# BOOK REVIEWS

*Economic Analysis of Law* by RICHARD A. POSNER, Professor of Law, University of Chicago. (Little, Brown and Company, Boston and Toronto, 1977, 2nd Edition), pp. i-xxiii, 1-572. Cloth, U.S. Price $17.00. (Library of Congress Catalog Card No. 77-71509).

*I: Review by Neville R. Norman**

Posner's book will delight any reader who relishes the application of the techniques and methodology of one discipline to another. The general thesis running through much of this book is that the methodology of economic analysis can be applied to interpret and evaluate laws and legal procedures, even where commercial transactions are not directly involved. Economics deals with decision-making units, and the associated aims, mechanics and implications of the decision itself. Within a structure of chapters that looks rather like a summary version of an Australian law degree, Posner applies these notions to describe and appraise the laws of property, contract, family relationships, torts, criminal law and constitutional law. While the book is apparently directed at law students (page xxii) I suspect that it will be seen mainly as an application of economic methodology rather than having elucidated any new body of legal critique or interpretation.

Posner applies economic analysis of property rights (in relation to broadcasting, pollution, patents and privacy) to the analogous legal issues; the opportunity cost principle to evaluate the rationale of contract damage arising from *Hadley* v. *Baxendale*; analysis of production and consumption relationships within a family to test principles of settlement on family dissolution in the context of a market for children. In relation to the law of torts, Posner makes good use of present value analysis from economics to evaluate legal procedures for assessing the loss of earning capacity, though a fuller explanation of the present value method for the benefit of non-economists would have been desirable, and the three per cent productivity margin (page 147) is probably now too high both for the U.S.A. and for Australia. Proceeding to criminal law, he analyses the behaviour of a rational criminal, weighing the benefits against potential costs of the crime, although he does not mention the interesting application of the same technique in the American literature to the theory of tax evasion. But he does develop a theory of optimal penalties which should cast new light on the legal discussions of this issue.

The middle substantive section of the book seems to depart from the theme developed at the beginning and the end: it is mainly an economic discussion of anti-trust, taxation, wealth and income distribution and corporate finance, in relation to each of which there are more direct and comprehensive economics texts suitable to the lawyer; but in the

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final part the author returns to apply economic analysis more directly to the law, the political process, campaigns, and the economics of legal strategy, judgments, settlement and optimal litigation strategy. There are also chapters on the constitutional process and federation, racial discrimination and broadcasting laws.

An economist can only speculate that the application of his thinking process to another discipline will provide valuable new insights thereto. That is ultimately for the lawyer and the law student to decide. But comment can be passed on the type of economics so applied and its likely relevance to legal issues in Australia. In my view, the description of market theory exaggerates the role of price factors (for example, other influences on demand are ignored on page 4), skates over important economic concepts such as "economic efficiency" (pages 10-12) and in general presumes (as might be relevant in the U.S.A.) that a large number of law students and lawyers have already a quite adequate grasp of economics. Further, in a number of places (for example, page 13) the view is taken that theories should be judged according to their predictive ability, to the exclusion of a view advanced widely in the literature before Posner wrote that this test is insufficient (where testing is impossible) and insufficiently discriminatory as between rival hypotheses (where two or more of such may generate the same prediction). Equally, it does not help that the meaning of static analysis is given erroneously (page 27) and that the economist's notion of "marginal revenue" is defined (in the footnote on page 195) only in mathematical terms.

While chapter 9 on monopoly theory gives part of the justification for anti-trust law, it does not cover the market structural form of "oligopoly" so prevalent in Australia (and in the U.S.A.) and is probably less useful to Australian lawyers than other American works on the economics of anti-trust by Areeda, Asch, Koch and Scherer, for instance. Moreover, the book lacks a substantial discussion of the notion of competition, an omission that makes difficult the task before a lawyer seeking the economic rationale behind Australian trade practices law.

These blemishes and limitations aside, the book remains a stimulating example of the benefits of academic cross-fertilisation that should encourage new and critical thinking towards legal procedure, damages and other pecuniary awards, and a wide range of concepts. Although it requires to be supplemented from both of the disciplines it seeks to join, Posner's book will be a unique experience for the rapidly-growing number of law and economics students in Australia.

