

RICHARD EPSTEIN AND THE THEORY OF STRICT LIABILITY IN TORT LAW

Thomas A. Fay
St. John's University

Professor Richard Epstein's theory of strict liability offers a distinctly different, and in my view, a much superior approach to tort law than negligence theory. While negligence theory employs such notions as "reasonableness," "due care," "foreseeability," etc., in its attempts to determine responsibility and compensation, Epstein's is a theory of corrective justice which attempts to determine responsibility on purely causal grounds. In this paper my procedure will be as follows. In the first section I will look at some of the salient features of Professor Epstein's theory of strict liability, such as the well known and much discussed causal paradigms, and then contrast his theory of strict liability with the established alternative, negligence theory. In the second part I will look briefly at some of the criticisms which Epstein's theory has received, particularly from Professors Borgo and Posner, as well as Epstein's response to these criticisms. In the third part I will consider what I take to be the advantages of Epstein's theory of strict liability over negligence theory, as well as some problems connected with it.

1. Differences between Epstein's Theory of Strict Liability and Negligence Theory

As we noted, Epstein's is a theory of corrective justice which attempts

to assign legal responsibility on purely causal grounds. In order to arrive at such a determination Epstein has established four causal paradigms. The four models of causation are: A hit B; A frightened B; A caused B to hit C; and A created a dangerous condition.¹ Using these four models for analysis of causation it is possible to establish *prima facie* responsibility. Thus in the simplest example of causation, A hits B,² if A, the driver, hits B, a pedestrian, there is a *prima facie* cause for action on B's part. B after all did not hit A. Thus Epstein notes in "Pleadings and Presumptions":

Under a theory of strict liability, for example, the *prima facie* case will take the form the defendant hit the plaintiff.³

The *ex ante* equities have been disturbed and at least *prima facie* B has an action against A, an action which, of course, may be defensible. Since cause is essential to negligence, it would be necessary for the plaintiff to show:

- a) that the defendant owed the plaintiff a duty.
- b) that the defendant is in breach of the duty owed.
- c) that the breach was:
 - 1) the actual cause of the new state,
 - 2) the proximate cause of the plaintiff's new state
- d) that the plaintiff's new state constitutes a damage.

The causal analysis of tort is a markedly different one from the negligence theory. Under the negligence approach much of the inquiry will center on the relative levels of prudence or care exercised by the two principals to the action.⁴ Negligence theory employs to a large extent economic theory as the primary means of establishing legal responsibility, where the comparative economics in the action can be either financial cost/benefit analysis, or moral.⁵ Thus Professor Epstein remarks in *A Theory of Strict Liability*

. . . the economic approach asks us in at least some cases to abandon our views on the initial assignment of property rights, on the ground that the aggregate costs of accidents (together with the costs of prevention) will be reduced by the substitution of new rights in their place.⁶

In terms of the differences between Epstein's theory of strict liability and negligence theory this means that the starting points, as well as the conclusions reached in many cases, though not all, are quite disparate. Professor Epstein's starting point is a concern with

individual liberty and property rights.⁷ Thus he remarks in his article, "Causation and Corrective Justice: A Reply to Two Critics":

In most cases I think these rights are deserving of absolute protection and vindication. In those cases in which such total protection is not feasible (usually for reasons of efficiency) I want to see compensation, be it in cash or kind, for the individual liberties or property rights that have been taken or destroyed. Individual rights remain a barrier to forced redistributions of wealth, even though they are not always barriers against forced changes in the form in which that wealth is held.⁸

Thus for Epstein ownership and property rights are closely related to tort concepts and a proper grasp of these notions logically entails a theory of strict liability in tort. As he notes again in his article "Causation and Corrective Justice: A Reply to Two Critics":

" . . . in my view the proper conception of ownership compels the adoption of strict liability."⁹

