

Whether Wrongful Death from Law and Economics View Could Satisfy Pareto Efficiency Criterion under US Law

Shenghao Jiang^{1,a,*}

¹*Xi'an Jiaotong Liverpool university, Suzhou, China*

a. 511945292@qq.com

**corresponding author*

Abstract: The development of economics has had a significant impact on the research of legal scholars, as analyzing legal principles from an economic perspective has become increasingly prevalent. It also has particularly influenced the field of tort law. Supporters of the economic analysis of tort law argue that it should be as efficient as possible in balancing the rights and duties between tortfeasors and victims. This essay provides a brief discussion of wrongful death from a legal and economic perspective. It begins with an introduction to traditional tort law and its elements, followed by an examination of the economic theory regarding compensation for wrongful death. The essay then explores whether the wrongful death rule could satisfy the Pareto Efficiency Criterion, which is a fundamental concept in welfare economics that evaluates the desirability of a change in allocation based on the principle that no individual should be made worse off. By applying an economic lens to the analysis of wrongful death cases, this essay aims to contribute to the ongoing dialogue between law and economics and to shed light on how economic principles can inform and potentially enhance the understanding and application of tort law.

Keywords: Wrongful death, tort law, economic analysis, pareto efficiency.

1. Introduction

Tort law governs civil liabilities between tortfeasors and victims. Normally, it could be harmful to someone's body or to someone's property. In order to have the proper rules that could deter any potential tortfeasors as well as an appropriate remedy which could provide the victims with enough compensation, the economic analysis perspective was introduced in analyzing tort law issues especially damages related to wrongful death. There are some essays that state there should be an economically efficient method between them, whereas this essay will argue in the opposite way, insisting that there is no Pareto Efficiency in wrongful death cases [1]. Therefore, this essay will first give a brief introduction to traditional tort law theory, then give an economic analysis of damages, including current damages rules and economic methods and finally reach the conclusion that the current rule cannot satisfy Pareto Efficiency, nor could any rule satisfy it.

2. Traditional Tort Law Theory and Wrongful Death

Historically, after England was conquered by the Normans in 1066, tort law was invented, which governs the same area of law in relation to "civil responsibility" in continental Europe. However, in

continental Europe, people usually believe this word “tort” means private legal actions against injuries as the civil counterparties of criminal liabilities [2].

Based on the traditional legal theory of torts, there are three elements that must be present for recovery by the victim. For example, the victim must have suffered harm; the tortfeasor’s act or failure to act must cause the harm; and the tortfeasor’s act or failure to act must constitute the breach of a duty owed to the victim by the tortfeasor. As a result, if a victim would like to have compensation under the scope of tort law, he or she should build up all three elements mentioned above.

For these three elements, the second one and the third one are normally not easy to build up. The second element is also called causation, which means the harm should be caused by the tortfeasor’s act. Legally speaking, the normal test for causation is the famous “but-for test.” Specifically, it determines whether action A was the actual cause of event B by asking, “But for A, would B have occurred [2]?” However, for cases involving multiple causes of harm, “but-for test” might not be as effective as we thought. The third element, whether there is a duty of care, is also controversial. It is possible for the tortfeasor to escape liability if he or she satisfied the duty of care to avoid the harm that he or she caused. The default test for duty of care is whether a reasonable and prudent person would act the same under the same scenario. In fact, a reason person standard is not a low bar standard, as Lord A. P. Herbert mentioned in *The Reasonable Man*: He is always thinking of others; prudence is his guide; and ‘Safety First’ is his rule of life. He is one who invariably looks where he is going and is careful to examine the immediate foreground before he executes a leap or bound, which means probably most people in daily life might not meet the requirement for a reasonable man. Consequently, these three elements are not straightforward to build up [3].

Like the classic tort law example, whose criminal liability would not be discussed in this essay, three hunters went to the jungle and were going to hunt birds together. Those three stood in line, and there should be 10 meters between each other. The hunter in the center shot a bird that flew up. The hunters on both left and right turned toward the bird in the middle and shot the bird as well. However, the bird was not hurt, but the hunter in the middle was killed by birdshots. As a result, it can be sure that either the right hunter or the left hunter caused the death, but there is not a scientific method that could fairly determine who killed the middle hunter. The victim and survivors, who have the standing to seek remedies, would bring actions against both the right hunter and the left man. Regardless of criminal liability, who should take the civil liability to make compensation to the survivors of the dead hunter.

