A Benefit Theory of Tort Law

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Date : May 12, 2017

Alex Stein, *The Domain of Torts*, 117 **Colum. L. Rev.** 535 (forthcoming 2017), available at SSRN.

Scholars seeking to interpret the common law of torts typically take a position on the merits of fairness or rights-based rationales for liability as contrasted to welfarist or efficiency-based rationales. Rejecting this fairness versus efficiency framework, Alex Stein defends an original thesis in his forthcoming article, *The Domain of Torts*: fair tort rules do not contradict or stand in tension with efficient tort rules; each type of rule instead "implement[s] different regulatory mechanisms—private and public—and appl[ies] to different kinds of accidents." (P. 541.) Tort law is comprised of both fair and efficient tort rules that govern different domains, eliminating any conflict between them. Although I'm not persuaded, Stein's article requires one to consider important issues from a fresh perspective and deserves to be widely read.

After arguing that the domain of tort law is distinctively defined by the problem of accidents caused by unwanted interactions, a position staked out long ago by Oliver Wendell Holmes, Stein then makes the more interesting claim that tort law further distinguishes between two types of accidents—those caused by the risky actor's pursuit of only private benefits, and the remaining accidents caused by risky behavior that benefits the public. "Private benefits are ones that improve the well-being of a single person: the actor (and her private beneficiaries, such as family and friends). Public benefits, on the other hand, improve the welfare of society in general (while also generating private gains for their producers)." (P. 552.) These definitions are not standard within tort law nor otherwise elaborated upon by Stein, yet he argues that they largely determine the substantive content of liability rules.

For risky behavior that pursues only private benefits, tort law is a "private mechanism of accident regulation [that] interprets negligence, causation, and damage in terms of the victim's entitlement to protection against disproportionate, or nonreciprocal, risks of harm and the actor's correlative duty to avoid or mitigate those risks." (P. 545.) For risky behavior that generates public benefits, tort law is a "public mechanism [that] interprets these pillars of liability through the lens of efficiency analysis that relies on economics and statistical information." (*Id*.) Tort law distinguishes between these two types of benefits for reasons of deterrence. When a risky actor seeks only private gains, tort law need not worry about overdeterrence, enabling it to burden such behavior with the relatively more onerous compensatory obligations entailed by principles of equality and fairness. But when the risky behavior benefits society, then overdeterrence supplies a good reason for limiting liability, justifying allocatively efficient or cost-minimizing tort rules.

Regardless of what one might think about this deterrence argument, a benefit theory of tort law is independently plausible for another reason. Although Stein claims that the tort doctrines governing accidental harm are "universally believe[d to be]… driven by harms, not benefits" (P. 535), he oversells the originality of his emphasis on benefits. As Francis Bohlen sought to establish over a century ago, "all affirmative duties rest upon consideration: some benefit to him on whom they are imposed."[1] In addition to the affirmative tort obligations based on benefit, Bohlen recognized the general tort "obligation to refrain from injurious action."[2] Although Bohlen did not discuss the matter, the general duty can also be included within his benefit theory. Risky conduct is presumably motivated by an expected benefit (like transportation in the case of automobile accidents), and so the general tort duty is also based on the fact that the duty-holder is deriving a benefit from behavior that imposes a foreseeable risk of physical harm on another who has an equal right to physical security. This extension of Bohlen's theory means that *all* tort duties are based on benefits. If so, the nature of the benefit could plausibly shape the form of the duty—its substantive requirements. Bohlen provided an impressive analysis of the case law to support his conclusion, and Stein in turn relies on further developments in the

case law to extend that argument from the basis of duty (Bohlen's inquiry) into the other elements of negligence liability—breach, causation, and damages.

What, then, to make of the argument?

Based on my prior analysis of the implications of reciprocity norms for tort law, I disagree with Stein's claims about how the requirements of equality and reciprocity relate to the standard of reasonable care and to concerns about overdeterrence more generally.[3] But regardless of one's position on these matters, Stein's argument is still intriguing because of its emphasis on benefits. Is negligence liability for harms fundamentally defined by the nature of the benefits generated by the risky behavior? If so, does that influence stem from the distinction between private and public benefits? And if so, what is the relevant conception of public and private benefits? These questions are largely understudied and merit extended analysis.

I do not think that these questions are adequately answered by Stein's article. His definition of a "public benefit" is not based on externalities and accordingly encompasses all forms of market transactions, because the risky behavior in these contexts affects individuals other than the buyer and seller, their families, and friends. Incidental increases of employment or corporate profits, for example, fall within Stein's definition of a "public benefit," although they are not ordinarily externalities within economic analysis. Indeed, this type of "public benefit" can be generated without market transactions, as illustrated by the federal constitutional jurisprudence on the Interstate Commerce Clause. If tort law must minimize costs anytime it has some impact on markets, then Stein's benefit theory apparently morphs into the subsidy thesis developed by Morton Horwitz: the fairness-based, early forms of accident law were replaced by the cost-minimizing negligence standard at the onset of the industrial revolution to subsidize economic development (or not overly deter economic growth).[4] The problems with the subsidy thesis, therefore, also apply to Stein's theory.[5]

For example, common carriers such as railroads—the engine of the industrial revolution in the U.S.—were traditionally subject to a demanding negligence standard such as utmost care, even though on Stein's account, common carriers provide "public benefits" and should be governed by the ordinary, or cost-minimizing, standard of care. As the twentieth century progressed, numerous jurisdictions rejected the more demanding standard in favor of the ordinary standard, providing some support for Stein's claim. But what explains why this change occurred long after industrialization? The distinction that Stein draws between private and public benefits does not adequately address this question. He does not persuasively answer the interesting questions posed by a benefit theory of tort law, but by provocatively posing them, Stein has made an original and valuable contribution.

1. Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts* (Parts I-III), 5 **Am. Law. Reg.** 209, 273, 337 (1905), at 273 n.1 (summarizing thesis of Part I). [?]
2. *Id.* at 273. [?]
3. Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 **N.Y.U. L. Rev.** 1517, 1572-81 (2016) (explaining why the reciprocity norm generates the cost-minimizing standard of reasonable care for risks that are no greater than the ordinary or background level of risk in the community); *id.* at 1588-92 (showing how a concern for overdeterrence—defined by reference to a substantive liberal egalitarian principle of equal opportunity—limits tort liability for nonreciprocal risks). [?]
4. Morton J. Horwitz, **The Transformation of American Law, 1780-1860** (1977). [?]
5. *Cf.* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 **UCLA L. Rev.** 641 (1989) (rejecting subsidy thesis based on extended study of nineteenth-century case law). [?]

Cite as: Mark Geistfeld, *A Benefit Theory of Tort Law*, JOTWELL (May 12, 2017) (reviewing Alex Stein, *The Domain of Torts*, 117 **Colum. L. Rev.** 535 (forthcoming 2017), available at SSRN), http://torts.jotwell.com/a-benefit-theory-of-tort-law/.