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Reflection on Tort Lawmaking

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REFLECTIONS ON TORT LAWMAKING

*The Hon. Robert E. Keeton**

I. A Foreword on Using Statutes in Deciding Cases

"The statute is founded on a fundamental contradiction."

"Congress did not resolve the issue."

"Look hard enough and you can find some expression somewhere in the legislative history to support any argument you want to make."

"The statute manifested a fundamental change in the law on the subject, but it said nothing about all the cognate rules that must be reconsidered."

Do thorough research on any controversial issue of substantive law—tort law included—and you will find each of these statements, and variations on them. Sometimes they are false assertions made by an advocate for a point of view—either the author of an article, a contributor to political debate, or an advocate before a court. Sometimes, however, one or more of these statements is true. A court that has to decide a case does not have the luxury of doing no more than speculating about what is the best answer. If the outcome of the case depends on the answer to a controversial issue, the court that does not find an answer in the sources of authority must fashion an answer to decide the case.

Courts are the clean-up crew. Any tough issue affecting the outcome of a case that constitutions, statutes, and precedents leave unanswered must be answered by a court. Some trial judge must fashion the first answer and has an obligation of reasoned decision and explanation. A trial judge's answer may have a very short life. I remember one occasion when I fashioned an answer to an unanswered question of state law in deciding whether to enjoin a state prosecutor's proceeding on a state indictment that one state judge had declared to be vindictive. The case came to me after another state judge had set aside the order of the first. My dismissal of the complaint before me at 1:00 p.m. was affirmed by the First Circuit at 4:00 p.m. and vacated by a Justice of the Supreme Court at 10:00 p.m., all on the same day.

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Ordinarily, a trial judge's decision on an issue of first impression lasts longer than that but fades fast when appellate courts begin to make pronouncements on the same issue. Appellate pronouncements ordinarily last for years or even decades. The law that trial and appellate judges have made, with the participation of advocates, is made not because judges choose this role of lawmaking but because it is forced upon them. Some may welcome the responsibility. Others may dread it. But whatever their attitude about it may be, sometimes they have to do it in order to decide the cases before them. The frequency with which this responsibility arises increases as the times in which we live and serve in our various professional roles change.

II. From Olden Times Into a Predominantly Urbanized Present

A few decades ago, in calmer times, the paradigm tort was a one-on-one wrong that gave rise to a claim for damages. Even some of the more exotic forms of twentieth-century torts have continued to illustrate this point. For example, the paradigm toxic tort of the last two or three decades was a one-on-one wrong that gave rise to a claim for damages. It was an up-date for the closing years of an industrial socioeconomic era of the pitchfork battery of the eighteenth-century agrarian era. Of course, even in the twentieth-century, we still have personal feuds, and perhaps even more than before because more of us are crowded together in urban settings. But the weapon an angry combatant now reaches for is more likely to be a baseball bat or a golf club than a pitchfork, an agrarian-era wagon tongue, or a kitchen pot of either agrarian or modern design.

Surely we may expect personal feuds and combats to be no less frequent in the twenty-first century. So we can expect the one-on-one batteries to remain a part of the total load of controversies for which the community's legal system must provide a forum when they cannot be settled privately—that is, outside the community's multi-chamber dispute resolution center provided at taxpayer expense. Furthermore, we may expect that the forum of first choice for those who are more interested in what they see as justice than in money awards, small or large, will be a courtroom with a presiding judge and a jury in the box to decide genuinely disputed and material questions of fact.

III. Changes in Courtroom Proceedings

Perhaps some of the personal feuds of the future that law in action must address will be about the paradigm one-on-one toxic tort of

three decades or more ago. For example, a "one-on-one" claim might arise when plaintiff parents, living in a thinly-populated rural setting, claim that their child died from drinking spring or well water allegedly contaminated by toxic waste that defendant had dumped earlier, the toxic waste having worked its way, over time, into the spring or well.

The focus of this session today, however, is at least in part on more complex kinds of disputes. We are not only thinking about one-on-one tort cases, but also about more complex intrusions on the health and safety of larger and larger numbers of persons, or even entire communities. Both criminal and civil cases of massive dimensions will be coming into courts, and before that, into law offices and into law school classroom discussions.

