

**Perspectives on Tort Law**

Perspectives on Tort Law, with notes on traditional and emerging viewpoints using a case study

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### Abstract

The tort remedial system has evolved from its ancient roots in *Lex Aquilia*, from the Roman law of 286 BC. It has undergone reforms and developed with insights from various perspectives including, economic, corrective justice and pragmatic viewpoints. In the recent years it has received considerable political attention, especially in the medical malpractice arena.

This paper reviews the basis and fundamentals of the tort remedial system and studies the popular case of *Liebeck v. McDonald's Restaurants* in two competing perspectives.

## Perspectives on Tort Law

### a) Introduction

Tort law provides monetary compensation to redress a plaintiff's claim that the defendant injured her, interfered with her property, invaded privacy, or invaded another legally protected interest. In some circumstances, where future harm is threatened, equitable relief, usually in the form of an injunction, may be available. While the circumstances that led to the harm might also support a criminal prosecution, claim for breach of contract, or other civil law complaint, the law of torts focuses on non-contractual rights and liabilities arising where no one promised to pay for the damages and without regard to whether the government could prosecute the actor for a crime. *Dan B. Dobbs, The Law of Torts.*

Major technological advances create new forms of injury that require updating the law of torts. In the 1960s, products liability evolved to address the social problems caused by marketing dangerously defective products. Today, tort law is evolving to address new injuries from the vulnerabilities of Internet networks. Society faces new threats related to cyber security, software, and the mutual vulnerabilities of the networked world.

Software vulnerabilities negligently enable cybercrimes such as the misappropriation of trade secrets, computer crimes and abuse, and economic espionage. Creative lawyers apply ancient personal property torts, such as trespass to chattels, to counter threats such as computer viruses and the disruption of massive amounts of e-mail spam. Old torts counter new Internet-related threats such as the enablement of cybercrime, inadequate cyber security, online privacy, and identity theft.

The tort system is a site for struggles between the societal need for containment of risks and freedom to take action. The process by which the legal system attempts to resolve these disputes and the ethical dilemmas that arise out of the litigation process, provide an interesting insight into the fundamental value conflicts faced by judges, legislators, administrators, and juries who must resolve tort claims. A true appreciation of the public policy implications of tort law requires reflection on the immediate and long-range impact of the tort system.

## b) Emerging view points

Over the past few decades, tort law has been at the center stage of public policy debates. William L. Prosser, in his classic tort treatise, described tort law as a “battleground of social theory”, *Prosser and Keeton, On the Law of Torts*. Today competing perspectives characterize the field of tort law. While some law professors may view the subject as value-free and neutral, tort law remains inevitably contested and contestable socio-legal terrain.

The tort remedial system broadly has the following steps:

- Plaintiffs state a claim and defendants respond to those causes of action;
- The tort litigation process determines the facts (the events that produced the injuries) and the law (the rules determining who should bear the loss);
- Different perspectives reflect value preferences supporting the plaintiff’s claim for legal redress and the defendant’s response;
- Identity categories, such as race, gender, and economic wealth, reverberate throughout the torts processes and have a weighty role in evaluating the compensation.

In every historical era, tort perspectives reflect the dominant ideologies. The jurisprudence of legal formalism dominated early tort law. At early common law, a tort plaintiff would need to “show that he had sustained a physical contact on his person or property, due to the activity of another.” Charles O. Gregory, *Trespass to Negligence to Absolute Liability*. Legal formalism constrained early tort law; a plaintiff would be denied a cause of action simply because his or her injury could not fit into an “existing and recognized writ.” Writs were formalistic forms of action used to vindicate rights and remedies. The legal realists of the 1920s and 1930s challenged formalistic assumptions by conducting empirical research and applying the social sciences to the law. Contemporary tort law is a pluralistic field with diverse perspectives on how to resolve an evolving and varied set of legal dilemmas.

Tort law is a common law subject, but it is also private law with a public purpose at the center of political controversy. President George W. Bush called for limitations on tort liability

for medical malpractice and an end to frivolous lawsuits in his 2007 State of the Union Address. Tort critics claim the overuse of tort remedies is responsible for declining U.S. competitiveness, excessive delays in developing new products, the withdrawal of useful pharmaceuticals and medical devices from the market, and high insurance rates. These “tort reformers” claim that defensive practices to avoid groundless litigation create a tort tax on all goods and services. In contrast, plaintiff’s lawyers believe they are protecting the public from careless or dangerous actors.

