

# **THE ROLE OF MONEY IN TORT LAW**

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by

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# **ABSTRACT**

## The Role of Money in Tort Law

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Tort law falls under civil law; it focuses on two parties and what has occurred between them. A tort is a wrongful loss or an infringement of a right that results in a harm or an injury to the victim from the wrongdoer. Tort law focuses on the defendant, who caused the wrongful act, and the plaintiff, who is the victim that has sustained damages due to the wrongful act occurring. The system that we have devised for amending the situation has money paying the main role. However, money is just a current form of exchange that can be accepted as reimbursement for goods or services. This quantifiable form of currency is being used as the solution to a wrongful act or an infringement of a right when there is no inherent conversion between the two. Therefore, the role of money in tort law begins to come into question. We will be analyzing the role of money in tort law under three different approaches that are used to analyze tort law in general, which are Retributivism, Law & Economics, and Corrective Justice. Under each of these three approaches we will be looking for two different elements. The first is the interpretation of money in the law, and the second is the moral justification of using money in this way.

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## INTRODUCTION

Money has been used for thousands of years to serve as a placeholder for something that holds value, but it has another crucial function, which is playing the role of a main solution for civil legal cases. When the defendant and the plaintiff go to court, the jury is attempting to adjudicate the case, not for bragging rights, entertainment, or just the fun of it, but they are attempting to resolve the case for money. Tort law covers a wrongful loss between the wrongdoer and the victim for cases that involve areas such as negligence, defamation, assault, and emotional distress in which the victims of tort law cases are reimbursed with money according to the damages they have suffered from the defendant. Imagine a family moved into a lovely home, and they are enjoying an evening stroll when the neighbor's dog runs out and attacks them. This attack unfortunately ends in one of the family members bleeding from a break in the skin from the animal. They are now the victim of a tort and can file suit against the wrongdoer, which in this case would be the owner of the dog. This case would go to court, and the owner would face strict liability for the dog attack.<sup>1</sup> The victim would be compensated with a sum of all of the damages they have sustained.

But, why exactly is money the remedy for these cases? Of course, the dog did not approach them and take a certain amount of money from them, he attacked them, so what is the purpose of these cases being taken to a court where it can be resolved for money? More often than not, damages that are awarded for tort cases are quantifying things that are not even

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<sup>1</sup> "STRICT LIABILITY. Liability without fault. Case is one of "strict liability" when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save defendant. Fresno Air Service v. Wood, 43 Cal.Rptr. 276, 279, 232 C.A.2d 801; Anslem v. Travelers Ins. Co., La. App., 192 So.2d 599, 600" (Campbell, 1591).

quantifiable, such as emotional distress. If the plaintiff gets into a car crash because the defendant was negligent, and they suffered from emotional distress, the plaintiff would be able to sue that defendant and be awarded damages for the emotional distress that they have endured. However, emotional distress has absolutely nothing intrinsic about it that can be directly translated to monetary values. Another aspect that highlights the oddness of money being the solution in tort law involves hedonic damages. The word hedonic means something that is related to pleasure, so hedonic damages are the damages that affect one's ability to have pleasure in life. "The hedonic value theory contends that in tort cases there is a loss of the pleasure of living damage component that must be considered in addition to the traditional lost earnings calculator" (Karns, 707). For example, a plaintiff might be awarded hedonic damages if it decided that there has been a loss of "intangible enjoyments, such as quality of education and environmental standards" (Karns, 707). These damages are very abstract and difficult to prove in a court because of the lack of evidence for them, and the difficulty with the hedonic damages is that they are an abstract concept that cannot be measured. If there is evidence for them, it is quite difficult to assign an amount of money to such a notional concept such as fear of an accident that never even occurred, the loss of an opportunity that one has never even experienced, and, once again, emotional distress. I would like to note here that it is possible to measure and assess some aspects that correlate with the hedonic damages such as medical damages like psychiatric care for loss of enjoyment of life, but at the end of the day they are just that, correlated, not equivalent.

This further extends the question of what role money plays in tort law because money, which is a quantifiable object, is the solution for tort cases when there are many aspects of tort law, such as between money and emotional distress, where there is not a conversion. Tort law

can cover anything as concrete as a broken bone from a negligent car crash all the way to something as extremely abstract as hedonic damages such as an athlete missing out on the ability to run due to that broken bone from the car crash, and money is playing the main role in amending the situation. Money is a “circulating medium of exchange” that is accepted as payment for services and goods, so why is this quantifiable form of currency the solution for something where no inherent conversion exists such as with a tort involving the infringement of a right (Campbell, 1157)? This is the system that has been composed for amending the vast majority of tort cases, and, therefore, the role of money in tort cases comes into question.

Many different theories aim to explain the purpose of tort law. These have been formulated depending on what they deem is the true purpose of tort law and what it actually achieves in society. These approaches will be used to analyze the role of money in the law and also the moral justification of using money in this way. The approaches that will be focused on here are Law & Economics, Corrective Justice, and Retributivism. While there are many differences among these theories, the foundation of each of them perceives money as something more than just a number added to a bank account. In Part I, I will analyze the role of money through the Retributivism approach, which focuses on punishment for the defendant. In Part II, I will examine the Law & Economics approach, which focuses on wealth maximization for economic efficiency. In Part III, I will present Corrective Justice, which is focused on the bipolar relationship between the two parties. In Part IV, I will identify the approach that best explains and justifies the role of money in tort law, which I will argue is Corrective Justice.



## 1. RETRIBUTIVISM

The first theory that will be analyzed to determine the role of money in tort law is Retributivism, which focuses on the punishment of the blameworthy and culpable defendant who caused the victim to suffer due to their wrongful act that was done with a guilty mind. Retributivism says wrongdoers deserve to be punished in proportion to the offense committed, and that this punishment is warranted because the defendant is culpable and blameworthy. Essentially, this theory says that if you cause someone else to suffer with a guilty mind then you deserve to suffer (Morawetz, 812). It is important to stress that one of the key parts of this equation is that the defendant has acted with a guilty mind, meaning that they did have ill will towards their victim in committing the act. Retributivism says that this is warranted because they have intentionally, with ill-will, caused the suffering of another, so the defendant should have to suffer too, which, according to Retributivism, is the role of money.