For Epstein, then, property rights, ownership, and tort are closely tied together. Further, property rights and ownership are the ground of individual autonomy and liberty. As Epstein remarks in his article "Nuisance Law: Corrective Justice and its Utilitarian Constraints": "Private property is an external manifestation of the principle of personal autonomy."¹⁰ From the basis of individual autonomy and inviolability, ownership rules organize rights prior to any violation and furnish the foundation for tort which is concerned with dealing with members of society who refuse to respect the rights of others. Thus Epstein notes in *Strict Liability*:

. . . the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others . . ."¹¹

Thus the defendant's invasion of the plaintiff's person or property establishes a *prima facie* tort.¹² The purpose of tort law then is the protection of individual liberty and private property.¹³ Thus Epstein's starting point for tort law in property rights and individual liberty is distinctly non-utilitarian.¹⁴

Generally, negligence theory, on the other hand, takes a utilitarian cost/benefit analysis as its starting point, e.g. nuisance cases,

though sometimes it does not, e.g. medical malpractice. This economic approach to establishing responsibility requires, at least in many cases, that we abandon the way in which property rights were initially assigned under the guise that in this way the aggregate costs of accidents, as well as the costs of prevention, will be reduced. This reduction in costs, the benefit it is argued, is bought for the price of loss of rights, or, euphemistically, the creation of new supposed rights, the cost in the cost/benefit equation. While the theory of strict liability holds that the plaintiff has a *prima facie* case whenever he can show that the defendant caused physical harm either to his person or property, regardless of whether he had exercised reasonable care, or intended the harm, negligence theory holds that the plaintiff should only be entitled to recover if it is shown that the defendant failed to take reasonable steps to avoid the harm, or if he intended it.¹⁵

2. Some Criticisms of Epstein's Theory of Strict Liability

To be sure the theory of strict liability has not been given a warm reception in all, or indeed many, legal quarters. For many the notion is anathema, a return to primitive legal barbarism, which it is thought the advances in late nineteenth and early twentieth century legal thinking had already transcended.¹⁶ The theory of strict liability which Epstein has proposed has received considerable attention, of which some, to be sure, has been adverse. Professor John Borgo¹⁷ in his article, "Causal Paradigms in Tort Law" attacks the linchpin of Epstein's theory of strict liability, his analysis of causation. The objections in Borgo's article basically come down to three. The first, that Epstein does not provide an *explication* of causation but only indicates how the term is *used* in certain contexts. His second point is that Epstein rests his theory too heavily upon his causal paradigms. And finally he argues that Epstein does not take "context" sufficiently into account.

It is this last point, which Epstein takes to be central,¹⁸ to which I will turn my attention. Concerning context Borgo argues that we only know what "cause" means legally from context. Thus in any action there are a myriad of antecedent conditions that are required before a given result can take place. We only know what the "cause" is in a legally tortious sense from certain policy statements that have antecedently defined it as a tortious cause.¹⁹ In other words Epstein's causation argument is circular. Epstein wants to use the causal para-

digms for the analysis of a tortious action and by the analysis of causation fix responsibility. He wants to keep responsibility closely tied to causation. Borgo argues that Epstein has gotten it backwards. Epstein argues that responsibility is ascribed on the basis of cause. Borgo, on the other hand, that cause is ascribed on the basis of legal responsibility. Thus, according to Borgo, Epstein's criterion for *prima facie* liability is circular. Through our common experience of responsibility, the way the word is used in ordinary language, we come to a notion of cause, e.g., because B is missing an eye we want to find out, of the many circumstances surrounding this loss, where the *responsibility* for this harm lies, and when we determine this we will think this agent *caused* the harm.

