

Introduction: Judges as Tort Lawmakers - Fifth Annual Clifford Symposium on Tort Law and Social Policy

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INTRODUCTION

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The current legal wars about tobacco products and handguns underscore the continuing importance of American judges as tort lawmakers. Since at least the time of the great Benjamin Cardozo, American judges have been key, albeit sometimes reluctant, players in the process by which the law regulating civil recovery for injuries has been fashioned. America's judiciary has been alternatively praised and damned for its efforts. In areas ranging from the asbestos tragedy to the silicone breast implant dispute, however, it has been the judges who have done the difficult, sometimes unpopular job of trying to "fix what's broke."

Should judges continue in this time-honored tradition? Should they retreat into some more passive role? If a more passive role is adopted, what is likely to be the reaction of citizens denied redress by slow-moving remote legislatures? These and a host of other questions surrounding the judicial tort lawmaking function are considered in this, the Fifth Annual Robert A. Clifford Symposium on Tort Law and Social Policy.

The Symposium begins with Professor Andrew Kaufman of Harvard discussing Benjamin Cardozo as tort lawmaker. Drawing on his work as Cardozo's biographer,¹ Kaufman concludes that while Cardozo was a champion of the judiciary's authority to make law, he also emphasized the restraints imposed "by history, by precedent, and by the powers and responsibilities of the other branches of government."² Kaufman's piece is followed by two responses, one from Judge Robert Keeton and the other from Professor Gary Schwartz of UCLA. Judge Keeton stresses the ever present necessity for good judges to balance the contending considerations identified by Professor Kaufman, while Professor Schwartz concentrates our attention on the limited scope of judicial lawmaking as exemplified in Cardozo's

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1. See ANDREW L. KAUFMAN, *CARDOZO* (1998).

2. Andrew L. Kaufman, *Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281, 281 (1999).

work, as well as his allegiance to liability limiting negligence principles as opposed to notions of strict liability.

Moving the Symposium forward more than seventy-five years, Professors Theodore Eisenberg of Cornell, Lucinda Finley of SUNY Buffalo, and Michael Green of Iowa, turn their attention to present-day judicial lawmaking in products liability cases. Professor Eisenberg returns to the topic of his pathbreaking 1990 article, *The Quiet Revolution in Products Liability*,³ in which he and co-author, James Henderson, Jr., identified a shift in federal judicial attitudes in the direction of greater hostility to products liability claims. Updating his data through 1997, Professor Eisenberg finds that the trends he identified ten years ago have continued unabated.

Professor Finley follows with a detailed examination of one of the ways judges have closed the courthouse doors to products liability plaintiffs. Professor Finley argues that the "gatekeeper" decisions mandated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴ on the question of expert testimony, have been transformed by federal judges into a series of "substantive legal rules on causation"⁵ which have been employed to reject the claims of an array of plaintiffs. Professor Green, too, examines the impact of *Daubert* and its progeny on the refashioning of products liability law, most particularly in the burgeoning field of mass toxic substance litigation. In findings that compliment and reinforce those of Professor Finley, Green suggests that rulings on the question of expertise have become a key judicial tool in curbing plaintiffs' claims. The effect has been felt not only in toxic substance cases, but, in the wake of *Kumho Tire Co. v. Carmichael*,⁶ in the full range of tort litigation from exploding tires to silicone gel breast implants. Professor Marshall Shapo of Northwestern rounds out the products liability package with a comment on the Eisenberg, Finley, and Green papers.

Products liability cases are not the only area in which judges have been busy fashioning new law. In fact, a whole range of issues has been the subject of judicial innovation. Professor Anita Bernstein of Chicago-Kent explores this general phenomenon, describing the "centrifugal" forces that are dispersing tort lawmaking into a host of different contexts in response to such diverse influences as statutes, regulations, theories of economic efficiency, market incentives, and

3. 37 UCLA L. REV. 479 (1990).

4. 509 U.S. 579 (1993).

5. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335 (1999).

6. 119 S. Ct. 1167 (1999).

the technologies facilitating legal research. All have lent impetus to the growth of new torts—but ones, Bernstein argues, devoid of classical indicia like a formalistic declaration of elements.

