The Expansion of Modern U.S. Tort Law and its Excesses

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Tort law in the United States was radically reformed over the past 50 years from a relatively minor mechanism for dealing with a small subset of accidents into, today, an institution that conceptually aspires to regulate all industries and social activities, making it the most significant regulatory body in American society.

Other chapters in this book document empirically the extraordinary rise of the field. This essay attempts to provide an explanation of these developments. It will show that, in theory, the expansion of tort law was well-intentioned and may have served a constructive purpose over some range. The essay will also attempt to show, however, that, because of the peculiar definition of the field—in particular, legal standards that are based upon vague and undeveloped economic analysis—modern tort law today exhibits vast excesses in liability that have transformed it into a significant instrument of redistribution that harms economic welfare in the U.S. and places the U.S. at a substantial competitive disadvantage to other nations. In recent years, other major nations, not appreciating the harms caused by the expansion of tort liability in the U.S., have begun to expand their internal tort law on the U.S. model. The expansion of tort liability by competitor nations will reduce the U.S. competitive disadvantage (though will not

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affect the competitive disadvantage against less-developed nations), but will contribute to the general diminution of world economic welfare, as has happened in the U.S., by substituting chiefly redistributionist for productive investment.

The paper first presents a brief history of conceptions of tort law that preceded the modern era. It next demonstrates how these conceptions were transformed following the mid-1960s. The paper then attempts to place these developments in the context of the then-emerging field of law and economics, in particular, the triumph of the approach of Richard Posner over that of Ronald Coase which was importantly influential in encouraging the expansion of the law. The paper separately addresses the rise of the class action, a significant adjunct of modern tort law, which vastly increases the deleterious effects of the law by allowing modern tort litigation to gain an extraordinary economy of scale. Finally, the paper discusses the economic effects of these developments.

Tort Law in the Pre-Modern Era

For the first centuries of the common law, private law—tort law, contract and property law—were seen to serve a minor role in the organization of Anglo-American life. The purpose of tort law was to compel redistribution from an injurer to a victim in a relatively small set of contexts, chiefly where the injurer had caused harm by acting in a way that deviated from normal activities. To describe this role of the law as a "system" is to incorrectly import a modern sensibility. Tort law sought no more than to compel redistribution where one person harmed another through an action that substantially departed from the status quo. The standards for assigning liability—that the injurer acted "unreasonably"; or failed to comply with "due care"—

show the commitment of the law to upholding the status quo. A damages payment served only a compensatory—i.e., redistributive—purpose. From this light, compensation, as reflected in the dominant legal remedy of compensatory damages, sought no more than to restore some victims to their pre-loss position.

In modern discussion, this view of private law has been supported by philosophical theories of corrective justice that attempt to justify this form of redistribution. These theories do not ignore the effects of legal decisions and rules on future behavior, but the role of private law viewed as a system of corrective justice, at best, is to prevent the need for future redistributive decisions; more typically, simply to restore the injured party (as much as can be done through money damages) to its pre-injury position, thus reinstating, except for the injury, the earlier status quo. Even modern theories of corrective justice view private law as serving a relatively modest role in societal affairs.

By protecting the status quo, private law, including tort law, had a limited role in the organization of a society's activities. As Holmes explained it, "the cumbrous and expensive machinery [of the legal system] ought not to be set in motion unless some clear benefit is to be derived . . ."[1] By definition, departures from the status quo, including actionable departures, are rarities. If such actions were more frequent, they would form a part of the status quo, suggesting the fluid—not principled—nature of the standard (which will be shown to have significance) and the fact that such a legal standard is not likely to importantly affect social organization.

The Rise of the Instrumental Conception of Tort Law

[1] O.W. Holmes, The Common Law at 96 (1881).

The modern—quasi-economic and instrumental—approach to the role of tort law was initiated in the 1940s, but became widely embraced in the 1960s, and expanded thereafter.[2] An earlier academic literature sought to define a set of tort law principles that would improve societal welfare, beyond merely protection of the status quo. Building on this work, the first iteration of what would become the modern view was the concurring opinion of Justice Roger Traynor of the California Supreme Court in the now-famous case, *Escola v. Coca Cola*.[3] The case was simple: A waitress in a restaurant was cut when a Coca Cola bottle exploded. The Court's majority opinion resolved the case on *res ipsa loquitur* grounds, a doctrine that presumes negligence—a departure from normal standards of behavior—from the facts of the case alone.[4] Justice Traynor, however, in a concurring opinion, argued that the manufacturer should be held

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[2] For a more detailed discussion of this history, see Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Studies 461 (1985).

