

## Presentation

*Charles Fried\**  
*David Rosenberg\*\**

PROFESSOR FRIED: Our paper was a joint venture and we therefore will be making a joint presentation. Although my co-author Professor Rosenberg and I differ on a number of issues, we are bound together by the conviction that questions regarding the proper role of courts and legislatures in the development of tort law need to be decided by a rational, nonrhetorical, unsentimental, disinterested analysis of who can best do what parts of the job. That, in turn, depends on getting a clear idea of what the job is, and a large part of our paper is devoted to that subject.

We accept as a background assumption that the ultimate constitutional responsibility for developing tort law, as with all lawmaking, is in the legislature. But we make that assumption without prejudice to the question of whether courts might not be better suited to the task under some circumstances.

There have been some state court decisions concluding that state constitutions give the courts the last word on an issue of tort law development. These decisions have, on the whole, been dubious in their reasoning and regrettable in their effect, but they depend on a variety of state constitutional provisions which we have not addressed in our paper.

PROFESSOR ROSENBERG: I should add that these decisions fit within the major thesis of our paper: namely, that judges, for whatever reasons, come to conclusions about the functioning of the tort system without fully understanding exactly what is in the best interests of the individuals in society who are to be served by the tort system. More specifically, to the extent that we see constitutional decisions limiting the power of the legislature to circumscribe the power of courts in their role as enforcers of tort law, we often see judges making exactly the same mistake that commentators make: they make broad assumptions about what torts should be doing without engaging in the kind of analysis that Professor Fried and I are offering.

---

\* Beneficial Professor of Law, Harvard Law School.

\*\* Professor of Law, Harvard Law School.

PROFESSOR FRIED: Though we have deprecated state courts using state constitutions to block appropriate legislative reform, it should be said that the Supreme Court of the United States has itself cooperated in foreclosing several rational schemes for the comprehensive treatment of claims in mass tort cases on due process grounds and grounds of limitations on federal jurisdiction.

PROFESSOR ROSENBERG: I would say that whatever the motives of the members of the Supreme Court, the outcome was entirely misguided.

PROFESSOR FRIED: Misguided because in many of these situations you have a national problem and a nationally distributed product. Impediments to national resolutions are irrational and unfortunate. But we are not going to worry about these kinds of constitutional questions today because our real subject, of course, is not tort law, but accident law. The function of accident law is to put in place incentives to reduce accident costs to the lowest efficient level, (not to eliminate them altogether because that is absurd), and to provide an appropriate level of compensation to those who are harmed by accidents, and finally, to extract or provide funding for this compensation. That is what an accident law system is supposed to do.

The first of these is a deterrent function; the second, an insurance function; the third, a distributor function. Professor Rosenberg speaks of progressive redistribution, and I must admit the word "progressive" is a term that makes me nervous. But not here because, in the context of funding schemes, what the paper means by progressive redistribution is only the special case of how one should fund systems of social insurance generally.

PROFESSOR ROSENBERG: I do want to add that the funding we are talking about is not only funding directed to the insurance role of the legal system but also to the deterrence role. The level of optimal deterrence that we suggest would be preferred by an individual may not be affordable by that individual or a segment of the population. As a result, there needs to be some means of funding to make that degree of optimal precaution available in the society. Whether we call it progressive or not, the funding that we are imagining goes both to the insurance role and to the deterrence role of the system.

PROFESSOR FRIED: Now this brings us to the two bugbears of this issue: corrective justice and the "day in court." We are very rough on both of those notions because for a very large part they do not make sense, or at least they do not make sense for the public they are supposed to serve. They may make sense for some individual actors, mainly, I would suppose, trial lawyers. But as a rational system, one must always look at this *ex ante*. One must always ask the question: consider persons who purchase

products, who are put in the way of accidents, and the persons who manufacture products and cause accidents. Not knowing exactly what their situation may be after an accident, what kind of system would they find rational and in their interest?

