

Media inquiries: Véronique Rodman
202.862.4871 (vrodman@aei.org)
Orders: 800.343.4499

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Making Tort Law: What Should Be Done and Who Should Do It

Tort law is popularly associated with films like *Silkwood*, *A Civil Action*, *The Insider*, and *Erin Brockovich*, in which courageous, beleaguered plaintiffs' lawyers battle the malevolent forces of "big business" and occasionally pull off startling victories that vindicate the rights of ordinary people. The reality is quite different.

In fact, the annual social overhead (i.e., total cost to the public) for tort litigation ranges into the hundreds of billions of dollars, but less than 40 percent of that amount reaches injured plaintiffs. What does society get in return for all this litigation? In *Making Tort Law: What Should Be Done and Who Should Do It* (AEI Press, March 2003), Charles Fried and David Rosenberg critically examine the existing system, identify the functions that tort law can and cannot serve, and argue that tort law should exclusively provide incentives to reduce the risks of accidents and injuries.

There is pressing need for this accounting. The expansive application of tort law to business establishes courts as regulators of the safety and supply of virtually all mass-produced goods, including those upon which the lives and livelihoods of most people depend. This inexpert, ad hoc, and tremendously expensive system actually results in heavy litigation costs for businesses and therefore in lower employment and wages, and higher-priced and fewer products and services. Focusing primarily on these societal costs, Fried and Rosenberg develop a comprehensive approach for both assessing and enhancing the social value of this legal regime.

Fried and Rosenberg believe that tort law should be designed to promote the well-being of individuals according to a "veil of ignorance" system (i.e., a system chosen by people before knowing if they will be plaintiffs, defendants, or even a party to the proceedings). The authors demonstrate that, if given the opportunity, people would prefer a system that would reduce total accident costs to a minimum. Based on this premise, Fried and Rosenberg then consider the social "goods" that tort law can effectively deliver. They examine the most salient of the aims professed for tort liability: preventing socially inappropriate risk-taking, insuring consumers and others at risk against accident loss, redistributing wealth from businesses to accident victims, and vindicating individual rights to a "day in court" and "corrective justice."

The authors emphatically rule out most of these hypothetical justifications and conclude that an appropriately reformed system of tort liability can most usefully be a deterrent. It can complement administrative regulations and social forces such as a firm's reputation in the marketplace, thereby deterring businesses from taking unreasonable risks. The authors argue that tort

law is wasteful, ineffective, and generally unnecessary as a source of accident insurance or as a vehicle to redistribute wealth, and that the justification for tort liability as a means of vindicating individual rights is a sentimental and distracting myth.

After sorting worthwhile from worthless objectives, the authors present a practical program of system-wide and specific reforms of tort law to facilitate its deterrence function. Among the important issues addressed are the timing of judicial intervention, the scope of sanctions, and the scale of enforcement, including related questions about predicating liability solely on risk. Fried and Rosenberg also consider the relative benefits of strict liability (where the defendant is responsible regardless of other considerations) versus a negligence standard (where the plaintiff has to prove, for example, that an employer erred relative to the industry standard even though the mistake was not intentional). They also weigh contributory negligence (where a defendant is held responsible for the entire wrong regardless of the breadth of his/her involvement) versus comparative negligence (where the defendant's responsibility is relative to the degree of involvement). Additionally, they also examine the basis for awarding non-pecuniary (e.g., pain and suffering) and punitive damages. The authors further contribute to the debate over the tort system through their analysis of the expense, the time, and the institutional mechanisms necessary to collect the information needed and accordingly prescribe guidelines to allocate the burdens of reform between legislatures and courts—an analysis that will assist in identifying the institution best suited to assume the lawmaking initiative.

Charles Fried, Beneficial Professor of Law at Harvard Law School, was solicitor general of the United States and served as associate justice of the Supreme Judicial Court of Massachusetts from 1995 to 1999. David Rosenberg is professor of law at Harvard Law School and has engaged in and studied legal practice for several decades.

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