Logic, Anecdote and Social Cost

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Torts is not my field. But in one sense neither is it Guido Calabresi's, although he is a professor of tort law at the Yale Law School. In neither The Cost of Accidents nor the series of earlier articles of which the book is a summation and amplification will the reader find more than passing mention of the rules and concepts that constitute the body of accident law or of the procedures and institutions by which that law is formulated and applied. Few cases are discussed and, if I recall correctly, no statutes.

To note the untraditional character of Calabresi's concerns is not to criticize, but to mark a new direction in legal scholarship. It is no secret that many law professors have lost interest in the traditional undertakings of legal research. These were two: determining what the law was and determining what it should be. But in practice they usually turned out to be the same. In both cases, one first sought to isolate the basic premises or policies underlying an area of the law by a close reading of judicial opinions and, where applicable, statutes and legislative history, and then comparing the specific rules of law developed by the courts with these premises. If a rule was found to be inconsistent with the premises, it was rejected as an aberration or, if too well established for that, as bad law.

The Cost of Accidents is an ambitious effort to employ a social science perspective in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists on which to rely. In its bold break with conventional legal analysis of tort questions, Calabresi’s work may be a portent of the future direction of legal scholarship in fields that, unlike antitrust, remain bastions of the traditional approach.

By this time the reader must be impatient to find out what exactly the book has to say. Its salient points can be summarized briefly.

Accidents impose costs. Those costs, in the Calabresian terminology, are primary (personal injuries and property damage), secondary (economic dislocation resulting from failure to compensate the victim of an accident), and tertiary (the costs of administering any scheme designed to reduce primary or secondary accident costs). The object of accident law or policy should be to bring about the socially preferred accident-cost level. Notice that the goal is not to minimize accidents or accident costs, unless by accident costs we mean costs net of any benefits. Traffic accidents could be eliminated by banning motor vehicles. But the price would be too high. The goal, rather, is to optimize accident costs.

Its attainment is complicated by the reciprocal character of the components of those costs. A plan that reduced secondary costs—for example, a scheme of compulsory social insurance against accidents—might increase primary accident costs by reducing the incentive to avoid an accident. A plan designed to reduce accidents by (say) forbidding liability insurance would concentrate accident costs and thereby aggravate the secondary-cost problem. Schemes to reduce tertiary (administrative) costs could increase both primary and secondary costs. And so on.

He distinguishes two basic approaches. The first is the market, or in his terminology “general deterrence,” approach. In its pure form, the market approach involves no government regulation of accident-producing activities at all; the level of accidents is determined entirely by voluntary arrangements among members of society. Thus, the number of coal miners killed each year would be a resultant of the demand for coal, the attitude of coal miners toward risk, the costs of safety devices, and the costs of other inputs. If the demand for coal was very large, if safety devices were very costly, and if the supply of coal miners willing to work for moderate wages despite highly dangerous conditions was also large, then the mortality rate among coal miners would be relatively high. But suppose instead that prospective coal miners are highly risk averse. They will demand very high wages, or safety devices, or both. The costs of mining coal will now be higher and the output smaller, unless coal operators can readily substitute other inputs for labor. Either way fewer miners will be employed; perhaps there will be safety devices, too. Mortality in the mines will be reduced. The important point is that whatever the risk preferences of miners may be, the level of mine accidents will be determined by voluntary transactions in the marketplace.

Unfortunately, it costs something to negotiate in the marketplace, and on occasion the costs of voluntary arrangements determining the number of accidents may be prohibitive: Pedestrians cannot get together and negotiate with drivers in the same fashion that coal miners can with coal operators. Where, as in this example, private contracting is precluded by high transaction costs, it may still be possible, through law, to simulate a market result. The trick is to impose the costs of the accident on that participant or contributor who, by a change in his activity, can reduce those costs net of any benefits. This would produce the same result as would private contracting. However, it may be unclear which accident contributor should be induced to alter his activity. A rule making the driver always liable in a car-pedestrian accident might induce auto manufacturers to install safety devices in in-
stances where a cheaper way of avoiding the same number of accidents might be to build pedestrian overpasses.

