Remedies as a Remedy for Uncertainty

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Alexandra D. Lahav, The Knowledge Remedy, 98 **Tex. L. Rev.** 1361 (2020).

Unlike its counterpart at the local IHOP®, the menu of standard tort remedies makes for a quick read. There are damages (in several 'flavors'), injunctions (typically ordering a halt to tortious activity), declaratory judgments, and … that's about it. In her fascinating and provocative article *The Knowledge Remedy*, Alexandra Lahav advocates for a new item to be included in the injunctions portion of the menu. In certain toxic tort cases, she maintains, courts can and should order a defendant to cover the cost of independent research designed to determine whether a substance for which it is responsible is capable of causing the type of injury for which the plaintiff is suing.

Lahav's opening example, based on an actual case, conveys the basic idea. A farmer notices that his once healthy livestock are dying, as are some local, furry woodland creatures. The farmer has his suspicions. It was not so long ago that a nearby factory commenced operations, and it was only a little after that that the creek that runs through the farm, and from which the critters drink, began to foam up in an odd way. And so the farmer hires a lawyer, who sues the factory's owner for private nuisance and obtains evidence that the factory has been dumping into the creek a chemical compound that was never vetted for safety by the EPA. Eventually, the litigation settles. In addition to agreeing to install filters, the owner agrees to fund scientific studies to determine what sorts of illnesses in animals and humans the compound is capable of causing.

The gist of Lahav's argument is that—in a legal system that (like ours) has relatively weak forms of *ex ante* regulation—plaintiffs in cases like *Farmer v. Owner* should sometimes be able to obtain such a remedy even absent a settlement. In other words, when there is a tort claim for a toxic exposure (whether grounded in nuisance, negligence, or products liability), and when there is scientific uncertainty as to the capacity of the substance to cause the injury for which plaintiff is suing, the presiding judge has the equitable remedial power to order defendant to fund research into the substance's toxicity and should be prepared to exercise that power. Lahav does not specify in detail the circumstances that warrant the imposition of this remedy, but she seems to have the following conditions in mind: (1) evidence suggesting some possibility that plaintiff has suffered a harm as the result of the breach of a legal duty owed by defendant to plaintiff (such as a duty not to injure plaintiff physically through careless conduct); (2) the unavailability, despite diligent discovery efforts by plaintiff, of sufficient information to determine whether the plaintiff has been injured by the breach; and (3) a superior capacity on the part of the defendant to develop the necessary information. In situations such as these, she argues, courts have discretion to order the defendant to pay for the production of the relevant knowledge and should be willing to exercise it when the plaintiff's case raises sufficient suspicion that she has been wrongly harmed by defendant's activity.

Lahav insists that her proposed addition to the tort remedies menu has doctrinal antecedents, particularly on the equity side of the old law-equity divide. Claimants alleging breach of fiduciary duty have long been able to request an accounting. Thus, for example, if the beneficiary of a trust has grounds for suspecting that a trustee has mishandled trust assets, the beneficiary can, under certain circumstances, obtain a court order directing the trustee to provide an accounting—i.e., records indicating what the beneficiary has done with the money. Of more recent provenance is the recognition by some courts of claims for medical monitoring. In cases in which a tort defendant has exposed a plaintiff to a known toxin, a court will sometimes order the defendant to pay for screenings to enable early detection of any illness associated with exposure to the toxin. The article concludes with an assessment of relevant policy considerations, arguing that, on balance, the availability of the knowledge remedy stands to do more good than harm by filling regulatory gaps and generating useful knowledge that otherwise would never be generated.

The Knowledge Remedy is a notable addition to a burgeoning and impressive scholarly corpus in which Lahav, with justified aggression, takes on the tort reform movement and its disparagement of tort law as merely a matter of plaintiffs' lawyers exploiting 'junk science' and lay-juror biases to extract wealth from firms. Paying close attention to the power dynamics that tend to prevail in life and litigation, she explains here and elsewhere how the law's empowerment of putative injury victims to bring civil actions serves, and might further serve, the public interest and hence warrant our support.[1] Amidst the modern tort wars, Lahav's is an eloquent and welcome voice: one that not only identifies the good that tort law does, but possibilities for goods it might yet deliver.

