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Toward A Unified Theory of Torts

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Toward A Unified Theory of Torts*

Guido Calabresi

Abstract

For at least the last 50 years two ways of looking at tort law have struggled for dominance. One characterized by system-builders, as Izhak Englard so felicitously termed us; the other by those who have seen in tort law the highest manifestation of the common law tradition of responding to breaches in non-criminal, often non-contractual interpersonal relationships. In this paper, I would like to explore the relationship between these two approaches, which I will suggest, find their common law antecedents, where else but, in the forms of actions, from which so much of modern Anglo-American private law derives. I will suggest that both approaches have always been there and that they have affected and shaped each other over the centuries and continue to do so today.

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For at least the last 50 years two ways of looking at tort law have struggled for dominance. One characterized by system-builders, as Izhak England so felicitously termed us; the other by those who have seen in tort law the highest manifestation of the common law tradition of responding to breaches in non-criminal, often non-contractual interpersonal relationships.

In this paper, I would like to explore the relationship between these two approaches, which I will suggest, find their common law antecedents – where else but -- in the forms of actions, from which so much of modern Anglo-American private law derives. I will suggest that both approaches have always been there and that they have affected and shaped each other over the centuries and continue to do so today.

In a recent conference, marking the 35th anniversary of my book *The Costs of Accidents*, Jules Coleman asserted that while one cannot conceive of a legal world without criminal law or contract, one can conceive of a legal world without torts.

He went on to suggest that the system builders had come close to reconfiguring the legal world to bring about just that. He then added that if that were to happen, if the assertion of duty relationships, which demand and promote personal responsibility in the furtherance of individualized corrective justice were to disappear, something significant would be lost. The gap created would have to be filled, because, unless it was, something would be lost in terms of interpersonal relationships at law. Another area of law would have to concern itself with: (a) duty, (b) breach of that duty, (c) causing, (d) damages, *i.e.*, the hornbook definition of liability. Somehow, somewhere, that highly personalized, interlocking, doctrinal structure would need to be re-established.

My reaction at the time was: Yes, all that can go out of torts, but tort law won't cease being. Because for me the essence of tort law is not that set of interlocking doctrines or the values these doctrines supposedly represent. No, for me what characterizes tort law is the liability rule. For me, tort law and the liability rule are the middle way between contract law and criminal law/regulation.

Contract law reflects the most libertarian set of relationships, in which – once an entitlement has been given or recognized by the polity – that entitlement can only be transferred if the parties themselves agree to do so at an individually determined price. Regulation/criminal law represents the most collective set of relationships in which the State not only decides who owns what, but determines, under pain of criminal sanction, when that entitlement can be removed, transferred or abrogated.

Torts and other related rules permit the involuntary transfer or destruction of entitlements so long as a collectively determined price is assessed as a result of that transfer or destruction. In torts, entitlements are allowed to be shifted or destroyed so long as someone is made to pay damages determined by the State,

that is, if someone pays a *collectively determined* price. That collectively fixed price can be individually compensatory or super-compensatory, but it is neither a criminal sanction nor an amount the affected parties have agreed to *ex ante*. It is a way of changing, destroying, or shifting entitlements, which is halfway between criminal law and contracts.

If that is torts, I mused, it is in no more danger of extinction than is contract law, which is not characterized by any individual set of (mutable) doctrinal rules, but is characterized rather by the fact that individuals have to negotiate with each other to shift entitlements. It is no more in danger of extinction than is criminal law, which is not characterized by any particular set of penal rules, but is instead characterized by the fact that the State determines not only who owns what, but also which changes in entitlements, if any, will take place.

Rather, tort law viewed in this way is characterized by a set of rules which determine when entitlements, when ownerships, can be shifted not as a result of direct agreement of the parties, nor as a result of direct decisions by the State, but as a result of the willingness of parties to take part in activities which will be charged a price determined by the State, a price which will, as a result, both limit the number and type of transfers that occur, and yet permit such transfers.

