Third Edition

Perspectives *on* Tort Law

Robert L. Rabin

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To 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 accomplishes 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.

In the mid-1970s, when I prepared the first edition of this book, many legal educators were engaged in self-criticism and a reexamination of goals precisely because law schools had concentrated too

exclusively on what they do best: analyzing issues and exploring the subtleties of doctrine within the confines of a comprehensive collection of appellate court opinions. I see only limited evidence that basic approaches have changed in the intervening years. Without downgrading the traditional 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 third edition, I have been guided by a continuing 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 thorough 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 into 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 snippets from law review articles and notes interspersed between cases.

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 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

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 mix 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.

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 cases involving victims of a staggering array of unintended harms. The result, of course, was the negligence system.

The first four chapters of the book deal primarily with the law of negligence, viewed 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. After this initial exploration of the meaning of the fault principle, Chapter Two attempts to assess the significance of the principle from a historical perspective. The essay by Charles Gregory, as well as my own contribution, explores the role of negligence from the preindustrial era to the mid-twentieth century. George Priest's essay develops the more recent movement beyond fault (and contractual privity) to strict liability for defective products, highlighting the role of enterprise liability thinking since mid-century.

Questions of equal import arise about the distinctive institutional characteristics of the system. The Holmes reading in Chapter Three explores the recurrent practical issue of the allocation between judge and jury of the power to decide. In the same chapter, James Henderson's and Mark Grady's essays offer contrasting perspectives on the courts' capacity to administer effectively a generalized duty of due care. Still another side of the system in action is examined in Chapter Four, in which Stephen Sugarman and H. Laurence Ross discuss aspects of the behavioral impact of tort liability rules.

Whether or not negligence law once ruled supreme, it is clear that we are now in a period of reexamining the principles of tort liability. Changing attitudes toward compensation, new forms of insurance, and a variety of other considerations have a dramatic impact on tort law, creating a constant impetus toward reparation irrespective of fault. But the negligence system has demonstrated

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. At the same time, the scope of the book is broad enough to include analysis of foreign systems — whether the system be English case law or the New Zealand accident compensation plan — when a comparative view seems illuminating.

remarkable toughness — resilience as well as resistance — in the face of rising claims and criticism from all sides. The literature of tort law has benefited greatly from the consequent tension between fault and nonfault 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, Walter Blum and Harry Kalven, Jon Hirschoff and Calabresi, and Richard Posner bring to the debate an economic perspective, analyzing the competing systems of liability rules from the standpoint of economic efficiency. In Chapter Six, George Fletcher and Richard Epstein eschew economics in favor of distinctive schemes of corrective justice, focusing on considerations of interpersonal equity. Finally, theory merges with practice in the last chapter as my essay discusses the sociopolitical conditions in which tort reform occurs, followed by Blum and Kalven, and then Henderson, discussing, respectively, auto compensation and comprehensive no-fault — legislative alternatives for accomplishing, in varying degrees, compensation irrespective of fault and outside the tort system.

The readings were selected, edited, and organized with the classroom in mind. This 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, readily can 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 Fletcher and Epstein articles on theories of corrective justice and the Henderson piece on the New Zealand no-fault system — the volume actually takes up issues that otherwise might 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 and Kalven piece on auto compensation plans might accomplish this end.

The volume was prepared, however, with the 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 have myself taught — the volume as a text that stands on its own in a torts seminar. The excerpts are deliberately of a length sufficient for thorough analysis, 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 by 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 has not been my purpose to duplicate that effort. Rather, I have tried to present a variety of perspectives on tort law from scholars who have been stimulated by the intellectual challenge of timeless questions about allocating liability for personal harm.

Robert L. Rabin

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Perspectives on Tort Law

Contents

Chapter 1

The Search for a Rationale for Fault Liability

For more than a century, three theories of redress have provided the framework for constructing a comprehensive basis of liability for unintended harm: negligence, strict liability, and no-fault recovery. Clearly, the dominant theory during most of this period has been negligence. Leading cases are filled with resounding affirmations, such as that of Commissioner Earl in Losee v. Buchanan: ". . . the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part."[1] Similarly, treatises, texts, and casebooks on tort law place major emphasis on the doctrinal foundations of negligence law: duty, breach, proximate cause, cause in fact, and the various defenses (with particular attention to contributory and comparative negligence).[2]

As might be expected, given the central role of negligence law, a great deal of attention has been devoted to exploring the rationale for liability based on fault. Some commentators, linking the rise of negligence to the industrial revolution, have argued that the fault principle—as a less expansive theory than strict liability — was a means of protecting youthful industries from inordinate liability.[3] We

1. Losee v. Buchanan, 51 N.Y. 476 (1873).

2. Questions of duty, proximate cause, cause in fact, and such defenses as assumed risk do not arise exclusively in negligence cases; nonetheless, they are usually given classroom and scholarly attention in the context of determining fault liability — the negligence case.

3. See Gregory, Trespass to Negligence to Strict Liability, pp. 35-42, *infra*, and references in Note 5, pp. 43-44.