

Revisiting Strict Product Liability: Taking Law and Economics Further

Megan L. Richardson

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Review Essay

Citation Information

Richardson, Megan L.. "Revisiting Strict Product Liability: Taking Law and Economics Further." *Osgoode Hall Law Journal* 35.1 (1997) : 195-207.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss1/5>

This Review Essay is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

REVIEW ESSAY: REVISITING STRICT PRODUCT LIABILITY: TAKING LAW AND ECONOMICS FURTHER[©]

A Review of
EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING
THE FACTS SERIOUSLY

DONALD DEWEES, DAVID DUFF & MICHAEL J. TREBILCOCK

(Toronto: Oxford University Press, 1996)

BY MEGAN L. RICHARDSON**

I. INTRODUCTION	195
II. THREE NORMATIVE PERSPECTIVES: ECONOMICS, DISTRIBUTIVE JUSTICE, AND CORRECTIVE JUSTICE	197
A. <i>Economics: Overcoming the Disutility of Uncertain and Onerous Standards of Liability</i>	197
B. <i>Distributive Justice and the Economics of Loss Spreading</i>	201
C. <i>Corrective Justice: Restoration for "Moral Wrongs"</i>	204
III. CONCLUSION	207

I. INTRODUCTION

In "Towards a Test for Strict Liability in Tort"¹ Guido Calabresi and Jon Hirschoff, writing as lawyer-economists in the early 1970s, made a radical argument for strict product liability based on a "cheaper cost avoider" test for liability. First, they argued that the test would reduce

© 1997, M.L. Richardson.

** Senior Lecturer in Law, the University of Melbourne.

¹ G. Calabresi & J.T. Hirschoff, "Towards a Test for Strict Liability in Torts" (1972) 81 Yale L.J. 1055.

administrative costs since the court would merely determine “which of the parties is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made”² without determining whether the injury should have been avoided (as under negligence).³ Second, they concluded that the test is more likely to result in optimal injury avoidance in practice because more claims are likely to be successful where there was negligence but this cannot be proved.⁴ Finally, they invoked a distributive justice argument: that the manufacturers’ ability to spread the costs of strict liability through the prices charged for their products, effectively insures product users against the risks of injury.⁵

Since Calabresi and Hirschhoff wrote their article, strict liability has been adopted for product injuries in the United States (continuing a trend noted by Calabresi and Hirschhoff) and, more recently, Europe and Australia.⁶ But none of the tests for strict liability exactly matches the original Calabresi and Hirschhoff test. The trend towards strict product liability has been criticized by economists and lawyer-economists, including Donald Dewees, David Duff, and Michael Trebilcock who in a comprehensive study, *Exploring the Domain of Accident Law*, favour the Canadian approach of maintaining negligence liability.⁷ Other chapters of the book, which represents an expanded and updated version of Dewees and Trebilcock’s groundbreaking article of the early 1990s, “The Efficacy of the Tort System and its Alternatives,”⁸ deal with automobile accidents,⁹ medical accidents,¹⁰ environmental injuries,¹¹ and workplace

² See *ibid.* at 1060, adding, *ibid.* at 1068, that the starting point can also be that “by and large manufacturers are better suited than users to make the cost-benefit analysis.”

³ *Ibid.* at 1060-61.

⁴ See *ibid.* at 1058 where Calabresi & Hirschhoff emphasize the ideal world as being especially necessary for the negligence standards to operate efficiently.

⁵ *Ibid.* at 1069-70.

⁶ See also J. Stapleton, *Product Liability* (Toronto: Butterworths, 1994); and I. Malkin & E. Wright, “Product Liability under the Trade Practices Act—Adequately Compensating for Personal Injury” (1993) 1 *Torts L. J.* 63.

⁷ D. Dewees, D. Duff & M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Toronto: Oxford University Press, 1996), c. 4.

⁸ D. Dewees & M.J. Trebilcock, “The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence” (1992) 30 *Osgoode Hall L.J.* 57.

⁹ *Supra* note 7, c. 2.

¹⁰ *Ibid.* c. 3.

¹¹ *Ibid.* c. 5.

injuries.¹² These topics, however—while fascinating and important in themselves—will not be discussed in detail in this review.