*II: Review by David Partlett**

A decade of stimulating and extensive thought in the economic analysis of law in the United States and to a much lesser extent in the United Kingdom[1] has passed Australia by. This economic thinking about

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[1] Ogus and Richardson, "Economics and the Environment: A Study of Private Nuisance" (1977) 36 Cambridge Law Journal 284; Harris, Ogus and Phillips,

the law is now inextricably part of the teaching of law in American law schools. Most of the leading American law schools have an economist on their faculty and some have centres for the study of the application of economics to law.[2] In the eyes of one commentator, so entrenched has the economic analysis of law become that it has been given an historical place in American jurisprudence.[3]

Whether it is our isolation, timidity or lack of imagination, legal scholars in Australia have not attempted to come to terms with the economic analysis of law. It finds a place neither in our writing nor in our teaching. In this country we are still at a stage of scholarship which is "practitioner-oriented and hence preoccupied with questions of legal doctrine".[4] In contrast, it has been stated that the American scholar today "is more likely to view the legal system through the lens of one of the humanities or social sciences".[5] The same tunnel vision with few exceptions has been ascribed to the "English lawyer".[6] Australian legal scholarship is poorer for its lack of receptivity. In this reviewer's opinion the economic analysis of law opens up a vast store of insight into the workings of legal rules and institutions.

In the scope of this review it is possible to accomplish only two things. First, to give a brief resume of the economic analysis movement and second, to offer some comments on Posner's book.

*Some background*

The movement is not a phenomenon of the last decade. To an extent we have had economists with us in certain fields of law for some time, for instance, in the regulation of trade and income distribution.[7] Specific focus in Australia in one traditional area has been given by the Trade Practices Act 1974 (Cth) with its overt economic rationale. However, the thoroughgoing economic analysis of legal rules and systems can be traced to the seminal article of Robert Coase, "The Problem of Social Cost".[8] This article in short discussed the influence of liability and

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"Contract Remedies and the Consumer Surplus" (1979) 95 L.Q.R. 581; J. M. Oliver, *Law and Economics: An Introduction* (1979).

[2] For instance the Center for Law and Economic Studies at Columbia University School of Law, and the Institute for Economic Analysis of Law at the University of Virginia School of Law.

[3] Grant Gilmore, *The Ages of American Law* (1977) 107-111; Gilmore dubs the school "The New Conceptualist"; see also G. Edward White, *Tort Law in America: An Intellectual History* (1980).

[4] Posner, "Utilitarianism, Economics and Legal Theory" (1979) 8 Journal of Legal Studies 103, 107; for isolated exceptions of Australian legal writing utilising economic analysis see Dickey and Ward, "Consumer Legislation in Socio-Economic Perspective: Observations from the Enactments in One State" (1977) 13 University of Western Australia Law Review 378 and Galitsky, "Manufacturers' Liability: An Examination of the Policy and Social Cost of a New Regime" (1979) 3 University of New South Wales Law Journal 145.

[5] *Id.* See also Krier, Book Review: "Economic Analysis of Law" (1974) 122 University of Pennsylvania Law Review 1664, 1666-1671.

[6] Ogus and Richardson, *op. cit.* 284.

[7] *Ibid.*

[8] Coase, "The Problem of Social Cost" (1960) 3 Journal of Law and Economics 1.

property rules on resource allocation.[9] The incubator in the development of this stream of ideas was the University of Chicago. The Economics Department under the leadership of Coase, Stigler and Friedman seeded the law school. Richard Posner has become the legal doyen of the economic approach and can be given credit for leading this remarkably influential school of thought. The approach is not wholly Chicago based; for instance, Calabresi of Yale Law School was also an early pioneer, adopting in most respects a less free market perspective than Posner.[10]

*The book*

As witness to the continued strength of economic analysis throughout the 1970s the first edition of this book was published in 1972 and the second edition in 1977. As Posner states in his Preface the new edition was necessary because "the literature on the application of economics to law has grown substantially . . ." (page xvii). The literature is now quite massive. This has been fuelled not only by Chicago's own Journal of Legal Studies and the Journal of Law and Economics but also by more traditional law school reviews which have given over increasing space to economic analysis.[11]

In view of this large and seemingly exponentially growing material Posner's book serves an additional use to its "use either as a text book in a law school in economic analysis of law or as a supplementary reading for law students who are interested in finding out what economics may have to add to their understanding of the legal process" (page xxii). This additional use is as a point of access to this learning for the uninitiated tyro lawyer.

