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Foreword: Tort Scholarship

Gary T. Schwartz†

Professor Stephen Sugarman is surely correct in suggesting that compensation proposals stood at the top of the agenda of tort scholarship during the late 1960's.¹ In this Foreword, I can appropriately consider how this situation came to pass. One explanation is that by the late 1960's, traditional tort scholarship—primarily concerned with the coherence and the clarification of tort doctrine—had just about exhausted itself. Robert Keeton's 1963 book on the law of causation in torts² stands as one of the last major instances of this scholarly genre.

A second explanation points out that tort scholars (who, after all, are citizens as well as academics) were all exposed to the revolution in social policy perception and evaluation that characterized the 1960's and early 1970's—a revolution that pervaded public discourse and private assumptions (certainly my own) during that period. The principle of broad social responsibility upon which the new evaluations rested made a tort style of reasoning seem excessively individualistic and moralistic.³ At the same time, it provided an impetus for proposals to extend the benefits of compensation to larger and larger numbers of accident victims. Accompanied by Professor Jeffrey O'Connell, Robert Keeton recommended in 1965 a no-fault program for automobile accident victims.⁴ The enthusiastic public and political reaction to the Keeton-O'Connell automobile no-fault proposal⁵ encouraged other tort scholars to advocate

† Professor of Law, University of California, Los Angeles; B.A. 1962, Oberlin College; J.D. 1966, Harvard University.

1. Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555, 558 (1985).

2. R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963).

3. In this regard, it is both noteworthy and surprising that tort law came through the 1930's without bearing, in any obvious way, the imprint of the New Deal.

4. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC ACCIDENT VICTIM* (1965).

5. As Professor O'Connell himself advises me, however, the enthusiasm may well have been

even more boldly. As part of a 1967 symposium on tort law, Professor Marc Franklin proposed a program to compensate all victims of accidents regardless of cause, thereby overcoming what he regarded as the tort system's "negligence lottery."⁶ The momentum of the late 1960's continued into the early 1970's. More and more states adopted some form of automobile no-fault and, on the opposite side of the globe, New Zealand adopted a comprehensive accident compensation plan.

As the 1970's began, however, new forms of tort scholarship began to emerge. Guido Calabresi's 1970 book, *The Costs of Accidents*, beautifully explicated the economic theory supporting compensation programs.⁷ Nevertheless, his book was ultimately critical of those programs, since by abrogating liability rules they abandoned an opportunity to reduce the "primary costs" of accidents.⁸ Two years later, Richard Posner's *A Theory of Negligence*,⁹ published in the first issue of Posner's new journal, relied on economic concepts and categories while devoting extreme and loving attention to actual tort doctrine. An entire industry in the economics of tort law had been initiated.

This initiation bred, however, an unexpected counterinitiation. In 1972 and 1973, George Fletcher (then located next door to me) and Richard Epstein (who previously had been located down the freeway from me) published articles espousing a "rights" approach to the law of torts.¹⁰ Not since Holmes, perhaps, had ethical issues been pursued so theoretically and so provocatively in tort scholarship. Given the keen enthusiasm with which the Fletcher and Epstein articles were received, there was now underway a major review of the ethical implications of tort doctrine.

The void created by the depletion of traditional scholarship accordingly had been filled. On both the economic and ethical fronts, large numbers of tort scholars now cared passionately about the structure and

based in dissatisfaction with high car-insurance costs rather than in any strong desire for expanded coverage.

6. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

7. G. CALABRESI, *THE COSTS OF ACCIDENTS* 39-64 (1970). Calabresi had been writing on tort law since 1961. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). My impression, however, is that the scholarly community had regarded Calabresi's pre-*Costs* writings as a somewhat esoteric sideshow. Certainly prior to 1970 he had acquired few followers. *But see* Franklin, *supra* note 6, at 802-12. Moderate interest in Calabresian economics was displayed in Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

8. *See* G. CALABRESI, *supra* note 7, at 64-67.

9. 1 J. LEGAL STUD. 29 (1972). The approach in that article had been anticipated in an article by Posner a year earlier. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971).

10. Epstein, *A Theory of Strict Liability*, 2-J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

the specifics of tort doctrine. Moreover, the arguments among the economists, among the ethicists, and between the economists and the ethicists provided tort scholarship with a dimension of genuine excitement; compensation-oriented scholarship, which previously had been in the vanguard, now seemed somewhat old hat.