[3] 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

[4] The case appears so simple to the modern eye that one wonders why the jury verdict in favor of the waitress was appealed to the California Supreme Court. In historical context, the case raised an interesting issue regarding the res ipsa doctrine since the manufacturer had dropped off the bottle at the restaurant some substantial time (36 hours) prior to the accident. At the time, a defense to a res ipsa claim was that the manufacturer had relinquished control of the product and thus should not be responsible for any subsequent event, which was attributed to the user or consumer, again suggesting the limited reach of tort liability.

absolutely liable for the injury, without regard to a showing of fault or negligence or even of a presumption of negligence through the *res ipsa loquitur* doctrine. He justified the position giving two reasons, both of which have something of an economic cast. First, the manufacturer is in a superior position to reduce the risk of injury:

> Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.

Second, even if the accident cannot be effectively prevented, the manufacturer can provide a form of insurance, passed on to the product's consumers in the product price:

> The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[5]

These two instrumental and quasi-economic goals—reducing the incidence of loss (improving safety) and, for losses that cannot be prevented, providing insurance through tort law damages—constitute the cornerstone of modern tort law. These goals were adopted as central to products liability law during the mid-1960s with the general adoption of the doctrine of strict products liability, first by the California Supreme Court;[6] then by the American Law Institute's Second <u>Restatement of Torts</u>;[7] ultimately, by courts or legislatures in all states.[8] The goals have been extended to other areas of tort law, beyond products, over the succeeding years.

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[5] Escola, 150 P.2d at 440-441.

[6] Greenman v. Yuba Power Prods., Inc., 59 Cal 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (Traynor, C.J.).

[7] Restatement (Second) of Torts, § 402(A) (1964).

More recently, these goals of employing the law to improve safety and provide insurance have been subsumed in the more general economic concept of "internalizing" the costs of injury to the injury-causing entity. The concept of internalizing costs is more centrally economic. The idea is to affect the productive decisions of all entities in the society by compelling them—through private law—to take accident costs into account in each of their productive decisions by directly imposing accident costs on them. Thus, the law serves to perfect the pricing system by requiring risk-generating entities to include in decisionmaking the price of accidents that result from their production.

At a very general level, the cost internalization concept is plausible. It becomes problematic, however, when the issue of causation is carefully addressed. As Ronald Coase showed many years ago, in the context of an interaction between a person injured and the entity whose production was involved in the injury, unless it is clear that one of the parties could have cost-effectively prevented the accident at a cost less than the other, one cannot from an economic standpoint attribute causation of the accident to either single party.[9]

Nevertheless, the goal of internalizing costs in order to create incentives to reduce the accident rate and to provide accident insurance is the dominant theory of tort law today. This goal has provided the justification for courts to expand substantive tort liability standards as well as to restrict legal defenses in a broad range of areas, from occupational safety to job-site discrimination. The goal—in particular, the internalizing costs concept—has also provided the basis for the expansion of recovery of non-economic damages, such as pain and suffering and

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[8] For a fuller discussion of these events, see Priest, supra note 2.

[9] Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

loss of the value of life, on the argument that, if costs are to be internalized, damages should equal the full costs of the accident, measured as completely as possible.

Together, these concepts have led to a vast expansion of tort liability over the past 50 years. Whether measured in terms of actual tort lawsuits (addressed in Chapter __); or in terms of tort law judgments or, more fully, judgments plus settlements, or more fully yet, judgments plus settlements plus attorneys' costs and fees, the amount of money transferred through the legal system has increased by many multiples and perhaps exponentially since the mid-1960s.[10]

In essence, the modern view has converted tort law into a regulatory institution that possesses authority over all activities in the society. From a political standpoint, direct economic regulation of industry has been relatively modest in the U.S. in comparison to other advanced nations, chiefly addressing natural monopoly industries. Modern tort law, in contrast, extends regulation through the concept of internalizing costs to all industries, indeed to all individual actions. There is no activity in the society that can escape the regulatory logic of the internalizing costs idea. Even activities that in other contexts are provided immunity from regulation—such as most governmental activities—fall under the regulatory purview of the theory of internalizing costs.

The Peculiar Role of Law and Economics in the Expansion of Tort Liability

[10] For some mid-term evidence of this trend, see Priest, Products Liability and the Accident Rate, in Liability: Perspectives and Policy at 184 (Litan and Winston, eds., 1988); Priest, How to Control Liability Costs, Fortune, April 24, 1989 at 323.

