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## Symposium Proceedings

Various Editors

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## SYMPOSIUM PROCEEDINGS

AUDIENCE MEMBER: I focus back on the quid pro quo aspect of the analogy to workmen's compensation. It seems the things that drove us to and started tort reform were products liability and strict liability. Isn't it a possibility to equate on one side? Isn't tort reform really giving back to the defendant what was taken away by strict liability?

PROFESSOR WHITE: I didn't make a laundry list of the various factors that I thought have affected insurance companies' behavior in the '70's and '80's. When the insurance (so called crisis) emerged, one factor surely was the development, the doctrinal development in products liability. Once strict liability theory was established, of course the next step is to apply it to an area of defective products and you begin to define what a defective product is. I think on balance it is fair to say two things. First, the plaintiffs are winning more cases because of strict liability. Second, strict liability is growing. I don't, however, think that the picture is altogether free from alternative developments. California, a pioneer in strict liability, has recently showed signs of reading the key terms of strict liability calculus, such as the meaning of defects or the meaning of state of the art, in what we may call a restricted fashion, so that it is not easy automatically to win such cases. By restricted, I mean they are engaging in balancing very much like a negligence analysis. They are engaging in costs benefits accounting to determine what they mean by defect or whether something represents the state of the art. So to me that raises the basic question that Professor Turkington and others have identified: which mechanism is going to make the change? If we perceive that the problem is that the tort doctrines are ultraliberal, is it the courts that are going to cut back on the doctrine or is it the legislature that is going to come in and make the reform? I think that the perception that there have been ultraliberal decisions is clearly there, but of course in my view if the courts intervene, or if the legislatures intervene, they still won't be able to intervene past a certain point.

AUDIENCE MEMBER: This question is for the panel in general. Given the standard concepts of liability against municipalities in recent years, to your knowledge have any municipalities in the

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United States been put in to insolvency because of adverse tort judgments?

DR. MOONEY: I guess South Tucson, Arizona is basically insolvent, but they worked it out. There is one other municipality that I can't think of.

MR. PARKER: In response to the other side of that, you should look at those states which have passed restrictive laws in terms of the liability of a municipality; and we happen to be sitting in one. The state of Pennsylvania has a \$500,000 cap on municipal liability for insurance companies which will cover municipalities in the state of Pennsylvania. . . . I fail to see the relationship between the coverage and the cap in those states that have enacted caps. They are still having trouble getting insurance.

DR. MOONEY: The problem we have with municipalities is the continuing erosion of sovereign immunity. What happens is a municipality in almost any accident can be brought in to the action. If I'm in an accident and I drive through a red light, the person could claim that he was injured because I went through the red light and because the municipality should have warned me three stops before: red light coming, red light coming, stop light coming, so on and so forth. So you can frequently involve a municipality in an action and that's where we get back to this basic theme. An insurer has difficulty in assessing premiums for a municipality where the source of claims is totally outside the control and activities of the municipality. That's why we are pulling back, nothing to do with caps on damages.

PROFESSOR MCKAY: You can claim it but you are not going to win under those facts.

DR. MOONEY: I was explaining why the insurance industry pulled back from providing insurance to municipalities.

AUDIENCE MEMBER: This is directed to Dr. Mooney, who mentioned as an alternative to punitive damages either criminal liability or administrative sanctions. I was curious to know what kind of criminal liability alternatives were you thinking of? What effect will this have on the standard of proof for the plaintiff?

DR. MOONEY: I was talking about the general liability system. Let's leave aside punitive damages for the moment. You have two elements in liability—deterrence and compensation. We could eliminate deterrence and move to no-fault system. The doctors are looking at this. When anybody enters the hospital, whenever

something bad happens to them, an insurance fund could be set up to provide them with compensation. Then you say, what about all those doctors that injure people through negligence? Then we would have laws and regulations either criminal or administrative to take away their licenses to deal with that situation. So in the instance of criminal behavior, in Chicago, where workers died from cyanide and the employers went to jail.

**AUDIENCE MEMBER:** Are we talking about an individual defendant as opposed to a corporate defendant, with respect to the criminal aspect?

