

Some Reflections on the Bases of Strict Liability

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[This is the substance of a paper read at the Round Table on Jurisprudence at the 1956 meeting of the Association of American Law Schools, as a part of a panel discussion. The three formal speakers were asked to initiate the discussion by presenting their respective philosophies of "The Jurisprudential Basis of the Law of Strict Liability." These speakers were to use as a basis for discussion the following group of cases:

- Vincent v. Stinehour*, 7 Vt. 61 (1835) (The "horse and buggy" accident case).
- Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910).
- A typical modern motor traffic accident case.
- Lutheringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948).
- Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932).]

My approach to tort problems has not been primarily a philosophical one. Yet it has been concerned with much beyond the concepts and rules of tort law itself. It has often been preoccupied with the practical implications of tort law for the social and economic problems of current life.

In dealing with such problems one must, of course, have a standard of values for assaying the problems themselves and the merits of possible solutions to them. And these values in turn must rest on some sort of justification. I have pretty much accepted values which have wide current recognition, and sought to employ them along pragmatic and utilitarian lines. This has not, however, meant a ruling out of moral considerations. Widely held feelings of what is fair or just must necessarily play a most

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important part in the solution of legal problems, whether the matter be viewed in terms of expediency or in terms of divine or natural law which is thought of as having an existence independent of the minds of men and only imperfectly reflected in them.

More concretely, things which I accept as good include: the dignity of the individual; the physical well-being of the individual; a wide freedom of speech, especially about matters that concern the public; the possession or receipt of property or money; the engaging in lawful activities for the production of goods or services, or entertainment, and the continuing development of the arts and sciences to advance such production; satisfying the prevailing community sense of justice or fairness.

The opposites of these things are bad.

These values are here vastly oversimplified. In other contexts they would need great qualification. At least some of them might not stand up at all. But in the present context they will serve as a useful point of departure for analysis, though the attempt to apply and balance them in the varying situations dealt with by tort law will yield no easy or automatic answer.

Let us start with *Vincent v. Stinehour*,¹ which exemplifies the unintended and undesired injury caused by *D* while he is in the course of pursuing a lawful activity — with what is generally called accidental injury. The loss caused to *P* is bad, but it has already happened. If *D* must pay, this merely shifts the evil from *P* to *D* and society gains nothing from that shifting (although something might be said for a *sharing* of the loss by the participants).² Moreover *D* has gained nothing from the accident and his conduct, if it was not negligent, carried no unreasonable threat of causing an accident. Current notions of fairness would be offended by making innocent *D* pay damages

1. 7 Vt. 62 (1835). "This was an action of trespass for defendant's driving against and over the plaintiff with his horse and sulky." Plaintiff asked the court to charge that if they found plaintiff while walking out of the travelled path was run upon by defendant, "the plaintiff must recover, though there was no fault, neglect, or want of prudence on the part of the defendant." The court declined so to charge, and instructed the jury instead that "there must be some degree of negligence . . . on the part of the defendant, to charge him." Defendant had a verdict and the judgment entered thereon was upheld on appeal.

2. The argument would rest on the concept of marginal utility, i.e., that a man's "bottom" dollar is his most valuable dollar, and each dollar added to that has decreasing value to him. If the wealth of *P* and *D* before the accident amounted to 100 units each, and *P*'s wealth has been impaired by 20 units by the accident, then more of value (in terms of human satisfactions) will be conferred on *P* by adding 10 units to his remaining 80, than will be taken away from *D* by subtracting 10 units from his 100, which the accident left intact.

under the circumstances described. Further, liability would tend somewhat to discourage his activity (which, by hypothesis, is good). That deterrence, however, is not an unmixed evil — if it is not too great it might not keep *D* from carrying on his activity but simply make him more careful in the prosecution of it.

Balancing all these considerations, the rational rule may well be to exonerate *D* unless the *manner* in which he was carrying out his legitimate activity was *unreasonably* dangerous. This is the rule of negligence and makes sense as applied to matters between neighbors.

The case of *Vincent v. Lake Erie Transportation Co.*³ calls into play some different considerations. Here, too, *P* has been hurt by *D*'s lawful conduct. But *D* did save his own much more valuable property by a deliberate choice of action which entailed damage to *P* as a foreseen and inevitable consequence. To shift *P*'s loss to *D* under such circumstances serves some good because the very conduct which caused *P*'s loss has preserved to *D* more valuable property out of which to pay that loss. From a purely utilitarian point of view, the net ill effects of the loss will therefore be reduced by this shifting. If the parties started with equal means, the marginal utility of the sum representing *P*'s loss is now greater to *P* than to *D*.⁴ Moreover, shifting the loss will not inhibit desirable conduct on *D*'s part. From society's point of view, *D*'s conduct in deliberately causing a loss is justifiable only because it prevents a greater loss or produces a gain. The greater the disparity between the saving (or gain) and the loss, the greater the justification. The greater this disparity, the less will *D* be deterred from making the saving (or gain) by fear of liability for the loss. It is only where the saving (or gain) approximates the loss that such

