The healthy fear of being sued - is it a deterrent to the commission of civil wrongs?


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Executive Summary

This essay aims to conclusively prove that the common law system of tort is an unambiguous deterrent to the commission of injurious conduct and civil wrongs in society. This is done by conceptually analysing the three major theories mooted as the rationales for common law negligence, namely the insurance theory, the corrective justice theory, and deterrence. It is submitted that the insurance theory and the corrective justice theory contain conceptual difficulties sufficient to place their efficacy under extreme doubt, whereas the deterrence theory is not only unencumbered by such deficiencies, it also is a conceptually rational and efficacious rationale for the tort system.

The analysis then changes to an empirical study which exemplifies the practical significance of the tort system as a deterrent to potentially injurious conduct in medicine. Medicine has been chosen as one of many possible subject areas which an analysis such as this could concentrate on. It will ultimately be submitted that the common law system of tort has an enormously real and substantial deterrent effect on negligent and injurious conduct generally.

1. Theories of Negligence

Feldman[1] states two traditional goals of tort law: recovery by victims for loss suffered, and deterrence of civil wrong inducing behaviour. However a brand new theory has recently come to light: the "Insurance Theory" of tort compensation. The roots of this theory lie in neoclassical economics, and thus adopts its guiding theory of economic rationality to frame its central premise that civil wrong victims should not recover damages for injuries that they, as rational economic agents, would not have insured against in the first place.

Obviously a theory such as this is diametrically opposed to any theory of negligence liability based on deterrence. Insurance theorists indeed expressly acknowledge this, and therefore propose increasing taxes, fines, and criminal sanctions as deterrent initiatives. The efficacy of such initiatives are but one factor to be considered when deciding which theory of negligence is in practice the guiding theory.

2. Insurance, Corrective Justice, and Deterrence: A Critique

2.1 The Insurance Theory of Tort

In deciding whether deterrence is in practice a substantive factor in negligence, all three theories must be considered.

First the insurance theory. Feldman[2] believes insurance demand should not be used as a benchmark for what tort victims want in compensation. While tort damages and insurance both provide compensation, Feldman believes their availability should not be governed by the same norms. Insurance theorists' rationales themselves bear this out. Rubin[3] says damages should not be awarded for pain and suffering because wealth is not a substitute for pain and suffering. Therefore rational insurers, anticipating lower overall post injury personal satisfaction levels (utility), would not insure to protect pre injury utility, because that would amount to overinsuring.

However the flaws in such an analysis are many. As economists, Rubin and others look at the issue from an overly blinkered viewpoint, focusing only on the economics of satisfying person's wants, and even then, getting their assumptions mistaken. For instance, there is no scope given for the role damages can play in purchasing medical treatment to alleviate pain and suffering. While it is true that persons incapacitated by post accident pain and suffering need fewer dollars to satisfy their wants because lower overall utility means fewer wants than before an accident, post accident wants could alternatively be greater if medical remedies are available, so damages should in these instances be higher than the negligible amounts Rubin and others arbitrarily submit to be appropriate for pain and suffering.

As stated earlier, such an analysis places no emphasis on deterrence, instead preferring to impute implied blameworthiness on plaintiffs for not having the foresight to insure themselves against potential accidents. Such a rationale may be appropriate in a neoclassical economics context, but totally ignores the fact that the judicial system through common law and statute determines and regulates damages payments, basis being restoration, not maximisation of people's preferences for accident insurance.[4]

The final flaw in the insurance theory is that the economists supporting it have forgotten one of the fundamental tenets of economics: market failure. What happens when the insurance market fails by either not supplying any insurance in certain areas, or supplying it with premiums so exorbitant that it becomes unviable. An example is obstetrics; litigation has so exponentially increased insurance premiums that many obstetricians make rational economic decisions to leave the practice.[5] This is the ultimate in deterrence, thereby causing a major paradox; that when the theory works, deterrence becomes insignificant, but when it fails, deterrence becomes the be all and end all. And subsequently, the utility of society as a whole, not just accident victims, falls when services demanded fail to be supplied. This is the ultimate market failure. ▶

2.2 The Corrective Justice Theory of Tort

The next major theory of negligence is the corrective justice theory. Schwartz[6] details that between the 1920s and 1950s, corrective justice was the dominant tort rationale with deterrence playing no role. However thinking has now shifted 180 degrees, with deterrence the unequivocally dominant view.

Corrective justice is self explanatory; the theory focuses more upon compensation for victims, rather than retribution against tortfeasors. A clear example is no fault compensation schemes like workers' compensation and third party motor vehicle accident insurance. However, given that the forgoing analysis has discredited the insurance theory of tort, leaving only deterrence and corrective justice, to properly ascertain the relevance of deterrence and subsequently justify its tenure as the dominant contemporary tort rationale, corrective justice has to be evaluated in the same way as for the insurance theory.

