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The Restatement of Torts and the Courts

Jack B. Weinstein*

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I. INTRODUCTION

Like other judges, I am strongly influenced by the *Restatement*. It provides us with principles allowing escape from the suffocating flood of precedents.

Primarily through tort law the courts compensate those injured by others. Secondary aspects of our work such as deterrence or forcing tortfeasors to pay the full social costs of their activities are minor and collateral. For jurors focusing on compensation, tort law has only two operative elements: damage and cause. It is the law professor and the judge, through decisions on motions and instructions, who are the main *Restatement* consumers.

Emphasizing mass torts, I will make three points relevant to those considering the health of tort law.

First: Tort law in its least inhibitory principle is useful because of its flexibility in solving new problems, particularly in the area of mass torts and public nuisances. Trial judges and juries see

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the people who suffer from asbestos, breast implants, DES, herbicides, tobacco, guns, tainted blood, dangerous pharmaceuticals, tires, security frauds and other products and activities. Those injured need the law's help.

Second: There has been an attenuation of our reliance on tort law in many areas. Increased statutory interventions on the state and national levels have imposed substantive and procedural limits. The growing role of administrative, executive, and criminal enforcement branches of government in providing compensation for delicts presents problems in coordination with judicially enforced tort law.

Third: It is more difficult for us to deal with multistate or multinational torts in an integrated and efficient way in view of the loss of principled court-made ruling law. State and federal statutes and decisions creating fifty-one different tort laws reduce effective administration of mass tort actions.

In considering the impact of tort law and the *Restatement*, we must recognize that it is the procedural-substantive balance, not theory alone, that controls what the courts can do for the injured. It is not clear whether a *Restatement of Torts* can or should integrate procedure and substance. Professor Arthur R. Miller's ALI study and suggestions for handling procedures for complex litigation are useful.¹

II. FLEXIBILITY

Internationalization of industry, growth of urban populations largely disconnected from producers, distribution of dangerous products, and new communication networks have created the potential for large harms with reduced ability of lay consumers and third parties to protect themselves.

Tort *Restatement* principles need to protect against the tire and car manufacturers who produce tires unsafe for the conditions they meet on the road in many countries, blood that is tainted,² tobacco that with asbestos exposure is synergistically lethal, purveyors of hate crimes, and gun distribution practices that lead to too many deaths. Government administrative regulations and criminal

1. See generally COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

2. *Honesty on Mad Cow Risk*, L.A. TIMES, Jan. 17, 2001, at B12 (noting that Red Cross bans blood donations by people who have been exposed to the human form of bovine spongiform encephalopathy, or mad cow disease).

law cannot, I think, be trusted to do the whole job. They tend to bend to political and private forces and often lose their steam.³

III. INCREASED STATUTORY ADMINISTRATIVE AND CRIMINAL LAW INTERVENTIONS

The role of torts is being whittled away by such developments as procedural barriers, preemption, workers compensation, black lung and children's vaccine procedures, and auto accident automatic payments. The growth of restitution in the criminal law, disgorgement in administrative law, and an antipathy towards the mass plaintiffs' bar have reduced the force of common tort law in the courts.⁴ Statistics show that the number of civil cases resolved by trial in federal courts, a substantial number of which would formerly have resulted in tort-jury-trials has decreased dramatically over the past twenty years.⁵

Availability of the administrative and criminal alternatives has substantially reduced the need for punitive damages. This also raises questions of differences in operative elements of the rules, definition of terms such as recklessness or intent in the three systems, collateral estoppel, splitting causes of action and exhaustion of the defendant's personal and insurance assets, leaving nothing for the tort plaintiff.

The availability of criminal and tort fines and orders also poses the question: Should tort law not be purged of punitive damages except for "mass effects," where full social costs should be paid on behalf of "all those injured" if possible, or for general public purposes, if controlled punitive damages provides the only way to do this. If class actions are available to pick up the total social costs, no punitive damages should be allowed. If the recovery amounts are small and only one or only a few people are hurt so that it is not

3. Charles Fried & David Rosenberg, *Making Tort Law: The Comparative Advantages of Courts and Legislatures* 67 (Dec. 15, 2000) (unpublished manuscript, on file with author) ("Tort law thus provides a decisionmaking authority that is not simply separate from, but also more decentralized and sometimes more insulated against political pressures than are legislatures and agencies.").

4. Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal and Tort Law*, Address Before the University of Illinois Law School (Oct. 17, 2000), in 2001 U. ILL. L. REV. (forthcoming 2001); see also Jack B. Weinstein, *United States Injuries Amenable to Compensation Under Tort Law* (2000) (Appendix A).

5. See *Analysis of the Decline in District Court Trials*, Administrative Office of the United States Courts to Chief Justice 4 (Sept. 27, 2000) (demonstrating that while in 1980, the percentage of all civil cases terminated by trial in federal district courts was 11%, by 1999, this percentage had shrunk to 5%) (Appendix B).

worth bringing suit, we can allow attorneys' fees and perhaps treble damages as in RICO. An example is harassment by collection agencies through Debtor Protection Acts.⁶ Recklessness could be added to this category. Criminal or administrative enforcement through fines and other punishment can do the backup job. Vengeance is for the state, not private litigants.