Generally, it may be said that the great strengths of this book are its focus on empirical data rather than what the authors term “abstract theorizing,”¹³ and a preparedness to consider the possibility that, ultimately, the best solution to the problems of tort law may be to move beyond tort to adopt government penal, regulatory, and/or compensatory alternatives (even though these are not the options preferred for product injuries where the authors can find little empirical evidence of success for such non-tort approaches in practice). But one of the risks of a primarily experience-based approach is that alternative theoretical approaches which have not been tried in practice are given little weight. In this review, it is suggested that the authors’ criticisms of strict product liability may indeed be able to be answered by revisiting the basis and operation of the Calabresi and Hirschhoff test.

II. THREE NORMATIVE PERSPECTIVES: ECONOMICS, DISTRIBUTIVE JUSTICE, AND CORRECTIVE JUSTICE

Deweese, Duff, and Trebilcock evaluate the merits and defects of each of the categories of liability, which they consider in terms of three normative perspectives of economic efficiency, distributive justice and corrective justice. Not surprisingly, given the background and expertise of the authors, most of the discussion is economic. Even the treatment of distributive justice, identified in terms of the “capacity to spread risk and provide meaningful, expeditious, and low-cost compensation or insurance to ... victims,”¹⁴ is closely linked in the case of product liability to the authors’ economic arguments about the inefficiency of manufacturers providing insurance for non-negligently caused injuries at a cost ultimately borne by users through the prices paid for products. The discussion of corrective justice, as “obliging a person whose morally culpable behaviour has violated another’s autonomy to restore the latter to as nearly as possible his or her pre-injury status,”¹⁵ is more clearly distinct from the authors’ economic arguments, although the meaning of “morally culpable behaviour” is apparently accepted as coinciding with

¹² *Ibid.* c. 6.

¹³ *Ibid.* at 3.

¹⁴ *Ibid.* at 6.

¹⁵ *Ibid.* at 8.

the legal, and therefore the economic standard, of negligence. The attempt to accommodate corrective justice in a discussion primarily about the economics of product liability raises most clearly the question of how a fundamentally non-economic approach can be married with an economic one, a question which has been only superficially addressed in law and economics writings to date although Dewees, Duff, and Trebilcock provide some extremely valuable insights.

A. *Economics: Overcoming the Disutility of Uncertain and Onerous Standards of Liability*

The principal economically based criticism which Dewees, Duff, and Trebilcock make of strict product liability is that the current tests for assessing liability in practice, in particular the "reasonable expectations" and "risk utility" tests, are confusing and inefficient in their operation because of their uncertain application and their tendency to favour product users over manufacturers.¹⁶ A particular problem with the tests is that, in a world of constantly expanding knowledge as to risks, the standard of information expected of product manufacturers becomes crucial.¹⁷ In practice, as Dewees, Duff, and Trebilcock argue, both the consumer expectation test and the risk-utility test, which "directs [...] courts to balance the risks of the current design, as now revealed, against the utility that the product and alternative designs provide," may require more than an efficient level of knowledge of product manufacturers.¹⁸ Conversely, as far as product users are concerned, the tests are unclear as to the level of knowledge expected with the standard for warnings particularly fraught with confusion and incoherence.¹⁹

In economic terms, apart from adding to the costs of litigating product liability claims (and the disincentives for claims to be initiated, impinging on the incentives for optimal care),²⁰ the consequence of such

¹⁶ *Ibid.* at 192.

¹⁷ See also Stapleton, *supra* note 6 at 236-38.

¹⁸ *Supra* note 7 at 192. See also D. Boivin, "Strict Products Liability Revisited" (1995) 33 Osgoode Hall L. J. 487 at 511-13.

¹⁹ Dewees, Duff & Trebilcock, *supra* note 7 at 193. See further H. Latin, "Good Warnings, Bad Products, and Cognitive Limitations" (1994) 41 UCLA L. Rev. 1193.

