

Compensation: Justice or Revenge?

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I. INTRODUCTION

Professor Sherwin is a contrarian and a skeptic. Surveying the doctrine and practice of legal compensation for wrongs—principally within tort law—she does not especially like what she sees.¹ Defenders of the system offer principles that do not readily explain the actual practice. In a variety of ways, she points out, so-called compensation often is not really an accurate measure of what is required to make the victim whole. And then she draws a rather startling conclusion. In reality, compensatory “justice” is based partly on revenge, on giving the victims of legal wrongs some satisfaction at the expense of their injurers. And such revenge is not a virtuous emotion or justification. So if you are a corrective justice maven, she says, don’t be so smug. You’ve got some serious explaining to do.

This Commentary takes up her challenge. I will suggest that

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1. See Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1388 (2003).

nonconsequentialist accounts of tort doctrine have much more explanatory power than she suggests and that the supposed fact that many tort victims act from vengeful motives has less. At the same time, her revenge interpretation does have value in illuminating some aspects of tort doctrine.

Let us begin with a closer look at Sherwin's argument. The first part of her paper describes some important discordances between compensation practice and the supposed goals of compensation. Often, she points out, actual compensation practice does not properly compensate—either because it undercompensates, because it overcompensates, or because it purports to compensate for things or conditions that cannot be restored or made whole.²

Undercompensation occurs when losses are excluded because they are too unforeseeable or remote, when plaintiffs are precluded from recovering the costs of litigation, when wrongful death statutes arbitrarily cap recovery, and in other situations. Overcompensation occurs when damages greatly exceed what the victim would voluntarily accept in order to suffer the harm (for example, for harm to dignitary interests and for violations of civil rights), and when *benefits* conferred by the injurer are not deducted. (Her examples include the collateral source rule, the award of loss of consortium damages even when the spouse of a deceased victim remarries, and the policy of not informing the jury that the victim's award is not taxed.)³

Finally, Sherwin identifies a category of “immeasurable losses,” which money cannot replace, and she notes that compensation is nevertheless often awarded for such losses—for sensory and emotional harm, pain and suffering, harm to reputation, and harm to personal relationships. Awarding compensation here is problematic, she suggests. First, the criteria employed are very unscientific: Juries are often merely asked to award a “reasonable” sum. Second, and more fundamentally, the victim would accept no amount of money for serious injury or death.⁴

What do these multiple discordances suggest? Although Sherwin concedes that policies other than compensation, and pragmatic difficulties, explain some of the discrepancies, she believes that not all of them can be so rationalized. Rather, the examples show that compensatory remedies are not exclusively devoted to loss adjustment, even in cases where no competing goals are evident. Instead, courts also provide claimants with a sense of satisfaction that justice has been done—and “justice” in the sense not of corrective justice, but of evening the score. The basic

2. *Id.* at 1389.

3. *Id.* at 1391–92.

4. *Id.* at 1393–94.

practice of compensation lets the victim not only regain lost ground, but regain it *at the injurer's expense*. Thus, Sherwin thinks, an element of revenge must explain tort's compensation practice.

Let me suggest three sets of responses to Professor Sherwin's provocative analysis.⁵

II. NONCONSEQUENTIALIST ACCOUNTS OF TORT DOCTRINE ARE MORE FECUND THAN SHERWIN SUGGESTS

Sherwin's analysis seems to betray a misunderstanding of corrective justice and other nonconsequentialist rationales for tort doctrine. Such rationales do not focus exclusively on the victim's need for compensation. Accordingly, it does not follow that some other rationale—revenge—is needed to explain the structure of tort law.

Most corrective justice and other nonconsequentialist tort scholars *insist* on a close linkage between the victim's right and the injurer's duty. They think that the injurer has an obligation to the victim to restore the victim's position. To be sure, they sometimes differ sharply about the nature of the required linkage. But there is broad agreement that a linkage is required. It is *not* enough just to show the social desirability of compensating the victim, on the one hand, and the desirability of having the injurer pay for the harm he has done, on the other.⁶ If this were enough, we could imagine many different social arrangements other than tort law that would serve these purposes, such as government no-fault insurance or risk premiums assessed against members of an industry.

