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## JUDGES AND *REAL* TORT REFORM CONCERNING UNCERTAINTY, DELAYS AND TRANSACTION COSTS

*Jeffrey O'Connell\**

Why is this Symposium so disappointing? The topic “Judges as Tort Lawmakers” conveys a distinct implication that we will hear about the capacity of the ablest in the judiciary to improve their creation of common law tort liability. The three crushing and intertwined liabilities of tort liability itself are its uncertainties, delays, and transaction costs, especially in the case of personal injury. One would hope that the very distinguished panel of tort scholars and other authorities assembled here would focus again and again on these blatant shortcomings, and perhaps even offer some solutions.

Instead, by starting the first session with a figure generally thought to be the greatest American judge ever to focus on tort law, Cardozo,<sup>1</sup> we heard concentration on what I would term relative minutiae. One certainly cannot blame Cardozo’s very thorough and perceptive biographer—Professor Andrew Kaufman—for this: he was just reporting the facts. As one concerned with the broader aspects of tort law’s performance, Cardozo, it turns out, was something of a bust (though Kaufman was far too elegant to put it so crudely).

Cardozo, then, despite his many tort opinions and scholarly lecturing, never gave much thought to tort law’s overall performance. It is not that his era was not confronted with such matters, as Professor Kaufman indicated. Cardozo practiced tort law, among other specialties, and ascended to the bench in an era that saw, amidst great controversy relevant to present debates, the abandonment of tort liability for the first great wave of accidents that had engulfed modern society—namely, workplace accidents. True, he presumably would not have ruled worker’s compensation unconstitutional as the New York

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1. Incidentally, for those like Professors Landsman and Galanter, devoted to ever-expanding tort law, it is provocative to recall that the most famous opinion of the most prominent judge ever to be identified with tort law was one by Cardozo *limiting* tort liability. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

Court of Appeals did in his time,<sup>2</sup> had he been sitting then. Certainly his great rival in tort scholarship on the bench, Holmes, crisply ruled workers compensation constitutional.<sup>3</sup> But unlike Holmes,<sup>4</sup> Cardozo never addressed in any of his writings the key issue raised by workers compensation—the adequacy of common law tort principles in an age of technology and insurance.

With this ominous beginning, the Symposium, if anything, went downhill because Professor Kaufman, as indicated above, was only reporting the unhappy facts. Other participants here had a choice as to where they could come out. The second session, for example, peopled by Professors Eisenberg, Finley, Green, Kiely, and Shapo, saw its speakers agreeably sink themselves into the Talmudic (or is it Jesuitical?) intricacies of products liability law—urging on occasion further expansion of this swamp, with too little focus on the uncertainties, delays, and transaction costs it imposes.

On the subject of tort law's uncertainty, consider the recent state supreme court case of *Montana v. Stanko*,<sup>5</sup> where the Supreme Court of Montana held a statute that in effect adopted the common law standard of fault as the basis of criminal liability for operating a motor vehicle at excessive speed unconstitutionally vague.<sup>6</sup> The statute, said the court, not only failed to give a "person of ordinary intelligence a reasonable opportunity to know what [was] prohibited," but "impermissibly [delegated] basic policy matters to . . . judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . ."<sup>7</sup>

Of course, technically, the *Stanko* decision does not invalidate common law standards, as opposed to criminal standards, identical though they may be. But surely the decision ought to shake one's confidence in the justice and reliability of common law standards of negligence. After all, a criminal defendant has far more safeguards than his civil counterpart. Indeed, they are often *seriatim* the same person, with the criminal proceeding dispositive as a practical matter of the civil one. The criminal case is pursued at the discretion of a prosecutor, exercised presumably in the public interest as to whether to prosecute. A

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2. See *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911).

3. See *N.Y. Central R.R. Co. v. White*, 243 U.S. 188 (1917).

4. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 96 (1881); see also DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 134 (1999).

5. 974 P.2d 1139 (Mont. 1998).

6. *Id.* at 1138. "A person operating . . . a vehicle . . . shall drive the vehicle in a careful and prudent manner . . . so as not to . . . unreasonably endanger the life, limb, or property, . . . of [any other] person entitled to the use of the street or highway." *Id.* at 1135.