²⁰ Dewees, Duff & Trebilcock, *supra* note 7 at 194-96 with reference to a 1991 study showing that only 2 per cent of those injured in product-related accidents outside the workplace actually took some action: see D. Hensler *et al.*, *Compensation for Accidental Injuries in the United States* (Santa Monica: Institute for Civil Justice, Rand Corporation, 1991).

uncertainty in the tests which apply in practice has been a possibly negative impact on levels of innovation. Dewees, Duff, and Trebilcock refer to a survey conducted in 1987 among product manufacturers in the United States indicating decisions by 47 per cent of respondents to discontinue product lines, and by 39 per cent not to introduce new products, while 25 per cent reported the discontinuation of product research.²¹ The decisions are attributed to the substantial increases in insurance premiums which followed the advent of strict product liability in the United States.²² The results are not entirely determinative, as Dewees, Duff, and Trebilcock point out. For example, it is not clear whether the response among insurers and manufacturers to strict product liability was a reasonable reaction to the real prospects of liability. Also, the sample used to assess manufacturer reactions (a total of 550 respondents, or 13.5 to 14 per cent of those contacted) was extremely small. In any event, the same surveys indicate some positive effects of strict product liability, revealing that 35 per cent of respondents introduced product-specific safety improvements, 33 per cent restructured existing product lines, and 47 per cent instituted improvements to instructions regarding product use and hazard warnings.²³ Nevertheless, the authors conclude that there is sufficient evidence to provide a basis for concern as to the efficiency of strict product liability in practice.

Interestingly, at one point Dewees, Duff, and Trebilcock suggest that a strict liability test may work efficiently if responsibility is placed on the "best-placed decider."²⁴ Although the suggestion is not developed, it recalls the Calabresi and Hirschoff test²⁵ which Calabresi with Alvin Klevorick later interpreted as a "cheaper fact-finder" test.²⁶ A focus on the best placed decider suggests that the question of which party is the "cheaper cost avoider" may be addressed, at least initially, by treating the costs of acquiring and assimilating information as relevant to avoidance costs. For instance, if further research is needed fully to

²¹ Dewees, Duff & Trebilcock, *supra* note 7 at 197-98, citing a 1988 United States Conference Board report: see E.P. McGuire, *The Impact of Product Liability* (New York: Conference Board, 1988) at 3.

²² Dewees, Duff & Trebilcock, *supra* note 7 at 198.

²³ *Ibid.*

²⁴ *Ibid.* at 193.

²⁵ See *supra* note 1, especially at 1067-85.

²⁶ G. Calabresi & A. Klevorick, "Four Tests for Liability in Torts" (1985) 14 J. Legal Stud. 585 at 625; and M.J. Trebilcock, "The Future of Tort Law: Mapping the Contours of the Debate" (1989) 15 Can. Bus. L.J. 471 at 474.

identify risks then—as Calabresi and Hirschhoff indicate with respect to the analogous case where risks are known but further research is required to develop cheaper safety alternatives—“[r]elatively, the manufacturer is better suited to make the only cost-benefit analysis that matters, which is one between further research and current damages.”²⁷ The analysis implies that the costs of acquiring and dealing with information should be taken into account in any decision as to which party is the cheaper cost avoider.

But the cheaper cost avoider test, as framed by Calabresi and Hirschhoff, does not permit the focus to be exclusively on the cost of acquiring and assimilating information, except in cases where this is “the only cost-benefit analysis that matters.”²⁸ For instance, they say that, in the case of warnings, the cost of understanding and acting on a warning must be taken into account in deciding whether the manufacturer or product user is the cheaper cost avoider:

[M]ere clarity of warnings or mere percentages of likelihood of harm may not by themselves resolve the issue. For these are only factors going to the basic question of who is in the best position to make the cost-benefit analysis and act upon it, and must be considered together with other factors, such as availability of substitutes and the nature of the user’s use of the product in order to determine liability.”²⁹

The reasoning suggests that all factors which impact on the ability to avoid should be taken into account in determining which party is the cheaper cost avoider.

The problem with a test which requires a general assessment of information and control is that this may not provide a basis for a very specific and predictable test of which party is the cheaper cost avoider,³⁰ a concern which Dewees, Duff, and Trebilcock may have felt about a “best placed decider” test as well.³¹ Nevertheless, the Calabresi and Hirschhoff test could potentially be developed into a test under which the actual costs of avoidance are precisely assessed and compared in order

²⁷ Calabresi & Hirschhoff, *supra* note 1 at 1071.

²⁸ *Ibid.*

²⁹ *Ibid.* at 1063.

³⁰ See, for instance, R.A. Posner, “Strict Liability: A Comment” (1973) 2 J. Legal Stud. 205 at 214.