If the defendant meets these requirements of an intentional tort that also was composed of “wanton and willful misconduct,” then Retributivism would say that punitive damages should be given to the defendant (Campbell, 1774). One example of this would be in the case of battery. Battery is “any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent” (Campbell, 193). Battery represents how Retributivism might be applied to tort law because it has all of the necessary components: the intentionality, the ill-will, and the actual act itself. Since battery is about the intentional harm on another with a guilty mind, Retributivism would say that the defendant should be punished in proportion to the suffering that they have caused the defendant. According to a retributivist, the money that the defendant owes the plaintiff is punishing the defendant. The intention for imposing this penalty

is not deterrence or the rehabilitation of the defendant even though these may be collateral effects; the purpose is solely just punishment.

Stating that the purpose of an entire rationale that is used to examine tort law and the role of money is “solely just punishment,” as I have stated right above, can seem like quite an inhumane claim to make. Punishment, which is a penalty inflicted, is suggested here to be a solution, which is thought to bring peace to a problem, for amending a wrongful loss that has occurred, and you could see how this might raise concern or worry. Because of this, it seems that a necessary part of understanding the retributivist approach is examining the moral justification of it. Some can be mistaken when analyzing Retributivism by thinking that it is actually just another word for or way to achieve revenge since revenge is about inflicting harm on someone that you have suffered at the hands of. Philosopher Georg Wilhelm Friedrich Hegel clarifies that Retributivism is not about revenge because if it was then that would create “a new transgression,” which would generate more issues to solve (Pauley, 144). Instead, Retributivism is about punishment on the basis that justice is deserved, and that this punishment would bring justice.

Furthermore, while some might think that punishment is treating wrongdoers in an unethical way, Retributivism would argue that punishing them is actually a way of treating them as rational moral agents. This approach recognizes each wrongdoer as a free, rational being who should be held accountable for their actions. The wrongdoer that is deserving of retribution is “a free person [that] has freely chosen to act in a way” that would bring about a tort, and “by punishing him, we honor his freedom and responsibility by making him pay the price of his transgression” (Pauley, 143). This is the moral justification of Retributivism because it treats

each individual like they are a rational being whose actions, which they willingly chose, are warranting a certain consequence.

Retributivism focuses on the concept of just "desert," which means that we are deserving of something due to our actions whether good or bad. Some might think that this means that punishment would focus strictly on equalities such as an "eye for an eye." However, this simple quote is much easier said than done in reality due to it not being practical. For example, if the idea is about punishing the defendant, for the dog bite case this would mean that the victim would bring their dog over to bite the defendant, but their dog might not be the same size as the one that bit them, they might not even have a dog, and, in general, it just sounds like a foolish solution. Since this may not be practical in reality, Retributivism is focusing on the tort and the sum of money that is equivalent to the damages that the victim has sustained because that is what the defendant deserves on a just desert basis (Pauley, 144). "Just desert" indicates "the principle that punishment should be given to people according to what they justly deserve, rather than to what we may feel is necessary" (Tebbit, 245). This means that one should always receive something in proportion to what they have done, whether giving them what they deserve is beneficial or harmful overall, just because their actions have warranted it. In terms of tort law, this says that since the defendant wrongfully harmed the plaintiff, they should be harmed themselves. Money is the legal system's way of ensuring harm is done to the wrongdoer. Therefore, the role of money, according to Retributivism, is that the money that the defendant owes the plaintiff is the punishment of the defendant for the intentional act they have committed with a guilty mind (Tebbit, 248). To summarize, Retributivism is concerned with making the defendant suffer, by way of money, in proportion to the intentional suffering that they have caused the victim due to the act being done with ill will.

As has been argued above, the role of money in tort law, according to retributivism, is to punish the defendant and this is justified due to their intentional, wanton, and willful misconduct against their victim. However, this justification for the role of money in tort law can only be applied to a very small subset of torts. Torts fall into three main categories which are intentional, negligent, and strict liability torts. Intentional torts are infringements of a right or infliction of a wrongful loss that is done purposely (Campbell, 948). Negligent torts are when there is “a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk,” and one can be negligent without intending to violate the standard of conduct (Tilley, 1345). Strict liability is “when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save the defendant” so the intention does not matter if you are found strictly liable (Campbell, 1591). The issue with the retributivist approach is that it can only be applied to one subset of torts: the intentional torts with a guilty mind. It cannot be applied to negligence and strict liability torts because with these torts the intention does not matter. It can almost even seem cruel to want the defendant to be punished in these circumstances.

The defendant in a negligence or strict liability tort will still be held liable and will have to pay a sum of damages to the victim. But these are typically categorized as compensatory damages, not punitive damages. The defendant did not act intentionally with ill-will because they had no true desire to harm someone in these situations, they are just accidents. While they should pay the plaintiff for the harm or injury they have sustained, nothing about these cases warrants punishment for the defendant. Therefore, Retributivism can only be applied to a very small subset of torts that are intentional with a guilty mind, and this approach is insufficient for explaining the role of money in all areas of tort law.

To take this critique one step further, there are even torts that are deemed “pure accidents” or “unavoidable accidents,” which are accidents that are “unforeseen and unavoidable” where “neither party...had control” (Campbell, 1400). There is still a defendant and a plaintiff in these cases because there was one who caused the act, however unintentionally and unavoidably it may have been, and there is another that has suffered a harm or injury from it. However, it seems barbaric to want the defendant to be punished for something that was completely out of their control and entirely unintentional. In cases of unavoidable accidents, juries commonly decide that the defendant does not even owe the plaintiff a sum of compensatory damages, let alone punitive ones, and this is reasonable (Campbell, 1400). This highlights the absurdity of wanting someone to be punished in all torts just because they have caused a tort because this shows that just because the defendant must owe compensatory damages does not mean they should also owe punitive damages. There is something else that does warrant these damages, which is the intentionality and guilty mind.

