PERSPECTIVES ON TORT LAW

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For Yemima

Preface

Like generations of earlier torts professors, I begin the introductory course with discussion of assigned cases from a casebook, moving slowly at first, exploring the facts, issues, procedural framework and rationale for decision. During the semester, the pace will quicken and the issues will vary. At times we will discuss the practical aspects of settling tort cases and at other times we will explore the economic justification for liability rules. But as we move through negligence, strict liability and intentional torts, we will never stray too far from the cases. Whether our focus is on defective products or auto accidents, an understanding of the rules of liability will emerge gradually as we build, case by case and issue by issue, an edifice that houses the relevant legal principles — however ambiguous or imprecise. By the end of the semester, if the course has been handled satisfactorily, the students should have a sense of the doctrinal framework of tort law, some skill in legal reasoning and a nascent understanding of the dynamics of the judicial process.

The course that does accomplish these pedagogical objectives has done well by the first-semester law student. Because the nature of the judicial process is largely unexplored territory outside of the professional school, case analysis is a new intellectual discipline for most entering students. The language of the law, as well as its procedure, is a mystery that takes time to unravel. It is small wonder, then, that the first-year student — whatever his or her reaction to law

school — rarely is moved to reflect on dimensions of the curricular offerings that might have been slighted. When such questions do begin to arise, in the second or third year, it is usually because the repetition of the case analysis process has led to a sense of boredom, or because the concentration on appellate decisions has created a sense of unease about whether the student is really learning enough "real world" lawyering techniques.

Legal education is in a phase of self-criticism and reexamination now precisely because it has concentrated too exclusively on what it does best: analyzing issues and exploring the subtleties of doctrine within the confines of a comprehensive collection of appellate court opinions. Without downgrading that enterprise in the least, as with an excellent meal or a curative drug, one can react against too much of a good thing.

In collecting, editing and commenting on the essays in this book, I have been guided by a conviction that legal education is seriously slighting a critical dimension of the training of lawyers: a conception of professional education that includes exposure to the intellectual heritage of major disciplines.[1] The case method is particularly inapt for in-depth exploration of the historical and ideological underpinnings of a system of legal rules. Particularly in the first year, a casebook channels the student's intellectual energy into exhaustive analysis of a series of conflicts and elaborate synthesis of the general rules or principles that can be drawn from the discrete occurrences. This enterprise is curiously unidimensional; in a sense, rules of law are treated as if they have the same self-contained quality as those governing basketball or chess. The social, political and economic factors that influence the development of doctrine are considered — if at all — through brief snippets from law review articles and notes interspersed between cases.

What is missing from the traditional torts course, then, as from the curriculum more generally, is a concern about the historical, moral and economic values that inform liability rules. Over the years an important literature on the intellectual foundations of tort law has been produced — much of which is familiar to virtually every torts teacher. Yet in the past, we have not been willing to say that the classic questions about the nature of tort liability are sufficiently

1. I would emphasize that I do not regard this dimension as the only element of legal education that has been slighted in the traditional curriculum. Claims can be made for more clinical training, directed research, specialized interdisciplinary courses, and a variety of other programmatic efforts to diversify and enrich the curriculum. Indeed, I would regard it as highly desirable if legal education were to move towards introducing a variety of curricular offerings that would allow the student to combine wholly disparate learning experiences, such as exploring the theoretical underpinnings of tort law in one course and simulating the handling of a malpractice case in another.

important to warrant independent analysis of the original sources, rather than merely tangential treatment within the confines of case analysis.

The essays in this book are intended to be representative of the major scholarly writing that has been done over the past century on the development and rationale of the tort system in the United States.[2] The organization of the materials follows the course of historical development. The era of rapid industrial growth beginning after the Civil War marks our point of departure. Along with unparalleled expansion of commercial activity and avenues of transportation came an unprecedented rise in the injury toll. As a consequence, tort law came of age. For the first time, liability rules were required that possessed sufficient breadth and scope to serve as a decision-making framework for victims of a staggering array of unintended harms. The result, of course, was the negligence system.

