IMPACT ANALYSIS AND TORT LAW: A COMMENT

ROBERT L. RABIN

This Comment is based on two impact studies of tort law published in this issue of the *Law & Society Review*, Canon and Jaros, "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity," and Croyle, "An Impact Analysis of Judge-Made Products Liability Policies." Canon and Jaros assess the effects on hospital room rates of the elimination of the charitable immunity doctrine which traditionally shielded such institutions from tort liability. Croyle presents comparative data on the expenditures for products liability insurance in states that either adopted a form of strict liability or retained negligence as the sole basis for recovery in product injury cases.

It is encouraging to find social scientists involved in exploring questions about the impact of judicial decisions in areas which ordinarily have remained the province of traditional legal analysis. Private law doctrine is not intrinsically more difficult to master than the public law issues which have traditionally interested social scientists. Moreover, the techniques of data analysis and other methodological tools which are the stock in trade of social science empirical research can be put to good use in private law areas. So there are reasons to welcome such work.

But the first step, of course, in any field of inquiry is to ask the right questions—in the case of tort law analysis, questions that are likely to generate insights into the way law influences private decisions about safety and establishes patterns of compensation. These questions can be raised at varying levels of generality, depending on the assumptions underlying impact analysis.

The studies reviewed here provide a useful forum for exploring some of the basic problems that confront social scientists when they turn their attention to the analysis of tort liability rules. In the following two sections, I will comment on each of the studies respectively, discussing the objectives of

the authors and assessing their contributions. In the final section, I will add a few general comments suggesting that such research might be profitably conducted from a more ambitious perspective.

I

Canon and Jaros utilize a technique they label "dynamic analysis" to come up with their principal finding. Comparing states in which the judicial treatment of charitable immunity remained unchanged with abrogating states—where immunity had been eliminated within the preceding two years—they find a consistent pattern of greater hospital room rate increases in the reforming states. A similar, somewhat weaker pattern is found when stable states are compared with abrogating states four or six years after the courts have eliminated immunity. The authors conclude that the abrogation of charitable immunity is an instance of judicial reform having an immediate and measurable economic effect—namely, the imposition of higher costs on a class of potential defendants directly addressed by the change in liability rules.

Although the authors' related effort to compare rates in retaining states with rates in abrogating states annually was inconclusive, I have no reason to question the general pattern that emerges from their dynamic analysis. Instead, my inclination is to ask more fundamental questions about what we learn from such an inquiry.

My starting point is the simplest of propositions, but one that is surely lost at times in popular reaction to the creation of new rules of tort liability. When a liability rule is established, costs do not suddenly appear that were previously nonexistent. To put it another way, there are very real costs associated with any injury-producing activity, whether we establish a liability rule or simply allow the costs to be borne by the injured party (in effect, establishing a no-liability rule). I am not suggesting that the authors are unaware of this point. But in view of it, I am uncertain about the purpose of the study. Clearly, when costs previously borne by hospital accident victims are shifted to hospitals, those institutions will have to raise their rates—absent market structure characteristics which are outside our present concern.

If the authors' findings, then, seem rather predictable, one must look for other bases of support for the study. Indeed, to

be fair, the authors suggest that theirs has been a modest undertaking. They are, however, inclined to accord the study importance both as an indication of the kind of analysis that might be applied to other instances of doctrinal change—some of which are mentioned in the concluding section of their study—and as a break from the narrow tradition of restricting impact analysis to major U.S. Supreme Court decisions.

I have difficulty with the justification of the study on both grounds. Consider, first, the suggestion that the study provides a model for assessing doctrinal change in tort law. I am willing to assume that more detailed and precise cost data than emerge from the present study might alone provide a useful critique of the wisdom and efficacy of a particular judicially fashioned change in liability rules. But there is nothing especially novel about the methodology employed in this study, and there are certainly no revealing theoretical insights that would serve as a building block for more innovative data collection and analysis.

The justification based on the need to move beyond public law impact analysis seems to rest on a dubious premise. Fundamentally, I agree with the authors that the preoccupation of political scientists with the Supreme Court is a mistake and that analysis of the impact of common law rules should be a fruitful field of inquiry. But I think they have missed the explanation for the traditional focus. I draw this conclusion from their somewhat casual use of the terms "politics" and "political decisions." The Supreme Court studies to which they refer—involving race, school prayers, criminal justice, and so forth—are political in a very different sense from judicially fashioned tort liability rules. These Supreme Court decisions either mandate public officials to take or refrain from taking action, on the one hand, or decide on the legitimacy of legislative enactments, on the other. In either case, political scientists are working in their traditional domain—dealing with the legitimacy of government action and the behavior of public officials, as well as with the relations between coordinate branches of government. The immediate terrain may be the uncertain territory of lawyers, but the landscape ultimately remains familiar—the analysis of public ordering.

