A THEORY OF NEGLIGENCE

*RICHARD A. POSNER**

NEGLIGENCE—the failure to exercise the care of an ordinarily prudent and careful man—has been the dominant standard of civil liability for accidents for the last 150 years or so, in this as in most countries of the world; and accident cases, mainly negligence cases, constitute the largest item of business on the civil side of the nation's trial courts. Yet we lack a theory to explain the social function of the negligence concept and of the fault system of accident liability that is built upon it. This article attempts to formulate and test such a theory, primarily through a sample of 1528 American appellate court decisions from the period 1875-1905.

I

There is an orthodox view of the negligence concept to which I believe most legal scholars and historians would subscribe that runs as follows: Until the nineteenth century a man was liable for harm caused by his accidents whether or not he was at fault; he acted at his peril. The no-fault standard of liability was relaxed in the nineteenth century under the pressure of industrial expansion and an individualistic philosophy that could conceive of no justification for shifting losses from the victim of an accident unless the injurer was blameworthy (negligent) and the victim blameless (not contributorily negligent). The result, however, was that accident costs were "externalized" from the enterprises that caused them to workers and other individuals injured as a byproduct of their activities. Justification for the shift, in the orthodox view, can perhaps be found in a desire to subsidize the infant industries of the period but any occasion for subsidization has long passed, laying bare the inadequacy of the negligence standard as a system for compensating accident victims. The need for compensation is unaffected by whether the participants in the accident were careless or careful and we

* Professor of Law, University of Chicago. Gary S. Becker, Owen M. Fiss, Morton J. Horwitz, Stanley N. Katz, John H. Langbein, George J. Stigler, and Hans Zeisel made helpful comments on an earlier draft of this article. Wendy Binder and Robert Schuwerk rendered valuable research assistance. Financial support was provided by the National Bureau of Economic Research under a grant from the National Science Foundation for research in law and economics; however, my findings and conclusions have not been reviewed or approved by the National Bureau.

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have outgrown a morality that would condition the right to compensation upon a showing that the plaintiff was blameless and the defendant blameworthy.[1]

There are three essential points here. The first, that the adoption of the negligence standard was a subsidy to the expanding industries of the nineteenth century, is highly ambiguous. It is true that if you move from a regime where (say) railroads are strictly liable for injuries inflicted in crossing accidents to one where they are liable only if negligent, the costs to the railroads of crossing accidents will be lower, and the output of railroad services probably greater as a consequence. But it does not follow that any subsidy is involved—unless it is proper usage to say that an industry is being subsidized whenever a tax levied upon it is reduced or removed. As we shall see, a negligence standard of liability, properly administered, is broadly consistent with an optimum investment in accident prevention by the enterprises subject to the standard. Since it does not connote, as the orthodox view implies,[2] an underinvestment in safety, its adoption cannot be equated with subsidization in any useful sense of that term. We shall also see that many accident cases do not involve strangers to the enterprise (such as a traveler at a crossing), but rather customers, employees, or other contracting parties, and that a change in the formal law governing accidents is unlikely to have more than a transient effect on the number of their accidents. Finally, whether the period before the advent of the negligence standard is properly characterized as one of liability without fault remains, so far as I am aware, an unresolved historical puzzle.[3]

The second major point implicit in the orthodox view is that the dominant purpose of civil liability for accidents is to compensate the victim for the medical expenses, loss of earnings, suffering, and other costs of the accident. Hence, if it is a bad compensation system, it is a bad system. Yet Holmes, in his authoritative essay on the fault system, had rejected a compensation rationale as alien to the system.[4] People, he reasoned, could insure themselves

[1] The various strands of the orthodox view are exemplified by P. S. Atiyah, Accidents, Compensation and the Law ch. 19 (1970); Guido Calabresi, The Costs of Accidents, A Legal and Economic Analysis pts. 4-5 (1970); Grant Gilmore, Products Liability: A Commentary, 38 U. Chi. L. Rev. 103 (1970); Cornelius J. Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash. L. Rev. 225 (1971); Herman Miles Somers and Anne Ramsay Somers, Workmen's Compensation—Prevention, Insurance, and Rehabilitation of Occupational Disability ch. 2 (1954).

[2] And as is made explicit in Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 515-17 (1961).

