

**Products Liability in Conflict**

**a review of**

**W. Kip Viscusi's Reforming Products Liability (1991)**

**&**

**Carl T. Bogus's Why Lawsuits Are Good for America – Disciplined Democracy, Big**

**Business, and the Common Law (2001)**

**Remington Smith**

## Summary

Written a decade apart by authors of dueling economics, these two books each offer their own unique perspective on products liability. Being the newest entrant in the liability establishment, products liability is a subject of great controversy. With the current events in tort reform, it is perhaps more important than ever to become informed of arguments from both sides.

Viscusi's *Reforming Products Liability* is written much in part due to the perceived product liability crisis of the 1980s where product liability reform was put on a high national agenda. It was Viscusi's hope that the ideas presented in his book would be taken into consideration when debating over possible products liability reforms to the law. While Viscusi claims his book is not an effort to advocate a specific and immediate legislative agenda, he does occasionally state a plan which he believes to be a better course of action. Developing as an outgrowth of his research on risk regulation, Viscusi bases his arguments on economic theory and often complicated empirical evidence. Primarily using data from the Insurance Services Office, Viscusi uses the changes and effects of the insurance market in almost every aspect of his arguments. Further explaining, Viscusi states that his concentration on the insurance market is prompted by the escalation in cost of liability which has profound effects on the products liability insurance market which is in turn the most visible symptom of the widespread economic ramifications of a changing tort liability system.

Viscusi's book presents an assessment of how liability can best be reoriented to advance social objectives in his perspective. In 11 chapters Viscusi analyzes topics of current debate and offers possible consequences to suggested reforms. In my summary of the book I will outline the overriding themes, arguments, and consequences outlined by the author.

Viscusi begins his book with several seemingly outrageous products liability cases in which astronomical settlements are awarded in what are presented to be frivolous and unwarranted injuries. The first such case describes a Beverly Hills oral surgeon who was awarded \$6.3 million for a product related injury he suffered when he fell off a horse during his polo lesson. There is very little information about the cases given but Viscusi describes the victim as a prize winner in the tort liability sweepstakes. The second case stated, describes a woman who was awarded \$1 million after her claim that a CAT scan caused her to lose her psychic powers. Again, no identifying information is offered enabling readers to verify that the alleged victim was ultimately awarded the original judgment.

Viscusi explains how we cannot reasonably expect manufacturers to make 100 percent safe products and that such requirements would lead to unfeasible situations such as requiring all cars to be built like tanks. He describes that the task of a well functioning social risk management policy is to find an appropriate balance between safety and the costs incurred to achieve safety, and then states that when market forces alone are not sufficient to generate these risk reduction incentives, tort liability and government regulation must do so. In the marketing and release of Ford's Pinto, despite high risks of explosion upon a rear impact, Ford's calculations showed that the costs of altering the design would have been more expensive than the court awards. The deficiency described in the Pinto case is an inadequate pricing of lost lives. Ford may have understood the value of human life but they lacked an adequate incentive structure to reinforce society's opinion of ethical behavior.

Viscusi presents three public perspectives which motivate liability reform actions: rising liability costs, tort reform motivated by isolated facts, and the tripling of products liability insurance premiums from 1984 to 1986. Viscusi views products liability reforms as a question of designing an appropriate institutional mechanism to control risks and compensate victims of product related injuries. He acknowledges the fact that products liability has several missions among which are deterrence and compensation. In his analysis he concentrates much more on the compensation aspect believing that using products liability suits for deterrence is often ineffective.

Viscusi confirms the widespread perception that there has been a major expansion in products liability by stating a sixfold increase in personal injury lawsuits from 1975 to 1989. He points out the small claims to be overcompensated relative to the amount of economic damages and conversely large claims tend to be undercompensated.

The primary task of products liability law, in Viscusi's estimation, is to promote safety incentives in situations not adequately addressed by society's other institutions for risk management and to provide compensation to victims when these safety standards are not met. He states that if safety levels are acceptable, the courts should not intervene simply to provide insurance.