As I have written in an article called "Torts – The Law of the Mixed Society":¹ "...all societies use all three of these methods all the time." Thus, the most libertarian 19th century societies had criminal law. And the most socialistic, collectivistic societies have had some contract law. And, all of them, in a variety of ways, have also used the middle ground. Whether it is eminent domain, that permits transfers as a result of paying a collectively set price, or tort law, they have all employed the liability rule. Moreover, to the extent that our societies have become more social-democratic, more mixed, then this way, the tort law way, far from disappearing, has become one of the dominant elements in the legal structure of our societies. It has come to be more important than either of the other ways.

From this point of view let me recall an observation made by the great legal scholar, Leon Lipson. He said that most of the legal philosophers in the 19th Century West came out of contract law. Contract law was the paradigm, the most popular of these three approaches. He added that most of the great legal philosophers from the, so-called, socialist countries (Soviet Law was his field), came out of criminal law. The predominantly collective approach was dominant in those countries, and hence in the minds of their leading thinkers. And he

¹ *In AMERICAN LAW: THE THIRD CENTURY* 103 (B. Schwartz ed., 1976); 56 *TEX. L. REV.* 519 (1978).

wondered whether in the modern Social-Democratic State the legal philosophers would come out of torts.²

But is it really this liability rule relationship that characterizes torts? That's what I say it is. Is it really that, or is it rather the furtherance of individualized corrective justice, characterized by a relationship of duty, of breach of that duty, which causes a harm that must be corrected? Perhaps historically it is an odd admixture of both of these!

Let me go back to one of the great cases in the common law of torts and hence of the forms of action, *Scott v. Shepherd*, 3 Wils. 403, Common Pleas 1773. It was decided in 1773, three years before *The Wealth of Nations* and the Declaration of Independence.

What happened in that case? It is well known to all torts scholars. Someone, it may have been a child, it may have been a mentally handicapped person (not clear, but he had a guardian), tossed a lighted squib, a firecracker. (I always say to my class, a lighted octopus because squib sounds like an octopus and I have this vision of somebody throwing a lighted octopus into a crowd.) Somebody sees it coming at him, and immediately tosses it away, towards someone else. This person does likewise. And the squib explodes, injuring the plaintiff, who sues the original thrower.

An action in Trespass was brought against the original thrower. But the problem was that an action in Trespass should not have lain. Why? Because Trespass lay for direct injuries and this injury did not fit past definitions of direct. At that time, as far as an action in Trespass was concerned, intent didn't matter, fault didn't matter, non-fault didn't matter. If I hit you, you had a right to recover from me. (It sounds an awful lot like corrective justice, doesn't it? And it was.) But the injury had to be direct.

An action for *Trespass on the Case* also didn't lie, however. Actions on the Case lay for certain categories of injuries, whether direct or indirect, faulty or non-faulty. Thus, one could sue in Case for nuisance, or innkeeper liability. Case lay for husband-wife and for master-servant liability. Fault was not a necessary element of an action on the case. Moreover, an injury could be direct or indirect, and recovery in Case might still be available. Case has been called a catch-all because it covered many things. But as I hope to show in a bit, Case was not a catch-all at all. The one thing, however, that an action on the Case did not cover was *intentional* wrong doing.

In *Scott v. Shepherd* there was an *intentional, indirect* wrong, which didn't seem to lie either in Trespass or in Case. And to the 18th century judges this seemed absurd. Why should it be that plaintiffs could recover if they were *negligently* injured indirectly, but could not recover if they were *intentionally*

² Conversation between the author and Professor Leon Lipson.

injured indirectly? It made no sense. And, when things don't make sense to judges, judges usually do something about it, although they often don't quite know what they are doing or why they are doing it. But they do try to make sense out of the situation they face.

The law at the time of *Scott v. Shepherd* made no sense to them, and so some judges tried to create new categories of law that would allow recovery. Others, instead, tried to fit the facts into old categories so that recovery would be possible. These said, well, it's like a bouncing ball so it is direct (which it wasn't). But Blackstone, who was on the panel, said: No, no, no, it doesn't fit. I will not change the law.

Had the suit been brought on the Case there would probably have been the same reaction. Some judges would have said, since the person needed a guardian it wasn't really intentional so we'll let an action on the Case lie, etc. Judges would have stretched, because they believed there was something absurd about not giving recovery.

But one must always ask when something is absurd, why was it there? How did it happen that the law had come to require a result that seemed so silly to the 18th century? It is through thinking about that silliness that I believe that we can come to understand the relationship between corrective justice and system building.

