¹⁶ and with a benefit structure that diminishes the extent of basic insurance coverage.¹⁷ Tort law insurance is provided at administrative costs that are multiples higher than the administrative costs of first-party insurance,¹⁸ and with a finance structure that compels poor and low-income consumers to subsidize wealthy and high-income consumers, reducing the extent of insurance availability.¹⁹

These grounds compel the elimination of the insurance features of modern tort law and a focus on the use of legal rules to create incentives for accident reduction.²⁰ In the article Professor Blomquist criticizes, I attempt to show how crudely and impressionistically modern tort law deals with accident reduction. The crudeness of modern law derives in part, I suspect, because Traynor, and the other pioneers of our modern legal regime, served only long enough to point the law in a new direction — to work out an approach toward accident reduction — and were not available to develop detailed applications.²¹ My article tries to outline how tort law could be reformed to reduce accidents more effectively.²²

Professor Blomquist, however, faults me for failing to consider other multiple goals of tort law beyond accident reduction and compensation. To my reading, Blomquist identifies ten separate goals for tort law,²³ and he

15. See generally Priest, *Modern Reform*, *supra* note 12; Priest, *Insurance Crisis*, *supra* note 3.

16. See Priest, *Insurance Crisis*, *supra* note 3, at 1553-57.

17. See *id.* at 1570-82, for a discussion of the various ways in which modern tort law has reduced insurance availability.

18. *Id.* at 1560.

19. *Id.* at 1546, 1585-87. See also *supra* note 10.

20. See Priest, *Modern Reform*, *supra* note 12, at 10-20.

21. See G. PRIEST, *STRICT PRODUCTS LIABILITY: THE ORIGINAL INTENT* (1987) (unpublished manuscript on file with author).

22. See generally Priest, *Modern Reform*, *supra* note 12.

23. 1) Upholding current ideas of fairness; 2) facilitating administrative convenience; 3) loss spreading; 4) creating "admonitory incentives" (accident reduction?); 5) vindicating irreparably injured plaintiffs; 6) channeling individual retaliation away from self-help; 7) providing alternative channels of full and complete redress; 8) fostering positive social attitudes toward courts by upholding process values; 9) making concessions to human frailty and legally recognizing diminished responsibility; and 10) removing industrial decision-makers from the market. Blomquist, *supra* note 11, 629-34 & n.50.

argues that the development of tort law or of tort law reform must be fully sensitive to all of these goals in order to adequately reflect the complex character of social ends for the law. Blomquist's paper is important in itself. But his insistence on the importance of goal multiplicity is representative of a much broader intellectual tradition within modern tort law scholarship. Much of the most prominent writing on modern tort law in recent years proceeds in a similar vein. Professor Shapo's injury treatise,²⁴ for example, reviews and embraces the multiple goals of tort law. The Congress' deliberations over federal tort preemption begin with a comprehensive review and endorsement of the multiple goals of torts.²⁵ More recently yet, the important report of the Florida Tort Reform Task Force commences with a thorough canvas of multiple tort goals and concludes with proposals consistent with those multiple goals.²⁶ Distinctive in each of these treatments, as in Professor Blomquist's critique, is not only a thorough and comprehensive listing of goals, but a commitment to reform consistent with all of the multiple goals.

I believe, however, that this dedication to multiple tort goals is destructive of the interests of consumers and, ultimately, of broader social interests in tort reform. Commitment to goal multiplicity is an impediment to true reform because it leads, inevitably, to nearly blind endorsement of the status quo, because it is insensitive to the realistic issues that courts must face in implementing tort liability rules, and, finally, because it is callous to the harmful effects of modern law on the lives and interests of consumers.

First, irrespective of any specific reform proposals (including mine), there is a deep methodological conservatism to the demand that any reform proposal be consistent with all of the multiple goals of tort law. The set of legal changes that can simultaneously achieve multiple goals is very small. As a consequence, any proposal satisfying such a requirement can never introduce anything more than small, incremental changes in the law.

Professor Blomquist does not offer reform proposals himself. But the conservatism inherent in the multiple goal approach is obvious in every other modern example of its implementation. Professor Shapo's encyclopedic study, conducted over many years, generated a call for nothing more than minor, procedural changes in the law, most significantly, slightly increased penalties for frivolous litigation.²⁷ Congress' insistence on multiple

24. M. SHAPO, *TOWARD A JURISPRUDENCE OF INJURY* (ABA 1986).

25. See *Product Liability Act Amendments: Hearings on S. 100 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 12-16 (1985) (statement of Sen. Slade Gorton).

26. ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS, *FINAL RECOMMENDATIONS*, ch. I.A.1., at 16-28 (Mar. 1, 1988) [hereinafter *FLORIDA TASK FORCE*].

27. See M. SHAPO, *supra* note 24.

goal (or interest group) satisfaction has led to no legislation whatsoever. Similarly, the multiple goal standard of the Florida Task Force empowers only modest recommendations for change, despite drastic conditions in commercial insurance markets in the state.²⁸

The conservatism of these efforts does not derive from substantive justifications for the premises underlying the current legal regime; rather, the conservatism is methodological. The requirement that some reform proposal satisfy all multiple goals is paralyzing because it establishes a nearly insuperable burden of persuasion. The burden is insuperable because of the simultaneity requirement, not because any one goal or the set of multiple goals is shown to be normatively superior to the proposed reform. Indeed, not one of the modern examples of the multiple goal approach cited above, including Professor Blomquist's critique, attempts a serious normative comparison of a reform proposal against the set of multiple goals. Success is achieved according to this approach by simply listing the multiple goals and condemning the particular reform proposal as partial or simplistic.²⁹ The accusation of simplicity, of course, is accurate. But it should not be a substitute for careful normative evaluation of the values underlying the goals.

The insistence on goal multiplicity, in addition, is insensitive to the hard issues that modern tort litigation compels judges and juries to face. There is an unmistakably academic flavor to the enumeration of multiple goals followed by a demand that some rule or ruling "achieve" them. Courts and juries, unlike academics, are seldom in position to perform consistency tests between the outcome of litigation and a goal listing. Courts face hard cases contested by serious combatants. An injured party has made a claim for compensation and the court must decide whether there is a justification for compelling another party to compensate the victim for the loss. Though none of Professor Blomquist's goals could be dismissed in the abstract, the justifications for a legal compulsion to pay are only vaguely addressed by the insistence on the satisfaction of goals such as "facilitating administrative convenience,"³⁰ making "concessions to human frailty,"³¹ or "foster[ing] positive social attitudes toward courts."³²

Finally, and closely related, the requirement of multiple goal satisfaction is callous to the real injuries and losses that consumers suffer under our current tort law regime. The inadequate attention of our modern regime to incentives for accident reduction increases the level of consumer injuries. Similarly, however well-meaning, efforts to provide compensation insurance

28. See FLORIDA TASK FORCE, *supra* note 26, ch. I.B.-I.D.

29. See Blomquist, *supra* note 11, at 629-30.

30. *Id.* at 629.

31. *Id.* at 634.

32. *Id.* at 633.

through tort law directly harm poor and low-income consumers without providing them important new insurance benefits.³³ These adverse effects of modern law call for reform now, not after academics become assured that a comprehensive listing of potential tort law goals is satisfied.

This point must be emphasized more strongly. I believe that there are compelling moral and economic grounds for reversing the burden of persuasion with respect to tort reform. Professor Blomquist criticizes my concerns with accident reduction as simplistic. I maintain that those who would assert tort law goals beyond accident reduction — and especially those who assert simultaneously a set of multiple goals — should be required to justify why these goals should prevail over accident reduction.

The economic grounds supporting the primacy of accident reduction are obvious: to preserve valuable resources in human capital. The moral grounds, however, are stronger. There is no coherent moral system in the world that justifies increasing the accident rate. At some point, of course, utilitarians or wealth-maximizers may debate whether further accident reduction is worth the cost. But modern tort law, though it often sounds as if it is making this judgment,³⁴ departs very substantially from the cost-benefit accident margin.

