Michigan Law Review

Volume 90 | Issue 6

1992

Reforming Products Liability

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REFORMING PRODUCTS LIABILITY. By *W. Kip Viscusi.* Cambridge: Harvard University Press. 1991. Pp. xv, 270. $39.95.

Much of Professor W. Kip Viscusi's past work has focused on occupational and consumer product safety.[1] In his latest book, *Reforming Products Liability,* the author draws on previous articles[2] to present a series of proposals for products liability reform. He covers a smorgasbord of topics, including proper formulation of the design defect test, valuation of damages, liability for warnings, and government regulation of safety.

The author begins by criticizing other dominant approaches to tort reform, which he terms "tort reform by anecdote,"[3] "tort reform by isolated fact,"[4] and "tort reform by legal theory and ideology."[5] He contends that none of these approaches conveys the full truth of the liability crisis and sets out to justify his own proposed policies on an empirical basis.

As a first step, Professor Viscusi examines whether a liability crisis exists. He first notes that sharply increasing insurance premiums have inspired many complaints of a liability crisis; the crisis has generally been attributed to changes in liability rules (p. 14). However, alterna-

1. W. Kip Viscusi is George G. Allen Professor of Economics, Duke University, and Associate Reporter on the American Law Institute tort liability reform project. His prior works include studies of the impact of workers' compensation on work fatalities, *see* Michael J. Moore & W. Kip Viscusi, *Promoting Safety Through Workers' Compensation: The Efficacy and Net Wage Costs of Injury Insurance,* 20 RAND J. ECON. 499 (1989), the impact of OSHA regulations on workplace safety, *see* W. Kip Viscusi, *The Impact of Occupational Safety and Health Regulation, 1973-1983,* 17 RAND J. ECON. 567 (1986), and the impact of consumer product regulation on consumer safety, *see* W. KIP VISCUSI, REGULATING CONSUMER PRODUCT SAFETY (1984).

2. *E.g.,* W. Kip Viscusi, *The Performance of Liability Insurance in States with Different Products-Liability Statutes,* 19 J. LEGAL STUD. 809 (1990); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis,* 39 AM. U. L. REV. 573 (1990); W. Kip Viscusi, *The Interaction Between Product Liability and Workers' Compensation as Ex Post Remedies for Workplace Injuries,* 5 J.L. ECON. & ORG. 185 (1989); W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety,* 6 YALE J. ON REG. 65 (1989).

3. Viscusi does not identify which authors belong to the school of "tort reform by anecdote." One book that does contain an extensive collection of anecdotes is PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). However, Huber's book does not meet the criteria set out by Viscusi for the "school of tort reform by anecdote," which does not "consider whether [the] developments are necessarily undesirable" and does not analyze the problems. P. 3. While making liberal use of anecdotes, Huber's book also includes analysis. Another entertaining book of this genre, albeit with less analysis, is WALTER K. OLSON, THE LITIGATION EXPLOSION (1991) (reviewed in this issue by Judge Douglas H. Ginsburg.—Ed.).

4. P. 3. The "isolated fact" under discussion is mushrooming liability insurance premiums. Pp. 3-4. The mere fact that liability insurance premiums have risen greatly is not proof by itself that the tort system is in crisis; higher premiums could be attributable to the underwriting cycle or to a conspiracy by the insurance industry. P. 4.

5. P. 4. Viscusi appears to be referring to the Calabresi school; he describes this school as "largely responsible for establishing the products liability regime in place today." P. 4.

tive explanations for the rise in insurance premiums, including fluctuating interest rates and collusive insurance firms, have also been suggested (pp. 14-15). Viscusi then tests these theories. Interest rate fluctuations, he concludes, do account for some of the variation in premiums (p. 29). On the other hand, low insurance profitability during the early 1980s, when the crisis was most acute, implies that any conspiracy to hold up rates failed (p. 31). Surveying the ever-increasing numbers of products liability cases, Viscusi concludes that "the products liability crisis is neither imaginary nor a contrivance of the insurance industry" (p. 40).

