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Tort law is a body of thought as well as an ensemble of norms. To ask, therefore, how tort law ought to develop or be reformed is to ask how we are to think about tort law. How we think about tort law is the subject of my remarks today.

I want to distinguish two conceptions of tort law: the relational and the instrumental. The instrumental conception has struck particularly deep roots in the tort jurisprudence of the United States. The relational conception, now in the eclipse in this country, thrives elsewhere in the common law world.

To illustrate the distinction between the relational and the instrumental conceptions, I propose to review an old controversy. In his illuminating history of modern American tort law, George Priest has described the decisive influence of Fleming James, Jr.[1] An early incident in James' academic career, his exchange with Charles O. Gregory concerning contribution between tortfeasors,[2] features powerful statements of these different conceptions.

One can think of tort law in two ways. The first way focuses on the relationship between the parties. Tort law features a claim that one party is entitled as of right to the liability of the other. The relational view concentrates on the normative bond that marks the particular parties off from the rest of the world and joins them in a legal relationship. In this view, tort doctrines and principles are sound to the extent that their justifications coherently single out and connect the specific parties. The relational view starts with the relationship of the parties to the litigation and asks how we can construe that relationship as a normatively significant unit. If we cannot so construe it, the claim fails, because there is no moral ground for linking the liability of this particular party to the entitlement of that one.

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1. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

2. Fleming James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941) [hereinafter James, *Criticism*]; Charles O. Gregory, *Contribution Among Joint Tortfeasors; A Defense*, 54 HARV. L. REV. 1170 (1941) [hereinafter Gregory, *Defense*]; Fleming James, *Replication*, 54 HARV. L. REV. 1178 (1941) [hereinafter *Replication*] Charles O. Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941).

The second way is to conceive of tort law instrumentally, as the means for accomplishing collective goals. The task then is to formulate the goals, elucidate their justifications, and show how they operate in the context of tort litigation.

An outstanding and influential example of the goal-oriented approach is Fleming James' idea of loss distribution. Throughout his writings, James maintained that accidents cause less social disutility the wider their costs are dissipated. He therefore favored liability rules that spread losses as broadly and thinly as possible. For James, the goal of loss distribution entailed the extension of liability, so that defendants would spread the loss through their insurance and through the consequent increase in the price of their products.

In his controversy with Gregory, James applied this approach to the problem of multiple tortfeasors. Gregory recommended abandoning the common law bar against contribution in favor of a rule that subjected each tortfeasor to contribution in proportion to fault. This, Gregory thought, would obviate the injustice of allowing the plaintiff to bring liability home to one tortfeasor while letting the others escape. For James, however, the common law rule, whatever its historical rationale, had the advantage of promoting broad loss distribution. In choosing among possible defendants intelligently, self-interested plaintiffs tended to sue rich or insured tortfeasors, who were strategically placed to distribute losses broadly. To James, Gregory's proposal had the fatal weakness of allowing these tortfeasors, in turn, to shift losses to tortfeasors less able to spread them.

Priest reads this exchange as hoisting Gregory on his own petard. According to Priest, Gregory's purpose was to change the common law by introducing a superior loss-spreading rule, which allowed any single tortfeasor to distribute losses to the other tortfeasors. James' point was that in fact the common law rule spread losses more effectively than Gregory's proposed substitute. In Priest's words, "James had simply thought through the problem more thoroughly and had accurately described the implications of Gregory's own approach."[3]

In my view, this interpretation is incorrect. James and Gregory, far from proceeding from a common premise, presupposed radically different conceptions of tort law. James wanted tort law to give effect to the goal of loss distribution. Gregory wanted tort law to respect the normative relationship between multiple tortfeasors. The contest between them was a contest between these two contrasting conceptions.

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3. Priest, *supra* note 1, at 475.

