

Tort Law, Moral Accountability, and Efficiency: Reflections on the Current Crisis

*Michael I. Krauss
Professor of Law
George Mason University*

Introduction

Tort law is like the Internal Revenue Service these days—almost no one likes it. Most people agree that today's Tort law discourages personal responsibility. Unfortunately, there is great disagreement about who *is* responsible for the injuries that Torts should address. Consider the following examples:

Plaintiffs' attorneys, consumer "activists" like Ralph Nader, and many politicians (in the main, Democrats) have for some time claimed that Tort law literally lets the powerful (physicians, hospitals, manufacturers, and so forth) get away with murder. They cite studies claiming that few injured people ever sue their tortfeasors, who therefore evade accountability for their wrongdoing. They advocate reforms that would make Tort more "plaintiff-friendly," by further restricting common law defenses such as "proximate causation" and "contributory negligence" (about which more below), expanding the scope of class actions, and expanding punitive damages. Their tort reform efforts had been successful at the state level until relatively recently.

Defendants' attorneys, insurance companies, and other politicians (in the main, Republicans) claim that Tort law is out of control. They contend that current Tort law allows people injured because of their own negligence to evade responsibility for their actions, and that Torts' uneven application in the various states has unduly increased the costs of doing business. In 1996 they invoked the interstate commerce clause of the United States Constitution to federalize, and propose several technical changes in products liability and medical malpractice (two principal components of Tort). Their tort reform bill was vetoed by President Clinton.

So all sides want tort reform. So do I. But what kind of reform, and at what level of government? My own verdict on the two Tort reform arguments sketched above is that they are defective, each in different ways. Their common failing, in my opinion, is to misunderstand the nature of Tort law. Each side (more the first group than the second, however) proposes reforms that would further denature this vital component of private ordering in a free society. Neither side adequately grasps the true nature of Tort law, the ways in which that nature has been diluted, and what we can do to bring it back.

To defend my verdict, let me recount three Tort stories from the Midwest.¹ The first was decided almost exactly one hundred years before the other two. All three cases made local newspaper headlines. In each case the plaintiff was victorious and the defendant protested the injustice of its fate. These stories provide clues that will enable us to explore the nature of Tort law and of its current plight.

Vosburg v. Putney (1893)

Vosburg originated when a twelve-year-old Wisconsin school boy lightly kicked a classmate in the shin after order had been called in a classroom one morning. The “kicker” apparently had every wish to annoy the “kickee,” but no desire at all to injure him. Unknown to the kicker, however, the kickee was recovering from an infection in precisely the spot where the contact occurred. The blow reactivated the wound, eventually resulting in permanent incapacitation. The young defendant, the kicker, was held financially responsible for the entire injury, despite his lack of knowledge of the plaintiff’s fragility. In an interesting aside, the court suggested that its decision would have been different had the kick occurred, say, during recess roughhousing on the playground.

Lee v. Chicago Transit Authority (1993)

Sang Yeul Lee, by all reports a hardworking immigrant and a good husband and father, was killed by the electrified third rail of Chicago’s “ell” track where it crosses Kedzie Avenue in Ravenswood, Illinois. To get to the rail, on which he was urinating when electrocuted, Mr. Lee had to cross a wooden barrier and ignore several signs that said “Danger,” “Electric Current,” and “Keep Out.” Those signs may have meant little to Mr. Lee, who apparently did not understand English. In addition, Mr. Lee was inebriated (the autopsy report placed him in the “stupor” category of intoxication) and was in urgent need of “relief”—the City of Chicago having declined to install any urinals in the vicinity. Following the death of her husband, Mr. Lee’s widow sued, invoking a litany of failings by the Transit Authority. Fourteen years later, the Illinois Supreme Court

approved the trial court's award of \$1.5 million against a Transit Authority which, it agreed, had not done all it could to make the "ell" trespass-proof.