7. *Id.* at 1136.

tort suit, on the other hand, is prosecuted by a private attorney pledged only to his client's own advantage, undissuaded by any sympathetic or extenuating circumstances surrounding the defendant's conduct. Furthermore, the prosecutor must prove the case beyond a reasonable doubt, whereas prosecutors of civil cases need only prove their case by a preponderance of the evidence. Finally, any penalty exacted in the criminal case is normally, at least for a first offense, relatively small, whereas a civil defendant can be threatened with huge financial losses in excess of his often limited insurance coverage. If, as a practical matter, damages over and above insurance coverage are rarely exacted from a defendant, think of the injured claimant whose violation of the identical contributory or comparative negligence standard can lead to the forfeiture in damages of hundreds of thousands of dollars or more, which no criminal proceeding would dream of exacting.

In sum, if the "reasonable care" standard is nakedly unconstitutional as applied to motorists in criminal cases, how appealing is it as applied to civil cases? Or indeed, how appealing is it as applied to providers of goods and services where the criteria are much more difficult to apply than in comparatively simple motor vehicle cases? Incidentally, courts' attitudes toward common law tort standards as a criterion for liability can be wondrously inconsistent. This phenomenon is illustrated by one court ruling them unconstitutional as applied in criminal cases, while other courts rule them so sacrosanct that legislative alterations in civil cases are also unconstitutional.<sup>8</sup>

None of this is new. A generation ago, John Frank, a former Yale law professor, and for years one of the most scholarly practitioners in the country, elucidated a tragic flaw of American law in its exploding creation of numerous complex "decision points."

As Robert Keeton and Alan Widiss summarized Frank's thesis:

The law maker's choice of an evaluative criterion [calling for a considerable measure of discretion in applying a criterion such as fault] confronts the law administrator with a type of decision point that is especially costly both because such a criterion has a capacity for generating numerous sub-points as factors to be taken into account [such as those for determining whether a product is defective] and

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8. See *The State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, Judge, 715 N.E. 2d 1062 (Ohio 1999); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997). William Glaberson, *Ohio Supreme Court Voids Legal Limits on Damage Suits*, N.Y. TIMES, Aug. 17, 1999, at A9; William Glaberson, *State Courts Sweeping Away Laws Curbing Suits for Injury*, N.Y. TIMES, July 16, 1999, at A1.

because its generality and imprecision reduce predictability and thereby impede the settlement process . . . .<sup>9</sup>

Turning then from the law's complexity to its concomitant delays—inevitable while all that complexity is dealt with—this subject was alluded to when Michael Green referred to a products liability case in which a new trial was ordered after thirteen years of litigation.<sup>10</sup> One can bet the court was totally unembarrassed by such a dilatory performance. A related article in this Symposium by a co-author and myself reports on our review of four leading torts casebooks which ignore such delays.<sup>11</sup> We found that in a sample of fifty-one personal injury cases, the *average* length of time between incident and appellate opinion was 6.94 years. Many took ten or more years, with a comparatively large number (twenty-three) involving, additionally, remands or new trials ordered by the appellate judges.<sup>12</sup> Only eighteen out of fifty-one cases were approved at the appellate level. But not *once* did either the casebook editors or the judges writing the opinions *ever* allude to the delay, no matter how lengthy.<sup>13</sup>

As to transaction costs incurred during all that delay dealing with all that complexity, the recent tobacco litigation has raised the issue to farcical levels, if it were not so tragic. To use Senator Moynihan's revealing concept of "defining deviancy down,"<sup>14</sup> society seems to have long reconciled itself to claimants' lawyers becoming hugely wealthy multi-millionaires in the course of helping the maimed and injured. But the new challenge to our society's capacity to further define deviancy down is presented by tobacco litigation which now makes claimants' lawyers *billionaires*. Are not they supposed to be fiduciaries gaining recompense for the afflicted? (Let me admit my interest to you. I was part of a group's so far-failed attempt to place a statutory limit on counsel fees in the tobacco cases of, say, \$4,000 an hour—rather a lavish limit itself, but one that would eliminate about 80% of the fees).<sup>15</sup>

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9. ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 17 n.3 (1988) (citing JOHN FRANK, *AMERICAN LAW—THE CASE FOR RADICAL REFORM* 85-110 (1969)).