Conversely, I do not think that impact analysis of tort law involves simply another kind of "political decision." Tort law is surely public law in the sense that liability rules have category-

wide effects (on drug manufacturers, drivers, landlords, pedestrians, and so on) rather than simply affecting isolated and discrete private parties. But tort rules are not "political" in the ordinary sense; they largely affect the behavior of producers, consumers, pedestrians, and others going about their daily affairs on the street and in the marketplace. As such, I would surmise that these rules have not traditionally seemed congruent with the professional interests of political scientists. And I fail to see why the present study, particularly given its modest scope, would shift scholarly inclinations one way or the other.

I would also point out that impact analysis of tort doctrine is by no means the barren and destitute field that the authors imply. In fact, some of the most significant work on analysis of legal rules has been done in the torts field—specifically, on the impact of negligence law on auto accident victims.[1] In addition to providing invaluable data on the phenomenon of claims consciousness, the distribution of reparations, and the efficacy of court-awarded relief, these studies have played a major role in bringing about legislative efforts to reform the tort system.

Is it necessary to choose between comprehensive analysis of the reparation of auto victims and the present modest undertaking, analyzing a single consequence of the abrogation of charitable immunity? I think not. Research aimed at middle-level generalizations is possible. The authors seem to believe that merely demonstrating an impact of judicial liability rules is a necessary first step towards an unspecified larger undertaking—perhaps, towards building a theory that explains how tortfeasors and injury victims will react to various types of liability rules under different economic conditions. I see no reason to think that their work is foundational, however.

The kinds of questions that need to be asked are these: Did abrogation of the charitable immunity doctrine lead to new safety practices in hospitals? Did it lead to cutbacks in service to certain types of patients? Did it have a differential impact on different kinds of hospitals? Did the abrogation have a major impact on hospitals as compared to other types of charitable institutions? Did claims consciousness rise immediately, and if so, how did the newly entitled victims find out about their rights? Did hospitals and other charities rapidly develop informal patterns of settling disputes, or did their long history of immunity lead them to react differently than other institutional defendants in managing the costs of injuries?

[1] See the bibliography in Franklin (1979) at p. 794.

I could go on at greater length, but I think the point is clear. If impact analysis is to be useful, it should be a tool for a richer understanding of how legal rules fit into the social and political system. Documenting the proposition that law has an impact, without linking the findings to behavioral patterns and institutional change, is a dead end.

II

Beginning around 1960, courts began to reconsider whether liability rules based on a negligence theory served as an adequate framework for compensation in cases of product injury.[2] Over the course of two decades, virtually every state judiciary has borrowed from earlier warranty and strict liability in tort theories to develop a new doctrinal approach in product injury cases. By 1970-1971, the period studied by Croyle, this movement was already fairly well along. He attempts to measure one aspect of the impact of doctrinal change: the extent to which greater expenditures for products liability insurance were being made in states where negligence had been replaced either by strict liability in tort or a warranty theory of recovery.

Like Canon and Jaros, Croyle makes no bold, exaggerated claims for his findings. He, too, suggests that the relationship found between liability rules and expenditures should be regarded as an initial step, directed towards "our beginning to understand the relationships existing between various kinds of human behavior and judicial output." Again, I surely would not quarrel with the author's objectives; rather, I have some reservations about the execution of the study, and as before, about its heuristic value.

At the outset, I am again troubled by the reasons given for pursuing impact analysis in a private law area like torts. Croyle is quite explicit about his motivation for departing from the tradition of analyzing U.S. Supreme Court decisions. He wants to avoid the "complexity" involved in studying that rather distinctive institution; among other things, he regards the causation problems in judge-made tort law as easier to isolate and model. His primary concern seems to be the "institutional interaction" that one encounters in studying the U.S. Supreme Court, which is lacking in many areas of private law, including the judicial development of strict liability in tort for product injuries.

---

[2] For an analysis of the early developments, see Prosser, 1966.