Larson v. Indianhead Golf & Recreation (1996)

Daniel Larson was also apparently a decent family man. One day, he played golf at Indianhead Country Club from 4:00 P.M. to 6:00 P.M., after which he spent four full hours at the "19th hole" drinking. At 10:00 P.M., walking towards his parked car on the stylish "terra-lock" brick ramp leading from the clubhouse, he fell on his face and sustained serious injuries. He sued the country club, claiming that it was at fault for not constructing the ramp with smooth concrete—the spikes of one of his golf shoes had caught on the edge of one of the terra-lock bricks. The trial judge agreed, finding the country club "51 per cent negligent" for not having eliminated the irregular surface of the path. Larson, on the other hand, was found "49 per cent negligent" by the court for the way he walked toward his car with a blood alcohol content of .30 (three times the legal limit for drivers) after having consumed 13 drinks. The percentage negligence figures were crucial, for Wisconsin has modified the classic contributory negligence rule (about which more below) that prohibits recovery by a negligent plaintiff, but only if he is less negligent than the defendant.

Contract and Tort: The Legal Foundation of a Free Society

These three stories can teach us a lot about the connection of Tort law with moral responsibility. Note first that they each involve ruinous losses suffered by nice people. Such losses occur all the time and in many different ways. Wonderful people get cancer and die. Thugs wipe out a family's possessions. Schoolchildren are struck by lightning. Two drivers are involved in a car accident and are equally careless in its occurrence, yet one emerges spectacularly uninjured while the other is crippled for life. A proud and reputable merchant "loses his shirt," despite his hard work, when a more savvy competitor sets up shop next door. In each of these cases and in many, many others, the natural victim is a good person who in no way "deserves" his loss. This victim may quite naturally hope to transfer this loss to another person. Sometimes the law helps people transfer losses, sometimes not. When should it, and when should it not?

In a free country, transfers of losses from one private citizen to another are accomplished through Tort and Contract law. Both Tort and Contract constrain our liberties but they do so in very different ways. Contract, to paraphrase a classical paradigm, arises from our realization that atomized liberty results in a "freedom" that is, in Kris Kristofferson's immortal words, "just another word

for 'nothing left to lose.'" From this understanding springs the paradox that true, moral liberty (not the Kristofferson kind) is achieved when freedom is voluntarily swapped for mutual commitment and obligation. We may not alienate our liberty entirely (slavery is contrary to human moral equality and cannot be countenanced), but we can and must parcel bits of it off if we wish to partake of a moral life. Contract law is all about such partial swaps of liberty for commitment and obligation. Through contract the *citizen* is distinguished from the *recluse*.

But Contract law is only one of three modes in which obligations can be created in a free society. The other two are Family law and Tort. Unlike some family obligations, which can result independent of any choice,² Tort and Contract obligations can only result from *voluntary decisions*—a reflex movement, for example, cannot result in Tort liability. But whereas Contract concerns acts *designed* to result in a loss of liberty, tortfeasors have no intention of incurring legal obligations. Holding a contract debtor liable is philosophically easy: the debtor *agreed* to be held liable when he made his pledge. But on what grounds can we justify holding a tortfeasor to an obligation that he did not voluntarily assume? Blood relationships aside, why should we ever be liable to someone to whom we have made no promise? Consider two very different answers to this question.

One answer will lead to a moral Tort system. In this view, the Tort tribunal is not a social planner but an arbiter between citizens who have a disagreement about who should bear a loss that has already occurred. The court must, if it decides to transfer this loss, have a *reason* for doing so. This reason must be understandable to the parties to the dispute. It must in some way appeal to deeply common values, for the arbiter knows that he has neither the means nor the authority to replace these values with centralized decrees. This appeal to values is simultaneously an appeal to the intelligence of free and responsible people. It communicates to both parties that, even though we live in a world in which *losses* cannot be avoided, one can, by properly leading one's life, avert Tort *liability*. This kind of Tort law respects both parties to a lawsuit by evaluating the voluntary decisions they have made. In Kantian language, it treats them as *ends*, capable of moral self-determination.

