



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 10 | Number 1

Article 7

---

1993

## Revising Section 402A: The Limits of Tort as Social Insurance

James A. Henderson Jr.

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Insurance Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Henderson, James A. Jr. (1993) "Revising Section 402A: The Limits of Tort as Social Insurance," *Touro Law Review*. Vol. 10: No. 1, Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol10/iss1/7>

This Symposium is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## REVISING SECTION 402A: THE LIMITS OF TORT AS SOCIAL INSURANCE

*Professor James Henderson\*:*

I am Professor James Henderson. I teach Law at Cornell, and by now you know I am one of the reporters on the Restatement (Third) of Torts project.<sup>1</sup> I am going to keep my remarks short so we will have some time for discussion. I am going to make a few comments about what I think a Restatement is, and then I will address the one issue, really one of the few issues, on which I disagree with everybody who has spoken thus far.<sup>2</sup>

So what is a Restatement? Professor Gray said that it is not law which I think is an awfully positivistic approach.<sup>3</sup> John Austin, a positivistic English legal scholar of the 19th century, defined law as commands which are backed by the force of the sovereign.<sup>4</sup>

---

\* Frank B. Ingersoll Professor of Law, Cornell Law School. A.B. 1959, Princeton University; LL.B. 1962, LL.M. 1964, Harvard University.

1. *Restatement (Third) of Torts: Institute Announces Advisory Committee for Restatement Product Liability Revision*, BNA PRODUCT LIABILITY DAILY, June 11, 1992, available in Westlaw, BNA file.

The American Law Institute announced the group of 20 judges, professors, and private practitioners who will serve as the advisory committee for the product liability portion of the Restatement (Third) of Torts. The committee will work with the two co-reporters on the first part of A.L.I.'s project to revise its influential 1979 treatise, Restatement (Second) of Torts. The product liability section should be complete within five years, but the complete revision is expected to take up to 15 years. The co-reporters . . . are Cornell Law School Professor James A. Henderson, Jr. and Brooklyn Law School Professor Aaron D. Twerski.

*Id.*

2. *See infra* note 27.

3. *See* WILFRED E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* 3 (1982). ("For the legal positivist, in brief, 'all laws owe their origin and existence to human practice and decisions concerned with the government of a society, and . . . have no necessary correlation with the precepts of an ideal morality.'").

4. *See* JOHN AUSTIN, *A Positivistic Conception of Law*, in *PHILOSOPHY OF LAW* 27 (Joel Feinberg & Hyman Gross eds., 4th ed. 1980).

Austin felt that any command that does not meet that definition is not law.<sup>5</sup> This is similar to the theory espoused by Professor Gray.<sup>6</sup> I take a broader view about the force of law and how law is promulgated. When a parent tells a child, in a family setting, "you are going to do this," that is law. Any source of norms that is respected and followed by the addressees is, in a broad sense, law. It is more helpful to think of it that way. The Restatement, if we end up with one, fits this broader definition of law.<sup>7</sup>

I believe the Restatement will have normative force. The prestige of the American Law Institute (A.L.I.)<sup>8</sup> will give it weight. However, I doubt that every court will adopt it. I do not think it will meet the reception of the Restatement (Second) of Torts section 402A,<sup>9</sup> which was an idea whose time had come. That origi-

5. See generally JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW I (1913) [hereinafter LECTURES] ("Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands.") (emphasis in original).

6. See Oscar Gray, *Reflections on the Historical Context of Section 402A*, 10 TOURO L. REV. 75 (1993).

7. See generally LECTURES, *supra* note 5.

8. The American Law Institute is a non-profit organization which has objectives that include educating, "promot[ing] the clarification and simplification of the law and its better adaptation to social needs, . . . secur[ing] the better administration of justice, and . . . encourag[ing] and carry[ing] on scholarly and scientific legal work." The American Law Institute., *Bylaws*, 66 A.L.I. PROC. 659 (1989).

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This provision provides in relevant part:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

nal version was not a breakthrough, contrary to what Professor Gray said.<sup>10</sup> I do not think Prosser<sup>11</sup> thought it was either.<sup>12</sup> For the original version there was only one case<sup>13</sup> but the reporters knew there were hundreds, even thousands on the way. It took no real guesswork to see that.

