

## A SCHOLARLY LIFE IN VISTAS: MARSHALL SHAPO'S PRODUCTS LIABILITY

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To read and reread Professor Marshall Shapo's products liability scholarship is to learn the important lesson of how to build a body of work that continually sees the same landscape from fresh vistas. Like watching the same landscape from different angles, during different seasons, and over several years, Professor Shapo's vistas provide us with a remarkably vivid view of the products liability landscape over the past fifty years and beyond. In doing so, he has constructed a vision of the richness and promise of products liability law while continually reminding us to be aware of the vista from which we view the law.

This Essay draws its theme from Professor Shapo's rich products liability scholarship, which states his views with a grace and authenticity we should all model. In an early article, Professor Shapo critiques the field of torts scholarship as failing to recognize the power imbalances that come from improvements in technology, and the need for a tort regime that focuses on these imbalances.<sup>1</sup> He writes about relationships between institutional actors—the legislature, government agencies, manufacturers and producers—and the impact of those relationships on consumers.<sup>2</sup> These early vistas ultimately lead to his seminal article advocating for a representational

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<sup>1</sup> Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 340 (1970) [hereinafter Shapo, *Changing Frontiers in Torts*] (describing a new torts regime that focuses on "the legal problems created by the impact of modern life and technology—with their concentrations of political, economic, intellectual, and physical power—upon the individual"). I unashamedly took the name of this Essay from this early work by Professor Shapo. For similar themes from Professor Shapo's experience teaching products liability, see Marshall Shapo, *Defective and Dangerous Products: A Personalized Instruction Guide*, 42 U. CIN. L. REV. 403 (1973).

<sup>2</sup> See, e.g., Shapo, *Changing Frontiers in Torts*, *supra* note 1, at 333–34.

and consumer-focused approach to products liability—the vista that becomes the hallmark of his vision for this field of law.<sup>3</sup>

In *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, Professor Shapo provides an extraordinarily in-depth, comprehensive analysis of the history of products liability law and consumer protection at a time when the modern legal framework in the area was just taking shape.<sup>4</sup> Professor Shapo's main thesis is that explicit and implicit representations made by sellers to consumers, including images of the product used for advertising purposes and images created in the minds of consumers after hearing sales proposals, should serve as the primary analysis in products liability cases, especially those involving consumer disappointment.<sup>5</sup> He explores, more fully than any previous scholar, public policy factors such as the need for a broad variety of product representations, the cost to both consumers and producers of accessing information, the impact on competition, and the effect on relief for injuries.<sup>6</sup> Professor Shapo looks to the history of this area, offers scholarly critiques, and then explores a series of cases and articles that developed the legal doctrine for consumer disappointment cases.<sup>7</sup>

His analysis defines the question of liability from the objective perspective of the consumer and considers what mental images the consumer would have reasonably created when hearing about the product.<sup>8</sup> This is much more than a re-hash of the importance of upholding implied promises in warranty: Professor Shapo looks at each of the different theories of liability by dividing them into the categories of representational and nonrepresentational, ultimately arguing that both categories are rooted in

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<sup>3</sup> Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

<sup>4</sup> *Id.*

<sup>5</sup> Professor Shapo described his thesis as:

[M]y thesis is that the process for determining the question of liability of consumer product disappointment should concentrate initially and principally on the portrayal of the product, broadly defined as ranging from specific performance claims to subtle utilization of the social consensus concerning product function as a background for sales messages.

I shall seek to relate this thesis to the requirements of public policy as articulated by lawmaking agencies, primarily the courts, while contending that analysis of consumer product disappointment should include examination of the broadest variety of product representations, the intellectual and emotional basis for consumer reception of those representations, and the nature of the consumer response to them.)

*Id.* at 1115.

<sup>6</sup> *See, e.g., id.* at 1287–89 (problems of image creation); *id.* at 1296–1314 (economic issues and policy exploration of such issues).

<sup>7</sup> *Id.* at 1131–52 (historical survey); *id.* at 1153–1203 (theories of liability).