Let me suggest to you that an action in Trespass was simply an action in corrective justice. It said: you injure me directly – I have a right to be compensated by you. It doesn't matter whether you are at fault, whether you are not at fault, whether it was intentional, negligent, or anything else, I have a right to be compensated by you because you have injured me directly.

Why the requirement of *direct* injury? Well, there has to be some limit on corrective justice, otherwise – absent limits such as fault, which did not apply, or something akin to directness or proximity, which did -- all of us would be responsible for everything that happens anywhere in the world. So it is perfectly understandable that an early society would say: corrective justice gives me an almost absolute right to recover from you when you injure me, but only if the injury is closely linked to your act, if it is, in other words, direct. It is equally understandable that such a society would not be particularly interested in fault or non-fault, and that deterrence and punishment had little or nothing to do with this right to recover. It wasn't a matter of whether the society wanted to punish somebody. A direct injurer might well not be at fault. Nor was it that the society wanted to deter such injurers. It was entirely a matter of personalized, individual relationships.³

³ While the existence of corrective justice imperatives has been recognized at least since Aristotle, just what those imperatives were for any given society has been extraordinarily mutable.

But corrective justice through Trespass was not the only thing that our ancestral tort law dealt with. There were also any number of activities that early societies wanted to deter or to limit, activities as to which incentives for safety were needed. The common law wanted to make innkeepers be more careful. It wanted to limit the amount of stink that stink-works emitted. It wanted to make employers more careful, and make them responsible for costs imposed by their employees. All of these things were also desired at common law.

And the deterrence the common law sought was the category deterrence that the system-builders have discussed as the key to what is achieved through liability rules. Induce deterrence by charging people or categories collectively determined prices. That will lead them to behave more carefully in situations that cannot, and should not, be reached by criminal law.

The early common law societies didn't want to hang an innkeeper because somebody stole goods from a guest. They didn't want to whip a husband because his wife behaved negligently, or an employer for the carelessness of his employees. Heaven forbid! They wanted to deter, but not punish criminally. And that was the basis of the action on the case. That's why it was *anything* but a catch-all; it had a very clear rhyme and reason!

Compensation to the victim was not a *necessary* part of it. And indeed, tort-like remedies that existed around the same time may not have contemplated compensation at all. The Hundred (the neighborhood) was assessed if a thief was not caught. The Hundred was charged the amount of the thievery. But this amount didn't necessarily go to the person whose property had been stolen. Compensation was not the essence of what was going on. It was not a matter of somebody's right to recover. It was system-building, not corrective justice. Why then, in an action on the Case did one give the victim the right to recover from the innkeeper, husband, nuisanceor, and so on? I would guess that one gave that right because giving recovery to the victim was a highly efficient way of structuring system-building.⁴

If one allowed individuals to recover, the victims would sue and the costs of the harm would be put on the activities that the rudimentary system builders wanted to charge. It was like having a whole lot of private Attorneys General. Compensation was not in the beginning what Case was about; compensation was simply an effective way of charging activities with their costs.⁵

⁴ The requirement of *but for* cause, shown more probably than not, in the action on the Case played a similar, highly effective, role in bringing about correct category deterrence in a simple common law system. See generally, Guido Calabresi, *Concerning Cause and The Law of Torts*, 43 U. CHI. L. REV. 69 (1975).

⁵ In this respect the common law and the action on the Case were every bit as sophisticated as I sought to be in discussing category deterrence in *The Costs of Accidents*. The common law's choice of level of category on which to put the incentive, *i.e.*, the innkeeper, the employer, the

But what happened? When one permits people to recover for an injury, even if one does it in order to accomplish something other than compensation, the injured people very quickly get used to getting the recovery. They come to think of it as their right. I have been injured on account of your negligence. I can sue. It's my right to recover. I have been injured on account of husband-wife, master-servant relationships. Whatever: I have a right to recover.

My expectations are that I will recover, and soon enough recovery becomes my right. When it becomes my right it readily becomes part of that society's notion of corrective justice. And people start to believe that not only do they have a corrective justice right to recover when they are injured directly (and regardless of fault), but that they also have a corrective justice right to be made whole when injured – whether directly or indirectly -- through someone's negligence, or through that person's activity as an innkeeper or as a creator of a nuisance, or as a result of that person's husband-wife relationship.