At the other end of this continuum, an amoral Tort system has very different premises. Tort law is ascribed no inherent moral content and involves no evaluation of the voluntary decisions of the parties to a lawsuit. Rather, Tort liability is seen as a means of manipulating behavior so as to achieve some end result that the government has identified. This is what Friedrich Hayek would call a *constructivist* Tort law. Under this view, parties affected by Tort judgments

need not accept a court's verdict as legitimate any more than a rat accepts the "legitimacy" of the design of its maze. An amoral Tort system treats the parties to a lawsuit as means to some legislatively determined goal.

Classic Tort Law: A Moral System

In Anglo-American Common law of Tort, before the shift to be described below, two types of acts could lead to liability. Both types illustrated the morality of Tort.

On the one hand, individuals were liable for deliberately choosing to violate the rights of another. The intentional torts of trespass, assault and battery are easy to understand. The underlying proposition of *Vosburg*, the 1893 case summarized above, is nonetheless worth fleshing out. Clearly the *Vosburg* court felt that the plaintiff, regardless of the fragility of his leg, retained his right to it. Sitting peacefully in his seat in class, he had given no sign of consent to risk or yield his bodily integrity. His presence on the playing field during recess might have conveyed an implied authorization to engage in roughhousing. But absent such consent, the victim's rights may not be traded off by the court in the name of some higher social purpose.

It is important to note that the court did not accept a consequentialist defense in the *Vosburg* case. In modern discussions of that case it is frequently argued that the victim was the "least-cost-avoider" of his plight; he alone knew of his injury and he could have taken special precautions, such as wearing a shin guard to protect him from kicks until the healing process was complete. To paraphrase one strain of modern law and economics, about which more below, societal resources might arguably have been maximized if the victim had protected himself (or at least advertised his disability). But had the court allowed this sort of argument to preclude the defendant's liability, it would in a significant way have denied the victim's property right in his leg.

Intentional tort has a distinctly moral flavor. But most Tort disputes are not the result of intentional torts. Most "collisions" are accidental. Remember our basic question: In a legal system based on personal responsibility, when should accidental losses be transferred without contractual consent?

One response (the "strict liability" standard) identifies causation as the sole determinant of liability. This view divorces Tort law from morality. The defendant's voluntary choice is not evaluated. Rather, it suffices for Tort liability that the defendant accidentally *caused* the victim's harm, even if this happened without any fault.

Every Western legal system, including the Common law, adopted a different view of liability for unintentional tort. This view holds causation to be a

necessary but not sufficient criterion for Tort liability. It refuses to transfer accidental losses from the “natural” victim to someone else unless that someone else *wrongfully* caused the damage. This is, of course, the negligence standard.

The strict liability view of unintentional tort, divorcing causation from wrongfulness, has led to an amoral Tort law, in part through the rise of what can be termed *causal nihilism*. This transformation of legal causation is a remarkable and under-reported event. I believe it is the product of a decline in religious faith and of the belief in objective right and wrong, and of a concomitant rise of unrelenting “end-justifies-the-means” consequentialism. Causal nihilism has reared its head both on the political Left and on the Right.

The traditional Left-wing, of course, sees root “causes” of problems, where all causes are social, and where individuals are never causal agents but rather unwitting pawns of social forces. The Left rejects individual moral choice (and individuals’ responsibility for their choices) because to the Left, individuals do not “count.”