As mentioned, there is an economic or quasi-economic cast to the concept of internalizing costs in order to establish incentives to promote safety and to provide insurance. Modern tort law in the U.S. was importantly affected, however, by the circumstance that the analysis and interpretation of these quasi-economic ideas was presented to the courts not by economists, nor even by lawyers with substantial understanding of economics, but by law professors who had only a vague idea of the economic principles that they were invoking, though ultimately supported by law and economics scholars, who ignored the operation of markets as well as all empirical evidence of the effects of modern law.

In the field of products liability, which served as the most important template for the adoption of these ideas, leading to their expansion into all other areas of tort law, the principal interpreter of the new approach was Professor John Wade. In an otherwise obscure article in the Mississippi Law Journal,[11] Wade set forth a seven-element test to define when a product should be determined to be defective under the then-newly-adopted Second Restatement of Torts § 402(A), a test which came to be known as the "risk-utility" test.[12] Wade's seven-element test was adopted widely by courts in their expansion of strict products liability.[13]

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[11] John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 (1973).

[12] Wade argued that courts in determining whether a product had been defectively designed should consider these factors:

1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

From the standpoint of economic analysis, Wade's seven-element test is basically incoherent. It confuses entirely the question of whether the allegedly defective product should be banned from the market altogether—i.e., whether its aggregate "risk" is greater than its aggregate "utility", the purported subject of the "risk-utility" test—with the more relevant economic issue of whether there were marginal changes that might have been made in production or design that would have cost-effectively reduced the risk of product use for the particular consumer-claimant. Wade's risk-utility test—as well as the general conception of strict manufacturer liability—mentions the role of the consumer in preventing loss, but, by focusing on the risk-utility of the product, minimizes it. The Wade test also refers to insurance, but without any careful analysis of how insurance for product-related losses may most

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3) The availability of a substitute product which would meet the same need and not be as unsafe.

4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

5) The user's ability to avoid danger by the exercise of care in the use of the product.

6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. [Id.]

[13] See David G. Owen, Products Liability Law at 499-504 (2005).

economically be provided. Nevertheless, Wade's analysis of the issue commanded, and (almost unbelievably) still commands wide adherence.[14]

The academic field of law and economics began to expand at roughly the same time as the shift in the analysis of modern tort law. Ronald Coase's famous article *The Problem of Social Cost*, was published in 1962.[15] The California Supreme Court's opinion in *Greenman v. Yuba Power Prods. Inc.*, adopting the standard of strict products liability was delivered in 1963.[16] Coase's article was far too conceptually advanced to have influenced the Court and, perhaps too obscure, published in an economics journal. It was not cited by the Court.

Coase's analysis in *The Problem of Social Cost* is acknowledged generally as the seminal source of the application of economic analysis to legal problems. Richard Posner's important book, *Economic Analysis of Law*, published a decade later, in 1972, is commonly viewed as extending the economic approach, beyond Coase and other pioneers of the field, such as Guido Calabresi,[17] to a wide range of other fields, indeed across the law in its entirety. Though often unrecognized, however, there are deep differences between Coase's and Posner's analysis of

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[14] Cf. Owen, id. at 503-04. But see Owen's description of a recent Georgia Supreme Court case, Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994), Owen at 499, adopting an approach and a standard very similar to Wade's.

[15] Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960) (The years do not correspond because, as is well-known, the Journal of Law & Economics was years behind in its publications).

[16] Supra note 6.

[17] Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).

legal issues. With respect to the field of modern tort law, Posner's approached triumphed, in ways that have led to the excesses that currently dominate the law.

The central point of Coase's paper—that the assignment of liability will have no effect on the allocation of resources—is, essentially, a proposition that private law rules will not determine outcomes so long as parties are permitted to bargain around them. Through market transactions, the interests of interacting parties in maximizing joint welfare will overcome any non-market, such as judicial, conclusion as to how resources should be allocated. I have separately described the intellectual origins of Coase's insight.[18]

Coase, however, did not anticipate the direction of modern tort law. If courts had defined modern tort law in a way that allowed for subsequent market correction, the deleterious effects of the advance of the law, described below, would never have occurred. Market corrections would have overcome the law, as described in Coase's article.