<sup>8</sup> *Id.* at 1115.

product portrayal.<sup>9</sup> The representational theories include fraud, negligent misrepresentations, and express warranties.<sup>10</sup> Under these theories, a representational approach already exists, but Professor Shapo asserts that it should be brought to the forefront of the products liability analysis instead of being an underlying factor.<sup>11</sup> He argues that courts should look at the character of the representation that created an expectation in consumers and then analyze the relevant policy considerations.<sup>12</sup> Professor Shapo then turns to the nonrepresentational theories which include negligence, implied warranties, adhesion contracts, and strict liability.<sup>13</sup> He argues that these theories are still rooted in product portrayal and attempts to use this as a mechanism for creating more clarity between these often-overlapping theories.<sup>14</sup>

The wide-ranging analysis in this article not only provides a roadmap of where Professor Shapo's products liability scholarship will travel in its emphasis on consumer disappointment, but it also illustrates the functionalism of his approach, which is not tied to any particular doctrine.<sup>15</sup> His exploration of product defect brings into focus how product function and purpose produce images born of an information imbalance between the consumer and the manufacturer that frustrates the consumers right to rely on the information provided to them. He announces this vista in the article, explaining: "I would thus suggest that courts dealing with individual lawsuits for disappointment with product performance should speak of 'an action for consumer injury,' or more simply 'the consumer tort.'"<sup>16</sup> Professor Shapo's bold agenda poses grand ideas, based in thoughtful doctrinal, functional, societal, and jurisprudential underpinnings. Indeed, he explains as much in the article, saying:

My principal concern here is with the endeavor to improve the general quality of society through the respect for law created by interstitial decision. In that effort courts, and ultimately legislatures, must deal with many conflicting signals from economic lore, behavioral investigation, and a socially inculcated common sense of commerce. All consumers are of several minds. They know

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<sup>9</sup> *Id.* at 1117, 1153–1285. The comprehensive exploration of this subject in this article, only ten years after the adoption of the *Restatement (Second) of Torts* section 402A on strict liability for products, stands, in my view, as one of the most remarkable surveys of any area of tort law.

<sup>10</sup> *Id.* at 1155–1203.

<sup>11</sup> *Id.* at 1154.

<sup>12</sup> *Id.* at 1286–94.

<sup>13</sup> *Id.* at 1204–85.

<sup>14</sup> *Id.* at 1264, *et seq.*

<sup>15</sup> *See id.* at 1258, 1317–19 (approach to liability does not require a liability label which can limit purpose of approach; function and purpose of liability matters).

<sup>16</sup> *Id.* at 1369; *see also id.* at 1370 ("Statement of the Thesis").

that you ‘get what you pay for,’ and they are bred to a healthy cynicism. Yet it is also human to hope, natural to feel compulsions, mortal to undervalue risk to oneself.

The law necessarily serves as arbiter of these conflicting elements of personality. It can perform the task with greater justice, as it responds more accurately to the way that inducements mesh with desires, as it defines remedies more sharply in terms of the mental images that produce belief, as it realizes more vividly the significance of products in this culture. The more precisely law fulfills these goals, the better it will serve to mediate those conflicts in society that arise from fortuitous variations of wealth, of intelligence, of rationality itself.<sup>17</sup>

This vista is one which would never be too far from his view, and one which would guide him throughout his scholarly wanderings.

Always asking the larger questions, Professor Shapo regularly coaxed other scholars in the field to ask “what’s next?” As in *A Representational Theory of Consumer Protection*, his vistas always included keeping an eye out for forces of change. In another comprehensive approach to personal injury law and litigation, building on his functional theory of consumer disappointment, Professor Shapo focused his view on the litigation landscape—in conjunction with the ABA Special Committee on the Tort Liability System—to produce a comprehensive report that “analyze[d] the role of tort law in our national life.”<sup>18</sup> In the eyes of Professor Shapo, this vista became the perch from which to imagine all that tort law could be, opening his lens from the singular perch of products liability.

There are so many beautiful articulations in Professor Shapo’s scholarship that provide access to his worldview. But, if I could recommend one, I would encourage the reader to read Chapter 14 of the ABA Report, “A Living Tort System for the Twenty-First Century.”<sup>19</sup> In the report, Professor Shapo recounts the modern development of the “great tree of injury jurisprudence,” remarks on tort law’s role in redressing power imbalances, the role of lawyers and judges, and the idea of tort law as an important reference point that helps “to knit a nation of diverse peoples and groups.”<sup>20</sup> What a breathtaking view.