Part of what is typically considered the Right-wing, notably one segment of the Law and Economics movement, also reject classical causation, but for a very different reason. It simply finds irrelevant the moral judgments that lie behind our causal statements. Say that X, driving while drunk, drives onto the sidewalk and collides with pedestrian Y, whose resultant injuries prove fatal. Most of us would say that X, not Y, accidentally caused Y’s death. We would ascribe causal responsibility to X because we judge that X, and not Y, acted wrongfully. But from the amoral standpoint of economics, as Sir Ronald Coase pointed out in his famous article “The Problem of Social Cost,” causation does not objectively exist. Rather, causation is really just bilateral participation in the generation of social cost. Both X and Y were simply in the same place at the same time with wasteful social results, creating a joint cost minimization problem. If, for some reason, Y can be deterred more cheaply than X, this view does not object to Y’s being assigned causal authorship of his own death.³

Building on Coase’s insight, Professor (now Judge) Guido Calabresi argued that a view of cause that assigned causal responsibility by evaluating behavior morally after an accident was lacking in scientific rigor. Calabresi proposed defining cause “agnostically” as a before-the-fact “increase in risk.” So, if an activity increases the chances of a kind of injury *ex ante*, that activity *causes* the injury. In this way a bar owner “causes” a drunk’s erratic driving because, if the bar was not there, there would likely be less drunk driving. Holding bar owners liable will incite them to exercise control over their clients. The end (reducing drunk driving) justifies the means (holding the dram shop owner liable in Tort for the drunk’s voluntary behavior).

Note how far this consequential idea has strayed from everyday moral reasoning. Calabresi's "causation" does not consider it relevant that the bar client chose to drink. All that matters is that a financially solvent actor (in this example, the bar owner) can efficiently insure against a social cost in a way deemed appropriate by policy makers.

Causation thus understood becomes a tool of public policy, not a measure of moral evaluation of private action. The implications of this shift are ominous. For example, whereas under classical liberalism tort law is invoked when one wrongfully commits harm to another, a nihilistic legal system can prevent you from "harming by omission," since an omission to help is equally "causal" as active harm. Redefining cause in this way accelerates a shift of the focus of Tort from *process-oriented, negative rights* (like the "right to be left alone") to *result-oriented, positive rights*, like the "right to good health." Absent a moral view of causation, the lack of attainment of good health is no different from the direct deprivation of good health through a harmful action. The person (or the corporation, or the government) who does not help improve my health becomes just as "causally" culpable as the one who actively harms me, under this view. New definitions of causation, rights, and harm, I submit, are at the root of Tort's current moral decay.

The Shift of Models in Modern Tort Law

Recent developments in Tort can be understood as just such a shift from moral to amoral Tort law; from a body of law assisting private ordering to a court-ordered public policy. Let me offer two brief illustrations of the impact of this shift on Tort law, then return to the two modern Tort stories with which I commenced this essay.

Products Liability

Many products liability suits used to be Contract, not Tort, problems: If I think my new car is a "lemon," I think that my seller breached his obligation to deliver a satisfactory automobile. But a shift occurred in a series of products liability judgments in the 1960s that denigrated contracts as products of "unequal bargaining power" resulting in oppression of consumers by manufacturers. Public allocation of risk (by courts) became a preferred alternative to private ordering, substituting the manufacturer's absolute liability (without any wrongdoing) for a contractual allocation of risks. Strict liability was seen as an instrument with a social purpose: to force (wealthy) manufacturers to purchase insurance for (poor) consumers unwilling to buy it themselves.

These developments in products liability have been incorrectly called "the

takeover of Contract by Tort.” This description is inaccurate. Rather, in today’s products liability, Contract has been taken over by a constructivism *foreign to* classical Tort. Products liability has become an attempt to implement preferences about the proper distribution of resources. The central thrust of products liability today is precisely its indifference to moral notions of responsibility for wrongful behavior. Thus transformed, products liability has softened “causation” in the ways discussed above. No moral link between defendant’s behavior and plaintiff’s injury need be shown so long as the defendant is an efficient insurer. So Nissan is held liable to the driver injured in the car with no air bag, even though the driver knew that the car had no air bag when he bought it, because the auto manufacturer must be “incentivized” to provide airbags to all drivers. So a pub can be held liable (in thirty states) when an adult buyer of the product over-consumes, then chooses to drive away and is involved in a collision. So, most recently, manufacturers of cigarettes are alleged to be liable to state governments for their disbursement of medical care to people who have voluntarily used tobacco. This is civil liability by public *diktat*, in flagrant contradiction to the personal responsibility that characterized Common law Tort.

