FOREIGN TORT LAW: BEYOND EUROPE

INTRODUCTION

Ellen M. Bublick[1]

One reason to seek conversations that cross borders is that what we expect and what we find may be quite different. This symposium, a project of the Torts and Compensation Section of the Association of American Law Schools and the Arizona Journal of International and Comparative Law, began with a call for papers that asked scholars across the globe to describe foreign approaches to civil liability for injury. As the call for papers observed, "Injury, particularly human physical injury, is a universal problem."[2] However, "In the United States little is written about other countries' mechanisms for awarding civil liability for injury. In recent years, with the European Group on Tort Law's publication of its Principles of European Tort Law, more is known about liability rules in the European Union. This panel attempts to further expand U.S. scholars' understanding of foreign tort law."[3]

Two important assumptions underlay the symposium invitation. First, that tort law, particularly foreign tort law, would principally address physical injuries to persons. Second, that the main dialectic that would arise from international discourse would stem from contrasts between countries' unitary systems of injury response.

Symposium articles, selected from paper proposals submitted by authors across six continents, belie both assumptions. First, symposium articles about contemporary tort issues in Ghana, Israel, and Singapore, reflect the international importance of questions about tort recovery for emotional and dignitary harm. Second, symposium articles about tort law in Ghana, Israel, Japan, and South Africa illustrate ways in which the tort law navigates tensions internal to a society, whether those tensions stem from conflicting cultural beliefs, distinct bodies of law, or multiple institutions that address injury-related problems. Although the articles in this symposium provide valuable insights into many individual topics of foreign law, these two unifying subjects permeate the symposium—defining the appropriate scope of dignitary injuries and recognizing the value of tort law within intra-societal conflicts.

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1. Dan B. Dobbs Professor of Law, University of Arizona James E. Rogers College of Law; 2008 Chair of the Torts and Compensation Section of the Association of American Law Schools. Special thanks to the Association of American Law Schools, the University of Arizona Journal of International and Comparative Law, and Dean Toni Massaro for their contributions to and support of this symposium. Thanks also to Barbara Atwood, David Jacobs and Victoria Torrilhon for helpful comments on an earlier draft.

2. Call for Papers (May 2008) (on file with the Arizona Journal of International and Comparative Law).

3. *Id.*

In terms of dignitary and emotional harms, a number of jurisdictions are currently wrestling with the definition of actionable torts within this sphere. As Ghanaian jurist S.K. Date-Bah observed, "Customary law is not alone in providing a remedy against insult and affronts to personal dignity and . . . it is no sign of backwardness for it to provide such a remedy."[4] Indeed, the dignitary torts addressed in this symposium span a wide range. Some date back to earlier times and values, while others are quite new and forward looking.[5] The countries that recognize dignitary and emotional tort actions are multiple too. In their article, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective,* Professor Julie Davies and Barrister-at-Law Dominic Dagbanja outline legal remedies for emotional and dignitary affronts in a number of jurisdictions.[6]

In defining the contours of dignitary wrongs that warrant legal remedy, symposium authors focus particular attention on a country's distinctive social and cultural characteristics. In his work, *Tort Law in the Face of Land Scarcity in Singapore,* Professor Yihan Goh emphasizes the importance to Singapore's tort jurisprudence of the country's land scarcity and resultant high population density. Specifically, in Singapore more than 4.8 million people live in a country of just 272.9 square miles (a population density that approaches that of New York City).[7] Although Singapore rarely departs from English common law, the High Court of Singapore did so to create a new tort of intentional harassment.[8] The doctrine, though not fully developed in terms of its conceptual parameters, may reflect pragmatic concerns about "intrusions to one's privacy" of particular import "in a densely populated environment."[9] Doctrinal development of broad privacy protections, and similarly broad recovery for housing-related economic loss, may reflect social needs when land is scarce.[10]

In their work addressing tort actions for dignitary harms in Ghana, Professor Davies and Barrister Dagbanja focus on a different cultural factor that warrants attention in Ghana—the family-oriented, communal focus of the society. Davies and Dagbanja see this factor as a key to the country's broad protection for

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4. Julie Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ. J. INT'L & COMP. L. 303, 310-11 (2009).

5. *Compare id.* at 312-14 *with* Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 287 (2009).

6. Davies & Dagbanja, *supra* note 4, at 310-11.

7. Yihan Goh, *Tort Law in the Face of Land Scarcity in Singapore*, 26 ARIZ. J. INT'L & COMP. L. 335, 339-40 (2009); N.Y. City Dept. of Planning, *New York City* (Dec. 2007) http://home2.nyc.gov/html/dcp/pdf/lucds/nycprofile.pdf (estimating that in New York City over 8 million people live in 304.8 square miles).

8. Goh, *supra* note 7, at 373.

9. *Id.* at 373-81.