Along with these massive problems are coming new opportunities. Our economy and our social and political order are moving beyond the industrial era into something more exciting. By enabling us to provide food and other physical goods more effectively, these opportunities allow for greater enjoyment of life by every member of larger and larger communities—regional, national, international, and global, if not inter-galactic. In this developing computer-aided electronic socioeconomic order, however, the risks are high that conduct driven by self-interest will increase disparities of property holdings and other circumstances essential to the pursuit of happiness. I believe we cannot expect to change those realities of human nature that include both nobility and crass self-interest any more than we can hope to change the realities of the scientific laws of the universe in which we live. But we might find ways to be more successful in encouraging and fostering nobility, cooperation, and mutual respect.

The unanswered questions of largest consequence for humanity concern not the forthcoming breakthroughs of the scientific type, but whether we will have the wit and wisdom to achieve enough breakthroughs in political and social ordering to devise better ways of working and living together in mutual respect. Can we come closer than humanity as a whole has come, thus far, to achieving the essential elements of the American Founders' distinctive objective of having a government of law, not merely a government of powerful persons, and a society committed to liberty and justice for all?

If we do not turn our minds and energies to these supra-scientific, supra-technical issues, and learn how to build bridges of understanding and gateways of communication among scientists, technologists, governmental officials of all kinds, and of leaders who orchestrate private transactions beyond law, we run the risk of losing our tenuous grasp on the American dream.

IV. TRANSACTIONS BEYOND LAW AND THE FUNCTIONS OF LAW

To understand law and its role in a successful, viable social and political order, we need to understand what is law's function. We need, just as much, to understand not to expect too much of law. We need to understand the limits of what law, well used in a social and political order can do for us. It is not the function of law to govern every transaction and relationship. Some transactions and relationships are beyond the reach of law in reality and, for very pragmatic reasons beyond anything in our control. In addition, every legal order in the history of human relations has chosen to place beyond the reach of law some freedoms of action and communication that could be controlled by law, at least to some extent, if the community chose to have its law intrude that far upon individual freedoms to act and speak.

Having stated these rather general propositions about tort lawmaking, and about the extent of and limits upon the reach of law, not only in relation to torts but also more broadly, I now want to add two more generalizations about the function of law in a viable economic, social, and political order.

There are two *realities* about law. The *first* reality is that *function is close to being the quintessence of law*. We could not fully understand law without fully understanding its function in human affairs. The *second* reality is that we can never *fully* understand either *law* or its *function*, and even if we did, the understanding would be momentary only. The reason is the inevitability of *change*. It is worth the effort, however, to come as close as we can to fully understanding both law and its function. The time to start, if not sooner, is now.

Acknowledgment of the critical role of change on the function of tort law is, I hope you will agree, not at all difficult for people who have spent enough time and energy thinking about torts to be attracted to attending these sessions. It is surely more difficult, though, to focus more precisely on the ways in which we should take into account the likelihood of particular kinds of changes as we plan any course of action about ways of resolving tort disputes.

If we make two assumptions, some of the conclusions that our conferring lead us to are likely to be of very limited usefulness for planning beyond a short span of years, or perhaps even months, as another breakthrough in relevant science, technology, or electronics occurs. First, we should avoid assuming, even provisionally, that an issue we are discussing will not be materially affected by changes in scientific understanding of the transactions out of which the tort dispute arises. Second, we should not assume that an issue will not be materially af-

fected by the electronic revolution in methods of recording, storing, and tapping (or, in the current jargon, "accessing"), and using information or data compilations. If, instead, we try to identify alternative assumptions about the nature of changes likely to occur, we at least have a prospect of coming to conclusions more likely to have somewhat longer-term usefulness.

V. Back to Toxic Torts and How We Think About Them

I ask you to reflect, for a moment, on how you read what others write about toxic torts. Start by reflecting on the different ways you read different things.