Is a new Restatement needed now? Well, I confirm what Professor Twerski said.<sup>14</sup> If you love confusion and lack of certainty, then it is probably not needed, because the revision will bring clarity.<sup>15</sup> We think it is time for a revised version, and

*Id.*

10. See generally Gray, *supra* note 6 (discussing how section 402A was not a breakthrough because it was just a combination of negligence law and warranty law).

11. William Prosser was the Dean of the University of California School of Law at Berkeley. He was also a professor at the Hastings College of Law. Most notably, he was Reporter for the Second Edition of the Restatement of Torts. Additionally, “[h]e wrote influential law review articles that predicted and then celebrated judicial adoption of strict liability for defective products.” Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 661 n.70 (1990) (book review).

12. See generally William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 848 (1966) (“[I]t seems quite apparent that there is nothing in any of the strict liability cases to indicate that the problems of proof will be dealt with in any different manner than in those involving only negligence.”).

13. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (en banc). This was the first court to apply a tort theory of strict liability generally. The court held that:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

*Id.* at 900.

14. See generally Aaron Twerski, *From a Reporter: A Prospective Agenda*, 10 TOURO L. REV. 5, 19(1993) (stating that lawyers may not like precision or clarity since it prevents “strategic behavior”).

15. See James A. Henderson, Jr., & Aaron Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM U. L. REV.

more importantly, the A.L.I. thinks that it is time for a revision.<sup>16</sup> I predict that something is going to come out of it.

Our job, when we meet the advisors and go through the process, will be to try to convince both plaintiffs' and defendants' attorneys that we, the committee for revision, have tried to make the revision of section 402A balanced rather than adopt a one-sided version. What should it formally and structurally look like? I do not think it should look like a statute. Unlike a statute, there will be neither a cap on damages provision<sup>17</sup> nor a period of repose.<sup>18</sup>

---

1257, 1262 n.27 (1993) (discussing issues in the field of products liability which the new restatement will clarify).

16. See Hildy Bowbeer, *The A.L.I.'s Restatement on Products Liability: Some Early Concerns and Suggested Revisions*, BNA PRODUCT LIABILITY DAILY, Aug. 2, 1993, available in Westlaw, BNA file; *Restatement (Third) of Torts: Institute Announces Advisory Committee For Restatement Product Liability Revision*, BNA PRODUCT LIABILITY DAILY, June 11, 1992, available in Westlaw, BNA file.

17. The term "cap on damages" is referred to as "statutorily imposed limits on recovery of noneconomic damages in tort actions." BLACK'S LAW DICTIONARY 207 (6th ed. 1990); see, e.g., *Sander v. Geib, Elston, Frost Professional Ass'n*, 1993 S.D. LEXIS 125 at \*1 (S.D. Sept. 15, 1993) ("The trial court applied [the state cap on damages statute], which places a cap on the medical malpractice damages which may be awarded to a plaintiff"); *Cott v. Peppermint Twist Management Co.*, 856 P.2d 906, 932-33 (Kan. 1993) (where the court held that "the statutory cap [on damages] is applicable to any suit, including breach of express warranty, in which personal injuries are claimed"); *Figgie Int'l., Inc. v. Tognocchi*, 624 A.2d 1285, 1293 (Md. 1993) ("Section 11-108 of the Court's Article establishes a cap of \$350,000 for noneconomic damages that may be awarded in a personal injury action."); see James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1340 (1991) ("Several states have enacted legislative caps on noneconomic losses."); see also Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1395 (1993) (stating that some "[a]dvocates of tort reform have frequently criticized large punitive awards and recommended caps on punitive damages, sometimes to absolute dollar amounts, but often to amounts determined by some fixed multiple of compensatory damages"). *But cf.* Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 n.156 (1987) (condemning

The revision which we are undertaking is not a reform measure. We are trying to read the cases and by and large conform to the trends that we see in them. Where there is no trend visible, we are going to call the shots because that is an integral part of the project. We cannot be as precise as a statute.