Weinribb and Coleman[7] list three paradigms in support of a corrective justice perspective:

- That tort liability operates not on every single person whose conduct is tortious, but only on those whose conduct caused actual injury,
- That defendant's liability is not the expected value of the risk that the conduct creates, but the amount of harm actually suffered,
- That tort litigation is brought by victims, and victims only.

Schwartz[8] correctly evaluates this analysis as deficient in many ways. Firstly, it focuses upon the burden of liability ex post, rather than liability ex ante. Deliberately taking a retrospective analysis will always omit consideration of deterrence. Secondly Weinribb and Coleman's paradigms are not immediately conclusive. While tort liability does not operate on every single instance of tortious conduct, their analysis arbitrarily declares the issue as "tortious" conduct, while omitting to consider matters of degree; for instance deterrence can elicit responses which decrease the tortiousness of tortious conduct in such a way that risk substantially decreases. Their analysis does not consider this aspect. Thirdly focusing on the victim as the party who initiates an action is inherently deterrence based when the defences of volenti and contributory negligence are considered, since deterrence obligations are consequently placed upon both plaintiffs and defendants.

This is not to say that corrective justice is irrelevant; plaintiffs will always seek damages to place themselves back in the same position (or substantially the same position) that they were in before, or so the theory goes. But as Feldman[9] surmises, this theory is "only a metaphorical aspiration, not a literal one", since victims are free to use damages payments whichever way they like, and not necessarily in a strictly corrective/restorative way. Also no fault compensation schemes have an indirect deterrent effect; if too many claims are made, premiums must rise, thus giving contributories an incentive to become more risk averse.

2.3 The Deterrence Theory of Tort

So what then of deterrence? Due to the conceptual difficulties of insurance and corrective justice theories outlined above, deterrence seems to attain the role of primary rationale behind the laws of tort by default. However, to prove its case, more substantive proof, both theoretical and empirical, is required. Beginning with theoretical perspectives, Schwartz and Komesar supply a compelling conceptual argument.[10] Since the only injuries which in practice get compensated are those sustained through negligence (omitting consideration of no fault insurance schemes and the like), tort litigation sends a signal to potential tortfeasors that it would cost them more to be negligent than to invest in risk management and other tort deterrent procedures. The importance of compensation in the scheme of things is that it provides victims with an incentive to sue, therefore making it an "indispensable ingredient" of deterrence, even though it is deterrence, and not compensation per se which is the main purpose of tort.

The applicability of this concept to "traditional" tort liability causes of action, is self evident. Also, it can be applied to traditional corrective justice provinces of tort. For the reasons outlined above, no fault compensation schemes like compulsory third party motor vehicle insurance is implicitly deterrent based when one considers that the more reckless the driving, accident incidence, and consequently scheme premiums, increase. This theoretically signals drivers that "the ball's in their court", placing them under a collective incentive to drive in more rational manners.

3. Empirical Aspects of Deterrence - Medical Negligence

The above mentioned conceptual deficiencies inherent in the insurance and corrective justice theories, along with the conceptual rationality of deterrence, details one half of the reason why deterrence should be seen as the major tort rationale. To prove this more conclusively however, reference must be given to empirical analysis, with emphasis on medical negligence as one of many possible categories of negligence.

It is by no means disputed that medical negligence is a major area of tort law. What would be less well known is that this is not a new phenonemon; as long ago as 1866 there was concern that "(l)egal prosecutions for malpractice in surgery occur so often that even a respectable surgeon may well fear for the results of his surgical practice"[11]. Nothing has changed since then - the fear Elwell spoke of is extremely real. Dickens[12], summarising the results of a major Canadian survey of doctors, describes the emotional trauma doctors go through when being served with lawsuits, enduring pre trial and trial procedures, especially cross examination, and going from a position of mastery of medical administration to being rendered "infantilised", powerless, and at other people's disposal during the course of litigation. Some doctors quoted analogised the situation to bereavement, with the death being not of close family members, but of their image, self esteem, and self confidence. Other studies of litigated physicians report symptoms "that might be associated with major depressive disorder(s)".[13]

With this as the situation, it is no surprise that empirical evidence shows that high risk medical areas, most notably obstetrics, have suffered from so much systematic exiting by practitioners that the position is reaching crisis in some situations[14]. Charles et al report that as far back as 1985, 25 percent of all obstetrician-gynaecologists in Florida wound up their practices for fear of litigation[15]. Their own

study pursuant to their employment as psychology academics, found 48.9 percent of previously sued physicians were likely to cease treating high litigation risk patients, 42.9 percent contemplated early retirement, and 32 percent had given consideration to expressly dissuading their children from entering medicine.[16]

This truly is the epitome of deterrence in practice. It also exemplifies the flaw in reasoning of the insurance theory; first, insurance can not remedy loss of reputation, need for court trials, and other collateral non monetary damage referred to above, and when litigation becomes too intense in certain areas, the insurance market simply fails to feasibly function.

