

Bodies on the Line: The Private Tragedies Underlying Modern Products Liability Law

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Barbara Young Welke, [The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy](#), 101 *J. of Am. Hist.* 97 (2014).

“Legal interpretation,” Robert Cover famously wrote, “takes place in a field of pain and death.” Honoring Cover’s important insight is one of the great challenges of legal scholarship. As we use our expertise to explore the nooks and crannies of our “legal world”—the clever transactional devices, complex regulatory schemes, and jurisdictional puzzles—do we recognize the state-inflicted and -sanctioned violence on which this world depends? [Barbara Young Welke’s](#) *The Cowboy Suit Tragedy* is a powerful example of how to write about law without losing sight of what Cover calls the “bodies on the line.”¹ In the tradition of critical legal history, Welke’s insightful and empathetic account of a mid-twentieth-century products liability case goes further still, to show us the profoundly unequal impact of law’s violence. By placing the case in the context of the “democratization of [consumer] desire,”² the rise of product liability insurance, and the inherently atomizing features of private law, Welke reminds us that even when tort law forced manufacturers to bear the monetary cost of accidents, the emotional and physical injuries lay where they fell. Families—here, children—owned the hazards inherent in many products, and most often they owned them not as a class or community, but as individuals, as scattered and disconnected as the transactions that brought the products into their lives.

The Cowboy Suit Tragedy centers on the New York case *McCormack v. M. A. Henry Co.*, a wrongful death suit brought by the McCormack family against the manufacturers of the Gene Autry cowboy suit. A popular toy since it first came off the production line in 1942, the “Autry cowboy ranch outfit” offered parents a way to “provide their children with a protected childhood,” an intense postwar desire, while participating in the mass consumer economy that increasingly defined American identity. (P. 103.) Unfortunately for seven-year-old Tommy McCormack, who received the toy for Christmas in 1944, there was a hazard “designed in” to the costume: its plush white chaps were made from a highly flammable viscose rayon fiber, at a time when “children encountered fire as a regular part of daily life.”³ “One minute Tommy was playing,” Welke writes, drawing from court testimony, “and the next he was screaming,” in what his brother Jackie remembered as “a ‘circle of fire.’” After four long months, he died from his injuries. (P. 101.) Other children had by then suffered similar fates, but after Mr. McCormack’s chance encounter with a lawyer, Tommy became the cowboy suit’s first legally cognizable victim. (P. 111.)

Roughly three years after the McCormacks filed suit, a jury awarded the family \$65,249.10 in damages, a result that Welke might have cast as a victory. News of the defendants’ careless actions made national headlines, raising awareness about the dangers lurking in common fabrics. And although an appellate court reduced the award nearly by half, the family received compensation for a loss that they otherwise would have borne on their own. Doctrinally, the case would appear to fit with a progressive, feel-good narrative of modern tort law: as litigants confronted courts with the hazards of automobiles and other complex, mass-produced goods, the story goes, and as judges recognized the asymmetries of power and information in the modern consumer-manufacturer relationship, they chipped away at doctrinal barriers—here, the notion of privity of contract—until they had produced a consumer-friendly regime of strict liability for defective products.

For Welke, however, the story remains a tragedy, and we are richer for her insistence on seeing it this way. “[E]ven as the economic burden of product hazard shifted from consumer to producer,” she writes, “a more fundamental continuity remained: product hazard was understood to grow out of private relations in a private economy addressed

through private law.” (P. 113-14.) And although subsequent decades witnessed the rise of the class action and the enactment of consumer safety laws, Welke’s point about the privatization of product hazard largely holds. The tragedy of this arrangement is clear from what happened after the *McCormack* case: some additional victims received compensation, via private settlements, but records were sealed, silence was purchased, and “more children were burned.” (P. 116.) In some cases their families never even realized they had a cause of action and dutifully absorbed both blame and expense. Nor did the public have much of a chance to weigh in: with the full extent of the harm hidden, the cluster of reported cowboy suit deaths quickly “slipped out of view and memory.” (P. 117.) In short, Welke’s telling of the *McCormack* case urges us not to dwell on the family’s unprecedented victory, but to ponder the costs of the very system that gave them justice. How many potentially outrage-inducing harms has this system kept from our view?

Welke ends the article with an even more important question, which I will rephrase here. The concepts of spreading risk and socializing loss are now woven into our legal fabric, and for good reason. There is no going back. But what would happen if every time we wrote about these concepts or taught them to our students, we reminded ourselves that risks “materializ[e] on the bodies and lives of individuals,” and that the resulting losses are never truly shared? (P. 121.) What would happen if every time we explained the logic of the law or offered a proposal for legal reform, we looked, as Welke has, for the bodies on the line?

1. Robert M. Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601, 1605. [?]
2. P. 103 (quoting William Leach, *Land of Desire: Merchants, Power, and the Rise of a New American Culture* (New York, 1993)). [?]
3. P. 104, PP. 107-09 (borrowing from Ralph Nader, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (New York, 1965)). [?]

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