THE ECONOMICS OF TORT LAW

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Steven Shavell. *Economic Analysis of Accident Law*. (Cambridge, MA: Harvard University Press, 1987). xii + 310 pp. References, index. $30.00.

William M. Landes and Richard A. Posner. *The Economic Structure of Tort Law*. (Cambridge, MA: Harvard University Press, 1987). ix + 329 pp. Notes, index. $27.50.

Henry J. Steiner. *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law*. (Madison: University of Wisconsin Press, 1987). xi + 230 pp. Notes, index. $32.50.

Almost twenty years ago Grant Gilmore proclaimed in *The Death of Contract* (1974) that contract law, which had long been the dominant area of the law, was disappearing and becoming a branch of tort law. Time has borne this prediction out: both in the academy and in the courts, tort law has become the most vibrant area of the law. Over the past decade the volume of litigation in the tort area—particularly in products liability, professional malpractice, and dignitary wrongs—has grown at a staggering pace. The legislative experiments of the 1970s with no-fault automobile liability as an alternative to the tort liability system are unprecedented. And I think that it is fair to say that some of the most novel judicial doctrines of the recent past—such as market share liability, intentional and negligent infliction of emotional distress, the call to recognize an action for tortious risk, and the expansion of the scope of vicarious liability—have emerged from tort law (in no small part because that area has been called upon by legal academics and practitioners to deal with some of the most vexing harms of modern life).

This ferment in tort law has quite naturally given rise to a reexamination of its fundamentals by legal scholars. While there is no denying the richness and importance of this reexamination, I confess to finding it surprising. One might have thought that at this late date in the history of tort law, the most fundamental issues would have long since been resolved or that, at least, the opposing two or three ways of looking at tort liability would be well known. But this is not at all the case. To take one example, there is nothing like unanimity among students of the law as to the difference between negligence liability and strict liability. There is a responsible position that perceives strict liability as more consis-

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tent with widely held notions of corrective justice than negligence liability. And there are those who hold that the difference between the two liability standards is semantic and that the two standards perform identically in terms of inducing precaution by potential victims and injurers, as well as other objective criteria. There is still another position that holds that there *is* a difference between the standards and that the types of accidental harms that are best controlled by some form of the negligence standard are distinguishable from those best controlled by strict liability. To confound matters further, there is no agreement about whether strict and absolute liability are the same thing or whether strict *products* liability is a distinct variant of strict (or absolute) liability. Why these confusions should persist is puzzling.

The three books under review attempt to resolve the doctrinal confusion of modern tort law. Steven Shavell's work and that by William H. Landes and Richard A. Posner are products of the law and economics movement. Henry J. Steiner's view of accident law is from a perspective that, while it is certainly not law and economics, is closely related to the positivism of the legal realist school from which law and economics is also descended. Taken together these three works are complementary: they triangulate the subject of modern tort law in a way that none of them individually could have done and provide a rich picture of one of the central areas of the law.

Shavell's *Economic Analysis of Accident Law* builds on his many articles on the economics of accident law, and in conjunction with Landes and Posner's book, defines the economic theory of tort law and the points from which future advances in the field must begin. The first seven chapters explain the premises of an economic investigation of tort law and the basic economic theory of tort liability. The remaining chapters are divided into two sections that take up advanced topics: Chapters 8–10 cover the relationship between the basic theory of liability and the economic theory of insurance, and Chapters 11–13 cover the costs of administering the tort liability system and compare the tort liability system and *ex ante* administrative agency regulation as methods of achieving optimal deterrence of accidental harms. Each chapter consists of a prose description of the central theoretical points and of a mathematical appendix.