Earlier Mr. Crofton talked about precision.<sup>19</sup> I would distinguish between precision and clarity. Precision implies detail. However, for a Restatement to work, it cannot be full of detail. It has to be clear so that the reader will not be confused. At the same time it has to leave breathing room; space for the courts to make their own versions of the themes. Therefore, this revision will contain more detail in the comments and a great deal of detail in the reporter's notes, in which we will put our research. Above all, it cannot be one-sided.

When I was first appointed,<sup>20</sup> Plaintiff's Bar had, collectively, what might pass for an aneurysm. For years I had written what was widely viewed, and I think fairly viewed, as pro-defendant

caps on damages due to their arbitrary nature which may create disproportionate results).

18. The period of repose is the period:

[W]ithin which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.

54 C.J.S. Limitations of Actions § 4 (1987); *see also* Cavanaugh v. Abbott Labs., 496 A.2d 154, 161-62 (Vt. 1985) (stating that a "statute of repose . . . establishes a maximum length of time within which a plaintiff must commence a suit for injury even if the cause of action is not barred by any applicable statute of limitation").

19. *See generally* Michael Crofton, *From a Defense Attorney's Perspective: "There is No Free Lunch,"* 10 *TOURO L. REV.* 55 (1993) (stating that law should be clear enough so that judges have the confidence to make rulings with respect to undisputed facts in motions for summary judgment).

20. Professor Henderson was approved on May 16 by the executive committee of the American Law Institute to be a co-reporter on the product liability portion of the Restatement (Third) of Torts. *Prominent Law Professors Offered Positions as Co-Reporters on Product Liability Study*, 20 *PRODUCT SAFETY & LIABILITY REPORTER* 547 No. 21 (May 22, 1992).

material.<sup>21</sup> However, I never thought of myself as pro-defendant. I identified what I thought were flaws in the system, and I did it when it was not popular to do so. When I was your age, I was surrounded by people who wanted ever greater expansion. There was no frontier that was not worth crossing. I started my career saying “wait a minute, do we really mean this?” Now, thinking as an academic, I have shifted and I am politically in the middle of the road. Maybe even in my off moments I am more liberal than many writers.

I agree with Mr. Vargo in that the law and economics movement has probably gone way beyond the point of contributing

21. See James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 766 (1983) [hereinafter Henderson, *Passage of Time*]:

[E]xposing manufacturers to product liability may be counterproductive . . . [P]roduct liability imprisons corporate managers in patterns of ‘deep play’ [deferring action on improving the safety of a product] such that the marginal incentives created by exposure to liability direct them away from, rather than toward, decisions that enhance the general welfare.

*Id.*; James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 784 (1978-79) [hereinafter Henderson, *Renewed Judicial Controversy*]:

If the [two tests developed in *Barker v. Lull Eng’g Co.*, 573 P.2d 443 (Cal. 1978) are] applied literally, every plaintiff represented by at least minimally competent counsel should succeed in shifting the burden to the defendant; and no defendant however capably represented will succeed, other than by agreeing to settle, in avoiding the retrospective evaluation of its design choices by lay jurors.

*Id.*; James A. Henderson, Jr., *Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1562 (1973) [hereinafter Henderson, *Judicial Review*] (“[C]ourts typically find the defendant’s product to be defective not only because it fails to meet minimum standards of reasonable design, but also because it is not accompanied by adequate warnings of the risks associated with its design.”); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1975-76) [hereinafter Henderson, *Expanding Negligence*] (“[w]here evaluation of the defendant’s conduct requires an assessment of complex technology”).

much in the way of new thinking in product liability.<sup>22</sup> Although I have written in support of the law and economics theories,<sup>23</sup> I share some of Mr. Vargo's criticisms.

This Committee on Revision did a study of every state, and just completed the last of fifty-one jurisdictions, including the District of Columbia. Thirty-four have expressly adopted some form of risk/utility balancing in design defect cases.<sup>24</sup> I think the positions are overwhelming.