I think Borgo's analysis is simply incorrect. When first A suffers the loss of the eye we do not immediately move to responsibility and only afterwards get to cause. No, first we determine cause, and only afterward does responsibility become a consideration, because even after we have determined the cause there may be *no responsibility*. They are distinct notions, and distinct notions that are *separable*. To illustrate this point, consider the biblical case of the elder Tobias. After he had buried a murdered kinsman against the royal edict he lay by the wall of the house to rest, and while he was asleep the birds released their droppings into his eyes blinding him. When Tobias is found blinded what question is asked? "Who is *responsible*?" Or, rather "What *caused* this blindness?" because in this case even though there was indeed a *cause* there is no responsibility for responsibility can arise only where in addition to the tortious act, there is also *volition*. Without this we have no responsibility, only an act of nature, or God. Clearly we first seek the *cause*, and only then determine how to affix responsibility. Thus also in the famous case of *Talmage v. Smith*²⁰ when the owner of a property threw a stick to chase some boys off of his property, striking one of them in the eye causing him to be blinded, we do not start with the question of *responsibility*, but rather with the *cause* -- who threw the stick? We first determine the cause. It is only after this determination has been made that we can begin to talk about the question of *responsibility*, for unless we determine that it was a human agent who caused not only the harmful act but did so with volition we do not have a tort. Thus it seems Borgo is mistaken and Epstein correct, and his analysis is not impugned by Borgo's criticism.

Let us turn our attention now to the key elements of Richard A. Posner's criticism of Epstein.²¹ Briefly, Posner thinks that Epstein is wrong on the following five points:

- 1) Epstein treats tort and contract law inconsistently.
- 2) He doesn't explain why causal principles should provide

the exclusive basis for tort liability.

3) Once he shifts from causation to rights (as he does in his article "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," *Journal of Legal Studies*, VIII (1979), 49-102, his argument becomes circular.

4) He doesn't explain why tort liability should be limited to cases in which a property right has been invaded.

5) Finally, Epstein's fourth article on Nuisance Law which allows economic principles to be used both to limit tort liability and to create tort obligations independently of causal principles makes it now necessary to reexamine all of the major conclusions of the previous articles.²²

A complete and detailed analysis of all five of these points would require more space than is available for the present article, but let me turn my attention to a couple of what I regard as the more important points he has raised. In his article Posner asserts:

The earlier articles based liability on the proposition (now placed in doubt by Borgo) that responsibility follows causation. The nuisance article says that before invoking causal principles one must find a right.²³

This position of basing liability on rights doesn't seem to make sense to Posner, and he adduces as evidence for his position what he takes to be Epstein's inability to handle cases such as the Santa Barbara oil spill.²⁴ Here fishermen sued the Union Oil Co. because the spill killed the fish, depriving the fishermen of their livelihood, so they argued. In order to determine a liability Epstein would seek a property right - did the fishermen *own* the fish? If not then their rights were not injured and there is no cause for an action. Posner thinks this is incorrect and would have, apparently, a judge create a right for the fishermen. Epstein disagrees with this and I believe he is correct. Posner remarks that Epstein objects to an economic/utilitarian approach because ". . . such an approach . . . was objectionable because it would give judges a roving commission to impose duties on people."²⁵ And here I think that Epstein's worry about giving judges "roving commissions to impose duties on people" is a point that could not be improved upon. This expansionary conception of the judiciary, with all of its baneful effects, is precisely what we have been witnessing for the last quarter of a century or so.

Posner would also like to create some other duties for us, this time of the good Samaritan sort.²⁶ He argues that Epstein's causal

approach cannot encompass all of our moral perceptions. He criticizes Epstein's position on good Samaritan cases because, Posner thinks, according to Epstein's causal arguments there is no liability in the good Samaritan case where I can, with little risk or inconvenience to myself, assist someone but do not, for example by throwing a rope lying at my feet to a drowning person. For Epstein there is no liability here because A, the potential rope thrower, has not harmed B, the drowning person, according to any of the four causal paradigms. After all, he does not have a legal duty to throw the rope. For Posner this failure to fasten a liability on A demonstrates the inadequacy of Epstein's causal approach. Clearly Epstein's strict liability approach with its causal analysis which cannot find a liability in such an inhuman action, or better inaction, as not even to throw a rope to a drowning man must be wrong. But Posner misses the point, a point which even Borgo had grasped, namely that the moral order of responsibility and the legal order of responsibility are not always isomorphic.²⁷ Clearly anyone, even someone whose moral sensitivities might in other respects be rather blunted, would see a moral obligation to throw the drowning man the rope. But because we might have a *moral obligation* to do something does not *ipso facto* create a legal duty to do it, the failure of which results in a tortious liability. Posner has confused an imperative of the moral order with one of the legal order.

