PRINCIPLE AND PRAGMATISM IN THE COMPENSATION DEBATE

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If there is a single principle explaining the relation between tort liability and other systems of compensating the injured and disabled, its content has never been clear on either side of the Atlantic. On the American side, 50 different jurisdictions and legislatures have produced 50 different bodies of law, and, at least in theory, 50 different relations. On the British side, according to Jane Stapleton's *Disease and the Compensation Debate,*[1] the absence of such legal Balkanization has not enabled the search for principle to fare very much better.

Misfortune may be handled in a variety of ways: by reimbursing loss through tort or other third-party compensation schemes; through social insurance and welfare programmes; or by leaving victims to deal with misfortune themselves through the purchase of first-party insurance, reliance on familial or charitable support, adjustment to a change of fortune, or simply by suffering. In practice we use these approaches in different combinations to deal with different kinds of misfortune. Stapleton argues that the tort and social insurance systems have drawn an unprincipled distinction between injuries and disabilities, readily providing compensation for the victims of traumatic accidents but too often leaving the victims of disease to deal with that misfortune through their own devices.

Ultimately, however, Stapleton's argument is not only against this difference between the legal treatment of injury and disease; it is an attack on the patchwork approach to dealing with misfortune, whether that misfortune is injury, disease, poverty, or mental handicap. The principle that drives her analysis is that compensation for misfortune should be determined by the need of the victim alone, and that the boundaries separating the different systems of dealing with different kinds of misfortune therefore are often arbitrary.

Stapleton begins by distinguishing traumatic accidents, man-made disease, and natural disease. The torque in her argument develops out of the quite reasonable assertion that individuals and enterprises that cause man-made disease are as much subject to tort liability as are those who cause traumatic accidents. Yet the victims of disease—who are far more numerous than the victims of traumatic accidents—are much less likely to institute or to prevail in tort claims. For Stapleton it follows that this inequity must be remedied outside the tort system. However, she believes that once the question of how to compensate the victims of

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1 Jane Stapleton, *Disease and the Compensation Debate* (Clarendon Press, Oxford, 1986), 183 pp.

man-made disease is removed from the shadow of the tort remedy, there is no persuasive reason to distinguish the victims of man-made disease from those who suffer natural disease or other kinds of misfortune. Need rather than cause becomes the appropriate consideration for any compensation scheme, and the door automatically opens to reveal a range of policymaking options far broader than had been supposed was available.

This is a long journey to have summarized in only a few paragraphs, and I want to turn now to the details of Stapleton's argument. The argument is systematic and insightful, and I found myself largely sympathetic with it. Nonetheless, at various points the argument turns on propositions that are by no means beyond dispute. These are worth exposing and scrutinizing, for the direction which the tort and compensation systems ought to take depends heavily on whether the propositions are true.

The central proposition in the first part of Stapleton's argument is that 'man-made' disease is a numerically significant problem. The proposition is central because, if man-made disease is not a significant problem, then the fact that the victims of such disease find it difficult to prove their rightful claims in tort is not of great moment. Since most of the available data on disease rates do not distinguish between man-made and natural disease, Stapleton admits that the proportion of disease that is man-made cannot be estimated with confidence.[2] She provides data on certain specific disabilities—adverse drug reactions, noise deafness, cancer caused by tobacco and asbestos, for example—designed to establish the breadth of the phenomenon. But these data do not sustain the point Stapleton wants to make. For instance, adverse drug reactions are among the easier man-made diseases on which to base a tort claim. They have neither of two characteristics that Stapleton indicates render disease claims difficult to prove: they tend not to be gradually contracted and tend not to have long-latency periods before manifestation. As to tobacco, in light of the risk knowingly assumed by the smoker, it is not at all clear that most lung-cancers caused by smoking should even in principle be the subject of tort liability by the tobacco manufacturer.