Efforts are afoot to cut torts law down further by such initiatives as caps on damages, procedural barriers to class actions, rules making compliance with administrative regulations a complete defense, and the like. The American tradition of "bottom-up" protection through initiative of the injured and their lawyers by private law suits and a democratized litigation process are, in my view, guarantees that need protection under tort law.

Administrative-determined product safety standards, as Professor Robert L. Rabin and the *Restatement* suggest, should merely provide minimum standards, not supplant the tort law.⁷ I must confess that my trust is in the jury and the tort law whose operations I can see, rather than in an administrative body, whose fairness and comprehensiveness I can only pray for. Preemption by regulation is a doctrine that makes me nervous in a world of rapidly developing technological dangers and wonders.

IV. BALKANIZATION'S IMPACT ON MASS TORTS

The rules of conflicts of law and outmoded limits on jurisdiction make it difficult to consolidate a litigation before one court, with one law and one science in a way that will permit swift and effective compensation. The problem is compounded when the injuries also occur in "top-down" foreign jurisdictions where our private

6. See, e.g., 11 U.S.C. § 362(h) (1994) (allowing debtors to petition for issuance of stay protecting them against harassment by creditors); *Id.* § 366 (protecting debtors against arbitrary utility cutoff); *Id.* § 727 (establishing the "fresh start" policy that enables debtors to be discharged from bankruptcy).

7. Compare Michael D. Green & William Schultz, *Tort Law Deference to Regulation of Medical Devices*, 88 GEO L.J. 2119, 2145 (2000) (noting that regulatory defense for pharmaceuticals is problematic and "for medical devices is even more undesirable") with Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO L.J. 2167 (2000) (replying to ALI Reporter's Study, *Enterprise Responsibility for Personal Injury* (1991) and approving preclusion of compensatory and punitive damages where administrative regulations are complied with). See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 4 cmt. (Discussion Draft Apr. 5, 1999); Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2051 (2000).

bar-operated system of justice is not in general use.⁸ Transnational differences are more procedural than substantive.

There is a role for a *Restatement* of "general principles" in aiding the resolution of mass tort cases, given the following trends: (a) an increasing hostility to private tort litigation, (b) the increasing fragmentation of tort law among the states, and (c) the rise of transnational torts.

In the absence of a common law of torts, judges faced with resolving mass tort cases confront difficult conflicts-of-law issues that affect decisions about class certification and hinder settlement.⁹ Different state and national procedures and jurisdictional rules compound our problems.

What can a *Restatement* do to combat or address these anti-tort trends?

Arguably, a *Restatement* for the twenty-first century should not be content to focus on domestic law, but instead should attempt to synthesize a tort law for the industrialized world. The passage of a uniform European products liability act¹⁰ points toward the aspiration that a truly "general" restatement ought to have. Can that be accomplished without too much sacrifice to American patterns? Should ours be "The Law Institute," leaving out the word "American"?

I recognize that the Restaters have different functions from the Commissioners on Uniform State laws, but the A.L.I. does have a great influence in unifying tort law. Even if substantive uniformity cannot be accomplished in trials, the *Restatement* formulation can provide a basis for settlements of multistate-multinational mass tort disputes. It can also furnish theoretical underpinnings for international arbitrations and mediations that encompass wide swaths of geography. A *Restatement* should not necessarily be limited to a synthesis of present and past court decisions and statutes.

8. Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms, Address Before the Conference on Group Litigation in Comparative Perspective (July 21, 2000)*, in 11 DUKE J. COMP. & INT'L L. (forthcoming 2001); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites, Address Before the AALS (Jan. 8, 2000)*, in 37 WILLAMETTE L. REV. 145, 151 (2001) [hereinafter Weinstein, *Mass Tort Jurisdiction*].

9. See Weinstein, *Mass Tort Jurisdiction*, *supra* note 8, at 151.

10. Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 (L 210) 29.

We can thus perhaps avoid such disasters as *In re Rhone-Poulenc Rorer, Inc.*¹¹ that almost doomed settlement of a tragic blood contamination case on conflicts of law grounds. If not black-letter law, is there a "gray letter," "better," or "bright letter" law that courts and arbitrators can invoke to assist in the resolution of mass tort cases that will set a standard for our integrated economic and technological world?¹² What is the best law for arbitration, mediation and settlement as well as adjudication? Should the law of the *Restatement* be the basis for a federal statute or treaty embodying workable and fair standards in mass cases?¹³