This almost post-modernist vision of a new tort centrifuge is to be contrasted with the observations made by Professor Robert Rabin of Stanford, whose paper begins with a look at the growing number of suits against gun manufacturers and out of these proceedings (as well as others) discovers a broad-based legal theory involving tort liability for parties who “enable” others to cause serious harm. Working in the grand tradition of Prosser, Rabin teases out of the cases a general principle that explains rulings as diverse as those in negligent entrustment claims, *Tarasoff v. Regents of the University of California*,⁷ and *Kline v. 1500 Massachusetts Avenue Apartment, Corp.*⁸ In a brilliant synthesis Professor Rabin pulls these and other cases, like the Florida second-hand smoke decision,⁹ together finding that in all “a dangerous ‘instrumentality’ has been put in the hands of a third-party with a foreseeable expectation that a ‘remote’ victim will suffer harm.”¹⁰ Here Rabin finds the essence of a new tort.

Professor Stephen Sugarman, of Boalt Hall, takes us from the synthesis of new torts to their dismantling, by examining the recent behavior of the California Supreme Court as tort law “un-maker.” He traces the effect of shifts in court personnel that have resulted in California’s highest court abandoning many innovations in tort law. He explores the “ironic sense”¹¹ in which destruction is the making of new law with substantial implications for a host of legal doctrines including those concerned with products liability, liability for third-party misbehavior, and the negligent infliction of emotional distress. Professor Jeffrey O’Connell of the University of Virginia, follows with not one, but two lively comments on the tort system and its flaws with respect to delay and transactional costs.

The next section of the Symposium is devoted to contemporary judges’ views of their role as tort lawmakers. Judge Robert Keeton of the Federal District Court of Massachusetts, begins this section with his thoughts on judicial lawmaking. As Judge Keeton points out the

7. 551 P.2d 334 (Cal. 1976) (finding liability possible in the case of a psychotherapist who failed to warn the intended victim of his patient’s murderous intentions).

8. 439 F.2d 477 (D.C. Cir. 1976) (finding liability possible in the case of a landlord who failed to protect a tenant from the criminal actions of a third-party intruder).

9. *Brion v. Philip Morris Co.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

10. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 450 (1999).

11. Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455, 455 (1999).

courts remain our society's "clean-up crew."¹² They must deal with the hard issues left when constitutions and statutes are silent. This, of course, means that they make a great deal of law. Judge Keeton urges that we see this as a challenge calling for our most innovative efforts and highest aspirations. Justice Gregory Scott of Colorado's Supreme Court then provides a state judge's perspective on these matters. He emphasizes the complex choreography involved in lawmaking, featuring interactions between legislatures and courts, precedent and reform, and appellate and trial judges. He stresses the importance of harmonizing practical imperatives with ethical and moral expectations. All these are parts of the unending social dialogue out of which new law is fashioned.

Professors Richard Abel of UCLA and Marc Galanter of Wisconsin complete the Symposium's assessment of judges as lawmakers. Professor Abel scrutinizes one of the central arguments against judicial lawmaking—that it is counter-majoritarian and thwarts the efforts of the democratically-selected legislative representatives of the people. Professor Abel argues that this proposition is unsound in a range of contexts. He finds that legislatures are often the captives of special interests and that legislative deliberations are frequently "secretive, hasty"¹³ and unreasonable. By contrast, it is the courts that are "populist and deliberative."¹⁴ Based on these observations he argues that courts should recognize the propriety of their developing the common law and should carefully scrutinize legislative interference with it. Professor Marc Galanter points out the importance of realizing that lawmaking is the domain of the lawyers and trial judges, that appellate courts "are the carpenters, not the architects, devising solutions to problems put before them by lawyers."¹⁵ The dynamic growth of tort law reflects not appellate deliberation but the expectations of claimants, the creativity of advocates and the responsiveness of trial judges. Implicit in all this is the ongoing nature of the process.

The Clifford Symposium concludes with the transcript of a set of videotaped interviews with Illinois Congressmen Henry Hyde and Rod Blagojevich and Senators John McCain (Arizona) and Dick Durbin (Illinois). Although these men hold a number of differing views on questions of judicial lawmaking, *all* see its importance and the necessity for a sharing of effort between legislators and judges.

12. Robert E. Keeton, *Reflections on Tort Lawmaking*, 49 DEPAUL L. REV. 503, 503 (1999).

13. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533 (1999).

14. *Id.*

15. Marc Galanter, *Makers of Tort Law*, 49 DEPAUL L. REV. 559, 564 (1999).

Presidential hopeful, John McCain, sounds a theme echoed by his colleagues when he decries the negative impact of the activities of “special interests” on legislative action and sees such intrusions as increasing the need for and importance of judicial lawmaking. These legislators’ candid discussion underscores the deep roots and ongoing importance of judges as tort lawmakers in America.