3. 109 Minn. 456, 124 N.W. 221 (1910). In this case the master of a vessel, under stress of an unforeseeably violent storm, kept his ship moored to plaintiff's dock after the full discharge of the vessel's cargo, for the purpose of preserving the vessel. The court held that prudent seamanship required this course to be followed and, in fact, the ship was saved at the expense of damage to the dock which was substantial (\$500) but presumably far less than the damage which would have been caused to the vessel if she had been cast loose.

Some of the lines by which the vessel was originally secured to the dock parted and chafed in the course of the storm. As soon as this happened the line "was replaced, sometimes with a larger one." The court concluded that defendants "deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted," in spite of the absence of any negligence.

4. Compare note 2 *supra*.

liability will deter the choice to make the saving; and in such cases society has little motive to encourage the conduct which inflicts the loss.⁵

Quite aside from these considerations from expediency, the prevailing climate of moral opinion will accept the notion of making *D* — though innocent of fault — pay for a loss he deliberately caused another either to make a gain for himself or to save himself from greater loss. This is attested by the universality of provisions for compensation where eminent domain is exercised to produce a public gain by inflicting loss on an individual.⁶

Where *D*'s conduct is not to preserve his own interest primarily but interests of third persons, this basis of liability on *D*'s part may fail. There may be a reason for distributing *P*'s loss among the beneficiaries but this will depend on many factors, such as the authority of *D* thus to act on their behalf.⁷

We come now to the case of the modern accident. This is a far cry from the typical accident of a century ago. It is no longer a matter between neighbors wherein the loss must be borne by one or the other of them. It is usually the by-product of commercial or industrial enterprise, or of motoring. These facts characterize the typical modern accident: The victims as a group fall in the lowest income brackets and are therefore least able to bear the economic loss involved.⁸ Those who are held for these accidents (under modern systems of liability and proposed extensions of them) have the means for combining and distributing these losses widely among the beneficiaries of the enterprise. Moreover these potential defendants have chosen to engage their activity in the face of statistical certainty that it will take a toll of life and limb.⁹ Recent studies show that ac-

5. See Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926). Cf. RESTATEMENT, TORTS § 73 and comments (1934).

6. See 1 NICHOLS, EMINENT DOMAIN §§ 1.2, 1.3 (3d ed. 1950).

7. See *Bishop & Parsons v. Macon*, 7 Ga. 200 (1849); *Feld v. City of Des Moines*, 39 Iowa 575 (1874); *Hale v. Lawrence*, 21 N.J.L. 714 (1848); *The Mayor, etc., of New York v. Lord*, 18 Wend. 126 (N.Y. 1837); see note 5 *supra*.

8. Corstvet, *The Uncompensated Accident and its Consequences*, 3 LAW & CONT. PROB. 466 (1936); McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L. REV. 585, 588 (1952); COLUMBIA UNIVERSITY, COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); 2 HARPER & JAMES, LAW OF TORTS § 11.1 (1956).

9. It is not meant that any individual participant in, e.g., the activity of motoring will inevitably inflict injury. Two things can, however, be said with considerable assurance: (1) such an activity taken in the aggregate will inevitably take

cidents are not usually caused by morally blameworthy conduct on the part of the people actually involved on the scene.¹⁰ Accident liability is not generally borne by the personal participants, but by absentee defendants like employers or insurers. Civil liability — even strict liability under workmen's compensation — has not discouraged useful enterprise but has acted as a spur to accident prevention by the parties best placed to promote it.¹¹

Under these circumstances — if you look at the real incidence of liability and not the nominal defendant in litigation — the reasons for liability without fault in the *Vincent* case apply to the modern accident. The loss is shifted to those who are benefiting from the enterprise which more or less inevitably took the toll. In addition, the loss is widely distributed and its ill effects thereby minimized by an even further application of the economic law of marginal utility. Moreover the risk of loss is thus made certain and calculable.

Morality and a sense of fairness might well be offended if the loss were shifted to the individual defendant who was the innocent instrument for causing it. The matter stands differently where the loss is distributed among the beneficiaries of the enterprise that had to inflict losses to gain the benefits.