To the contrary, in the expansion of tort liability, U.S. courts framed the expansive doctrines as what would now be called "inalienability" rules, following the terminology of a

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[18] Priest, The Limits of Antitrust and the Chicago School Tradition, 6 J. Competition Law & Econ. 1 (2010). See also Priest, The Rise of Law and Economics: A Memoir of the Early Years, in The Origins of Law and Economics: Essays by the Founding Fathers at 350 (Parisi and Rowley eds., 2005). Coase understood that market agreements were entered subject to transaction costs. Some analysts used the existence of transaction costs to justify the expansion of liability, chiefly in property law areas though also, as will be discussed, to justify the modern class action. This argument is unavailable in the products field and in other areas where transaction costs are low.

famous article by Calabresi and Melamed[19]: rules that cannot be contracted around. In adopting the standard of strict products liability and associated standards serving the quasi-economic objective of internalizing costs, courts in the U.S. prohibited a manufacturer or seller from limiting its liability by contract, such as through a product warranty. Where personal injury is involved—but not, for undefined reasons, with respect to other product-related losses—a contractual limit of liability is regarded as a contract of adhesion, and, consequently, unenforceable.[20] In this way, Coase's analysis of the welfare-correcting function of market transactions became irrelevant in the field of products liability.

Coase's insight in "The Problem of Social Cost" was so astounding that it took many years of subsequent discussion to fully understand it. Harold Demsetz was an important figure in this respect, writing several significant articles explaining the implications of Coase's idea.[21] Reflective of the importance of the idea, many scholars felt the need to define their earlier work in contrast to it. My colleague Guido Calabresi, an important law and economics theorist

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[19] Guido Calabresi and A. Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

[20] See Priest, supra note 2, for a further discussion. See also Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J. 1297 (1981), for a description of the operation of the market for product warranties.

[21] Harold Demsetz, When Does the Rule of Liability Matter?, 1 J. Legal Stud. 13 (1972); Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. Legal Stud. 223 (1972).

himself, initially claimed to refute Coase's idea;[22] subsequently, recanted the refutation;[23] and later claimed to have developed the idea himself, simultaneously with Coase.[24]

Important to the subsequent development of the field of law and economics and, in my view, to the ultimate expansion of tort law in the U.S., was the publication in 1972 of Richard A. Posner's *Economic Analysis of Law*. Posner, though not an economist (important, as I will explain, because Posner has never been interested in the corrective results of market processes), but with full mastery of economic analysis, applied that analysis in an extraordinary, encyclopedic manner, to all areas of the law. Some years earlier, in his first article in this vein, Posner had surveyed 19th Century U.S. tort law. This article, equally extraordinary, analyzed *every* tort law decision by American courts in the 19th Century.[25] Posner's article claimed that every 19th Century tort decision adopted a rule that achieved economic efficiency. Posner's 1972 book reinforced the conclusion of his early article on tort law, but expanded it, both over time—all tort law decisions in the 20th Century were equally efficient—and over the remaining

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[22] Guido Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713, 730 n. 28, 731 n. 30 (1965); Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 Yale L.J. 216, 231-32 (1965).

[23] Guido Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. Law & Econ. 67 (1968).

[24] See e.g., Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 Yale L.J. 1211 (1991).

[25] Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972). For good reason, much of the attention and respect given to Posner's conclusions derived from his prodigious energy.

private law fields: all contract and property law decisions over all eras achieved efficiency as well.

Posner's claims in this book had a revolutionary effect on the field of law and economics, beyond that of Coase.[26] Posner's analysis—in particular, the focus on the effect of legal rules on the allocation of resources—appeared to derive from Coase. But Posner went substantially beyond Coase. *The Problem of Social Cost* discusses legal cases, but they are quaint decisions from England,[27] raising conceptually interesting economic issues, but of no general importance to an understanding of the broader law. Posner, in contrast, addressed all common law cases and the rules emanating from them, with apparently equal economic acumen.

The deep difference in approach as between Coase and Posner, however, has not been fully appreciated, perhaps concealed because both were colleagues at the University of Chicago Law School. In addition, in the early years, when the relevance of law and economics as a discipline was heavily disputed, Coase and Posner were allies in the trenches, defending the application of economic analysis to law against startled and poorly equipped opponents. Within law and economics, however, their approaches could not be more different. Posner is the anti-Coase. Coase's analysis shows that market transactions will correct any less effective allocation of resources directed by governments, including courts. Posner's efficiency-of-the-law theory, in sharp contrast, eliminates markets. According to Posner, courts (through some unexplained process called "the implicit logic of the common law"[28]) adopt uniformly efficient rules. Where courts uniformly achieve efficiency, markets have no role. Coase views judges as imperfect

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[26] Priest, The Rise of Law and Economics, supra note 18.

[27] Coase studied law as an undergraduate.

