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Izhak Englard

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THE COSTS OF ACCIDENTS: A RETROSPECT VIEW FROM THE CATHEDRAL

IZHAK ENGLARD*

I underline the preposition “from,” as distinguished from “of,” as used in the famous and seminal paper of my esteemed colleague and dear friend Guido Calabresi that he wrote with A. Douglas Melamed.¹ What is the identity and character of that Cathedral of which one view was given? In my critical paper on Calabresi’s theory, where I made some rather aggressive remarks, bearing witness to my then still youthful impetus and fervor, I reproached him for disparaging the complex psychological factors looming behind many legal rules, and especially for his scanty treatment of the retributive and retaliatory function of liability.² I noted that: “True, in one of his articles, Calabresi claims to present only ‘one view of the Cathedral,’ but views about the constructions of law and normative policies are quite distinct from views about the aesthetics of inanimate buildings.”³

Here then we have a first notion of the Cathedral: the existing law and normative policies. The Cathedral is therefore the positive legal system dealing, in our specific context, with accidents. Hence, it constitutes the actual law of accidents.

My retrospective view is, therefore, directed from the traditional system towards the ideas of Calabresi, and naturally to the question of the actual impact of *The Costs of Accidents*⁴ on the law of accidents. In the metaphorical sense of the Cathedral, I am inquiring to what extent that imposing, orthodox structure, solidly founded in the earth and pointing to the heavens, has been changed through Calabresi’s profound architectural and statical critique? Has it been fully replaced by a new structure, or only partly by adding or removing rooms? Or, has it continued unchanged, so that the one view upon it remains unaltered?

* Justice (ret.), Supreme Court of Israel; Bora Laskin Professor (Emeritus) of Law, Hebrew University, Jerusalem.

1. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

2. Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33-36 (1980) [hereinafter *System Builders*].

3. *Id.* at 35 (footnote omitted).

4. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

As the astute reader will perceive immediately, my last sentence implies a shift in perspective: the view *from* the Cathedral changed to a view *of* the Cathedral. Indeed, the two perspectives are intertwined, and given their inevitable interplay my further comments will be a combination of both.

No doubt, the impact of *The Costs of Accidents* on legal scholarship has been tremendous. The literature abounds with terms of highest praise such as “seminal work,”⁵ “groundbreaking book,”⁶ “locus classicus,”⁷ “canonical source,”⁸ “rich analysis,”⁹ “famous book,”¹⁰ and “leading contemporary account,”¹¹ to quote a few randomly chosen expressions of the last year or so.

I have been deeply influenced by the book to an extent that provoked me to undertake a critical analysis of its foundations, a considerable intellectual effort in light of the impressive and highly sophisticated elaboration of a new theory of liability, which is basically an economic one.¹² About ten years after my initial critique, I made a special follow-up in order to check the actual impact of Calabresi’s theory, together with that of Richard Posner, on adjudication in U.S. law.¹³ The results were rather sobering, at least for the economics enthusiasts. I do not put myself in this category, for I pronounced in my first paper serious doubts about the practicability of any prescriptive economic theory in adjudication because of the inevitable absence of exact data, a vital requirement for the successful implementation of such a theory.¹⁴ In my general critique I had some harsh words for the two basic elements of Calabresi’s theory: first, what I have called a comprehensive functional conception of accidents—the attempt to integrate all legal categories and concepts in order to achieve the overriding goal of primary, secondary, and terti-

5. Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 51 (2003).

6. Alan Calnan, *A Consumer-Use Approach to Products Liability*, 33 U. MEM. L. REV. 755, 776 n.174 (2003).

7. Larry T. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U. L. REV. 345, 371 n.113 (2003).

8. Wendy J. Gordon, *Copyright as Tort Law’s Mirror Image: “Harms,” “Benefits,” and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533, 533 n.3 (2003).

9. Jason Crowell, Note, *Duties of Care and the Constitution: A Negligence Model of Individual Rights*, 21 YALE L. & POL’Y REV. 473, 478 n.16 (2003).

10. Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659, 690 n.117 (2003).

11. John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 30 n.188 (2003).

12. See Englard, *System Builders*, *supra* note 2, at 33-36.

13. Izhak Englard, *Law and Economics in American Tort Cases: A Critical Assessment of the Theory’s Impact on Courts*, 41 U. TORONTO L.J. 359 (1991) [hereinafter *Critical Assessment*].

14. E.g., Englard, *System Builders*, *supra* note 2, at 43-47.

ary accident cost reduction; and second, the importance of general deterrence in primary accident cost reduction.¹⁵ I doubted the feasibility of the first, and the reality of the second.