Similarly, Sherwin complains that corrective justice cannot fully explain why an injurer must pay the victim for his loss; often, she points

5. I also believe that tort goals and policies other than compensation, and pragmatic and institutional constraints, are more potent than Sherwin suggests in explaining the various discordances she describes in her article.

6. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 134–35 (1995) (arguing that the defendant must have breached a duty correlative to the plaintiff's right); Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 276 (1996) (discussing this structural feature of corrective justice accounts). In his earlier work, Jules Coleman did suggest that compensation and payment might be disconnected and still comport with corrective justice. See, e.g., Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 422–27 (1982). However, he has since substantially changed his view. See JULES L. COLEMAN, *RISKS AND WRONGS* 365–71 (1992) (describing a “mixed” conception of corrective justice); see also Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y 849, 851–56 (1992) [hereinafter Simons, *Jules Coleman*] (discussing Coleman's new “mixed” conception of justice).

out, the outcome was highly improbable at the time the injurer acted. But again, she understates the justificatory power of nonconsequentialist tort theory, which indeed can explain why the award of damages for harm caused is a just remedy even if the injurer has created only a small, but still unjustifiable, risk of harm.⁷

Another example of Sherwin's insufficient appreciation of nonconsequentialist principles comes late in the paper. Having concluded that vengeance plays a surprisingly important role in explaining both the motivation of litigants and the tort system itself, Sherwin asserts that the pursuit of vengeance in this form is more a vice than a virtue. State-recognized retribution (through the criminal law), she concedes, is arguably a moral good. However, the form of revenge that tort litigants display is more akin to a private vendetta and is thus at best excusable (for example, as a private outlet for emotions). Why is revenge a more legitimate consideration in criminal law than in tort law? According to Sherwin, state retribution focuses on the actor's absolute desert; by contrast, informal revenge is based on personal grievance, on a loss that need not be caused by blameworthy conduct, and on a desire for comparative mastery over the injurer.⁸

Again, however, this analysis understates the resources of corrective justice and fairness accounts. Even if providing the victim with a right to recover damages from an injurer is properly described as a form of "retaliation," it is a highly constrained form of retaliation, similar in this respect to the criminal law's punishment of an offender in accordance with his just deserts. Just as criminal law constrains the retributive urges, so does tort law by permitting recovery only if the victim proves that the injurer violated a standard of care, that this breach caused specific types of damages, and so forth.⁹ (Also, apart from punitive damage cases, evidence of the injurer's wealth is normally excluded.) Why, then, is the legally constrained "retaliation" achieved in tort law not also a moral good?¹⁰

7. These reasons include the following: (1) *ex ante*, it is fair to require the defendant to pay for even a small risk of loss, if that risk is unjustifiable, because his default will only require payment in a correspondingly small proportion of cases; (2) the alternative of requiring compensation for risk creation (whether or not harm results) is ordinarily very costly and often infeasible.

8. Sherwin, *supra* note 1, at 1409–11.

9. On the other hand, one difference that supports Sherwin's argument is the following: Most criminal law criteria are pretty clearly defined, while the tort standard of negligence is relatively open-ended, perhaps permitting jury recourse to "retaliatory" impulses.

10. Sherwin does identify a special problem with tort law: The injurer might not have committed a moral wrong. Again, however, she understates the ability of nonconsequentialist accounts of tort law to account for strict liability doctrine. See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544–51 (1972) (offering a "nonreciprocal risk" justification for strict liability); Simons, *Jules*

III. DO SOME TORT DOCTRINES SUPPORT THE REVENGE INTERPRETATION?

Even if we reject Sherwin's broader claims about the failure of nonconsequentialist accounts to justify tort doctrine and practice, it is worth looking more closely at certain doctrines that might lend some support to her revenge interpretation. Consider the law of damages, including pain and suffering and hedonic damages.

With respect to pain and suffering, Sherwin repeats two common criticisms: The criteria for measurement are extraordinarily vague, and in any event, victims would not accept any amount of money for serious injury or death. Instead, she suggests, variations in pain and suffering damages often reflect variations in injurer culpability as much as variations in the extent of the loss.¹¹ Indeed, given that these harms are immeasurable and irreparable, the award of damages can be viewed as a vehicle for the transfer of wealth (and, thereby, status) from wrongdoers to victims. Thus, Sherwin claims, the practice of awarding pain and suffering damages supports her retaliation interpretation.