Let us take into consideration the dog bite case once more. The family was enjoying a nice evening when suddenly everything went downhill with the dog attack. The family brought this case to court and the dog owner was found liable. The solution here would be to award damages to the victim for aspects like medical bills, physical pain, or emotional distress. These are compensatory and not punitive, because nothing about this case calls for punitive damages since the dog owner did not have a guilty mind. This tort emphasizes once again, that the Retributivism approach cannot be applied to certain torts such as strict liability since with strict liability the intention does not matter and there was no ill will. Essentially, the only way that Retributivism could be applied to a dog bite case would be in extremely rare circumstances such as one where the dog owner deliberately sent the dog out to attack the victim. This situation is an

outlier and very unlikely to occur, thankfully. By looking at the dog bite case, it is apparent that Retributivism cannot be applied to all torts due to the lack of intentionality and ill will that is found in many cases. In conclusion, Retributivism can only be applied to a small subset of torts, and the role of money according to Retributivism is explained incompletely.

## 2. LAW & ECONOMICS

Retributivism is known as a backwards-looking approach, meaning that it is looking at the case that has just occurred and how to resolve the issue at hand. However, the next approach that we are analyzing is Law & Economic which is a forward-thinking approach. This means that instead of looking directly at the case at hand, it is taking potential, future cases more into consideration. This forward-thinking approach is focused not on punishing the defendant like Retributivism, but it is focused on incentivizing all members of society to avoid torts. Law & Economics takes all future predicaments more into consideration because of this which can cause the current wrong at hand to feel as though it is being overlooked.

Law & Economics focuses on incentivizing potential defendants to act in a way that avoids torts because this theory says that avoiding torts would increase economic efficiency and wealth maximization. It says the law actually serves “the goal of economic efficiency,” which focuses not on just one case, but all past, present, and future cases alike (Dimock, 69). To Law & Economic theorists, law is really just perceived as an instrument for wealth maximization in which there is a distribution of costs throughout society. While some philosophers may view laws as a structure that ensures justice, equality, or even empathy, this theory takes a different perspective by declaring that rules are set in place because they are efficient. We will be analyzing what wealth maximization looks like in a society. Then we will determine how this can illuminate the role of money in tort law.

Wealth maximization is a term coined by American Judge Richard Posner that claims that “an efficient outcome is in which wealth is maximized” in a society (Dimock, 70). Wealth maximization in a society is when all goods and services, both economical and non-economical,

are allocated to the most beneficial uses (Dimock, 70). Theorists such as Posner state that “resources are efficiently allocated in a system of wealth maximization when there is no reallocation that would increase the wealth of society” (Marciano, 3). Since it is arguing about “efficiently allocating” these resources, it is speaking in terms of both the positive and negative aspects of these resources. This means making sure that the burdens and costs of getting these valuable goods and services are lowered to the point of them being cost justified. This almost takes a utilitarian perspective by asserting that society should maximize efficiency, instead of pleasure, for all that are involved and will be affected.

Among the costs that we want to reduce, when it is cost justified to do so, are the costs of accidents and other torts. We want to reduce these because they pose a risk to economic efficiency in society since this can lead to an inefficient allocation of resources. The Law & Economics approach is focused not on eliminating all accidents, but rather it is concerned with ensuring an efficient level of accidents and an efficient allocation of their costs since they are aware that it would be impossible to eliminate all accidents unless at the expense of something else of value to society. The focus is not to “eliminate all accidents,” it is to steer them in a way that would promote a logical and structured level and distribution of them (Dimock, 73). Law is the tool used to pursue the efficient distribution of the costs of accidents, including the costs of *preventing* accidents. For example, if there is a wet floor in a store, the store would be required to put up a caution wet floor sign by law. If they fail to do so, they may be sued. This law is put in place to reduce the number of torts that could occur from a wet floor injury, and this is beneficial for society because it is reducing the number of people who are victims of torts. Law & Economics’ focus on economic efficiency is morally justified, according to its defenders, because it has not only the efficiency of the economy at its core, but also the efficiency of



society, as is shown with the wet floor example. For Law & Economics, the role of money in tort law is to incentivize the defendant and potential offenders to act in a way that avoids torts in the future. In fact, according to Law & Economics a defendant should be held liable only if holding them liable gives an efficient set of incentives. If one is reading this with little to no previous background knowledge of Law & Economics it can seem as almost a coldhearted approach that solely focuses on the rotation of green pieces of paper throughout our nation. However, under a closer analysis, it is easy to gather that this approach serves the well-being of a society which includes many other areas than just the monetary aspect. This will be shown through examples below.

Acting in a cost-justified way fits into the Law & Economics model because it means evaluating the expenses of the tort occurring versus the expense of preventing the tort. If it is less expensive for you to prevent the tort, rather than for the other party to do so, then you would be required to prevent the tort. Your prevention efforts are cost-justified. If you fail to make those efforts you would be found liable. This works in Law & Economics by incentivizing people to take care to avoid torts, because if they don't, then they would be deemed liable (Dimock, 74).

Thinking back to the dog bite case, the dog owner could have taken precautions such as keeping the dog on a leash when outdoors, training the dog, or leaving the dog in a secure, fenced-in area at all times. While taking these extra precautions may not be free and could contain additional costs or time, they would have been cost-justified in this situation in comparison to the expenses that are being accumulated from the accident occurring. Because the accident expenses outweigh the precaution expenses, it is safe to say that taking precautions to avoid the accident would have been justified here, which leaves the dog owner liable.

Law & Economics suggests that the defendant should be held liable only if holding them liable will give them an efficient set of incentives to ensure the tort does not occur. For Law & Economics, by “exposing the costs of their actions via liability rules” each party “will be appropriately motivated to take optimal care to prevent accidents” (Faure, 78). Money being the compensation in tort cases can essentially be perceived as a warning label that is taped across any activity that one does where potential risk is involved. To summarize, the role of money, according to the Law & Economics approach, would be to incentivize everyone in society to act in a way that avoids torts, and this is morally justified because it increases not only economic efficiency but also general welfare.