Thus, on moral grounds, the burden of persuasion should lie on those who would assert goals alternative to accident reduction to justify why the achievement of such alternative goals is more important than reducing consumer injury. Professor Blomquist's comprehensive goal listing is a useful starting point. Begin with a pair-wise goal comparison. Are there normative grounds for preferring Blomquist's first goal, "upholding current ideas of fairness"³⁵ over reducing injuries? Next, can we defend "facilitating [the] administrative convenience of the courts"³⁶ over accident reduction? Are there reasons to believe that making "concessions to human frailty,"³⁷ or "foster[ing] positive social attitudes toward the courts"³⁸ should prevail over specific recommendations to reduce the accident rate? Several of Professor Blomquist's goals may be consistent with accident reduction in some cases,³⁹ although inconsistent in others. The differences, however, should

33. See Priest, *Insurance Crisis*, *supra* note 3, at 1585-87.

34. Commentators like Professor Landes and Judge Posner claim modern tort law is engaging in this calculus, though this is, in my view, incorrect. See generally Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); Priest, *Influence on the Accident Rate*, *supra* note 8.

35. Blomquist, *supra* note 11, at 629.

36. *Id.*

37. *Id.* at 634.

38. *Id.* at 633.

39. I.e., "providing an admonitory incentive"; vindicating a plaintiff where irreparable injury has occurred; channelling individual retaliation away from self-help remedies. *Id.* at 630.

not be ignored. Will Professor Blomquist defend vindicating plaintiffs where there is irreparable injury in instances in which the vindication of a given plaintiff impairs incentives of reducing the likelihood of injuries to other plaintiffs?⁴⁰

As I have explained, much of the power of the multiple goal approach derives from the seeming comprehensive character of the listing. An exhaustive goal listing appears beyond controversy because it incorporates everything in which a society is interested. But the issue is no more easily resolved when all alternative goals are considered. Does lumping together "facilitating administrative convenience," making "concessions to human frailty," and "foster[ing] positive social attitudes toward courts" compel us to relax our commitment to reducing consumer injuries? Again, I believe that the burden should be faced by those demanding satisfaction of alternative goals even to show why satisfaction of all alternative goals on the list should take precedence over direct efforts to reduce injuries to consumers.

My article attempted to show how modern tort law could be reformed to better create incentives for accident reduction. It proposed specific changes in the law to achieve this end. It did not purport to claim that the task of defining more effective legal incentives for accident reduction was complete.⁴¹ My article attempted no more than to point the courts in a new direction. This direction compels courts to seriously consider specific ways to influence the determinants of the accident rate and to seriously reanalyze the insurance function of tort law.⁴² This direction must be pursued now,

40. See Priest, *Influence on the Accident Rate*, *supra* note 8, for a discussion of how the expansion of defendant liability can reduce incentives for accident reduction.

41. Priest, *Modern Reform*, *supra* note 12, at 36.

42. Professor Blomquist's detailed criticism of my approach in his example of hazardous waste liability illustrates current misunderstandings about insurance. There is no disagreement between us with respect to future accident reduction with respect to hazardous waste, whether through regulation or liability rules that incorporate versions of cost-benefit analysis. Instead, our differences derive from analysis of the insurance consequences of tort liability for past dumping. Blomquist believes that first-party insurance is unavailable or unsupportable for injuries from hazardous waste. Blomquist, *supra* note 11, at 635. He is clearly wrong. I know of no first-party health or hospitalization policy excluding coverage of injuries from hazardous waste. If I contract leukemia from toxic dumping, I expect health and hospitalization coverage from my Blue Cross/Blue Shield carrier, as do the 200 million Americans covered by similar plans. Similarly, if I die from exposure to hazardous waste, my first-party life insurance will provide benefits to my family. *See id.* at 638 & n.85. Professor Blomquist cites disputes over workers' compensation coverage of hazardous waste injury. But the example misses the point. Worker claims for coverage are disputed because the employer's causal role is often in dispute. Workers who are denied coverage under workers' compensation plans are still eligible for (often employer-provided) health and hospitalization coverage. The example, in fact, illustrates my argument about the relative disadvantage of third-party to first-party insurance coverage. *See Priest, Insurance Crisis*, *supra* note 3, at 1580-82. Currently, the market for third-party coverage for hazardous waste liability cannot be maintained. Yet the market for first-party coverage has hardly been affected.

without further hand-wringing over the satisfaction of tort law's multiple goals.

Professor Blomquist complains, in addition, that first-party insurance does not provide compensation for pain and suffering or for the loss of a child. Blomquist, *supra* note 11, at 635, 638. But where the issue is appropriate insurance, consumers are not benefited by the compulsion to buy pain and suffering insurance or insurance on non-wage earners. See Priest, *Insurance Crisis*, *supra* note 3, at 1556-57.