The Uneasy Case for Product Liability

A. Mitchell Polinsky and Steven Shavell

123 Harv. L. Rev. 1437 (2010)

In this Article we compare the benefits of product liability to its costs and conclude that the case for product liability is weak for a wide range of products. One benefit of product liability is that it can induce firms to improve product safety. Even in the absence of product liability, however, firms would often be motivated by market forces to enhance product safety because their sales may fall if their products harm consumers. Moreover, products must frequently conform to safety regulations. Consequently, product liability might not exert a significant additional influence on product safety for many products—and empirical studies of several widely sold products lend support to this hypothesis. A second benefit of product liability is that it can improve consumer purchase decisions by causing product prices to increase to reflect product risks. But because of litigation costs and other factors, product liability may raise prices excessively and undesirably chill purchases. A third benefit of product liability is that it compensates victims of product-related accidents for their losses. Yet this benefit is only partial, for accident victims are frequently compensated by insurers for some or all of their losses. Furthermore, the award of damages for pain and suffering tends to reduce the welfare of individuals because it effectively forces them to purchase insurance for a type of loss for which they ordinarily do not wish to be covered. Opposing the benefits of product liability are its costs, which are great. Notably, the transfer of a dollar to a victim of a product accident through the liability system requires more than a dollar on average in legal expenses. Given the limited nature of the benefits and the high costs of product liability, we come to the judgment that its use is often unwarranted. This is especially likely for products for which market forces and regulation are relatively strong, which includes many widely sold products. Our generally skeptical assessment of product liability for such products is in tension with the broad social endorsement of this form of liability.



The Easy Case for Products Liability Law:

# A Response to Professors Polinsky and Shavell

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123 Harv. L. Rev. 1919 (2010)

At least since World War Il, tort law has played a more prominent role in the U.S. legal system than in those of other industrialized nations. The emergence in the 1960s and 1970s of the doctrine of strict products liability was in many ways emblematic of this distinctiveness. The new regime was introduced not by legislatures, but by courts. The rationales on which those courts relied were more instrumental than doctrinal. And the rules they fashioned conferred on judges and jurors broad discretion to impose new responsibilities on commercial product sellers. In these respects, the products liability revolution had an 'only-in-America' flavor to it.

A mere half-century later, American law is perhaps becoming distinctive for its hostility to the idea that consumers should have the right to obtain redress against manufacturers who have injured them through the sale of defective products. Products liability law has been the subject of sustained attacks. Advocates for business and professionals have insisted that it is a drag on innovation, quality, and competitiveness. Libertarians have complained that its mandatory obligations prevent citizens from trading cost for safety. A coordinated public relations campaign has helped convince many Americans that it is primarily a means by which the foolish and the feckless foist responsibility onto others. Even among those unpersuaded by these criticisms, many are prone to dismiss products liability law as second-rate regulation or insurance—a clumsy governance structure left over from pre-modern times. . . 

Now into this mix comes an article in the Harvard Law Review titled The Uneasy Case for Product Liability, authored by Professors A. Mitchell Polinsky and Steven Shavell. The article is . . . a brief survey of prior analyses of benefits delivered by, and costs associated with, the application of tort law to injuries caused by widely sold products. Based on that survey, it offers a preliminary assessment of whether tort law, thus applied, is net beneficial to society. While measured in tone, Uneasy generates a surprising and stark conclusion: that it is probably desirable for manufacturers not to be subject to any tort liability for injuries caused to consumers by widely sold products

What shall we say, then, about the justifiability of products liability law—conceived as a modernized amalgam of negligence, misrepresentation, and warranty that, through the concept of a defective product, permits certain injury victims to hold manufacturers (and retailers) accountable? We should say that the case for products liability law, so conceived, is easy. It holds manufacturers accountable to persons victimized by their wrongful conduct. It empowers certain injury victims to invoke the law and the apparatus of government to vindicate important interests of theirs. It instantiates notions of equality before the law and articulates and reinforces norms of responsibility. And in doing all these things, it contributes in direct and indirect ways to deterrence and provides welfare-enhancing compensation. For all these reasons and others, it is extremely valuable that courts, at the behest of victims, have the authority to order commercial sellers of defective products that cause injury to compensate their victims. If it is all so easy, one might ask, why are legislatures heatedly debating whether to reform products liability law? The answer is that there is a host of related questions that are difficult. To name only the most visible: how much defect-based liability retailers should face, how non-class aggregate litigation over product-related injuries should be structured to achieve both efficiency and due process, how evidentiary rules should be framed for causation issues, how and when regulatory law should trump tort law and who should decide this issue, and how concerns about excessive and arbitrary damage awards should be addressed and by which institution(s). The mere recitation of these familiar issues suggests that there are important aspects of products liability law about which we should be uneasy. That is why they have earned a great deal of judicial, legislative, and scholarly attention. But the case for products liability law itself is easy.

NOTE

We do not think that the Uneasy Case should be taken seriously.

First, the authors failed to understand the most basic nature of the field of law they purport to critique—products liability law—since they equate it to a single branch of the field, strict products liability. Plainly they did not recognize that strict liability in tort was merely a single basis of liability among many in a much larger field of law, nor that widespread products liability reform in many courts, legislatures, and the Restatement (3d) of Torts: Products Liability (1998) has reformulated the field largely into principles of negligence.

Second, their critique of strict liability merely rehashes a narrow efficiency perspective that became passé quite long ago a generation in the past.

The Easy Case is a far more effective analysis of this field of law, but it frames a defense of products liability law in a formal internal structure that only skims the most fundamentally important dimension of any field of law: its moral foundations.



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