In the development of the basic theory, Shavell focuses on two variables, the level of precaution and the amount of the activity that the potential tort-feasor engages in, and examines how potential victims and injurers are likely to behave under the different forms of liability. Two examples clarify the style of analysis. Consider the case of unilateral accidents (those in which only one party can reasonably take action to reduce the probability or severity of an accident) in which only the injurer's level of precaution is determinative of the occurrence and severity of an accident. Both

negligence and strict liability induce socially optimal levels of precaution. However, when there are multiple dimensions of precaution (e.g., potential injurers must not only drive within the speed limit but also check their rearview mirrors) and when the negligence standard ignores some of those dimensions, strict liability is the only standard that induces optimal behavior. Consider now the more complex case where activity levels (e.g., the number of miles driven) as well as levels of precaution determine the probability and severity of an accident. In unilateral accidents, injurers can be induced to take optimal precaution and activity levels only under strict liability. In bilateral accidents (those in which both victims and injurers can reasonably take action to reduce the probability or severity of an accident), there is no liability rule that can induce optimal behavior by both parties.

The later chapters build on these and other conclusions of the basic theory. There are discussions of the liability of firms, of how courts might determine negligence, of causation, of the measurement of damages, and of joint and multiple tort-feasors and vicarious liability. The material that relates the economic theory of liability to the economic theories of risk bearing and insurance is the most original in the book. The conclusions of the basic theory chapters assume that both parties are risk-neutral. When one allows for risk aversion and insurance, those conclusions must be revised. For instance, under strict liability potential injurers bear all the risk of accident losses. If they are risk-averse and if there is no liability insurance, strict liability may induce injurers to take excessive care. When both victims and injurers are risk-averse, comparative negligence becomes the most attractive liability standard.

The Economic Structure of Tort Law is a significant piece of scholarship that complements Shavell's work. But more wondrous still, Landes and Posner have produced a highly readable book. The text could not be clearer and is supplemented with highly informative footnotes; the references to the literature are exhaustive; and the legal points are ably illustrated by reference to actual cases.

Landes and Posner elaborate what they call the "positive economic theory of tort law" (p. 312). This theory holds that

> the rules of the Anglo-American common law of torts are best explained as if designed to promote efficiency in the sense of minimizing the sum of expected damages and costs of care; or, stated differently, that the structure of the common law of torts is economic in character. (p. 312)

In the first ten chapters the authors explore the doctrines of tort law to see the extent to which those doctrines contribute to the minimization of the social costs of accidents. There is much in common between these chapters and Shavell's basic theory chapters, but there are important differences in coverage. Shavell's use of short examples and of mathematical appendices is better, but

Landes and Posner's illustrative use of actual cases is superior. Shavell sticks to the central points in tort law, while Landes and Posner make use of the exception to the general rule in an extremely effective manner. While Landes and Posner maintain an assumption of risk neutrality throughout, Professor Shavell relaxes that assumption in order to append some important caveats to the conclusions of his basic theory.

Many of the substantive conclusions in Landes and Posner are identical to those of Shavell, so I shall not repeat them. (Harvard University Press could do the scholars a great service by providing a concordance for the subjects covered in the two works.) Other than the matters of style alluded to previously, there are two important substantive differences between Shavell and Landes and Posner. First, in general, Shavell prefers strict liability: it is usually as efficient as negligence, and it is Pareto superior when the injurer's activity levels influence the probability or severity of an accident. In general, Landes and Posner prefer negligence to strict liability. Second, Shavell believes that there are circumstances in which no single liability standard nor any combination of liability standards on the potential parties can induce efficient precaution. Landes and Posner are more sanguine about the ability of the appropriate liability standard to induce efficient behavior.

One especially noteworthy part of Landes and Posner is a long chapter that examines the law of product-related accidents in order to see whether socioeconomic variables can explain the principal changes in that area of tort law over the last half century. For example, Landes and Posner test the hypothesis that the year in which states dropped the privity requirement in products liability actions is determined by the state's degree of urbanization, its per capita income, the population per registered automobile, the percentage of the population that is illiterate, the percentage of the state labor force that is employed in agriculture, and so on. There is a bit of "ad hoc-ery" in this list of variables, but the study is, nonetheless, to be applauded as a sophisticated attempt to explain an important legal change. Econometric work of this sort is clearly the direction in which law and economics must move.

