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Does Tort Law Empower?

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Ori J. Herstein, *How Tort Law Empowers*, 64 **U. Toronto L.J.** ____ (2014) (forthcoming), available at [SSRN](#).

[Ori Herstein's](#) *How Tort Law Empowers* takes on the question of whether and how tort law empowers victims. Herstein presents himself as a friendly critic of civil recourse theory, and offers an amendment that he claims makes the theory both more plausible and less interesting. Like many friendly amendments, it is an offer that must be carefully examined before it is accepted.

Herstein begins by noting that one of the most important and interesting contributions by civil recourse theory is the idea that tort law empowers tort victims. This contribution comes from the work of John Goldberg and Ben Zipursky, and has been embraced by others as well, either within tort law or in other parts of private law, such as contract theory (see, for example, the work of Nate Oman and Andrew Gold).

Herstein argues that, while attractive, the idea of victim empowerment may promise more than it delivers. His main concern in *How Tort Law Empowers* is to refine the concept of victim empowerment and to expose it as a feature of civil procedure generally and not a concept that is uniquely entailed by civil recourse theory (or, for that matter, any “orthodox” theory of private law).

Herstein begins by noting that, in the work of Goldberg and Zipursky, whom he treats as representative of civil recourse theory, two different ideas of victim empowerment are deployed. The first, which Herstein calls the “thin view,” says nothing more than that the power of a tort victim is the power to initiate proceedings. The second, which Herstein calls the “expansive view,” says that tort law invests tort victims with legal power over others, specifically both the tortfeasor and the court. Both types of power share certain characteristics. Most important, both are discretionary, in that the decision to exercise the putative powers depends entirely on the tort victim’s judgment. Of lesser importance is that both require the tort victim to invoke the legal system; neither is a license for self-help unsanctioned by law.

The problem, Herstein argues, is that Goldberg and Zipursky are confused about what it means to exercise legal power. That is to say, if the thin view is right, tort victims may exercise something—practical power or legal rights but they do not exercise legal power over anyone. Only under the expansive view can it be said that tort victims exercise legal power over either the tortfeasor or the courts. But, according to Herstein, the expansive view is indefensible.

Herstein’s analysis depends heavily on his own definition of legal power, and it goes something like this. A legal power is “the ability to create and change law.” (P. 9.) Herstein’s definition follows Hohfeld and Raz. Herstein makes clear that legal powers are not practical powers to cause action in the world, although very often action is the result of the exercise of legal power (“it is a conceptual truth that legal powers regulate norms, not actions”). (P. 21.) Legal power is the power to change reasons for action in a certain domain of human relations: it is the power to affect the reasons all members of a state have to act with regard to the familiar Hohfeldian list of legal relations of rights, obligations, liberties, duties, etc.

According to Herstein, the power of a tort victim to bring a lawsuit (the “thin view”) is not a legal power. The power to bring a lawsuit is the exercise of power in many dimensions—practical (one may need resources) and political (one may need membership in the community to even file a suit)—but it is not a legal power since its successful exercise in no way depends on the alteration of another’s legal relations. All that X may demand on the thin view is that the court receive the complaint as it would any other under the laws of civil procedure (it cannot arbitrarily reject it, although it

can bar it under a statute of limitation). *X* cannot force a court to endorse her legal judgment that a compensable wrong has occurred. If the first court to hear *X*'s claim rejects it, all *X* can do is appeal, and that appeal may be rejected too. The fact that *X* may be correct as a matter of law does not translate into more than the powers to oblige the defendant to respond and the courts hear both sides of the dispute.

The chief objection to Herstein's argument is that he is too much of a legal realist. The fact that, when all is said and done, *X* may not succeed in altering the legal relations of the person who harmed her does not mean that *X* did gain a power to alter the legal relations when she was harmed. The courts to whom *X*'s legal arguments are addressed are obliged to adopt her reasons and issue an order consistent with those reasons if those reasons are correct (that is, legally valid). The fact that the courts, as *X*'s agents, might fail in their obligations is a feature of the practical operation of a legal system, but it does not prove the absence of *X*'s legal power.