Calabresi’s criticism of the market or general-deterrence approach to the problem of primary accident costs sets the stage for a discussion of the alternative approach, “specific” or “collective” deterrence. The term means direct public regulation of safety, as in traffic rules and in laws requiring the installation of seat belts in all new cars. The distinction between market and collective deterrence is unfortunately quite unclear. Some types of safety regulation, such as traffic rules, can, it seems to me, be explained better in market-deterrence than in collective-deterrence terms. Imagine a state in which the highways were privately owned and there were no traffic laws. One would expect the highway owners to establish rules of the road, speed limits, and the like for the same reason that auto manufacturers installed some safety devices even before they were required by law to do so—in order to promote use of their product by meeting the user’s demand for safety. These rules might be more lax or more stringent than those imposed by governments; my point is only that many safety regulations, and specifically the traffic regulations that loom large in Calabresi’s discussion of specific deterrence, need not reflect any dissatisfaction with the level of accidents determined by the market. These regulations are imposed by the community because the community is the proprietor of the transportation facility, the road.

Even where the government is not a proprietor, its safety rules may instance market rather than collective deterrence. Collective deterrence, as a functionally distinct mode of regulation, comes into play when the government decides that the violator of a rule shall be made to pay a fine or be imprisoned rather than merely held liable for any injuries or damage that he may cause.

Safety-belt, mine-safety, and like laws are something else again. Their rationale is pure paternalism. They force people to pay more to protect themselves (not strangers) than they would voluntarily pay.

Calabresi concludes that a mixed system of general and specific deterrence is desirable. The appropriate proportions he regards as a mixed empirical and political question. Having established the goals and methods of accident control, he then asks whether the prevailing system of accident control in this country, the “fault system” (negligence law), is a rational system for optimizing accident costs. He concludes that it is not. The fault system not only ignores the problem of secondary costs, save by permitting private insurance; it actually aggravates them by delaying compensation until the conclusion of an often lengthy jury trial or settlement negotiation. The dependence on costly and time-consuming judicial processes also multiplies tertiary (administrative) accident costs. The fault system is not good at optimizing primary accident costs either. The notion of “fault” is freighted with moral concepts that get in the way of allocating liability as to reduce the net costs of accidents. Furthermore, liability is determined by the facts of each particular case rather than by those of an entire class of cases. Moreover, the judge considers only who between the parties before him is better able to reduce accident costs, although someone not before the court at all (e.g., the auto maker) might be even better. Finally, the ability of the fault system to devise discriminating rules of liability is limited by the degree to which insurance companies find it commercially feasible to establish different risk classes. Calabresi concludes that the fault system is “absurd” and “ineffective” as a system of accident control.

So brief a summary of The Cost of Accidents cannot do justice to the author’s graceful if somewhat sinuous and elusive style or to the excellent if sometimes protracted discussions of detail with which the book abounds. But it can indicate the dominant characteristics of his approach, which are two: reliance on economic theory, and a weak sense of fact. His debt to economic theory is most obvious in the use of a variety
of economic doctrines to establish key points in the analysis: to show why wide cost spreading might not increase the welfare of society, why schemes of secondary-cost reduction could impair incentives to avoid accidents, why the complete elimination of accidents would not promote welfare, what the market can and cannot do to bring about a socially preferred level of accidents, how the presence of monopoly might alter the analysis, and in a host of lesser ways.

At points I find myself in disagreement with his use of economic doctrine. For example, the unwillingness of contemporary economists to ascribe an automatic increase in total welfare to any redistribution of income from a wealthier to a poorer person stems not from rejection of the assumption of the diminishing marginal utility of income, but from recognition that the interpersonal comparison of utilities is arbitrary. But on the whole, Calabresi's handling of economic doctrine seems, to me at least, highly competent.