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<sup>17</sup> *Id.* at 1387–88.

<sup>18</sup> MARSHALL S. SHAPO, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, REPORT TO THE ABA 14-1 (1984).

<sup>19</sup> *Id.* at 14-1.

<sup>20</sup> *Id.* at 14-2, 14-12.

Professor Shapo's "visit to the mountaintop"<sup>21</sup> during the early 1980s did not prevent him from responding to the tsunami of scholarship criticizing the consumer-focused strict products liability of the previous two decades as inefficient and already in need of reform. Crises in tort law were proclaimed and calls for reform abounded.<sup>22</sup> Having explored the wider tort litigation landscape in the ABA Report, Professor Shapo was called to address those who would critique the litigation landscape and his consumer protection vista. The rapid changes to products liability doctrine in the 1990s, furthered by the American Law Institute's (ALI) projects on enterprise liability and the *Restatement (Third) of Torts: Products Liability*, provided an opportunity to respond to those with a narrower vision of what tort liability could accomplish. He approached this challenge from a variety of vistas in the 1990s and early 2000s.<sup>23</sup>

Professor Shapo initially took a critical perspective of the ALI's projects.<sup>24</sup> Yet, true to being a scholar of broad views, he explored the wider questions. In *In Search of the Law of Products Liability*, Professor Shapo examines the ALI's efforts in the products liability area asking how products liability and the role of restatements should be treated in the future.<sup>25</sup> Professor Shapo identifies three approaches to restatements: a literal approach that involves "counting the decisions and selecting the majority rule," a "case-centered, incremental, and focused on reasoned development"

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<sup>21</sup> I use this reference intentionally as the ABA Report includes a number of Biblical references, in particular the mountain scene in Exodus. *Id.* at 1-1, 14-1, 14-2.

<sup>22</sup> See Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185, 185-87 (1990) (responding to calls for reform because of the cost of liability insurance and verdicts for large sums becoming more common and how these affect corporations, professionals, and governments). Professor Shapo recognized that institutional approaches are much like the approach he took in his 1984 ABA report but argues restructuring the tort system through institutional rearrangement is impractical because the American system is not set up to unilaterally (the so-called "Tsar") assign certain injury tasks to certain systems. *Id.* at 186-87.

<sup>23</sup> See Marshall S. Shapo, *Bashing the Law*, 65 N.Y. ST. BAR J. 46, 46, 48 (1993) (responding to comments made at the Republican National Convention about the need for reforming the tort system); Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279 (1993) (offering a comparative analysis of the products liability systems in Europe and America with the goal of "provid[ing] American lawyers with a fresh perspective on some leading issues in the products liability law of the United States," showing potential issues in Europe, and isolating disputes in product injuries that are common across "industrialized and increasingly technological societies").

<sup>24</sup> See generally Marshall S. Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993) (criticizing preliminary chapter in ALI study on product defects and warnings by noting the lack of a proper and accurate historical context surrounding strict products liability); Marshall S. Shapo *Rejoinder: Advances in the Analysis*, 30 SAN DIEGO L. REV. 365 (1993) (responding to his critiques of the ALI's projects).

<sup>25</sup> Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 631-32 (1995).

approach, and a “frank legislative” approach.<sup>26</sup> He explores the idea of a Products Restatement and begins with Section 402(A) of the *Restatement (Second) of Torts*, briefly addressing the process that made it part of the *Restatement (Second)* and how the courts in most states chose to support this provision.<sup>27</sup> He then reviews the landscape of the 1980s and the politicization of products liability law.<sup>28</sup> Professor Shapo explains that “restating” this area is problematic because of the robust and broad ongoing national dialogue on the subject.<sup>29</sup> He moves easily between the doctrinal, the social, and the practical views of products liability law and litigation, crafting a compelling case for doctrinal flexibility given the controversial nature of products law.<sup>30</sup> He also returns to his earlier emphasis on product promotion, access and information processing capability, consumer expectations, and the concern for products that are simply too dangerous.<sup>31</sup> As a solution to the complexities of restating products law, Professor Shapo encourages leaving room for “judging and the creativity accompanying it” by preserving strict liability, having a flexible standard for design defects, retaining the warnings focus on adequacy of information, and recognizing the power of product promotion.<sup>32</sup>