Viscusi turns next to the causes of the crisis. His data show that total premiums actually increased faster from 1968-1978 (12.6% annual real growth) than from 1978-1988 (5.3%) (pp. 26-27), while at the same time the amount of coverage written decreased (p. 29). According to Viscusi, if strict liability — another oft-posited cause of the crisis — were the cause of the rise in premiums, the increases in the early 1960s should have been greater (p. 28). The greater premium increases during the 1970s, as compared with the 1980s, suggest that the design defect doctrine and the increased liability for failure to warn caused the surge in liability (p. 28).

To assess design defect claims, many courts use the risk-utility analysis proposed by Dean Wade,[6] which measures a product's overall risks and benefits to decide whether its sale constitutes negligence. This analysis considers a product's usefulness and desirability, its safety, possible substitutes and modifications, the user's precautions, the user's anticipated awareness of the dangers, and potential loss spreading.

Courts relying on the Wade analysis have sometimes stopped with the first factor: the product's usefulness and desirability. In *O'Brien v. Muskin Corp.*,[7] a twenty-three-year-old jumped off a garage roof into a shallow above-ground pool, sustaining serious injuries. Under Wade's test, which it professed to adopt, the court should have considered that the user could have minimized — indeed eliminated — the risk through responsible behavior. Instead, the court stopped with the first factor, finding some products too hazardous to be sold at all.[8]

The first prong of the Wade test invites courts to impose their own value notions on others. As Viscusi notes, in a democratic society, courts should not decide that some products are not useful or essential for the public (p. 74). To avoid this pitfall, Viscusi proposes a more objective risk-utility analysis consisting of three separate tests applied

6. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973).

7. 463 A.2d 298 (N.J. 1983).

8. P. 73 (discussing *O'Brien*, 463 A.2d at 306); *see also* 463 A.2d at 314 (Schreiber, J., concurring and dissenting).

in sequence. A product's failing any of the tests renders the manufacturer liable. The first test — the purchaser's risk-utility index — calculates risks and benefits by weighing consumer utility (willingness to pay for the product) against the purchase cost and the unexpected injury costs.[9] The test measures the product's value to the consumer by using its demand curve, rather than its purchase price.[10] Injury costs are based on risks that the producer should have foreseen at the time of sale, excluding information that becomes available later.[11] If, after consideration of unexpected injury costs, the product would have been an "attractive purchase on an expected value basis for the average consumer" (p. 79), the first test is met.

The second test — the private risk-utility test — assesses specific product designs. To pass this test, the design must maximize the combined net benefits to the purchaser and producer (p. 79). In addition to the factors used in the first test, the second test considers the profit to the producer.

The third test — the social benefit-cost test — weighs the costs imposed on society by the product against the benefits from the product, such as taxes collected and jobs created. Because courts have limited ability to conduct social research, Viscusi proposes that government agencies, not courts, apply the social benefit-cost test through regulatory decisions (p. 80).

Together, these tests form a "more tightly specified negligence standard" (p. 81). Like the Calabresi strict liability approach but unlike traditional negligence,[12] Viscusi's inquiry focuses on cost-benefit tests rather than moral fault (p. 81). Unlike Calabresian theory, however, Viscusi's formulation does not consider insurance to be a worthy objective of tort law.

Viscusi next analyzes the proper role of hazard warnings. Courts imposing warning requirements have not always required evidence that the plaintiff would have behaved differently if a warning had been present.[13] Viscusi notes that warnings should deter risky patterns of use, thus shifting responsibility to the consumer to use the product

9. Unexpected injury costs are used because Viscusi assumes that expected injury costs are reflected in the price paid. P. 80.

10. P. 80 n.34. However, Viscusi does not explain how to determine what price the particular injured consumer would have been willing to pay for the product. This omission is a major shortcoming to actual application of the test.

11. This is in sharp contrast to the standard applied in Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539 (N.J. 1982), in which the New Jersey Supreme Court held an asbestos manufacturer liable without evidence that the manufacturer had reason to know of the risks posed by asbestos.