³¹ See Trebilcock *supra* note 26 at 474, criticizing the test for indeterminacy and arguing that “it is not clear where the line might be drawn in any principled way.”

to determine which party is the cheaper cost avoider.³² Such an approach would arguably also represent an improvement in certainty and efficiency terms over the current tests for strict liability which apply in practice. The cheaper cost avoider test, so developed, is now perhaps closer to a negligence test than the original test as framed by Calabresi and Hirschhoff. But, on the other hand, it is clearly not a full negligence test since the court is not required to assess whether avoidance was worthwhile (with the ancillary costs involved in a court making such a decision).³³ The point to be made here is that, once the move is taken beyond the realm of actual practice, the Dewees, Duff, and Trebilcock conclusion that “it would be desirable to reinstate the negligence regime”³⁴ is debatable as being necessarily the best option in terms of economic efficiency.

B. *Distributive Justice and the Economics of Loss Spreading*

In what is partly an economic argument, Dewees, Duff, and Trebilcock suggest that, contrary to Calabresi and Hirschhoff's distributive justice argument for strict product liability, not all product users may need or wish to be effectively insured against the costs of economically unavoidable injuries through the prices paid for products.³⁵ The authors refer to evidence provided by Alan Schwartz that, contrary to the assumptions behind strict liability, product users may, on average, respond appropriately to information as to product risks or be risk averse in their demands for product safety measures.³⁶ George Priest has also pointed out that particular low-risk or low-income product users may prefer not to pay insurance costs calculated on the basis of the costs of avoidance for the average manufacturer and user.³⁷ Schwartz himself

³² See further S.G. Gilles, “Negligence, Strict Liability and the Cheapest Cost-Avoider” (1992) 78 Va. L. Rev. 1291; and M. Richardson, “Towards a Test for Strict Liability in Tort: A Modified Proposal for Australian Product Liability” (1996) 4 Torts L.J. 24

³³ Although Gilles, *supra* note 32 at 1317, points out that the distinction breaks down in particular cases where “to determine the cheapest precautions, the court ... must determine the effect of various precautions on the probability and magnitude of expected accident costs.”

³⁴ *Supra* note 7 at 205.

³⁵ *Ibid.* at 190-91.

³⁶ See A. Schwartz, “Proposals for Products Liability Reform: A Theoretical Synthesis” (1988) 97 Yale L.J. 353.

³⁷ G.L. Priest, “A Theory of Consumer Product Warranty” (1981) 90 Yale L.J. 1297 at 1350-51.

has further argued that product users would generally prefer to limit insurance to direct pecuniary losses rather than extending this to pain and suffering, which money can do little to assuage and which is difficult to value, explaining why there is no developed market for pain and suffering insurance.³⁸ Dewees, Duff, and Trebilcock finally comment that if a broader distributive justice perspective is adopted, any system of tort liability represents an expensive and incomplete system of insurance.³⁹ They ultimately conclude, however, that the economic costs of no-fault compensatory alternatives to tort liability for product injuries, even if coupled with penal and/or regulatory measures, outweigh the benefits of providing broader and more uniform coverage. In general, compensation schemes can be expensive to operate and tend to eliminate incentives to take optimal care;⁴⁰ and penal or regulatory measures, although useful in some areas and capable of improvement with a more rigorous cost-benefit approach, have been shown to be generally too broad-based to be efficient for many product-related injuries where it is difficult to predict the cheaper cost avoider on a category basis.⁴¹

From a broader distributive justice perspective, there must be better systems of victim compensation than tort liability, especially given the transaction costs of initiating and pursuing tort remedies in court.⁴² The New Zealand experience of a no-fault accident compensation scheme is a good example of how distributive justice, if defined simply in terms of loss-spreading, may be served by a non-tort approach.⁴³ But the unpopularity of the New Zealand scheme in a period of economic

³⁸ Schwartz, *supra* note 36 at 364-66.

³⁹ Dewees, Duff & Trebilcock, *supra* note 7 at 206.

⁴⁰ *Ibid.* at 240-45, with reference to compensation schemes for vaccine-related injuries and drug related injuries and, more generally, at 136-46. See also M.J. Trebilcock, "The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis" (1987) 24 San Diego L. Rev. 929 at 994 [hereinafter "Deterrence Dilemma"]; and M.J. Trebilcock, "Incentive Issues in the Design of No-Fault Compensation Systems" (1989) 39 U.T.L.J. 19.