22. See John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1992-93). "Economists experience a great deal of consternation . . . in trying to place economic or monetary values on intangible items, such as human life and well being." *Id.* at 1627. "The core of any economic analysis is the measurement of 'economic costs' and 'economic benefits.'" *Id.* at 1628. "Nevertheless, public policy decisions about any issue, including fee shifting, cannot be based solely on the cost-benefit analysis of economics." *Id.*

23. See, e.g., Henderson, *Renewed Judicial Controversy*, *supra* note 21, at 775, 805 (supporting the growing consensus that in design defect cases cost-benefit analysis should be used, "with the injured plaintiff bearing the burden of persuading the tribunal that costs associated with the defendant's design choices including accident costs, exceeded the benefits of the design."); James A. Henderson, Jr., *Extending The Boundaries of Strict Products Liability; Implications of the Theory of Second Best*, 128 U. PA. L. REV. 1036 (1980) (discussing the economic policies behind holding certain types of sellers strictly liable for harm caused by their defective products).

24. See, e.g., *Hull v. Eaton Corp.*, 825 F.2d 448, (D.C. Cir. 1987) (relying on risk-utility balancing); *Dreisonstok v. Volkswagenwerk*, 489 F.2d 1066 (4th Cir. 1974) (manufacturer owes duty to adopt reasonably safer alternative designs); *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128 (Ala. 1976) ("fault concept" retained); *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329 (Fla. 1983) (risk-utility balancing and unreasonable danger tests); *Toner v. Lederle Lab.*, 732 P.2d 297 (Idaho 1987) ("unreasonably dangerous" standard), *cert. denied*, 485 U.S. 942 (1988) ); *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990) ("claimant should be able to demonstrate that a feasible, safer, more practicable product design would have afforded better protection"); *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976) (risk-utility balancing test employed); *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980) ("ordinarily prudent company" test); *Back v. Wickes Corp.*, 378 N.E.2d 964 (Mass. 1978) (risk-utility balancing); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me. 1988) ("danger-utility test"); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984) ("the overwhelming consensus among courts deciding defective design cases is in the use of some form of risk-utility analysis"); *Holm v. Sponco Mfg.*, 324



Geoffrey C. Hazard Jr.,<sup>25</sup> the Director of the A.L.I., gathered together a group of advisors to be on the Committee who would

---

N.W.2d 207 (Minn. 1982) (defectiveness of design to be determined by whether designer exercised "reasonable care"); Sperry New Holland, A Div. of Sperry Corp. v. Prestage, 617 So. 2d 248 (Miss. 1993) (adopting risk-utility balancing and rejecting the consumers expectation test); Carlton J. Voss, Jr. v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107, 450 N.E.2d 204, 207, 463 N.Y.S.2d 398, 401 (1983) ("[A] defectively designed product is one . . . whose utility does not outweigh the danger inherent in its introduction into the stream of commerce."); McCollum v. Grove Mfg. Co., 293 S.E.2d 632, 638 (N.C. App. 1982) ("the duty of the manufacturer . . . must be determined by the principles of negligence), *aff'd*, 300 S.E.2d 374 (N.C. 1983); Claytor v. General Motors Corp., 286 S.E.2d 129, 132 (S.C. 1982) ("In the final analysis, we have another of the law's balancing acts and numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger."); Peterson v. Safway Steel Scaffolds Co., 400 N.W.2d 909, 912 (S.D. 1987) (value in product is compared with the level of dangerousness it possesses); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979) (product designs should be judged by a risk-utility standard); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 683 (W. Va. 1979) ("the general test for establishing strict liability [for design] is whether the involved product is defective in the sense that it is not reasonably safe . . ."); Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897, 902 (Wis. 1991) ("the test [for defective design] is ultimately one of reasonableness."); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 834-35 (Iowa 1978) ("The article sold must be dangerous to an extent beyond that which would be expected by the ordinary consumer . . . . Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other side is the risk of its use."); Lamkin v. Towner, 563 N.E.2d 449 (Ill. 1990) (purports to adopt consumer expectations test but employs risk-utility analysis in ruling for defendant manufacturer); Seattle-First Nat'l Bank v. T.E. Tabert, 542 P.2d 774, 779 (Wash. 1975) (en banc) ("In determining the reasonableness of expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant . . . .").