Corrective justice is an ideal that looks at solving a problem after it has occurred. People, for example, are mesmerized by the deplorable situation of the accident victim wheeled into the courtroom in a wheelchair, not really to give testimony, but to elicit the sympathy of the jury. This invites the irrationality and the sentimentality which we are saying has to be washed out of the system. In the design of the system and in the allocation of roles to courts and to legislatures, the kinds of concerns which are elicited by the plight of individual accident victims after the fact really have to be disregarded. The question that has to be asked is "what would that accident victim herself have chosen before she knew she was getting into the accident."

As for the "day in court," which is another bugbear, that turns out very often to be nonsense as well. Most accident victims do not have a day in court. Matters are settled. But in any event, in assessing the "day in court" ideal the question once again has to be: "Does providing a day in court so increase the costs that potential accident victims looking at the matter before the fact would prefer the gratification of the day in court over an adequate system of deterrence and insurance compensation? Would they prefer the risks and the pleasures of a day in court to this deterrence; that is to say, to the measures of safety on one hand and to the insurance on the other?" Again, this is the way in which the matter has to be analyzed.

PROFESSOR ROSENBERG: So we take a general position as follows: we imagine an individual in an *ex ante* position who chooses a legal system to maximize his or her expected welfare across all potential states of the world. And we reason from that based on experience that that individual would want a system we characterize in the paper as one seeking to minimize the sum of accident costs, in particular, through appropriate levels of safety and appropriate provisions of insurance with sufficient means of funding to achieve both.

The strong position we take is the following: vindicating a moral, rights-based, or fairness claim based on some value independent of the welfare of the individual will make everyone worse off. And as a result, it must be excluded from the scope of the legal system. None of this is to suggest that people do not want occasionally to be in court. They may turn out to be lawyers or more usually they will be law professors who have never gone to court and so do not really know what it is like to be in court. But it is perfectly reasonable to believe that there is a variety of tastes. Some people want to go to court. Some people do not want to go to court.

The usual way we deal with that variety of tastes is we offer those tastes a market for their satisfaction, and those who are willing to pay the price can have their tastes satisfied. So anyone who wants to go to court and state their case—although we deny that there is any coherence to anything that they might say—can buy their time in front of anyone who is willing to sit and listen to them for the price they are willing to pay.

PROFESSOR FRIED: Considering such a rational system, then there comes the question who ought to be performing what roles—what role for the legislature, and what role for the courts? What is absolutely necessary in such a system is the aggregation of claims and the aggregation of loss, in other words, aggregation on both the sides of both the plaintiff and the defendant.

This aggregation can often be done by legislatures, but in fact, courts have been the engines for these rational aggregation systems. For instance, class actions suits are an indispensable form of this kind of aggregation. They arose out of the actions of courts. Along come legislatures that sometimes codify, or modify what courts have begun, and along come courts again, and further tinker with the system. That is perfectly reasonable and perfectly appropriate and there is no *a priori* ground for saying that one or the other should have the exclusive role.

Similarly, setting rules of liability which tell us what counts as an appropriate level of safety, can be done by courts or by legislatures. Very often, again, courts begin the process with respect to any product or group of products, and then along come legislatures and codify those standards. Frequently the actor is not legislature itself, but legislative delegates in the form of administrative agencies. Examples of such agencies are the Food and Drug Administration or OSHA. What they are doing, of course, is performing a function similar to the courts that set rules for the appropriate level of safety.

The question is who is better situated to set those rules. To what extent should those rules be set through the trial and error of the common law as opposed to legislative action? There is once again no *a priori* ground for preferring one to the other. But here it becomes very important that when the legislature or its delegate regulatory agency has spoken in setting those rules, the courts must cooperate rather than undermine that determination. A number of doctrines which courts have fashioned have worked to undermine rather than make effective that particular legislative exercise. Rules of preemption in tort law are a particularly strong example of this where you have expert agencies acting as the delegates of the legislature performing precisely this function. Now when that has happened, it is usually unfortunate if courts across the country then choose

to “supplement the work of these agencies and to set their own standards.” What you then have is competing work rather than collaborative work toward a rational result.

