Introduction

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INTRODUCTION – THE LAW OF TORTS: DUTY, DESIGN, & CONFLICTS

A FESTSCHRIFT IN HONOR OF AARON TWERSKI

Edward J. Janger*

According to a central ethical maxim of Judaism, the world rests on three things: the law ("torah"); service ("avodah"); and acts of human kindness ("gemilut chasadim"). Aaron has always straddled the secular and Jewish worlds—and the distinction between ethical precepts and functional legal rules—but these three values have been constant and consistent themes in his life as an academic. This special volume of the Brooklyn Journal of Corporate, Financial & Commercial Law is a celebration of Aaron’s life and career as a scholar. It reflects those three themes and is, to an extent, organized around them: his contributions to legal doctrine, his service to the academy and the profession, and the fact that, above all, he conducted himself with integrity, human decency, and a deep sense of what is right—in short, as a “mensch.”

Aaron began his career as a trial attorney with the United States Department of Justice, Civil Rights Division, but soon returned to academia, serving as a teaching fellow at Harvard before joining the faculty at Duquesne Law School in Pittsburgh, then moving to Hofstra. While at Hofstra, he held visiting positions at Cornell, Boston University, and University of Michigan Law Schools. Luckily for us, the draw of Brooklyn was too great, and finally, he found his true home here at Brooklyn Law School starting in 1986 and continuing to the present. At Brooklyn, he has held two chairs, the Newell deValpine Professorship and now the Jill and Irwin Cohen Professorship. He has taught torts, products liability, and conflict of laws, all of which are areas where he has written important scholarship, specifically six books and more than eighty articles in scholarly journals. He received the William L. Prosser Award from the Association of American Law Schools. He also received the

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1. This quotation can be translated as: “The world rests on three things: the torah (law); service; and acts of human kindness.” The word “torah” is sometimes translated as “truth” and sometimes treated just as a reference to the scripture. The word “avodah” is sometimes translated as service, service to god, or good works. The term “gemilut hasadim” is translated as “the giving of lovingkindness.”

2. He did leave briefly to serve as Dean at Hofstra Law School, but after two years, he came to his senses and returned.
Robert B. McKay Law Professor Award from the American Bar Association’s Tort Trial & Insurance Practice Section.

His scholarship merged with service when he served as co-reporter for the American Law Institute’s Restatement (Third) of Torts: Products Liability, receiving the prestigious designation of “R. Ammi Cutter Reporter” for his outstanding performance. And his service required wisdom and humanity when United States District Judge Alvin Hellerstein appointed him as one of two Special Masters to handle cases filed by workers who suffered respiratory illnesses as a result of cleaning up the World Trade Center site after the September 11, 2001, terror attacks.

Each of these aspects of Aaron’s career is reflected in the articles in this volume. While each of the articles presented here stands on its own as a reflection on the law and Aaron’s role in shaping it, the essays can be divided into four groups: (1) reflections on the concept of duty in tort law; (2) consideration of the law of products liability and, in particular, the concept of defect; (3) consideration of mass torts and the ability of tort law to address them; and (4) conflict of laws.

Law. This volume’s first cluster of articles centers on Professor Twerski’s approach to the “duty” requirement in negligence law. Are duties interpersonal based on a relationship that creates a duty of one person to another, or are they, as Section 7 of the Third Restatement of Torts states, determined by reference to a risk-utility calculation, limited only by policy-based principles of proximate cause on the one hand, and no-duty rules on the other? This question has its roots in the classic debate between Justices Cardozo and Andrews in Palsgraf; but it continues in the conversation between those who take a private law view of negligence law and those who view negligence law as grounded in social policy.

Needless to say, Professor Twerski had a view—one that has influenced the debate in a way that is simultaneously pragmatic and wise. In his classic article, “The Cleaver, the Violin, and the Scalpel,” he weighs in firmly on the side of the Restatement but in a thoughtful way that preserves and operationalizes the debate. Professor Twerski turns to metaphor—the violin and the cleaver. He points to the then-proposed comment a to Section 7:

There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called “proximate cause”). An important difference between them is that no-duty rules are matters of law decided by the courts, while the ‘defendant’s scope of liability is a question of fact for the factfinder. When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or

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patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.⁵

As he puts it, “scope of liability” rules are the violin, standards that offer a particularized determination after a full airing of the facts; “no-duty” rules are the cleaver, cutting off the case at the motion to dismiss stage. Professor Twerski, however, rejects the dichotomy:

The belief that all cases can be dealt with by a categorical rule, or by fact-sensitive directed verdict practice (based on a finding that reasonable persons could not disagree on either standard of care or proximate cause), is erroneous. It is possible to identify factors that militate in favor of a no-duty decision. And a court utilizing even rigorous risk-utility balancing cannot adequately address those factors. There exists a principled in-between that is neither the cleaver nor the violin. A well-honed scalpel is sometimes necessary to make the no-duty decision—one that does focus on the facts of the case before the court.⁶

This interplay between the violin and the cleaver and the introduction of the scalpel reflects Professor Twerski’s approach not only to duty but also to law: attention to doctrine, systemic imperatives, and justice. The duty discussion is presented directly in the contributions by Professors Wendel and Geistfeld and addressed more conceptually later in the volume by Professors Kysar, Goldberg, and Zipursky.

While Professor Twerski plants his flag firmly with the Restatement and its risk-utility analysis, Professor Wendel, his casebook co-author, seeks to reconcile risk-utility with the “relational” view of torts advocated for by, among others, Goldberg and Zipursky. He posits that the duty element is “relational,” as Goldberg and Zipursky would demand, but it includes a duty to the relevant community and, with it, consideration of whether imposing a duty would make the world a safer place, both in terms of the benefit and cost of precaution.

Professors Goldberg and Zipursky, by contrast, seek to pull Professor Twerski in a “relational” direction. Instead of using the relational approach as a limit on liability, as in cases like Palsgraf and in more recent private law scholarship, they focus on the relationship as creating a right of redress. They discuss the New York Court of Appeals’ recent decision in Fereira v. City of Binghamton.⁷ There, police officers executing a no-knock warrant injured an innocent bystander. The Court held that the victim could establish liability against the police department if it failed to properly plan or execute the warrant. Goldberg and Zipursky agree with the result but take issue with the

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5. Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7 cmt. a (Am. L. Inst. 2010).
6. Twerski, supra note 4, at 4 (emphasis added).
Court’s expansion of the “special duty” rule to cover cases of misfeasance as well as non-feasance. Goldberg and Zipursky situate tort duties in so-called accountable relationships, and here, they argue that such a relationship existed. They query, without answering, whether a risk-utility scholar like Aaron might similarly take issue with the Court of Appeals’ decision. Recent work by Aaron suggests that he would agree that general principles of tort accountability should operate here.8

Douglas Kysar’s essay, “The Constitutional Claim to Individuation in Tort – A Tale of Two Centuries, Part 2,” aims to pull Professor Twerski in the opposite direction. He seeks to free tort law from the strict relational “A-hits-B” giving rise to recourse dyad. He looks to Professor Twerski’s essay, “Market Share—A Tale of Two Centuries,”9 where Professor Twerski criticizes the New York Court of Appeals’ decisions on market share liability as straddling two centuries—an early insistence on a direct link between the plaintiff and defendant to give rise to liability, and a more modern focus on risk-utility and incentives. He argues that while Professor Twerski’s work is congenial to relational theories of tort liability, it need not (and should not) be so limited.

**Service.** The first group of articles explores the legal and doctrinal bases for duties in tort. The second cluster explores the area of products liability and, in particular, the concept of “defect” as articulated in the Restatement (Third) of Torts: Products Liability. Here, Professor Twerski’s doctrinal ideas merged with his service to the profession.

Professor Twerski served, along with his good friend and co-author Professor Jim Henderson, as Reporter of the Restatement of Products Liability. It is here that Professor Twerski’s devotion to the risk-utility approach to tort law becomes most apparent. On the one hand, the Restatement took a functional approach to who might be held liable for injury caused by a defective product. Section 1 makes clear that liability runs to anybody in the chain of distribution: “One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”10 However, Section 2 of the Restatement also firmly rejects the “consumer expectations” test that had developed under Section 402A of the Second Restatement in favor of traditional negligence principles.11 In particular, it

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8. See Edward J. Janger & Aaron D. Twerski, *Functional Tort Principles for Internet Platforms: Duty, Relationship, and Control*, 26 YALE J. L & TECH 1, 12 (2023) (“We join them here in detailing the nature of the relationship between Amazon and its customers, but we go further and explore the lack of any policy rationale for a ‘no duty’ rule that might limit that liability.”).


