

Tort law and harm/injury

- Actions (or failure to act) that cause harm and deserve court-awarded private compensation.
- Diff from contract law, gov't penalties (speeding fines).
- Liability.
- Purposes: Compensation and deterrence.
- Torts can be intentional or unintentional.
- Hence: negligence is typical standard.

Why standards of negligence and liability are contested.

- Alternatives to insurance or gov't.
- Negligence: requires standard of 'due care'
 - Problem of desirable/expected level of precautions.
 - Construct: reasonableness, normal or average practice.
 - Malpractice liability and defensive medicine

More on negligence and compensation

- Should courts compensate for pain and suffering?
 - Goes beyond 'losses'.
- What about lost income?
- Some accident avoidance measures are more costly than others.
- Asymmetrical knowledge and power between the parties.

Even more issues

- Should tort law be redistributive?
- Should it favor socially disadvantaged groups? (see Cooter and Ulen).
- Soaking the rich. Helping the vulnerable.
- Unintended consequences:
 - Too much litigation.
 - Passing on costs to all customers: cigarette mfrs.
 - Some agents can't pass on costs: no school playgrounds.

Are there better mechanisms?

- Government regulation:
 - Fines, monitoring, building standards etc.
 - Complement to torts, not a substitute (remember gov't failure). Gov't has poor info, sets minimum standards.
- Insurance:
 - Only works when risks can be fully assessed.

- Problem of moral hazard (adjusting care to the insurance).

Other mechanisms (cont'd)..

- Contracts (warranties), product warnings and disclaimers:
 - can't anticipate all possible damages, can't include all information.
- Caveat Emptor – let market decide.
 - Consumers know how much they value safety. Market will provide 'right amount'.
 - Assumes 'perfect information'.

Concerns of Economists (and others)

- 1960's: rise of new tort law.
 - Previous rules limited liability: e.g., contributory negligence.
- Jackpot mentality.
- New forms of compensation.
- Rise of litigious society.
- Social justice and more rights.
- Now, increased use of 'strict liability'. (more hazards are foreseeable – 'risk society')

Economists' alternative

- Pay attention to the behavioral function of legal rules.
 - Deterrence, not just compensation.
- Do we want to deter all accidents?
 - No: only those where the benefits of avoidance exceed the costs. (Posner)
 - Legal rules as incentives for precaution.
 - The 'value' of precaution is a 'how much' question (trade-offs).

Hand Formula

- B – burden of precautions.
- L – cost of each accident.
- P – probability of the accident.
- $p \times L$ – expected cost of an accident.
- Formula: $B (< \text{ or } >) p \times L$.
- Negligence determined using cost benefit analysis.
- No negligence when $B > (p \times L)$
- Why not?: SOCIAL EFFICIENCY
 - We don't want the **cost** of accident prevention to exceed the **value** of prevention.

Hand formula's implication

- Sensitive to marginal cost of accident avoidance.
- Not all prevention is valuable.
- We want to deter only inefficient accidents.

- Helps with Ford Pinto case.
- Liability threshold:
 - point where harm-causing actions result from lack of due (efficient) care.

Strict Liability

- Liability for any harm caused.
- Use of tort law to internalize all costs (not just in case of ‘negligent’ actions)
 - Aligns private incentives with social incentives.
 - I have an interest in preventing accidents until cost goes above expected cost of court settlement.

Problems with Strict Liability

- Lots of litigation: liability for every accident.
- Open to moral hazard: no recognition of contributory negligence.
 - Users will be less careful.

Negligence and Due Care: is it better?

- Avoids litigation costs when due care is exercised.
- But claims can be costly (investigation, expert witnesses, technology changes, etc.)
- Less incentive for firms to innovate (find cheaper or alternative ways of avoiding accidents)

Why use economic tests to establish standards of liability?

- An accident occurs.
- Who should have taken care, user or mfr?
- Economics provides impartial rule for assigning responsibility:
 - The agent who could have avoided the accident at the lowest (marginal) cost.

Caveat Emptor