**DR. MOONEY:** The sanctions can be on both individual and corporate wrongdoers.

**AUDIENCE MEMBER:** This is directed to Dr. Mooney. You are not objecting to the money it is the same money. The difference is to whom the money is to be paid. For example, if there is a punitive damage award against Union Carbide for five billion dollars; you wouldn't object to that being paid by Union Carbide into a trust or something.

**DR. MOONEY:** We are moving towards a first-party system. That is, when people are injured, they immediately get compensated without going to court and waiting five years. This is different from a system of fault. Then what do you do on the deterrent side? On the deterrent side you would have the criminal system or sanctions within the administrative system, such as removal of license from professionals.

**AUDIENCE MEMBER:** This is directed to Mr. Parker and Dr. Mooney. Do your statistics show a significant diminishment of verdicts for defendants, since the advent of comparative negligence in personal injury cases?

**DR. MOONEY:** I couldn't say off the top of my head.

. . . .

**AUDIENCE MEMBER:** If we are worried about comparative negligence making it a lot easier to win cases, what are the facts? Are we finding that there are a lot fewer verdicts for the defendants these days?

**DR. MOONEY:** No. The economic reason somebody goes to trial is because there is a 50-50 chance of them winning or losing. Most of the cases as you know settle out of court. So once the rule changes, that doesn't change whether you go to court, you

win or lose in court, it's still the same. On the plaintiffs' side, the success they have is a 50-50 chance. On the defendants' side, they still have a 50-50 chance. When you look at the statistics, for the state of California you see, it's pretty close to 50-50.

**PROFESSOR WHITE:** The so-called transaction costs under a comparative negligence system would be much higher than under contributory negligence. You know you'll be "at fault" and you're not going to negotiate to settle. More often there is a problem of joining additional people. Once you bring them into the California procedure, you can bring anybody in, whether or not they were a party to the action, and apportion the fault.

**AUDIENCE MEMBER:** This is directed to Professor White. You identified the moral presence underlying modern strict products liability as being the difficulty, the proof being what the plaintiff has encountered in cases like *Escola* [v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944)]. We learned here that another basis of the utilitarian notion is that industry is uniquely able to pass on the cost of the tragedies of industrialization to the consumer. Also, the fairness notion that the tragedies of modern industrialization should be borne by the system itself. To what extent is that principle at issue here and perhaps to the whole panel? Would Dr. Mooney reject that principle?

**PROFESSOR WHITE:** I'll restrict my comment to saying what *Escola* and the follow-up cases represent. I think if we were to look at them now from the perspective of 1980 economics, they represent a bundle of mixed arguments some based on cost spreading and others based on fairness or powerlessness. I think it's also fair to point out that theories of economic activity have changed since *Escola*: the idea of an enterprise being able to shift or spread its costs indefinitely has been somewhat complicated by the idea of incentive structures in economics, so that there will be a point, I heard Dr. Mooney say earlier that under a strict liability regime there may be a situation where you would have no incentives to make a safe product. I frankly doubt that because of good will factors. I do think, however, we are in some respects in a different situation from the time of *Escola*.

**DR. MOONEY:** I think this is the basic point we are talking about here. People will get injured in society, sometimes they are at fault, sometimes they are not at fault. If they are not at fault and someone else clearly is at fault then the liability system says that person should pay. If they are only at fault by themselves we have

the system of first-party medical insurance. What do we do in the gray area? I think that the argument you're putting forward in this grey area. The argument goes that since industry is presumably in some sense knows more about the size of the risks, probably it has more financial resources, it should bear the costs. That's arguing for a first-party system and if we argue for a first-party system, let's go and have a first-party system. Let's just extend accident insurance and not go through this whole procedure of staying in court 5, 6 or 7 years with all the expense entailed.

**AUDIENCE MEMBER:** A few minutes ago with regard to the municipal red light hypothetical, it was said you could claim it, but you couldn't win, and that reminded me of something Professor White said, that that you hope that the jury will sort it all out and see through the crafty lawyers and come to some conclusions. But even if they do, if someone can come to court claiming that a municipality is at fault and the jury does see through the crafty lawyer, you still have a defendant who has incurred considerable expense getting that resolution and the longer the attorneys are willing to take on frivolous suits the system pays; whether the insurance company is defending it you have to spend money to be reimbursed. What do we do to avoid that kind of abuse? For example, the psychic in Philadelphia who was awarded \$1,000,000 for the loss of her powers.