[28] Richard A. Posner, Economic Analysis of Law at §8.1 (8th ed. 2010).

decision-makers, though of little (but distributive) consequence, given the ability of parties to negotiate around the rules they promulgate. Posner views judges as social engineers, always achieving efficient results. Markets are unnecessary to achieve efficiency.

The difference in these conceptual approaches defined the careers of these two great scholars, but also affected the direction and expansion of tort law in the U.S. Coase, largely uninterested in common law rules, most probably because his interests were in the operation of markets, perhaps because he thought that the market could overcome any flaw in judicial decisions,[29] never focused on the common law. Following his seminal article showing the ineffectiveness of governmental—judicial—regulation of common law subjects, at least where private contracting was allowed, he studied other vestiges of socialist interference in the market. The academic project he chose following *The Problem of Social Cost* addressed the governmental monopoly of postal delivery.[30]

Posner, in contrast, through his emphasis on the uniform efficiency of all common law decisions, endorsed the expansion of tort liability in the product defect field and in other tort law fields. An important article, with his gifted co-author William Landes, presented a model that

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[29]As editor of the Journal of Law & Economics, Coase was interested in legal rules dealing with industrial organization because he saw that regulatory policies or antitrust decisions could influence output. Regulatory commands and antitrust prohibitions cannot be contracted around. Coase did not apply the same critical approach to common law rules, perhaps because he thought contracting around was generally possible; thus, the market would correct legal rules. As mentioned, this is not true of the rules of modern tort law.

[30] Ronald H. Coase, The British Post Office and the Messenger Companies, 4 J. Law & Econ. 12 (1961).

demonstrated that the tort law standards of negligence, strict liability, comparative negligence and contributory negligence were, from an economic standpoint, identical in effect. All of these rules achieved efficiency.[31] This result was surprising and incredible. Roger Traynor would not have expected it; otherwise, what was the purpose of absolute manufacturer liability? John Wade would not have expected it. The Landes-Posner result was obtained, first, because it derived solely from a model; second, because the model assumed that, under strict liability, negligence, or any of their variations, courts applied optimal standards of contributory negligence with respect to victim activities. This assumption has no empirical support, though is buttressed by the belief that all common law rules are efficient.

Other modelers in the field of law and economics contributed support. In a paper that has been given great attention, Steven Shavell added to the foundation of the expansion of liability by showing—again, in a model—that the effects of the standards of negligence and strict liability were essentially identical, except that strict liability was advantageous in the context of what Shavell described as "unilateral accidents"—accidents in which only the activities of the injurer affect the accident rate.[32] The Shavell article remains widely cited even though, on Coase's analysis in *The Problem of Social Cost*, unilateral accidents do not exist.[33]

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[31] William M. Landes and Richard A. Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. Legal Stud. 517 (1980). The point had been made earlier, though less comprensively, in John Prather Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323 (1973).

[32] Steven Shavell, Strict Liability versus Negligence, 9 J. Legal. Stud. 1 (1980).

[33] Because both parties to any accident can adjust their activity levels.

These various contributions of economic analysis to the understanding of the expansion of tort liability probably cannot be shown to have directly influenced courts. It is an interesting, but unanswered, question as to the extent to which the Landes-Posner or Shavell articles, or their progeny, were relied upon by courts expanding modern tort law, irrespective of citation. But those articles and the many articles that derived from them had the effect of giving an economic imprimatur to the expansion of tort liability. Their prominence diminished economic opposition to the expansion of liability.

Some scholars criticized the expansion of liability. Richard Epstein was an early opponent,[34] though understanding his views was complicated since he had written earlier articles endorsing the strict liability standard on libertarian grounds.[35] I attempted to criticize the progression of the law.[36] Popular authors, such as Peter Huber, also opposed expanded tort liability.[37] Paul Rubin attempted to resurrect a contractual approach to the problem.[38] And there were others. All of these efforts had no effect. Modern tort law continued and continues to expand.

The Rise of the Class Action in Modern Tort Law

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[34] E.g., Richard A. Epstein, Modern Products Liability Law: A Legal Revolution (1980).

[35] Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1979).

[36] See e.g., Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).

[37] Peter W. Huber, Liability: The Legal Revolution and its Consequences (1989).

[38] Paul H. Rubin, Tort Reform by Contract (1993).

The introduction of modern class action procedures occurred roughly simultaneously to the substantive expansion of tort liability. The Federal Rules of Civil Procedure were amended in 1966 to adopt, in Rule 23, the class action as a means of aggregating private law claims that raised similar issues of law and fact. Aggregation of claims had been possible under earlier iterations of civil procedure, through the joinder of claims or parties. The adoption of the class action mechanism formalized and simplified the procedure, especially with respect to potentially large numbers of claimants. It also endorsed the idea that benefits could be achieved from aggregating claims.