I am mystified, however, by the equation of "complexity" with institutional interaction.[3] In my view, the problems of causation and prediction that arise in private law analysis of a doctrine like products liability are at least equal to the difficulties encountered in tracing the effects of Supreme Court pronouncements. The "complexity" simply has a different source: managerial expenditure decisions and resource allocation issues generally are influenced by a staggering variety of economic variables. Moreover, comparing "the law" of a number of jurisdictions when dealing with an emerging system of rules as complicated as products liability—as distinguished from the charitable immunity doctrine—is no easy matter. I particularly stress these points because they are fundamental to my reservations about this study.

In fact, the three categories of legal doctrine that Croyle isolates and treats as his independent variable appear to me to be largely his own constructs, rather than sharply differing liability rules. One of the principal arguments that Judge Traynor—whom Croyle rightly identifies as an architect of strict liability doctrine—gave for the adoption of the theory was that the courts had in reality largely accepted it already. While still adhering to negligence law, for example, state courts had extended the doctrine of *res ipsa loquitur*, a doctrine that eliminated the need to establish a negligent act on the grounds that the manner of injury itself sufficiently indicated wrongful conduct, to the point where many commentators observed that a *de facto* version of strict liability had been established.[4] Formal doctrinal developments like *res ipsa* were matched by a growing public awareness of the risk-spreading potential of business enterprises, an awareness which juries seemed to take into account in applying the sweeping generality of the negligence formula. These developments could not have been ignored by purchasers of products liability insurance in states adhering to negligence doctrine.

Thus, the negligence category was by no means as distinct from strict liability as the difference in doctrinal labels would suggest. Moreover, one must take note of the other side of the coin: strict liability did not spring forth as a full-blown distinctive theory. Questions about the meaning of the term "defect,"

---

[3] More generally, Croyle's brief discussion of the difficulties inherent in impact analysis treats Feeley's categories as though they are exclusive, rather than simply suggestive. See Croyle, *supra* note 2, at p. 952.

[4] See, for example, Jaffe, 1951.

the nature of product uses that would be regarded as foreseeable, the defenses to be recognized, and the scope of recovery by third parties remain open in many states even now—almost a decade after the date Croyle selected for data analysis. Indeed, ironically, in some important instances the clarification of these liability rules strongly suggests that strict liability is not very different from negligence.[5] At the time, the uncertainty was even greater.

The same difficulties exist in distinguishing between strict liability in tort and warranty theory. Croyle is simply wrong in saying that most jurisdictions picked up warranty as a general basis for products liability. The development is far more complicated (see Prosser, 1966: 791-805, *supra* note 5). A number of jurisdictions had picked up warranty as a *limited* basis for strict liability—in food cases, for example—decades before the general movement to strict liability. For a while, some states had liability rules that featured both strict liability in tort and warranty without privity, depending on the type of product or manner of injury. A handful of states developed a general warranty theory, but very few stayed with it after strict liability in tort became popular. It seems inconceivable that in the mix of uncertainty and confusion that existed in 1970, one could pigeonhole states into the three categories established by Croyle.[6]

Most important, the labels are without meaning. Warranty without privity is not necessarily a narrower base for recovery than strict liability in tort. I am unclear why Croyle thinks it would be. Courts could easily treat the notice requirement in warranty as inappropriate in nonprivity personal injury situations. Disclaimers could be, and were, voided as against public policy—and, in fact, had a counterpart in tort theory in the assumed risk defense. The strongest argument for a distinction, which Croyle does not articulate, is that even if privity were abandoned, only third parties in the chain of sales transactions—and not bystanders—would be allowed to recover in warranty. But this distinction, too, is blurred when one realizes that many states adopting strict liability in tort were unwilling to follow California and allow bystanders to recover for product injuries. Even today a substantial number of states are unwilling to take that step. Hence, Croyle's distinction between

---

[5] See, for example, *Barker* v. *Lull Engineering Co.*, 20 Cal.3d 413 (1978).

[6] I am not clear about how he reached the specific categorizations found in Table 2, p. 959, *supra*.

states adopting strict liability in tort and warranty without privity is clouded in even greater ambiguity than the distinction between negligence and strict liability.