Speaking of civil liability, or, in other words, monetary compensation, how to decide the amount of compensation is not only a legal question but also an economic one. From a legal perspective, this amount should be significant enough so that the following people will learn a lesson from the case and take more precautions. Meanwhile, from an economic perspective, this amount should also be enough to support and comfort survivors economically and emotionally.

3. The Economic Theory of Efficient Tort Damages

Nowadays, the reason why tort law imposes liability and damages on tortfeasors in relevant cases is to provide incentives for people who will restrict their potential high-risk activities to the appropriate extent and to make compensation for those who might get injured. Based on the economic analysis of the relevant tort law rules, in order to achieve a balance between the limited high-risk activities and the most appropriate compensation amount, the tort system must “fully compensate” those who are harmed for their losses.

3.1. Requisites of Efficient Tort Damage Rules

In order to reach efficient damages under tort law, the tort law legal system must enable each party to be responsible for the accident costs they put on other parties [4]. Therefore, damage rules must require the liable party to undertake the costs of their accidents in full [5-6]. If the damage rule with priority does not impose on tortfeasors the liability to pay the costs in full, the potential tortfeasors might not pay enough attention and may not take sufficient care. As a result, in a bigger picture, those tort rules might lead to various accidents since, from the resulting level of accidents' perspective, the social benefit from additional expenditures to avoid accident is likely to exceed the additional cost. Whereas, if damages are too high, which might exceed the amount necessary to provide full compensation to victims, the potential tortfeasors may be involved in accident prevention too much, which may lead to the deterrence of some "economical" accidents [7].

From what has been discussed above, damage rules are less likely to be efficient unless the tort law rules compulsively require tortfeasors to provide full compensation to each victim for the costs imposed on him or her. Furthermore, the efficient damage rules should also have mandatory requirements for tortfeasors to make compensation to third parties, including any losses they incur due to the victim's death. However, in order to have a simplified analysis of this topic, this essay will only discuss whether the current recovery rules in the US would be enough to provide adequate compensation to the victims and whether there would be any further improvements regarding damages rules.

3.2. Laws Governing Recovery for Wrongful Death in US

Every country has some form of wrongful death law and regulation. These laws and regulations generally base recovery on the losses incurred by the victim's relatives, or, in other words, survivors. These rules basically cover aspects including who may recover, what losses are recoverable, and caveats concerning recovery.

First of all, spouses and dependent children are usually allowed to recover from wrongful deaths [8]. However, some states allow siblings or any person related to the deceased person by blood or marriage to have life reliance upon the deceased to be recovered [9-10].

For recoverable losses, in general, it would cover salary/wage income, asset income, investment income, reasonably expected gifts and transfers income, etc. Moreover, the loss of companionship, pain, and grief suffered by the survivors should be covered. However, the recoverable losses may not be fully distributed to the survivors. For instance, in Nevada, the recovery for wrongful death might go to the survivors in part and the decedent's estate in part, which means some part of the recovery might go to persons other than survivors [11].

Thirdly, since every person will have a daily consumption of his or her income to survive, normally recoverable loss should be calculated on the net income base, which is also called caveats concerning recovery [12]. Meanwhile, the cost of household services should also be deducted from the recoverable losses.

3.3. Methods for Determining the Full Compensation Value of Life

Based on classic economic theories, there are two methods that could evaluate the cost of harm imposed by tortfeasors to determine the appropriate amount of compensation deserved for victims. One method is named the ex post valuation method, which means the cost of the tortfeasor's risky behavior could only be determined upon the occurrence of harm [13]. Therefore, in a wrongful death case, the amount of compensation should be the whole life value. The other method is the ex ante valuation method, which means the cost of the tortfeasor's risky behavior should be calculated based on the cost of the additional risk of harm brought by the tortfeasor.

4. The Current Rule under the Pareto Efficiency Criterion

The most well-known efficiency criterion is the one named Pareto criterion, which refers to the scenario that no one gets worse and at least has a person become better. According to that criterion, the recovery of loss is efficient when it requires a tortfeasor to compensate the victim to the same extent as the victim was before the occurrence of the accident, which equals the full compensation of the victim's loss [14]. This calculation method is the ex post valuation method, as mentioned above.