⁴¹ Dewees, Duff & Trebilcock, *supra* note 7 at 214-40.

⁴² See Hensler *et al.*, *supra* note 20; and Dewees, Duff & Trebilcock, *supra* note 7 at 207, noting a 1986 study which indicates that, on average, only 46 per cent of damages paid in product liability cases represents compensation: see J.S. Kakalik & N. Pace, *Costs and Compensation Paid in Tort Litigation* (Santa Monica: Institute for Civil Justice, Rand Corporation, 1986).

⁴³ See New Zealand Law Commission, *Personal Injury Prevention and Recovery: Report on the Accident Compensation Scheme* (Wellington: New Zealand Law Commission, 1988) [hereinafter *N.Z. Accident Compensation Report*]; and Rt. Hon. Sir G. Palmer, "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 U.T.L.J. 223.

rationalism, and its recent retrenchment,⁴⁴ indicates the general concerns that economists and lawyer-economists have about the economic effects of such schemes, even if coupled with penal or regulatory measures aimed at increasing levels of information and safety in the community.⁴⁵ Nevertheless, if the conclusion is then that tort liability is to be preferred on economic grounds, a strict liability test that requires manufacturers, as the superior cost spreaders, to bear the costs of economically unavoidable injuries⁴⁶ may still be no worse in distributive justice terms than negligence liability. Negligence, after all, requires users either to bear the costs individually or rely on their own insurance, inadequate though it might be to cover their full costs.⁴⁷

Deweese, Duff, and Trebilcock identify the deficiencies of the insurance market, particularly in the United States, in their recommendations for comprehensive first-party disability insurance coverage (recommendations that are not limited to product users).⁴⁸ But the question remains whether negligence liability, even if coupled with first party disability insurance (and taking into account the administrative costs of providing such insurance),⁴⁹ would necessarily be superior to strict liability from a distributive justice perspective. Interestingly, here Schwartz's evidence may be interpreted as indicating a general preference for product manufacturers to provide insurance or extra safeguards to users: for instance, showing that consumers are prepared to pay more for safer common household products, that workers appreciate that there may be risks to life and health in the workplace and exact wage premiums for bearing them, and that

⁴⁴ See the *Accident Rehabilitation and Compensation Insurance Act, 1992* (N.Z.), 1992, no. 13, in force 1 July 1992, [repealing and replacing the *Accident Compensation Act, 1982* (N.Z.), 1982] [hereinafter *A.R.C.I. Act, 1992*]. The new statute was described by one judge as having aims which are "much less wide than the aims of the former Act" in endeavouring to establish an insurance-based scheme which is "financially affordable": see *Magee v. A.C.R.I.C.* [1994] N.Z.A.R. 19 at 22 (D.C.).

⁴⁵ See, for instance, R.A. Epstein, *Accident Compensation: The Faulty Basis of No-Fault and State Provision* (Wellington: New Zealand Business Roundtable, 1996), although compare Palmer, *supra* note 43; and *N.Z. Accident Compensation Report*, *supra* note 43 at 15-16.

⁴⁶ That is, injuries which, in economic terms, should not be avoided because the costs of avoidance outweigh the benefits.

⁴⁷ See Hensler *et al.*, *supra* note 20 at 105, for empirical findings regarding the insurance market for product users (judged to be particularly weak for non-occupationally induced injuries).

⁴⁸ See Deweese, Duff & Trebilcock *supra* note 7 at 432-36.

⁴⁹ See *N.Z. Accident Compensation Report*, *supra* note 43 at 14, comparing the costs of private insurance to the costs of administering the New Zealand no fault compensation scheme which at that stage had no insurance element (although compare the *A.R.C.I. Act, 1992*, *supra* note 44).

consumers routinely purchase warranty coverage when buying expensive cars and computers.⁵⁰ Furthermore, contrary to Schwartz, a study by Steven Croley and Jon Hanson shows a preference for pain and suffering to be covered by tort liability, with product users prepared to pay the insurance costs in the price of their products.⁵¹ In the light of the empirical evidence, it is questionable what the advantage of negligence liability, even if coupled with comprehensive first-party disability insurance, would be for the average product user if strict liability already mirrors to some extent his or her optimal insurance contract.⁵²