Assuming, then, that the entire system should not be questioned because of its failure to compensate disabilities like noise deafness, the issue really is whether the asbestos epidemic is sui generis or is only one of many present and future man-made disease epidemics. In the United States a large part of the current 'crisis' in liability insurance cost and availability seems premised on the fear that further epidemics are on the horizon, and that the courts will find a way to impose tort liability when the next epidemic hits. This has not happened as yet. Until the next epidemic materializes, therefore, or at least until medical science can tell us

2 P 6. I am setting aside here the separate question whether the distinction between diseases that are man-made and those that are natural can be drawn even in theory. The concept of man-made disease seems to presuppose a background, or base category, of disease that would exist in the absence of human activity. But since no human disease would exist in the absence of human activity, the distinction between man-made and natural disease may well be incoherent.

that a substantial portion of the disease that now occurs is man-made, the case against the accident 'preference' embodied in the tort system has not been proved. Whether wholesale law reform ought to take place because of the mere possibility that a sizeable portion of disabling diseases is man-made seems very debatable.

A second proposition on which Stapleton's argument hinges is that there are nearly insuperable obstacles to recovery in a tort action for man-made disease. Her analyses of the difficulties claimants face in proving negligence and causation, and of the reasons a move to a strict liability or no-fault system would not satisfactorily circumvent these difficulties, are sophisticated and thorough. First, when suing for negligence the plaintiff must prove that the defendant had or reasonably could have obtained knowledge of the risk to which the plaintiff was subjected, and that the defendant's actions in relation to that risk were unreasonable. Meeting this burden of proof requires the plaintiff to reconstruct events that occurred (or did not occur) a decade or more earlier, and to answer counter-factual hypotheticals—what should the defendant have done if he had possessed the relevant knowledge?—whose answers are likely to be obscure. Both are highly difficult burdens to meet. Second, medical science usually cannot isolate the causes of gradually-contracted, long-latent disease with the kind of certainty required to prove a claim in tort. Third, strict liability tort and no-fault compensation systems are plagued by similar difficulties, and though the latter can adopt presumptions about causation, this simply shifts the locus of difficulty to the process of formulating presumptions.

I believe that on the whole Stapleton is correct in suggesting how difficult it is for disease victims to recover compensation in tort actions. There is certainly a difference, however, between the situation that prevails in Great Britain and that in some jurisdictions in the United States. Although Stapleton's argument is predominantly concerned with Great Britain, she makes liberal use of precedents and examples from the United States. The American experience therefore seems relevant both to her analysis and conclusions. There are several important differences between the two legal systems: in the United States the traditional rules governing proof of causation are increasingly being relaxed in plaintiffs' favour; there is a right to trial by jury in civil cases in both state and federal courts; and plaintiffs' attorneys are permitted to handle cases on a contingent fee basis.

The consequence of these factors is that the barriers to recovery in tort actions for disease are not as severe in the United States as they apparently are in Great Britain. A plaintiff may be able to impose 'market share liability' on each of several defendants, even when it is clear that some did not cause the injuries in question,[3] or to shift to a series of partially responsible defendants the burden of apportioning their responsibility for the total damages incurred.[4] How far these

3 See *Sindell* v *Abbott Laboratories*, 26 Cal 3d 588, 607 P 2d 924 (1980).

4 See *Michie* v *Great Lakes Steel Div*, 495 F 2d 213 (6th Cir 1974).

and other similar innovations will evolve is not yet clear, but they may remove some of the obstacles that prevent recovery by disease victims.

Moreover, even under traditional doctrine, summary judgment and directed verdicts are rarely granted in defendants' favour. This tendency of American trial judges to submit for jury decision even cases with borderline plausibility improves plaintiffs' prospects of success and encourages favourable settlements. Indeed, although many who are identified with consumer and victim interests make complaints about the American system similar to Stapleton's, there are equally vehement criticisms of the system's pro-plaintiff bias. Almost every state has enacted some kind of tort reform in the last year in response to such criticism, though little of this legislation is likely to have substantial impact on disease claims.