The scope of the book covers what may be described as the whole constitutive process of the law. It runs from common law concerns such as property, contract rights and remedies, family law, tort rights and remedies, and criminal law to "public regulation of the market" including the "anti-trust laws" and regulation of the employment relation, to the "law of business organizations" including corporations and financial markets, to the "law and distribution of income and wealth", to the "legal process" including the judicial and legislative process, and to the "constitution and the federal system" including the economics of federalism and racial discrimination. This is a bewildering and wide ranging array. It is kept within the bounds of one book by selecting certain areas within each topic for treatment.

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[9] The article departed from the accepted Pigovian analysis. See Demsetz, "When Does the Rule of Liability Matter?" (1972) 1 Journal of Legal Studies 13.

[10] *Cf.* Calabresi, *The Costs of Accidents* (1970), Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harvard Law Review 1089; Calabresi, "Transaction Costs, Resource Allocation and Liability Rules—A Comment" (1968) 11 Journal of Law and Economics 67.

[11] For example: Goetz and Scott, "Measuring Sellers' Damages: The Lost Profits Puzzle" (1979) 31 Stanford Law Review 323; Goetz and Scott, "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach" (1977) 77 Columbia Law Review 554.

These disparate areas of law and the legal process are linked by three fundamental concepts of economics. The cardinal principle is that "man is a rational maximizer of his ends in life . . ." (page 3). Thus "if a person's surroundings change in such a way that he could increase his satisfaction by altering his behaviour he will do so" (page 4). From this stem three fundamental concepts. The first is "the inverse relation between price charged and quantity demanded" (page 4). In other words the economist's "law of demand" (page 5).

The second is the economic definition of cost: "Cost to the economist is 'opportunity cost'—the benefit forgone by employing a resource in a way that denies its use to someone else" (page 6).

The third, "is the tendency of resources to gravitate towards their most valuable uses if the voluntary exchange—a market—is permitted" (page 9). Posner explains:

> By a process of voluntary exchange, resources are shifted to those uses in which the value to consumers as measured by their willingness to pay, is highest (page 10).

This is the cornerstone of Posner's economic analysis. Legal rules, processes and relationships are measured by this yardstick of economic efficiency.

> "Efficiency" means exploiting economic resources in such a way that "value"—human satisfaction *as measured by aggregate consumer willingness to pay* for goods and services—is maximized (page 10).

Legal rules and processes in the book are examined under the microscope of economic efficiency. For instance, in torts, the function of the rules of liability is tested against the sounding board of the maximisation of efficiency. The rules of a tort system maximise efficiency by ensuring that persons who engage in harm creating conduct will do so only when the value to society of that conduct is greater than the costs represented by the harm it creates.[12] In situations where the cost of market transactions is too high for a contractual distribution of rights the prior distribution of rights and liabilities most approximating to the feasible market allocation will produce the most efficient result (page 11).[13]

As this efficiency notion is central to Posner's thesis it should be noted that it has been criticised.[14] It has been suggested by Professor Michelman that weaknesses stem from the lack of real world impacts of rules described as "efficient" and the burden of defending the theory against attacks on its empirical integrity.[15] These weaknesses can be remedied, Professor Michelman argues, by a restatement of Posner's

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[12] For a valuable perspective that this tort system represents a compromise between *laissez-faire* capitalism and collectivism see Calabresi, "Torts—The Law of the Mixed Society" (1978) 56 Texas Law Review 519.

