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AN ACT OF FAITH

*Jerry J. Phillips**

MODERN PRODUCTS LIABILITY LAW. By *Richard A. Epstein*. Westport, Conn.: Quorum Books. 1980. Pp. 210. \$25.

Recently our minister was telling us about theology school. "We were taught very early in our careers," he said, "that the single most important thing about a man is what he believes — his faith." When I first heard this central tenet of the theologian, I thought how very different it was from the legal world, where we are impressed by empirical data and practical considerations. A leap of faith is not grounded in reason, and thus seems to have little place in the world of law.

The more I have thought about the comparison of law and theology, however, the more I have come to believe that they are not so different after all. Throughout the law, we make many assumptions about human nature that are not empirically demonstrable. We admit dying declarations as an exception to the hearsay rule, for example, because we assume that persons are generally uninclined to die with a lie on their lips, but we have no way to establish the validity of that assumption. We assume that free speech promotes free debate and a more enlightened and democratic society, but we cannot establish the validity of that assumption either. It is based on intuition.

Much of tort law, including products liability law, is based on the yet untested assumption that tort liability provides an incentive to care. Justice Mosk, in his dissent in *Daly v. General Motors Corp.*,¹ resists the adoption of comparative fault in strict product liability cases because, he contends, such a rule would decrease the manufacturer's incentive to produce a safe product. Richard Epstein faults Justice Mosk for making this argument:

As is so often the case with incentive arguments, the results are inconclusive without empirical evidence, and the empirical evidence that is required is, only because of the difficulty of the subject matter, never forthcoming. [P. 132.]

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1. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

Similarly, Professor Epstein criticizes Justice Traynor's reliance on incentive policy-analysis as the basis for adopting strict tort liability in *Greenman v. Yuba Power Products, Inc.*:²

If ninety-nine cases out of a hundred will be decided the same way no matter what liability rule is adopted, then the shift in rules simply cannot make that great a difference in the behavior of the parties whose conduct is governed by them. [P. 40.]

Later, in discussing Learned Hand's famous cost-balancing test,³ he says:

The central assumption of Hand's position, as applied to design defect cases, is that in the absence of judicial intervention firms will have incentives not to do their best on matters of safety The "lags" in safety can be shown only if, holding technology constant, there is some residual improvement in safety levels during the last decade or so attributable to judicial innovation. The position has by no means been established, and it is in large measure doubtful. [P. 89.]

When criticizing the work of others, Professor Epstein seems well aware of the dangers of drawing unwarranted inferences from inadequate (or even nonexistent) empirical research.

But Epstein is hoist by his own petard. His criticism of Traynor's position in *Greenman* impliedly assumes that "ninety-nine cases out of a hundred will be decided the same way" no matter whether negligence or strict liability rules are applied. Yet he offers no proof of that assertion. On the same page where he criticizes Hand's negligence-incentive argument, he asserts: "Each firm when acting in its own self-interest will improve safety levels even in the absence of exposure to product liability suits" (p. 89). What proof does he have? He simply asserts that if manufacturers do not continually strive for safer products, then "losses in production" and "expensive repairs" caused by unsafe products will "reflect ill on the reputation" of the "[c]omplacent firms [that] run the risk of displacement and bankruptcy at the hands of competitors who provide better and safer products to their customers" (p. 89). For those who share Epstein's economic faith, this proposition will be intuitively obvious.

Others will have doubts. Terence Ison, in particular, offers a more pessimistic view. In reviewing the New Zealand no-fault system, Ison says:

The dogma that safety and profit inevitably coincide is widely proclaimed and accepted not because of any validity but because of the comfort that it can offer to all concerned. For companies and other employers, it denies any need for government regulation, and it denies

2. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (*en banc*).

3. See *The T.J. Hooper*, 60 F.2d 737, 739-40 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

any need for health and safety to become a controversial issue in labour relations. For government officials, it justifies a non-controversial role of exhortation and tends to minimise any perceived need for the more hostile and controversial role of enforcement. For company doctors, it can help to promote an image of neutral and professional help to labour and management, and to deny that their role involves participation in controversial issues of labour relations. For union officials, acquiescence in the dogma can justify the avoidance of confrontations with management on issues that can be highly technical, where success may be hard to demonstrate and where membership support may be uncertain. For workers, the dogma facilitates a natural human wish to believe that life is not threatened by the ways in which they must earn a living.

. . . .

The dogma is counter-productive in several ways. By denying the existence of any conflict of interests, it implicitly denies the need for any procedures to resolve the conflicts. It undermines the need for setting health and safety standards, and it undermines the democratic process by denying any need for worker participation or public participation in the setting of those standards.

Perhaps the most objectionable features of the dogma are its denial of truth, and the ultimate conclusion to which it tends to lead, i.e., that killing and maiming are acceptable as long as they are profitable.⁴

However one characterizes the connection between profit and safety — whether one sides with Epstein or Ison — few will contend that bald, unsupported assertions about the issue contribute anything to the debate.

