

TORT LAW AND DETERRENCE: A RESPONSE TO DR. HUBER

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Dr. Huber's thesis¹ is that the tort system currently delivers less safety than it might for two reasons. First, it discourages activities, among them scientific and technological innovation, that in the long run bring about a net increase in social benefit. Second, it fails to take safety trade-offs into account. Imposing liability for one type of dangerous conduct may deter that conduct and yet at the same time encourage alternatives that are even riskier or more detrimental to society. I will put forward something of a critique of Dr. Huber's case against the tort system.

One point regarding the deterrence of innovation needs to be stressed at the outset. The mere fact that a corporate official claims that a company is not spending money on particular products (such as contraceptives, for example) because it fears lawsuits does not necessarily prove that tort suits are actually discouraging the company from innovating. Instead, this claim may be self-serving; it may indicate a corporate interest in promoting changes in product liability law, changes that would favor manufacturers. Similarly, it may conceal other factors that might have influenced the company's decision. For example, profits from the sale of a particular product might not be high enough to justify research expenditures. Finally, the company's assertion may simply reflect an overreaction by corporate decisionmakers.

I cannot take all that seriously Dr. Huber's claim that the French abortion pill is not going to come on the market in the United States because of fear over product liability suits. It

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1. Dr. Huber's case of the Dannon cherry yogurt puzzles me. See Huber, *Who Owns the Cherry Pit?*, 13 *HARV. J.L. & PUB. POL'Y* 22 (1990). I had not thought of it as something that would cause indignation. I suggest that Dannon would probably settle the case without blinking twice. Without getting into a risk-utility test or anything else, it is a fairly open and shut case whenever there is a foreign substance in food—one people normally do not expect to find—and it causes harm. Of course, if on the container there is a large warning label that says, "WATCH OUT FOR PITS," then maybe we have another ballgame.

seems to me that the "specter" of product liability pales before the threat of retaliatory action by anti-abortion groups in this country. After all, such retaliation is already happening in France.² One can bet that what is happening there would increase by a hundred or a thousand times here.

Despite Dr. Huber's contentions, a recent article in *The New York Times* indicated that there is currently an increasing amount of research occurring in the birth control industry.³ Although research expenditures among all industries have been down, political and economic, as well as legal, reasons are cited as causes of the decrease. Worldwide spending on research has declined by nearly twenty-five percent in the past fifteen years, a trend that can hardly be attributed to tort suits alone, at least in connection with foreign research and development.⁴ The article points out that those companies that have remained in the field are making substantial profits; it also notes that several firms are working to bring new contraceptive products to the market (although a patent dispute between two of them is delaying the introduction of a new version of the birth control pill).⁵ So, one may justifiably question calls for radical change in the tort system when these calls are based on assignments of blame that do not entirely stand up to close scrutiny.

Let me cite another example of doubtful causation, one that Dr. Huber has mentioned in his book.⁶ He links the unwillingness of physicians to stop and aid accident victims with the risk of tort liability.⁷ It is true that some years ago physicians vigorously lobbied state legislatures to enact so-called "Good Samaritan" statutes limiting the liability of health care professionals who spontaneously render aid to strangers.⁸ Proponents of these laws emphasized doctors' fear of being sued after volunteering to help accident victims.⁹ Yet it is also true

2. See N.Y. Times, Oct. 29, 1988, § 1, at 1, col. 6; N.Y. Times, Oct. 27, 1988, at A1, col. 6.

3. See N.Y. Times, Feb. 22, 1989, at D1, col. 4.

4. See *id.* at D1, col. 2.

5. See *id.* at D1, col. 5.

6. P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

7. See *id.* at 11, 162.

8. Since 1959, all fifty States and the District of Columbia have enacted some form of Good Samaritan statute. See Note, *Good Samaritans and Hospital Emergencies*, 54 S. CAL. L. REV. 417, 428 nn.74-78 (1981).