25. Geoffrey C. Hazard, Jr. is a Sterling Professor of Law at Yale University. He is a co-author of many works including, FLEMING JAMES, JR. AND GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE (4th ed. 1992); GEOFFREY C. HAZARD, JR. AND JAN VETTER, PERSPECTIVES ON CIVIL PROCEDURE (1987) and GEOFFREY C. HAZARD, JR. AND ALBERT A.

provide a balanced representation of well-known plaintiffs' lawyers and well-known defendants' lawyers in the group.<sup>26</sup> Since the revision should be unbiased, if either plaintiffs' lawyers or defendants' lawyers give us a standing ovation, we are dead. However, if both groups start throwing things at us, we have done well. It is better to have something we can all tolerate rather than a version which favors either plaintiffs or defendants.

I want to talk for a moment about the imputation of knowledge issue that was discussed by almost everybody who has spoken so far.<sup>27</sup> I think the use of that principle in the revision would be a

---

EHRENZWEIG, JURISDICTION IN A NUTSHELL: STATE AND FEDERAL (4th ed. 1980).

26. Named to the committee are professors Kenneth S. Abraham of the University of Virginia School of Law; Paul Weiler of Harvard Law School; Oscar S. Gray of the University of Maryland School of Law; Robert L. Rabin of Stanford Law School; Gary T. Schwartz of the University of California at Los Angeles School of Law; Marshall S. Shapo of Northwestern University School of Law; Roger C. Cramton of the Cornell Law School; and Michael D. Green of the University of Iowa Law School. Practitioners named to the committee are Sheila L. Birbaum of Skaden, Arps, Slate, Meagher & Flom in New York; Robert L. Habush of Habush, Habush & Davis in Milwaukee; Paul D. Rheingold of Rheingold & McGowan P.C. in New York; Victor E. Schwartz of Crowell & Moring in Washington, D.C.; Michael Traynor of the Sierra Club Legal Defense Fund in San Francisco; Bill Wagner of Wagner, Cunningham, Vaughan & McLaughlin in Tampa, Fla.; Conrad K Harper of Simpson, Thatcher & Bartlett in New York; and, John W. Martin Jr., vice president and general counsel for Ford Motor Co. in Detroit. The A.L.I. also named four judges to the committee: Dineen King of the U.S. Court of Appeals for the Fifth Circuit; Hans A. Linde of the Oregon Supreme Court; Vincent L. McKusick of the Supreme Judicial Court of Maine; and Robert E. Keeton of the U.S. District Court for the District of Massachusetts. *Restatement (Third) of Torts: Institute Announces Advisory Committee For Restatement Product Liability Revision*, BNA PRODUCTS LIABILITY DAILY, June 11, 1992, available in Westlaw, BNA file.

27. Imputed knowledge is defined as "knowledge attributed or charged to a person because the facts in question were open to his discovery and it was his duty to inform himself as to them." BLACK'S LAW DICTIONARY 758 (6th ed. 1990). See, e.g., *Vermeulen v. Superior Court*, 251 Cal. Rptr. 805, 813 (1988) ("[M]anufacturers may not be held strictly liable for failure to warn of risks of which they were unaware and could not have been aware by the reasonable application of scientific knowledge available at the time of distribution. Consequently, 'state of the art' evidence may well be relevant and

mistake. I will not let the cat out of the bag by telling you that the revised section 402A will not include imputation of knowledge in the toxic pharmaceutical area. I probably overstepped my orders by telling you this and it probably gives you a glimpse under the tent.

However, as Professor Twerski mentioned earlier, the committee has no problem imputing knowledge in every other context.<sup>28</sup> Plaintiffs should not have to jump through hoops via Newton's laws<sup>29</sup> to prove their claim. I think it would be a terrible mistake to impose liability in the form of imputation of knowledge where a company truly could not know of the sometimes enormous risks and it is ostensibly public minded, though for a profit. It is a mistake to think that those risks are insurable. They are not.

At lunch we had a fruitful, robust discussion, and it was suggested to me that we could cap insurance, maybe with huge deductibles, as a way to protect the insurance companies' liability.<sup>30</sup> However, that is essentially a refusal to write insurance.

admissible in a failure to warn case."); *Toner v. Lederle Lab.*, 732 P.2d 297, 307 (Idaho 1987) ("Knowledge of the product's risks based on reliable and obtainable information is imputed to the seller.").

