

## Discriminatory Impact of Application of *Restitutio in Integrum* in Personal Injury Claims

Elizabeth Adjin-Tettey  
Faculty of Law, University of Victoria

## Taking Tort Remedies Seriously

- Remedies inform and give content to substantive rights
- *“When we talk about tort law, we should start with the premise that it is designed to protect [human] dignity and protect social equality and social justice. Our causes of action and remedies should be tailored to . . . achieve those ends.”* Leslie Bender, “Tort Law’s Role as a Tool for Social Justice Struggle” (1997) 37 Washburn L. J. 249 at 257

## Theoretical Grounding *Therapeutic Jurisprudence*

- Therapeutic and/or non-therapeutic effects of law
- Remedies reflect value of right vindicated
- Potential therapeutic or anti-therapeutic effects from valuation of plaintiff’s losses
- Effect of personal injury
  - Need for therapeutic outcomes
- *“It is hard to use the word justice to describe a system that replicates injustice and ensures that the disadvantaged remain disadvantaged”*, J. Cassels, “(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages” (1995) 17 Adv. Q. 158 at 198

## Objectives of Paper

- Focus: pecuniary losses – in trust awards and impaired working capacity
- Personal injury remedies may reinforce marginalization
- Cheaper to harm vulnerable people
- Reinforces social inequalities
- Diminished therapeutic outcomes

### Theoretical Foundation of Tort Law: Corrective Justice

- Bilateral transaction between doer and sufferer
- Focus on relationship between parties

#### Remedial Implications

- *Restitutio in integrum*
- Differential valuation of losses
  - Claimant's characteristics determine *Status-quo ante*
- Inequalities in original position ignored
- Focus on principled outcome

### Concerns

- Social identity determines original position and losses
- *Status quo ante* and value of losses socially constructed
- Restorative principle discriminates against marginalized plaintiffs
- Social inequalities protected and promoted

### In Trust Awards

- Gratuitous services
- Services necessitated by injury
- Plaintiff would likely have purchased services
- *Restitutio in integrum* governs availability and quantum
- Limited to "extraordinary" services
- Reasonable replacement or opportunity cost

### In Trust Awards: Concerns

- Common understanding of familial expectations?
- **Gender, Class and Cultural Implications**
- Gendered care responsibility
  - Women's care work may not be "extraordinary"
- Low-income families/plaintiffs likely to rely on gratuitous services
- **Why?**
  - Liability contested and/or lack of financial resources
  - No first party insurance
  - Lower opportunity cost
- Services provided by low-income, unemployed, social assistance recipients, etc. devalued
- Result – discrimination based on socio-economic status

### In trust Awards: Egalitarian Approach

- Services that benefit plaintiff due to injury
- Quantum: market value/ reasonable replacement cost
- Identity of service provider ignored

### Impaired Working Capacity: Young Plaintiffs

#### Construction of “original position”/value of loss

- Gender, family background and work ethics, disability
- Focus on “reality” of plaintiff’s situation, e.g. potential occupation, income level, attachment to labour force, etc.
- Social inequalities inherent in original position ignored
- Unfair to “scapegoat” defendant for systemic problems

### Implications of Restorative Principle

- Cheaper to injure members of marginalized groups
- Family/parental background accurate predictor of children’s socio-economic prospects
- Validates occupational segregation
- Legitimizes social construction of gender roles and gendered division of household labour
- Public/private dichotomy: Invisibility and devaluation of unpaid work in the “private”; remuneration determines value of work; corresponding devaluation of care work in market
- Commodification anxiety
- Promotes notion of ideal worker unencumbered by care responsibility
- Ignores emerging social reality of men’s involvement at home
- Skewed wealth redistribution in favour of the privileged

### Distributional Considerations in Tort Law: Tort Liability

- Corrective and distributive justice inform tort liability
- Corrective justice – structure of tort law, e.g. appropriate defendant
- Societal interests relevant in tort liability; correlativity between doer and sufferer not determinative
  - Public institutions determine tort law
  - Societal interests inform scope and extent of tort law
- Examples:
  - Duty (broader policy); Remoteness (reasonable foreseeability): defendant-favourable
  - Causation (lower threshold): plaintiff-favourable

### Distributional Considerations in Tort Remedies: Personal Injury

- Broader societal interests not entirely absent
- Often not to plaintiff's benefit

Examples: Non-Pecuniary and Punitive Damages

#### Non-Pecuniary Losses

- Social cost of extravagant awards
- Functional approach determines availability and quantum; No correlation with plaintiff's loss
- Cap
- Paramountcy of care
- Disadvantages plaintiffs with mostly intangible injuries, e.g. reproductive harms, sexual wrongdoing

### Punitive Damages

- Focus: defendant's reprehensible conduct
- Goal: Societal condemnation and disapproval of defendant's conduct
- No correlation with plaintiff's losses
- Deviation from corrective justice
- May increase plaintiff's damages relative to losses
- Limited availability and modest amounts
- Non-compensatory
- Not a panacea for devaluation of plaintiff's losses

### Conclusion: Challenges for the 21<sup>st</sup> century

- Broader societal interests inform tort liability and remedies
- Egalitarian valuation of losses: Personal injury remedies promote social justice consistent with social change and substantive equality
- Defendants should not benefit from plaintiff's marginalized status

**THE END**