

AN INJURY LAW CONSTITUTION

Chapter Summary

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Introduction. The introduction summarizes a work that “reaches across the spectrum of legal institutions and societal mechanisms to encompass basic ideas of responsibility for injuries and prevention of injuries.” It presents an overview of important tort litigation and safety regulation, noting the way that “private law and safety statutes overlap, and sometimes generate legal conflict.” It refers to “the great set of struggles, ideological and cultural, about what we mean by the ordinary rights of Americans, and about the very definition of injury.” Included in these struggles are the constant debates between supporters of efficiency as the main goal of injury law and those who emphasize the achievement of individual and social justice. After a summary review of principal models of injury law and criticisms of it, the Introduction concludes that the legal system “constantly presents an experiment in progress, testing out what we mean by justice, in the setting of injury,” a process that “reflects our views of the human condition.”

Chapter One, An Injury Law Constitution. This chapter introduces the idea of a body of law governing injuries that has “some of the qualities of a constitution”—“a fundamental set of principles that govern relations between human persons and corporate and governmental institutions.” It traces the historical development of the idea of a constitution from the time of Solon and Aristotle up through the early American Constitutional period. It includes a summary of relevant aspects of the British constitution, referring to the British Human Rights Act and the European Convention on Human Rights, and analyzes a fascinating analogue that appears in a decision of the Italian Supreme Court of Cassation.

Chapter Two, Injury Law and Power. This chapter identifies ways in which the modern American law of injuries “manifests an effort, on the part of judges and legislators, to check the use, including misuse and abuse, of power.” This

includes “not only the power of individuals and of firms but also the power of governments and officials.” It notes that “many judicial decisions and statutes in the field of injury law seek to create a playing field that has some elements of equality” and “may be said to have constitutional dimensions.”

Chapter Three, Rights. Here, I discuss rights involving personal security, tangible property and economic interests, and the differential protection the law sometimes provides to these interests. I focus on personal freedom as a value that is invoked by both plaintiffs and defendants. I analyze “individualism” as a basis for the creation of rights and the parallel concepts of “individual responsibility” and individualization of justice in disputes. Specifying examples of how “humanitarian considerations” occasionally affect judicial decisions, I conclude that our law of injuries “confirms that makers and interpreters of the law respect and value the worth of every human being—a “constitutive pillar of the law.”

Chapter Four, Injuries. I identify sources of risk that lead to various kinds of harm, and present a brief summary of the statistics of injury in America. I discuss the difficulty in identifying the “cause” of injuries, including the situation where an “injury” is a joint product of the complaining party and the defendant. I discuss types of occurrences that many people think of as harms but that the law refuses to recognize as “injuries,” e.g., certain kinds of emotional distress and harms labeled “economic loss.” I note that “the injury law constitution recognizes, often implicitly—in tort law, compensation schemes, and safety legislation—the benefits that individuals bestow on society and the losses the society suffers when individuals are hurt.”

Chapter Five, Mechanisms of the Law. This chapter examines structural aspects of the legal system that provide a frame for the injury law constitution. It focuses in part on the federal structure of government and the sometimes thorny relations between courts and legislatures. It examines how courts employ the concept of duty as a limitation on liability. It compares and contrasts the particularization of remedies in tort law, and the difficulties courts have in trying to regularize amounts of damages, with the deindividualization of injuries in workers’ compensation law. The text also discusses how the law deals with scientific uncertainty. It concludes with a consideration of different kinds of standards used in the law—“some precisely arithmetical, some involving numerical estimates, and others pitched in more abstract language and requiring some interpretation.” “Operating under the umbrella of the injury law

constitution, all of these standards are products of the vast mechanisms of injury law.”

Chapter Six, Legal Doctrine. I examine the slipperiness of legal doctrines in tort law—intentionality, negligence, and strict liability for both activities and defective products. A specific application in the field of products liability describes how “the conflicting views of various courts and legislatures are part of the constitutive development of injury law,” involving “an ongoing dialectic that arises from specific types of cases.” I illustrate how in the interpretation of workers’ compensation legislation, courts may load their “own moral judgments upon the moral foundations embedded in the workers’ compensation statute itself.” I note that in the area of safety regulation, where strong ideological arguments abound, the language of statutes may, interestingly, be more technocratic than moralistic. I present an intermediate summary on the “abstract guides” of the injury law constitution. It includes, among other things: conceptions of right, cost control, and “compensation for as many injured persons as possible, with the boundaries for amounts being left to a choice among social mechanisms.” I also refer to “a standard of basic decency, not always articulated; and, very seldom articulated, some small measure of compassion.”

Chapter Seven, Functional Elements of the Law. This chapter has two major themes. One is an elaboration of the theme of power in injury law begun in Chapter Two. This section includes discussions of police misconduct and sexual imposition. It also focuses on the role of power in the workplace, as it plays out in the tripartite elements of tort, workers’ compensation and regulation. In workers’ compensation, an interesting narrative feature is the discussion of the grant of compensation to a trucker injured while engaging in sexual intercourse with his trucking partner, who died in a collision at a railroad crossing. On the tort side, there are discussions of litigation against employers and suits against makers of workplace machines. Here a principal conclusion is that “under the injury law constitution, the power to choose is dispositive.”