The first four chapters of the book deal with the law of negligence from a variety of perspectives. In the opening chapter, essays by Oliver Wendell Holmes and Richard Posner focus on an issue that remains central to tort law today: the justification for fault liability in cases of unintended harm. Whatever the underlying rationale for the negligence system, questions of equal import arise about how the sytem functioned — past and present. The Holmes and Wex Malone readings in Chapter Two explore the recurrent practical issue of the allocation of power to decide between judge and jury. Still another side of the system in action is examined in the following chapter, in which Malone, Posner and H. Laurence Ross discuss aspects of the social impact of the negligence system. Finally, in the last of the chapters examining negligence, the focus shifts — anticipating the readings on strict liability in following chapters — to questions about whether fault liability ever really served as a comprehensive system for compensating unintended harms. Charles Gregory, William O. Douglas and Jeremiah Smith consider areas of strict liability that existed alongside of the negligence system.[3]

Whether or not negligence law once ruled supreme, it is clear that we are now in a new era. Changing attitudes towards compensation, new forms of insurance and a variety of other considerations have had a dramatic impact on tort law, creating a constant impetus towards strict liability in tort. But the negligence system has demonstrated remarkable toughness — resilience, as well as resistance, in

2. The scope of the book is limited primarily to consideration of liability for unintentional physical harm. Consequently, the coverage includes negligence, strict liability and no-fault compensation systems.

3. In the last instance, the author discusses a legislatively created system, workmen's compensation.

the face of pressure for reform. The literature of tort law has benefited greatly from the consequent tension between fault and non-fault systems. Academics, as well as courts and legislatures, have been forced to reexamine established principles of liability.

Chapters Five through Seven focus on this continuing process of reevaluation and change. Guido Calabresi, Posner and Walter Blum & Harry Kalven bring to the debate an economic perspective, analyzing the competing systems of liability rules from the standpoint of economic efficiency. In the chapter that follows, George Fletcher and Richard Epstein eschew economics in favor of distinctive schemes of corrective justice, focused on considerations of interpersonal equity. Finally, in the last chapter, theory merges with practice as Blum & Kalven and Marc Franklin discuss, respectively, auto compensation and social insurance plans — legislative alternatives for accomplishing, in varying degree, compensation irrespective of fault and outside the tort system.

The readings were selected, edited and organized with the classroom in mind. The book is designed for use in either of two ways. It can serve as a supplementary volume in an introductory torts course or it can be used as the primary text for an advanced course or seminar. In conjunction with an introductory course, the readings, with accompanying notes and questions, can readily be keyed to the subject matter covered in torts casebooks since virtually all of the essays can be inserted into the sequence of a typical introductory course. In some instances — such as the Douglas piece on respondeat superior, and both the Fletcher and Epstein articles on alternative liability systems — the volume actually takes up issues that might otherwise be ignored in such a course. In still other instances, the instructor might want to substitute an excerpt from this volume for the more detailed treatment in a casebook; for example, the Blum & Kalven piece on auto compensation plans might accomplish this end.

The volume was prepared, however, with recognition that many torts teachers are severely constrained by the limited hours allocated to the introductory course. With this in mind, I have designed — and myself taught — the volume as a text that stands on its own in a torts seminar. The excerpts are deliberately of sufficient length to make it feasible to analyze the essays in depth, and the notes and questions are specifically meant to serve as a basis for class discussion. The chronological, historical organization should satisfy the fundamental pedagogical tenet that the materials for a seminar demonstrate a coherent approach to a clearly delineated subject matter.

The volume is intended, then, as an exploration of the ideological roots of tort law. Torts teachers have been well served by treatise and

text writers, as well as a long tradition of law review scholarship analyzing tort doctrine. That literature provides an excellent supplement for the student who seeks missing pieces of the doctrinal puzzle or, perhaps, simply wants confirmation that all of the pieces are properly in place. It was not my purpose to duplicate that effort. Rather, I have tried to present a variety of perspectives on tort law, taken by scholars who have been stimulated by the intellectual challenge of timeless questions about allocating liability for personal harm.

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Contents

Chapter One

The Search for a Rationale for Fault Liability

Before the mid-nineteenth century, it would have been difficult to find any legal commentator who regarded liability for unintended harm as an organized body of law deserving serious attention.[1] In fact, however, the antecedents of modern tort remedies date back to medieval times in England. Before turning our attention to the modern era, the scattered evidence of early law deserves brief examination, if only to provide a sense of continuity and an historical perspective on the emergence of fault liability.[2]

In medieval England, redress for injury appears to have served the function of ameliorating the desire for revenge. The kin of an injured person were "rewarded" for abstaining from clan warfare by gaining satisfaction in damages according to the station of the victim. Concomitantly, forfeiture of the animate or inanimate instrumentality of harm was an accepted obligation in such a case. Civil and criminal

1. Fault principles extend to liability for intentional as well as unintentional harm. In this chapter, however, fault liability will generally be used to refer to the doctrinal rules for redress of unintended harms — the law of negligence.

