

Jules Coleman and Tort Law *Natasha Fouts*

In *Tort Liability and the Limits of Corrective Justice*, Jules Coleman proposes allocating cost on the basis of fault, as determined by the principles of corrective justice. In corrective justice, also known as retributive justice, a victim has suffered a loss due to the fault of the injurer or as a result of their rights being invaded and the victim's loss is imposed on the injurer whose fault or conduct is responsible for the loss. Justice begins with the duties owed to the victim; an individual may owe a duty to a victim who has suffered a loss, even if they are not responsible for the loss. Coleman recognizes the possibility of a no-fault, or distributive, system of compensation if there are existing legal or social practices. Coleman concludes his argument by stating that either the principles of corrective justice or a no-fault system can be used to compensate victims in tort cases, but the two systems cannot be combined in a tort law system. A tort is defined as a wrongful act that causes injury to a person or property and the law allows for a claim by the injured party to be compensated for damages. I shall argue that it would be possible to combine the two systems of justice in tort law, as long as; both systems are not combined in a particular case.

Coleman argues that tort law may rely on the principles of corrective justice or a no-fault practice of recovery if existing legal, political, or social practices have already laid the groundwork. Conflict arises if the courts combine the two systems of compensation. Coleman concludes that only one method must be used to prevent incommensurable rulings. Coleman is defending the claims that there are justifiable departures from the corrective justice core in the rights and duties that are sustained in tort law and that the extent to which corrective justice imposes moral duties on the individuals of a community depends on already existing practices. Coleman begins his argument by exploring the

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four types of cases in tort law. He uses the distinctions between the different cases to show corrective justice can be the core of tort law and there are justifiable departures from this core. Next, he gives examples where the state may have good reason to impose compensation on a third-party who is not at fault. Coleman uses two famous tort cases to demonstrate that implementing corrective justice requires a set of substantive liability rules and administrative rules to establish burdens of proof. Coleman ends by looking at two modern tort cases. In these cases the courts try to combine corrective justice with an at-fault system and the outcome is an incommensurable ruling.

Coleman begins his argument by making a distinction between four kinds of tort cases to show that corrective justice is implemented in the duties sustained in tort law. In case one, the victim suffers a loss due to the fault of the injurer or as a result of their rights being violated and the victim's loss is imposed on the injurer whose fault or conduct is responsible for the loss. This is the only kind of case with corrective justice at its core. In case two, the victim suffers a loss due to the fault of the injurer or as the result of their rights being invaded and the victim's loss is imposed on someone who is not at fault. Case two demonstrates a type of distributive justice, for example, insurance companies. In case three, the victim has suffered a loss, which is no one's fault and their rights have not been invaded. The loss is imposed on a party who is only causally responsible for the victim's loss. Case four is similar to case three, but the loss is imposed on someone else altogether. In order for Coleman to demonstrate that corrective justice is at the core of tort law, he must show that the last three cases are only departures from the corrective core and there are conditions where they can be justified and defended.

Next, Coleman gives an example of a case where a manufacture provides an ineffective label because it does not adequately warn and deter accidents. A person is injured as a result of using the product. If the victim read the label, they would have a right in corrective justice to compensation. If the victim fails to read the ineffective label, the victim is at fault for their loss even though the manufacture is at fault for providing an inefficient label. Regardless of the victim's right in corrective justice to repair,

the manufacture can be held liable on the grounds that it would create a system of incentives to litigate and invest in safety. This is a case where the victim is compensated for their loss, not under the considerations of corrective justice.

Coleman imagines another case where a victim has a claim in justice to be compensated, however the defendant in the case has no duty of justice to them and someone else owes a duty of repair to the victim. The court may choose to impose liability on some third party who the court sees as the cheapest cost-avoider (someone able to reduce the probability of harm at the lowest cost) even though they are in no way responsible for the loss. The court would be enforcing a claim that is valid in corrective justice but it is not implementing corrective justice. According to Coleman, corrective justice prohibits imposing losses on an innocent third party who is the cheapest cost-avoider. However, the manufacture example does not violate corrective justice because creating a system of effective incentives to reduce accidents is a good reason for imposing the victim's loss on the cheapest cost-avoider. As long as the state acts on the basis of good reason that is within its authority and falls in the constraints of the relevant principles of justice and political morality, the state may choose to impose losses on a third party. The state does not implement corrective justice and it does not violate it. Corrective justice has no absolute priority and does not cancel or override reasons for acting that the state would otherwise be authorized to implement.

Coleman uses two famous tort cases to demonstrate that implementing corrective justice requires a set of substantive liability rules and administrative rules to establish burden of proof. In *Ybarra v. Spanguard*, a patient is mistreated while under general anesthetic during surgery. The plaintiff can prove he suffered a loss but he fails to establish negligence or responsibility. The doctrine of *res ipsa loquitur* is applied by the court to shift the burden of proof to the defendants to prove that no negligence occurred. All who were present in the operating room have the burden of showing they were not responsible or they will remain subject to liability even if they have no duty to repair or they are not in a position to reduce risk. Corrective justice will have been served if by being excused from liability each defendant has the

incentive to reveal the information that will hold the responsible person solely liable for the victim's loss.

