

WHAT HAVE CALABRESI & MELAMED GOT TO DO WITH FAMILY AFFAIRS? TORT LITIGATION AGAINST PARENTS AND SPOUSES

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Intrafamilial tort litigation has become very frequent in many countries lately. The damages sometimes awarded in these claims for non-pecuniary damages, along with high sums of punitive damages in cases of intentional acts, make this type of litigation a significant factor in tort law research. Nonetheless, only a little academic research has been conducted in the last decades regarding the issue.

The most important thing to understand in this kind of lawsuits is the intersection between tort law and family affairs, sometimes family law itself, including religious-personal family law. In many cases family law is dealt with in one instance (such as courts for family affairs or religious courts), and intrafamilial law suits are dealt in civil courts (such as magistrate or district courts, or courts for family affairs acting as civil courts in dealing with intrafamilial tort suits). In many cases there may be a real conflict between the laws and the instances; however, in other cases the intrafamilial tort suits do not create or reflect any conflict between tort law and family law or between the different instances.

One option for a researcher who wants to research the intersection between family affairs and tort law is to see tort damages awards as a secondary remedy, which enters into the picture only when there was no real possibility or normative will to grant the main remedy according to family law. This might, in fact, remind the researcher of the famous article of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). One of the models that the authors present in this article, when dealing with different ways of defending legal entitlements, is a liability rule. Calabresi and Melamed demonstrate their model regarding pollution and nuisance. If we examine our issue in the eyes of that "liability rule", it seems that tort law sometime enters into a vacuum by granting compensation as a secondary remedy in cases in which family law cannot or would not grant the main and more desirable remedy (like the right to marry in cases of a breach of a promise to marry, or the right to divorce in cases of recalcitrant husbands and the Jewish *get*). It is a sort of a comfort remedy, since it grants damages but cannot change the personal status of the claimant..

Comparing the intersection between family affairs and tort law has academic value of its own, especially given the fact that Calabresi and Melamed themselves seek to examine their thesis from areas and angles of the law other than nuisance. But furthermore; this comparison will help us understand tort litigation against parents and spouses in an overview, which will include the differences between tort law remedies and family law remedies, the differences between the instances, and the use of the mechanism of main and secondary remedies in our issue. It might also deepen the understanding of the differentiation between cases in which there are conflicts, even clashes, between family law and tort law and between the instances, and cases in which there is no interaction between the laws.

This research might be the beginning of some applications (with necessary changes) of the economic approach (as Calabresi and Melamed's) to areas of law, such as family law, in which the economic research is not yet well developed.