3. Advantages of Epstein's Theory of Strict Liability.

Let us now turn our attention to some of the advantages that Epstein's theory might have to commend it. The first of these I would call a certain intuitive moral persuasiveness, that is, that he who causes the harm should, at least *prima facie*, compensate the victim, provided, of course, that the plaintiff had a duty toward the defendant. Individual autonomy cannot be used as a justification for using someone else as a mere resource without compensation. Second, Epstein's theory, exploiting as it does the four causal paradigms in affixing responsibility, and eliminating such loose, ill-defined, and perhaps undefinable, notions as "reasonable man," "due care," etc., which play such an important role in negligence theory, has the merit of *elegance*. It has efficiency that is based on *principle*. This in its turn leads to much greater predictability of legal outcome,²⁸ a notion so important that Oliver Wendell Holmes placed it in the essence of law. The strict liability approach, it seems to me, also has the merit of eliminating a lot of the fuzziness and vagueness which presently surround negligence language. There is no need to try to determine *ex*

post what risks, in those circumstances, were “undue,” or “unreasonable,” and which ones were not. This type of vague, ill-defined language is simply eliminated. The issue is simply: if the defendant harms the plaintiff, then *prima facie* he should pay even if the risk was reasonable, provided, of course, that the defendant owed a duty toward the plaintiff, just as he should pay in cases where the decision to injure was unreasonable, or without “due foresight.” If the defendant in conducting his own business injured not someone else but himself he would, of course, have to sustain the loss. It may be that he deems the risk of loss, weighed against the possible gain, worth the gamble but whether it is or is not, the loss is his, should it occur. If this is true in his own case, as it obviously is, then it is equally clear that if in the course of conducting his affairs he accepts for a possible gain, the possibility of inflicting harm on someone else he should not be preferred to the one he has harmed even if his action is reasonable. The reasonableness of the act, or the lack thereof, is immaterial.²⁹ The principle in strict liability is straightforward - one man should not be allowed to solve his problems at the expense of another.³⁰

These are some of the advantages of Epstein’s theory of strict liability. Are there also some problems connected with it? Yes, several come to mind, particularly in the area of product liability. If, for example, corporations are held to a standard of strict liability, under the fourth causal paradigm of creating dangerous conditions, is this not a temptation, impossible to resist, to abuses by avaricious lawyers and activist judges to rush to litigation? Part of the problems which presently are creating a crisis in tort law have been caused by judges who have abandoned the negligence theory with respect to corporations. In the early 1960s, liberal judges began scuttling the rule that only defendants who acted negligently could be liable. Judges decided that “deep pockets”, i.e., corporations, should pay wherever anyone suffered. This leads to such bizarre decisions as that of the New Jersey Supreme Court in *Beshada v Johns-Manville*, 1982, wherein the Court mysteriously concluded that even if the manufacturer could not have known about possible dangers of its product, still it somehow should have warned consumers.

If manufacturers are held to a standard of strict liability, rather than a standard of negligence, isn’t this the inevitable result? Further, isn’t it also true, in the area of pharmaceuticals for example, that to hold the manufacturers to a standard of strict liability so that they are responsible for any injuries to consumers, even where there is no evidence that they or anyone else knew of any risks, is a disincentive so powerful that it will greatly impede the research, development, and

marketing of new products, with the subsequent loss to the general public that these new products would bring? And doesn't holding corporations to standards of strict liability produce results which are exactly the opposite to the ones desired by Epstein - that is, judges acting on their vision of "fairness," and a "deep pockets" theory of justice, attempting to redistribute the wealth of wealthy corporations? And isn't this in its turn an attack on the property rights of the shareholders? This result of holding corporations to a standard of strict liability can hardly be one which would please Professor Epstein. And yet isn't it true that when we put these elements together we must inevitably get this result: strict liability + "deep pockets" = redistribution of wealth?