Herstein's response to this argument is to push the defender of the expansive view to choose between natural law or legal positivism, since only the former can make sense of the idea that the court is an agent of the tort victim. If civil recourse theory hews to some version of legal positivism, it must accept that courts can change legal relations even when they are in error and that courts sometimes make the law through the exercise of "strong" discretion in the Dworkinian sense of the term. (P. 14.)

In the alternative, the defender of the expansive view has to argue that courts do not actually exercise valid legal authority when they issue erroneous judgments and they do not exercise discretion when they correctly resolve legal disputes. Herstein argues that there are two possible views about tort claiming that lead to the rejection of legal positivism.

The first, which Herstein calls the "vending-machine view," takes the practical power of the tort victim to file a lawsuit as a power to set into motion a process in which the court's judgment mirrors the tort victim's view of the legal relations that exist between her and the defendant. Since there can only be, on this view, one "right" answer to the legal claim raised by the *X*, her decision to set the judicial system in motion is the only exercise of legal power in the whole story. The "vending machine view" sounds a little like the caricature of Langdellian formalism that is often raised by critics of late Nineteenth Century American private law theory. Herstein's main objection to it is that it has no room for what he calls "judicial agency" in adjudication (P. 19) and he doubts anyone associated with civil recourse theory really believes the vending machine view.

The rejection of legal positivism could also be based on what Herstein calls the "vertical view." Under this view, tort victims "hold a [legal] power over the *court's* exercise of the *court's own power* over the" tortfeasor. (P. 20 (emphasis in original).) This is a more elaborate restatement of the view that courts are agents of the tort victim and therefore have a legal obligation to instantiate her view of the legal relations that exist between her and the defendant. Herstein's rejection of this view is based on what he calls the "error test of normative power." (PP. 12–14.) It reminds us that the courts' legal power is more than the power to announce legal rights. Courts have the power to change legal relations even they are mistaken about those rights: "the capacity to create binding legal norms that nevertheless misapply higher binding law demonstrates that courts hold the legal power over the rights of litigants." (P. 14.)

Herstein's conclusion is that tort-victims gain, at most, "claim-rights" as a result of having been wronged by a tortfeasor. (P. 22.) A claim-right is really nothing more than the thin version of legal empowerment. Herstein's account of civil recourse theory is, as he says, a "deflationary" but not a fatal attack on civil recourse theory.

It may be that the deflated view of civil recourse theory is in fact the view that has always been on offer from Goldberg and Zipursky, and it may be that it is more interesting than Herstein believes. I want to note, however, that there may be a view *in between* the thin view and the expansive view and this third view may warrant further examination.

A feature of Herstein's account of legal powers as they apply to private law is that it is a zero-sum game: *either* the tort-victim has the legal power in question *or* the court has it. Yet concepts of overlapping or shared sovereignty are not

logically impossible. One might ask why the legal power at stake in a tort suit is not shared by the tort victim *and* the court?

Herstein might say in response that the act by *X* of filing a complaint is not an *exercise* of legal power since the defendant's legal relations are not altered by that act. Only the final step of the process—the exercise of judgment by a court—alters the defendant's legal relations with *X*. But why base the interpretation of “exercise” on the actions of the last agent in the story? As Herstein himself notes, “it is a conceptual truth that powers regulate norms, not actions.” (P. 21) Assume that the court agrees with *X*'s legal reasons for suing. Under these circumstances, why not say that both *X* and the court exercised legal power over the defendant?

Herstein might object, of course, is that if the legal system makes an error, its judgment is “authoritative,” meaning that it cannot be reversed and the results of the error are final. But *X*'s errors are also final: if *X* mistakenly concludes that she has no case—for example, she misinterprets tort principles against her own interest—that decision affects the legal rights of the defendant in a way that cannot be reversed by anyone, including a court. *X*'s legal power *mirrors* that of the courts.

To conclude, *How Tort Law Empowers* is an article that raises important questions about the definition of civil recourse theory and its significance for modern tort theory. It raises, in particular, provocative questions about the relationship between civil recourse theory and legal positivism. For this reason it should be of interest to anyone interested in private law theory and jurisprudence.

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