

Roundtable: Redressing Harm: Who Decides?

PROFESSOR FRIED: I disagree with David Vladeck. Juries are not democratic at all. It is twelve people. And twelve people creating a situation which might, in fact, raise the insurance premiums and perhaps make automobile or other kind of insurance unavailable to millions of people who are not sitting in that jury box. They are raising costs which a lot of other people are going to pay. I do not see what is so democratic about the jury at all.

MR. VLADECK: Let me make three brief points. First, as to the attack on the jury system launched by Professor Fried, he overlooks the fact that cases do not get to juries unless judges let them. But at some point, there must be rules and decisions, and there is no reason to exclude juries from that process. In fact, we should celebrate their role in that process because the cumulative impact of multiple jury awards is a highly democratic way of establishing liability rules. To be sure, it is easy to single out and criticize isolated jury verdicts. But Professor Fried's hyperbolic observation that one jury verdict could "raise insurance premiums and perhaps make automobile, or some other kind of insurance, unavailable to millions of people" is beyond the pale. No single jury award Professor Fried or anyone else can point to has had that kind of cataclysmic impact on society. To the contrary, jury verdicts alter liability rules only when multiple juries render consistent verdicts through a process supervised by trial judges and appellate courts empowered to set aside jury awards that depart from the law or evidence.

Second, the fact that there are differences in the way juries in Brooklyn, New York and Bozeman, Montana decide cases reflects the founding father's decision to preserve and honor our regional differences rather than mandate uniformity. Federalism may be an inconvenient historical artifact for national corporations, but that is hardly a reason to scrap it.

Third, let me talk briefly about the arguments over trying to decide liability rules *ex ante* rather than *ex post*, because Professor Fried emphasizes the importance of deciding liability rules before the fact. I have two things to say about that. One, *ex ante* decisions about liability rules of the kind we are talking about do not happen in real life, and two, if they did, those decisions would be made in the context of the informational void that the authors decry. Take a look at the asbestos litigation. It has

been an extremely vexing problem, but it is wrong to think that back in 1925 (or 1975) we could have sat down and rationally set the rules for asbestos liability. Our knowledge base was too imperfect and incomplete to set reasonable and fair rules. The tort system works in a largely reactive way, and yes, in an ideal world we all sit down and we come up with an immutable doctrine to be applied to subsequent cases, but we really would not know what we were doing. Part of the virtue of the tort system is that not all of the rules are decided in advance. Therefore, liability rules can be set as emerging hazards like asbestos are identified so liability can be imposed where it belongs.

AUDIENCE MEMBER: I think I heard Professor Rosenberg say that courts should not concern themselves with compensation, and that deterrence is what they should talk about.

PROFESSOR ROSENBERG: I think I did say that, but let me qualify it to this extent, to the extent they talk about and think about compensation and it becomes important in the decision making it should go only one direction. The courts should never adopt rules, maintain rules, or modify rules to enhance the compensatory role of tort liability.

AUDIENCE MEMBER: So suppose a woman is severely brutalized by a wealthy man. Ultimately, it all comes out, the man is arrested and put in prison for years. The woman sues the man. I do not understand what it means to say the courts should not talk about compensation, that they should always talk about deterrence. Should not the courts begin by talking about how much this woman should be compensated for this brutality?

PROFESSOR ROSENBERG: What they can talk about or what they should talk about is whatever fine is due to prevent that kind of behavior from occurring. So whatever fine or penalty of damage assessment should be used to deter that inappropriate behavior and the court should levy the assessment to make it clear the courts constantly will be seeking to achieve the deterrence role.

The question of compensation goes back to the question of why somebody would want money to be transferred from X to Z. Why would you want it if it costs money to do it and you were going to bear some of the expense? The expense that is born, we imagine, is by an individual who chooses what legal system should govern. That person would never, if they are going to bear the cost of that system, want the money transferred to them. They do not want the harm. They do not want harm done, and they want a fine assessed so that harm will be optimally deterred. There is nothing else that can be done to make a person better off. If the argument for compensation holds, you are arguing that the person should choose a welfare future that is worse than the one they would rationally prefer. Why would you want to make everybody worse off?

AUDIENCE MEMBER: It seems to me you that are creating a tort system that leaves victims far more badly off.

PROFESSOR ROSENBERG: The victim has the benefit of commercial and government supplied first-party insurance. She pays premiums and taxes for this benefit. That is the premise of my point.