**c) Competing Perspectives on Tort Law**

Tort law represents more than a collection of causes of action; it also embodies ways of seeing the world. The torts casebook as traditionally conceived does not devote much attention to competing perspectives and inherent presumptions.

Two competing perspectives in tort law are law and economics and corrective justice, which are “unfriendly camps.” Law and economics focuses on deterrence, paying little attention to justice, fairness, or distribution. In contrast, corrective justice focuses on justice issues avoiding questions of allocative efficiency, externalities, or the economic welfare of society.

Scholars widely acknowledge the impact that the law and economics movement has had on the study of tort law. Though controversial, economics provides a useful heuristic framework to approach nearly every tort doctrine and defense.

Beginning in the 1970s, corrective justice theorists such as Jules Coleman, George Fletcher, and Ernest Weinrib began to examine liability rules from the perspective of fairness, allocation, or distribution of resources. While many scholars, lawyers, and judges employ the law and economics or corrective justice views, critical race theory, feminist jurisprudence, pragmatism, and social justice also offer useful insights challenging the more dominant views.

**d) Case study – Liebeck v. McDonald’s Restaurants**

Stella Liebeck, 79, purchased the coffee and while driving her car, placed the coffee cup between

her legs and tried to remove the lid. The cup spilled and coffee ran into her lap. Wearing a sweat suit and sitting in a bucket seat, she received second- and third-degree burns across her buttocks, thighs, and labia. After the spill, Liebeck spent seven days in the hospital and three weeks recuperating at home with her daughter in attendance. This was followed by skin grafts. During this period, she lost 20 pounds—to 83 pounds—almost 20% of her body weight.

Liebeck wrote to McDonald's and asked them to turn down the coffee temperature, which was set at 170 degrees. She also asked for her out-of-pocket medical expenses of about \$2,000 plus the lost wages of her daughter. McDonald's offered \$800. She sued, asking for no less than \$100,000 in compensatory damages, including pain and suffering, and triple punitive damages. Just before trial, she offered to settle for \$300,000, but McDonald's rejected the offer.

The case went to trial in August, 1994. Photos were shown of Liebeck's burned skin, and a burn expert, Dr. Charles Baxter (Southwestern Medical School), testified that 170-degree coffee would cause second-degree burns within 3.5 seconds of hitting the skin. Christopher Appleton, a quality assurance supervisor at McDonald's headquarters testified that the company had not lowered the heat under the coffee despite receiving 700 burn complaints in 10 years. Safety consultant Robert Knall said that 700 complaints was about 1 in 24 million cups and "basically trivially different from zero."

After four hours of deliberation, the jury found for Liebeck. She was awarded \$200,000 for compensatory damages, reduced by 20 percent because Liebeck had contributed to the accident. They also awarded \$2.7 million in punitive damages.

## **I. Law and Economics Perspective**

### **a) Concepts & Methods**

The Law and Economics movement has established a strong beachhead in law and legal education because it provides a powerful tool for assessing the costs and benefits of a given legal rule or case outcome. Tort law is largely about reducing the cost of accidents in the most efficient manner possible. Standard textbooks in economics define the field as the study of resource allocation in the presence of scarcity. Tort law determines who bears the burden of an

injury and what forms of injury are compensable.

b) Applying Law & Economics to the Hot Coffee Case

Tort lawyers for both sides can apply economic analysis to the McDonald's hot coffee case. Defense counsel for McDonald's Corporation could apply neoclassical economic theory to argue that the company was not engaged in excessive risk-creation. After all, McDonald's sold billions of cups of coffee and registered only 700 or so complaints that resulted in settlements. Legal norms that improve the safety of consumers are not cost-free and are borne by the consuming public in the form of higher prices. Increased tort verdicts will increase the price of coffee and perhaps even change the preferences of consumers.