Susan Dimock provides an example that puts it simply: there was a schoolyard playground where a few children suffered small accidents from the equipment, and the parents in the community were outraged that there was potential for their children to get hurt (Dimock, 73). The administration of the school stated that there was not any room in their budget for replacing their equipment with something safer, but the parents still wanted it gone. So, what was the result of this? The playground equipment was removed and hundreds of children lost out on potential enjoyment (Dimock, 73). Law & Economics theorists would surely say that this did the opposite of maximizing wealth since there was a large amount of pleasure lost in order to prevent a small amount of pain.

Even though this is a simple analogy that does not specifically relate to something that contributes to economic loss on any large scale, we can generalize this to more relevant situations such as driving. Dimock says if we were to extremely reduce the driving speed or only allow people to receive a license after strenuous testing in order to lower the amount of auto accidents then the repercussions would be huge losses in areas such as convenience and

productivity. She states, “the costs would not be outweighed by the corresponding benefits derived from fewer accidents” (Dimock, 73). Here, it is easy to understand why Law & Economics says that the goal is not to eliminate all accidents but instead to ensure the efficient level of them because, in a realistic world, society can never eliminate all accidents unless at the expense of something else of value.

Now, let’s examine the role of money in tort law within the Law & Economics approach. To determine this, let’s take another visit back to the dog bite case. Recall, the family is out on a stroll, the neighbor's dog runs up and bites one of the family members, the case is taken to court, and the victim is awarded money. So, how would the Law & Economics approach view this case and the purpose of money? Remember that the point is not to eliminate all accidents because if that was the goal, one might outlandishly suggest that there should be a law against domesticating dogs as pets. This idea, according to Law & Economics, is outlandish because it would be a decrease in efficiency in society due to the valuable experiences that people get from having dogs as pets. Instead, the goal is to reduce accident costs to an efficient level. The purpose of money in tort cases is to place liability in the most efficient way so that it will give motivation to take care to avoid torts because “a good rule from an economist’s stand point is one that distributes liability in such a way as to give incentives to both potential injurers and potential victims of accidents to reduce the likelihood and costs of such accidents” (Dimock, 74). Through tort law, we should place liability on the person who could most easily avoid the torts from occurring. It is easier for the dog owner to take certain actions and precautions to avoid the bite than it is for pedestrians. Therefore, based on this approach, the dog owner would have to act in a way to reduce the probability of a bite occurring, which means making sure that the dog is under control. Having to pay the victim money in a tort case not only warns the defendant that

this is the repercussion of the tort occurring, but it warns all other dog owners in society, too. As mentioned earlier, money serves as a “warning label” that is used to incentivize all to take care to minimize these accidents in order to ensure wealth maximization in a society.

However, there is an objection to applying the Law & Economics approach in the context of tort law. The objection is that it is too demanding because it assumes that potential defendants have perfect knowledge not only of tort law but also of the evaluations of their actions (Faure, 78). If we are assigning liability for the defendant under the cost-justification approach, this puts too much pressure on the potential defendant to always be aware of the cost of their actions in comparison to the cost of the tort that their actions could cause. Michael G. Faure summarizes this objection by saying that the Law & Economics approach assumes “that all parties have information about the applicable tort law regime, about the probability that their behavior may create a certain accident risk, about the magnitude of the damage that may occur in the case of an accident, and about the optimal preventive measures that could efficiently reduce the accident risk” (Faure, 78). It unreasonably assumes that all citizens are constantly checking to see if they are acting in a way that could bring about a tort when, in reality, many daily activities could bring about torts. Furthermore, many people may not be aware that their actions might cause a wrongful loss or an infringement of a right since many daily activities that we do have risks that we tend to overlook such as driving.

Law & Economics assumes that “the parties involved not only have access to this information [of tort law and of the possible outcomes of their actions] but are also able to process it: in other words, to make objective and correct assessments of each of these elements. It is on this basis that parties will adapt their behavior and thus contribute in an efficient manner to reducing accident risks” (Faure, 78). To summarize, it is only on the basis that the potential

defendants have perfect knowledge over tort law and their actions that they will be able to be accurately incentivized to behave in a way that reduces torts which would generate an efficiency level of them and their costs. The role of money in tort law is supposed to incentivize people to act in a way that avoids torts, but this is difficult to accomplish in actuality because of the unrealistic demandingness of this approach. Consequentially, the analysis of the role of money in tort law is incomplete in the Law & Economics approach.

One final objection with Law & Economics is that it does not focus on the bipolar relationship between the defendant and the plaintiff. It is so focused on incentivizing everyone in society to act in a way that avoids torts to ensure an efficient level of them and their costs. By hyper focusing on incentivizing society at large, it misses out on accounting for the plaintiff's and defendant's relationship. The reason that we should care about the relationship between the two is because it was the defendant who harmed the plaintiff; they are the wrongdoer and the plaintiff is the one who is suffering at the hands of them. The money that the defendant owes the plaintiff compensates not just for the pain that they have suffered, but it is for the wrongful loss or infringement of a right that they have personally committed against them. Weinrib explains this missing link in the analysis by stating that "economic analysis treats the parties as subject to separative incentives, without linking the plaintiff and the defendant in a unified judicial relationship" (Weinrib, 47). For the defendant, he states that the incentive is about the induction "of cost-justified precautions [which] supports taking money from the defendant," but for the plaintiff, it is about things such as "the need to induce enforcement of the norm" which does not "entail take the money from the actual defendant" (Weinrib, 47). This means that the victims do need to be compensated, but with the Law & Economics approach, there is nothing suggesting that it needs to come from the defendant themselves if they could be more efficiently

compensated from something else such as from an outside source. Because of the lack of need to “take money from the actual defendant” to give to the plaintiff, you can see here that the Law & Economics approach is missing out on the actual relationship that is there between the two by treating the plaintiff and defendant as two unconnected entities (Weinrib, 47).