10. *Id.*

family members "impugned through insults, abusive language, or words injurious to reputation," as well as for torts that redress broken family bonds and promises.[11] Though strands of Ghana's broad rules against insult are reflected in other countries' laws, the "Ghanaian customary tort law is broader and more encompassing than U.S. common law."[12] For example, in Ghana the tort of slander has been found applicable in cases in which the plaintiff was called a "witch," a "slave," and a "mad woman," among other insults.[13] In addition, Ghanaian tort liability may arise when a wife or child is seduced to leave the family home. Moreover, a father is liable for a son's "misconduct with a woman if the father has not obtained a wife for the son by the time the son has reached puberty."[14]

Ghanaian High Court Justices have been conflicted about whether to maintain these causes of action. In the case of insult, Justices have both voiced concern that vituperation does not merit serious consideration by customary courts and yet have worried that citizens' delicate sensitivities, left unaddressed, might lead to aggrieved parties "taking the law into their own hands."[15] In terms of a father's liability for his son's sexual misconduct, courts have viewed the liability as both outmoded in light of contemporary sexual behavior and yet have worried about "moral degeneration of youth" and the "use of the law of torts to change a particular feature of the mores of Ghanaian society."[16]

A similar tension between traditional practice and contemporary values suffuses Israel's relatively new tort of *get* refusal. As Professor Ayelet Blecher-Prigat and Professor Benjamin Shmueli describe in their article, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case,* the new tort of *get* refusal sanctions, at least in certain circumstances, a man's unreasonable refusal to grant his wife a divorce.[17] The refusal bears particular significance in Israel where divorce is considered a private act of the parties such that judicial and religious authorities view themselves as generally lacking power to dissolve a marriage.[18] The significance of *get* refusal is further heightened by the socially-sanctioned adverse consequences faced by a woman who is refused the *get*, including her inability to remarry and to have subsequent children who are recognized as full members of the community.[19] With the tort of *get* refusal, a husband may still unreasonably refuse a divorce, however, if he does so he must redress the emotional distress and infringement of rights suffered by his wife.[20]

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11. Davies & Dagbanja, *supra* note 4, at 309.
12. *Id.* at 310-11, 315.
13. *Id.* at 312.
14. *Id.* at 314.
15. *Id.* at 325.
16. *Id.*
17. Blecher-Prigat & Shmueli, *supra* note 5, at 284.
18. *Id.* at 281.
19. *Id.* at 281-2.
20. *Id.* at 285.

Though different in many ways from U.S. law, foreign commentaries about the appropriate breadth of dignitary and emotional harms provide useful lessons for scholars in the United States who are collectively grappling with similar issues at this juncture. The Restatement Third of Torts recently added provisions concerning liability for emotional harm.[21] More Restatement work remains to be done in outlining dignitary torts.[22] As that work unfolds, the articles in this symposium suggest ideas for delineating emotional and dignitary torts.

Approaches taken in other countries highlight alternatives for the United States. Israel, for instance, draws no distinction between intentional and negligent infliction of emotional distress—a cornerstone of U.S. litigation.[23] The lack of differentiation in terms of intent may create somewhat broader liability for emotional harms or may create other methods for resolving liability issues, whether through stronger demarcation of particular interests to be protected from invasion, different views of causation, or more developed standards for defining the severity of harm. In Ghana, broader tort law and narrower criminal law are used to maintain social order.[24] In addition, customary law is easily accessible to the public and generally aims at name-clearing rather than damages.[25] This focus on dignitary torts to differentiate limits on acceptable conduct rather than to assign monetary claims may suggest an alternative to traditional U.S. practices such as presumed damages in cases of some dignitary injuries. Finally, Singapore's decision not to wait for statutory enactments to bar harassment contrasts with the approach taken in England and some states in the United States (though in the United States the common law tort of intentional infliction of emotional distress might well extend to bar the behavior sanctioned by the Singapore High Court case *Malcomson*). While Singapore's approach presents problems of scope which Professor Goh aptly describes, it also extends the common law to proscribe conduct that is beyond the periphery of accepted behavior.[26] Given the fluidity of norm changes in the realm of dignitary torts (the Restatement Second of Torts on Privacy from the 1960s provides many examples of quickly outmoded illustrations), flexible mechanisms for defining dignitary torts may have advantages to fixed governing rules.

On the separate issue of the role of tort law in a dynamic process of cultural response, a number of symposium papers address the way in which tort law does not reflect a unitary national culture, but plays an important role in mediating tensions between institutions within the culture. The tort of *get* refusal

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21. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 45-47 (Tentative Draft No. 5, 2007).

22. Ellen Bublick, *A Restatement Third of Torts: Intentional Torts to Persons*, WAKE FOREST L. REV. (forthcoming) (draft on file with the Arizona Journal of International and Comparative Law).

23. Blecher-Prigat & Shmueli, *supra* note 5, at 295.

24. Davies & Dagbanja, *supra* note 4, at 307-8.

25. *Id*. at 320.