11. Section 2 of the Restatement (Third) of Torts: Products Liability provides as follows with regard to product defects and failure to warn:
limits liability to situations where there is a “reasonable alternative design.” Mark Geistfeld, in his contribution, looks at the Restatement (Third) of Torts: Products Liability through the lens of bystander liability and finds that neither the consumer focus of strict liability nor the delegation to the buyer to make risk-utility decisions sufficiently accounts for the treatment of harm to bystanders in products liability. Michael Green looks at failure to warn lawsuits against generic pharmaceutical manufacturers and similarly finds that recourse to ordinary tort principles of accountability are required as a supplement to the strict liability doctrines of products liability.

**Human Kindness.** The final group of articles examines Professor Twerski’s hands-on involvement with mass torts through his service with Jim Henderson as the Special Master in litigation brought by first responders injured during the response to the 9/11 attacks at the World Trade Center in New York City. Both Steve Landsman and Tony Sebok recount the role played by Professor Twerski when he was asked to figure out how to administer the first responder claims. As both Professors Sebok and Landsman point out, the claims were problematic in many respects. Most of the claims were for respiratory ailments caused by inhaling hazardous chemicals and particles during the rescue, recovery, and cleanup efforts at the World Trade Center site. According to views articulated in their scholarship, Professors Twerski and Henderson might have had difficulty accepting claims of establishing liability. And, even once liability was established, the claims varied tremendously, both in terms of length of exposure and severity of injury. Confronted with the need to effectively administer the Victims Compensation Fund and the very real human tragedy, Twerski and Henderson worked out a system for coding the claims and determining liability that became a model for future mass tort cases. In serving as Special Master, Professor Twerski demonstrated that his doctrinal views were tempered by real-world concerns about harm.

Professor Janger’s article highlights the conflict between the tort goal of compensating victims of harm and the incentive-based goals of the tort system when a tortfeasor is insolvent. He discusses the effects of insolvency and aggregate litigation on the recourse and incentive-based principles of tort law. In particular, he looks at the ability of an insolvent business to continue

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

*Id.* § 2.
operations notwithstanding its failure to make tort victims whole in the face of arguably intentionally tortious behavior. His essay highlights a central tension between maximizing the recovery for plaintiffs and the need to forgive some fairly bad behavior in order to do so. This question has loomed large in recent discussions under bankruptcy law. That discussion would benefit from the wisdom of Professor Twerski’s wisdom.

The Brooklyn School. The final article in the Festschrift, Robert Sedlers’s appraisal of Professor Twerski’s work on conflict of laws, does not precisely fit the tripartite framework described above, but it nonetheless serves an important role in the Festschrift, both as an appreciation of Professor Twerski as a scholar and also as an illustration of one of Aaron’s personal characteristics that is not unique to him but which explains and illustrates his central role in the life of Brooklyn Law School. In the essay, Professor Sedler details the dispute between them over the proper approach to conflict of laws in tort cases. Sedler aligns himself with the modern “interest analysis” approach, while Twerski with the older “territorial approach.” The essay is a triangulation that identifies the areas of agreement and disagreement. In so doing, Professor Sedler reveals Professor Twerski’s “territorialism” to be a functional rather than formal concept that takes classical territorialism and imbues it with both the realism and practicality that is the hallmark of Professor Twerski’s scholarship.

Here, it must be noted that this Festschrift is the third in a series of such volumes published by the Brooklyn Journal of Corporate, Financial & Commercial Law. The first was for Roberta Karmel, the second was for Neil Cohen, and this third is for Professor Twerski. As I noted in the introduction to the volume in honor of Professor Karmel, the inspiration for this series arose when a brand-new colleague, seeking to understand the institution he had just joined, asked, “Is there a Brooklyn School?” He wondered if there was a particular point of view or type of scholarship practiced at Brooklyn Law School. My first thought was that the question seemed a bit odd. My second thought was that when I arrived at Brooklyn, and still today, the answer was absolutely “yes,” and that the characteristics of Brooklyn Law School could be identified in the work of four faculty members, Roberta Karmel, Neil Cohen, the late Margaret Berger, and Aaron. Each was eminent in their field. Each wrote scholarship that was intellectually and theoretically sophisticated. But in each case, the intellectualism was tempered by pragmatic practice relevance. Each wrote that made it the sort of scholarship that actually influenced practice, shaped institutions, and defined their areas of law—Securities Regulation, Commercial Law, Evidence, and now Torts. Aaron’s work (and theirs) has

12. The symposium brochure, containing a biography of Professor Twerski, a description of the panels, and a list of presenters and commenters for each, can be accessed at the following link: https://www.brooklaw.edu/News%20and%20Events/Events/2023/2023_04_20e.
set the tone for the generations of scholars at Brooklyn Law School who have followed: clarifying doctrine, serving and improving the profession, and doing so with a healthy dose of humanity.