Now What?

Steadying Tort Law's Pendulum

By Nelson P. Miller

Tort law was common law when I studied it in law school 25 years ago—ancient law, or at least the venerable William Prosser's law. Oh sure, the new comparative negligence[1] was making tort practitioners feel very progressive. But the almost-as-new "strict" products liability was turning out to be not so strict, looking much more like plain old negligence.[2] And the great law-school debates, such as they were, still seemed to center on decades-old cases like *Palsgraf v Long Island R Co*[3] and *Vosburg v Putney*.[4]

Michigan tort law then saw successive waves of statutory and judicial reform limiting tort claims. The mid-1980s brought the first wave of statutory reform. Suddenly, there were damages caps,[5] present valuation of damages,[6] reduction of damages by collateral sources,[7] and allocation of fault and apportionment of damages among defendants.[8] Affidavits of merit[9] and expert-witness requirements[10] were added like sentinels outside the court clerk's office, discouraging the uncertain plaintiff. The mid-1990s brought a second wave of statutory reforms abolishing joint-and-several liability in most cases,[11] requiring presuit notices of intent to sue with lengthy mandatory waiting periods,[12] modifying comparative negligence,[13] allocating fault to nonparties,[14] tightening the affidavit-of-merit requirement,[15] and moving from jury to judge decisions on the motor-vehicle no-fault tort threshold.[16]

FAST FACTS

Tort law has seen successive waves of statutory and judicial reform.

There is a point from which every pendulum hangs.

The new Michigan Supreme Court majority need not try to undo all the reforms of the past 25 years.

Around the turn of the millennium, a new Michigan Supreme Court majority enhanced the statutory swing of tort law's pendulum. The high court held that presuit notices of intent to sue had specific and exhaustive pleading requirements[17] and abolished the discovery rule for the tolling of the period of limitations.[18] It also held the filing of an affidavit of merit to be necessary (in addition to the filing of a complaint) to toll the limitations period[19] and required third-party no-fault claimants to establish a change in their life's trajectory.[20] It became open and obvious[21] that claimants' rights in medical malpractice, premises liability, products liability, and motor vehicle no-fault were on the wane.

The legislators who were responsible for so fundamentally altering Michigan tort law might have said that they were simply pushing back against what had been a decades-long judicial expansion of tort-law rights. If the pendulum had once swung too far in favor of tort claimants, then what was wrong with duly elected representatives of the people swinging the political pendulum back in the other direction? The high-court justices who were indirectly responsible for advancing the reform agenda would likely not call it a change in the direction of a political pendulum at all, but, rather, the restoration of important principles of statutory interpretation. The changes were asserted to be both political (on the legislative side) and principled (on the judicial).

The changes were also asserted to be in response to perceived economic and social demands and thus well intentioned. Manufacturers, insurers, and physicians (among others) have claimed to be hurting in various ways (claims for which there is evidence, not to say that others are more or less fortunate), and not just in Michigan. Similar reforms were going on across the nation. True, the judiciary in some states struck some of those reforms as unconstitutional,[22] while Michigan's judiciary instead enhanced those reforms in a manner some scholars characterized as over-zealous.[23] Legitimate questions remain regarding the appropriateness of the legislature dictating judicial procedures and the judiciary undervaluing its own stare decisis. But the judicial responses either tempering the reform agenda or advancing it were (it can at least be said) made in different geographic, political, historical, and social contexts. With Michigan's economy in its current especially troubled state, 25 years of tort-law reform seems not to have substantially helped Michigan's manufacturers, workforce, business competitiveness, rising insurance premiums, or economy. But then, economies have their own trends and cycles independent of tort law.

Stop here, though. The results of the most recent Michigan Supreme Court election, a change in its chief justice, and a presumed new high-court majority raise a more important question—namely, now what? Does the new majority swiftly and vigorously push tort law's pendulum back in the other direction?

There are two ways to look at this dynamic. Too swiftly reversing the trend might be viewed as a good bit unseemly, even embarrassing—like Toto pulling the curtain back on a bumbling Wizard. Scholars and the public have decried the sad state of affairs within a once proud Michigan judiciary. To see the high court swing tort law's pendulum back too swiftly and sharply would not necessarily change the high court's image as more political than principled, unless it were able to do so in a manner that the profession and public accepted as consistent with the rule of law.

On the other hand, tort law's pendulum dynamic might be seen as a healthy exercise in American democracy and governance. Interests should be heard, while at the same time citizens should be protected. Law should adapt, but only on the premise that everyone remains equal. The machinery of government should respond to the social and economic demands of a complex modern society but also to its humanitarian interests. When the levers of power seem to be too much in the hands of interest groups, the citizenry should be aroused to elect a new judicial majority to guard the open courthouse doors for the tort claims of those innocent who are injured or damaged by the misconduct of others. Pendulum swings may seem pointless and distracting, but they do have energy and momentum.

How should the high court respond to the tension created by these waves of reform, sharply differing views of their beneficence, and, now, the election results?

For one, it is good to remember the way in which the American system of government divides power, and not just between branches of government, houses of legislatures, political parties, and judge and jury. It also divides power by making available to judges (not to mention attorneys and law professors, except that they do not wield the same direct power) a variety of rules, policies, and, yes, ideologies, to support statutory construction. Just as it can be dangerous for any one branch or party to exercise power unchecked by another, so too can it be dangerous for any one policy, ideology, or rule of construction to operate to the exclusion of others.

American law is, thankfully, both principled and pragmatic. Judicial decisions are properly guided not only by the past (case decisions having the authority of stare decisis), the present (legislative edicts representing the current will of the people), and the future (pragmatic predictions representing policy

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considerations), but also by the eternal (timeless principles by which society is formed and the polity constituted).