Finally, plaintiffs' attorneys in the United States are permitted to handle cases on a contingent fee basis. Undoubtedly more cases with a low probability of success are instituted because of the high potential pay off for the attorney in the event of success, and some of these are successful. Since awards of general damages for pain and suffering in cases tried by a jury are sometimes high (there are several hundred verdicts exceeding one million dollars each year), the potential reward to the successful attorney creates substantial incentives to bring tort actions for disease.

For each of these reasons, the American experience with disease claims is dynamic and complex. There is still a sizeable gap between the actual litigation prospects of injury and disease victims, but the gap is closing. Whether it will close significantly remains to be seen.

The third and most important proposition on which Stapleton's argument depends is that the threat of liability for man-made disease does not and could not effectively deter the activities responsible for causing such disease. This is of course the critical step in her entire enterprise, for the tort system has long been justified not merely as a compensation system, but as a method of deterring unsafe activity. When tort law succeeds in deterring, its compensation objective can be relegated to a secondary position. When tort law fails to deter, there is not much to be said for it even when it succeeds in compensating—there are far more efficient and cheaper methods of passing out money than through litigation. The inequities produced by the tort system's affording of compensation to some of the victims of misfortune and not to others have always been tolerated precisely because activities causing some kinds of misfortune can be deterred by the threat of tort liability, while others cannot.

Activities causing man-made disease are difficult to deter for the same reason that causation is difficult to prove in tort claims alleging liability for such disease. Data that would support the probabilistic and quantitative estimates necessary to refine liability insurance pricing do not exist. Potentially liable enterprises consequently are charged relatively level premiums; the incentive effects of differential pricing therefore do not materialize, and would not materialize even if

the judicial system were prepared to impose liability more liberally than under the current doctrinal regime. All this is equally true of the problems of creating incentive effects through categorical compensation programmes that are financed through assessments against activities causing the harms compensated. Where there is crude liability insurance pricing, there will also be crude setting of the assessments charged enterprises contributing to a compensation fund, and for the same reasons.[5]

This notion that the current legal and scientific state of the art preclude fine-tuned deterrence, however, says very little about what the future will bring. Stapleton's argument implies that we cannot expect much change in science's ability to trace the relation between diseases and their causes over the next decade or two. The fact that she is trained not only in law but also in chemistry may qualify her to take such a position; but I wish that she had done so explicitly and explained to her readers on what she bases her opinion. I am not qualified to have an opinion on the question, yet its answer seems to me of critical importance. Perhaps we can expect many decades of scientific uncertainty, and little improvement in the capacity of tort law to reduce the incidence of man-made disease. On the other hand, science's increasing ability to recognize the probable causes of different diseases, even though it often cannot pinpoint causation in individual cases, certainly suggests the direction in which our knowledge is moving. Perhaps we are in a period of transition, during which our scientific capacities will increase geometrically, and tort liability for man-made disease soon will be far more common that it is today.

If that were to happen, we might be able to wall-off the events covered by tort liability from Stapleton's argument that compensation for misfortune should depend mainly on need. For then awarding compensation in tort could be justified as part of a system designed to deter the deterrable, including man-made disease.[6] If there is no quantum leap in our ability to pinpoint the cause of disease in individual cases, however, then the possibility of reform of the sort Stapleton recommends will remain at the centre of the compensation debate. Should compensation reform follow the accident preference of the tort system, or should it

5 Stapleton also argues that long-latency periods make it unlikely that the threat of liability would effectively deter even if recovery in tort were facilitated, because responsible enterprises sometimes will disappear, because decisionmakers tend to discount future gains, and because health hazards are more expensive to control than accident hazards. The first two of these problems, however, are largely the product of the data gap I have just noted. Dangerous enterprises can be required to purchase insurance covering future liabilities even after they are liquidated, if only we know in advance the dangers they pose. Decisionmakers are likely excessively to discount future gains from avoiding liability if the probability and severity of that liability is speculative. The third problem—the high cost of reducing health hazards—simply suggests that some hazards are not worth deterring.