If this is so, the interests of particular low-risk or low-income product users may better be met by permitting contracting out of strict liability rather than adopting a general negligence standard which affects all users (as recommended by Dewees, Duff, and Trebilcock).⁵³ However, there are also problems with that option as far as individual users are concerned. In particular, it may be predicted that manufacturers are likely to prefer standard contract terms as a method of avoiding transaction costs.⁵⁴ And the question then, as Trebilcock points out elsewhere, is whether such terms would take account of particular users who cannot necessarily be assumed to be sufficiently informed, sophisticated, and aggressive to adequately protect their interests.⁵⁵

C. Corrective Justice: Restoration for "Moral Wrongs"

As Dewees, Duff, and Trebilcock explain, the focus of a corrective justice perspective is on correcting past injuries rather than guiding and controlling future behaviour or compensating victims merely

⁵⁰ See Schwartz, *supra* note 36 at 379; and, further, Dewees, Duff & Trebilcock *supra* note 7 at 190-91.

⁵¹ S. Croley & J. Hanson, "The Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law" (1995) 108 Harv. L. Rev. 1785.

⁵² See similarly Schwartz, *supra* note 36 at 404-08, although arguing for a broader strict liability than the cheaper cost avoider test would provide (but with a contributory negligence defence). See Richardson, *supra* note 32 at 35-36, regarding the advantages of a cheaper-cost avoider test in insurance terms.

⁵³ Schwartz, *supra* note 36 at 404-08.

⁵⁴ Schwartz acknowledges this, *ibid.* at 371, stating that "[f]irms commonly are unresponsive to the preferences of consumer groups, rather than the preferences of every consumer."

⁵⁵ See M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 119-26.

for misfortune.⁵⁶ In Kantian terms, this perspective is based upon a principle that persons should be treated as ends in themselves and not merely as the means to the ends of others. The difficulty, as John Rawls stated in his important discussion of Kant, is knowing precisely what the standard requires in individual situations of decisionmaking.⁵⁷ In particular, little work has been done in this regard as far as resolving issues of tort liability is concerned, although Dewees, Duff, and Trebilcock have gone further than other economists and lawyer-economists in acknowledging and accommodating a corrective justice perspective in their work.

Dewees, Duff, and Trebilcock, basing their treatment of corrective justice on the writings of Ernest Weinrib,⁵⁸ refer to corrective justice as “obliging a person whose morally culpable behaviour has violated another’s autonomy to restore the latter to as nearly as possible his or her pre-injury status.”⁵⁹ The statement provokes the question of what is meant by “morally culpable behaviour.” Dewees, Duff, and Trebilcock apparently accept Weinrib’s view that this equates with the legal standard of “fault,” leading to their conclusion that corrective justice can be treated as consistent with negligence liability.⁶⁰ But, as pointed out by John Gardner, critiquing Weinrib’s latest book,⁶¹ strict liability may more closely approximate the Kantian ideal if a broader view is taken of moral agency as being concerned with responsibility for accomplishments rather than merely for purposes, and under which actors are conceived of in terms of their “successes and failures as well as [their] attempts and neglects; in which it is sometimes the achievements and not just the thought, or effort, that counts.”⁶²

Indeed, economics, being explicitly concerned with outcomes rather than merely purposes, may already provide a basis for responding

⁵⁶ Dewees, Duff & Trebilcock, *supra* note 7 at 8.

⁵⁷ J. Rawls, *A Theory of Justice* (New York: Oxford University Press, 1972) at 179-80.

⁵⁸ E.J. Weinrib, “Towards a Moral Theory of Negligence Law” (1983) 2 L. & Phil. 37; “Liberty, Community and Corrective Justice” (1989) 1 J. L. & Juris. 3; and “Understanding Tort Law” (1989) 23 Val. U. L. Rev. 485. See also E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 145-52 [hereinafter *The Idea of Private Law*].

⁵⁹ Dewees, Duff & Trebilcock *supra* note 7 at 8.

⁶⁰ For a more elaborate and critical discussion, acknowledging that there may be different views of corrective justice, see “Deterrence Dilemma,” *supra* note 40. He notes that “even if [Weinrib’s] view of the tort system is persuasive, it leaves unaddressed the insurance needs of many injured individuals who would not be compensated”: *ibid.* at 985.

⁶¹ *The Idea of Private Law*, *supra* note 58.

