

Summer 2000

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Recommended Citation

George L. Priest, *The Culture of Modern Tort Law*, 34 Val. U. L. Rev. 573 (2000).
Available at: <https://scholar.valpo.edu/vulr/vol34/iss3/7>

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THE CULTURE OF MODERN TORT LAW

George L. Priest*

In this speech, I would like to address a feature of legal regimes in general that is too often ignored in the study of how law operates. Though I believe that the concept is relevant to many different areas of law, I shall focus on modern tort law. I wish to address what I will call the "culture" of our modern law of torts. By culture, I mean a set of attitudes and expectations embedded in the conceptual basis of the law that is only captured in a limited way by the principal legal doctrines of the area of law themselves.

I believe that those of us who work in the field of law and economics, especially, have neglected the broader impact of the culture of modern law. As a consequence, we have failed to understand the significant consequences that have derived from the shift in the culture of tort law that occurred in the 1970s and 1980s from what is typically called the regime of "negligence" to the regime of increased responsibility for risk identified with the adoption of the standard of strict products liability. I have argued separately, including in this forum,¹ that the strict liability idea extends far beyond the products field. Here, I want to examine that extension more carefully.

Let me present a primary example of the failure of law and economics to appreciate the role of culture. According to the most basic principle of law and economics, there is very little difference in effect between the standards of negligence and strict liability. Indeed, when those standards and their defenses are appropriately defined according to economic analysis, there is virtually no difference, except in an extremely limited number of cases in which the injurer and the victim are in a position of exact equipoise with respect to fault. According to economic analysis, at this point, the strict liability standard compels the injurer to become an insurer of the victim. In all other contexts, however, strict liability and negligence (again, attended by economically appropriate incentives) generate exactly identical effects.

This analysis—though widely accepted—is belied by basic facts known to us all. This analysis asserts that negligence and strict liability

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¹ George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987).

are indistinguishable. Yet, over the past 20 years, we have seen a vast increase in the number of suits, in the number of settlements, and in the magnitude of liability payouts and insurance premiums.² We have seen in response a vast increase in the size of the plaintiffs' and defense bars, its training and its sophistication, as well as the development of an industry of expert witnesses, all unlike anything seen in the legal profession before, reflecting extraordinary investment toward redistributing resources in society through tort litigation. Law and economics on the whole has had nothing to say about these phenomena. The reason is that law and economics has neglected the importance of the broader culture of modern tort law.³

What was the nature of the shift in legal culture? If one reads cases from the turn of the 20th Century through roughly the 1960s, a period we associate with the negligence doctrine (though I think the term "negligence" does not capture its essence), we observe a legal culture in which our system of civil liability played a relatively minor role. The method of analysis of legal disputes was chiefly categorical: Did the defendant's behavior depart substantially from some vision of normal behavior to justify making the defendant liable for the plaintiff's losses? Unless that departure from the normal was extreme, the answer was "no" and the plaintiff was left to bear his or her losses alone. The economic implications of this approach toward civil liability were reliance on the market and reputation to create incentives for safety and an allocation to consumers-users of the responsibility of selecting the right products or services and, then, to watch out for themselves how they used them in order to prevent injury. A regime of this nature is not accurately described as one dominated by a conception of "negligence"--especially as the term "negligence" is defined by modern law and economics. The regime may be better considered as one in which "departure from normalcy" defines the most common grounds for finding liability.

In a story well-known to all,⁴ roughly from the period of the mid-1960s through the mid-1970s, there was a change in the law. I believe that, over time, this change developed into a profound

² George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184 (Robert E. Litan & Clifford Winston eds., 1988); George L. Priest, *How to Control Liability Costs*, *FORTUNE*, Apr. 24, 1989, at 323.

³ My talk at the Inaugural Monsanto Lecture, *Modern Tort Law and Its Reform*, 22 *VAL. U. L. REV.* 1 (1987), also neglected this broader culture.

⁴ For one version, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. LEGAL STUD.* 461 (1985).

transformation in the legal culture of tort law. The change began modestly with the alteration of a certain set of principles with no expectation of large scale changes in the effect of the law or in underlying behavior.⁵ But the underlying conceptual basis for the change and the way the change occurred meant that the change would have far-reaching effects beyond what could ever have been anticipated.