When that happens it is not long before people say: Good heavens, if I have a right in corrective justice to recover when you injure me indirectly on account of your negligence, surely I should have a right in corrective justice to recover when you injure me through an intentional wrong, even if indirectly.⁶

And that is how we come to the problem of *Scott v. Shepherd*, to the paradox that at common law, there would have been no recovery on the facts of that case, and yet “everyone” believed there should be. Why did it take so long for the paradox to become troublesome? Why did not the law say much earlier: if you injure me intentionally but indirectly, *you should be deterred through an action on the Case*? If one thinks about it the answer is easy. When someone injured somebody else *intentionally*, even if indirectly, the injurer was hanged or whipped. It was an intentional wrong. It was a crime. The state hanged the wrongdoer; it whipped the malefactor. Later it deported the criminal.

Individual deterrence through the criminal law was draconic, and there was no need for category deterrence at all! And since there was no need for category deterrence, there was no need for an action on the Case. Nor was there any reason for compensation. The injury was indirect, and the original common law, directness-limited, notion of when corrective justice compensation was justified,

polluter, stands up very well to modern economic analysis. *See, generally*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

⁶ Not surprisingly, the requirement of *but for cause*, *see* note 4, *supra*, so beloved of the corrective justice scholars, came to accrue to itself an analogous justice gloss. And this gloss remains there, even in the face (a) of various classic system-building-justified exceptions to an absolute requirement of *sine qua non* causation, *see, e.g.*, *Corey v. Havener*, 182 Mass 250 (1902); *Summers v. Tice*, 33 Cal.2d 80 (1948), and (b) of the more recent, occasional use of statistical cause, *see, e.g.*, *Sindell v. Abbott Labs.*, 26 Cal. 3d 588 (1980), *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989).

remained. Corrective justice required compensation, whenever a victim was injured – regardless of fault – but only if he was injured *directly*!

It made perfectly good sense until the need for deterrence in areas where the society did not want to hang, draw and quarter, and so on, led to the action on the Case, led, that is, to negligence based (and occasionally status-based) liability with compensation to indirect as well as direct victims. Society wanted to charge injury costs – whether they were direct or indirect – to some activities, and, for efficiency reasons, it did so by giving people a right to sue. People came to expect compensation. And expectations, of course, are always at the root of corrective justice. Little wonder that the paradox developed.

I cannot tell you whether this description is fantasy or is actually true. Who can tell what people in ancient time really were thinking? It has been said that lawyers always imagine the past in order to remember the future. So it may be that my description is completely fanciful. But it's the only one I have found that makes any sense of what was going on. And it is a description that has, I think, great consequences for the present, and for the relationship between system-building and corrective justice.

At another conference, in Rome, a speaker said that one of the problems legal systems have with the kind of system building that Calabresi is associated with – he spoke of me in the third person, even though I was there – is that system building creates *expectations* that are too costly, or even impossible, for the society to meet. I don't know if it creates expectations that are impossible. But it certainly has the effect of creating expectations, *i.e.*, of altering our corrective justice notions.

In other words, if – in order to deter by charging certain activities “their costs” – a society gives people the right to recover, such recoveries will surely affect what people think their *rights* are. And that in turn will surely affect that society's notions of corrective justice, just as happened between Case and Trespass in the 18th century.

At that point, the corrective justice scholars in that society will say, it is absurd not to give recovery in similar or related situations. And soon enough that society will begin giving recovery in circumstances in which recovery is not justified from a “deterrence” point of view and hadn't been from an original or earlier corrective justice standpoint either.

I believe this kind of interplay has affected our view of punitive damages, as well as of emotional damages and other non-economic damages. Let me just say a few words about these, to indicate my line of thinking.

System-builders may want to charge more to activities that cause emotional damages. If there is a terrible accident on the street, when I drive by I feel sick. Why isn't this a cost properly charged to those who caused that accident? It is. But if society gives me a cause of action in that situation, I don't just feel sick for

a few minutes. I feel sick for days. And it's not that I am malingering. I feel sick for days because society has given me a right to feel sick! Once the legal system has given me a *right*, I insist upon that right and cherish that right. That's what corrective justice is all about. We are back to the 18th century paradox.