The deterrent effect of litigation is by no means confined to obstetrics; all areas of medicine are affected. Physicians now do not feel as confident of their diagnostic abilities as they once did, and as such, have begun to practice what has been described as "defensive medicine". Sappideen[17] describes defensive medicine as the undertaking of excessive medical tests and procedures to ensure that there are no lingering doubts about the patient's health. But as Sappideen[18] adds, there is no conclusive definition of defensive medicine; different physicians will differ on the question of what constitutes "excessive" tests and procedures, and what is simply being prudent. With the practice of medicine increasing in complexity, it is only reasonable that physicians should order more tests and procedures to place the issue of patient health beyond doubt; they do, after all owe strict fiduciary duties to their patients, and a tort system which deters over confidence in individual physician abilities is serving a valid purpose.

A corollary to this however is that all these measures, whether motivated by prudence or "defensive" excess, add to the national health care bill. This has led to what Dickens describes[19] as a new conflict facing physicians; do they follow their medical and fiduciary principles and practices by acting as unfettered advocates for their patients, or do they take an altruistic attitude to society in general by striving to restrain health care costs? Linton's provocatively titled article[20] "Would Hipprocates Accept Cost Containment?" expresses the medical fraternity's apparent "damned if we do and damned if we don't" frustration since costs to society from medical malpractice litigation can only go one way: up. This is either through increased costs of tests and procedures, or costs incurred through litigation: court costs, damages payouts, exponentially increasing insurance premiums, right through to complete withdrawal from certain areas of practice. While medically induced injuries are a very serious matter, and malpractice litigation is prima facie designed to aim to restore injured patients as far as possible to their pre malpractice states of health, actual withdrawal of service proves conclusively that medical malpractice litigation is inherently deterrence based, with ultimate deterrence of practice as a result.

A scenario as unflattering as this could easily proffer the question of whether a no fault compensation scheme should be introduced for medical injuries. Two problems however, are apparent. First, there is the issue of the ever expanding costs such a system would necessarily entail. Second, there is the more worrying application of lower medical standards that a removal of deterrence would lead to. Danzon[21] quotes observers of the New Zealand scheme who claim that medical standards have fallen, while Miller, after touring New Zealand, declared[22] that the scheme's consequence is that "disgracefully hazardous conditions (are) evident". Clearly such a situation in a medical context is just as non-optimal as deterrent induced withdrawal from medical practice. A no fault insurance scheme therefore would not be an ideal solution for medical malpractice.

Conclusion

The foregoing analysis proves conclusively the value of the tort system as a deterrent to injurious conduct. While other theories of negligence like insurance and corrective justice have merit, in the overall analysis, it must be accepted beyond doubt that from both a conceptual and practical angle, deterrence is the ultimate tort rationale, therefore exemplifying the value of the tort system in deterring injurious conduct. ■

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Notes:

1 Heidi C Feldman "Harm and Money: Against the Insurance Theory of Tort Compensation" (1997) 75 *Texas Law Review* 1567-1603, at 1570

1 Feldman (supra), at 1571

2 Paul H Rubin "Tort Reform by Contract" (1993) AEI Press, at 30.

3 Feldman (supra), at 1580

4 See n.14 below.

5 G.T. Schwartz "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice" (1997) 75 Texas Law Journal 1801-1835, at 1804-1808.

6 Weinribb and Coleman

7 Schwartz (supra), at 1816-18

8 Heidi Feldman (supra), at 1579.

9 Schwartz W.B. and Komesar N.K. "Doctors, Damages, and Deterrence - An Economic View of Medical Malpractice" (1978) 298(23) *New England Journal Of Medicine* 1282, at 1283.

10 Elwell, John "A Medico-Legal Treatise on Malpractice and Medical Evidence, Comprising the Elements of Medical Jurisprudence" (1866), at 82.

11 Bernard Dickens "The Effect of Legal Liability on Physicians' Services" (1991) 41 *Toronto Law Journal* 168, at 180-1.

12 Charles, Sara C. et al "Sued and Nonsued Physicians' Self Reported Reactions to Malpractice Litigation" (1985) 142(4) *American Journal of Psychology*, at 440.

13 ibid, at 185 and 206

14 Charles et al (supra), at 437.

15 ibid, at 438.

16 Carolyn Sappideen "Medical Malpractice Liability - Are We Ready for Reform?" (1992) 12 *Queensland Lawyer* 155, at 160.

17 ibid, at 161

18 Dickens (supra), at 207.

19 Linton A.L. "Would Hipprocates Accept Cost Containment?" (1988) 21 *Annals of the Royal College of Physicians and Surgeons of Canada*

20 Danzon P.M. "Malpractice Liability: Is the Grass on the Other Side Greener?" in P.H. Schuck (ed) "Tort Law and the Public Interest" Norton & Co (1991), at 203.

21 Miller, Richard "The Future of New Zealand's Accident Compensation Scheme" (1989) 11 *University of Hawaii Law Review 1*, at 37-38.