[13] Borgo, "Causal Paradigms in Tort Law" (1979) 8 Journal of Legal Studies 419.

[14] Michelman, "A Comment on Some Uses and Abuses of Economics in Law" (1979) 46 University of Chicago Law Review 307, and Ogus, "Economics, Liberty and the Common Law" (1980) 15 Journal of Society of Public Teachers of Law (N.S.) 42, 50-53.

[15] Shuchman, "Theory and Reality in Bankruptcy: The Spherical Chicken" (Autumn 1977) 41 Law and Contemporary Problems 66.

hypothesis in the following way: that common law rules taken as a whole "tend to look as though they were chosen with a view to maximizing social wealth (economic output as measured by price) by judges subscribing to a certain set of ('micro economic') theoretical principles".[16] So numerous are the real world exceptions to efficient results that it would seem to be necessary for Posner to make this concession.

It is important to observe that this central efficiency criterion is not normative.[17] Posner does not propose that economic efficiency ought to be the guiding principle in determining legal rules and processes. This positon is made clearer in a recent article, "Some Uses and Abuses of Economics in Law".[18] It is important that this be kept in mind. Posner himself has confused the issue by answering critics who have proposed that the economic theory of law is a version of utilitarianism.[19] In refuting this argument he says, ". . . the economic norm I shall call 'wealth maximization' provides a firmer basis for a normative of law than does utilitarianism".[20] He later says:

> [E]conomic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments.[21]

He does not claim exclusiveness for the "wealth maximization" thesis; he admits that a "theory of rights is in fact an important corollary of the wealth maximization principle".[22]

In the context of his "Economic Analysis of Law" efficiency is used positively or descriptively and not normatively. We must be alert, and Posner fails in not sufficiently reminding his readers, that the inefficient result may be socially desirable, either because it is more just or fair or is designed for some other legitimate social purpose.[23] For instance, the legal rule may be designed to effect a redistribution of wealth rather than promote economic efficiency.

*Some perspectives*

This lays the foundations of the book. The reader will possibly be startled by some of Posner's arguments and conclusions. Here lies one of the great strengths of the book. For those complacent in their acceptance of traditional ideas about the law Posner's book comes as a disturbing shaft of light. The force of the book demands that we view the law from a fresh viewpoint. An example: in the law of Torts most students are told of the benefits of strict liability as opposed to

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[16] Michelman, *op. cit.* 308.

[17] Some deny the value neutral quality of economic analysis; see Cranston, "Creeping Economism: Some Thoughts on Law and Economics" (1977) 4 British Journal of Law and Society 103, 112-113.

[18] (1979) 46 University of Chicago Law Review 78.

[19] Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints" (1979) 8 Journal of Legal Studies 49, 74-75.

[20] Posner, *supra* n. 4, 103.

[21] *Id.* 110.

[22] *Id.* 126; by the "theory of rights" he is referring to the influential jurisprudence of Dworkin, *Taking Rights Seriously* (1977).

[23] Atiyah, *Accidents, Compensation and the Law* (2nd edition, 1975) 554-557.

negligence liability. Posner shows that strict liability may work inefficient results without any commensurate increase in the measure of safety afforded to, say, industrial workers (page 137).[24] He states that, "a pure rule of strict liability would frequently result in inefficient solutions to conflicting use of problems because it would give the victim of the accident no incentive to take steps to prevent it even if those steps cost less than prevention by the injurer" (page 139). In reaching an efficient result liability is to be placed on the cheapest cost avoider. If that party is the victim in economic terms society is better off if he bears the cost of the injury. This does not end the question, however. The subtlety of economic analysis must carry us further. It has been pointed out that litigation costs, which are a form of transaction costs, restrict the efficiency of a rule of law that encourages litigation.[25] A rule such as strict liability which lessens the likelihood of litigation may avoid costs by tending to keep a dispute out of court. The parties would have a firm rule of law around which to bargain.[26]

It may be seen then that strict liability is not the simple panacea that most Australian law students would believe from their course in Torts.