I would do much injustice to Calabresi by claiming that he was not aware of the practical difficulties of his theory's implementation. From the beginning, but especially in his later works, he insisted upon the inherent limits of his comprehensive theory. Indeed, I wrote in my paper on the theory's impact upon the courts:

In Calabresi's own understanding the practical role of his theory in courts must be a rather limited one: its sophisticated analysis of liability rules establishes the need for a wealth of empirical data that in practice are unavailable to private litigants and, therefore, to the courts. Moreover, the instrumental nature of the theory leaves the court with the residual, but basic, issue of justice. Finally, Calabresi's radical functional approach, which postulates the integration of all legal means and techniques (of public and private law) in order to achieve efficiently the rationally defined goals, requires the authority of legislature. A court's legitimate creative power is necessarily limited. Calabresi, who is fully aware of the legal process constraints imposed upon courts, clearly considers the political lawmaking institutions as the major implementing agencies of his general theory of accident liability.¹⁶

Unfortunately, the lawmaking process has its own drawbacks and pitfalls, a point to which I will return later.

In the meantime, the scholar Calabresi became Judge Calabresi, and thus metaphorically a part of the Cathedral, or better—a guardian of it. And, indeed, as far as I can tell, he is very careful to observe the delicate borders between the judge and the academic. I have found in his opinions very few references to his own writings, and his opinions generally rely heavily on the existing case law, on traditional concepts and literature, renouncing any academic elaborations of novel ideas, which he evidently does not lack.

I found a most interesting comment by Judge Calabresi, where he says on the topic of "Litigation or Government Regulation?":

15. *Id.* at 36-47. A recent paper dedicated to a similar scrutiny of the theory's impact on courts reached an identical conclusion in relation to negligence, though exclusively from the perspective of the Learned Hand formula and of Richard Posner's law and economics theorizing. Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 699-704 (2002).

16. Englard, *Critical Assessment*, *supra* note 13, at 364 (footnote omitted).

I speak to this topic today not as a judge, but as a legal scholar. As a judge, I am perfectly happy to apply regulations, and I'm perfectly happy to apply the laws that allow litigation. In diversity cases, I will apply the laws of the various states, no matter how absurd they are. Obstructing rules that I disagree with, isn't my job as a judge.¹⁷

According to Calabresi then, the judicial process cannot be used for systematic, comprehensive, radical changes. However, in some fields and in some very limited respects judicial lawmaking is apt to rationalize legal results even in the framework of traditional concepts. Thus, with regard to the complex issue of punitive damages, for a foreign lawyer a rather irrational aspect of contemporary U.S. tort law,¹⁸ Judge Calabresi has tried to put the institution on an economically sounder basis. He says in his concurring opinion in *Ciraolo v. City of New York*:¹⁹

Punitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence.

. . . .

In some circumstances, compensatory damages alone will be enough to promote an adequate cost-benefit analysis. In other cases, however, compensatory damages will not come close to equaling all the costs properly attributable to the activity. Costs may not be sufficiently reflected in compensatory damages for several reasons, most of which go to the fact that not all injured parties are in fact compensated by the responsible injurer.

. . . .

. . . In such circumstances, additional damages, assessed in the cases that *are* brought, may be an appropriate way of making the injurer bear all the costs associated with its activities.

. . . .

17. *Panel One: Litigation or Government Regulation?*, in CENTER FOR LEGAL POLICY AT THE MANHATTAN INST., MANHATTAN INST. CONFERENCE SERIES NO. 2, REGULATION THROUGH LITIGATION: ASSESSING THE ROLE OF BOUNTY HUNTERS AND BUREAUCRATS IN THE AMERICAN REGULATORY REGIME 1, 3 (2000) (remarks of Judge Calabresi) [hereinafter Manhattan Institute Remarks].

18. I remain unconvinced by the many scholarly attempts to justify on retributive or economic grounds the use of punitive damages. As I remarked years ago: "Thus, paradoxically the ancient combination of tort and crime, decried as a primitive state of law, is resuscitated in the modern environment." Englard, *System Builders*, *supra* note 2, at 69.

19. 216 F.3d 236 (2d Cir. 2000).