[3] Holmes argued brilliantly that it was not. See Oliver Wendell Holmes, Jr., The Common Law 100–05 (1881), and for the same argument in slightly different form, his article Trespass and Negligence, 1 Am. L. Rev. (N.S.) 1, 15-20 (1880). Other historical discussions are cited in Cornelius J. Peck, *supra* note 1, at 225-27.

[4] See Oliver Wendell Holmes, Jr., The Common Law, *supra* note 3, at 96, 110.

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against uncompensated accidents,[5] and there was accordingly no occasion for a state accident-compensation scheme. Holmes left unclear what he conceived the dominant purpose of the fault system to be, if it was not to compensate. The successful plaintiff does recover damages from the defendant. Why? Suppose a major function of the negligence system is to regulate safety. We are apt to think of regulation as the action of executive and administrative agencies. But the creation of private rights of action can also be a means of regulation.[6] The rules are made by the judges aided by the parties. The burdens of investigation and of presenting evidence are also shouldered by the parties. The direct governmental role is thus minimized—a result highly congenial to the thinking of the nineteenth century. Such a system cannot function unless the damages assessed against the defendant are paid over to the plaintiff. That is the necessary inducement for the plaintiff to play his regulatory role of identifying violations of the applicable judge-made rule, proving them, and when appropriate pressing for changes in the rule.

The third essential point in the orthodox view is that negligence is a moral concept—and, in the setting of today, a moralistic one. The orthodox view does not explore the moral roots of fault, but contents itself with asserting that such moral judgments as can be made in the usual accident case are an anachronistic, even frivolous, basis for determining whether to grant or withhold redress. The rejection of moral criteria as a basis for liability follows easily from the conception of the fault system as a compensation scheme and nothing more: it would be odd to deny welfare benefits on the ground that the recipient's misfortune was not the product of someone's wrongful conduct.

Characterization of the negligence standard as moral or moralistic does not advance analysis. The morality of the fault system is very different from that of everyday life. Negligence is an objective standard. A man may be adjudged negligent though he did his best to avoid an accident and just happens to be clumsier than average.[7] In addition, a number of the established rules of negligence liability are hard to square with a moral approach. Insane people are liable for negligent conduct though incapable of behaving carefully. Employers are broadly responsible for the negligence of their employ-

[5] Life and accident insurance was apparently fairly common during our period, at least among workers. See Gilbert Lewis Campbell, Industrial Accidents and Their Compensation ch. III (1911). In 1907-1908, some 49 per cent of workers in New York State involved in accidents carried some type of insurance. 1910 Rep't New York State Employers' Liability Commission 101.

[6] A book published by the Association of Railway Claim Agents exhorting railroad personnel to observe safety rules laid down in the book illustrates the regulatory function of private law. R. C. Richards, Railroad Accidents, Their Cause and Prevention (1906).

[7] See Oliver Wendell Holmes, Jr., The Common Law, *supra* note 3, at 108.

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ees. The latter example illustrates an immensely important principle. In less than four per cent of the cases in our sample was the defendant accused of actually being negligent. In all other cases the defendant was sued on the basis of the alleged negligence of employees or (in a few cases) children. The moral element in such cases is attenuated.

Moreover, to characterize the negligence concept as a moral one is only to push inquiry back a step. It is true that injury inflicted by carelessness arouses a different reaction from injury inflicted as the result of an unavoidable accident. We are indignant in the first case but not the second. The interesting question is why. What causes us to give the opprobrious label of careless to some human conduct but not other and to be indignant when we are hurt by it? The orthodox view gives no answer.

II

It is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand's famous formulation of the negligence standard—one of the few attempts to give content to the deceptively simple concept of ordinary care. Although the formulation postdates the period of our primary interest, it never purported to be original but was an attempt to make explicit the standard that the courts had long applied. In a negligence case, Hand said, the judge (or jury) should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident's occurring; and the burden of taking precautions that would avert it.[8] If the product of the first two terms exceeds the burden of precautions, the failure to take those precautions is negligence. Hand was adumbrating, perhaps unwittingly,[9] an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. It may be the cost of installing safety equipment or otherwise making the activity safer, or the benefit forgone by curtailing or eliminating the activity. If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the

[8] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).

[9] But it should be noted that Hand was no stranger to economic analysis. See especially United States v. Corn Products Co., 234 Fed. 964 (S.D.N.Y. 1916).