4.1. The Ex Post Valuation of Life

In order to see whether the current recovery rule of wrongful death could satisfy the criterion of Pareto efficiency and to what extent this rule can be further improved, it is essential to set up the threshold of an appropriate ex post compensation as to the value of life. From the perspective of economic theories, there are two ways to determine the value of life through the ex post valuation method [15].

The first one is called the ex post willingness-to-pay method, which sets the value of a life at the price that a reasonable and ordinary person could pay to be alive instead of immediate death [16]. From this aspect, most people would be willing to pay all they have to purchase their lives. Therefore, the purchase amount should be the present value of the whole life income plus any assets held by the person. According to the current rules governing wrongful death, the actual recovery amount might be less than the amount under the ex post willingness-to-pay method, since the actual recovery amount should deduct the cost of personal consumption and household services.

The other method is the ex post compensation demand method, which sets the value of a life at the amount that the person would be willing to sell his or her lives. As a result, it is reasonable to assume that amount to be infinite since most people would view the value of their lives as infinite.

The major differences between these two methods focus on the entitlement to life. The ex post willingness-to-pay method indicates that the victim does not have a right to his or her life since he or she needs to purchase it, whereas the ex post compensation method shows that the victim actually has a right to his or her life since he or she might sell it. According to current tort law and principles, tort law allows the tortfeasors to destroy the entitlement of one person if the tortfeasors are willing to pay for an objectively price for it. The only applicable method here is the ex post compensation method since the victim is entitled to his or her life under this method.

4.2. Whether the Current Law Could Satisfy Pareto Efficiency Criterion

From what has been discussed above, if the current rules governing wrongful death are required to satisfy the Pareto Efficiency Criterion, those rules should be based on the ex post compensation method. However, under the ex post compensation method, the efficient recovery of wrongful death is infinite. As discussed aforesaid, under current rules, the recoverable loss is usually calculated based on the net income plus assets held minus the necessary cost, which is less likely to be the infinite compensation. Therefore, it is less likely to form the view that the current law governing wrongful death would satisfy the Pareto Efficiency Criterion.

5. Discussion

Although the economic view inspires legal practitioners to have some new thoughts in analyzing issues, it does not mean that the economic view always gives efficient resolution. From the above discussion, it could be seen that, from an economic perspective, the recovery rules for wrongful death should be infinite, which could satisfy the Pareto Efficiency Criterion. Whereas the current tort law and principles cannot provide such a threshold, what they can provide is net income and asset

recovery, which might be subject to deduction of necessary costs. As a result, under the current tort law and regulations, damages for wrongful death are not efficient from an economic view.

6. Conclusion

Introducing economic analysis in legal issues aims to improve efficiency in both legislation and execution of law, which also contributes to a better social order. However, law is a classical social science that cannot be quantified accurately, especially when it relates to personal life or health issues. Consequently, economic analysis did provide a new view on traditional legal issues, but the economic view cannot always be the most efficient method. As discussed previously, recovering damages for wrongful death is a complicated topic. What the current tort law tries to do is compensate the survivors in a manner that could be calculated and reasonably predicted, but it cannot provide the survivors with the same treatment as if the victim did not die. Since everyone's life should be infinite and there is no fair way to evaluate the life, it is less likely to have a way to make compensation which could satisfy the Pareto Efficiency Criterion for issues like wrongful death.

However, for other damages rules like compensation for goods, it might be possible to develop a Pareto Efficient way of making and executing laws since the value of goods could be quantified fairly. Whereas, for compensation for health or personal life, the economic analysis of these legal issues did not provide more efficient resolutions. In conclusion, it is possible and also encouraged to deeply explore developing economic analysis for legal issues, inter alia, in tort law regarding compensation for goods, to design better rules for society. As for the topic wrongful death topic, since the value of life cannot be fairly evaluated and given that the current rules only provide a reasonable, predictable, and practicable way of making compensation, the current US law's rule in wrongful death is less likely to satisfy the Pareto Efficiency Criterion from a law and economics perspective.

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