The change began in the products field with the adoption of the standard of strict liability which, in the first instance only placed modestly greater responsibility on product manufacturers to protect consumers.⁶ But the underlying shift in attitudes and in the conception of the role of law extended far beyond the modest adoption of the strict liability standard.

Many law and economics scholars have claimed that the strict liability standard is economically efficient.⁷ There is no question that strict liability *can be defined* in a way consistent with economic efficiency. But the underlying conception of strict liability is significantly broader: it is that repeat defendants—typically corporate parties—are in a vastly superior position than consumers to protect and insure against injury and loss.

Because of the change in the culture—not in the legal standard—defenses to strict liability central to the claim of economic efficiency, but meaningless to the culture, have never been seriously entertained. Thus, the defense of contributory negligence has been almost entirely abandoned. While many courts entertain a misuse defense, in practice the application of the defense operates far short of contributory negligence as defined in law and economics. Similarly, though nominally, many courts have retained an assumption of risk defense, it has largely been swallowed in the expansion of the duty of the injurer to warn of potential dangers, again reducing very dramatically the obligations of consumers that law and economics analysis assumes will apply.

These changes occurred because the development of products law was dominated and directed by a culture of the law, not by economic analysis. Indeed, to the extent that the field of law and

⁵ George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

⁶ See generally *id.*

⁷RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

economics was successful in defining an economic interpretation of the negligence standard just at the beginning of the change in legal culture in the early 1970s,⁸ many courts intentionally sought to define a strict liability standard that departed from this definition, for example, through elaboration of the maxim that strict liability was addressed to the nature of the product, not to the behavior of the manufacturer, a maxim that is meaningless in law and economics.

More generally, building on the underlying idea that strict liability constituted liability without fault of the *manufacturer*, courts began to ignore and increasingly have ignored the behavior, the choice, the position and the role of consumers with respect to product use almost entirely, focusing on some technological definition of an ideal product, not on the economic question of defining the set of consumer and producer inputs that optimizes safety.

This has led to an extraordinary transformation in the law. Today, in the products field, as a general matter, the only question for the jury is whether a safer product *could have* been designed or built that would have prevented the accident to the injured plaintiff in the case. This is not the standard that prevailed prior to the 1960s in which the jury was asked whether the product deviated too substantially from some norm. Nor is it the standard promoted by economic analysis which evaluates whether some greater level of consumer or producer investment at the margin would have prevented the accident, accepting that many accidents will occur that are not, from an economic perspective, worthwhile preventing. The adoption of the new approach--generated by the culture of the law, not by the legal rule itself--is responsible for the transformation of product suits from trials over manufacturing normalcy to trials over the disparate claims of product design experts.

It should be obvious that a culture which defines principal responsibility on corporate entities to either prevent or insure for losses is not by any inherent meaning limited in application to the products field. Indeed, this change of attitude has extended beyond the products field into all areas of corporate activity. The question again under modern culture is, could some change in corporate behavior have prevented the harm suffered by the injured plaintiff in this case?

⁸ See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

I believe that this change in approach is better understood as a cultural change, than only as a change in legal rules. First, the underlying attitudes and conceptions of our modern culture of tort law are entirely different both from the preceding regime and from economic analysis. The modern approach incorporates a method of analysis--an attitude--completely different from the categorical analysis of previous regimes in which the dominant question was whether the defendant's behavior had substantially deviated from the norm? Today the question is, could *anything* have been done to have prevented the injury? Under the culture of modern tort law, defendants prevail only where the accident was truly freakish or, to a large extent, self-inflicted.

Second, the conception underlying the culture of modern tort law is almost infinitely expandable. In the products field, focusing in some technological sense on the product, not conduct, and asking could anything be done to make the product safer, means that defendant liability is nearly certain to follow. In this country, we believe in perpetual progress. There is always something that can be done to improve a product, especially when the only template for improvement is the single accident in the underlying case before the jury.