6 Even if disease did suddenly become easily compensable in tort, the need-based argument would in theory still be available. Why compensate the victims of disease differently from the unemployed and the mentally handicapped? But the most glaring inequity, from the standpoint of civil liability reform, would have been removed.

be based on the needs principle? She astutely traces the manner in which non-tort compensation programmes designed to remove tort law's traumatic accident preference often end by reinstating it: the beneficiaries of the tort system must not be disadvantaged under its replacement; the treatment of accident victims and the tort system's measure of damages therefore become the standards against which the success of the reform must first be evaluated, and the programme is fashioned to meet these standards. Thus, the needs argument may prompt reform, but it does not determine the shape of the reform that is adopted.

The explanation for this phenomenon, I think, is partly conceptual and partly pragmatic. The conceptual explanation lies in the failure of participants in the debate to recognize where tort law falls in the range of compensation alternatives. Systems of compensation may be based on one of four principles: (1) consent (contract, warranty), (2) fault (negligence), (3) cause (strict liability in tort, workers' compensation, and other categorical compensation programmes) or (4) loss (social welfare). Shifting from the traditional fault approach to a cause-based system is unlikely to change matters if causal uncertainty is the underlying problem facing disease victims. Yet this is usually all that a move from negligence to strict liability or a categorical compensation system achieves. Stapleton argues that only a loss-based system will circumvent this problem, and concludes that once a loss-based system is adopted for disease, there will be no justification for limiting it only to disease.

A second and pragmatic explanation for the accident preference, however, demonstrates a soft point in this conclusion. Though the rules of tort liability may be designed largely for the purpose of deterrence, they both reflect and create feelings of entitlement that distinguish between man-made and 'natural,' or legally unprotected misfortune. When tort liability is replaced by another system, those previously protected against man-made injury feel entitled to reasonably equivalent protection from the new system. The politics of tort reform in the United States certainly reflect this sentiment, and I suspect that something analogous operates in the Commonwealth nations whose reforms Stapleton analyzes.

Since the tort system purports to protect at least some of the victims of man-made disease but then usually fails to do so, this denial of entitlement is admittedly not remedied by cause-based reforms that continue the accident preference. For this reason the move to a loss-based system of compensation for disease would be a logical solution to the inability of disease victims to prove their entitlements within fault or cause-based compensation programmes. A loss-based system, that is, might be a method of carrying out the entitlement promises that the tort system makes to potential disease victims but cannot keep.

Is it inconsistent or arbitrary, then, to adopt a cause-based compensation system that retains an accident preference, or a loss-based system of disease compensation that does not afford protection for other misfortunes? Such reforms may well be inconsistent with Stapleton's needs principle. It is not necessarily

arbitrary, however, to attempt first to satisfy existing expectations before extending protection to other needs. Moreover, the concept of need is not self-defining, and Stapleton herself devotes little attention to its content. Need may be understood in different ways, as Stapleton's imaginative explication of the different compensation packages that could be fashioned outside the confines of the injury reimbursement model implies.[7] The 'needs' created by existing expectations might justifiably be satisfied before moving on to the others on a reform agenda.

In short, a needs principle may in fact be the proper touchstone for evaluating the justice of modern compensation schemes. But there is a difference between an argument *from* such a principle, and an argument *for* it. Because Stapleton deploys an argument from a needs principle, she concentrates more on what such a principle might require of a civil justice system than on the reasons such a principle should be adopted. Both problems are profound, and Stapleton has done an admirable job of explaining what the needs principle might require. The practical success of her proposals, however, probably will depend a good deal more on the ability of reformers to explain why that principle should be adopted.

7 Pp 149–50.