28. See generally Twerski, *supra* note 14.

29. "Newton's first law states that, if a body is at rest or moving at a constant speed in a straight line, it will remain at rest or keep moving in a straight line at constant speed unless it is acted upon by a force." 7 THE NEW ENCYCLOPEDIA BRITANNICA 306 (15th ed. 1982).

30. A deductible is the amount that the insured is required to pay when found liable for someone's injury. The insurer is responsible for paying any amount above the deductible. For example, if an auto manufacturing company takes out an insurance policy to protect itself against lawsuits and its deductible is one million dollars, the auto company will have to pay the first one million dollars for which it is liable in a lawsuit, and the insurance company will pay any amount above one million dollars if the auto company is found liable for an amount greater than one million dollars. The higher the deductible, the less money the insurance company will have to pay and the more exposure to liability for the insured. See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 93, at 441 (1987) ("[A] 'deductible' provision causes the insurer and insured to share the loss. When insurance coverage is subject to a deductible, the insured bears that portion of the loss up to the amount of the deductible. However, the amount of the deductible bears no relationship to the extent of coverage of a property's total value."); ROBERT E. KEETON, BASIC

I teach insurance, and we contrast insurance and gambling from the first day of class. Insurers do not like to gamble. So, what if we were to occasionally impose enormous crushing liabilities on producers of toxic chemicals or pharmaceuticals? I cannot tell you what would happen. I do not think that insurance companies could write insurance which would adequately classify the risks. Insurance companies charge a premium which reflects the insured's relative contribution to the risk pool which is comprised of the insurance company's clients. People do not ordinarily write life insurance on a flat rate, i.e., the same rate for everybody.<sup>31</sup> The way a life insurance company classifies the risk you present to them is by determining your age, your sex, and your health, among other things, and they will charge you according to the risk they feel you present. If the risks are, *per se*, unpredictable, then it is a contradiction in terms to think that they could adequately be classified. My hunch is that something like the following scenario would result if a system was put in place which would require insurance companies to insure risks that were not foreseeable at the time the policy was taken out. The producers of products exposed to these potential risks would seek insurance and not be able to find it. And, if they could find it, it would be at exorbitant rates. The actuaries would compute a sum of money that represented the basic risks presented based on the statistics they had. Whatever figure they came up with, they would multiply it by ten and maybe write some insurance. This would be very, very costly to the insured.<sup>32</sup>

---

TEXT ON INSURANCE LAW § 3.6(a), at 131 (1971) ("Sometimes . . . there is added to the clause the phrase 'under x per cent, which is deductible.' In such case, the insured always bears that part of the loss up to the deductible percentage, and the underwriter pays only the excess.").

31. See, e.g., Robert Lowe, *Genetic Testing and Insurance: Apocalypse Now?*, 40 *DRAKE L. REV.* 507, 512-13 (1991) ("If workers paid the premium themselves, the younger, healthier employees might opt for less expensive coverage. The flat rate works as a cross subsidy with premiums charged for younger and healthier workers subsidizing the older and less healthy employees.").

32. See, e.g., Richard A. Epstein, *Products Liability as an Insurance Market*, 14 *J. LEGAL STUD.* 645, 651 (1985) (stating that insurance companies

My hunch is that firms, in any event, would not obtain insurance policies for amounts beyond what they are worth. For example, if a firm was exposed to two hundred billion dollars of damages and the firm was only worth twenty billion dollars, it would be silly for that firm to write insurance for the full exposure to liability. At some point it would be cheaper simply to go under. Could the purchase of hundreds of billions of dollars of insurance be required as a prerequisite for entry into certain markets, where there are many unforeseeable risks that are considered in insurance plans? Could these companies be given no choice? That is politically dangerous and I would not want to run on that platform. For example, if that system was to cause prices of drugs to rise dramatically, then what would we have done? We would have added to the costs that the new President and his lovely wife promised to reduce, namely containing the costs of the health care.<sup>33</sup>

Now, what do I do with the ogreistic aspects of leaving the costs on the victims? I do prefer shifting the costs to the firms. As I explained at lunch, I voted for President Clinton, and I am not ashamed to say that I was led to that by my children who badgered me to have a conscience and believe in America. My children are becoming more liberal and believe that the victims of that kind of bad luck ought to have someplace to look for what I would call social insurance.