Meanwhile, in the political arena, major portions of the Great Society had been enacted into law. Medicare and Medicaid now paid most of the medical bills for the aged, the poor, and many of the disabled. Legislation in 1965 broadened the definitions of eligibility for the Social Security disability program.¹¹ And though President Nixon's welfare reform package failed to be enacted in the early 1970's, the effort yielded, almost without notice, a new category of Social Security, one concerned with those victims of total disability who lacked prior work experiences.¹² Especially as these federal programs were discovered by larger and larger numbers of claimants, there was an increasing flow of income-replacement benefits to disability victims. By the mid-1970's, therefore, the noncompensation of accident victims that had so disturbed Keeton, O'Connell, and Franklin had been responded to by public programs; a nontrivial floor had been established that deprived compensation proposals of much of their urgency.¹³

Also, by the mid-1970's, the ambitions of the Great Society became open to interpretation. To be sure, those ambitions could still be admired for their strong public-mindedness and their uncomplacent openness to innovation. Nevertheless, they equally could be characterized as somewhat glib and grandiose. Huge cost overruns began to plague Medicare, Medicaid, and Social Security disability. While almost no one recommended their repeal, most tended to agree that a large measure of naivete had accompanied their adoption and that any further expansions of social-welfare programs would need both to acknowledge the reality of limited resources and to be preceded by rigorous policy analysis.¹⁴ Within the law reviews, it was Jeffrey O'Connell who almost singlehandedly kept the compensation issue alive during the 1970's and early 1980's. Aware, however, that the 1960's were over, O'Connell offered

11. See C. MEYER, *SOCIAL SECURITY DISABILITY INSURANCE* 5 (1979).

12. For a useful account, see Leibman, *The Definition of Disability in Social Security and Supplemental Social Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976).

13. I have heard Marc Franklin make basically this point. Surprisingly, however, he leaves the federal disability programs out of his coursebook. See M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 684-766 (3d ed. 1983).

14. I use guarded language ("most" and "almost") in this statement to acknowledge the positions taken by both the critical right and the Critical (Legal Studies) left. For the former, see, for example, C. MURRAY, *LOSING GROUND* (1984). For the latter, see Allan Hutchinson's Article in this Symposium, *Beyond No-Fault*, 73 CALIF. L. REV. 755 (1985).

limited reforms based on highly pragmatic sets of considerations.¹⁵ Even so, his proposals were largely disregarded, as O'Connell would be the first to acknowledge.¹⁶

This description provides some background for the present Symposium, and explains why I am inclined to classify the Symposium as an important event: for what the Symposium endeavors to do is to reestablish the priority of the compensation question. In particular, Stephen Sugarman's Article¹⁷ not only stresses the goal of compensation but systematically challenges (and may well succeed in placing on the defensive) all of those who might be inclined to favor a tort approach either for deterrence or for fairness reasons. In all, thirteen writings are included within this Symposium. Just as one cannot tell the players in an athletic event without a scorecard, so one cannot appreciate this configuration of manuscripts without knowing something about the authors and about their teaching interests and scholarly backgrounds. Sugarman teaches courses in social welfare law as well as torts. In this regard, it becomes more understandable that he recommends that recoveries for tort-like injuries be absorbed into a range of social-welfare programs. Whether he subjects his recommendations to the cost-conscious, tough-minded review that I have referred to above is a separate question, which I reserve to the reader.

Professor Lewis Kornhauser and Judge Richard Posner are economists as well as lawyers. (Posner's lack of a formal economics degree is surely a technicality.) Their contributions display their unwillingness to give up on a tort strategy, given what each perceives as tort law's ability to achieve the economist's goal of efficient deterrence.¹⁸ Professor Craig Brown was born in New Zealand, and received his education as a protégé of Geoffrey Palmer, a principal architect of the New Zealand program (and now Deputy Prime Minister). Avowedly skeptical of the economists, Brown offers valuable empirical evidence on the relationship between the New Zealand plan and auto accident rates.¹⁹ Read quickly, his Article seems to say that the repeal of tort rules had no effect on incentives for safety; read more carefully, his conclusion is that in light of

15. E.g., O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L. F. 435.

16. His Article in the current Symposium is of special interest, because the high school athletic injury compensation plan he describes is actually being implemented. O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

17. Sugarman, *supra* note 1.

18. Kornhauser, *Theory and Fact in the Law of Accidents* (Book Review), 73 CALIF. L. REV. 1024 (1985); Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CALIF. L. REV. 747 (1985).

19. Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976 (1985).

regulatory and other innovations the extent of those effects cannot be clearly ascertained. And given what he tells us about personal injury liability insurance arrangements in New Zealand prior to 1973, it is far from clear that the results of the New Zealand experience are suitable for generalization.