Posner finds the efficiency criterion running through the fabric of the common law (pages 179-180). Indeed, within the bosom of common law judges we can find lurking an element of Adam Smith or perhaps Milton Friedman:

> The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities (page 179).

Of the judicial process Posner says:

> The invisible hand of the market has its counterpart in the aloof disinterest of the judge (page 401).

As Professor Leff notes in a review this latter statement ignores the legal realist school of learning on judicial behaviour.[27] It may properly be said that the results of the judicial process may be influenced by the fact that judges tend to come from upper socio-economic groups. Posner although he does show that judges are restrained by the rules of precedent and the appeals system from obvious bias, fails to demonstrate that the extraneous factors that the realists have pointed to do not fundamentally influence judicial decision making.[28]

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[24] This thesis is spelt out in greater detail in Posner, "A Theory of Negligence" (1972) 1 Journal of Legal Studies 29.

[25] Epstein, "A Theory of Strict Liability" (1973) 2 Journal of Legal Studies 151, and "Defences and Subsequent Pleas in a System of Strict Liability" (1974) 3 Journal of Legal Studies 165. In liability for defective products, reform proposals have favoured strict liability; see The Law Reform Commission and Scottish Law Reform Commission (Law Com. No. 82) (Scot. Law Com. No. 45) *Liability for Defective Products* (1977) Cmnd. 6831 and Ontario Law Reform Commission, *Report on Products Liability* (1979).

[26] But compare Posner, "Strict Liability: A Comment" (1973) 2 Journal of Legal Studies 205.

[27] Leff, "Economic Analysis of Law: Some Realism About Nominalism" (1974) 60 Virginia Law Review 451, 471.

[28] The limits of the realist school are well discussed in Woodard, "The Limits of

Posner contrasts this underlying efficiency rationale of common law rules and processes with the often inefficient results of legislative decision making. The nature of the legislative process "creates a market for legislation in which legislators 'sell' legislative protection to those who can help their electoral prospects with money and/or votes". This leads to an emphasis on wealth distribution rather than on efficiency (page 405). For this reason, from an economic viewpoint, if the law must interfere because of high transaction costs, it is preferable that the interference be *per* medium of the common law rather than by legislation.[29]

*Some comments*

The reviewer's description is necessarily limited and can only give a glimpse of the richness of this book. Posner provides a remarkably penetrating analysis of many areas of law. No-one can be but impressed with the ability of economic analysis, at least in the hands of Posner, to lay bare policy choices available and consequences of legal rules. It is thus possible to glean the reason for the growing appeal of economic analysis—the lawyer can apply a matrix to any legal problem and gauge its suitability in producing efficient results. However, we should not be inveigled too easily. Dangers spring from Posner's pedantic presentation and somewhat simplistic overview of law and economics. The law is more complex than it is presented. Law students may be trapped into a belief that the law can be reduced to a Posnerian universe. Posner's simplification has a disarming quality; we need to be armed with the realisation that legal rules and institutions are influenced by moral, ethical, wider utilitarian, psychological and anthropological as well as economic considerations. And further that the aims of the law are as varied as the aims of society itself; economic considerations may play a very small role.

A second danger stems from Posner's simplified and pedantic presentation. Admittedly a full course in micro economics is out of the question but after a full immersion in Posner's book an interested lawyer, and even more so a law student, could not confidently use the economic tool in novel situations. One can admire the force of Posner's exposition but not accumulate the necessary knowledge and skill from this book for one's own investigation. A little knowledge is a dangerous thing. It seems easy to reach certain facile conclusions without a background in the intricacies of economics. One has sympathy for Sneed J. in the California case of *Union Oil Co.* v. *Oppen*[30] who attempted an economic analysis with a marked lack of sophistication. In this case the 9th Circuit Court of Appeal found that fishermen who had suffered economic loss caused by the Santa Barbara oil spill could recover damages from the negligent

Legal Realism: An Historical Perspective" (1968) 54 Virginia Law Review 689; G. Edward White, *op. cit.* 230-235 perceptively argues that the economic theory of Posner, amongst other universalist trends, is a reaction to the "atomization" of the law in the hands of the Realists.