10. See Michael D. Green, *The Road Less Well Traveled (And Seen): Contemporary Law Making in Products Liability*, 49 DEPAUL L. REV. 377 (1999).

11. Jeffrey O'Connell & Craig A. Stanton, *Justice Delayed is . . . Delay Ignored: The Indifference of Judges and Law Professors to Legal Lassitude*, 49 DEPAUL L. REV. 489 (1999).

12. *Id.* at 491-94.

13. *Id.*

14. DANIEL PATRICK MOYNIHAN, *MILES TO GO* 136-67 (1996).

15. See Lester Brickman, *Want to Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A11 (discussing the outrageous amounts of money attorneys receive in contingency fees from tobacco companies).

Well, one could go on, but what do we hear of this at this Symposium? Not nearly enough. As just one of many counter examples that could be cited, in the session on new torts we hear an exegesis on “enabling torts” whereby the liability of an aunt who buys a car for her alcoholic nephew who then crashes into the plaintiff, is litigated.<sup>16</sup> Other similarly technical matters are dealt with by speaker after speaker.

This is not to say that there is no place in this conference for such technical matters. It is only to lament such a relatively uniform focus. I listened in vain at every session, despite much elegance and learning in the presentations, for enough material that addressed tort law’s fundamental flaws.

Such myopia in our discipline reminds me fearfully of our medical colleagues. The medical profession, is, I am afraid, considerably more prestigious than ours, but similarly went on for generations ignoring its own increasing profligacy, and then in a few short years, faced an abrupt revolution with a concomitant loss of so much of its precious professional independence—as well as its fees.<sup>17</sup>

It is, I suggest, imperative for lawyers, especially legal scholars, to be thinking not so much about the types of relatively marginal issues focused on at this conference—matters about which many of us are so learned and skilled—but about tort law’s essential shortcomings.

In this connection, what *can* the courts do, either with scholars’ advice or without? As just one example, in the formulation of the new *Restatement Third of Products Liability*, I undertook a long, persistent colloquy with a very patient reporter, Jim Henderson. I pushed very hard to gain acknowledgment of the legitimacy of pre-accident waivers of full-scale tort liability by consumers of goods, in return for prompt payment of economic losses of wages and medical expenses. After *much* to-ing and fro-ing, this phraseology emitted:

**Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons**

**Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.**

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16. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

17. Ewe E. Reinhardt, *Should Physicians Unionize? No, Patients Would Pay the Price*, WALL ST. J., July 7, 1999, at A22.

*d. Waiver of rights in contractual settings in which product purchasers possess both adequate knowledge and sufficient economic power.* The rule in this Section applies to cases in which commercial product sellers attempt unfairly to disclaim or otherwise limit their liability to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests. This Section does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication. When such contracts are accompanied by alternative nontort remedies that serve as an adequate quid pro quo for reducing or eliminating rights to recover in tort, arguments may support giving effect to such agreements. Such contractual arrangements raise policy questions different from those raised by this Section and require careful consideration by the courts.

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*Comment d . . . .* See, e.g., O'Connell, *Elective No-Fault Liability by Contract: With or Without an Enabling Statute*, 1975 U. Ill. L. F. 59, 65-71 . . . . Also see Vol. II, *The American Law Institute, Reporters' Study: Enterprise Responsibility for Personal Injury* 517-536 (1991) . . . . This Section does not address the wisdom of such proposals. It speaks only to traditional disclaimers that function *unfairly* to deny or limit liability to persons who lack either information or bargaining power to protect their interests.<sup>18</sup>

Admittedly, this is not exactly a ringing endorsement, but it may be a start. After all, should not courts be receptive to contracts that strike a bargain between the desires of accident victims for prompt compensation of actual losses and of producers of goods and services to provide such? This is especially called for when one considers the sweeping immunity from *any* tort liability that judges afford themselves, and their rationale that they could not discharge their duties if somebody was constantly looking over their shoulders to impose liability.<sup>19</sup>

At any rate, so say I.

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18. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1998).

19. Jeffrey O'Connell & Ralph M. Muoio, *The Beam in Thine Eye*, 1997 U. ILL. L. REV. 491.