

TORTS: PAST, PRESENT, AND FUTURE – PRESENTATION OF VICTOR SCHWARTZ

VICTOR SCHWARTZ:

Well, thank you for inviting me here. Many plaintiffs' lawyers just go and buy a yacht, but Brian Panish has helped other people. He also is able. Very few lawyers can both deal with Congress and the courtroom.

A number of years ago I testified with Brian and he was absolutely perfect. He did everything right, and most plaintiffs' lawyers talk too long or they don't know how to handle it. And it was in front of Senator Specter, who's real tough. Before I came down here, I checked with one of the prior presidents. [Doing impression of President Clinton:] "Look, I want to say that right now about Brian. He was one of the best lawyers I have ever known. I mean if Hillary had hired him, she would be right in that White House."

They said to mention the casebook: *Prosser, Wade, and Schwartz*. So, I had a minor job with one of these presidents. And there's something called the White House Fellows Program, which is a great thing for the students here if you can get into it. You learn about the government, and they wanted me to hire somebody. So, I would ask a kid or young person, "Did you take Torts?" I knew I'd get a yes. "Do you remember your Torts book?" None of them did. One guy came in, he said, "I remember. It was a blue book with a red insert." I was so happy. I was jumping like this. I said, "Do you know the authors?" "Yes. Prosser, Wade and some other guy." I love humility. It's a great thing. It's a great thing. Take that home.

I'm not going to go through this whole paper. I've given it to the Law Review and they're going to publish it. It's going to also be published in Israel in Hebrew. I'm working on that. It's a gag. So, I'm not going to read the paper, but just tell you about three themes I talk about rendering justice

in tort law in the next decade.¹ And I'm just going to do an opening because I know that Brian will rebut, so I reserve the balance of my time.

If you look, and I look at the whole picture of all the people I work with around this country, and then at the law . . . [to help inform] the 14th edition of the book.² What are the real big ones; where a defendant can end up liable when they didn't do anything? There's three areas. One deals with experts, and judges who don't take their role of gatekeeper seriously with experts. How many of you have taken Evidence? Some of the students here. Okay, you know that an expert can only testify if a lay person doesn't understand something.³ So, there's a burden on that judge, a duty, to see that the expert has the background and the qualifications to testify.

An argument is made by some of my plaintiff lawyer friends, "Oh, leave it to the jury. The judges don't have to worry about this. The jury can figure it out." How can they figure it out if there's two experts dealing with a topic [the jury] knows nothing about? So, the judge's role as gatekeeper prevents somebody who's innocent from being held liable.

And if you think it doesn't mean anything, there was a drug many years ago called Bendectin[®]. It was the only drug that stopped morning sickness, and litigation against the company that made it went through because experts testified who had a lot of degrees from famous schools, but didn't really have the science.⁴ The drug was pulled off the market, and for twenty years, people who were very sick didn't get help at all. If you blame the wrong cause, you may not look for the right one So that's number one.

Number two—and I trademark this because trademarks are fun, because you can put them on t-shirts, on coffee cups—I call it "deep pocket jurisprudence[®]." Deep pocket jurisprudence. Now what happens there? That's when the real defendant, the wrong person, the wrongdoer has done something, but he or she can't be sued, so the plaintiff blames somebody else.

The Supreme Court ruled that generic drug manufacturers had the benefit of preemption [and generally cannot be sued successfully].⁵ If you have a branded drug, the Supreme Court ruled you may sue, even if the

1. Victor E. Schwartz, *Rendering Justice in Key Areas of Tort Law in the Next Decade*, 49 SW. L. REV. 378 (2021).

2. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS (14th ed. 2020).

3. See FED. R. EVID. 702(a).

4. See generally MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996).

5. See *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 609 (2011).

drug has been approved by the FDA.⁶ So deep pocket jurisprudence seeks out a wrongdoer [for injuries caused by generic drugs, and plaintiffs try to persuade courts to adopt] a doctrine to hold the branded drug company liable for what a competitor did, somebody else's product. Most courts said, "No, you can't do that."⁷ Basic product liability says you're liable [only] for products you make or sponsor.

The label's the same [for both generic and branded drugs], but the label's the same because federal law requires it. But the Supreme Court of California went the other way and held a branded drug company is subject to liability, even though it didn't make the drug anymore.⁸ There are many other examples of deep pocket jurisprudence in my paper, but again, I don't want to take too much time.

I want to go to the third topic. And I didn't come up with this label. It was Secretary of Labor, Robert Reich. Anybody ever hear of him? He's almost as little as I am, believe it or not. When I was in government, he taught me how everything I was doing was kind of stupid, and it was. So, I listened.

Anyway, he came up with this label "Regulation through litigation." Regulation through litigation. Now this is timely. Is the Trump Administration for regulation? How many people say yes? Are they against it? Oh, yeah, I wish I could do an impression of Trump. Look, you can do Bernie. [Doing impression of Senator Bernie Sanders:] "I think you're wrong on everything you said. Everything. I agree with Mr. Panish. Panish knows. Panish is wise. Panish is smart."

Regulation through litigation is when courts look at Washington [and] say they're doing nothing about guns; they're doing nothing about climate change. They're not doing things about items that we think are important in the public agenda, the public interest agenda. So we, the courts, are going to take tort law and stretch it from here to Oklahoma and change it, and there are examples in my paper. It's a tough thing, because if any one of you is a judge and you're looking at public policy, and you see that nothing is being done to control guns. [The judge thinks] . . . "I'd hold them liable." If you hold manufacturers of guns liable for every death, that's gun control. If you want a lock on every gun and you hold them liable because there's no lock, that's gun control. So, the temptation to do it is very great.

6. See *Wyeth v. Levine*, 555 U.S. 555 (2009).

7. See Victor Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm Was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 81 *FORDHAM L. REV.* 1835 (2013).

8. See *T.H. v. Novartis Pharmaceuticals Corp.*, 407 P.3d 18, 47 (Cal. 2017).

But Robert Reich, after first liking [litigation to achieve such ends] said, it violated the fundamentals of our democracy. Those decisions are for other branches of government; elected branches, the President or the Executive branch and the Legislative branch, and it isn't for a judge to do that. Very recently, the Ninth Circuit, which is not known in my life as being a conservative court, and in a climate change case went sixteen pages about the horrors of climate change, but then dismissed a suit that was brought because it was not the judge's role.⁹ And with that, I will say farewell, and I hope I see you again.

9. See *Juliana v. United States*, 947 F.3d 1159, 1164-65 (9th Cir. 2020).