. . . A more appropriate name for extracompensatory damages assessed in order to avoid underdeterrence might be "socially compensatory damages." For, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages are, in a sense, designed to make society whole by seeking to ensure that all the costs of harmful acts are placed on the liable actor.²⁰

He then continues to explore the relationship between the retributive and deterrent functions of extracompensatory damages:

Indeed, it would not be inappropriate to disaggregate the retributive and deterrent functions of extracompensatory damages altogether and allow separate awards to further the two separate goals. . . . But a separate award of *punitive* damages would be allowed only in cases where the defendant's conduct was sufficiently reprehensible to deserve punishment apart from whatever assessment was required to compensate the individual victim or society as a whole.²¹

Here Judge Calabresi applies his theory of specific, or individual, deterrence. As he explains in a footnote in his opinion: "This function of punitive damages renders them analogous to criminal penalties that seek not to achieve a socially optimal level of activity, but to discourage or even eliminate a particular activity altogether."²²

He then observes that in order to accomplish these goals while preventing a windfall to the victim (and the lawyers), "it would be preferable if such damages were paid into a fund that could then be applied to remedy some of the unredressed social harm stemming from the defendant's conduct."²³ Judge Calabresi finally notes that some states have adopted split-recovery legislation for just that reason.²⁴

Eventually, the Court of Appeals in the *Ciraolo* case submitted to the Supreme Court's interpretation of 42 U.S.C. § 1983, which grants immunity from punitive damages to municipalities, even if those damages are conceived and assessed as socially compensatory.²⁵

I am insisting on this example of punitive damages for a number of reasons. First, it clearly shows the limited potential of judicial law-

20. *Id.* at 243-45 (Calabresi, J., concurring).

21. *Id.* at 246 (footnote omitted) (Calabresi, J., concurring).

22. *Id.* at 246 n.8 (Calabresi, J., concurring).

23. *Id.* at 246-47 (Calabresi, J., concurring).

24. *Id.* at 247 (Calabresi, J., concurring).

25. *Id.* at 239-42 (following *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)).

making according to broad, monistic theories of liability. No doubt, had Judge Calabresi won the consent of the Supreme Court, he could have eliminated by his analysis some of the worst excesses of punitive damages. However, it would still be a far cry from full implementation of the comprehensive theory of liability. Thus, paying part of the compensation into a public fund requires legislative intervention. Moreover, it runs counter to the basic idea of corrective justice, the starting point of individual private-law litigation. Furthermore, the attempt to use private-law procedures to impose criminal-like sanctions creates enormous (and hardly resolvable) legal problems of coordination in view of the very existence of a separate system of criminal law and sanctions. Finally, I have always been a skeptic of general deterrence in the context of accident law. I have found it a kind of myth that is not borne out by empirical evidence. Thus, for example, I do not believe that the legal system of traffic accident compensation substantially influences the behavior of drivers or pedestrians in relation to traffic accidents.

Another peculiar aspect of contemporary American tort law is the popular resistance to the purely economic cost-benefit calculus that underlies the concept of market deterrence. *Grimshaw v. Ford Motor Co.*,²⁶ the Ford Pinto case, is a good example of the outcry against the cost-benefit calculus.²⁷ I quote again from Judge Calabresi's words:

When a defendant in a tort case, like Ford or General Motors, tells the court that it made a cost benefit analysis and, on that basis, decided that a safety feature was not worthwhile, a jury is going to award huge punitive damages. No jury wants to be told that safety was not the primary concern. The public does not want to know that, in fact, we are always deciding between life and the cost of saving life. That's the nature of the human condition. The solution is a system where costs are assessed and paid and nobody speaks a word about cost benefit analysis. There is a tragic cost to being too truthful.²⁸

But can we really prevent being truthful?²⁹

26. 174 Cal. Rptr. 348 (Ct. App. 1981).

27. See *id.* at 376-78 (finding no error in the trial court's refusal to issue a jury instruction embodying the "risk-benefit" test for design defect).

28. Manhattan Institute Remarks, *supra* note 17, at 18.

29. For a thoughtful analysis of the Pinto case, see Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991). Schwartz concludes that "the Pinto jury's decision that punitive damages were appropriate—a decision that was affirmed by the trial judge and the court of appeal—raises serious questions about the operational viability of the risk-benefit standard itself." *Id.* at 1067.

Finally, the legal Cathedral cannot be structured according to one style—it is by its very essence pluralistic, composed of contrasting parts. I have elsewhere used the fundamental idea of Niels Bohr, the idea of complementarity, in order to conceive the structure of law.³⁰ Hence, notwithstanding the rational difficulty, I am in favor of combining in one mental process retribution and compensation, corrective and distributive justice. Rational purists may abhor pluralism of aims and methods, but I trust that it is and will remain reality, like human life!

We have seen the inherent limits of the judicial process. I do not believe that legislation has a better chance to introduce the sophisticated, optimal system envisaged by Calabresi in his seminal book. He himself describes a frustrating personal experience:

I confess to be something of an idealist. As a judge, I make decisions every day trying to make the system that we have a better one, within the limited authority I am given. But when we're talking here, in the presence of people who can move and shake the system, I think we ought to think broadly about what kind of system we want. If we don't set our goals high enough, we will get a system that may work for a little while but will ultimately fail.