If the plaintiffs are so trivial in this whole approach, or at least trivial enough for Law & Economics to be forward-thinking to the point where it is not even focusing on the case at hand, then why do we leave it to the plaintiffs to decide to bring the case to court? If the focus is about incentivizing wrongdoers to act in a way that avoids torts, then leaving it to the plaintiffs to bring the case to court does not appear to be the most efficient way to actually provide an incentive because many victims do not actually sue the defendants in torts (Weinrib, 48). Law & Economics cannot explain why we leave it to the victims of the tort to sue the ones who cause this wrongful loss because, once again, it is not concerned with the case at hand due to it being so forward-thinking (Dimock, 73). There is a clear, important aspect of tort law that Law & Economics fails to account for which is the relationship between the current defendant and plaintiff. Because of this missing focus on one of the most important components, Law & Economics cannot accurately and completely explain the role of money in tort law.

### 3. CORRECTIVE JUSTICE

People tend to analyze tort law in terms of functionalism or what the goal is or should be. Some theorists of tort law like to restate that “the purpose of private law is to be private law” meaning that it is about the two parties and the relationship between the two rather than focusing on anything else other than this relationship (Weinrib, 5). This means that it is solely about the relationship between the two parties and fixing that relationship, so it is not about pursuing some larger goal for society as a whole as other approaches might suggest (Campbell, 1359). Some approaches tend to look for goals for the purpose of tort law that are justifiable independently of the two main parties, such as wealth-maximization and punishment. However, according to Corrective Justice, the purpose of tort law is just to rectify the wrongful harm that is imposed by person A on person B. Corrective Justice argues that it can account for the relationship between the person who caused the wrongful loss and the person who is harmed because of them which is an important aspect that Law & Economics fails to focus on and explain (Weinrib, 2). A connection is there between the two, and the main task of Corrective Justice is to illuminate this relationship and the amendment of it by compensation for plaintiff that is proportional to the damages that the defendant has caused.

Focusing on other approaches such as Law & Economics takes away from the connection between the two parties because this approach focuses on goals such as wealth maximization in a society which does not highlight that fact that the defendant and the plaintiff are in a directly related relationship in which the transfer of damages should be resettled (Weinrib, 11). Ernest Joseph Weinrib states that, “the resources transferred simultaneously represent the plaintiff’s wrongful injury and the defendant’s wrongful act,” and this is why the defendant must pay

money to the plaintiff (Weinrib, 56). This connected, bipolar relationship is easily identified when looking at basic syntax rules that are apparent in tort law. For instance, the roles that both parties play are defined “as being active and passive with respect to each other” (Weinrib, 64). The active role, which the defendant plays, is the one who performs the action, and the passive role, which is the victim, is the one who receives the action. For example, sentences such as, “The defendant hit the plaintiff,” or “The defendant caused emotional distress for the victim,” have a direct object that shows the inarguable connection between the two because the subject, the defendant, is acting upon the direct object, the victim, in some way. This highlights just how connected the two roles are.

When other approaches, such as Law & Economics, are focused on anything other than the bipolar relationship between the two parties, they are missing a crucial part of tort law. Even the word ‘plaintiff’ and ‘defendant’ are defined in terms of one another. This also shows the connection because the defendant is the person who is responsible for inflicting the damages and the plaintiff is the injured party. ‘Plaintiff’ is not defined as some injured party from some unknown source out there in the universe, it is defined as a party that was injured from the party that harmed, and ‘defendant’ is not defined as the party that has harmed, it is defined as the party that has harmed another party (Campbell, 583). This highlights the moral justification of Corrective Justice. By paying the tort judgment, the injurer is correcting the harm that they are personally liable for, and the plaintiff deserves to have compensation from the party that has harmed them.

Corrective Justice focuses on restoring things to where they would have been before the tort occurred. The word ‘tort’ itself comes from the Latin word “tortum,” which means something that is “twisted” or “wrong” (Tort). Furthermore, there are three elements of every



single tort action: “existences of legal duty from defendant to plaintiff, breach of duty, and damages as a proximate result” (Campbell, 1660). When a tort occurs, there was a primary obligation to not cause a tort that was imperfectly performed, so there is now a secondary obligation to “mitigate” the primary one (Gardner, 36). “Tort lawyers often speak of the obligation of reparation as a secondary obligation which arises out of breach of a primary obligation” (Gardner, 35). This means that it is the lack of the primary one being completed that generates the secondary one, which obliges the compensation of the victim by the defendant. The obligation to not cause a tort that was originally there does not go away just because you have not fulfilled it, on the contrary it actually produces a second obligation, which is the compensation of the victim, that arises from the first not being performed perfectly. Stated another way, there was an opportunity present to conform to societal norms, but the defendant failed, and the secondary obligation can mitigate the violation of the primary one. For tort law, just because you committed a tort does not mean that you can’t comply with the rules, standards, and laws, it actually means that you are now required to do so by compensating the victim.

For example, with the dog bite case, the owner had an obligation to not let the dog bite the victim because the victim had a right to not be bitten, which was imperfectly performed resulting in a tort. However, the reason for the primary obligation is still there, which is the reasoning that the victim has a right to not get bit by the dog since they did nothing to provoke it. So, since that was not fulfilled, there is still an obligation to them that needs to be fulfilled. Since you cannot go back in time and prevent that from happening, you can just fulfill the secondary obligation which is paying the victim the money. This really highlights the fact that Corrective Justice takes a ‘good enough’ approach, meaning that compensation for the victim is the next

best thing that we can offer since it is not possible to go back in time and prevent the tort from occurring.

John Gardner argues that, “if all else is equal [between the primary and secondary obligation], the reasons that were capable of justifying the primary obligation are also reasons that are capable of justifying the secondary obligation,” and the secondary obligation is compensating the victim (Gardner, 40). Therefore, the same reasons that were used to justify the primary obligation, which is the obligation to not create a tort, are the same reasons that justify compensating the victim, since that is the secondary obligation. Even though the tort has already occurred, “the original reasons that were not satisfied when they could have been satisfied are still there” (Gardner, 44). To summarize, the primary obligation in tort law is the right of the plaintiff not being a victim of a tort, and that obligation not being fulfilled is when there is a wrongful loss against them or an infringement of their right. Therefore, a secondary obligation is generated due to these same reasons that were present for the primary obligation which is that the victim had a right to not be the recipient of a tort which is then satisfied by compensating the victim.