During the late 1990s, there was a palpable sense of urgency in Professor Shapo’s products liability scholarship concerning whether the vistas of his early work would continue to draw the eye of decision makers in the field. His future articles in products liability worked around the edges of the primary vistas of consumer protection, societal impact of legal doctrine, and the proper role of institutional actors.<sup>33</sup>

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<sup>26</sup> *Id.* at 634–35.

<sup>27</sup> *Id.* at 636–39.

<sup>28</sup> Professor Shapo recounts proof of this politicization with a “parade of bills” beginning in the late 1970s that contained reform ideas and proposals for federal legislation on products liability. *Id.* at 644. He also notes the Model Uniform Products Liability Act, which was published in 1979, and observes that even the ALI had become entangled with interest groups. *Id.* at 644–45. Finally, Professor Shapo discusses the importance of taking foreign developments into account because of the effect U.S. law will have on domestic producers and foreign producers, giving more context to his earlier comparative vista. *Id.* at 650.

<sup>29</sup> *Id.* at 646–47.

<sup>30</sup> *Id.* at 649–50.

<sup>31</sup> *Id.* at 664–65, 671–75.

<sup>32</sup> *Id.* at 697.

<sup>33</sup> *E.g.*, Marshall S. Shapo, *Freud, Cocaine, and Products Liability*, 77 B.U. L. REV. 421, 423–25 (1997) (using Freud’s promotion of cocaine cleverly to emphasize the need for private law to examine dangerous products before regulation); Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH. J.L. REFORM 215, 216–17, 219 (1997) (offering several viewpoints from which to view the *Restatement (Third)*—including explaining case law, culture and its influence on buying and selling including the influence of the media, and, finally, politics—and

He need not have worried. The 2000s saw a renewed energy for the broader vistas which had held Professor Shapo's earlier attention, particularly those which revealed a comprehensive approach to tort liability. In his turn of the century work, *Millennial Torts*,<sup>34</sup> he recalls a presentation he gave on his 1970 article *Changing Frontiers in Torts: Vistas for the 70's* and the mixed reactions to his ideas from some great legal minds, including William Prosser and Leon Green.<sup>35</sup> His reflections seek reconciliation between the differing traditional, modern, and postmodern approaches to tort law.<sup>36</sup> He sweeps broadly again, noting the way tort law responded to technological advances, the privatization of power, and the consequent "public law" nature of torts.<sup>37</sup> He provides a vista into the future, seeing the role of tort law as the "decentralized resolver of disputes" and the "decider" for solutions to "emerging injury problems," defining the playing field for dispute resolution as one that concerned everyday conduct.<sup>38</sup> He uses these principles to educate law students on the importance of tort, and its role as a "social symbol, a cultural mirror that reflects the moral views of society."<sup>39</sup>

Subsequent articles sketch these broad vistas of a coherent scheme for responsibility for product injuries. In *Products at the Millennium: Traversing a Transverse Section*, for instance, Professor Shapo looks at principles that courts have either fixed into the law or are currently developing in products liability jurisprudence.<sup>40</sup> He highlights "the gritty realities—including some dilemmas—of modern entrepreneurial and consumer life."<sup>41</sup> This article, again, illustrates the nimble way Professor Shapo brings a new view to a subject he has explored for decades.

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commenting that a "proper" Restatement should take a broader approach and consider product promotion and intellectual processes); Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L. REV. 761, 764, 766–68 (1998) (renewing his emphasis on the role product portrayal could have played in furthering the importance of the consumer expectations test in the *Restatement (Third)* and forecasting that the *Restatement* will not be able to solve various issues, including those arising under representational theories); Marshall S. Shapo, *Judges and Products Law: Provisional Truths and Designated Designers*, 49 DEPAUL L. REV. 405, 406 (1999) (encouraging judges to continue to be "the designated designers of the law").