The other major section of this chapter focuses on communication and information. It includes discussions of liability for defamation and the publication of truthful material. It analyzes imbalances of information in cases of product injury, including the levels of specificity that courts require of product warnings. I also analyze the problems of scientific proof in areas where data are not dispositive, and of lack of relevant information in emerging areas of technology, for example nanotechnology. The chapter concludes with

an examination of safety legislation which reflects the importance of information to consumers and workers, summarizing some Supreme Court decisions on questions of federal “preemption” of private lawsuits where risk information is involved. Concluding this discussion is the observation that the injury law constitution “may be said to prioritize the judgment of consumers at trench level whenever that can meaningfully be registered.”

Chapter Eight, Social and Individual Goods, Sometimes in Competition.

This chapter details how “the injury law constitution . . . reflects a constant set of tensions” about “social and individual goods.” A simple example is the competition between those goods that “intensifies with physical contact in sports and games.” The definition of the boundaries of individual responsibility comes to the fore when actors as diverse as pedestrians and workers on the job take chances with their safety, and the results in tort litigation can be diverse. A relatively delicate set of problems arises when people sue for emotional distress they ascribe to the conduct of others. Sometimes these cases may arise from simple outbursts of anger. Sometimes they may be generated by more deliberate conduct.

The tradeoffs for personal freedom move into the public sphere when people wish to use unproven drugs. Important judicial decisions have resolved this problem in favor of prohibitions by the Government on access to those products. One feature of the chapter is its description of the paradoxes of the presumed opposition of concepts of communitarianism and individualism in the context of the traditional clash between morality and economics.

Chapter Nine, The Rationales of Injury Law. This chapter identifies the great catalog of “rationales, goals and purposes” that various observers have seen as supporting pillars for injury law. One of these, the promotion of safety, has a fork in the road that leads to two very different outcomes: maximization of security from harm and the use of balancing tests like risk-utility and cost-benefit analysis. Individual compensation for injury has diverse rationales, not all in harmony with one another. One is corrective justice, which is highly personalized to individual claimants. At a far point on the compass is loss spreading, which has a significantly more socialized perspective. This complex admixture includes motives of retribution, punishment and condemnation. The neediness of victims is a problem usually referred to legislation, with an interesting aspect of tort law being that at least for economic damages, it rewards well-off claimants as contrasted with impoverished ones. Members of different schools of thought—economics, feminism, pragmatism—advocate

dissimilar sets of rationales. The injury law constitution manages the “tensions that arise from what are often opposed commitments which may people hold in mind at the same time,” for example, “commitments to an efficiency-oriented society and a just one,” and to “freedom of action and the right to be free from invasions of physical and emotional integrity.”

Chapter Ten, Remedies and Sanctions. Here I analyze the principal ways in which the law directly seeks to prevent injury and the way it compensates for it. In the former category there appears a new echo of the problem of federal preemption of civil lawsuits—specifically in the case of passenger restraints in vehicles. In the compensation category, the chapter spotlights the problem of intangible harms like pain and suffering in different ways. The text illustrates the difficulty for judges who must consider whether to reduce jury awards for such harms, and it refers to the way that the September 11th Fund dealt with this form of “noneconomic loss.” It also discusses different ways that the court divides the burdens of injury among multiple parties. It parallels tort law, safety regulation and the September 11th Fund as methods of preventing or remedying injury. It concludes that taken together, these methods exhibit the tensions that attend the brokering which the injury law constitution “provides among elements of causal impact, moral responsibility, dispassionate accounting related to control of risk, and humanitarian concerns.”

Chapter Eleven, The Supreme Court and Injury Law. “As is so for the federal Constitution, the Supreme Court is a principal arbiter of the injury law constitution, sometimes articulating and sometimes implying its governing principles.” The Court does this in bedrock common law territory—for example the tort of fraud, with nineteenth century antecedents. It chooses up sides in rejecting tort recovery for “economic loss” in a decision that has been much-cited by state courts. It has largely constitutionalized the law of defamation.

It has entirely created the “constitutional tort” as a check on official misuse of power. But in doing that, it has drawn lines against plaintiffs who sue for the failure of government officials to give protection against harm. The text describes the two most poignant cases: *DeShaney*, in which the Court denied recovery to a small child, when state officials knew of repeated episodes of abuse to him; and *Castle Rock*, where police did not enforce a protective order in favor of a mother with the result that three children were murdered by their father. A summary of principal decisions on punitive damages provides “an

especially interesting act in the little opera score” that the Court “has written within the injury law constitution,” taking “its legal as well as human drama from the use of civil law to punish, when ordinarily the main thrust of tort law is to compensate for injury.”

Conclusion. The concluding chapter sums up how courts, legislatures, and agencies both work together and compete with one another, and how the interests of individuals sometimes clash with those of society. It indicates how the injury law constitution forces decisionmakers to mediate among competing views, sometimes held simultaneously by the same individuals. The chapter sets out a group of principles that one can discern in the injury law constitution. The most general principles include the premium to be placed on the dignity of the individual, the maximizing of freedom for the exercise of individual autonomy, and the assessment of responsibility for injury, as much as possible, on the basis of control of risk. The text then moves to particulars concerning legally protected interests and decisions about whether harms are legally cognizable. It then identifies the best decisionmakers in various kinds of controversies, and presents some guides for the making of decisions. These include the need for judicial neutrality but also refer to a limited permissible scope for moral judgments.