
The Law and Economics of Public Health

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Abstract

The fundamental question addressed by this paper is whether or not and the extent to which imposing tort liability on potential injurers improves the public's health. Conceptually, imposing the threat of litigation on potential injurers gives them an incentive to exercise more care than they would absent the threat. While the conclusion might seem to be obvious at first glance, in reality, the conclusion is far from obvious. For one, insurance coverage may blunt incentives to take care. Also, the tort system may operate far less perfectly than the theory would have it. In the end, the question must be answered on the basis of empirical evidence.

Keywords: Medical malpractice; tort liability; product liability; workers compensation; public health.

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1

Introduction

The allocation of most goods and services in market-oriented economies is left to market forces. For some goods and services, however, there is a collective decision that some form of government intervention in resource allocation is appropriate. There are other reasons for government intervention, such as pursuit of fairness and justice, but the goal on which we will focus in this review is pursuit of economic efficiency — that is, the goal of attaining the highest level of wellbeing of members of society from a given level of resource endowments.

One rationale for promoting economic efficiency through public intervention is the presence of externalities in production and/or consumption of a good or service. Another concerns situations in which consumers are not well-positioned to make rational decisions about resource allocation because they lack the requisite information, e.g., such as inability to make rational choices due to youth or lack of cognitive ability, or a product's characteristics include risk inherent in consuming the good.

Government intervention may take one or more forms, including tax-subsidy arrangements, various forms of regulation ranging from mandates to outright bans on a particular activity, and implementation

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of legal rules that are enforced by the state or by litigation brought by private parties (see, e.g., Breyer, 1982). Laws may be efficiency-enhancing if they reduce costs of market transactions.

In principle, regulation is designed to serve the public interest. Yet as several scholars have noted (Stigler, 1971; Peltzman, 1976; Becker, 1983; Laffont and Tirole, 1994), the regulatory apparatus is often subject to control or substantial influence by the stakeholders it is established to regulate (for a somewhat more favorable view, see Breyer, 1993). While individual citizens have a vested interest in market outcomes, their interest is often distributed among many different outcomes. By contrast, the stakeholders' self-interest is often highly concentrated. It is often worthwhile for stakeholders to invest in influencing regulatory decisions in pursuit of private gain rather than the public interest (Wilson, 1980). Even if stakeholders were ineffective in promoting their self-interest, public employees may lack adequate resources to make timely decisions. For tobacco, a strong case can be made that tort litigation radically changed the political balance between tobacco manufacturers and interests supporting tobacco control (Trogdon and Sloan, 2006).

Much research in the law and economics literature, at least narrowly defined, has been theoretical. By contrast, there are large pertinent empirical literatures, particularly pertaining to findings relating legal practices to the public health that are not in publication outlets typically read by specialists in law and economics but which offer important implications for the field. Empirical research findings on the relationship between law and the public's health are scattered in different literature ranging from economic journals to medical journals, journals on addictive behaviors, law reviews, and books. No study to date has assembled the empirical evidence from various areas, ranging from motor vehicle liability and dram shop liability, to medical malpractice, to products liability as it applies to pharmaceutical products and medical devices. This is the task of this paper.

The fundamental question addressed by this paper is whether or not and the extent to which imposing tort liability on potential injurers improves the public's health. Conceptually, imposing the threat of litigation on potential injurers gives them an incentive to exercise more

care than they would absent the threat. While the conclusion might seem to be obvious at first glance, in reality, the conclusion is far from obvious. For one, insurance coverage may blunt incentives to take care. Also, the tort system may operate far less perfectly than the theory would have it. In the end, the question must be answered on the basis of empirical evidence.

The following sections discuss theory and empirical evidence in several areas of personal injury to which tort liability has been applied. Section 2 describes the general law and economics framework used to assess both positive and normative issues as they apply to tort liability. Sections 3–8 present the rationale for, and empirical evidence, on particular applications of tort liability as it applies to personal injury.

Section 3 describes motor vehicle torts. Judged in terms of the sheer number of legal claims, this is the most active area among those we discuss. Compared to several others, motor vehicle liability is widely accepted as socially beneficial. State legislatures have passed legislation on an ongoing basis, but such legislation tends to be below the public radar screen.

Section 4 is about dram shop liability, statutory or common law, which reaches the alcohol seller legally responsible for loss from injuries directly caused by a minor or an obviously intoxicated adult who, after leaving the establishment, injures or kills a person or persons in a roadway accident. Less frequently, common law imposes liability on social hosts that serve minors or obviously intoxicated adults. There is less empirical evidence on social host than on dram shop liability.

Section 5 is about medical malpractice. This topic commands considerable public attention particularly during times of crisis, which follow substantial increases in medical malpractice insurance premiums and sometimes withdrawal of insurers from this line of business. Only a small part of the literature on medical malpractice focuses specifically on injury deterrence. In contrast to dram shop liability and to a lesser extent motor vehicle liability for which there is evidence that tort law deters accidents and injuries, based on what we know, there is little evidence that the threat of medical liability leads to improvements in the public's health. Reforms that have been enacted do not address structural flaws in the medical malpractice system as it exists today.

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Section 6 discusses tobacco litigation. Tobacco is distinct in that the alleged misconduct generally occurred several decades before the lawsuits against the tobacco manufacturers were filed, in particular, the litigation that resulted in payment to plaintiffs. This type of litigation is controversial since it would seem that smokers would have known about the health harms of tobacco consumption, and they decided to smoke anyway. Tobacco litigation has improved the public health mainly by its effect on the price of cigarettes and the political fallout that has facilitated passage of legislation raising cigarette excise taxes.

Section 7 focuses on products liability for pharmaceuticals, medical devices, and vaccines. The case for imposing liability on the manufacturers of these products is namely that patients are not sufficiently informed about the underlying risks of consuming these products. But, as we discuss, empirical evidence on this point is scanty at best. Products liability has had a major impact on availability of some products. Whether the public's health has been measurably improved by having pharmaceutical products liability remains to be demonstrated.

In Section 8, we describe the rationale for and empirical evidence on workers compensation. From an historical viewpoint, workers compensation should be discussed as the first application of the role of tort liability in the public's health. However, litigation brought by injured employees against their employers has been virtually eliminated in the United States and in other countries for about a century, having been replaced by employer-provided insurance coverage for work-related injuries and illnesses. An exception is that products liability remains in force. Employees can file products liability suits against manufacturers of products, alleging that these products caused work-related injuries or illnesses, but the employer is not named as a co-defendant. There are advocates for introducing workers compensation type insurance in other contexts, such as for injuries sustained in the process of receiving medical services. However, no other field has gone as far in substituting insurance for tort as has workers compensation.

In Section 9, we evaluate the evidence from the various applications and present our conclusions and suggestions for future research.

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