<sup>34</sup> Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021 (1999) (examining the past, present and future of tort law at the turn of the century with a focus on large societal challenges such as racial inequality and the social meaning behind the development of strict products liability that produced consumer-oriented decisions).

<sup>35</sup> *Id.* at 1027–28.

<sup>36</sup> *Id.* at 1028.

<sup>37</sup> *Id.* at 1031–37.

<sup>38</sup> *Id.* at 1043.

<sup>39</sup> *Id.* at 1044–45.

<sup>40</sup> Marshall S. Shapo, *Products at the Millennium: Traversing a Transverse Section*, 53 S.C. L. REV. 1031, 1031 (2002).

<sup>41</sup> *Id.* at 1032.

Later in the article, Professor Shapo returns to the concept of defect, which he labels at “the heart of the matter in products liability law,” and discusses his willingness to revisit the former “defective condition unreasonably dangerous” notion of the *Restatement (Second)* in the context of two intractable products—cigarettes and handguns—which push the boundaries of his lifelong dedication to the product portrayal thesis.<sup>42</sup> He discusses the potential duty of manufacturers to consumers in these contexts, rather than focusing on the notion of defect.<sup>43</sup> He briefly mentions how the two primary tests of design defect might operate in these contexts, but without tarrying on doctrinal details.<sup>44</sup> Moving away from the defect question, Professor Shapo points out the “moral burden” these cases place on both manufacturers and consumers, examining overlaps in behavioral and legal concepts including those involving obviousness in failure to warn and assumption of the risk.<sup>45</sup> During these millennium-induced musings, one can see the broad vistas taking shape for what would be his scholarly piece on resistance.

It was inevitable for a person with Professor Shapo’s visions for tort liability to ultimately stretch and see how they could all be brought together. In the following years, he would continue to sketch the outlines of the vistas he imagined on the horizon. For example, in 2006, he articulated the broad outlines of a comprehensive structure for responsibility for injury, effortlessly pulling threads from the wide world of jurisprudential underpinnings of tort law.<sup>46</sup> He continued to see the cultural, doctrinal and institutional challenges that products liability presents.

Ultimately, Professor Shapo put all his formidable intellectual energy into the masterful *An Injury Law Constitution*.<sup>47</sup> This book appropriately serves as the culmination of the career of a scholar who has seen the world from both the mountaintop and the trenches. As I reread this beautiful explanation of what tort law is all about, it is hard to find one quote, or one concept, or one chapter that I can refer you to that does justice to its accomplishment.

In the conclusion, he ends where he was destined to end: when he began to write about the importance of the consumer perspective in products liability. He ends with an emphasis on the dignity of individual human beings

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<sup>42</sup> *Id.* at 1033–37.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1033–35.

<sup>45</sup> *Id.* at 1038–42.

<sup>46</sup> Marshall S. Shapo, *Responsibility for Injuries: Some Sketches*, 100 Nw. U. L. REV. 481, 481 (2006).

<sup>47</sup> MARSHALL S. SHAPO, *AN INJURY LAW CONSTITUTION* (2012).

deserving the primary respect of society: “Individuals should have maximum freedom for the exercise of personal autonomy, and the law should foster people’s ability to make choices that materially affect their lives.”<sup>48</sup> He places the emphasis on the rights and obligations we owe one another, not on the harm.<sup>49</sup>

The scholarly vistas of Professor Marshall Shapo’s life, particularly those in the world of products liability where much of his scholarship resides—consumerism, doctrinal functionality, and reliance on institutional actors—have come full circle and are blended into one brilliant and massive landscape.

Professor Shapo’s works have influenced the evolution of both products liability law and tort law more generally. Professor Shapo’s influence is also more personal for those of us lucky enough to know him. When I was a young products liability professor in the early 1990s trying to find a voice, Professor Shapo wrote to encourage me. He sent me a copy of the ABA Report, suggesting that it overlapped with my own thoughts about tort law.<sup>50</sup> I have received no higher compliment.

It has been an honor and a privilege to explore the scholarly vistas of Professor Marshall Shapo. They illustrate the remarkable journey of a visionary scholarly life.

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<sup>48</sup> *Id.* at 268.

<sup>49</sup> *See id.* at 270.

<sup>50</sup> I cherish that letter and have kept it all these years.