It is similar with punitive damages. In order properly to deter an activity, we must often award a multiple of the damages suffered by the particular plaintiff. This is because a defendant may not get caught or held liable each time that defendant imposes such social costs.⁷ But if these "socially compensatory" costs are awarded to the plaintiff because it is an efficient way of assessing costs on defendants, in due course plaintiffs will come to view such damages as their right. And soon enough they will feel cheated if they do not get them.

What is the solution? Well, one solution would be if we could split off completely the right to recover (limiting that according to our then extant notions of corrective justice), from the charging of those activities that we want to have pay so that they will have incentives to be safer. If we could make people pay according to the incentives that we want them to face, and give recovery only if, and when, pre-existing notions of corrective justice justify recovery, and if we could do both completely separately from each other, the *Scott v. Shepherd* paradox would be avoided.⁸

I sometimes call that New Zealand with steroids – the New Zealand system but worked out in a far more articulated way. If we did that we might not have the constant tension between corrective justice and the system-building that has characterized tort law over the centuries. We would avoid situations in which each is pushing and pulling the other.⁹ But it is not easy to do, and I am not sure

⁷ The multiplier, its *raison d'être* and its limits, have been analyzed with great ability and thoroughness by Sharkey, Shavell and Polinsky, and Hylton. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages -- An Economic Analysis*, 111 HARV. L. REV. 870 (1998); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 456 (1998). It is also discussed in opinions of Judge Richard Posner, and of the author. See, Keemezy v. Peters, 79 F.3d 33 (7th Cir. 1996); *Ciraolo v. New York*, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi J., concurring).

For a general discussion of the various reasons why punitive damages may be deemed worth awarding, only some of which start out involving a plaintiff's right to recover such damages, see Guido Calabresi, *The Complexity of Torts – The Case of Punitive Damages*, in *EXPLORING TORT LAW* (M. Stuart Madden ed., 2005).

⁸ Of course, the placing of correct economic incentives may also require compensation of victims, and that makes such a separation much harder.

⁹ While in this paper I have been primarily concerned with how system-building affects corrective justice, it is equally important to examine how shifting notions of corrective justice affect system-building. As our values, tastes, and sense of justice change so will the allocations of incentives that most efficiently serve them. Thus, if individuals value something – their sense of ownership in their homes say – so that they would be grievously hurt if that ownership could be

that would be what a society would want anyway. Maybe legal-political systems like that kind of pushing and pulling. Indeed, they may depend on just such pushes and pulls to further what they view as desirable change.

I was on the verge of working on these things when I became Dean and stopped thinking. Perhaps some day I may go back and try to outline a system that separates the two. And then I would analyze and criticize that system. I would do so because I believe that somewhere in that line of thought lies the link between corrective justice with its personal responsibility requirements, and the requirements of system-building deterrence.

The corrective justice scholars are quite right to say that we would lose something of value if we were to lose that which corrective justice represents. For at any given moment the justice imperatives that the corrective justice notions of a given society represent must be served. And that is the reason for the continuing survival and appeal of such scholarship.

But we would lose something just as essential if we were to abandon general deterrence and liability-rule system-building. For if corrective justice is crucial to certain notions of personal responsibility in human relationships, so is the liability rule essential to deterring activities done by people whom we do not want to hang – people who, if they were subject to criminal punishment, would not simply fail to do things that are too dangerous, but would, instead, fail to get into the activity which entails danger. We don't want people to drive negligently. But if we jailed people who have negligent accidents, people would not simply drive more carefully or drive safer cars, they would not drive at all!

Somewhere in that line of thought, and in the 18th century lighted squib case, lies a unified field theory of torts, the kind of theory to which I believe our scholarship should increasingly turn.

taken away even by a fully adequate eminent domain payment, it is incorrect to say that such liability rule protection is more efficient than property rule protection simply because, absent that special taste or value, the pie would be bigger if the property were taken, and compensation paid. It is, in fact, identical to saying to people who like caviar that they could be fed more cheaply if they ate potatoes. That would undoubtedly be true, but it tells us nothing about efficiency. *See generally*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). And so it is with some “expensive” tastes that reflect a given society's sense of justice.