Many years ago, I worked on a plan to reform automobile accident law in the state of Hawaii. . . . I came up with a system that would have created an adequate system of incentives without regulation. It was not a system that put the liability on the automobile manufacturers, it was a form of first-party system. It was going through the Hawaii legislature until the trial lawyers bought a half time spot during the Super Bowl and managed to kill it off.³¹

This does not mean that we should accept all the shortcomings and distortions of our tort system, and I am speaking universally. The system is in crisis and is ripe for improvement. Even if I am critical of the ambition to create a well-tempered system that optimally combines the contrasting triple aims of cost reduction, I still rate highly the illuminating analysis of *The Costs of Accidents*. It demonstrates the aims of primary accident cost reduction and the impact and importance of liability insurance. On the other hand, I believe in the viability of the fault system on the basis of corrective justice combined with

30. See Izhak England, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 183, 187-88 (David G. Owen ed., 1995) ("Complementarity meant to convey the idea that the full understanding of physical reality may require the use of contrasting, mutually exclusive models.")

31. Manhattan Institute Remarks, *supra* note 17, at 28.

some ideas of distributive justice, such as distribution of risks and deterrence.

Looking upon the American tort system from the outside as a foreigner, I find the civil jury system and punitive damages quite irrational. Another peculiar feature of U.S. law is the class action in tort, where often the initial risk distribution of very small amounts suffered by a multitude of persons is reversed, and the full amount of damages are imposed on the perpetrator of the wrong on the basis of the idea of deterrence. The implementation of this system seems very costly, and I seriously doubt its deterrent effectiveness.

To provide an additional perspective, I will offer a few words about the Israeli accident law system. Incidentally, the scholar Guido Calabresi is by no means unknown by the Israel judiciary. His writings—including *The Costs of Accidents*—have been quoted and relied upon in a number of Supreme Court decisions.³² The impact of his scholarly works was less in relation to the actual solution of these cases, than in providing important insights into the workings of liability and risk distribution.

Israel introduced in 1976 a quite progressive traffic accident compensation system based on absolute liability combined with compulsory liability and first party insurance.³³ However, the law turned out to be extremely complicated because of the difficulty in determining what accidents were within the law's coverage.³⁴ The legislature intervened in order to restrict liberal judicial interpretation of the statute, and the result was unsystematic and contradictory provisions that caused an enormous increase in litigation.³⁵ In many respects the law was successful. However, if examined according to Calabresi's analysis, it fails to address adequately the goal of primary accident cost reduction, in view of the comprehensive insurance system with flat rate premiums for specific vehicles.³⁶ In other fields, such as medical malpractice, and general accident law, the system is based on fault and experiences the typical problems of a common-law jurisdiction (and

32. *E.g.*, C.A. 2454/98 Lindauer v. Ringel, 56(1) P.D. 225, 227; C.A. 1845/90 Sinai v. Migdal Ins. Co., 47(5) P.D. 661, 682; C.A. 206/89, Hamutal v. Elisha Hosp. Ltd., 47(3) P.D. 805, 818.

33. *See* Izhak England, *Traffic Accident Victim Compensation in Israel: A Decade of Experience with No-Fault*, in COMPENSATION FOR PERSONAL INJURY IN SWEDEN AND OTHER COUNTRIES 155, 155-58 (Carl Oldertz & Eva Tidelfelt eds., 1988).

34. *Id.* at 160.

35. *Id.* at 160-61.

36. *Id.* at 162-64. Recently, new legislation has been introduced aimed at opening the car insurance market to more competition, by a system called "controlled competition." *See Competition in Compulsory Auto Insurance Market Gets Green Light*, HA'ARETZ, Nov. 12, 2000, available at LEXIS, ALLNWS file.

probably to a large extent civil-law countries too): duty of care, causation, remoteness of damages (shock cases), and governmental liability.

At one time I thought that the future would bring a more developed social security system for personal injury cases.³⁷ But, the welfare state seems to have reached its outer limits, the universal tendency being to restrict benefits. Moreover, I had second thoughts about state-administered compensation systems in view of their far from perfect performances. It seems that in New Zealand, too, the country that had instituted the most ambitious public-law social insurance system, some changes have been introduced in order to involve again private institutions, such as commercial insurance companies.³⁸ It seems, therefore, that we will have to continue to live with accident law that is based on the traditional fault system, combined with private liability insurance, with its flaws and advantages, and supplemented by pockets of strict liability and sporadic public law schemes of compensation.³⁹

37. Englard, *System Builders*, *supra* note 2, at 68.

38. Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404, 405-06 (2000).

39. Englard, *System Builders*, *supra* note 2, at 68. For a recent critique of the coexistence of different systems of compensation in the context of the September 11 Victim Compensation Fund, see John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003).