9. See G. ANNAS, *JUDGING MEDICINE* 43 (1988); Holland, *The Good Samaritan Laws: A Reappraisal*, 16 J. PUB. L. 128, 132 (1967).

that during that particular time there was no record of any physician ever having to pay damages under such circumstances.¹⁰ Moreover, even after Good Samaritan statutes considerably narrowed the grounds on which a doctor might be held liable, a poll of physicians revealed that more than half of those surveyed still would not provide assistance to a stranger.¹¹ Thus, an exaggerated view of the tort system seems to be no more than a fig leaf concealing other reasons that physicians refuse to help strangers in need of medical attention.

Dr. Huber also points to a handful of products that have been the subject of lawsuits producing socially undesirable results. One of these is the IUD or intrauterine device. He asserts that litigation took from the market not only the infamous Dalkon Shield, which deserved its fate (by the way, I assume this means that he thinks the tort system does some good), but also two other IUDs.¹² Because these IUDs were the safest effective contraceptives for many women and because no alternatives to these devices are available, he argues that a number of unwanted pregnancies may occur.¹³ In addition, Dr. Huber claims that lawsuits have excessively burdened contraceptive makers in connection with the warnings that must accompany their products.¹⁴ He sees this burden as a barrier to innovation.

In response to these contentions, the other IUDs to which Dr. Huber refers can only be used safely by women who have already been pregnant and who have stable sexual relationships. A large part of the liability problem stemmed from improper targeting of a much larger and hence more profitable market by the manufacturer. One interpretation of what later happened is that, instead of intelligently searching out the appropriate market and promoting and labelling the product accordingly, the manufacturer chose to cease production of IUDs. Thus, the question is whether the tort system really brought about this decision?

Furthermore, characterizing the duty to warn as being onerous to the point of discouraging innovation in the production

10. See S. LAW & S. POLAN, PAIN AND PROFIT: THE POLITICS OF MALPRACTICE 116-17 (1978); Annas, *Law and Medicine: Myths and Realities in the Medical School Classroom*, 1 AM. J.L. & MED. 195, 198-99 (1975).

11. See S. LAW & S. POLAN, *supra* note 10, at 117.

12. See Huber, *supra* note 1, at 26; see also P. HUBER, *supra* note 6, at 41-42, 162.

13. See P. HUBER, *supra* note 6, at 162.

14. See P. HUBER, *supra* note 6, at 158.

of IUDs is surely premature. In fact, the one company that remained in the field, Alza, has pioneered the development of an informed consent brochure. This brochure seeks to ensure that a woman will be able to make an intelligent choice about her method of contraception and use Alza's IUD only when it is appropriate.¹⁵ A second company that entered the field has adopted an identical informed consent form for its IUD.¹⁶ It is probably not far-fetched to suggest that product liability suits brought against IUD-makers and based on a failure-to-warn theory may have contributed to the development of the Alza informed consent brochure.

This is not the first time that the tort system has achieved salutary results. One can mention other examples of product liability litigation that have contributed either to the removal of unsafe products from the market or to changes in design that have eliminated unreasonable dangers from a product. Such litigation targeted the Dalkon Shield IUD¹⁷ and superabsorbent tampons that cause toxic shock syndrome,¹⁸ both of which were later discontinued. Certain hot water vaporizers were redesigned to be tip-proof after a series of lawsuits.¹⁹ Multi-piece tire rims were reconfigured to eliminate an unreasonable risk of explosion.²⁰ I am not suggesting that the tort suits were the sole trigger of these developments, but rather that they contributed to product safety in important ways.

I do not stand alone in asserting that the tort system does some things right. A 1987 report by the Conference Board, the research arm of the business community, found that "[w]here product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves."²¹ According to man-

15. See Nat'l L.J., Oct. 10, 1988, at 3.

16. See *id.*

17. See, e.g., *Coursen v. A.H. Robins Co.*, 764 F.2d 1329 (9th Cir. 1985); *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984); *Hawkins v. A.H. Robins Co.*, 595 F. Supp. 1290 (D. Colo. 1984); S. PERRY & J. DAWSON, NIGHTMARE: WOMEN AND THE DALKON SHIELD (1985).