“Caretaker” Liability

The new paradigm has expanded beyond products liability. Thus *Lee*, the 1993 subway case alluded to above. Liability was rationalized by the need to “incentivize” the Chicago Transit Authority to prevent inebriated and illiterate people from trespassing onto its tracks. Thus, *Larson* in 1996 meant to encourage golf courses to landscape pathways in smooth (if unsightly) asphalt, so that they are safe when people in a drunken stupor choose to navigate them. Thus, cases condemning psychiatrists when their patients commit violent crimes; cases holding diskjockeys liable for on-the-air contests that lead some listeners to choose to speed to the contest location; rulings holding car owners liable when their unlocked vehicles are stolen by hit-and-run drivers; and so forth. In each case the party whose wrongful choices caused the injury would alone assume liability under classical Tort; under the new paradigm, wrongful causation takes a back seat to social engineering.

All but four states have abandoned the Common law’s contributory negligence doctrine, under which (to repeat) a plaintiff whose wrongful behavior has proximately caused his injury may not shift any of this injury to a defendant.⁴ The contributory negligence doctrine would have resulted in the *Lee* and *Larson* claims being dismissed outright. But under the modern doctrine of comparative negligence, negligent victims can recover from negligent defendants, with shares of negligence decided by jurors who often seem more swayed

by class envy than personal responsibility. “Joint and several liability” was a doctrine that had been limited to holding “co-conspirators” (e.g., multiple bank robbers, drag racers, and so forth) each liable for all the damage they caused. Today this doctrine is applied to allow tort victims to recover damages from defendants (like the psychiatrist, or the disk jockey, or the car owner who forgot to lock his doors) who are in no way joint tortfeasors, but who had the bad luck to be wealthy or insured. Jurors, formerly selected from the more educated segments of society, are today more likely than ever to be swayed by demagogic arguments based on class envy.

Under this new paradigm, Tort’s ability to address private wrongs has decreased. For to declare behavior wrong is to declare that there are objective standards of conduct, and in an age when all standards are supposed to come from legislatures and regulators and none from God and cultural tradition, judges are increasingly reluctant to call anything wrong unless it is also illegal. Thus, the concern for freedom of the press during a libel suit that should have been all about private fraud (i.e., the *Food Lion v. ABC* case). Thus, the concern for American race relations in a battery suit that in fact concerned one vicious double murder (the O.J. Simpson case). Thus, the decline of the Tort of Intentional Infliction of Emotional Distress under the banner of free speech (the *Falwell v. Larry Flynt* case, and the “f— the draft” case of the 1970s where Justice Harlan wrote, “One man’s vulgarity is another man’s lyric”). Our courts are increasingly reluctant to admit the possibility of private wrongs unless these wrongs have been declared illegal through public ordering. This moral constructivism (“If it is not illegal, how can it be wrong?”) is the ultimate victory of statist ideology over private moral responsibility.

Conclusion: What Can Be Done to Rescue Tort Law?

In what might be termed America’s first postmodern Inauguration Speech in January 1993, President Clinton spoke of our urgent need of “self-definition.” “Each generation of Americans,” he proclaimed, “must [presumably through their federal government] redefine what it means to be an American.” Both the President and the First Lady have consistently emphasized this “politics of meaning.” Their idea is that America means what we (presumably through our political representatives ...) say it means. Under such a guise, this article is nothing more than a loser’s lament—for Tort liability would then mean nothing other than what our governing institutions, allegedly acting in the public interest, say that it means. Under this view people with power determine, as opposed to discern, meaning. Legal philosophers will recognize

the debt that this philosophy owes to Critical Legal Studies' liberation of judges from the "archaic" constraints of text and of natural law.