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ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability. Furthermore, overall economic value or welfare would be diminished rather than increased by incurring a higher accident-prevention cost in order to avoid a lower accident cost. If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.

One misses any reference to accident avoidance by the victim. If the accident could be prevented by the installation of safety equipment or the curtailment or discontinuance of the underlying activity by the victim at lower cost than any measure taken by the injurer would involve, it would be uneconomical to adopt a rule of liability that placed the burden of accident prevention on the injurer. Although not an explicit part of the Hand formula this qualification, as we shall see, is implicit in the administration of the negligence standard.

Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.[10] Under this view, damages are assessed against the defendant as a way of measuring the costs of accidents, and the damages so assessed are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system. Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

If indignation has its roots in inefficiency, we do not have to decide whether

[10] The first systematic attempt to explain a portion of tort law by economic theory was R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960) (English nuisance law). The extension of the approach to negligence is suggested, but not developed, in Harold Demsetz, Issues in Automobile Accidents and Reparations from the Viewpoint of Economics (June 1968), in Charles O. Gregory and Harry Kalven, Jr., Cases and Materials on Torts 870 (2d ed. 1969); and Guido Calabresi, in The Cost of Accidents, A Legal and Economic Analysis (1970), and in his earlier articles, cited *id.* at 321, has used economic theory to mount an attack on the negligence system. The utility of economic theory in explaining the law of intentional torts is explored in Richard A. Posner, Killing or Wounding To Protect a Property Interest, 14 J. Law & Econ. 201 (1971).

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regulation, or compensation, or retribution, or some mixture of these best describes the dominant purpose of negligence law. In any case, the judgment of liability depends ultimately on a weighing of costs and benefits.

In order to explore the hypothesis that liability for negligence is designed to bring about an efficient level of accidents and safety, I sampled American appellate decisions in accident cases from the period 1875-1905. That was the classical flowering of the negligence concept. Before 1875 the standard was rather new (although most of its major doctrines had been announced) and the reported decisions few. After 1905 the tort system entered a new phase. The first Federal Employers' Liability Act was passed in 1906 and the first workmen's compensation statute a few years later. These enactments cut deeply into the domain of the traditional negligence doctrines and, after initial constitutional difficulties, brought the classical period of the negligence standard to an end.[11] The disadvantage of choosing such a period is that it obscures the dynamics of legal change. The negligence system may have reached maturity in 1875, but it did not begin then. The process of selection and rejection by which earlier doctrines and procedures were woven into the coherent system that we will be examining in the following pages is of the highest interest, but it is a study in itself.

The sample was constructed in the following manner. I read every published accident opinion of an American appellate court (state or federal, final or intermediate) issued in the first quarter of 1875, 1885, 1895, and 1905.[12] A few categories of borderline cases were excluded, primarily those involving lost freight, nondelivery of telegrams, nuisances, and sales of liquor to drunkards. I abstracted the information in the opinions and then tabulated that information. The opinions in the sample constitute about one thirtieth of all the appellate accident opinions issued during the period.[13] By taking such a

[11] These developments are traced in Herman Miles Somers and Anne Ramsay Somers, *supra* note 1, ch. 2. The texts of the early federal employers' liability acts are set forth in W. W. Thornton, A Treatise on the Federal Employers' Liability and Safety Appliance Acts 545-48 (3d ed. 1916).

[12] Federal cases prior to 1895 are excluded because in the earlier periods there were no federal appeals courts other than the Supreme Court, and the Court decided few negligence cases (only one in the first quarter of 1885, for example). A problem with the 1875 and 1885 cases in the sample is that decisions in these early periods were not always dated, and some guesses had to be made. As a result, some of the cases included in the sample for 1875 were probably decided in 1874 and 1876; and in order to circumvent the dating problem I went to the first quarter of 1887, by which time dates can be found for all cases, for cases in a few of the jurisdictions in place of the first quarter of 1885. A spot check indicated that these modifications of the sampling method made no significant difference in the number and type of cases collected.

[13] This is a rough estimate. The flow of appellate decisions is not even throughout the year; in particular it tends to be thinner in the summer. In this respect, the sample may represent more than ¼ of the year's cases. But in two other respects the sample is incomplete: (1) not all appellate decisions were reported or reported sufficiently completely

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