The adoption of the class action mechanism was not without an economic justification, nor was it particularly controversial at the time given the success of the internalizing costs idea. Where, in our modern society of mass production and distribution, a group of individuals claimed common harm from a single source and where the economic harm to each individual might not be sufficiently substantial to justify the costs of litigation, but where the aggregated interests of the group would do so, consolidation of the claims through the class action device would serve the economic goal of appropriately internalizing costs to the harm-causing entity. The defining justification of the procedure was to achieve the quasi-economic ambition of internalizing costs. An opponent might have argued that, if each individual claim were not worth bringing, none should be brought.[39] The dominant view, however, again from the

[39] See Holmes' view on litigation, supra note 1. Holmes' view was more divergent from the modern approach and, if adopted, would have prevented the expansion of liability. In the passage cited at note 1, supra, Holmes wrote:

internalizing costs conception, was that, unless some means of aggregating these less-than-litigation-worth claims were available, costs would be imposed on potential claimants that were not appropriately internalized.

A central question in the definition of the class action procedure was how to impose upon the new class action the same controls that exist in the prototypical, single plaintiff versus defendant, litigation. In the basic view of the adversarial litigation process, control over the litigation is placed in the hands of the plaintiff—the alleged victim of some harm—with decisions made and directions given to the attorney by the plaintiff to best control the direction of the lawsuit. In this view, the plaintiff controls the lawsuit in the same manner as a property owner decides how best to develop the property.

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle pro tanto, and divide damages when both were at fault, as in the rusticum judicium of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things . . . [citation above at n. 1]. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but, as it is hoped the preceding discussion has shown, to the still graver offense of offending the sense of justice. The Common Law at 96.

Obviously, Justice Traynor, and modern tort law, rejected Holmes' judgment.

By definition, class actions are different. Any single plaintiff (or putative class member) will have suffered only partially—in comparison to the aggregate—from the allegedly harm-causing behavior. As a consequence, no single member of the class can personally make decisions appropriate on the basis of the full harm suffered by the class as a whole. The drafters of the class action device dealt with this problem by turning to political decisionmaking methods. A class would be "represented" by a class member or class members whose position was "representative" of the interests of the class and who was willing to serve a representative role. These putative class representatives would control the litigation, just as individual plaintiffs control individual litigation. Note that the conception of "representation" in class action litigation is quite muted. There is no election of representatives by the full class membership. A class member is chosen as a "representative" by putative class attorneys, though upon approval of a court, because her or his circumstances are alleged to be similar to those of other presumed members of the class.[40]

This conception of class action litigation, controlled through a weakly representative process for the advance of the action, would prove to be unrealistic. By definition, each class member possesses only a small stake—oftentimes a trivial stake—in the litigation as a whole. They are not the equivalent of political representatives whose current jobs and reputation depend upon their faithful representation. Representative plaintiffs still have no serious stake in the litigation; the time commitment required of a class representative is measured in hours: some discussions with attorneys; perhaps a deposition. The parties that possess a substantial stake in

[40] Other prerequisites for class certification are defined to give the representative class members individual-plaintiff like control over the class litigation. See Priest, Procedural versus Substantive Controls of Mass Tort Class Actions, 26 J. Legal Studies 521 (1997).

the litigation—often 30 percent to 40 percent of a settlement—are the attorneys selected to represent the class. A representative class member will typically possess a fraction of a percent of the outcome; class attorneys, 30-40 percent. As a consequence, in virtually all class action litigation, effective control over the litigation is possessed by class attorneys.

At base, this device converts tort litigation into a form of bounty system where the bounty hunters—the class action attorneys—are empowered to define the grounds upon which and the defendants from whom the bounty is to be extracted.[41] This has the effect of vastly expanding the reach of modern tort law. Attorneys can develop claims of harm, find individuals allegedly subject to those harms who will agree to serve as representative class members (there typically is little cost—time only, no direct cost—to serving as a representative class member and sometimes a small gain), and bring an action, purportedly on the basis of hundreds or thousands of individuals similarly suffering from such harms. The notion that a class action is a mechanism through which a number of individuals suffering harms can ban together to bring an action for redress is an artifice. The modern class action is an avenue for attorneys to create claims based upon expanded conceptions of modern tort law with the benefit of the mass aggregation of claims made possible through the class mechanism to threaten huge economic loss upon any defendant.