12. *See* OLIVER W. HOLMES, JR., THE COMMON LAW 96 (1881).

13. *See* HUBER, *supra* note 3, at 59 (discussing Reyes v. Wyeth Lab., 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974), in which recovery was allowed for insufficient warning of vaccine dangers where the child's mother admitted that she had not read the warning presented).

safely (p. 9). Yet the current liability system impedes the fulfillment of this purpose. By imposing penalties for failure to warn but never for overwarning, it creates incentives for "information overload," which decreases the deterrence utility of all warnings (pp. 139-40).

Viscusi proposes national standards for warning labels to ensure adequate communication of necessary information. As a model, he cites the warnings adopted by the FDA for pharmaceuticals (pp. 150-52). These warnings, which target physicians, organize the different sections (descriptive information, clinical pharmacology, contraindications, etc.) in standard layouts so that doctors can locate information quickly. Examining the effectiveness of the warnings, the author reviews the case of tetracycline, an antibiotic that can cause discoloration of the teeth in young children. After warnings appeared in 1963, prescriptions of the drug for young children declined rapidly (p. 152).

Viscusi also proposes standardized wording for warning labels (p. 155). At present, even labels subject to advance approval by the EPA, such as those for pesticides, vary widely in wording for identical hazards. Consumers are thus inundated with information that they have trouble sorting out.[14]

Standardized warnings could be very helpful to both producers and consumers if clear guidelines — presumably set by a government agency (p. 155) — existed. Unfortunately, no one knows — not even Professor Viscusi — what information is necessary. Viscusi decries a case holding a folding chair manufacturer liable for failing to warn that an improperly opened chair could collapse.[15] However, he speaks approvingly of a requirement to warn softball players that softballs are *more likely than baseballs* to cause brain damage, even when consumers already recognize some risk of brain damage from softballs (p. 142). If the scope of mandatory warnings continues to expand, even standardized warnings will not solve the problem.

According to Viscusi, in addition to incentives to overwarn, courts currently provide inadequate incentives to producers to take other precautions because damages are not calculated properly (p. 213). As he explains, there are two potential measures of noneconomic damages: the deterrence value and the insurance value (p. 89). The insurance value represents the amount of insurance people would select for the injury incurred if they had perfect information. The deterrence value quantifies the value of the risk to the individual (e.g., the extra compensation demanded to undergo a 1/10,000 risk of fatal injury) (p. 90). Viscusi proposes a sliding scale for damages according to the level of

14. Viscusi has published previous studies on the problems of hazard labeling and how to convey information most effectively. *See, e.g.*, W. KIP VISCUSI & WESLEY A. MAGAT, LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION (1987); W. Kip Viscusi, *Predicting the Effects of Food Cancer Risk Warnings on Consumers*, 43 FOOD DRUG COSM. L.J. 283 (1988).

15. P. 143. *See* Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538 (Ind. 1987).

safety precautions taken by the producer. The insurance value would provide a floor for damages (p. 93), while the deterrence value would provide a ceiling. As the producer's level of care deviates progressively from the optimal standard, the level of damages would rise to the deterrence value. No punitive damages would be allowed (pp. 93-94). This approach would replace the current overreliance on the insurance value.

Despite the author's claims, this approach to calculating damages does not significantly reduce uncertainty. As an example of the undervaluation of human life, Viscusi cites the Ford Pinto case, in which Ford decided not to modify the design of the Pinto gas tank based on calculations that it would pay only $200,000 for each life lost due to the defect (pp. 111-13). Viscusi claims that $5 million would have been a more appropriate figure to use, because it would have been closer to the deterrence value (p. 112). If society is to encourage such cost-benefit analyses, it will be vital to supply reliable figures for producers to use in valuing life. Viscusi, however, does not supply a source for such figures, although government agencies have calculated values of life varying between $100,000 and $132 million (pp. 119-20). Viscusi's own occupational studies of deterrence values, calculated by correlating wage differentials with occupational risk, show that most workers value their own lives at between $1 million and $10 million (p. 108). A firm selling products has no ready method to calculate the risk-averseness of its customers.