The 1984 through 1985 premiums for products liability insurance tripled, prompting the general public sentiment that there was a crisis in liability insurance. Viscusi explains that the volatility of the insurance industry and the comparison of profitability across other industries truly did

warrant the perceived crisis. Viscusi presents statistics that show that the increase in the number of personal injury cases is attributable to the fact that our society has become wealthier and that we demand greater safety from our products; therefore the amount of risk we are willing to bear has declined.

Viscusi scolds legal reformers who call for caps on pain and suffering awards and the abolition of strict liability without regard to how this will affect the behavior of plaintiffs and defendants. Using economic models Viscusi shows that damages caps will not in fact affect the propensity of plaintiffs to win but will instead reduce the amount of the award. A reduction in the expected court awards will increase plaintiffs' incentive to drop their case, therefore altering the cases that get to be litigated as well as those settled out of court.

Where risk is not known, firms simply choose the least expensive variant of the product. Viscusi suggests that products liability can be used in this circumstance to compensate for the inadequacy of the missing market function by imposing costs on the producer to compensate for risk decisions that are not efficient. If the market function were operating properly, such action would not need to be taken. Properly operating market/social behavior shows individuals displaying a tendency to overestimate low probability risks and underestimate larger risks. Viscusi suggests that highly publicized risks are overestimated by the general public and need no additional intervention through tort liability. The public will pay more to avoid what they perceive to be a larger risk. Viscusi also suggests that tort liability can possibly be used to supplement the financial incentives missing when consumers underestimate the risk.

Some say that products liability hinders innovation. Viscusi describes a survey of risk managers where one-third improved the labels and warnings, one-third altered the design of their products to make them safer, and one-fifth who made changes reported a decrease in accidents.

Regarding innovation, one-sixth of recorded firms chose not to invest in the products or services due to products liability. In such situations, liability determines whether product lines are too risky to be marketed or whether they should be designed differently. A well functioning products liability system should lead to the discontinuation of the risky product lines, Viscusi believes.

Some rationalize products liability through the producer as insurer relationship. When producers act as insurers, in fact, the consumer buys an insurance policy with their product purchase.

Viscusi believes this situation does not establish an appropriate general basis for liability, pointing out that due to potential time lags, the amount that would have to be added to the price of current products to fund all prior liabilities would be far greater than the value of the insurance to the consumer buying the current product, therefore breaking down the insurance analogy. In Viscusi's design defect test reform plan, he proposes the abandonment of tests related to consumer expectations and a de-emphasis on the producer's role as an insurer.

Viscusi discusses the value of life and acknowledges the disparity that exists depending on whether one's concern is with accident prevention or compensation. Excessive awards do not restore the life of the departed and must therefore be justified by a deterrent motive rather than that of insurance. Insurance compensation alone is not enough to deter behavior and therefore Viscusi suggests a restructuring for damages based on the value of life amount. Value of life amounts are presented to be efficient enough incentives to avoid accidents.

Deterrence value may also prove to be a worthy replacement for economic damages while maintaining the deterring power of the value of life amount. The deterrence value of life reflects the value that the individual attaches to the risk of experiencing an injury, losing one's income, and losing one's ability to enjoy life. If Ford would have used the deterrence value to evaluate their decision, they would have arrived at very different results. Viscusi does not discredit Ford for attempting to calculate their decision, but suggests that they should have used the deterrence value to do so.

Viscusi discusses regulations versus liability suits and arrives at the conclusion that regulations are better suited to addressing industry wide risks, but due to the inefficiencies of regulatory the system leaves room for tort liability. Violations of regulations often add to the evidence presented in liability cases and usually increase the chances of success. Interestingly Viscusi states that just under half of the violations in products liability claims are for OSHA and CPSC standards. In this way, the two systems work together. Viscusi claims that one cannot rely solely on the liability system in lieu of regulation because products liability incentives are ill-suited to the task due to the fact that court awards are not high enough to prompt more efficient safety incentives.

To correct for the many problems and confusion that exists with hazard warnings Viscusi suggests a national warnings policy that would outline exactly what was to be said and what words would signify more severity etc. He also suggests that courts not treat hazard warnings as yet another test that firms can fail during litigation but instead focus on the entire communication

system including how information is exchanged through medical journals, seminars, and even the general media.