Only with the greatest reluctance have I gone into these doctrinal refinements. But some discussion was essential because the doctrinal ambiguity has not been lost on either lawyers or their clients, among whom were the purchasers of liability insurance. It is, of course, these same purchasers whose expenditures comprise the dependent variable in Croyle's analysis. I am suggesting that in virtually every state, in 1970, it was nearly impossible to make an educated guess about differences in potential liability keyed to the three liability categories that Croyle discusses. Perhaps purchasers of liability insurance reacted in some general way to formal doctrinal changes in the state. More likely, Croyle's positive findings indicate a reaction to a cluster of variables that he does not isolate in his regression analysis—general "plaintiff-mindedness" on the part of state court judges and juries in the larger industrial states and heightened claims-consciousness among the residents of those states. Indeed, I would guess that one would find even greater differences in medical malpractice insurance expenditures a few years later among the same "categories" of states, even though no critical doctrinal differences existed in the law being applied.[7]

These criticisms are meant to underscore my earlier point: complexity will not be avoided by putting aside public law impact analysis and venturing into the realm of tort law. Impact analysis in fields of private law will require both a close familiarity with the network of legal rules and a sophisticated analysis of the factors that lead those affected by the rules to react as they do.

Let us give the author's findings the benefit of the doubt, however. It is, of course, possible to conclude that the higher insurance expenditures in a strict liability state are in part, at least, a function of product manufacturers' concerns about the stringency of the state's liability rules. In other words, it could be concluded that higher expenditures express a concern about more extensive liability. Surely, if product manufacturers did in fact think that they would be liable in situations where they previously were not, one would expect them either to self-insure or insure at higher levels than previously.

---

[7] I would not regard the abolition of the "same locality" doctrine as a major shift in liability rules. For a discussion of the doctrine, see *Robbins* v. *Foster*, 553 F.2d 123 (D.C. Cir. 1977).

Does the study take us beyond this rather modest conclusion? Again, I am skeptical about "first steps" unless they lead us in new directions. The use of regression analysis seems promising, once the salient dependent variables have been more precisely defined, but the present study hardly seems necessary to make that point. I concur entirely with the suggestions for further research in the concluding section of Croyle's paper, but I wonder whether this study was really needed to point the way. Thus, I am left with the conviction that impact analysis must be more boldly conceived if it is to be worth pursuing.

III

If impact analysis of tort law is to move beyond the most modest observations about the relationship between law and private behavior, it must be undertaken for the right reasons. The novelty of the area is not a sufficient reason, because it tells us nothing about what questions are worth asking. Similarly, it is a mistake and an illusion to think that private law areas in some sense will be easier to analyze. Admittedly, assessing the immediate reaction to a change in tort law may create no great difficulty—tort law decisions allocate economic resources in ways that sometimes can be easily traced to a first-order response. But establishing the obvious in an authoritative manner is not an especially rewarding endeavor. More generally, as I have said, I am skeptical about studies which have as a principal justification that they are a "first step." Too often the second step is never taken; but most critically, the first step is only warranted if it is a necessary prerequisite to a more sophisticated understanding of a problem or if it demonstrates some new analytical approach.

The time seems ripe for extensive impact studies of tort law. Theoretical work has been done on the relationship between liability rules and private behavior, and best of all, the theories have not gone unquestioned (see Rabin, 1976: 139-257). Empirical studies should be able to offer real insight into the effect of liability rules—whether such rules influence manufacturers' product and plant design, landlords' maintenance practices, doctors' counseling techniques, shopkeepers' security strategies, motorists' driving behavior, or innumerable other such decisions—including, of course, consumers' own patterns of self-protection. But these issues will generally raise questions that cannot be answered exclusively through recourse to aggregate statistical data. Social scientists will have to use an

array of methodological techniques, such as interviewing, analysis of records, and participant observation; and they will have to familiarize themselves with insurance practices, investment decisions, settlement techniques, accident records, and courtroom behavior. They will, in short, have to view the tort system as it affects a substantial cross-section of social behavior if they are to reap real intellectual rewards.

REFERENCES

CANON, Bradley C. and Dean JAROS (1979) "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity," 13 *Law & Society Review*, 969-988.

CROYLE, James L. (1979) "The Impact of Judge-Made Policies: An Analysis of Research Strategies and an Application to Products Liability Doctrine," 13 *Law & Society Review*, 949-968.

FRANKLIN, Marc (1979) *Injuries and Remedies: Cases and Materials on Tort Law* (2nd ed.). Minneola, N.Y.: Foundation Press.

JAFFE, Louis (1951) "Res Ipsa Loquitur Vindicated," 1 *Buffalo Law Review* 1.

PROSSER, William (1966) "The Fall of the Citadel (Strict Liability to the Consumer)," 50 *Minnesota Law Review* 791.

RABIN, Robert L. (1976) *Perspectives on Tort Law.* Boston: Little, Brown.