---

should charge the insured based on "their expected losses so the better risks do not leave the pool because they are required to subsidize the inferior ones").

33. While campaigning in South Carolina, Clinton was quoted as saying that:

Under our plan we will keep what is best about American health care; the right to pick your doctor, the right to choose your health care provider. But we will control costs, put more money into basic, primary, preventive-health-care clinics in inner cities and rural areas, put more money into health-education programs in the schools and the workplaces, and stop the kinds of mindless explosions of costs that are not making us a healthier people.

Ronald A. Taylor, *Clinton Braves 'Rocks' on GOP Turf*, WASH. TIMES, Sept. 6, 1992, at A4; see also *A New Framework for Health Care*, N.Y. TIMES, September 23, 1993, at A20 (outlining the newest proposal by President Clinton for his health care plan).

When I came here, I thought Mr. Vargo and I would be at each other throats. I bulked up in anticipation for that happening. However, my opinions are close to his.<sup>34</sup> Although we use different language, we are not that different. He would tell me that social insurance is inadequate. To that I would reply that he wants tort to replace otherwise nonexistent social insurance. He does not want tort to play a deterrence game, but rather a social insurance game. I would tell him that his opinion is anti-consumer and unconscionable. Although it is pro-plaintiff, injured plaintiffs are a small subset of consumers. The rest of us would pay through the nose and collectively receive pennies on the dollar. The tort system is a miserable flop as a social insurance system.<sup>35</sup> I am not against tort, but just do not sell it to me as social insurance. Most of the money goes to the lawyers.

Now, I am talking to the wrong group about limiting tort as a form of social insurance. You are going to be out there getting your piece of the pie. But, from a larger view, to suggest that we ought to shift these enormous losses when they occur strikes me as bad. We should keep the pressure up, get behind Mrs. Clinton and contain costs. To accomplish these goals we should use a resource other than tort, that would not be as spectacular as tort.<sup>36</sup> The empirical studies I have read suggest that when tort does pay, it pays on a random, unfair, and speculative basis.<sup>37</sup> The worse the injury, the less the recovery as a percentage of the cost

---

34. See *supra* note 19.

35. See Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 *SAN DIEGO L. REV.* 17, 35 (1986) ("Almost anything is likely to be better than the common-law tort system that lawyers have devised.").

36. See generally O'Connell, *supra* note 35 (suggesting workers' compensation, no-fault insurance, and alternatives in contract).

37. See, e.g., New York State Insurance Dept., *Automobile Insurance . . . For Whose Benefit?; A Report to Governor Nelson A. Rockefeller*, (1970). See generally James A. Henderson, Jr. & Theodore Eisenberg, *Inside The Quiet Revolution in Products Liability*, 39 *UCLA L. REV.* 731, 761 (1992) ("[W]hile success rates might be expected to respond in an observable manner to doctrinal change, award sizes are more likely to follow a path of their own, at least until the change is fully absorbed by plaintiffs and defendants.").

of the injuries, and the less you are injured in tort, the more the recovery may be.<sup>38</sup>

I almost sound like Peter Huber,<sup>39</sup> that M.I.T. person from Harvard Law School. I think much of what he says is baloney and overstated, but he has popularized the notion that we have met the enemy and they are lawyers.<sup>40</sup> I agree with that because I do not think tort-run social insurance is pro-consumer. I really do not. It is pro-lawyer, and I would not want to see it implemented as a working protective device for consumers; I promise you it will not under the revised Restatement.

---

38. See generally William W. Falsgraf, *Should Curbing Medical Malpractice Litigation Be Part of the Solution? No: Exploding the Myths*, 78 A.B.A. J. 43 (1992) (“[P]roposals to limit non-economic damages deprive the most seriously injured victims of full compensation—essentially the worse you are injured, the less you recover.”); Henderson & Eisenberg, *supra* note 37 (supporting the theory that there is a pro-defendant trend in product liability recovery); James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (supporting the theory that there is a pro-defendant trend in product liability recovery).