Viscusi bemoans the fact that firms "pay cut-rate prices for the injuries their products inflict" (p. 213). Elsewhere, though, the author admits that "utilization of the deterrence values of injury across the board is excessive except when firms *completely ignore* safety" (p. 115, emphasis added). Far from completely ignoring safety, Ford attempted to calculate the risks and benefits of the design assuming it would be liable. Viscusi uses a value of $5 million per life to show the calculation that Ford should have made (p. 112). Because even government agencies use widely varying values of life in their calculations (p. 120), where Ford could have obtained the correct value is unclear.

Viscusi discusses at length the use of tort liability as insurance, concluding that it is generally ill-suited to that role.[16] While administration of insurance consumes twenty percent of premiums, administration of the tort system consumes over half of the total resources expended on liability (pp. 75-76). Long delays and uncertainty about recovery also plague the tort system. Another problem with insurance is moral hazard, which occurs when insurance leads the insured to

16. In criticizing the tort system as an insurer, Viscusi finds himself in good company. *See, e.g.*, HUBER, *supra* note 3, at 150; Stephen D. Sugarman, *Doing Away with Personal Injury Law*, *in* PERSPECTIVES ON TORT LAW 126 (Robert L. Rabin ed., 1990).

take fewer precautions. Viscusi is aware of this problem,[17] but fails to specify under what circumstances, if any, contributory negligence or outright misuse would bar or reduce recovery.[18]

The tort system provides particularly ineffective insurance for products with delayed effects, such as pharmaceuticals.[19] If unforeseen health risks emerge decades after sale of a product, manufacturers frequently cannot recover those costs through current sales, because current consumers do not receive benefits in relation to the costs. This is exacerbated by potential competition from new market entrants, particularly foreign companies, which do not bear the "tail" of liability from past sales.[20]

Design defects pose a further challenge to the concept of the tort system as insurer. Insurance relies on uncorrelated risks pooled in a single portfolio (p. 76). In design defect cases, however, the risks are correlated. If the whole product line is defective, Viscusi argues, it is impossible to recover the injury costs from the consumers or the producers.[21] As in the case of asbestos, a major defect may shut down the industry rather than spread risk (p. 76). Adequate compensation may then be impossible due to limited industry assets.

According to the author, government regulation addresses many product risks more effectively than tort liability (p. 118). While the tort system undervalues noneconomic damages, such as loss of life, regulatory agencies may overvalue them when setting safety standards (p. 119). Thus, when agencies regulate actively, tort liability should be unnecessary to ensure adequate safety precautions.

Regulations have shortcomings, however. For instance, they do not cover all areas of product design. Also, lax enforcement by some

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17. P. 76. Viscusi's intriguing research on the effect of child-proof caps on storage precautions, which illustrates a phenomenon related to moral hazard, is described *infra* at text accompanying notes 23-24.

18. The closest he comes to developing such a test is to say, "[c]onsumers may be disappointed when cars driven into a lake do not float, but a failure to meet these expectations does not imply that the product is defective." P. 72.

19. Pp. 76-77. Because the "insurance premium" foreseen by products liability theory is not charged up front (since no risk is evident), the tort system fails as an effective insurer for mass torts. Focusing on asbestos, Agent Orange, and the Dalkon Shield, Viscusi deplores the high litigation costs and widely varying verdicts obtained by comparable victims. Given increased regulatory activity, he argues that deterrence from the tort system is no longer necessary for asbestos. P. 172. He then abandons the compensation rationale altogether: "When compensation fails to provide deterrence, presumably victims of product-related disease should be treated the same as victims of diseases of unknown origin . . . ." P. 172. Social programs such as Social Security disability insurance, not the tort system, should compensate asbestos victims. Pp. 172-73.

20. HUBER, *supra* note 3, at 229-30. As Viscusi points out, efforts by manufacturers of small planes to tack on liability from past sales have simply resulted in sharp sales declines. P. 40.