⁶² J. Gardner, “The Purity and Priority of Private Law” (1996) 46 U.T.L.J. 459 at 492.

to Gardner's more sophisticated view of moral agency. The economic standard of Pareto efficiency which (unlike the more common Kaldor-Hicks standard) requires that no party can be made worse off in order to make another better off⁶³ has been identified by Anthony Kronman as essentially a Kantian standard.⁶⁴ The economic justification for the Pareto standard is that, if strictly applied as requiring a voluntary transaction, it avoids the need for a court or other decisionmaker to engage in interpersonal comparisons of utility.⁶⁵

Nevertheless, as Calabresi effectively demonstrates, the standard so strictly framed is virtually useless as a tool of normative economic analysis since "the set of Pareto exchanges which would make no one worse off and at least one person better off must ex ante be a void set"⁶⁶—that is, why would there be no consent except that someone considers they are losing in some broadly defined way? The conclusion (although not apparently Calabresi's) may therefore be that a less strict version of Paretianism should be adopted to allow for third party intervention.⁶⁷ Indeed, it may well be argued that a strict liability test that makes product manufacturers responsible to users for injuries regardless of negligence comes closest to satisfying the Paretian requirement that no party can be made worse off in order to make someone else better off.⁶⁸ But it should be noted that, at this point, the Pareto standard is no longer simply an economic standard. Rather, its appeal is intuitively a moral one,⁶⁹ in corrective justice terms placing responsibility on agents to those around them for their acts and failures to act where harm would otherwise result.⁷⁰

⁶³ See further J. Coleman, "Efficiency, Utility and Welfare Maximisation" in *Markets, Morals and the Law* (Cambridge, U.K.: Cambridge University Press, 1988) 95 at 97.

⁶⁴ A. Kronman, "Wealth Maximisation as a Normative Principle" (1980) 9 J. Legal Stud. 227 at 235-36

⁶⁵ G. Calabresi, "The Pointlessness of Pareto: Carrying Coase Further" (1990) 100 Yale L.J. 1211 at 1216-17.

⁶⁶ *Ibid.* at 1216, adding that limiting the analysis to take account only of factors which can be valued in financial terms, or which society considers to be worthwhile or important, introduces a "non-unanimously held value into the scheme," gutting the Pareto concept of its economic force.

⁶⁷ Coleman, *supra* note 63 at 124.

⁶⁸ If Kronman's framing of the Kantian-Pareto standard is accepted as meaning merely that "no one should be treated as an *unwilling* instrument of another's happiness," (see *supra* note 64 at 235, emphasis added), then even the cheaper-cost avoider test, to the extent it approximates the product user's optimal insurance contract, can meet this corrective justice standard.

⁶⁹ See also Calabresi, *supra* note 65 at 1216.

⁷⁰ See Gardner, *supra* note 62.

III. CONCLUSION

In the writings of many economists and lawyer-economists to date, distributive and corrective justice perspectives, if acknowledged at all, are treated as inferior to the writers' economic perspectives. Fortunately, Dewees, Duff, and Trebilcock take non-economic values seriously in their comprehensive analysis of accident law in *Exploring the Domain of Accident Law*, leading to a much richer consideration of the costs and benefits of particular forms of tort liability or alternatives to tort liability. The question remains whether economic and non-economic values can ever be fully accommodated in the same analysis, particularly in the case of corrective justice whose dictates seem to be so opposed to the person-neutral character of classical utilitarian economics. In their introductory discussion of corrective justice, Dewees, Duff, and Trebilcock suggest that the source of commonality between law and economics and corrective justice may be the focus that both can have on "notions of individual responsibility."⁷¹ Certainly this is true if individual responsibility is taken as meaning more than the individual's right to be guaranteed "a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties,"⁷² the traditional libertarian defence of individual liberty which has so influenced law and economics to date. Clearly, Dewees, Duff, and Trebilcock contemplate that both economic efficiency and corrective justice, as indeed distributive justice, may require some responsibility to others for product-related and other injuries. It has been suggested in this review that ultimately an alternative economic analysis may be needed if the perspectives are to be fully harmonized. What is most important, however, is the set of insights which the authors of *Exploring the Domain of Accident Law* provide on the fundamental question of the relationship between economic and other perspectives in their excellent book.

⁷¹ *Supra* note 7 at 8.

⁷² See R.A. Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 J.L. & Econ. 293 at 293-94.