We read differently, depending on why we read. My experience is, and I suspect yours is too, that reading the so-called news in any newspaper, even the New York Times, is something I do very differently from the way I read an editorial or op-ed piece on a subject that especially interests me. Different from each of those is the way I am likely to read a set of opinions of the various justices or judges in a reported case that especially interests me. Different, too, is the way I read a scholar's article in a journal of science, social science, law, or "law-and." Ordinarily I am reading less critically the news, ordinarily just somewhat more critically the editorial or op-ed piece, and ordinarily still more critically a scholarly article or judicial opinion. But the intensity and nature of the critical focus in all these illustrations comes nowhere close to what it was, as lawyer, when I was reading or re-reading in preparation for advising or representing a client, and what it is, as judge, when I am reading or re-reading in the process of deciding a case before me that involves some disputable issue of tort law bearing on the outcome of a case.

The more intense my focus happens to be as I read, the more likely the focus will be on the substantive meaning of the text before me. Usually I am interested in how that substantive meaning might come to bear upon a problem arising from human relationships and transactions about which I am uncertain as to the "right" or "best" answer.

Is this the focus, is this the interest, is this the objective of the papers and oral presentations we have been considering here? I am encouraged by things said here yesterday and today to believe that more interest in this kind of understanding of the law of torts is developing. I applaud this interest and effort unreservedly, and I would like to do anything I can to encourage and help.

I acknowledge that I have a special interest in being explicit about my own focus on this subject. It stems partly from the fact that so many commentators read judicial opinions on the premise (whether

explicitly stated or not) that judges decide cases first, for unexamined reasons, and only then begin to think about what they will say to explain the decision. My view is that most of us do our best to write our opinions (or state them orally on the record in the courtroom) clearly. We try to state exactly the reasons we decided as we did.

I think it is important for any advocate who hopes to influence a judge to know that it is likely the judge will hold this view about her or his sworn obligation as a judge. And I think it is also important that any commentator who is reading judicial opinions and trying to understand them fully know that many judges (I believe most) hold this view about the obligation of a judge.

Statutes and administrative regulations about the subject matter of tort cases are also better understood if we read them with conscious focus on their manifested meaning rather than just searching out sentences or phrases that might reasonably be interpreted quite differently if used in another context.

VI. An Illustration

Before closing my remarks, I want to try to do one more thing which is to illustrate in a relatively concrete way what I mean by change that requires some bridging. The illustration I turn to is a change in law that, in my view, lawmakers have manifested to be imperative in view of changes in practices of toxic waste disposal and in scientific understanding of the consequences of those toxic waste disposal practices.

What are the characteristics of the remedies a court is authorized by law to fashion for all the parties in interest, including individuals and private and public entities, when a toxic waste dump site was used by dozens or more of trivial, substantial, and heavy contributors to the toxic porridge that predictably will continue for decades to impair the usefulness of downslope areas, waterways, and bays into which they flow? Is the paradigm tort remedy of an award of damages useful? If so, is it sufficient if it is only in the paradigm form of one money award on judgment day in the trial court, including an amount intended to be fair and reasonable compensation for losses and harms to be suffered in the future as well as those past? Or must the remedy be, and can we fashion ways in which as a practical matter it can be, subject to correction or modification if forecasts of harms to be suffered decades later turn out to be grossly off the mark, either in an upward direction or in a downward direction?

A case that was before me involving a municipal dump site at a thriving coastal community, before economic and social changes made

it less thriving economically, concluded with a jury verdict. Based on that verdict, and with the help of the lawyers in the case, I came to a judgment that included a money award for past harm and a provisional award for future harm subject to modification on stated conditions. That remedy is under challenge on appeal. If it survives appeal, it represents one step in a process of developing more flexibility in the form of judgment that will make the judgment adaptable to the distinctive circumstances of a particular case. If that form of judgment does not survive appeal, even the most preliminary steps in the remedy phase of tort lawmaking for the future remain to be fashioned.

VII. CONCLUSION

Whither tort lawmaking? From where, and when, and how, has the law of torts come? In what ways do the answers to these questions enlighten us and prepare us to decide questions we need to decide now?

Whither tort lawmaking? To what destination are we pointed, and when, and how do we get there? And should we be changing the destination, or the path of movement toward it? In what ways may thinking about the answers to these questions prepare us decision-makers, inside and outside officialdom, to plan better immediately and in the future?

The exchange of views that has occurred at this conference encourages me to hope that these questions of target destination and choices among paths will be a part of our tort lawmaking agenda, today and in the future.