Where the probability of injury is low, a punitive damages award against McDonald's may "over deter" socially beneficial activities. The deterrent message sent by a large punitive damages award will result in inefficiency. Consumers prefer superheated coffee, judging from the billions of cups sold. Punitive damages will encourage the company to serve tepid coffee causing consumers to change their preferences and perhaps drink more beer, tea, or other beverages. The company could argue that punitive damages will create a disincentive for marketing coffee in a way that reflects consumer preferences. A cost-benefit analysis might balance the benefits of selling 2.5 billion cups of McDonald's coffee against only approximately 700 consumer injuries. McDonald's could argue that if it lowered the temperature of its coffee, there will not be a net benefit. McDonald's best neoclassical economics argument is that the efficiency rule dictates that it should be able to continue selling its hot coffee since the cost of lowering the coffee is greater than the benefit of eliminating 700 burn injuries.

A plaintiff will argue that McDonald's should be assessed a large punitive damages to deter the company from failing to take prompt remedial steps in the wake of hundreds of prior reported injuries. The plaintiff will argue that McDonald's can spread the loss paying the judgment across millions of sales. The giant corporation is in the best position to pass costs along to its customers. A law and economics oriented court might ask whether McDonald's burden of precaution exceeds the costs of injury avoidance. If the burden of precaution exceeds the probability of the

injury factored with the severity of the injury should it occur, then this precaution is not cost-justified. The net effect of the punitive damages award was that McDonald's only lost two days worth of coffee revenue.

## II. Corrective Justice

### a) Concepts & Methods

Corrective justice views the goal of tort law to be providing victims with the legal weapons necessary to right wrongs. Of course, tort remedies will seldom be able to restore the plaintiff to the pre-injury situation in the literal sense. While the circumstances that led to the harm might also support a criminal charge, a claim for breach of contract, or other complaint, the torts case focuses on rights and liabilities that arise although no one promised to pay for the damages and without regard to whether the government could prosecute the actor for a crime.

Corrective justice theory is based on the simple and elegant idea that an injurer who wrongfully injures another must make the injured party whole. This idea of justice presupposes the Aristotelian idea of normative equilibrium. One party wrongfully injuring another disturbs this equilibrium. Corrective justice restores it. Aristotle's distinction between voluntary and involuntary harm anticipates modern concepts of negligence.

### b) Applying Corrective Justice to the Hot Coffee Case

Corrective justice requires that the party at fault make the victim whole. Proving fault in this case is problematic as often happens in complicated torts cases where the plaintiff and the defendant may be both at fault or where there may be multiple causes of a given injury.

The defense view would be that Mrs. Liebeck was the primary cause of her own injuries and therefore should not be able to recover. The real life McDonald's hot coffee case was based upon strict liability and breach of the implied warranty of merchantability. Mrs. Liebeck's attorney could also have filed a negligence claim. The plaintiff would counter that McDonald's was negligent in serving superheated coffee and was in the best position to avoid the peril by turning down the heat, strengthening warnings, or redesigning cups so they would not easily collapse.

The jury's finding of contributory negligence is entirely consistent with corrective justice in that

McDonald's should be liable for the portion of damages reflecting its share of responsibility.

Corrective justice would dictate that McDonald's disgorge its illicit gains from not paying the price for marketing superheated coffee. The purpose of corrective justice is "to make repair, to make good the victim's loss." Jules I. Coleman, *The Practice of Corrective Justice*.

A corrective justice theorist would consider evidence that McDonald's corporation failed to take prompt remedial steps in the face of a developing profile of danger that emerged from reported injuries. The defendant should be accountable for bearing "the cost of the harm for which it is legally responsible."

Mrs. Stella Liebeck sought redress for an injury caused by this conduct.

### **Conclusion**

The nature and of tort remedial system has undergone continual changes. In the United States tort reform has become a contentious political issue. This is particularly true in the medical malpractice arena, where it has been argued that the high costs of compensation awards are passed through to health care consumers. US reform advocates have proposed, among other things, limiting the number of claims, and capping the awards of damages.

Tort reform advocates argue that the present tort system is too expensive, that meritless lawsuits clog up the courts, that per capita tort costs vary significantly from state to state, and that trial attorneys customarily receive an unusually large percentage of the punitive damages awarded to plaintiffs in tort cases. High-profile tort cases are often portrayed by the media as the legal system's version of a lottery, where trial lawyers actively seek the magic combination of plaintiff, defendant, judge, and jury.

The tort remedial system is in fact constantly evolving with insights from sociological, economic, pragmatic perspectives.

### References

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