So, why is money the means of satisfying the secondary obligation in tort law? Why is money the form of compensation used in tort law? Corrective Justice is concerned with the equality of quantities. This is not to say that corrective justice is concerned with making everyone equal, it is just focused on the equality of quantities related to the wrong in question. Weinrib explains this by saying that “justice is effected by the direct transfer of resources from one party to the other” and that with the compensation, the “resources transferred simultaneously represent the plaintiff’s wrongful injury and the defendant’s wrongful act” (Weinrib, 56). You can think of the tort as represented by two line fragments, one which represents what the

defendant has and the other represents what the plaintiff has, in which a segment is broken off of the victim's line by the defendant and tacked on to the end of their own line. You can think of compensation as a line segment of equivalent length as the one that was taken off of the defendant's fragment and connected back to the victim's. However, in reality, the goods or values represented by that specific line segment that were taken originally might not be able to be given back to the victim's line. For example, with the dog bite case, the dog cannot literally un-bite the victim. Yet, the defendant owes the victim a segment that is equivalent in value to the one that they have taken from the victim (Weinrib, 56). That is the role of money in tort law, according to Corrective Justice theory; the money is the defendant's compensation for the wrong that they have committed since it may not be, and typically is not, possible to completely fix the situation exactly back to how it was. Compensation in tort law is about what the defendant is able to offer the victims, and money poses the best solution for restoring equality. Justice is solely just about a transfer of damages back to the plaintiff since the defendant has made the plaintiff "less than" with their actions, and the monetary compensation is the means of doing this.

Corrective Justice "focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another and, therefore, must be shifted back to its rightful owner" (Weinrib, 62). This means that there was a loss from one party that is equal to the gain of the wrongdoer and this is not a coincidence, it is because the loss of one party *is* the gain of another; they are not mutually independent. If they were mutually independent, then they could be easily "restored by independent operations" without any notion of a missing amendment of a relationship (Weinrib, 63). But this is not the case due to the connectedness of the parties, which warrants corrective justice where there is the transfer of money as compensation from the

defendant to the plaintiff (Weinrib, 63). Corrective Justice also excludes all comparative assessments, meaning that it doesn't look at the age, wealth, gender, or income of the party, and it only focuses on the harm that was inflicted and the suffering that came as a result of it (Weinrib, 61). For example, with the dog bite case, the victim still deserves to be compensated by the defendant even if the plaintiff is wealthy and the defendant is poor. This highlights the fact that it is all about the equality of quantities, not based on an equality of ratios to make everyone even. Instead of making everyone even, it is about focusing on what one 'ought to have' and what 'one ought to have' is what one would have before there was harm done, and this acts as a baseline for which the loss and gain are calculated (Weinrib, 62). From the defendant harming, infringing, or taking from the victim, they have now made the victim have less than they ought to. This necessitates the transfer of damages back to the plaintiff from the defendant.

Corrective Justice does well with explaining the bipolar relationship between the defendant and plaintiff that Law & Economics seems to neglect. It is also able to cover the areas of tort law where Retributivism is unable. Recall, Retributivism only explains intentional torts due to the focus being on punishing the defendant with a guilty mind. Corrective Justice on the other hand is able to account for strict liability, negligence, and intentional torts because it is focused on the transfer of damages from the defendant to the plaintiff which can be applied to any wrongful loss or infringement of a right.

However, an objection with Corrective Justice is that the definition of Corrective Justice might be too lofty and unrealistically aspirational in the way that it states it will amend the damages from the tort, and there is a challenge to give an account that makes the most sense of all of these damages. Tort cases that are more black and white such as conversion of personal property, which is when someone possesses someone's property with no intention of returning it,

are simple to understand in tort law under Corrective Justice. If person A takes person B's property, they should have to compensate them for that harm.

However, it is not always black and white, and sometimes Corrective Justice fails to explain those areas. For example, as mentioned in the introduction, there are aspects like the hedonic damages which are damages that the victims sustain that take away their ability to have pleasure in life, and these are very difficult to measure due to their abstractness (Karns, 709). As stated above, Corrective Justice is concerned with the equality of quantities, but difficulty follows when there are areas of tort law that are not easily converted into quantities. It is hard to assign a quantity to the suffering that the plaintiff has sustained in order to then assign a quantity to the compensation that must be transferred back from the defendant. For example, let's say there was a car crash due to negligence and the victim, who just so happens to be a senior in high school who is on the soccer team, broke their leg. The victim, who was anxiously waiting to play this season to hopefully get scholarships for college, is now unable to play for the rest of the semester. The victim now is not able to be scouted for soccer scholarships to his fullest ability, and he is missing out on potential college scholarships and experiences that very well could have been available to him had he not broken his leg. This is a hedonic damage that is very hard to calculate and assign a monetary value to due to it being an experience that never even happened. Through this example, it is clear that there is difficulty in identifying the baseline of what the victim 'ought to have' in torts that are more abstract.

Another issue is that it is not possible to amend all the damages of the tort, just most of the damages associated with it. For example, if a tort results in a broken arm, the money that the victim is compensated with will not just magically fix the broken arm, it will only repair the damages associated with it such as medical expenses or emotional distress. Corrective Justice

preaches about restoring the balance that occurred before the wrongful loss occurred and amending the situation, but it seems a little unrealistic in its goals of actually amending all aspects of the tort (Weinrib, 56). This can bring into question if money really is the best solution for amending the relationship between the plaintiff and the defendant according to Corrective Justice. However, in this next section, I will present my argument for why money is the best solution that we can offer, and why Corrective Justice provides the best analysis of the role of money in tort law.