These last observations are creative and interesting. However, I believe that awards for pain and suffering can, to some extent, be justified on more conventional grounds. Although few victims would accept any sum in exchange for serious injury or death, many would (and do) accept money or some other benefit in exchange for accepting a *risk* of injury or death. To be sure, it does not then follow that compensatory justice is satisfied by providing damages in the amount of whatever sum a particular victim or class of victims would (or did) accept. Whether this is the proper criterion depends on a particularized account of welfare, value, or protected human interests. And the selection of such an account in turn depends on the underlying nonconsequentialist theory.¹²

Once more, Sherwin seems to assume that corrective justice and other fairness-based theories cannot explain whether and how tort law should compensate for intangible and irreparable harms. But any complete theory must address such issues. Relevant distinctions might be drawn along numerous dimensions, including: physical, emotional, or economic harm; expectation or reliance; harm or loss of a benefit;

Coleman, supra note 6, at 875–81 (suggesting that corrective justice might support two strict liability categories: conditional fault and nonfault).

11. Sherwin, *supra* note 1, at 1404.

12. For one such account, see generally Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247 (1992).

subjective or objective valuation of a loss; and ex ante or ex post measures of restoration.

Consider, for example, the question whether damages should be awarded to a comatose person for the loss of sensation or pleasures. Should such damages be more or less than the damages owed to a conscious person who is aware of her loss of the same sensations or pleasures? On the one hand, the latter at least possesses consciousness. On the other, she is also aware of her loss, as the former is not.¹³ Only an account of the kinds of interests that the law should protect can answer such questions. An appeal to the revenge interpretation is not illuminating here.

However, Sherwin is more persuasive when she turns to punitive damages. She plausibly argues that the availability of such damages is better explained as serving the victim's interest in imposing private punishment than as improving deterrence.¹⁴ Indeed, she might emphasize that an award of punitive damages requires some aggravated form of fault, such as recklessness or willful conduct. This requirement supports her general thesis: Additional damages are permitted in just those cases where the retaliatory impulse is understandably the strongest.

Moreover, the revenge interpretation sheds more light on another doctrine that Sherwin mentions only in passing—hedonic damages. Corrective justice has some difficulty justifying the award of damages for the lost pleasures of living in cases where the victim dies and is not survived by family members. In such a case, who deserves compensation? And similarly, even when the victim leaves survivors, do they deserve as an element of damages his lost pleasures of living, over and above their own personal economic and emotional losses? Practical and standing difficulties partly explain this lacuna in the law of damages. And some fairness-based theorists might try to affirmatively justify noncompensation here (though this raises the usual objection against permitting an injurer to be better off for killing a victim than for seriously injuring her). But perhaps the retaliation interpretation is also a partial explanation for nonrecovery for such hedonic damages. After all, the retributive sentiment will normally be weaker when the immediate victim is not even conscious of her loss.

Finally, Sherwin aptly observes that the current compensation system supports individual suits by victims against injurers but does not endorse recovery from a risk pool (into which all tortious potential injurers have

13. Courts are split on this question. See DAN B. DOBBS, *THE LAW OF TORTS* 1052 (2000) (collecting cases).

14. Sherwin, *supra* note 1, at 1402.

contributed).¹⁵ Of course, high administrative costs would make the latter approach impractical in all but a few cases. Still, she is correct that her revenge interpretation supports the tort law's endorsement of the traditional approach, which provides the victim with a sense of satisfaction from pursuing the actual injurer. Whatever arguments of fairness one might offer for the pooling approach,¹⁶ victims are less likely to feel personally vindicated under that approach. Another illustration of Sherwin's point is the states' experiences with no-fault automobile legislation. Notwithstanding the high hopes of no-fault advocates, the public seems to care a great deal about retaining the fault system in all but the most minor accidents, even at the expense of significantly higher insurance premiums.¹⁷

IV. THE PHENOMENOLOGY OF LITIGATION

Sherwin's revenge interpretation also includes a phenomenological claim about the motives of legal actors seeking compensation. Corrective justice, she asserts, cannot explain the aggressive sentiments often accompanying claims to compensation. Victims do not just want to recover for losses; they wish to "prevail over their injurers." (Indeed, with a melodramatic flourish, she suggests that victims "stalk" their injurers.)¹⁸

This phenomenological claim is intriguing but inadequately developed. In the first place, it is ambiguous. Is it a claim about the reasons why victims participate in the system? About the tangible or intangible benefits they expect to obtain at the end? More empirical support would be helpful here.