To put it another way, returning to the central analogy, there is a point from which every pendulum hangs. There is a moral center toward which reason pulls law whenever one side or the other has gotten too much of what it wants and it is time for it to get what it deserves. Law is only partly political, democratic, and instrumental (those attributes that give it life, play, and action). Law is also natural, meaning that it is traditionally and constantly concerned with the fundamental and timeless fitness of relations and conduct. In that sense, law is at once progressive and conservative, with both attributes critical to its balanced and commonsense functioning.

Fortunately, tort law's natural center across which the political pendulum swings is as clear as it is ancient. Tort law is both love's law (the ethos of "do unto others") and the redeemer's law (settling scores by the literal, meaning financial, satisfaction of judgment). It is also a law of great liberty, bounding us only to pay for another's harm when we cause it by our misconduct. We can, in other words, be as negligent as we wish, as long as we are responsibly enough insured or financially enough solvent to pay for the harm we fail to avoid in the enjoyment of our negligence.

Tort law's natural center gives any judiciary an excuse to push back to equilibrium an off-centered pendulum at the same time that it gives the judiciary a reason not to push too hard. The tort-law insights Michigan's high court has developed and the concepts it has employed over the past few years need not be discarded. Some of them might instead simply be given a different emphasis and applied equally by a blindfolded Lady Justice.

It is not hard to imagine some possible centering changes. Whether there are special aspects making a condition less than open and obvious might become not an element of the plaintiff's claim but a legitimate consideration for the jury.[24] Statutory notices of intent to sue might be interpreted as notices rather than all-inclusive fact-certain pleadings before there is discovery.[25] Affidavits of merit could be required without making them necessary from the first moment to toll the limitations period.[26] Changes in the course or trajectory of one's life might become a consideration for the jury in deciding whether a third-party no-fault claim meets the tort threshold rather than a condition of it.[27] Important new concepts can be preserved and employed, but their unduly harsh effects justly ameliorated. Substance and merit can once again prevail over form.

I love tort law, and not just because (admittedly) it made me a decent living as both a defense and plaintiff's lawyer and continues to keep me employed as a law professor. I saw tort rights give solace to some quite disfigured and distressed clients. I also saw tort law redeem reckless defendants (in the sense of satisfying judgment against them for the harm they caused) while protecting innocent defendants from misguided allegations.

The profundity of tort law is that it can accomplish all these ends (compensate the injured, reform and redeem the errant, and protect the assets and liberty of the innocent accused) without favoring either the poor or the powerful. Those laudable interests meet at justice's center, where a steadied pendulum would hang and where there is room for all of us. ■

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FOOTNOTES

1. *Placek v Sterling Hts,* 405 Mich 638; 275 NW2d 511 (1979).
2. See *Prentis v Yale Mfg Co,* 421 Mich 670; 365 NW2d 176 (1984).
3. *Palsgraf v Long Island R Co,* 248 NY 339; 162 NE 99 (1928) (proximate cause).
4. *Vosburg v Putney,* 80 Wis 523; 50 NW 403 (1891) (eggshell-skull rule).
5. MCL 600.1483, as added by 1986 PA 178 (effective October 1, 1986).
6. MCL 600.6306(1)(c), as added by 1986 PA 178 (effective October 1, 1986).
7. MCL 600.6303, as added by 1986 PA 178 (effective October 1, 1986).
8. MCL 600.6304, as added by 1986 PA 178 (effective October 1, 1986).
9. MCL 600.2912d, as added by 1986 PA 178 (effective October 1, 1986).
10. MCL 600.2169, as added by 1986 PA 178 (effective October 1, 1986).
11. MCL 600.2956, as added by 1995 PA 161 (effective March 28, 1996).
12. MCL 600.2912b, as added by 1993 PA 78 (effective April 1, 1994).
13. MCL 500.3135(2)(b), as amended by 1995 PA 222 (effective March 28, 1996).
14. MCL 600.2957, as amended by 1995 PA 249 (effective March 28, 1996).
15. MCL 600.2912d, as amended by 1993 PA 78 (effective April 1, 1994).
16. MCL 500.3135(2)(a), as amended by 1995 PA 222 (effective March 28, 1996).
17. *Roberts v Mecosta Co Hosp (After Remand),* 470 Mich 679, 700–701; 684 NW2d 711 (2004).
18. *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378, 388–392; 738 NW2d 664 (2007).
19. *Scarsella v Pollak,* 461 Mich 547, 549–550; 607 NW2d 711 (2000).
20. *Kreiner v Fischer,* 471 Mich 109; 683 NW2d 611 (2004).
21. See *Anderson v Pine Knob Ski Resort,* 469 Mich 20; 664 NW2d 756 (2003) (open-and-obvious hazard bars tort claim as a matter of law); see also *Lugo v Ameritech Corp,* 464 Mich 512, 517–518; 629 NW2d 384 (2001).
22. See, e.g., *Ferdon v Wisconsin Patients Comp Fund,* 284 Wis 2d 573; 701 NW2d 440 (2005) (noneconomic damages cap unconstitutional); *Best v Taylor Machine Works,* 179 Ill 2d 367; 689 NE2d 1057 (1997) (same); *Arneson v Olson,* 270 NW2d 125 (ND, 1978) (cap on all tort damages unconstitutional).
23. See Robertson, Powers, Anderson & Wellborn, Cases and Materials on Torts (3rd ed), p 283, citing Delaney, *Stare Decisis v the "New Majority": The Michigan Supreme Court's practice of overruling precedent, 1998–2000,* 66 Alb L R 871 (2003).
24. Cf. *Lugo,* n 21 *supra.*
25. Cf. *Roberts,* n 17 *supra.*
26. Cf. *Scarsella,* n 19 *supra.*
27. Cf. *Kreiner,* n 20 *supra.*