It is a measure of the in terrorem redistributionist effect of the modern tort class action that virtually <u>no</u> class actions, once certified, are litigated to judgment. As has been shown elsewhere, in typical civil cases that proceed to judgment, plaintiffs win as often as defendants.[42]

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[41] How they do so is described in other chapters of this book, notably Chapter 3.

[42] Priest and Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). Put quite briefly, this result occurs because defendants are unwilling to offer a settlement equal to a

In class action litigation, in sharp contrast, but indicative of the in terrorem feature of the process, once a class is certified, plaintiffs succeed in nearly 100 percent of cases. The class action procedure, obviously, vastly expands the effects of the expansion of tort liability.

In recent years, some modest constraints have been imposed upon class action litigation. Rule 23 of the Civil Rules has been amended to allow appellate review of class action certification. The Class Action Fairness Act removes many class actions to federal courts.[43] These are modest reforms. The potentially overwhelming economic effect of class action certification in the context of expanded tort liability standards remains a serious source of redistribution.

The Economic Effects of the Expansion of Tort Liability

What have been the effects of the extraordinary expansion of tort liability since the mid-1960s? Measuring the effects of tort law is particularly difficult since no adequate statistics exist recording either the benefits of tort judgments and settlements or their costs at any particular point or over time.

There exists, however, less systematic evidence from which inferences can be drawn as to the effects of the expansion of tort liability. As examples, at various points in time where the continuous increase in liability judgments has appeared to spike, various products and services have been withdrawn from the market. In the mid-1980s, for example, many pharmaceutical

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plaintiff's demand where the defendant believes (more than the plaintiff) that the defendant will win the case.

[43] Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711-1715 (2006).

products were withdrawn; day care centers closed; many doctors shifted from obstetric and specialized surgery to less litigation-prone practices; manufacturers of private aircraft went out of business, all allegedly attributable to the increase in liability judgments.[44] There were similar withdrawals of service—especially of medical services such as obstetrics—during periods of the 1990s and early 2000s.

Certainly, one of the ambitions of the expansion of tort liability is to create incentives for the withdrawal of products or services that are excessively dangerous in the sense that their costs of production, including resulting injury costs, exceed the benefits from use of the product. In some cases, the law may have had that effect. It is difficult to believe, however, that medical services such as obstetrics or specialized surgery, or products such as general aviation, are too dangerous to provide in any form. Moreover, there is evidence that, where legislatures have adopted measures limiting the expansion of liability, previously withdrawn products and services have been restored, such as general aviation manufacture after the enactment of federal tort reform and obstetric and specialized surgery services after state tort reform, as an example, most recently in Texas.

Why would products that are not inherently excessively dangerous be withdrawn from markets with the expansion of tort liability? The quasi-economic goals of increasing safety and providing insurance, themselves, provide no obvious answer. It is well-established as an economic proposition that enhanced liability will lead manufacturers and service providers to make investments in increasing safety up to the point at which the marginal benefit and marginal

[44] For a discussion of this period, see Priest, supra note 36.

cost of further investments are equated.[45] Additional liability will not increase investments in precaution beyond the point of maximum cost-effectiveness; it will only shift the burden of insuring losses that cannot be prevented from the victim to the injurer.

If the insurance provided through the tort system levied on manufacturers were superior to the insurance that could be obtained by potential victims—which Justice Traynor presumed—then the expansion of liability would increase the availability of risk-related products by reducing total product costs (manufacturing costs plus insurance). If the insurance provided through the tort system were the equivalent of private victim insurance, there would be no general effect on production. In contrast, where the insurance provided by the injurer through tort law, in the form of damages, is more costly than the insurance that could be obtained by potential victims and the difference in insurance costs exceeds the net benefit of the product to consumers, products and services that are not excessively dangerous will be withdrawn from markets on account of the expansion of liability because consumers are not willing to pay the increased insurance costs.

There are strong reasons to believe that tort law insurance is substantially more costly than private insurance available to consumers. Damages as measured by tort law differ dramatically from accident insurance benefits typically purchased directly by consumers or indirectly, when provided by their employers. Third-party tort law insurance provides full recovery of medical expenses and lost income; private first-party insurance never provides full recovery, but is uniformly attended by deductibles and forms of coinsurance to control moral hazard. Tort law insurance, in addition, provides full recovery of pain and suffering loss; in

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[45] See e.g., William M. Landes and Richard A. Posner, The Economic Structure of Tort Law 54-80 (1987).

contrast, there is no private first-party market for pain and suffering insurance because pain and suffering is largely unmeasurable (making it difficult to insure) and, more importantly, because it does not implicate financial well being, the equalization of which over time is the economic function of insurance.[46] Moreover, private first-party insurance is structured in order to constrain loss in ways impossible for third-party tort insurance.[47] Finally, the costs of providing third-party tort law insurance—including attorneys' costs and fees in the judgment and settlement process—are vastly greater than the administrative costs of providing and delivering first-party accident insurance.