Perhaps I should mention here what seems to me to be a necessary rational corollary to strict liability in accident cases. The argument for meeting the human needs of accident victims and distributing their loss among the beneficiaries of the enterprises that cause them is not an argument for full compensation to these victims as we think of compensation in tort cases today. It calls for damages or awards which will provide for care, cure, and rehabilitation; for the preservation of homes and the necessary maintenance of dependents during periods of incapacity; for the reparation of economic loss. But allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons.¹²

some toll (though we hope it will be reducible); (2) even the individual entrepreneur on a large scale (e.g., the running of a railroad, or a fleet of trucks) for a considerable period of time, must contemplate the statistical certainty of an accident toll.

10. 2 HARPER & JAMES, LAW OF TORTS § 11.4 (1956).

11. *Id.* § 12.4.

12. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW

This line of reasoning would, I submit, warrant strict liability generally for accidents caused by enterprises or activities wherein risks are now combined, or feasibly could be and would be combined in response to pressure.¹³ The same reasoning would, *a fortiori*, justify imposing strict liability on *extra-hazardous* activities, as was done in the *Luthringer*¹⁴ and *Chapman*¹⁵ cases.¹⁶

Some of the same considerations apply to *Sorenson v. Wood*,¹⁷ but not all. And here I think countervailing considerations outweigh them at least in that part of defamation which lies within the field of debate and discussion of issues of legitimate public interest. What will be deterred here, if liability is strict, will not be the enterprise as a whole but the publishing of potentially defamatory matter. And this would lead the owners of our modern channels of communication to restrict their use in public

& CONT. PROB. 219 (1953); James, *Book Review*, 25 HARV. L. RECORD No. 7, p. 1 (Nov. 7, 1957); 2 HARPER & JAMES, LAW OF TORTS § 25.1 (1956).

13. See, in general, Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. OF PA. L. REV. 298, 373, 423 (1911), reprinted in STUDIES IN THE LAW OF TORTS 436 (1926); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); 2 HARPER & JAMES, LAW OF TORTS c.14 (1956).

14. *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948). In this case defendant was held strictly liable for injury caused by the use of hydrocyanic acid gas for the extermination of pests.

15. *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949). In this case the court at least suggested that the maker of herbicide to be sprayed aerially in dust form might be held strictly liable for harm resulting from its unsuspected propensity to drift for great distances. See Note, 3 VAND. L. REV. 341 (1950).

16. Professor Seavey has recently proposed strict liability in favor of atomic radiation victims. See 25 HARV. L. RECORD No. 8, p. 1 (Nov. 14, 1957).

17. The *Sorenson* case was an action by a candidate for public office against the speaker (a candidate for a different office) and a radio station for libel in the course of a campaign speech broadcast over the station's facilities. The station pleaded that it did not know in advance the contents of the speech, that it was not negligent in preventing its publication, and that it was forbidden by what is now Section 315 of the Federal Communications Act (37 U.S.C.A. § 315) to censor political speeches by candidates for public office. The state supreme court held that (1) liability of a radio station for defamation was strict, even where the speaker was not the station's employee, and was not based on negligence; and (2) the prohibition against censorship in the federal statute created no privilege in the station under the state law of defamation, since it did not forbid deletion of defamatory statements but "merely prevents the licensee from censoring words as to their political and partisan trend."

Although the questions raised in *Sorenson* have not been settled, either by later Congressional legislation or by a federal Supreme Court decision, later decisions have made the case very questionable general authority. See, e.g., *Felix v. Westinghouse Radio Stations, Inc.*, 89 F. Supp. 740 (E.D. Pa. 1950), *rev'd* 186 F.2d 1 (3d Cir. 1950), *cert. den.*, 341 U.S. 909 (1950); *Dale System v. General Teleradio*, 105 F.Supp. 745, 751-2 (S.D.N.Y. 1952); *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948); *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S. 2d 985 (1942); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939).

For the attitude of the Federal Communications Commission on the scope of

debate.¹⁸ This, it seems to me, would be too high a price to pay for the additional protection given to private reputations by strict liability here. Moreover the injury is of a different type and one for which money damages are not nearly so appropriate a remedy.

the prohibition against censorship in political campaign speeches, see *Port Huron Broadcasting Co.*, 4 Pike & F. Radio Reg. 1 (1948), noted, 58 YALE L.J. 787 (1949); *W.D.S.U. Broadcasting Corp.*, 7 Pike & F. Radio Reg. 769 (1951).

Law review comment on the problem has been prolific. Some highlights are Vold, *Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611 (1935); Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12 (1948); Leflar, *Radio and TV Defamation; "Fault" or Strict Liability*, 15 OHIO ST. L.J. 252 (1954).

18. See *Dale System v. General Teleradio*, 105 F.Supp. 745, 751-2 (S.D.N.Y. 1952); CHAFEE, *FREE SPEECH IN THE UNITED STATES* 521 (1941); materials collected in SHULMAN & JAMES, *CASES AND MATERIALS ON TORTS* 950-1007 (2d ed. 1952).