Viscusi believes that in the case of mass toxic torts, such as asbestos, the tort liability system cannot provide either insurance or effective deterrence. Mass toxic torts cause additional problems when dealing with proximate cause. Substantial transaction costs and congestion of the courts warrant a better strategy. One possibility described abandons the standard of preponderance of evidence and instead assigns liability based on each firm's contribution to the risk - effectively, a proportional liability system. Another alternative could be to set up an administrative compensation system similar in operation to the worker's compensation system. The system has many benefits but Viscusi describes many adverse affects of the system as well. Unfortunately the costs of such an alternative would greatly overshadow the current method of individual litigation. The author suggests that tort reformers simply keep the workers' compensation system in mind due to its great benefits, case in point, its extremely reduced transfer costs.

Viscusi ends his book stating that current reform measures are aimed primarily at reducing costs instead of actually attempting to improve problems with the tort liability system. If cost reduction is the only objective of reform then reformers should instead abolish products liability altogether. The tort liability system ensures accident victim are compensated; there should not be attempts to strategically reform law in efforts to place plaintiffs at a disadvantage, neither should the system continue to place inappropriate design responsibilities on firms.

Carl T. Bogus's *Why Law Suits are Good for America* was written in large part to combat poor public perceptions of products liability resulting from directed publicity attacks by those wishing to reform the laws. Corporate America has created organizations devoted exclusively to lobbying state legislators and Congress for so-called tort reform legislation much of which is directed at legislatively restricting products liability law. Bogus explains that though the majority of the public is not aware of it, George W. Bush's commitment to "tort reform" is in fact a statement of his intention to constrict the ability of individuals to sue corporations. Is for this reason that Bush was able to raise unprecedented sums of money for his campaign; corporations would pool donations from top executives to create extremely sizable campaign contributions. It is this war on products liability that so compelled Carl T. Bogus to offer the public the true facts.

Bogus begins his book describing in detail the attempts of Senator John C. Danforth to mislead Congress by telling stories of lawsuits that are strategically designed, through the constraint of information given, to make individuals believe a crisis exists in products liability when there truly is none. Bogus specifically references the first page of Viscusi's *Reforming Products Liability* where he discusses the clairvoyant that lost her powers due to a CAT scan. Many others use the same story quoting the psychic who won a jury awarded of \$986,000. In truth Bogus explains the actual facts of the case, beginning by explaining that the plaintiff suffered an allergic reaction to contrast dye that was administered in connection with a cat scan. The plaintiff testified that she had told the neuroradiologist who was preparing to dye that she had suffered an allergic reaction to the dye before but was embarrassed into consenting to the procedure when she was told she was being "ridiculous". Surely enough the patient went into anaphylactic shock, her blood pressure severely dropped, she began vomiting and had great

difficulty breathing. Additionally she developed hives and welts covering her entire body. The trauma the patient endured, warranted a monetary verdict. The patient did testify that whenever trying to use her psychic powers, she experienced severe headaches. Three police officers additionally testified that she had used her powers to help them solve cases. Nonetheless the judge ruled that there was not adequate evidence for loss of psychic powers and instructed the jury to disregard that portion of claim. After the jury verdict the judge ruled the jury's award was grossly excessive and ordered a new trial. The plaintiff was unsuccessful in her second trial. Bogus describes several such cases where misleading quotes about cases, leading to misguided notions of products liability, actually are found to have reasonable reasons for verdicts and/or following appeals or judicial rulings lead to severe reductions in awards and oftentimes dismissal of cases. In fact, an entire report could be done just on correcting misconceptions and describing the true facts in the cases often quoted by politicians and members of the media.

Throughout his book Bogus stresses this country's affection for the common law system, touting its accomplishments over socially biased systems such as that in the Great Britain. It is this affection that prompts Bogus to rely more on precedents and legal theory to support his views on liability rather than empirical data.

Bogus explains much of the politics behind reform actions and details attempts of Republicans to pass reform bills. When unsuccessful at the federal level tort reformers turn to state legislatures to enact reforms. Often successful with state legislatures several reforms have been held to be unconstitutional by state supreme courts adding that such reforms violate the provisions of state constitutions that provide "the rights of trial by jury shall remain inviolate." Through this

system, conflicting interests are pitted against one another through the political process. One reason reformers have been somewhat successful at the state level is because anti-reform groups often do not have the resources that big businesses wield to fight against reform at both the federal and state level.