**MR. PARKER:** Let's talk about the psychic. I don't think that is abuse of the system. If you know the facts in the case, you have a woman who made her living as a psychic just like some people make their living as a law professor or director of public affairs. Her claim was that she went in to get a CAT Scan. She advised the doctor that she was allergic [to the dye]. They proceeded even with that knowledge, one doctor wanted to, the other didn't. They injected her with the dye. She had a severe reaction and went into anaphylactic shock. She emerged with headaches and a great deal of pain and suffering over a long period of time. She claimed as a result of that she could no longer engage in her profession as a psychic. The judge at the time of the trial instructed the jury to disregard any of that evidence and to look at the medical malpractice claim. They did and came back with an award in the neighborhood of five or six hundred thousand dollars. There was prejudgment interest in Pennsylvania, so it amounted close to \$1,000,000. The judge then looked at the result and said no I think there is something wrong here and he set it aside. I think that case, rather than showing that there are frivolous cases

brought shows simply that the system works, and no system is perfect. I abhor frivolous law suits. I abhor frivolous defenses on the part of the defense. I think there are more frivolous defenses than frivolous law suits. It is to the benefit of the defendant to string the law suit out because that money in terms of the interest payments is coming in all the time. They are making money on our money. That's why cases take a long time, that is why so many suits aren't settled earlier. You could have so many law suits settled fairly and quickly. I see plaintiff lawyers as collection plates. That is basically what we are. We have to go collect what is due to the injured party. If we were getting it we wouldn't have to go collect it. I also worry about use of the term "frivolous law suits." I dare say all those law suits brought about by asbestos were considered frivolous. I think the initial suits on the Dalcon Shields may well have been considered frivolous. One person's frivolous law suit turns out to be another person's extreme damage. I think you have to be careful. I think the system easily adjusts for that. Yes, there are some costs and those costs are covered by insurance. Don't forget this is a very incestuous affair we are having here. The plaintiff lawyer, the defense lawyer and the insurance company were all in bed together in the civil justice system. I think we have to arrive at the very best system we can. As I said earlier, there are some blemishes on it, but it is not the fault of the people that brought these claims.

**AUDIENCE MEMBER:** This is directed to professor McKay. Since our system of justice puts so much reliance and confidence in our judiciary, did the A.B.A. discuss how to upgrade the quality of the judges in this country?

**PROFESSOR MCKAY:** The A.B.A. worries about it all the time. As you know there is a very good screening system for the federal and state judiciary. In my own jurisdiction, the New York Bar Association worries a great deal about judges and screening panels. It's imperfect, but I think in general, I hope the others on the panel agree with me, we're doing better with the judiciary than we did in former years. The process is more open and there is more scrutiny of the kind of people and the results. We should never be satisfied, but I think we're better than we used to be.

**AUDIENCE MEMBER:** Does there exist a mechanism for continuing education of judges?

**PROFESSOR MCKAY:** There is a very substantial network operated by the Federal Judicial Center. It does a great deal for the federal

judiciary. I think all the states, certainly New York, has an elaborate system. California has an elaborate system. There is one in Pennsylvania for continuing education for judges.

AUDIENCE MEMBER: This is directed to Dr. Mooney. You keep ratings based on experience, but in Virginia, where the Attorney General also introduced legislation for rates based on state experience, the insurance industry has been shrill in its opposition. Can you resolve that?

DR. MOONEY: We're opposed to the legislation in Virginia for a number of reasons. We would never be opposed to rates based on experience, where the experience is what we call credible. Let me give you an idea of what could happen. If you are looking at a line of insurance, like liquor liability insurance, and you could look at the loss experience in a low population state like Nevada. For 1984 the data shows that losses were zero. Premiums were received but no claims came in. The same result occurred in 1983, no claims. But in 1982 the loss experience was 600 to 1. For every dollar received in premiums the industry paid out \$600. Clearly, you cannot write liquor liability insurance in the state of Nevada on its own. You have to spread that around, at least to California or some states in that region in order to have a credible statistical base to allocate the risk. That is the issue in Virginia; on categories like day-care, liquor liability, and other small lines of insurance the data may not be sufficiently credible in that state.