Calabresi's debt to economic theory is greater than I have indicated. That theory supplies the very structure as well as the details of analysis. The form of *The Cost of Accidents* is that of "cost-benefit" or "systems" analysis. These terms describe techniques of applied economics that involve (1) an initial specification of goals, (2) the arraying of alternative methods of achieving these goals, and (3) the costing out of each alternative. Calabresi begins by setting forth the goals of accident law. He derives these goals from broad considerations of social policy rather than from tort cases or other legal materials. He then describes the full spectrum of alternative methods for achieving these goals; and this procedure immediately carries him beyond the conventional bounds of tort doctrine and into areas usually thought to belong to the administrative and criminal law fields. Although he never actually costs out these alternatives, it is significant that his analysis is cast in terms of comparing their costs and that he subordinates considerations (such as "justice") that are not susceptible of precise and objec-
tive description. In principle, his analysis could provide a framework for a quantitative evaluation of alternative accident-control schemes; at least, the considerations relevant to evaluation have been carefully marshalled.

The utilization of this systematic procedure to bring elementary but profound insights of economic theory to bear on the accident question proves a powerful forensic and analytical machine with which Calabresi easily sweeps rival approaches, employing more conventional legal analytic methods, from the board. He demonstrates that these methods overlook important consequences of different accident-control schemes, proceed on no coherent theory, and provide little useful guidance to policy makers; and that an approach grounded in the procedures and theorems of economics offers greater promise. This is the heart of his achievement. His failure is in exaggerating the utility of the economic (or any other) approach when uninformed by facts.

One sees this most clearly in his discussion of the fault system. I noted previously the strong language in which Calabresi rejected the possibility that the fault system might approximate the model of an effective accident-control system that emerges from his analysis of goals and alternative methods for achieving them. But his reasoning is analytic rather than empirical and the analysis is not compelling. That "fault" is not a term that an economist seeking to optimize accident costs by identifying the cheapest accident avoider would use is hardly dispositive. The question cannot be answered by reference to a dictionary.

Nor is it clear *a priori* that in deciding tort cases judges consider only the relative abilities of the particular parties before them to minimize net accident costs. It is open to a party to prove that not it but a stranger to the proceeding—the manufacturer of the automobile, the contractor who built the roadway, the city that installed (or failed to install) the traffic signals—was the one "at fault," or to seek contribution from some other party, alleging it to be a joint tort-
feasor. And perhaps the experience accumulated in a series of trials involving accidents of similar types does enable insurance companies to identify accident-prone activities, people, procedures, and equipment and fixed premiums accordingly. A more disturbing characteristic of present insurance practices is that the accident costs of the most dangerous drivers are systematically shifted to the less dangerous. Compulsory-insurance schemes now widely in force require insurance companies to insure, at rates not much above normal, those drivers whose driving records or other characteristics make them such poor risks that no company would voluntarily insure them at rates that the driver would be willing to pay. Such insurance is written at a loss, the deficit being made up by other policyholders.

With features such as these, the fault-cum-insurance system is open to valid criticism. But a compulsory-insurance scheme that encourages accidents is not inevitable. We could if we wished require that drivers obtain adequate liability insurance at whatever was the competitive rate for their risk group—this to assure that the costs of their accidents be made costs to them—and simply bar from the roads any driver who failed to obtain that insurance. Otherwise we are subsidizing accidents—more concretely, permitting people to kill and maim without bearing the costs of such conduct. The weakness is not in the fault system; it is in the public regulation of the insurance industry.

While it is apparently true that the ratio of administrative overhead to claims paid is higher in the fault system than in most nonfault social or private insurance schemes, that is the wrong comparison. The fault system has a function beyond compensation: the deterrence of accidents. However large the administrative costs of the system in relation to the compensation paid under it, they may be well worth incurring if the tort system is responsible for even a small reduction in the accident rate—traffic accidents alone cost society billions of dollars every year—unless the same deterrence could be obtained at lower cost by the use of another system. Finally, since I reject Calabresi’s assumption that people are psychologically incapable of voluntarily protecting themselves by insurance, I conclude that the fault system need not entail an intolerable problem of secondary accident costs.

