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'Causation-consistent' liability, economic efficiency and the law of torts

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Abstract

Some legal scholars have argued that the standard modeling of liability rules is inconsistent with the causation requirement of the law of torts. It has been claimed that under the doctrinal notion of causation liability, an injurer is liable only if he was negligent. Moreover, he is liable for only that loss which can be attributed to his negligence and *not* the entire loss, as is the case with the standard modeling of liability rules. Our analysis shows that the 'causation-consistent' liability provides interesting insights on several issues concerning efficiency as well as compensation. Paper shows that when care is bilateral, causation-consistent liability provides a basis for efficiency characterization of the *entire* class of liability rules. Moreover, it remains a basis for the efficiency classification of liability rules even for bilateral-risk accidents.

JEL classification: K13

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1. Introduction

In the standard modeling of liability rules, the proportion of accident loss a party is required to bear, generally, does not depend upon the extent to which the party contributed to the loss. For example, at the time of accident if the care level of an injurer was just below the due level of care, under the standard rule of negligence he is held liable for the *entire* loss. Moreover, a negligent injurer is held to be fully liable even when it can be established

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that at the time of accident the victim had taken no care at all. Similarly, under the rule of strict liability with the defense of contributory negligence, if the victim's care level falls just short of the due level, he would be liable for the entire accident loss irrespective of the level of care taken by the injurer. Some scholars have questioned this specification of liability rules (Grady, 1983, 1988, 1989; Kahan, 1989; Wright, 1985, 1987).

In several scholarly writings, it has been argued that as a matter of legal doctrine, the standard modeling of liability rules is incorrect.[1] Here, the argument is that under a liability rule, say the rule of negligence, the doctrinal notion of 'causation liability' has two requirements: (i) an injurer is liable only if he was negligent at the time of accident and (ii) a negligent injurer is liable for *only* the loss that can be attributed to his negligence. That is 'causation liability' restrict the liability of a negligent injurer to the part of accident loss that can be attributed only to the injurer's negligence.[2]

For the ease of illustration, consider the following example. While engaging in his activity, a (potential) injurer can decide whether or not to take care. Let the cost of care be 1. If the injurer takes care the actual loss in the event of an accident will be 6, and 9 if he does not. The probability of an accident also depends upon the care level of the injurer, and is 1/3 when he takes care and 2/3 when he does not. Thus, when the injurer takes care, the expected loss is $(1/3) \times 6 = 2$; while, if he does not take care, the expected loss is $(2/3) \times 9 = 6$. Assume that the court will find the injurer negligent if and only if he does not take care. Under the standard modeling of the rule of negligence, liability of the negligent injurer is the entire loss, i.e. 9. As a result, the negligent injurer's expected liability is $2/3 \times 9 = 6$. But, note that the expected loss goes up only by 4 (i.e. $2/3 \times 9 – 1/3 \times 6$) if the injurer does not take care. Therefore, under the standard rule of negligence, the *expected* liability of the negligent injurer is greater than the expected loss that can be attributed to his negligence. As an alternative, we can consider a liability assignment such that when the injurer is negligent his *expected* liability is only 4, i.e. equal to the increase in the expected loss caused by his negligence, not the entire expected loss.[3] This alternative specification of liability is what we call '*causation-consistent*' liability, and forms the focus of the paper.

Several noted legal scholars have advocated this alternative approach towards liability assignment. For instance, Honoré (1997) writes: "In a legal context, . . . when the enquiry concerns the causal relevance of *wrongful* conduct, as is usual in tort claims, we must substitute for the wrongful conduct of the defendant *rightful* conduct on his part. That is, when liability is based on fault, the comparison is not with what would have happened had the defendant *done nothing*, but what would have happened had he *acted properly*. . . . the aim of the legal enquiry is to discover not whether the defendant's *conduct* as such made a

[1] Kahan (1989, p. 428), e.g. writes: "Rather, in most models, liability turns solely upon an injurer's negligence: if the injurer was not negligent, he is not liable; but if he was negligent he is liable for any accident that arises – including, if only by implication, those accidents that would have happened even if he had employed due care – This characterization of liability is incorrect."

[2] One basic feature of the legal systems is that, the claim goes, a negligent party is held liable for the loss of which the party's negligence was a necessary and proximate cause—'the causation requirement' (among others, see Keeton (1963, sec. 14), Kahan (1989), Honoré (1983), Shavell (1987, ch. 5), and Wright (1985, 1987).

[3] Here, in case of an accident if the negligent injurer is required to pay 6 (instead of 9) his expected liability will be $2/3 \times 6 = 4$.