#### 4. CORRECTIVE JUSTICE AS BEST ANALYSIS

As was stated in the previous section, Corrective Justice does well in actually focusing on the bipolar relationship and the amendment of that relationship that is crucial to examining tort law and the role of money since an undeniable connection between the two parties is apparent that should be addressed. There is no arguing that Corrective Justice does well on this necessary aspect, and it certainly does better than Law & Economics. However, if all the analysis of tort law really needs to be successful is the amendment of the relationship of the defendant and plaintiff, then why does money need to be the solution when there might be better solutions of actually restoring the balance? If all a victim actually needs for the relationship to be amended and to be whole again is to be heard, to be acknowledged, to be given an apology, or to see remorse on the defendant's face, then what makes us think that money can successfully restore the balance better, let's say, a handshake and a heartfelt apology?

In an article from Deborah Hensler called "Money Talks," statistics that actually show that for a specific fatal, mass tort, only 5% of the victims even wanted to assign "a dollar value" to the damages in the case (Hensler, 449). This highlights that while money is the solution for tort cases favored by the courts, it may not be what the victim actually is looking for. Sometimes, victims of torts just want the case to be brought to court to have the defendant found liable, for the defendant to be held accountable, or for the defendant to admit to the wrongdoing (Hensler, 418). This is contrary to the idea that money is the best possible restoring factor since there are other things that victims actually might want. We already acknowledged above that Corrective Justice is about the equality of quantities and compensating the victim for the damages they

have, but is there a better way to go about making the victim as close to whole as possible other than just money that is equivalent to the sum of their damages?

There is an approach called Restorative Justice that focuses on “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense” (Braithwaite, 115). One idea from this approach for focusing on truly amending the relationship is to have “conferences as repentance rituals,” which is an idea taken from “New Zealand Maori justice traditions” (Braithwaite, 119). While this arose with criminal law and not civil, the aspect of amending the relationship can be applied to tort law. This is an “institutionalization of reintegrative shaming rituals” in which the whole family and anyone who cares for and loves either side of the party stands in on this conference with them on their behalf (Braithwaite, 4). There is open communication here in which the victim states the damages they have suffered right to the defendant and all of the defendant's loved ones (Braithwaite, 119). This process allows for the defendant to feel remorseful after hearing how their wrongful act has affected the victim and victim’s loved ones. It can cause them to feel the shame and responsibility that they have brought on their loved ones who care about them enough to stand beside them (Braithwaite, 119). The theory is that this process is actually restoring the balance that was there before the tort occurred because it is focusing on amending the relationship that has generated from the tort by negotiating what will happen next by “talking about how the harm might be repaired” (Braithwaite, 119).

This theory may sound outlandish, but the successful outcomes for this show otherwise. One states that “the proportion of victims feeling sympathetic towards the offender almost doubled (from 23% to 43%)” (Braithwaite, 124). Another observes that after the session concludes, “a female victim hugs an offender here” and “an offender strides across the room and



extends his hand gratefully to the facilitator” (Braithwaite, 126). This seems to show that if the amending of the relationship between the two parties is our entire mission, the way to go about that would be hosting civil conversations where accountability and blame can be placed upon the defendant in such a way that allows them to feel the emotional weight of their actions while discussing further plans of action for amending the situation. Therefore, this Restorative Justice focus shows that the role of money in tort law may not actually be necessary if the goal really is about repairing the relationship between the two parties, as Corrective Justice claims it is. According to this perspective, the money can be a possible solution if the two parties so choose, but it is not the only solution.

However, I would like to defend why Corrective Justice and monetary compensation for the victim is the best approach for analyzing the role of money in tort law: (1) Corrective Justice offers the best analysis of tort law, better than Law & Economics, due to its focus being on both parties, and (2) money, in the context of Corrective Justice, is the best solution due to it being the most practical and universal solution applicable. Money, in the context of Corrective Justice, meaning when it is recognized to be the transfer of damages back from the defendant to the victim, is the best solution that the defendant can offer to restore the balance back to how it was before the tort. Compensation for the victim repairs the relationship between the defendant and the plaintiff by focusing on restoring the victim to the baseline of what they ought to have. This compensation then severs the ties that are connecting the two parties together and allows each of the parties to return to their lives as untouched as possible. Their lives were not connected, at least in this way, before the tort, so restoring the balance to how it was before would end any connection on this basis. Other solutions such as the “institutionalization of reintegrative shaming rituals” do not sever the ties but instead seem to leave room for them to linger because

of the new connection to the other members present at the conference that were not actually a part of either party in the tort themselves (Braithwaite, 4). Because of this, I do not feel like this is necessary for the society that is here today since our society is more individualistic where people are less connected than in a society where, perhaps, there are tribe members whose lives are each intertwined, for example. This is not to say that with the role of money in Corrective Justice it is just about pretending like the tort never happened and moving on with your life, it is just stating that money provides a solution that means that the parties *can* move on with their lives without any residual connection between the two while the Restorative Justice approach gives the opportunity for the parties to still be connected in relation to the tort, which I do not feel is necessary. If, in Corrective Justice, the parties wish to stay connected, this can be done outside of the context of the tort while Restorative Justice proposes, as a possible solution, the opportunity of continual connectedness in relation to the tort.

As was stated earlier, sometimes the victim just wants the defendant to be held accountable and to accept the blame, and it can seem like money is pushing that aside or gliding over this desire of the victim. However, by paying the sum of money to the victim, the defendant is being held accountable and somewhat accepting that the liability is theirs. Even if the defendant disagrees with the liability being placed on them, the moment that they compensate the victim they are somewhat allowing that liability to be theirs. And, to be frank, the money is important; it is important enough to the point where victims would bring and have brought cases to court to resolve them for money. Hensler argues that more than anything, victims want accountability, and that money is the legal system's way of holding someone accountable (Hensler, 418). The victims want “money to cover their losses, but they also want the defendants to accept responsibility,” and the money is the way that the defendant is accepting the

responsibility (Hensler, 452). Furthermore, when the defendant pays the victim a sum of money that is equivalent to the damages they have sustained, they are placing liability on the defendant for the pain and suffering, which some victims argue is all they are searching for from the beginning (Hershovitz, 108). While the victims may want to bring a tort case to court to achieve different things, and money may not be one of those goals, money has the ability to actually be somewhat of an acknowledgement of the defendant of their wrongful actions that have harmed another. While this may not be the best way to ensure that the defendant is actually accepting liability as theirs due to the possibility that they are just compensating the victim to appease the situation, for the legal system that we have in place and with our society, this is the most efficient way to hold the defendant accountable. Therefore, on the grounds that money is not an effective enough tool because it is not truly focusing on what the victim wants, this is argued to be incorrect due to money's ability to be the acknowledgement of the defendant of their wrongful actions that have harmed another to the best of our legal system's ability.