Moreover, if this is a factual claim, the obvious next question is why, or even whether, these facts matter. Why should we care *why* litigants use the legal system? And why should we expect corrective justice (or any other justificatory theory) to "explain" the phenomenology of litigation? More needs to be said here. If our tort system is adequately justified by

15. *Id.* at 1400–01.

16. See Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 460–69 (1990) (arguing that corrective justice supports such a risk pool); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 118–20 (1990) (agreeing in part).

17. See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 242–48 (2d ed. 2002) (noting that legislatures have been reluctant to abolish tort liability for automobile accidents entirely). Plaintiffs' tort lawyers no doubt have also discouraged the development of no-fault systems.

18. Sherwin, *supra* note 1, at 1397.

principles of efficiency, or corrective justice, or transactional or distributive justice, should it matter that litigants have their own distinct motives for using the system, even if the motives seem to be in tension with those principles?

On the other hand, it is indeed plausible to believe that the underlying justifications for the legal system should pay some heed to the motivation of actors who use the system. The necessity of some such connection is most clear under an efficiency theory. For if the tort system is to give injurers appropriate incentives to take due care, then it is relevant whether and how often victims use the legal system.¹⁹ Also, insofar as the efficient state of affairs being sought assumes a utilitarian calculus that counts the satisfaction of the preferences of participants, the satisfaction of the victims' desire for revenge has positive social value.

It is less clear how nonconsequentialist theories take into account the motives of victim litigants (vengeful or otherwise). At the very least, such theories must be perceived as legitimate, but this alone imposes only a very weak constraint on the content of the principles. Almost any coherent approach to compensation satisfies this criterion, even if the approach does little or nothing to satisfy the supposed preferences of victims for revenge.

However, there is another way to understand Sherwin's emphasis on the phenomenology of litigation. The "prevailing over the injurer" story might be an account of how the legal system—or at least an important part of the legal system—understands itself. The jury plays a vital role in tort cases. And it is possible that the arguments that really matter to jurors are those based on revenge, rather than corrective justice (insofar as these genuinely differ). Some support for this view can be found in Neal Feigenson's recent book.²⁰ Reviewing the literature on jury decisionmaking in tort cases, Feigenson suggests that juries very often try to do "total justice." That is, they "strive to square all accounts between the parties [and] reach a decision that is correct as a whole," sometimes in disregard of the technical legal standards.²¹ And revenge, or something closely akin to it, often plays a vital role. "[P]eople tend to conceive of accidents as melodramas and the doing of justice as the righting of an imbalance (or the distribution of accident costs) between the good guy(s) and the bad guy(s)."²² Also, insofar as negligence

19. Of course, whether vengeful motives actually do promote efficiency depends on whether they encourage victims to sue at an optimal rate or instead too often (or too infrequently).

20. See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

21. *Id.* at 5.

22. *Id.* at 13.

doctrine itself often relies heavily on the judgment of an individual jury about what constitutes “reasonable care,” rather than on a preexisting judicial or legislative criterion, juries are relatively free to rely on retributive sentiments in deciding whether the injurer has acted tortiously.

V. CONCLUSION

Professor Sherwin’s mischievous claim, that compensatory remedies actually rest in part on vengeance, will strike some readers as hyperbolic or even absurd. Torts are not crimes. And compensation is not punishment.

But Sherwin succeeds in demonstrating some complexities and contradictions in the legal institution of remedial compensation. Although she underestimates the power of nonconsequentialist principles to explain and justify that institution, and is too quick to assume that the vengeful motives of some litigants bear on such an explanation or justification, her unorthodox excavation does reveal trace elements of retribution. It is an interesting find, well worth pondering.