Professor Epstein's position is, moreover, internally inconsistent. In arguing for contributory negligence as a defense to strict liability, he contends that the defense does indeed encourage care. He does not explain why imposing greater costs on litigants — increasing defendants' liabilities with strict liability, diminishing plaintiffs' recoveries with contributory negligence — would tend to make plaintiffs more careful, but would not do the same for defendants. To the argument that no additional incentive is needed to induce people to care for their own safety or property, he points to the fifty-five miles-per-hour national speed limit, which has reduced road accidents significantly. Although he acknowledges that other factors may be at play, he nevertheless concludes: "[I]t seems clear that the speed limit, especially when enforced, is a dominant factor" in reducing accidents (p. 130 n.22). I suppose that if "when enforced" means that anyone who exceeds the speed limit will be stopped, then the proposition is self-evident. (My teenage son, however, tells me that many people exceed the speed limit.) In any event, even if the lower

4. T. ISON, ACCIDENT COMPENSATION 165 (1980) (criticizing the New Zealand law).

speed limit has reduced accidents, it does not necessarily follow that the defense of contributory negligence will increase self-care.

I think that it is fair to conclude that Professor Epstein has faith in manufacturers' voluntary concern for the safety of consumers, but has little faith in the voluntary concern of consumers for their own safety. I do not share these beliefs. Justice Stewart once said about hard-core pornography, "[p]erhaps I could never succeed in intelligibly [defining it]. But I know it when I see it."⁵ By analogy, I cannot demonstrate the inaccuracy of Professor Epstein's catechism, but my common sense tells me that it is not quite right. I believe that both manufacturer and consumer are responsive to safety incentives, but that the manufacturer, with all its expertise, is in a much better position than the average consumer to decrease the incidence of accidents.

Professor Epstein would also revitalize the defense of assumption of the risk, even for workplace injuries. He concludes, for example, that the facts in *Micallef v. Miehle Co.*⁶ "warranted a directed verdict for the defendant manufacturer" (p. 145). The defect there — a printing press without an easily accessible emergency shut-off button — was open and obvious, and if the employee "was unsatisfied with the conditions of labor, he might have chosen to work elsewhere" (p. 145). One is reminded of Marie Antoinette's response when told that the peasants lacked bread: "*Qu'ils mangent de la brioche.*"

There are some positions that a society should insist upon even if they do not comport with what empirical evidence indicates would otherwise be ordinary conduct. Professor Epstein tells us that it is "probable that most purchasers would in fact accept limitations upon liability as being in their own self-interest" (p. 55). Initially, I find this to be a startling observation about human nature — although neither of us can prove or disprove the observation empirically. But even if he is correct, it does not follow that the law should condone such agreements when they are not in the best interests of society. I suppose, for instance, that many employers would use child labor if permitted to do so, and that many children would accept such employment. This is not a persuasive argument for returning to nineteenth-century working conditions.

I am pleased that Professor Epstein recognizes at least that "today it is tilting at windmills to fight the anti-contractual bias" of products liability law (p. 55). I would not, however, characterize one

5. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

6. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). The case involved a photo-offset press operator who got his hand mangled in the printing machinery.

who so tilts as a modern-day Don Quixote. Perhaps, a modern-day troglodyte would be a better comparison.

One of Professor Epstein's major concerns is with design litigation. He believes — with Professor Henderson, to whom Epstein acknowledges that he "owes much" (p. 69) — that the jury is not equipped to decide cases involving conscious design decisions of the manufacturer. They should be restricted to " 'strong' design defect cases" — those resting on the defendant's "express or implicit representations" about his product — and to those cases involving "the defendant's breach of external standards, whether imposed by statute or by common practice." The " 'modern' design defect cases," involving "extended use of cost-benefit formulas," he believes are not capable of rational jury determination (p. 69). The gist of his argument seems to be that fact-finders should be allowed to hear only easy cases, and that the hard decisions should be left to the manufacturer's untrammelled discretion. If one has little faith in the judicial system, this position is eminently correct. I prefer, however, not to make the manufacturer the ultimate arbiter of its own conduct. There is no other readily apparent arbiter than the judicial system, which works somewhat like the democratic form of government: It has many faults, but no one has yet come up with a better system.

Professor Epstein covers all aspects of products liability law, and I think it is fair to say that in practically every instance he argues for a decidedly conservative position that favors the manufacturer. His consistent stance is understandable in view of the fact that the book "began as a more modest research endeavor undertaken in 1976 at the request of the American Insurance Association."⁷

The book is generally well-written and often insightful. Professor Epstein writes with a flair, and turns many quotable lines. If it were not for matters of fundamental principle, I would be persuaded by many of his arguments.

7. P. vii (Foreword by T. Lawrence Jones, President of the American Insurance Association).