A similar rationale is given in the case of *Summers v. Tice*. The plaintiff was struck by one of the bullets being negligently fired in his direction by two hunters. There is no way to identify whose bullet was responsible, so the court shifted the burden of proof to the defendants. If either hunter could prove it was not their bullet that caused the injury, the other would be held responsible and corrective justice would have been served. Only one of the hunters has the duty of repair, but since neither can prove they are not responsible they both are liable for the victim's loss. According to Coleman, this case is a predictable consequence of applying evidentiary rules used to implement corrective justice in conditions of uncertainty.

Modern tort cases like *Sindell* and *Hymowitz* might be understood as an extension of corrective justice. In both cases, plaintiffs were injured by a drug administered to their mothers during pregnancy to prevent miscarriage. The defendants, the manufacturers and marketers of the drug knew or should have known that its causes cancerous or precancerous vaginal and cervical growths in the daughters of the mothers who took it, but they failed to test for safety and warn of its potential danger. In the case of *Sindell*, the courts adopted a "market share" theory in order to find for the plaintiffs because of the time between ingestion of the drug by the mothers and the harm to their daughters, and the large number of drug manufactures, made it almost impossible for the plaintiffs to identify who manufactured the drug. The principle of market share liability is the principle that each should be liable for that percentage of the total damages that corresponds to its share of the market. However, if a defendant shows that none of the drugs they manufactured are responsible for the harm caused, they can free themselves of liability. In the case of *Hymowitz*, one of the defendants proves that their product is not causally responsible for any of the harms inflicted on the plaintiffs. Under the market share formula they should be released from liability. The court disagrees and allows the defendant liability reflecting their share of the national market. According to Coleman, *Hymowitz* is the correct interpretation of the basic principles of the market share

formula set forth in *Sindell*. The case of *Sindell* involves a localized at-fault plan, not an extension of corrective justice. *Sindell* cannot comprehend the underlying principles it created because a corrective scheme and an at-fault pool cannot be used at the same time. Thus, Coleman concludes that either the principles of corrective justice or a no-fault system can be used to compensate victims in tort cases, but the two systems of justice cannot be combined in tort law.

Finally, I will give my critical evaluation of Coleman's argument. I will suggest a different approach to Coleman's argument that would solve an important problem with his exegesis. I think the major problem with Coleman's argument is that he concludes that a corrective justice scheme or a no-fault system can be used in compensation, but not both. In complicated cases like *Sindell* and *Hymowitz*, a no-fault market share plan was needed to justly compensate the victims. Class action suits like these cannot be based on a corrective justice approach. A class action is a lawsuit which is brought on by one or more persons on the behalf of themselves and others with similar grievances. However, for simpler tort cases all that are needed is the principles of corrective justice to justly compensate the victim. The person who caused the harm is responsible for compensating the victim.

If according to Coleman, only one system of justice can be used in tort law, there will always be cases where victims will not be justly compensated. I think Coleman can solve this problem by allowing both systems of justice in tort law, as long as, both systems are not used in a particular case. In class action suits a no-fault market share system may be the best approach for allocating the relevant cost. In a case like this the court could *not* adapt a conflicting corrective justice approach, in order to prevent an incommensurable ruling.

The legal system could make categories in tort law that would distinguish corrective justice (retributive justice) cases from no-fault (distributive justice) cases. The courts must choose to adopt a corrective justice or a no-fault approach before proceeding with the trial. The courts should choose the system that would give justice to the victim. This would solve the conflict Coleman sees in cases like *Sindell* and *Hymowitz*, where the courts attempted to combine both systems. Coleman never addresses which approach he

thinks is best or which one we should adopt. He only states that we cannot have both at the same time. Coleman never proposes a solution and I think that if he could contemplate a detailed account for separating tort cases into to categories it would solve the problem I see with his argument.

I think that corrective justice does play an important role in tort law, but in today's complicated world it is not as easy as a victim suffering a loss and whoever is at fault being held liable for damages. In environmental cases there can be thousands of victims and finding who is at fault and proving fault can be close to impossible. There needs to be more than one way to approach tort cases, and I believe that there are existing legal practices in the U.S. that allow for different tort law categories. Criminal law utilizes different categories for criminal cases. Coleman needs to go a step further in his argument to solve the conflicts that arise from trying to combine systems. Although Coleman sees the possibility of having either system of torts he does not allow for a combination of systems in one legal system or one tort case.

REFERENCES

- Coleman, J. (1994). *Tort Liability and the Limits of Corrective Justice*. Cambridge, UK: Cambridge University Press.