[29] But compare Cranston, *op. cit.* 111-112.

[30] (1974) 501 F. 2d 558.

oil company. This conclusion was supported by reference to Calabresi's *The Costs of Accidents*.[31] The approach, as has been mentioned, is to place liability on the cheapest cost avoider. As Posner has shown the Court misapplied Calabresi's guidelines to identify the cheapest cost avoider although it reached the correct result.[32] It is abundantly clear that the oil companies were the cheapest cost avoiders; only the oil companies could take efficient measures to prevent or limit oil damage to fish and making them liable would provide the correct incentives to take those measures.

Although it is possible that the new generation of lawyers will have the requisite skills, the law being the mistress that she is is jealous of those who would devote time to attempt a full mastery of micro economics.[33] On the other hand, part of the lawyering skill is to be the generalist, to absorb ideas from other disciplines and harness them to practical use. Economics is not the first area to impose this challenge of absorption. The benefits to be gained from a successful mastery of economics as Posner well shows in this book are considerable.

The reviewer's complaints are necessarily mild, for it is impossible to see how one book could answer them. However, in the reviewer's opinion the criticisms should be brought to the attention of the members of the particular market to which the book is directed. A proper warning that law and economics are both in themselves sophisticated and complex may prevent a naive and misguided embrace of the Posner analysis.

The usefulness of economic analysis as a powerful analytical tool should be stressed. Posner's book stimulates thought on the application of economic analysis to the law. The possible fruitfulness of the approach may be observed in the following example.

The English Court of Appeal in *Allen* v. *Gulf Oil Refining Ltd*[34] recently considered the defence of statutory authority in nuisance cases. The defendant oil company under a private Act (the Gulf Oil Refining Act 1965 (Eng.)) had been authorised to construct certain works. The plaintiff was one of several villagers nearby the defendant's refinery who brought actions in nuisance based on noxious odours, vibrations and offensive noise levels, allegedly caused by the refinery. A preliminary point of law was taken by the defendant that the defence of statutory authority applied. At first instance this point was sustained. The plaintiff appealed to the Court of Appeal which reversed the finding at first instance.

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[31] *Supra* n. 10.

[32] Posner, *supra* n. 18, 299-301.

[33] *Cf.* Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 669 in referring to criticisms of facile argument by lawyers by Hayek in *Law, Legislation and Liberty* (1973); he agrees, "there is force in these remarks":

> [T]hey suggest the somewhat depressing conclusion that the attempt by lawyers to extend their understanding of economic theory may often make matters worse, because most lawyers will only succeed in understanding what was orthodox a generation or two back.

[34] [1979] 3 W.L.R. 523. The assumptions of the Chicago school are not universally accepted: Markovits, "A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World" (1975) Wisconsin Law Review 950.

Lord Denning M.R. and Cumming-Bruce L.J. delivered careful speeches analysing the background and rationale of the defence of statutory authority. Lord Denning M.R. stated as the applicable general principle the following:

> I have considered this case on the construction of the statute according to the principles laid down in the railway cases of the 19th century. But I venture to suggest that modern statutes should be construed on a new principle. Wherever private undertakers seek statutory authority to construct and operate an installation which may cause damage to people living in the neighbourhood, it should not be assumed that Parliament intended that damage should be done to innocent people without redress. Just as in principle property should not be taken compulsorily except on proper compensation being paid for it so, also, in principle property should not be damaged compulsorily except on proper compensation being made for the damage done. No matter whether the undertakers use due diligence or not, they ought not to be allowed—for their own profit—to damage innocent people or property without paying compensation. They ought to provide for it as part of the legitimate expenses of their operation, either as initial capital cost or the subsequent revenue. *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679, exposes the injustice of the Victorian rule. A landowner had a wood of eight acres before the railway came. The railway company got a private Bill and built the railway. Sparks from an engine burnt down the wood. He was denied any compensation at all. To avoid such injustice, I would suggest that, in the absence of any provision in the statute for compensation, the proper construction of a modern statute should be that any person living in the neighbourhood retains his action at common law; and that it is no defence for the promoters to plead the statute. Statutory authority may enable the promoters to make the installation and operate it but it does not excuse them from paying compensation for injury done to those living in the neighbourhood.[35]