My view is that President Clinton is as wrong about the meaning of America as Critical Legal Studies is wrong about the meaning of legal texts. What it means to be an American is not redefined in each generation or each election. It has an objective meaning provided for us by our founding documents. We are, I submit, a creedal nation defined by basic and permanent philosophic affirmations. These include the idea that citizens are responsible for their own behavior; that they have negative natural rights essential to the pursuit of their happiness; and that government must protect these natural rights. This credo preserves an intrinsic place for private ordering and obligation, and Tort law, one of private ordering's pillars, is therefore an intrinsic part of the American credo. But this credo is now persistently rejected. Modern Tort tends to be both devoid of and hostile to moral responsibility. President Clinton is certainly not the man to rescue Tort law from this malaise. Further denaturing of Tort as proposed by many of the President's allies will merely accelerate the destruction of its soul.

On the other hand, the federal Tort reform proposals vetoed by the President in 1996 are mere Band-Aids plastered onto a festering wound. They reflect the lobbies they serve. They limit defendant's liability in narrow areas without addressing fundamental problems or restoring basic principles. Worse, these federal Tort Band-Aids themselves contain medicine that is noxious to the ailing patient. They remove much of Tort from the ambit of state control, which is the *locus* of private ordering under our Constitution. Use of the "Interstate Commerce" clause to invade one of the last areas left under local control drives one more nail into the coffin of our federal structure. Moreover, the spirit of these reform measures borrows exactly from the public ordering rationale of their opponents. The federal Tort reform movement is "he says-she says," with both sides saying Tort is about public welfare. "He says" we will get cheaper products through absolute liability, since manufacturers will internalize accident costs into design. "She says" corporations need subsidies to compete internationally and reduce unemployment, and immunity from all liability in certain industries will provide that subsidy. Neither party seems to realize that if Tort is to be reborn we must return to its private ordering function. Tort must not be about immunizing plaintiffs or defendants from the consequences of true misbehavior, or about increasing or decreasing employment. As this essay has tried to show, Torts is not even about helping innocent victims as such: Most innocent victims (like the cancer and the lightning victims portrayed above) never

have any Tort recovery. Rather, Torts *is* about private moral accountability of a wrongdoer to his victim.

Tort law is in crisis, and I am afraid there is no magic solution. Many different people must do much on many different levels. Substantive state Tort law must be restored, *at the state level*, to the notions of personal accountability that prevailed until recently. Returning to original notions of causation, contributory negligence, and joint liability are what I have in mind. Shifting legal fees to losers and limiting unethically high contingency fees may also be needed to reverse decades of Tort abuse. On the bright side of things, recent developments in Illinois and California are very heartening. We who teach Tort law must educate our students, and through our writings reeducate judges and legislators, about Tort's fundamental nature. Judges must firmly instruct jurors, and take cases away from juries in cases that lack wrongdoing and causation. Until state legislators, the judiciary, and the academy do their jobs properly, Tort law will remain a distributive lottery. And to paraphrase a great sage, "All Lott's statutes and all Haster's men can't put Tort law together again."

Notes

¹ I have chosen this region, renowned for the sage moderation of its institutions, in preference to areas of the country where "Tort craziness" is deemed to be rampant. I hope the examples will lead readers to see that no area of the country has been spared the decline of Tort law.

² For example, children have obligations toward their parents, even though they did not choose these (or any) parents.

³ In Professor Coase's defense, I should note that he firmly believes that law (as opposed to economics) can and indeed must ascribe moral causation to one of the parties to an accident. He simply believes that economics, in and of itself, cannot do so. Coase's views have been borrowed by those who believe that law should be nothing but economics. Coase himself does not share this view of the law.

⁴ Only Maryland, Virginia, North and South Carolina, retain this classic Common Law doctrine.