PROFESSOR ROSENBERG: Now for a summary of our conclusions. We ask whether the individual *ex ante* would rationally prefer insurance, the appropriate funding of insurance, and the appropriate funding of deterrence. We look at it from the point of view of which institution, courts or legislatures, are the most competent in supplying what the individual wants from the legal system. We eschew any *a priori* view as to which one should go forward simply because of the subject matter. And we look at it more particularly in light of information costs, that is, the effectiveness of the institution in achieving the rational result.

We come to two emphatic conclusions. First, we see no role for the courts in how the distributive problem can be solved for funding optimal deterrence and optimal insurance. The information burden, including the information needed to effectuate a wealth tax and transfer system through the courts, states for itself why it is unlikely that the judiciary could, in anybody’s wildest imaginings, achieve that objective. Whenever they are inclined to think that distributive questions should have some play in their decision making, the courts should generally banish that thought from their minds, except to the extent that there is a possibility that a decision on other independent grounds will eliminate some of the regressive tax effects of tort liability. To the extent that courts can roll back regressive tax effects in the course of achieving some other objective that they might be suited to achieve, we suggest courts should take that into consideration. But outside of that, the courts should banish problems of distribution from their minds.

Second, our definition or the standard definition of optimal insurance suggests that nothing tort can supply remotely approaches what people would want from insurance, either from commercial insurers or from social insurers. To almost a universal degree, people are covered for catastrophic accidents in this society. Those who do not have commercial insurance generally have social insurance. When social insurance is not formally available, it is informally available through emergency room services in hospitals and so forth.

The insurance scheme in the United States is not necessarily optimal on the whole, but there is no rational basis for thinking that high cost, limited, and risky tort liability could serve as a useful mode of insurance to deal with chronic problems in our system of social insurance. So our strong presumption is that courts should not give any independent weight to compensation in deciding on expanding or contracting tort liability. There is really no rational justification for courts to engage in the business of insurance. They do it poorly. If there is any plausible role for the courts, it

is deterrence. But it is a very doubtful and problematic role for courts in the area that we are concentrating on: namely, mass production torts which encompass virtually all risks that are created by business activity.

The information costs to resolve those cases are high. We refer to the recent Supreme Court *Pegram* decision concerning HMOs that were using various incentive systems that were allegedly interfering with doctors' reasonable decisions about how to treat their patients.<sup>1</sup> The case included the kinds of problems the Supreme Court noted it lacked the resources to deal with: in particular, acquiring and evaluating essential economic, scientific, technological and social policy, including distributive policy. None of this type of information was likely to be available in the normal case. Even if the information was there, the Court conceded it could not master it with sufficient proficiency to make good use of it, even to begin to formulate a workable solution to the regulatory problem involved. It is not that those decisions cannot be made. It is that judges are not trained to make them. Lawyers are not trained to do it. And, of course, jurors are not trained to do it.

For courts to perform a socially useful deterrence role, they must confront the information costs of the conventional tort suit dealing with business risk. There is really no distinction between those cases and the kind of problems that befuddled and confounded the Supreme Court in the HMO case. We are not constructing the best system, only trying to suggest how a better one can be contrived. Our weak suggestion is to roll back the general movement toward the negligence rule, as signaled by the *Restatement of Torts (Third)*, in connection with products liability.<sup>2</sup> To decrease the information burden on courts they should, to the extent that it is otherwise functionally sensible, move in the direction of strict liability. There are many other suggestions in this paper, but to cap it off, we think that courts have only a plausible role in effectuating deterrence and that role probably should be confined to the area where strict liability is a cost-effective solution.

---

<sup>1</sup> See *Pegram v. Herdrich*, 530 U.S. 211 (2000).

<sup>2</sup> See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* (1997).