Third, under this approach, the question of comparative responsibility as between plaintiffs and defendants largely disappears. Defendants are held liable as long as the plaintiff's behavior at the point of the accident was in some way foreseeable to the defendant. If the plaintiff's behavior--however incautious--was foreseeable, and the accident or injury still occurred, it follows that the defendant did not do enough to protect the plaintiff from the foreseeable consequences of the plaintiff's own actions. For repeat defendants, such as corporations, all actions of those citizens with whom they interact are foreseeable at some level of generality. Thus, it is not a defense in this legal culture that plaintiffs incur injuries while driving drunk, failing to wear seatbelts, or neglecting other common sense safety precautions. Standards and rules of this nature cannot be defended by economics; they reflect a culture alien to economics.

Fourth, because our system delegates decisions in liability cases to juries, lay juries have become the most important safety regulators of our society. The costs imposed on corporate actions by juries are far greater than costs imposed by the entire set of state and federal regulatory agencies. And juries operate in substantially different ways. A regulatory agency such as the National Highway Traffic Safety Administration, or the Food and Drug Administration, for example,

studies auto accident statistics or the results of drug tests in the aggregate and adopts regulations or imposes safety standards only where there is a strong statistical basis for believing that a different design might significantly save lives. Juries may be presented similar data, but the jury has to answer a different question. The jury is not asked, "Is there sufficient statistical support for believing that a product design change would improve welfare for consumers in the aggregate?" The jury is asked, instead, "Should this severely injured person sitting before you be compensated for the horrible and tragic losses or be forced to suffer the losses himself or herself?" A defendant may attempt to redefine the question as whether cars would be more or less safe on the whole if the plaintiff's expert's proposed design were adopted. But the jury is compelled to address the claim of this victim alone and is forced by the culture of the law if it is to render a defense verdict, to state to the victim, "You cannot recover because you yourself are totally responsible for your injuries" or "You cannot recover because the design you propose *may* have adverse effects on some unknown person in the future." If the plaintiff's expert is able to identify some alleged design improvement--and again, every product can be improved--the jury cannot reject the injured person's claim.

It is, thus, not a surprise that we have seen a dramatic rise in the creation of an industry of experts testifying that improvements to products could have been made, because the truly unpreventable is extremely rare. Our modern culture of tort law has vastly expanded legal liability. What are the consequences of this change in the legal culture? Despite the extraordinary increase in the extent of legal liability, no single study has been able to demonstrate any consequent improvement in safety or any reduction in the accident rate. Do not misunderstand me--the world is getting safer in every respect. There are many forces and reasons for that development. Yet, for every product and for every activity, the trend in accident reduction has been constant from the end of World War II to the present--there has been no additional increase in safety or in accident reduction that can be attributed to the expansion of liability.

This finding, however, is devastating to the ambitions of the culture of modern tort law. It means that the principal effort of the change in the legal culture has not been productive and not enhanced the welfare of American citizens. There have resulted far greater earnings to attorneys--both plaintiffs' and defendants' attorney--far greater earnings to experts, vastly greater recoveries to individual plaintiffs, but for no clear productive end. There is no demonstrable increase in safety.

It follows that the principal effect of the change in the legal culture has been redistributive, not productive. This is a most unfortunate development for our country—really for the productivity of the world—because many other countries are affected by our legal culture. Redistributive cultures thwart economic growth. They diminish gains from economic growth that otherwise would add longevity and enjoyment to life.

Over the past century, we have observed many cultures that are essentially redistributive. The most significant of these cultures—communism—failed; but in only some areas has been replaced by a culture of greater productivity. A second example is the culture of bribery and corruption of the underdeveloped world, which has kept those countries with small exceptions to an economic base closely resembling that of the Middle Ages.

The U.S. economy of course starts from a far stronger base. I am not claiming that the culture of modern tort law will lead us to the fate of the communist states or the Third World. But, we should not be led to complacency by what is today a happy comparison. Our measures of economic growth in this country are deceptive because they count the totality of resources devoted to modern law as contributing to the national product. Some surely do, but there is no empirical evidence confirming that the great expansion of tort law has had any productive effect. And the proportion of our country's resources devoted to this culture continues to increase.

The slow rise of the redistributive state after World War II in socialist countries such as Sweden progressively choked off that nation's economic growth. We must reevaluate the redistributive culture of modern tort law—with models and analysis much richer than those of modern law and economics—in order to avoid a similar fate.