21. P. 76. This point assumes that every defective product causes an injury, which is not necessarily the case. Most Ford Pinto drivers, after all, were never involved in rear-end crashes. Even in the case of the Dalkon Shield or DES, the injury rates from use were well under 100%. *See* HUBER, *supra* note 3, at 81.

agencies greatly reduces deterrence in some areas.[22] More fundamentally, regulations may ignore behavioral responses (p. 123). An earlier study by the author examined the effect of "child-proof" caps on medicine containers.[23] Viscusi's study found that the caps lulled parents into a false sense of security and careless storage resulted. Although the percentage of aspirin sold with child-proof caps remained relatively constant from 1972 to 1978, poisonings from child-proof bottles rose from forty percent to seventy-three percent of all aspirin poisonings in the same period (p. 124).

Despite these shortcomings, the author would exempt firms from liability for design defects if they can demonstrate "either compliance with a specific government regulation or the use of a hazard warnings program that is sufficiently effective that it leads to informed market decisions."[24] Firms complying with safety regulations should not be required to provide higher, inefficient levels of safety (p. 129).

Viscusi's proposal remedies little of the uncertainty of the present system. In contrast to Viscusi's approach, Peter Huber has proposed compliance with government regulations as an absolute defense in "comprehensively" regulated industries, such as nuclear power and pharmaceuticals.[25] Huber's proposal, if implemented, would remove the uncertainties of the liability system for those industries. Viscusi's proposal, however, leaves liability protection to be decided case by case. To reveal the uncertainty of his approach, one need only look at the author's analysis of the Ford case. The Ford Pinto was in compliance with specific government standards for gas tanks,[26] but Viscusi still finds that Ford was properly held liable (pp. 111-13).

Reforming Products Liability is laden with trenchant criticisms of the current liability system. Unfortunately, with some exceptions, the author's own proposals for products liability reform are subject to equally serious criticism. Although Viscusi presents an extensive empirical analysis of several aspects of the current tort system, his solutions fail to provide clear rules. For example, his risk-utility test would remove the emphasis on fault by looking only at cost-benefit analyses. In practice, though, this distinction would probably break

22. Pp. 121-22. The author praises workers' compensation as an effective safety incentive which has decreased work-related fatalities by almost 30%. P. 178. In contrast, OSHA has only reduced injuries by at most two to four percent. P. 178. Workers pay for the gains in safety by accepting lower wages than they would otherwise earn. P. 179. Workers' compensation, like the tort system, charges costs of injury to the specific employer. Given Professor Viscusi's enthusiasm for workers' compensation and low regard for OSHA, it is somewhat surprising that Professor Viscusi is so sanguine about the prospects of safety enforced by agencies.

23. *See* W. Kip Viscusi, *The Lulling Effect: The Impact of Child-Resistant Packaging on Aspirin and Analgesic Ingestions*, AM. ECON. REV., May 1984, at 324.

24. P. 128. Tort liability would remain the main recourse in the case of manufacturing defects. P. 131.

25. HUBER, *supra* note 3, at 213-15.

26. HUBER, *supra* note 3, at 115.

down. Under Viscusi's test, the manufacturer must still prove both that it had no knowledge of the specified risk and that it had no reason to know; the latter inquiry will inevitably focus on whether the manufacturer was at fault for failing to conduct adequate research.

Also, while Viscusi's proposal on damages purports to remove some of the uncertainty of the current regime and its lottery-like punitive damage awards, it probably would not work in practice. A sliding scale of damages based on how close the producer comes to the correct standard of safety would in practice be just as subjective as a determination under the current system.

Reforming Products Liability presents an impressive collection of empirical data and painstakingly reviews various interrelated aspects of the tort system. Overall, however, it is disappointing. Viscusi begins by mapping an apparently clear path around the swamp of current tort doctrine, covering many of the weightiest issues in tort reform: the standard of liability; the importance of liability rules; the value of injuries; the role of warnings; and the role of government regulation. As the reader follows the path and examines the solutions in detail, though, he gradually slips off the path and winds up back in the swamp.

— *Suzanne M. Lambert*