Steiner's book, *Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law*, might appear at first blush to be the odd person out in this grouping. While his subject matter is accident law, his arguments are not economic. Nor does he seek a (normative) overarching rationale for modern tort law. Steiner's goals are more modest. First, he attempts to discern coherent doctrines in modern accident law. Second, he wants to determine what moral justification judges have given for the evolving tort doctrines of the last thirty years. And finally, he attempts to discern in these justifications—what they are and how they have changed over the recent past—a changing vision of what society is and should be and what the law's role is and should be in that soci-

ety. Steiner's source materials for this study are appellate opinions, not academic commentary or socioeconomic data.

Steiner perceives the hallmark of current tort doctrine to be "heightened liability," by which he seems to mean that injurers are more likely to be held liable for victims' injuries than they used to be. While this change is perceptible within accidents judged on a fault standard as well as those judged according to strict liability, it is accompanied by a broader movement in tort law away from negligence and toward strict liability.

Courts feel obliged to justify their holdings, to explain why they have decided a dispute in a particular way. The justification typically goes well beyond a contention that the holding is in line with the holdings in past opinions where the facts were roughly similar. Judges frequently try to ground their holdings on principles outside the law, for example, by appealing to widely accepted community norms. Steiner contends that before the era of heightened liability judges often justified their holdings in favor of classical negligence by appeal to utilitarian arguments. For instance, law and economics scholars use such an argument when they take the goal of tort law to be the minimization of social costs. With the shift to heightened liability, there has come a shift in the sorts of moral justifications given by courts in tort actions. Steiner maintains that this is a subtle shift, not a revolution: the new moral justifications pick up arguments that were being made under the older, classical negligence system but give them more weight than did previous courts. Thus, modern justification stresses the desirability of loss spreading, of redistributing accident losses among large numbers of people (e.g., the future customers of an injuring corporation) rather than trying to determine precisely which party was better placed to assume the risk of harm; and modern justification is willing to interfere with the principle of freedom of contract in order to protect accident victims (e.g., by allowing recovery for a victim who had voluntarily and explicitly assumed the risk of harm).

These changes in doctrines and in their moral justification raise important questions. Why has there been a trend toward heightened liability and away from fault? And why have the courts chosen to justify this trend with the particular moral arguments they have? Steiner's answer is that in the past accidents were perceived to be random encounters between two individuals. The victims and injurers were taken as representatives only of themselves and not of groups. Under this perception, accidents are unique; the law's role was to resolve a particular dispute and not necessarily to create rules, and certainly not to adjudicate on broad questions of social policy implied by the accident (e.g., is capital-intensive production a good thing?). By contrast, according to Steiner, modern courts perceive accidents as instances of broader sociopolitical and ideological trends:

> They visualize the parties before them less as individual persons or discrete organizations and more as representatives of groups with identifiable common characteristics. They understand accidents and the social losses that accidents entail less as unique events and more as statistically predictable events. Modern social vision tends then toward the systemic-group-statistical in contrast with the vision more characteristic of the fault system, the dyadic-individual-unique. (p. 8)

It is a significant achievement to have elaborated the changes in the moral justifications and social visions that have attended the change toward heightened liability. But as Steiner points out, once we are aware of the historic changes that are afoot in tort law, we are led to ask why they should have occurred. One possibility is that the law changes in response to changes in objective socioeconomic variables, as Landes and Posner's investigation of the end of privity had suggested. But Steiner, without offering an alternative hypothesis, proposes a slightly different way of looking at the problem. The law, he suggests, reflects the prevailing vision of what society *should* be; that vision manifests itself in the moral arguments that courts use to justify their holdings. Therefore, to understand why the law changes, one must explain how and why the conventional social vision changes. This extraordinary question is at the heart of much modern jurisprudence, such as that of Ronald Dworkin, and while socioeconomic factors like those identified by Landes and Posner may well have a significant part to play in explaining the formation of social visions, I suspect that the matter is more complex, more exciting, and more elusive than that.

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REFERENCES

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