26. Goh, *supra* note 7, at 350.

recognized by Israel's secular courts provides a particularly interesting example. Situated in the civil courts, the tort ameliorates "suffering caused by the governance of religious laws over family matters."[27] In a number of *get* refusal cases, the new civil tort seems to support the entrenched religious system by requiring men to follow decrees issued by religious authorities and sanctioning those who disobey the decrees in minor ways that would be considered appropriate under religious law. And yet, as Professors Blecher-Prigat and Shmueli point out, the tort creates a conflict between civil and religious authority.[28] Indeed, Professor Blecher-Prigat and Professor Shmueli's proposal to expand the tort beyond failure to follow a previously-ordered religious decree and beyond low award amounts that would be deemed non-coercive under religious law seems likely to broaden the dispute. But this observation is not meant to cast doubt on Professor Blecher-Prigat and Professor Shmueli's conclusion; quite to the contrary. As a normative matter, their proposal seems eminently reasonable.[29] If the *get*-refusal plaintiff wants to limit her damage award she can be given the option of taking a full judgment that reflects her real dignitary damages or electing the smaller sum needed to obtain a *get* in accordance with religious law. Moreover, Blecher-Prigat and Shmueli make a compelling case that allowing the tort of *get* refusal regardless of whether a rabbinical court has issued a decree appears to fit within the broader framework of Israeli negligence law as long as the husband's failure to cooperate with the divorce can be adjudged unreasonable by secular norms outside the religious process. As with the similar tort recognized for women divorced against their will but in compliance with Sharia law, civil tort actions do not prohibit religious practice that fails to comply with contemporary civil understandings as much as it prices those practices. In the long term, this pricing may maintain religious authority as much as undermine it, as religious laws are unburdened of some of their mismatch with civil society.

The Ghanaian system provides an intriguing contrast to the Israeli system. Although not divided on grounds of religious and secular authority, the country's laws reflect a divide between customary law administered by chiefs and common law administered by judges. However, the Ghanaian constitution provides the common law judges with a trump—a means to invalidate customary practice entirely. Specifically, the constitution *prohibits* "customary practices which dehumanize or are injurious to the physical and mental well-being of a person."[30] Under this system, civil courts might not simply price practices

27. Blecher-Prigat & Shmueli, *supra* note 5, at 279.

28. *Id.* at 288.

29. In the United States, attempts have been made to curtail *get* refusal in cases granting civil divorce judgments. *See* N.Y. Dom. Rel. Law § 253 (2009) (requiring both parties to file and serve sworn statements that the party "has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce" and noting that "barrier to remarriage" includes "any religious or conscientious restraint or inhibition").

30. Davies & Dagbanja, *supra* note 4, at 308.

deemed injurious to mental well-being, but put an end to them altogether. However, the courts have opined that even in the case of customs that appear contrary to public policy, invalidation should be used sparingly.[31]

The reticence to overrule custom might be quite different in South Africa. Christopher Roederer, in his article, *Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights*, recounts U.S. civil rights history as a story of the desirability of incorporating equality norms not only into public law but into private conduct by private parties.[32] This full incorporation of equality norms into private law is now the constitutional mandate in South Africa. Roederer endorses the plan on the ground that constitutional law itself will not transform a society until private law, such as the law of delict—the South African tort equivalent—is infused with constitutional principles.

The importance of private law to desirable public outcomes is a point well illustrated by Professor Eri Osaka's article, *Reevaluating the Role of the Tort Liability System in Japan*. Administrative compensation systems might be thought to relieve the need for tort suits. However, as Professor Osaka demonstrates, even with formal administrative compensation programs in place for victims of industrial pollution, it has been the tort system in Japan that has kept up the pressure to redress victims' injuries.[33] Tort litigation was critical to both the creation and functioning of administrative pollution-related health damage compensation systems. Moreover, tort litigation enabled victims "to negotiate[] on even ground with responsible companies" and "to change national and local environmental policies for the public."[34]

One might think the tort law would have little power. Israel could abandon its system of allotting control over divorce to religious authorities and yet it does not. Similarly, Japan could instruct its pollution-related administrative system to afford broad recovery, and yet its administrative programs repeatedly narrow the group provided a remedy. Ironically, the tort law provides continued pressure on these internal systems despite those systems' resistance to change. Perhaps the reason that tort law is so surprisingly effective in intra-cultural battles is in the constant forum it affords the injured to be heard—the woman wrongfully denied an ability to remarry, the villager deliberately insulted by others, the citizen denied equality, and the person poisoned by industrial pollution but denied access to medical care. If this is the lesson of foreign law, that the voice of tort law is indeed a powerful internal cultural force, perhaps that too is a message valuable to

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31. *Id.* at 325.

32. Christopher J. Roederer, *Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights*, 26 ARIZ. J. INT'L & COMP. L. 427, 460-467 (2009).

33. Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26 ARIZ. J. INT'L & COMP. L. 393, 421, 423 (2009).

34. *Id.* at 425.

an audience in the United States. In oral commentary to this symposium at the Association for Law Schools annual meeting in San Diego in January 2009, torts scholar and Canadian Court of Appeals Judge Allen Linden bemoaned "the unmaking of tort law" in the United States.[35] Many doctrines illustrate Judge Linden's conclusion. But perhaps if tort professors in the United States listen to our foreign colleagues—to the transformative fight of the tort law—we will see that ultimately the voice of the injured can play a powerful role in shaping the society itself.

35. The Honorable Allen Linden, Remarks to the AALS panel on Foreign Tort Law (Jan. 9, 2009) (on file with the Arizona Journal of International and Comparative Law).