18. See, e.g., *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988).

19. See, e.g., *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967).

20. See, e.g., *In re Multi-Piece Rim Product Liability Litigation*, 464 F. Supp. 969 (J.P.M.D.L. 1979); 5 J. VARGO, PRODUCT LIABILITY PRACTICE GUIDE ¶95.01[2], at 95-3 (1988).

21. Weber, *Product Liability: The Corporate Response*, 893 CONFERENCE BOARD REP. 2 (1987).

agers, products have become safer. Manufacturing procedures have been improved; labels and use instructions have been made more explicit. I should point out that those who fund the Conference Board were so displeased by this report that they, in effect, killed the messenger responsible for the bad news. The author of the study was fired, a second report²² was undertaken, and, predictably, more palatable findings were reached. The first report surveyed the risk managers of major corporations—managers who deal first-hand with such matters as product design, insurance costs, and actual exposure to litigation. The second report surveyed chief executive officers, who were much more attuned to the debate over product liability reform taking place in Congress at the time.

Dr. Huber cites the small plane industry as another crisis area, one in which increasing liability insurance costs are making it no longer economical for manufacturers to produce small planes in the United States.²³ If I understand the problem correctly, it affects only the market for the sort of aircraft used by Sunday afternoon leisure pilots. The market for small jet aircraft is not impaired, perhaps because the corporate purchasers of these aircraft do not mind (and probably insist on) installing the most effective and up-to-date safety features on planes designed to carry corporate executives.

I believe we need more information to assess just how the tort system has affected the recreational aircraft industry. First, we need to know much more about the safety record of these planes. Are they crashing often? Are they crashing because of manufacturing defects or design defects? Second, we need to find out how often purchasers of these planes bring product liability suits. How successful are these suits? Most interestingly, how often do pilots injured in crashes and yet concerned about the rising cost and concomitant unavailability of small recreational aircraft opt to forego bringing product liability suits and rely instead on their first-party insurance for compensation?

The recreational aircraft market, among others, is amenable to private arrangements between sellers and knowledgeable buyers—buyers who are aware of risks and yet prefer to encounter them rather than give up flying. Hence, Dr. Huber sug-

22. McGuire, *The Impact of Product Liability*, 908 CONFERENCE BOARD REP. (1988).

23. See Huber, *supra* note 1, at 26; see also P. HUBER, *supra* note 6, at 161.

gests that one way of resolving the liability crisis is to promote greater reliance on pre-accident contractual arrangements fixing the relative responsibilities of buyers and sellers. He criticizes the trend towards judicial abrogation of the defense of express assumption of risk in product liability cases; indeed, he sees this trend as a major obstacle to his proposed restructuring of the tort system.

In theory, I have no problem with this line of argument. I tend to agree with the proposition that courts have been quick—perhaps too quick—to deny individuals the right to assume risks of harm on a voluntary and fully informed basis. Still, such agreements could not bind third parties. Hence, if passengers in small planes and persons on the ground or in other planes were harmed in crashes caused by defects, they would still have the right to bring a product liability suit. And so, one of the questions I pose is whether the relief manufacturers would receive from this rather limited use of express contractual assumption of risk would have a significant impact. I would also ask, within the broad context of the whole product liability problem, just how often a purchaser has enough information concerning all the risks involved to make a free and voluntary choice regarding these dangers.

Furthermore, even if a person can choose between a less expensive product without safety devices and a more expensive product with safety devices, what should happen if he chooses the less expensive product and is later injured by it? It seems clear to me that, by knowing what the risks are and specifically opting to encounter them, such a person should not be permitted to bring a suit based on the absence of a safety feature that he decided to forego. Still, this situation is not going to come up all that often, and I believe the courts can very easily resolve it. I think we can count on the courts to render some sensible decisions in this area, but I do not think this will really solve the problems claimed by the critics of the system.