Epstein, to be sure, in his later writing, for example, "Products Liability as an Insurance Market," 1985, has attempted to address this problem and notes:

A return to more limited rules of product liability seems clearly required. The demand that the legal system take into account the ability to insure does not translate into automatic justification for continued expansion of liability.³¹

But is this position entirely consistent with the theory of strict liability as he had presented it in his earlier writings?

In conclusion we might say that there are considerable advantages to Epstein's theory of strict liability, as I have attempted to point out. But as it stands there are some very serious problems with it and these need to be addressed.

1. Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980), p. 75. Cited hereafter as SL. This book reprints two of Epstein's articles which appeared in the *Journal of Legal Studies* Part One of the book appeared as "A Theory of Strict Liability," vol. 2 (1973). Part Two appeared as "Defenses and Subsequent Pleas in a System of Strict Liability," vol. 3 (1974).
2. Richard Epstein, "Pleadings and Presumptions," *University of Chicago Law Review*, 40 (1972-73), 574. Hereafter cited as PP.
3. PP., p. 57
4. "Judges in some jurisdictions do not like the doctrine of contributory negligence because they believe that it is harsh to excuse a negligent defendant merely because the plaintiff has been negligent as well." PP, p. 578.
5. Epstein, SL, p. 51.
6. Epstein, SL, p. 135.
7. Richard A. Epstein, "Causation and Corrective Justice: A Reply to two Critics," *Journal of Legal Studies* 8 (1979), p. 488. Hereafter cited as CC.

8. CC, p. 488.
9. CC, p. 499.
10. Richard A. Epstein, "Nuisance Law: Corrective Justice and its Utilitarian Constraints," *Journal of Legal Studies* 8 (1979), p. 63. Hereafter cited as N.
11. SL, p. 68.
12. N, p. 90.
13. Richard A. Epstein, "Intentional Harms," *Journal of Legal Studies* 4 (1975), p. 441. Hereafter cited as IH.
14. IH, p. 442. Though see also his later work (1985) *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), p. 5, where he seems to have shifted somewhat on this point. Thus he remarks: "Thus the political tradition in which I operate, and to which the takings clause itself is bound, rests upon a theory of 'natural rights.' That theory does not presuppose the divine origin of personal rights and is consistent, I believe, with both libertarian and utilitarian justifications of individual rights . . ."
15. "Plaintiff will not, of course, be barred by contributory negligence unless his negligence was a proximate cause of the damage sued for" PP, p. 574, n35.
16. SL, p. 71. See also for example, Jerome Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1947), pp. 304-305, and James Barr Ames, "Law and Morals," 22 *Harvard Law Review*, 99 (1908).
17. John Borgo, "Causal Paradigms in Tort Law," *Journal of Legal Studies* 8 (1979): pp. 419-455.
18. CC, p. 478.
19. Borgo, pp. 421-423.
20. IH, pp. 395-397.
21. Richard A. Posner, "Epstein's Tort theory: A Critique," *Journal of Legal Studies*, 8 (1979): pp. 457-475.
22. *Ibid.*, p. 458.
23. *Ibid.*, p. 467.
24. *Union Oil v. Oppen*, 501 F. 2d 588 (9th Cir. 1974).
25. Posner, p. 459.
26. *Ibid.*, p. 465.
27. Borgo, p. 419.
28. IH, p. 401.
29. IH, p. 398.
30. SL, p. 77.
31. Richard A. Epstein, "Product Liability as an Insurance Market," *Journal of Legal Studies* 11 (1985), p. 669.