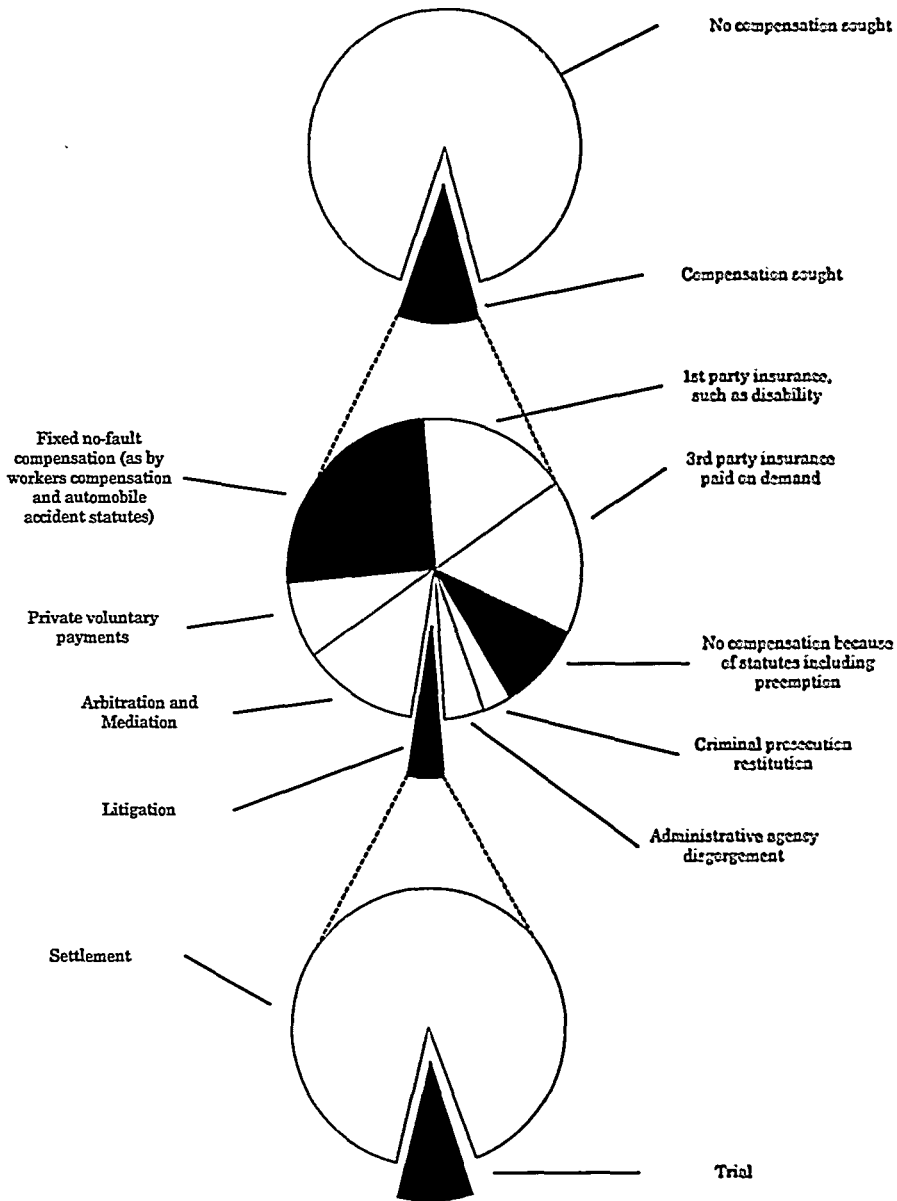
Tort law has been, and continues to be essential for the protection of large masses of people. The *Restatement* has a vital role in keeping this branch of law vital.

11. *In re Rhone-Poulenc, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (issuing writ of mandamus ordering trial court to decertify class in part because of "questionable constitutionality of trying a diversity case under a legal standard in force in no state").

12. See *Bergeron v. Philip Morris, Inc.*, 100 F. Supp. 2d 164 (E.D.N.Y. 2000); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000); *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000); *Simon v. Philip Morris, Inc.*, No. 99 CV 1988, 2000 U.S. Dist. LEXIS 16713 (E.D.N.Y. Nov. 16, 2000); see also Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1149 (2000) (observing that "a body of substantive international rules, a new *ius gentium* that extends beyond the field of contracts"); Weinstein, *Mass Tort Jurisdiction*, *supra* note 8, at 150-51.

13. Cf., e.g., Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1638 (1997) ("Federal reform is the only solution to the national crisis in the tort system.").

Appendix A: United States Injuries Amenable to Compensation Under Tort Law (not quantified)



Appendix B: Decline in Civil Trials

While civil caseloads have increased, the actual number of civil trials and the percentage of civil cases going to trial have been decreasing for the past 18 years.

Civil Cases	1999	1982	1982 to 1999
Total Filings	260,271	206,193	+26%
Total Number of Trials	8,532	10,074	-15%
Total Jury Trials	3,795	4,679	-19%
Percentage of Cases Terminated by Trial	3%	8%	-62%
Average Terminations per Judgeship ¹⁴	422	368	+15%
Average Number of Trials per Judgeship	13	29	-55%
Average Jury Trial Length (Hours)	23	19	+21%

What Factors May Have Contributed to the Decline in Civil Trials?

- Civil Rules of Practice and Procedure
- Views on Settlement as a Preferred Outcome
- Judicial Education Programs
- Case Management Practices
- ADR Programs
- Growing Workloads
- Delays
- Financial Incentives for Litigants
- Financial Incentives for Attorneys
- Attitudes Toward and Misconceptions About Juries
- Are There Others?

14. "Per Judgeship" numbers include work done by active Article III and Senior Judges. They do not include work by Magistrate Judges.