39. Peter Huber received a Juris Doctor from Harvard Law School and a Ph.D. from the Massachusetts Institute of Technology. He is currently an Associate Professor at the Massachusetts Institute of Technology. He is the author of several law review articles including, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987) and *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985). He is also the author of the book PETER HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURT ROOM (1991).

40. See James H. Andrews, *Court’s Disposal of ‘Junk Science,’* CHRISTIAN SCIENCE MONITOR, Aug. 30, 1993, at 13.

In Huber’s view, American courtrooms are being swept by a tidal wave of testimony from scientists and physicians who are proffering half-baked, untested, and even specious notions about the causes of illness to help people recover multimillion-dollar awards from chemical and drug companies and other deep-pocket corporations. Huber has exhorted judges to probe more deeply before allowing “expert witnesses” to testify. But Huber has critics among scientists, legal scholars, and lawyers, who say he has overstated his argument and has engaged in the same selective use of data that he charges “junk scientists” with.

*Id.*

Finally, I want to note that tort as social insurance is not law anywhere. However, there is some dictum in some states.<sup>41</sup> Professor Twerski shocked me when he admitted to three states where it is mentioned as dictum,<sup>42</sup> and Professor Gray said that there is a case in Massachusetts.<sup>43</sup> However, the Massachusetts case is a design defect case, and we are permitting tort to be used as social insurance in those types of cases. I do not want strict liability to be used in toxic pharmaceutical cases.<sup>44</sup> It was done in *Beshada*<sup>45</sup> and the result in that case was not a good one.

---

41. *See, e.g.*, *Becker v. IRM Corp.*, 698 P.2d 116, 123 (Cal. 1985) (stating that “[t]he paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects”); *Weems v. CBS Imports Corp.*, 612 P.2d 323, 325 (Or. 1980) (adopting as the test for strict liability “whether the seller would be negligent if he sold the article knowing the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product”).

42. *See In re Hawaii Fed. Asbestos Cases*, 699 F. Supp. 233 (Haw. 1988) (rejecting the use of the state-of-the-art defense in asbestos cases), *aff’d.*, 960 F.2d 806 (9th Cir. 1992); *Dambacher v. Mallis*, 485 A.2d 408, 428 (Pa. 1984) (stating that “in a strict liability case, principles of negligence have no place”); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 797 P.2d 527, 531-32 (Wash. Ct. App. 1990) (stating that “foreseeability is not an element of strict liability claims because the focus is not on the manufacturer’s conduct, but on the expectations of the consumer”).

43. *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318, 320 n.3 (Mass. 1992) (stating that strict liability for design defect will be permitted without regard to foreseeability).

44. *See, e.g.*, *Brown v. Superior Court*, 751 P.2d 470, 482-83 (Cal. 1988) (holding that “a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution”); *Grundberg v. The Upjohn Co.*, 813 P.2d 89, 92 (Utah 1991) (holding that sellers of prescription drugs “when the products are properly prepared and marketed and distributed with appropriate warnings, should not be held strictly liable for the ‘unfortunate consequences’ attending their use.”). *But cf.* *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 654-57 (1st Cir. 1981) (applying the doctrine of strict liability to prescription drugs).

45. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982). This was a consolidated suit where the plaintiffs were employees and families of employees who had worked for asbestos producers and who had contracted



*Beshada* stands alone,<sup>46</sup> and it should. I call it “The Plague Ship *Beshada*” because I hope it never docks at another shore again.

---

illnesses connected to exposure to asbestos. *Id.* at 592. The connection between the illness and asbestos was unknown at the time that these employees were exposed. *Id.* at 542. The court held that the defendants could not assert the state-of-the-art defense. *Id.* at 547. The court reasoned that “[e]ssentially, state-of-the-art is a negligence defense . . . . But in strict liability cases culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe.” *Id.* at 546.

46. See generally Andrew T. Berry, *Beshada v. Johns-Manville Products Corp.: Revolution-Or Aberration-In Products Liability Law*, 52 *FORDHAM L. REVIEW* 786, 787 (1984) (arguing that *Beshada* “was an unprecedented departure from prior products liability cases” and “concludes that *Beshada* can and should be limited to its unique factual situation).