

# COMMENTARY

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## I

I would like to say a few words about the hindsight test, which in my teaching I have called the ex post Learned Hand test.<sup>1</sup> Any suggestion that this test is new is mistaken. Besides its use by Deans Wade and Keeton,<sup>2</sup> the hindsight test appeared, albeit a bit obscurely, in a marvelous nineteenth century case, *Mayor of New York v. Lord*.<sup>3</sup> *Lord* presented the question of whether the city should pay damages to a lessee of a store that the city blew up to create a fire break. The court, acting under a statute, saw three possible approaches to this question: treat the destruction as a "taking" and hold the city liable regardless of the circumstances; adopt a fault theory and ask whether a reasonable person would have foreseen that the destruction of the store was unnecessary and would not have blown it up; or apply the hindsight test, as the court actually did, and hold the city liable if, after the fact, it was apparent that the destruction of the store was unnecessary. This case is a wonderful, and old, example of how the hindsight test might be applied.

Notice that, if we apply the hindsight test to every accident situation, a Learned Hand cost-benefit analysis becomes virtually meaningless. Suppose I ask myself, "given what I now know, was it worth my while to speed at the particular instant that my speeding car mangled Richard Epstein?" The answer would almost always be no,

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<sup>1</sup> Learned Hand stated his famous "negligence calculus" in (among other places) *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947):

[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [the boat] will break away; (2) the gravity of the resulting injury, if [it] does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .

<sup>2</sup> See, e.g., Keeton, *Some Observations About the Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29*, 56 Calif. L. Rev. 149, 158 (1968); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 834 (1973).

<sup>3</sup> 18 Wend. 126 (N.Y. 1837). The court, of course, does not use the modern jargon of product liability.

because the few seconds that I saved by speeding at that very moment would only in the most extraordinary cases be beneficial. Why, then, can we apply the hindsight test in product liability situations without establishing absolute liability? Another way to look at this issue is to consider the relationship between a particular cause in fact—was my speeding car a “but for” cause of my hitting Richard Epstein—and a general causal link—did my speeding, even if only in retrospect, increase the chances of my hitting people like Richard Epstein. That is to say, is the knowledge we have gained about the danger of speeding as a result of my accident going to be of any use to us in the future? The conclusion that “if I hadn’t sped at that particular moment, I wouldn’t have hit Richard Epstein” does not shed much light on whether speeding is risky in general. In contrast, however, some of the knowledge about products that we have gained from certain product liability cases—cases where a hindsight test has been applied—is knowledge that we think should influence buyers and sellers in the future.<sup>4</sup> It is interesting to note that the area where the hindsight test has been applied generally is an area where the information gained has both retrospective and prospective significance.

There are, I suggest, three possible tests for liability: nonfault, hindsight, and Learned Hand. The first, which I have called the strict liability test in some of my writings,<sup>5</sup> determines who was in the best position to make a cost-benefit analysis prior to the accident. Depending on who occupied this position, the loss may be put on either the victim or the injurer regardless of how we ourselves might calculate the costs and benefits with or without the advantage of hindsight. That is to say, there are instances in which we find a product to be without defect even though the manufacturer might well have flunked all sorts of hindsight and reasonable person tests. We do not hold manufacturers of contraceptives liable for pregnancies resulting from contraceptive failure because we think that the factors in the users’ knowledge and control are more significant: users are in a better position to assess the risk, to them, of failure and the benefit, to them, of using a particular form of contraceptive rather than another, and to make the critical choices accordingly. Alternatively, there are instances, such as workers’ compensation cases, when liability is placed on the employer whether or not it would flunk either a prospective or retrospective cost-benefit test. We hold the employer liable because it

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<sup>4</sup> See Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69 (1975).

<sup>5</sup> See, e.g., Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972).

is better able than its employees to gauge the relative costs of safety and accidents, and so is in a better position, if liable, to decide whether the costs of greater safety in employment are worth undertaking.

Assuming that a cost-benefit analysis not made by the parties themselves is possible,<sup>6</sup> we have two alternatives. We can use a retrospective cost-benefit test, a test applied not by the parties themselves but by some institution of society; this is the hindsight test. Or we can use a prospective test, as might have been applied by some institution of society just prior to the accident; this is the classic Learned Hand negligence test.<sup>7</sup> If the law of torts is not concerned with deterrence, both of these tests are irrelevant because both of them are designed to deter undesirable conduct. But if we are concerned with deterrence, then either of these tests can be an appropriate approach to the liability issue.

We should not forget that a certain amount of unknown risk exists, regardless of who bears it. Professor Phillips was quite correct when he said that plaintiffs should have a crack at claims they do not discover until after a product is marketed.<sup>8</sup> This observation should remind us that defendants are not the only ones unaware of the risks; plaintiffs do not know about them either. The question, then, is who should bear the unknown or unknowable risk? The answer depends on various factors, including which side is more likely to take action to avoid even unknowable risks and which party is less averse to the taking of such risks. In an entrepreneurial society like ours, those who choose to be entrepreneurs can properly be assumed to be less risk-averse than others. If this notion is correct, it is one argument—maybe a small argument compared with other arguments about administrative costs, loss-spreading, and so forth—for placing the burden of unknowable product risks on defendants (entrepreneurs) rather than on plaintiffs.