Bogus describes much of the history that led to the judicial system we currently use, adding that the jury system has long been the central feature of common law heritage. Additionally Bogus describes the development of punitive awards as a civil method of striking back at those who wronged one. Though jury trials have been over the years reduced in other countries, believing that they are inefficient, lack uniformity and are difficult to correct on appeal, Bogus explains that America's continual support for the jury trial is in effect our attempt to tie court decisions to general public sentiment.

Bogus explains ways in which judges can correct for what they perceive to be excessive jury verdicts through *remittur* and *additur*. *Additur* is the judge's ability to add to the amount awarded and is entirely pro-plaintiff, however, this exists in less than 1/4<sup>th</sup> of the states. *Remittur* gives judges the ability to call for a new trial unless the plaintiff agrees to remit the portion of the award that the judge considers excessive. Though this approach Bogus says is nonsense, judges do occasionally get away with it. The rationale behind such measures often relies on the Eighth Amendment's prohibition against excessive fines. Many courts believe it is their constitutional obligations to reduce awards believed to be above the constitutional ceiling without the plaintiff's agreement

Bogus uses trends in auto safety, auto safety regulatory agencies, and products liability cases to explain the worthiness of products liability as an effective means to deter harmful behavior by firms, describing the auto regulators as captured agencies that have become fearful of exerting their power due to political budget reprimands. Whenever NHTSA attempted to start new programs to test safety and increase standards, their budgets were slashed. Bogus states that recalls by automobile manufacturers have essentially become voluntary; attempts by NHTSA to force recalls through court measures have resulted in decade long litigation that lasts longer than it takes for the defendant to naturally increase the product's safety. Inefficiencies such as this, Bogus uses to justify products liability litigation. Firms quite often conceal information from the regulatory agencies and this information is usually only brought to life during the discovery process of products liability suits.

Bogus discusses escalator dangers and cases that have been brought against the manufacturers to demonstrate the idea of strict liability. No matter how many caution signs that are posted on or near escalators manufacturers must still consider the actual use of their product. If children's fingers can get caught between moving parts, they surely will, and therefore the manufacturer must bear the responsibility, in Bogus's view, to make all attempts to minimize such risks. The idea of regulation specifically tells firms how to correct such action but the products liability system simply gives an incentive to fix the problem, leaving the task of reducing injuries to the firm. Often excuses are given stating that companies have tried everything and simply cannot figure out any way to reduce injuries. In such circumstances, Bogus refers to the development of fire alarms pull triggers that spray the hand of the person who pulled it, as an indicator that innovation to meet odd situations is possible.

Bogus explains the need for common law more than ever before due to the emergence of unprecedented corporate power and influence. The increasing expense of running political campaigns leads most candidates from both sides of the political spectrum to draw from large corporations to raise contributions. These great contributions expect returns of reform legislation. Manufacturers must not be allowed to undermine the importance of safety when considering market factors. Bogus states the result of one of the most extensive studies of corporate crime ever undertaken which found that 60.1 percent of the nation's largest corporations violated federal law at least once during a two-year period with an average of 4.4 violations per company. Pressure by higher-level managers is usually claimed to be the motive.

Summarizing his book, Bogus explains the three primary effects of products liability. Products liability increases the manufacturer's cost of distributing unreasonably dangerous products. The discovery process in litigation unearths facts that would otherwise remain hidden from regulatory agencies and public view. Lastly, products liability brings into public view decisions balancing the utility and hazards of the products we use and depend on, allowing people to pass judgment on those decisions.

### **Analysis and Review**

Overall I think both books did an excellent job of accomplishing their intended goals. Viscusi's book propagated the idea that there are many serious problems with the tort liability system and that rational actions must be taken to improve it. Viscusi claims to be unbiased in his suggestions, only alluding to political affiliation later in the book. If one did not have additional information on the author, the reading would be much different. Bogus's book attempts to

counteract misnomers and deceptions being propagated by tort reformers, in addition to educating readers of the reasoning and history behind products liability. He makes no qualms about his political affiliation and subsequent views regarding big business. In all fairness, I must state that my own biases may impact my analysis of the book and acknowledge the fact that differing political views will prompt different emphasis on facts and theories stated.