MR. VLADECK: I am familiar with mass tort litigation. The one point that I want to make is that although you may be right that, at times the tort system pushes towards overcompensation, you must also realize that at times it pushes towards undercompensation and serious underdeterrence. The literature confirms that only a small fraction of people injured due to the negligence of others sue. And the notion that the manufacturers of breast implants have overpaid injured parties by several billions of dollars to avoid the transaction costs of litigation is at least highly contestable; if not just wrong.

I am surprised by the suggestion that medical monitoring cases are a symptom of an out of control tort system. I agree that plaintiffs occasionally bring cases for medical monitoring alone. But just as often, medical monitoring claims are devices defendants use to buy broad *res judicata* in large class action cases. For instance, in *Amchem Products, Inc. v. Windsor*,¹ the main claims were personal injury claims by workers occupationally exposed to asbestos. But the defendant corporations, which wanted to wrap up all of their potential liability relating to occupational exposures, insisted that the plaintiffs tailor their class action complaint to include everyone occupationally exposed to asbestos, even if they had not manifested any injury. Hence, the settlement included provisions that gave these exposure-only "futures" a right to medical monitoring if they opted for it. In *Amchem*, like many mass tort cases, medical monitoring is a device used to get future exposed people into the class, to give them a nominal benefit, and then to buy *res judicata* against them. The mass tort system is a two-way street in that sense. It may be true that at times the tort system overcompensates, but increasingly it undercompensates injured parties by buying *res judicata* against them for nominal settlements.

PROFESSOR ROSENBERG: This is where the rational analysis comes in. I am in favor of both medical monitoring and cancer fear cases classified under litigation class actions. They are socially useful to the extent that science supports them. But, again, compensation is not the argument. It is senseless to talk about compensation. The social justification for these claims is deterrence. I would note that we could instead assess punitive damages in cases of actualized harm to serve the deterrence objective, but outside of paying plaintiffs' lawyers for their law

¹ 521 U.S. 591 (1997).

enforcement work, the money should not be paid to the plaintiffs themselves. We have to understand that the best the system can do is prevent unreasonable risk. So you want all the harm that results from the unreasonable risk internalized to the potential tortfeasor. One way to achieve that is through risk-based claims, but you are not going to make any functional headway by talking about compensation.

AUDIENCE MEMBER: Why is it that you assume that most prefer a system that will leave victims, on average, perhaps slightly worse off, if by selecting that system they absolutely guarantee themselves there will be no calamitous, serendipitous, or uncontrollable events?

PROFESSOR ROSENBERG: The person in the position we are imagining in most of our analysis is risk averse. So we are assuming the person takes into account exactly that worse state and weighs it more heavily than more benign state, allocating legal resources accordingly. So there will be allocations for deterrence in light of risk aversion and allocations for insurance.

AUDIENCE MEMBER: But if risk aversion is a variable, the someone surely could rationally select the system which may, on average, make them slightly worse off in order to guarantee against adverse outcomes.

PROFESSOR ROSENBERG: That is correct, but the allocation of resources totally to insurance and safety is what actually produces the total greatest value for that individual. So we are taking into account two goods that the individual wants to reconcile, and put in some ratio according to their own preferences about how much risk they want to bear and how much they want to avoid accidents and be safeguarded against the worse case scenario you presented. By definition, that individual contemplating all possible outcomes in the world to come, including varying degrees of risk aversion, makes a decision that makes that person best off, regardless of what fate has to say about it.

AUDIENCE MEMBER: I have a question I hope David Vladeck could answer. I wonder if you believe that aside from the FDA, other government agencies might have adequate information-gathering capabilities?

MR. VLADECK: My point was our legislative and administrative bodies do not have superior information fact-finding capabilities in the context of setting liability rules. That is a myth. Most agencies are like the FDA; they lack the statutory authority, staffing, and other resources they need to effectively oversee the industries that they are supposed to regulate.

To the extent that agencies are given the authority and resources to go out and find facts (which they will not succeed at getting in this congressional climate), then maybe the pendulum will swing back. But I

was trying to describe my experience with the regulatory agencies that are supposed to be guardians of the public health, yet by and large do not have the subpoena power, the personnel, or the political independence to do their jobs effectively.

PROFESSOR FRIED: You may be right, and our paper should not be taken to say that courts, in all circumstances, do not have some advantages in gathering information. Where they do, that is good.