The true premise of Gregory's proposal was that their common liability to the victim creates a juridical relationship among multiple tortfeasors. His question was: what legal doctrine is required by the logic of the tortfeasors' relationship? Contribution, he explained, "presupposes a common burden or incubus resting upon all members of a group, more than his share of which one of such members has discharged for the benefit of all."[4] By allowing one tortfeasor to be compelled to discharge the liability shared by others, the common law bar against contribution worked an unjust enrichment. Gregory proposed that a burden resting on all should be borne by all.

Gregory and James divided not on the desirability of loss distribution but on the connection between that goal and tort liability. Gregory argued that, within the relationship among tortfeasors created by tort liability, the common law bar against contribution works injustice even if it forwards James' goal. In Gregory's view, no matter how laudable the goal, tort law was not its proper context. James, on the other hand, gave priority to the goal and saw in tort law the opportunity to give it at least a limited effect. Gregory measured the goal by the relationship; James made the relationship subservient to the goal.

The Gregory-James controversy features a goal that few scholars today would promote with James' uncompromising fervour. Nonetheless, the significance of the controversy transcends their specific dispute. James' argument exemplifies the instrumentalism that over the last half-century has triumphed in American tort thinking. In contrast, Gregory's approach is standard in the non-instrumental thinking still widespread elsewhere in the common law world. (This is hardly surprising: Gregory used Canadian and English law reform statutes as the models for his own proposal). The implications of this dispute are worth keeping in mind as we consider the future of tort reform.

James projected the tough-mindedness of the Yale realist. While conceding that the contribution proposal coherently developed the principle of fault liability, he considered it a misplaced aestheticism that elevated "theoretical symmetry"[5] over social utility. He portrayed Gregory as the champion of logic over life: Gregory's "quixotic" proposal "sacrifice[d] good sense to a syllogism -- and an outworn syllogism at that."[6] As for his own mission, James described it in stirring language: "I must look behind the trappings of verbiage and rationalization to see how the rule is really working out, how it affects litigants

4. Charles O. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365, 369.

5. James, *Criticism*, *supra* note 2, at 1169.

6. James, *Replication*, *supra* note 2, at 1183.

singly and in the mass, where its incidence truly is."[7]

Gregory's position was a set of nuances with which James had no patience. First, Gregory supported loss distribution as a goal of social policy. "I think it highly desirable," he wrote, "to provide for the shifting of tort damage -- the victims of which are statistically ubiquitous but personally unidentifiable in advance -- from the shoulders of those who are hurt to all society, or to all who partake of the risk-creating activity producing the harm."[8] But, second, he recognized that the systematic introduction of loss distribution was too monumental a social program for tort litigation to achieve. Holding up the model of workers' compensation, Gregory observed that "[i]f Mr. James supported a program of socialization of loss through taxation or compulsory insurance, preferably administered through quasi-judicial commissions, I would be most sympathetic."[9] Third, Gregory was not enamoured with tort law, which he regarded as an archaic mechanism. He recognized that systematic loss distribution "might mean complete abandonment of tort law as we have known it," but this, he said, "is not necessarily a condemnation."[10] Fourth, he nonetheless held that "[a]s long as we retain this outmoded vehicle, developed to provide a distribution of loss based on something called fault, I believe we should honestly recognize its purposes and attempt more perfectly to achieve them."[11]

James construed Gregory's adherence to the goal of loss distribution as narrowing the issue between them. For James, their agreement about the ultimate desirability of comprehensive social insurance left room for disagreement only about how to deal with accidents in the interim. For James, the goal of loss distribution was decisive. He assumed that if the goal was desirable, it should be implemented to whatever extent possible. Gregory's defense was "quixotic" in its excessive concern for an anachronistic regime of liability.

The dispute highlighted two different justificatory considerations. Gregory pointed to the avoidance of unjust enrichment, James to the spreading of losses. Once Gregory acknowledged both the cogency of loss-spreading and his antipathy to tort law, James considered the battle over and declared victory. James assumed that if they agreed on the substantive merit of loss distribution, they could not reasonably disagree on anything else.

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7. *Id.* at 1178.
8. Gregory, *Defense*, *supra* note 2, at 1176.
9. *Id.* at 1171.
10. *Id.*
11. *Id.* at 1177.