Uncertainty about business risks is costly because an entrepreneur's rate of return for taking an unknowable and uninsurable business risk must be high. People who take these kinds of risks, people who innovate, properly demand high returns. The cost of this uncertainty is thereby reflected in the marketplace through the price of risky products. What we should remember is that "unnecessary" uncertainty—the uncertainty of potential but as yet indeterminate legal

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<sup>6</sup> Sometimes the difficulties of proof will make the application of such a cost-benefit test impossible and thus will require a rule that imposes liability on one party regardless of how society might strike the balance between the costs and benefits were it able to do so.

<sup>7</sup> See note 1 *supra*.

<sup>8</sup> See Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906, 923-25 (1983).

liability and that of undefined damages—has also been built into the business of making certain products. The cost associated with this added uncertainty will be borne by one party or the other, and, unless we can abolish it, the principal question is how to place it on the party who becomes less averse to bearing such uncertainty for a fee. If you ask whether this is the question being addressed by product liability law today, I would say no. This problem is very serious. It is terribly important that we not confuse the uncertainties we have created with the uncertainties that are a fact of economic life. There is nothing wrong with allocating the latter on the basis of traditional tort policies, such as deterrence. Nor is there anything wrong with allocating the former on the same basis—but *only after* we have decided that the uncertainty is worth having.

## II

Both Victor Schwartz and Dean Wade commented that the hindsight, or *ex post*, test might discourage innovation.<sup>9</sup> I would note that innovation will be discouraged only if a relatively competitive market does not exist; if we assume instead that the market is competitive, we must conclude that innovation will occur. If we are convinced that the market is noncompetitive, perhaps we should consider adopting a rule under which anyone who innovates is immune from resulting lawsuits, with those injured by a particular innovation compensated from a fund to which others contribute. I am not convinced that innovation will be deterred by a hindsight test, and even if it were, I think the test raises other, more significant problems.

Victor Schwartz suggested that, if compensation is our goal, a tort system that uses a hindsight rule does not work well, because there are cheaper and better ways of compensating victims.<sup>10</sup> There is a problem with this view. If we focus on any single goal of tort law, we will find that tort law may not serve that goal very well at all. But this cannot be the issue. We must look at how the particular system serves a combination of goals. Victor Schwartz considered each goal separately and found that the hindsight rule was not the best way to compensate injured plaintiffs; he should instead have looked at the combination of goals that the rule promotes.

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<sup>9</sup> See Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 899, 901 (1983); Wade, *On the Effect in Product Liability of Knowledge Not Available Prior to Marketing the Product*, 58 N.Y.U. L. Rev. 734, 755 (1983).

<sup>10</sup> See Schwartz, *supra* note 9, at 903.

In commenting on Victor Schwartz's paper, Professor Epstein began by distinguishing between situations of private ordering and situations where we need to impose an ordering from outside, and he referred to the bystander problem as an example of the second situation.<sup>11</sup> I would suggest that if Ronald Coase has taught us anything,<sup>12</sup> it is that the distinction between a bystander and the party in privity of contract with the tortfeasor is too simple. It may well be that we do not need to impose an outside ordering on behalf of the party in privity, while we do on behalf of the bystander. But one can posit factors—unequal knowledge among contracting parties and ready feasibility of entering into a contract with the bystander—that reverse the situation. Thus, while I think that Professor Epstein is right in terms of the particular cases he discusses, his distinction probably does not provide a theoretically correct way to examine the problem of private versus outside ordering.

Dean Wade mentioned the Tylenol scare.<sup>13</sup> I wonder if the manufacturer of Tylenol would flunk a cost-benefit test, whether prospective or retrospective. Manufacturers have begun to package their goods in tamper-proof containers, but does it really make sense, given all the other risks associated with products and the long period of time since the last series of tampering episodes, to worry about the problem and go to the expense of such packaging? I think not. The reaction to the Tylenol incident suggests that something other than ordinary cost-benefit analysis underlies the decision to begin using tamper-proof containers. If we take into account emotional stress—the momentary fear of everyone who takes Tylenol that they may have just been poisoned—cost-benefit analysis may explain the new packaging; otherwise, it really does not.

As the panel was discussing hindsight and foresight, I could not help thinking about what we would do in the following situation. Suppose that at the time a defendant took the action in question it would have flunked a Learned Hand test for doing so, but that information we have learned since that time shows the defendant's action to have been eminently, if fortuitously, desirable. If this example strikes you as fanciful, consider the situation in which a doctor, before the link between leukemia and X-rays was discovered, failed to

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<sup>11</sup> See Epstein, Commentary, 58 N.Y.U. L. Rev. 930, 930 (1983).

<sup>12</sup> See Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). The "Coase Theorem" states that, assuming the absence of transaction costs, imposing liability on a particular party will not affect the efficiency of the party's undertaking; the incentives created by a liability burden will always be shifted through bargaining onto the party best able to act on them.

<sup>13</sup> See Wade, *supra* note 9, at 736-37.

take an X-ray in a case that, on the basis of contemporary knowledge, seemed to require X-rays. We now know that X-rays can cause leukemia and therefore are undesirable unless there is a substantial need. What happens if a lawsuit for failure to take the X-ray is brought against the doctor today? Ex ante the doctor was clearly at fault; with the benefit of hindsight the doctor may well have done the right thing. My point is that a hindsight test may work both ways—we may discover information that renders an earlier decision reasonable or unreasonable. When we evaluate the hindsight test, we should consider both of these possibilities.