Lord Denning states his principle in terms of compensatory justice. The strength of this perspective in the law should not be underrated.[36] However, to use a cricketing analogy that I hope Lord Denning would find appealing,[37] he has concentrated on the opening fast attack and neglected the complementary spin attack. The spin attack would have involved a consideration of the economic perspective. This would have supported him in his initial presumption of liability on the private undertaker. Liability in efficiency terms is to be placed on the cheapest cost avoider. This is clearly the defendant oil company for the villagers would have great and probably insuperable transaction costs imposed in bargaining for the right to be free from pollution or in relocating.

What of the defence of statutory authority? The oil company can be thought of as having bargained for its legislation (page 408). In economic terms if part of this bargain were an easement to pollute, the

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[35] *Id.* 532.

[36] But *cf.* Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harvard Law Review 537; Epstein, *supra* n. 19.

[37] The Master of the Rolls' regard for the game is judicially exposed in *Miller* v. *Jackson* [1977] 3 W.L.R. 20, 24.

failure to enforce it would bring in its train costs; a disincentive would be created for parties in the future to commit resources on faith of such bargains.

The difficulty faced by the court in this area is to recognise when a right is granted. The parties can be presumed to have ordered their legal relationship on the basis of existing law.[38] The *discrimen* was whether the Act *expressly* authorised the operation and use of the refinery. The absence of this express authorisation was fatal to the defence in *Allen.* This in practice, is an indeterminate test and its uncertainty is costly. A firmer rule would avoid those uncertainty costs.

Lord Denning's new rule based upon compensatory justice, while certain, precludes an entire range of bargaining available to a company establishing an operation. The rule absolutely determines that an easement may be granted only on terms that compensation for injury be paid if and when an action is available at law. Parliament is precluded from bargaining this right of action away in the usual sense of granting a statutory authority.[39] To base this his Lordship relies upon the polluter pays principle, a principle justifiable in terms of compensatory justice but not economic efficiency. The economic detriments of Lord Denning's test should be considered. It may increase the cost of allocation of resources to their most efficient use. Certainly the government and industry could negotiate around the rule by expressly excluding its applicability in legislation but this in itself will impose greater transaction costs. This opens up a wider consideration of justice. May it be that Lord Denning's new test would increase the costs of goods to the public? This would act in the long run as a regressive tax,[40] its impact being felt disproportionately by the poor. A consideration of the ramifications of an increase in the cost of oil should give pause to a narrow application of compensatory justice, the basis of Lord Denning's rule.

*Victoria's Lawyers. The First Report of a Research Project on "Lawyers in the Community"* by M. HETHERTON, M.A., DIP. SOC. WK.; Research Officer, Victoria Law Foundation. (Victoria Law Foundation, 1978), pp. i-xi, 1-200, Appendix C—The Questionnaire i-xxiv. Paperback, recommended retail price $6.90 (ISBN: 0 908417 00 4); *Lawyers and their Work in New South Wales—Preliminary Report* by ROMAN TOMASIC, B.A., LL.B.; Senior Research Officer and Solicitor, Law Foundation of New South Wales, and CEDRIC BULLARD, B.A., PH.D.;

[38] Hence the reliance upon previous case law in *Allen* v. *Gulf Oil Refining Ltd* [1979] 3 W.L.R. 523: the rules of precedent in the common law increase efficiency by "firming up" rules, see Landes and Posner, "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19 Journal of Law and Economics 249.

[39] The contractual basis of, at least, private Acts was well recognised in the 19th century: *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.* (1877) 2 Ex.D. 441, 445 *per* Lord Cairns, and *Davis & Sons* v. *Taff Vale Railway Co.* [1895] A.C. 542, 559 *per* Lord Macnaghten.

[40] For economic analysis see Alchian and Allen, *Exchange and Production: Competition, Coordination, and Control* (2nd ed., 1977) 279-280.