2. For a more detailed account of the origins of Anglo-American tort liability, see Malone, Ruminations on the Role of Fault in the History of the Common Law of Torts, 31 La. L. Rev. 1 (1970). The definitive treatment of the English antecedents to contemporary tort law is F. Pollock & F. Maitland, History of the English Law (1895). An interesting cross-cultural survey discussing tortious liability in preliterate societies is McLaren, The Origins of Tortious Liability: Insights from Contemporary Tribal Societies, 25 U. Toronto L.J. 42 (1975).

remedies were indivisible, and the procedure for securing justice was a far cry from the modern adversary model. The alleged wrongdoer was subjected to trial by oath and ordeal, two processes that placed considerable reliance on religious stricture and revelation in determining guilt. There seems to have been no presentation of evidence about the defendant's actual course of conduct for purposes of determining blameworthiness. Thus, neither the process nor the substance of the law appears to have been designed to facilitate a determination of "fault" in the modern sense.

In the mid-thirteenth century, as part of the development of the forms of action, the writ of trespass appeared on the scene, marking the real beginning of the history of tort as an independent branch of law. Trial by oath and ordeal disappeared as part of a general secularization of the judicial process. Substantive liability in trespass turned on whether the victim could establish that defendant injured him through a "direct" act.

In the classic illustration of trespass a defendant threw a log into the road as plaintiff was passing. If the log hit plaintiff, trespass lay for the resulting direct injury. Sometimes, however, the log failed to hit the plaintiff; instead, it fell in his path and he tripped over it. The injury was indirect and there was no action in trespass. To accommodate this problem of the so-called "consequential" injury a second form of action soon developed, trespass on the case, which dispensed with the strict requirement that injuries be occasioned by a "direct" act. Legal scholars have debated whether it was necessary in establishing trespass on the case to show that the defendant had acted carelessly or unreasonably.[3] But it seems beyond dispute that no clearly understood conception of liability based on fault emerged at that time.

Through the mid-nineteenth century, liability in tort was confined within the restrictive boundaries of the forms of action, trespass and trespass on the case. Whether the forms in fact constituted a serious limitation on liability, however, is debatable. Intentional harms probably created no stress on the existing remedies. And, before the Industrial Revolution, inadvertent harm was a relatively unusual occurrence. Railroad grade crossings, industrial assembly lines, complex mass-produced products, crowded highways and other injury-producing phenomena were yet to redefine the terms of everyday life.

The latter half of the nineteenth century marked the beginning of modern tort law. A dramatic upturn in the toll of injuries attributable to industrialization and urbanization, corresponding with the final

3. See discussion and references at p. 15 infra, n.1.

eclipse of the forms of action, ushered in the era of fault liability. The concept of negligence as a basis for determining liability in cases of inadvertent harm was fused to preexisting notions of moral blameworthiness underlying liability for intentional harms to create a comprehensive theory of liability based on fault. In the decades that followed — from about 1870 through the beginning of the twentieth century — the law of negligence reached its apex, providing the rules of decision for virtually all of the most prevalent types of unintended harms.

Why did the law of negligence come to be so widely perceived as the most desirable means of determining liability for unintended harms? The importance of this intrinsically interesting question is underscored by the continuing vitality of the fault principle. While the law of negligence has lost its preeminent position, it retains a formidable influence on the shape of tort law — it remains a working system of rules and supporting ideology against which reform efforts are invariably measured and, frequently, found wanting.

The two essays in this section, written nearly a century apart, suggest the range of justifications that can be offered for a system of liability based on fault. Oliver Wendell Holmes wrote The Common Law during the golden age of the law of negligence. His statement of the moral and political case for fault liability is recognized as the classic rationale for the principle in its ascendancy. Richard Posner, a contemporary commentator, defends the negligence doctrine, now in retreat, as a system for the efficient allocation of economic resources. Taken together, these essays lay the foundation for a comprehensive examination of the rationale for the fault principle.

Holmes **The Common Law***

LECTURE III

Torts — Trespass and Negligence

The object of the next two Lectures is to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law. The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are

* *Source:* 77-80, 81-84, 88-99, 107-10 (1881).