It is noteworthy that apart from the economists none of the contributors has anything affirmative to say about our existing tort system. Professor David Owen is well known as one of the revisers of the Prosser treatise²⁰ and as the principal author of a leading coursebook on products liability,²¹ a coursebook that treats its subject with apparent sympathy. It is remarkable, therefore, that in this Symposium Owen reveals that he does not really believe in a torts approach.²² His Comment largely concurs in Sugarman's recommendation that tort law be abolished. Professor Richard Abel, as former Editor of *Law and Society Review*, is a strong admirer of empirical research. He accordingly is eager to bring to the attention of an American audience the findings of an impressive English empirical study;²³ he interprets that study, moreover, as demonstrating the basic depravity of tort. Victor Schwartz, unhappy with our common law regime of products liability, has been at work for several years on statutory proposals for products liability. Unhappy in particular with the common law's treatment of the causation issue in the DES cases, he and Liberty Mahshagian recommend in this Symposium a statutory alternative and identify the issues that a legislature will need to address.²⁴ (Interestingly, the Kasten Bill on behalf of which Schwartz has been laboring reserves the market-share issue for the states, despite the Bill's general goal of achieving national uniformity.²⁵) Professor Allan Hutchinson's entry in this Symposium²⁶ is the latest in an impressive string of articles he has published within the last year on questions of political and social theory and their relationship to law.²⁷ His appraisal

20. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

21. W. KEETON, J. MONTGOMERY & D. OWEN, PRODUCTS LIABILITY AND SAFETY (1980).

22. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665 (1985).

23. Abel, *£'s of Cure, Ounces of Prevention* (Book Review), 73 CALIF. L. REV. 1003 (1985).

24. Schwartz & Mahshagian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941 (1985).

25. S. 100, 99th Cong., 1st Sess. § 3(d) (1985); see also S. REP. NO. 476, 98th Cong., 2d Sess. 25 (1984).

26. Hutchinson, *supra* note 14.

27. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984); Hutchinson & Morgan, *The Canengusian Connection: The Kaleidoscope of Tort Theory*, 22 OSGOOD HALL L. J. 69 (1984); Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209 (1984); Hutchinson, *Of Kings and Dirty Rascals: the Struggle for Democracy* (Book Review), 9 QUEEN'S L.J. 273 (1984).

is that tort law is fundamentally deficient. In his view, however, compensation proposals are shallow as well, since even they rely, he argues, on individualistic premises that are discouragingly liberal.

Alone among the contributors, Jeffrey O'Connell teaches a course in insurance law. He is thus in an excellent position to develop insurance-based solutions to what he believes to be the problems of tort.²⁸ None of the Symposium's contributors teaches a course in workers' compensation—our society's most prominent example of an accident compensation program. Professor Jean Love's Article²⁹ discusses how current law responds to the nonphysical injuries that employees may suffer at the hands of their employers. Her Article is a quite valuable contribution to the literature. There may be room for argument, however, whether her recommendation for cumulative remedies adequately honors the accommodations lying at the core of workers' compensation theory. Dean Richard Pierce teaches administrative law rather than torts. Hence, he is interested in developing an administrative procedure to effect basic reforms in tort law's policies relating to the goals of compensation and deterrence³⁰ (reforms that he apparently believes are supported by a near unanimity of tort scholars). Professor Howard Latin, as a teacher of environmental law, is certainly aware of the vulnerabilities of regulation and of the vivid debate about whether the strategic assertion of environmental liability rules might provide a better form of social control. This awareness at least partly explains his own Article's³¹ attention to the proper design of personal-injury liability rules and the actual attractiveness of regulatory alternatives. Professor Stanley Ingber offers courses in jurisprudence and constitutional law in addition to torts. His Article³² brings a range of philosophic concerns to bear on the question of pain and suffering damages. In his discussion of defamation and privacy, he is intrigued by the extent to which tort theory might provide a benign perspective on the "chilling effect" that has so disturbed first-amendment analysts.

I have suggested that a partial understanding of the entries in this

28. O'Connell, *supra* note 16. At the same time that Robert Keeton was working on his causation book—which operates exquisitely within the framework of tort doctrine—he had also begun working on his automobile no-fault book, which disparages the tort system as a near-total failure. See *supra* notes 2, 4. How was this combination of efforts possible? The answer to this question begins with the fact that in the early 1960's Keeton was teaching courses in both tort law and insurance law. His causation book obviously grew out of his tort interests; his no-fault work evidently grew out of his insurance interests.

29. Love, *Actions for Nonphysical Harm: The Relationship Between the Tortsystem and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857 (1985).

30. Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917 (1985).

31. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985).

32. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772 (1985).

Symposium can be gained by considering the contributors' scholarly and curricular interests. A quite different methodology would be to pin down what each contributor has to say about the extent to which tort law achieves or can achieve deterrence, the extent to which tort law serves or should serve as a source of fairness, and how appropriate it is to attribute to tort law a primary goal of generally compensating accident victims.

A pursuit of that methodology, however, would result in an essay of considerable length, and surely this Symposium is already thick enough. It is time for this Foreword to end and for the actual Symposium to begin, a symposium that commendably returns the compensation issue to its prominent position.