These systematic differences between the magnitude and structure of third-party tort law insurance and first-party insurance explain why the expansion of tort liability is not universally beneficial to consumers or other potential victims. Products and services that are not excessively dangerous will be withdrawn from markets where the differential insurance costs are greater than the net benefits of the product or service to the dominant set of users.

The criticism of modern tort law, however, can be made more sharply. The compulsion of manufacturers and service providers to include an insurance component in the sale of products and services was thought to repair a distributive failure in American society: the fact that many in the society, especially the lower-income, did not possess insurance. That was why Roger Traynor endorsed absolute manufacturer liability. There are two important problems with this conception. First, the insurance provided through tort law is generally regressive: the insurance

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[46] For a further discussion of these points, see Priest, supra note 34.

[47] See Priest, How Insurance Reduces Risk, mimeo (1996). Briefly, insurance policies are drafted to include definitions of coverage, conditions, and exclusions that create incentives for the policyholder to constrain losses that allows reduced insurance premiums.

costs added to the price of the product or service will reflect the expected liability to all consumers, high-income and low-income alike. Since those costs—expected liability judgments or settlements—are determined by the measure of damages in tort law: lost income, medical expenses, and pain and suffering (highly correlated with lost income), the insurance cost component will be higher than average for low-income claimants and lower than average for high-income claimants. As a consequence, low-income consumers pay more for product- and service-related insurance than actuarially appropriate.[48]

Second, in our modern society, perhaps unlike that of 1944 when Justice Traynor first developed the strict liability idea, or even of 1963, in *Greenman,* when the idea was adopted by the California Supreme Court, Americans possess many other sources of insurance to address losses suffered from product or service use. U.S. citizens largely have first-party health insurance,[49] and also have other insurance resources that provide coverage of product-related losses: auto, homeowners, and life insurance. As discussed earlier, first-party insurance is more economical in many dimensions than insurance provided through the tort system.

This analysis also suggests the broader effect of the expansion of tort liability on innovation and economic growth. The prospect of having to include expected liability costs in the product or service price will affect the introduction of new products and services. Products

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[48] See Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J.1297 (1981); Priest, supra note 36.

[49] First-party health insurers routinely pursue claims against product and service providers through subrogation provisions in their plans. A separate, but unpublished, study (Priest and Kathleen Cleaver), shows that, in modern products liability litigation, only 4 percent of litigated cases are brought by low-income claimants.

and services never introduced because of a decision that expected liability costs would make them unmarketable constitute losses to innovation and economic growth that can never be observed.

The economic effects of the expansion of tort liability in the U.S. are evident. The expansion of liability has placed what is essentially a tax, a redistributionist tax, on U.S. productive investment. The tort liability tax, as explained, does not provide commensurate gain to those who benefit from it. As a consequence, it constitutes a deadweight loss on American output.

Deadweight losses will impair the competitive position of any economic actor. The deadweight loss of the U.S. tort liability tax impairs the competitive position of the U.S. in comparison to all countries not imposing such a tax. Though many European countries are moving in the direction of adopting U.S. tort law concepts—note that there is now growing asbestos litigation in Europe—none has adopted principles equivalent to those of the U.S. today. Nor certainly have lesser-developed nations, with less developed legal cultures. To the extent that they do, the competitive disadvantage of the U.S. will decline, but the economic welfare of the world will decline by substituting redistributive for productive investments.

Conclusion

There are strong reasons to believe that the expansion of tort liability since the mid-1960s has hampered innovation and economic growth. The effect of the expansion has been to shift an insurance burden to manufacturers and service providers. The provision of third-party tort law insurance is substantially more costly in many dimensions than the provision of first-party accident insurance. This shift in the insurance burden provides no benefit to consumers; indeed,

it imposes greater costs on all consumers; it imposes a regressive harm on lower-income consumers. The prospect of paying damages on account of the expansion of liability impairs innovation and economic growth because the increased insurance burden acts as a deadweight tax on innovation. The development in the U.S. of the class action mechanism accelerates these effects. Economic growth could be enhanced if tort liability were shorn of its insurance features and liability attached only where a party failed to make a cost-effective investment in prevention of the loss.