My argument is not that the fault system is in fact superior to alternative systems of accident control but that a judgment is impossible without studying how the system operates. Economic theory will help us to design the necessary studies, but in this instance, at least, it will not yield the answer in advance.

The book, in short, furnishes a useful perspective on the problem of accident control but not a predicate for deciding between competing solutions, and this I suspect will be a frequent characteristic of the new version of legal scholarship exemplified by The Cost of Accidents; at least it is a major pitfall. A taste for proposing new organizing principles need not be accompanied by interest in devising methods of empirical research that will enable us to use those principles to add to our knowledge of how the legal system operates and could be improved. Indeed, it may imply a lack of interest in a useful and familiar if insufficient technique of empirical legal research: the close reading of cases.

Calabresi’s defense, offered early in the book, is that “if we waited for such facts concerning the actual operation and effects of accident law to be adequately proven before we made societal changes, we would rarely if ever depart from the status quo.” But one could as plausibly argue the reverse: The status quo that Calabresi so deplores—the fault system—is likely to continue to resist change in the area of his primary concern, traffic accidents, until the alleged shortcomings of the present system are verified by empirical research. This need not mean forever. Empirical research has already proceeded further in the accident field than in most other areas of the law, although one would hardly guess this from The Cost of Accidents. Calabresi cites exhaus-

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student or a group of students on any problem of legal education. Such reports being as rare as they are in the case of faculty members, the opportunity is in a sense very great.

One would think that law students especially would respond to this challenge if they are interested in the problems, since they have chosen a career that puts high value on the arts of reasoned analysis and persuasion. But this kind of contribution is one that not many students are able or willing to make. Hard work is involved. The stock of ideas that students can bring to old and difficult problems is understandably limited. The most capable students will recognize the difficulties and, for the most part, will rightly conclude that there are better and more interesting ways to use their time. The result is, I am afraid, that most efforts of students to become involved in these matters take the form of superficial proposals based on whatever happen to be the current clichés of reform that leap from one law school to another.

We should by all means encourage thoughtful consideration of the problems of legal education by students, and listen to what they have to say. I doubt very much that the process is going to be much advanced in the long run by institutional arrangements, whether in the form of joint committees, parallel committees, representation at faculty meetings, or whatever other devices a particular school may see fit to adopt. There seems little reason to believe that whatever contributions students can make cannot be made by them as students rather than as participants in governance. The elements that make for excellence in law schools are ideas, intellectual climate, and incentives. More governance will not improve these elements. In relation to the environment of a law school, governance is really a form of pollution. If we would preserve the vitality of our institutions, we must hope that we will recognize governance for what it is before it is too late. Perhaps it is already too late.

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1. One could compare accident rates in jurisdictions having different accident-control schemes or rules (are pedestrians more careless in jurisdictions in which contributory negligence is no longer a defense?), and in the same jurisdiction before and after a change in tort law or other relevant institutional change.

2. As my colleague Harold Demsetz suggests, one could collect either instances where changes in technology altered the relative costs of accident avoidance and ask whether the rules of liability were changed to conform, or instances where the rules changed and ask whether the changes followed technological developments that affected the relative costs of accident avoidance.

3. One could ask how many of the doctrines of accident law currently in force can be deduced from the premise that the purpose of such law is to reduce the (net) costs of accidents.

Perhaps such projects would prove more difficult to undertake than I think. There is ground for optimism in the fact that accidents, unlike some other important subjects of interest to the student of legal institutions, such as collusion, are not covert. At all events, I see no other way of making substantial forward progress in the accident-control area; and perhaps this is a point with general application to legal scholarship.