In Viscusi's book he discusses out of court settlements, stating suits settled out of court for losses over \$100,000 take a sharp cut in the mean replacement ratio between mean lost and mean payments with suits over \$1 million averaging payments of 26 percent of mean loss. However, following the observation that smaller losses tend to be overcompensated, the mean replacement ratio for losses under \$10,000 is 700 percent. This interesting disparity is made more interesting by the fact that Viscusi's statistics show that overall mean replacement ratio is 1, meaning that the overcompensation of small losses exactly makes up for the undercompensation of large losses in the aggregate perspective. One can derive their own conclusions from this information, but it seems to me that the myth that plaintiffs in products liability suits are awarded excessively irrational settlements seems laughable. In the aggregate perspective, it is the plaintiffs with the largest losses that are hit the hardest, the plaintiffs with small losses currently reap all the benefits of the disparity.

Bogus thinks of the tort system as a more regulatory than compensatory system. Bogus believes products liability is the common law's greatest advancement of the twentieth century and combats big business by allowing jurors and lay people to judge the reasonableness of product

risk. Bogus further argues that the common law system is not just a supplement to the regulatory system but instead an essential element.

If anything, the case descriptions where Bogus outlines the faults with misleading statements, I am at the very least made skeptical of any case results quoted where little information given.

Throughout his book, Viscusi makes numerous such claims to support his reasoning for reform and after reading Bogus's book, I have to scrutinize the validity of Viscusi's statements though context, knowing that he contributes to the misconceptions.

Bogus states that more recently, the war on the common law has included attacks on jury verdicts as being insanely high. W. Kip Viscusi, who Bogus states is generally hostile to nearly all forms of regulation of corporate activity, suggests that jury awards are irrational, explosive, escalating and random. Viscusi Argues that part of problem is that pain and suffering amounts are often the largest part of the damages award and that juries have an inability to make reliable judgments regarding such damages (Viscusi 88). Bogus provides testimony to the contrary stating that according to Neil Vidmar, a professor of law and psychology at Duke University, "pain and suffering does not constitute the vast proportion of jury verdicts and instead the data regarding reliability suggest that the juries are far superior to judges. Bogus refers to Viscusi's claim that the median jury verdicts in products liability rose 3.97 percent from 1971 to 1988; while Bogus does not disregard the increase as insignificant, he neither believes it to be "explosive" as Viscusi claims.

Viscusi claims that “The proliferation of substantial products liability awards has made six-digit payoffs from a products liability suit much more frequent than comparable payoffs from state-run lotteries. The leading award winner in the products liability sweepstakes in 1987 received \$95 million” (Viscusi 87). Bogus researched Viscusi’s claim and in keeping with the deception proliferated by many sources, found that in fact there was no “payoff” at all. The Judge later eliminated the punitive damages and the subsequent unsuccessful appeal left the plaintiff with nothing. I, as well as Bogus, believe such statements are irresponsible and unethical, when only revealing half truths.

Bogus and Viscusi have very different views regarding hazard warnings as well. Viscusi believes that the ultimate goal of hazard warnings should be to shift the liability from the producer to the consumer, where as Bogus believes that regardless of any warnings, manufacturers should be liable for the risks they impose on the public. Using Viscusi’s words, I believe that the most “socially beneficial” concept is that presented by Bogus. Ultimately, regulatory agencies can impose all the regulations in the world, but if they are not effective, why should manufacturers be released from liability.

The concept above carries over across the entire products liability issue; it is my belief, and I feel comfortable stating that Carl T. Bogus would agree, that the burden to reduce risk should be placed on manufacturers, not consumers, and not on often inefficient and ineffective regulatory agencies. By placing the burden on manufacturers, consumers still ultimately have to pay for that the additional costs of safety but those costs are distributed across the economy rather than

forcing single consumers to bear whole burden of precaution costs. The market effect of reduced products liability suits can be the only true indicator of reduced risk and increased safety.

I enjoyed reading both of these books and would suggest to anyone that they must be read in tandem. Both books carry skewed perspectives and reading one without the other may lead to a greatly, uninformed bias.