Recent Developments in the Law of Torts

Introduction

Jon T. Hirschoff

Indiana University School of Law

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JON T. HIRSCHOFF

Two attitudes characteristic of our affluent society have exerted increasing pressure upon tort and compensation law. The first is intolerance of bad luck, to the extent that its victims are thought not only to need but to deserve compensation. The second is a belief that where the technology to prevent accidents or cure or prevent disease exists, it should be used. In reacting to this pressure, courts and legislatures may divert resources from other social goals. Legislatures are more directly responsible than courts for the resource allocation effects of their decisions. Courts sit to resolve disputes, and their decisions about compensation for bad luck and deterrence of accidents and disease must therefore be made in terms of rights and duties, principles and rules. Their decisions will have resource allocation effects in the aggregate, but the merits of a particular decision will seldom be argued in terms of collective resource allocation. Nonetheless, courts in their deliberations have been affected by the social attitudes I have described. There is therefore a need for consideration of the limits of adjudication as a process for redistributing wealth to accident victims and setting standards of conduct. We are fortunate to have in this symposium three thought-provoking articles which consider that question.

Professor Pearson's article examines some implications of the astounding opinion in *Helling v. Carey* for medical malpractice litiga-

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*A.B. 1963, Stanford; J.D. 1967, Yale; Associate Professor of Law, Indiana University, Bloomington.

1 Some scholars have argued that particular judge-made rules may promote "efficient" resource allocation through market mechanisms. See, e.g., Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975). That question is not at issue in this symposium.

tion. He argues convincingly that the court's rejection of the medical custom rule was unwise as a matter of policy. (The court held that the defendant ophthalmologists were negligent as a matter of law for failing to test the plaintiff for glaucoma.) The crux of his argument is that courts, in part because they must act in an ad hoc, case-by-case fashion, lack the institutional competence to set standards of care for the medical profession. It is not particularly surprising that a court, faced with a glaucoma victim whose disease could have been discovered at an earlier stage, would hold that it should have been. But even if the test were riskless (as Professor Pearson points out, it is not), a court could not possibly know the resource allocation effects of creating a duty to administer available riskless tests to patients complaining of a variety of symptoms, even if each of the tests, viewed in isolation, were relatively inexpensive. Thus the opinion, if favorably received in other jurisdictions, threatens to immerse courts in a problem they cannot handle.

The limits of the process of adjudication are more broadly addressed by Professor Henderson. He argues that policy-based changes in negligence law have eliminated much of the specificity of negligence doctrine, making it increasingly impossible for the torts litigant to claim that established legal rules entitle him to a favorable result as a matter of right. Thus the "retreat from the rule of law" referred to in his title. More specifically, he contends that legal rules were necessary to avoid the open-endedness implicit in negligence as a basis of liability in situations where the evaluation of conduct requires an assessment of complex technology, where special relationships are involved, or where practical limits on the extent of liability are required. The primary function of doctrinal limits on liability for negligence, he suggests, was to avoid arbitrariness by insulating courts from problems which would otherwise threaten to engulf them in a morass of social planning.

In his concluding paragraph, Professor Henderson admits that the negligence concept may have contained the seeds of its own destruction. Given a system of law based on compensating the victims of wrongful acts, it was inevitable, in light of the social attitudes I referred to at the outset, that formal limitations on recovery would drop away and that more and more acts would be found "wrongful." But surely Professor Henderson is right that the degeneration of an entire system of law into an inefficient lottery cannot be tolerated, and that absent sufficient formality in its liability rules, the negligence system will not survive.

What will follow the demise of negligence is unclear. Legislatively adopted no-fault plans may replace adjudication. But that prospect
(whatever one may think of its attractiveness) is far from certain, and in the meantime courts must continue to decide cases. We may see a return to strict liability, but courts and scholars seem unable to agree on what strict liability means and how it differs from "fault." The task which faces torts scholars in these circumstances is to assist courts in developing new tests for liability which will lend themselves to formal expression and thus facilitate adjudication. In doing this, we have an assist from a commercial law scholar, Professor Schwartz. It might be tempting for courts, as negligence doctrine dies, to turn to distributional rules in resolving torts disputes. Thus the concurring opinion in *Helling v. Carey*, rejecting the majority's duty approach, suggested the imposition of strict liability on doctors where they are, through the use of insurance, financially more responsible than plaintiffs. In his article, Professor Schwartz defines a distributional rule as one which makes a particular class better off at the expense of other classes. He contrasts distributional rules with "general rules," which encourage the performance of duties which we all have. He then argues that courts should generally not adopt distributional rules because they will lead to an arbitrariness which should not be characteristic of adjudication but develops criteria to justify exceptions to this prohibition against distributional rules. Finally, he examines the abolition of vertical privity limitations in products liability and proposals to impose unknowable risks on sellers, finds that rules of both kinds are distributional, but concludes that the abolition of the vertical privity limitation is nonetheless weakly justifiable.

The remaining two articles are less directly concerned with issues of institutional competence than the three already mentioned, but are no less timely. When no-fault automobile accident reparations bills were introduced in various state legislatures, their proponents argued that a significant improvement in the extent of victim compensation could be achieved without diverting public and private funds from other uses, so long as resources were reallocated within the existing fault-insurance system. Professor Little's article on no-fault reparation outlines some of the ways in which it was thought that this could be done, e.g., ending over-payment for minor injuries, abrogating tort liability for pain and suffering, eliminating multiple recoveries of tangible economic losses, and reducing administrative costs. He then provides us with some interesting information as to the extent to which the no-fault statutes adopted in Massachusetts, Florida, and Delaware actually address the goals which have been held out as desirable by proponents of no-fault plans.
Courts have been increasingly willing during the past fifteen years to allow damages for a variety of intangible losses, even while traditional damages of this kind (pain and suffering) have been under attack as diverting resources from needy victims who under the fault system receive no compensation at all. But a court presented with a grieving parent who claims damages for mental suffering or lost companionship because his child has been permanently injured by the defendant's negligence is not likely to take into account the plight of needy victims who are not before the court. Professor Love's article presents a strong argument that the rule denying actions for the lost society and companionship of an injured person is inconsistent with other common law rules and therefore, given the trend in favor of compensation, will fall. As to the possibility that recognition of such intangible losses will cause an increase in insurance premiums, she argues implicitly that generalized resource allocation questions are for the legislature; if compensation is too costly, the legislature can impose a ceiling.