James ignored an important aspect of Gregory's approach. Gregory realized that legal disputes involve more than disagreement about the substantive merit of different justificatory considerations. Also to be considered is the way these considerations apply to the legal relationships they are supposed to govern. Sensitive to this additional dimension, Gregory realized that the goal animating public insurance did not fit the relationship among joint tortfeasors. The fact that he wished public insurance to replace tort law did not, in the absence of public insurance, preclude him from advocating that tort law should more perfectly reflect its own nature.

To appreciate Gregory's position, one must contrast the role of justificatory considerations in the relational and the instrumental conceptions. In the relational view, the justificatory consideration is internal to the nexus among the parties, because it is implicit in the relationship's interior structure. For example, once one conceives multiple tortfeasors as related through their common liability to the victim, the idea of unjust enrichment -- in this particular instance that one tortfeasor should not be compelled to discharge the liability of all -- becomes morally significant simply by virtue of the relationship's structure. The justificatory force of the principle against unjust enrichment is immanent to the liability that all the parties to the relationship share. Of course, contribution among tortfeasors is not the exclusive context for the principle against unjust enrichment. But that principle operates as indigenously in the contribution context as it does in any other.

On the instrumental view, in contrast, the normative consideration is external to the parties' nexus. The favored goal is justifiable independently of the relationship and then applied to it. For example, James' goal of loss distribution, which James argued ought to govern the tort relationship, is not a normative implication of that relationship as such. Indeed, tort law artificially restricts loss distribution by channelling the loss spreading through the litigants even though other parties, such as the government operating through its powers of taxation and redistribution, can spread the loss even more widely. As a justificatory consideration, loss distribution is compromised by, rather than immanent to, the structure of the tort relationship. This is why James championed a scheme of social insurance as the best ultimate solution to the problem of accidents.

We can sum up the different roles of justification as follows. On the relational view, justification is internal to the relationship. Therefore, the moral force of the justification is co-extensive with the relationship that it justifies. On the goal-oriented view, justification is external to the relationship. Consequently, the goal's justificatory reach need not correspond to the relationship's scope.

From this an important consequence follows. If we regard law as a justificatory enterprise -- that is, not merely as an exercise of official power and authority, but as a social arrangement that is responsive to moral argument, we should especially prize the relational conception of tort law. Unlike the instrumental conception, the relational conception fully respects the justificatory nature of law by allowing a justification to function *as* a justification.

Let me explain this seemingly cryptic remark. A justification justifies: it has normative authority over the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. A consideration that functions as a justification must be permitted, as it were, to expand into the space it naturally fills. Consequently, a justification sets its own limit. For an extrinsic factor to cut the justification short is normatively arbitrary.

Gregory's point was that the attempt to achieve loss distribution through tort law is normatively arbitrary. If loss distribution is to function as a justification, it must be achieved through arrangements, such as taxation or compulsory insurance, that adequately reflect its justificatory nature. The channeling of loss spreading through the tortious liability of the injurer artificially restricts the operation of loss distribution. In a sense, Gregory accepted the normative implications of loss distributions more fully than James himself. That is why Gregory was able both to support a program of loss socialization and to reject the introduction of loss distribution into tort law.

In giving voice to the contrast between the relational and instrumental conceptions of tort law, the James-Gregory exchange exemplifies the different ways of connecting relationships and justifications. All instrumental conceptions of tort law, I believe, have justificatory problems similar in structure to those facing loss distribution.

Let me draw a very broad conclusion. Perhaps, as Gregory thought, we should replace tort law with a regime of public compensation. Perhaps also, more generous provisions of public welfare, especially health insurance, would alleviate the temptation, so evident in James' writing, to use tort adjudication to provide what the political process has withheld. But tort law is fundamentally relational: it presupposes a normative bond that singles out and connects the particular parties to the litigation. If our project is the reform of tort law, let us at least remember that it is tort law that we are reforming.