6-1-2008

The Frontiers of Tort Law

John T. Nockleby

INTRODUCTION: THE FRONTIERS OF TORT LAW

*John T. Nockleby**

The contributors to this Symposium all pose vexing challenges to the role of tort law in contemporary society.[1] Some critique the way we think about torts, some use empirical studies to show how tort law fails to accomplish its objectives, and others propose alternative modes of effecting positive human behavior.

The articles are grouped around common themes. First, several question traditional theories about tort law. These authors reflect on the boundaries of tort law, provocatively ask about "doing away" with tort law, or wrestle with theoretical concepts such as the role of duty and causation. This group includes articles by Professors Coleman, Simons, Esper and Keating, Wright, and Hanson and McCann.

A second group of articles explore how tort theory applies to real-life situations. These authors examine empirical data to show the ways in which the law in action can either support or undermine the policy goals originally guiding it. This group includes articles by Professors Witt, Bublick, Bernstein, and Crowley.

The third group of articles offers new tools that address key problems within tort law, here targeting preemption and tobacco regulation. Professors Sharkey, Klass, and Rabin fall into this group.

CHALLENGES TO TORT THEORY

The first group of essays addresses fundamental debates in tort theory. In *Doing Away with Tort Law*, Professor Coleman challenges those who view tort law as a technology to achieve goals

* Professor of Law & Director of the Civil Justice Program, Loyola Law School. Thanks to Student Symposium Editor Jessica Shpall for invaluable assistance. A special thanks to the Civil Justice Program Steering Committee for marvelous support and guidance in creating a series of symposia focused on important civil justice issues.

1. This set of articles stemmed from a live Civil Justice Program symposium conducted at Loyola Law School on January 24–25, 2008.

such as accident reduction,[2] instead of as a set of doctrines grounded in a moral understanding of human relationships.[3] In contrast, Professor Simons critiques *both* the law and economics approach *and* the corrective justice, rights-based approaches to tort theory.[4] According to Professor Simons, these two perspectives serve as foils to one another. He offers an approach that borrows insights from both theories, concluding that the Learned Hand test found in the *Restatement (Third) of Torts* is flexible enough to accommodate his qualified approach.

Two articles focus on the theoretical implications of duty and causation. In a critique of a series of "no duty" rulings by California courts, Professors Esper and Keating posit that duty analyses should examine obligation at a high level of generality, rather than at the retail level of a particular controversy.[5] Professor Wright explores the challenges of problematic causal situations, arguing that the ways in which tort law handles the issue ultimately undermine its own effectiveness.[6] He contends that the statistical probability interpretation of the preponderance standard should be abandoned.

Professors Hanson and McCann address the boundaries of tort law.[7] They challenge the "dispositionalist" model where an individual is regarded as making choices based on preferences. Arguing that law generally—and tort law in particular—would benefit from a "situationist" perspective, Hanson and McCann emphasize that forces outside the individual guide or even control those choices. If those forces are considered, tort law would employ very different conceptions of responsibility, causation, and blame.

APPLYING TORT THEORY TO REAL-LIFE SCENARIOS

A second group of articles explores how concepts grounded in legal theory often create conundrums for actors attempting to satisfy

2. *E.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

3. Jules L. Coleman, *Doing Away with Tort Law*, 41 LOY. L.A. L. REV. 1149 (2008).

4. Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171 (2008).

5. Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225 (2008).

6. Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295 (2008).

7. Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008).

competing goals. In a fascinating look at compensating civilians during war, Professor Witt examines the practice of paying American-style damages to settle civilian claims against the U.S. military in places such as Afghanistan and Iraq.[8] The military's use of money to achieve military objectives—what Witt calls "money as ammunition"—embodies contradictory impulses: compensating civilians accidentally injured by the military but only where compensation achieves the primary objective of pacifying the civilian population. In turn, Professor Bublick discusses a counterintuitive jury verdict in a lawsuit arising from the 1993 bombing of the World Trade Center.[9] When asked to apportion liability among all potentially responsible actors, the jury found that the Port Authority was twice as responsible as the terrorists themselves. Professor Bublick explains that tort-reform-produced state apportionment laws that require juries to apportion responsibility between negligent and intentional tortfeasors force an irrational allocation of loss in those situations where the source of negligence is the very failure to protect against third-party criminal behavior.

Professor Bernstein and Professor Croley separately address how tort law is implicated in how lawyers practice law. Professor Bernstein offers empirical evidence to support an argument for liberalizing the ban on solicitation of clients.[10] Through a study of disciplinary measures for solicitation in the United States between 2002–2007, Bernstein finds very few instances of punishment in relation to the 1.3 million licenses held to practice law and suggests that the purported dangers of solicitation are not present apart from limited situations such as duress or overreaching. Bernstein concludes that to declare behavior punishable while permitting it to go on without punishment is a practice that the bar should abandon. In contrast, Professor Croley turns back to the courtroom to study a cutting edge, litigation-based approach to improving access to civil justice.[11] Employing a case study of one of the few jurisdictions to

8. John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455 (2008).

9. Ellen M. Bublick, *Upside Down? Terrorists, Proprietors, and Civil Responsibility for Crime Prevention in the Post-9/11 Tort-Reform World*, 41 LOY. L.A. L. REV. 1483 (2008).

10. Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545 (2008).

11. Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 LOY. L.A. L. REV. 1585 (2008).

implement summary jury trials—Charleston County, South Carolina—he notes the potential of this procedural tool to maximize access to redress for low-damages tort plaintiffs. Professor Croley and the other authors in this group suggest innovative ways to employ existing doctrines in an effort to better tailor the law to the needs of society.

NEW HORIZONS FOR CIVIL JUSTICE

A third group of authors focuses on major debates within tort law involving preemption and tobacco litigation. Professors Sharkey and Klass advocate loosening the preemption doctrine in recognition of a changing federal and state regulatory landscape. Addressing developments in consumer advertising of prescription drugs, Professor Sharkey notes that consumer fraud claims could soon be preempted where the FDA has approved the advertising in question.[12] Given that the FDA's review of advertising is relaxed, she argues that the FDA's regulatory review of drug advertisements provides a weak floor rather than a ceiling, and therefore, preemption of state fraud claims involving drug advertising should rarely succeed. Likewise, Professor Klass reevaluates preemption doctrine generally in light of the states' widespread participation in fulfilling congressional policy goals.[13] Professor Klass argues that current preemption doctrine should to be modified to incorporate the role of state innovation, particularly in cases involving human health and the environment.

Addressing the tobacco wars, Professor Rabin recounts the evolution of a wide variety of efforts to regulate smoking, including excise taxes, restricting second-hand smoke, and increasing "information"—as well as tort claims against tobacco companies.[14] In considering the effectiveness of various mechanisms used to reduce tobacco use, Professor Rabin ultimately concludes that the most effective future approach for minimizing tobacco use and its related problems is through initiatives such as raising excise taxes on

12. Catherine M. Sharkey, *Drug Advertising Claims: Preemption's New Frontier*, 41 LOY. L.A. L. REV. 1625 (2008).

13. Alexandra B. Klass, *State Innovation and Preemption: Lessons from State Climate Change Efforts*, 41 Loy. L.A. L. Rev. 1653 (2008).

14. Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721 (2008).

tobacco products, regulating point-of-purchase advertising, and promoting counter-advertising.

CONCLUSION

The title of this Symposium, "Frontiers of Tort Law," suggests that we are at an important juncture; changing technologies and legal theories are pushing tort law in new directions. We believe that this collection of articles will help shape that dialogue, and we hope you will agree.