I also believe that money is the most practical and universal solution that we can offer. Looking at the origin of money gives insight to why money has always been the most efficient tool that we have for representing something of value to us. Money can be defined as "whatever is generally accepted in exchange for goods and services-accepted not as an object to be consumed but as an object that represents a temporary abode of purchasing power to be used for buying other goods and services" (Chung, 111). From the beginning of bartering, to the heyday of the gold standard, all the way to today's economy, money has always been used as a symbolic placeholder for something of value that serves as a currency of exchange (Chung, 117). It is this symbolic nature of money that allows us to assign a monetary estimation to things of value to us. Nothing inherent about a bag of apples is equal to four dollars, we have assigned it that value.

We are calculating the farmers' labor, transportation cost, supplier cost, etc. Likewise, nothing about a car inherently equals a certain amount of money, and therefore, nothing inherent about damage to your car from a negligent car crash is equal to a certain amount of money. These are all amounts that we have assigned to it based on the value that it is to us. Therefore, just like there is no obvious estimation for a car, there is no obvious estimation for more abstract concepts such as hedonic damages. We are just better able at being aware of the estimated value that a car is to us in a society because we have a market for it since it is more concrete. Money may not seem like the best solution for amending the relationship between the two parties due to money just being a current form of exchange, but I am arguing that this current form of exchange has been and will always be a symbolic representation of something that is of value to us. This makes money a great candidate for being the amending piece to the bipolar relationship between the two parties.

The money that each citizen has can represent different things such as our labor, our time, and how we choose to spend our day to make our money, and I argue that this is the next best thing that we can offer someone since it is impossible to go back in time and prevent the tort from occurring. In a "leading treatise on the legal history of money," it is written that "money is an instrument for helping men create and manage some of their relationships" (Chung, 111). It is with this instrument that we are able to restore the balance that was there before the tort. Like I argued earlier, Corrective Justice is just about the two line fragments, and money is a part of your line that you can break off and offer to someone else if you take part of theirs. If you were to cause a car crash because of negligence and the person broke their leg as a result, it would be impossible to break anything off of your line segment to add to theirs that would fix their leg, and the best you can do is offer a sum of money that is equivalent to the damages.

Also, it is not practical to say to the victim “I bet you are having trouble getting around town since you can’t drive with the broken leg, here let me be your chauffeur.” While that may actually be the best solution for the plaintiff, since it is true that they will need help getting around town now, this is not practical for our society. This could be difficult for the court to oversee, and there would have to be a certain person in charge of ensuring that the plaintiff is receiving this service from the defendant. It is impractical in comparison to money because money would be a more clean-cut solution in comparison to other options that would require residual follow up. The best that the defendant can do then is offer up a sum of money that is equivalent to all of those damages that they have caused. This money is symbolic of the defendants’ resources that they are transferring over to the victim since it is deserved by the victim. Not only is “money is a medium of exchange for labor and products, but it is also a medium for conveying social meaning” (Hensler, 451). “Whenever money changes hands, it carries with it multiple messages about personal and social relationships and about personal and social worth” (Hensler, 451). The meaning that it carries is representative of all the things that money is composed of and earned by such as the defendant’s time and labor. By giving the victim a sum of money, the defendant is saying something along the lines of, “I am not literally transferring over to you my time and energy, but here is a sum of money that I have accumulated through things like working to earn this money which did take my time and labor at one point.” This is what it means by “conveying a social meaning” and how it carries messages about “personal and social worth” (Hensler, 451). In conclusion, Corrective Justice offers the best analysis of the role of money in tort law because it acknowledges the relationship between the two parties and recognizes that money is the best solution for amending that relationship due to it being the most practical solution.

Let's look at the dog bite example one last time. In the Corrective Justice section, we acknowledged that there was a primary obligation to not let one's dog bite another person that was imperfectly performed which results in a secondary obligation where the defendant owes the victim a sum of money that is equivalent to the damages that they have sustained. For the dog bite case under Corrective Justice, we are analyzing how compensation for the victim would be focused on returning the victim back to a state where they are as close to whole as possible. As was stated above, money being the solution in this case, and all tort cases, is the most successful solution that is devisable because of three reasons: money symbolically restores the balance, as best as is possible, to how it was before better than any other proposed solution, money fulfills the victims desire to hold the defendant accountable, and money is the most practical solution that is offerable. Therefore, because of these three reasons and the fact that Corrective Justice focuses on the necessary component which is that there is a bipolar relationship that needs to be addressed, Corrective Justice best explains the role of money in tort law.

## CONCLUSION

The goal of this thesis was to analyze the role of money in tort law. We examined three different approaches to determine the best explanation for why money plays the main role of being the solution for a wrongful loss or an infringement of a right between a defendant and a plaintiff. Under Retributivism, which says that the role of money is the punishment of the defendant in proportion to the suffering that they have caused another, the analysis is incomplete. Retributivism can only be applied to a small subset of tort law in which the tort was intentional and with a guilty mind. Under Law & Economics, which focuses on wealth maximization for efficiency in a society, the analysis is also incomplete. It is too demanding by assuming that each individual will have perfect knowledge not only of tort law but also of the evaluations of their actions and the monetary value of the consequences. Also, it is not centered around the bipolar relationship between the two parties which leaves it incomplete. Finally, under the Corrective Justice approach, which focuses on both parties, the relationship between the two, and amending that relationship, we find the best analysis of the role of money in tort law. Additionally, I defended the claim that money is the best solution for transferring damages back from the defendant to the victim, as Corrective Justice requires. Money is preferable due to its ability to restore the balance as close as possible to how it was before, hold defendants accountable, and its practicality in society.

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