Academics who are somewhat removed from the political trenches will likewise benefit from reading Lahav's article. Courts and commentators have long wrestled with how best to handle the difficulties of dealing with the causation aspect of toxic tort cases. Sticking with traditional tests for actual causation, and with traditional burdens of persuasion, entails that many plaintiffs who have colorable claims stand to lose merely because of an unfortunate lack of scientific knowledge. This is why commentators and, at times courts, have turned to doctrines such as "loss of a chance," or to 'fudge' terms such as "substantial factor" that give juries more leeway to impose liability. The deep insight of Lahav's article is the suggestion that creativity in injunctive remedies—which, historically, operated in the more flexible domain of equity—might provide an alternative and more satisfactory way of getting at some of these problems.

Of course in tort law, and the civil side of law more generally, a remedy is predicated on and responsive to the claimant having proved herself the victim of a legally recognized wrong. Thus, it is because the farmer in Lahav's opening example seems well-positioned to prove that he was the victim of a private nuisance that it is intuitive to suppose that the farmer is in a position to demand relief from a court. (This is also presumably why the farmer obtained a meaningful settlement.) Yet in the cases Lahav has in mind, the plaintiff stands to obtains such relief without having made out a standard case of negligence, nuisance, or some other tort. Indeed, as noted, it is the plaintiff's inability to prove her claim in the absence of better scientific knowledge that drives the call for the knowledge remedy. Before we can sign off on this remedy, therefore, we need an account of the wrong for which redress is being provided.

At times Lahav suggests that the knowledge remedy is suitable for instances in which defendant's breach of duty to the plaintiff happens also to involve a wrongful evasion of regulatory scrutiny. But the Supreme Court seems to have rejected the idea that private rights of action can be harnessed to respond to misconduct of this sort, and perhaps with good reason.[2] At other times, Lahav seems to rely on the idea that an order to fund scientific studies is an appropriate response to conduct that has some of the hallmarks of a tort such as negligence, and could eventually ripen into such a tort, but has not yet done so. In this regard, the medical monitoring cases—understood as instances in which a court, prior to the commission of a tort, orders a defendant who has imperiled a plaintiff by exposing her to a known toxin to take steps to assist the plaintiff in maintaining her health—arguably provide the most direct precedential support.[3]

Yet, as Lahav acknowledges, medical monitoring liability of this sort is predicated on exactly what is missing from the cases she has in mind: namely, *knowledge* that the substance to which the defendant has exposed the plaintiff is capable of causing the illnesses that the plaintiffs are now hoping to ward off or ameliorate. (By way of analogy: it is one thing for a court in a case like *Summers v. Tice*[4] to use its equitable powers to shift the burden of proof on causation to the defendants, given that the court *knows to a certainty* that one of the two of them actually caused the plaintiff to be shot, and hence it is exactly fifty percent likely that each did it. It is quite another to extend the rule of *Summers* to a case in which a plaintiff sues two defendants for an illness allegedly caused by a toxic exposure and yet it is unclear that *either of the exposures actually caused the illness*.) In some medical monitoring cases, courts have gone so far as to order a defendant whose misconduct might someday result in harm to plaintiff to take certain protective actions for the benefit of potential victims. Even so, the traditional rule that an adequate remedy at law counts strongly against the provision of injunctive relief suggests that equitable orders of this sort should be granted only in special circumstances.[5] Lahav, by contrast, seems to be arguing for the general availability of the knowledge remedy in any toxic tort case where there is some evidence of wrongdoing and a plausible suspicion of toxicity.

There is a deeper irony in Lahav's invocation of the medical monitoring cases. As courts sometimes seem to appreciate, the reason why there is something extraordinary about ordering a defendant to pay for medical monitoring

before the plaintiff has manifested any injury is precisely because such an order is *not* merely a matter of courts providing a creative remedy. In most of these cases, the plaintiff cannot prove, in the usual manner, that a recognized legal wrong has been committed. Instead, in these cases, courts seem to be ordering defendants to fulfill a primary duty of conduct—a duty to pay for health screenings that will help plaintiffs manage a risk of injury that defendants have wrongfully imposed on them. In this respect, while Lahav makes an impressive case for a novel form of judicial order, it is arguably mislabeled. Hers, it seems, may in the end be an argument for the addition to our menu of rights, not remedies.

1. Alexandra Lahav, **In Praise of Litigation** (2017).
2. Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) (deeming plaintiffs' "fraud on the FDA" claim preempted, primarily on the grounds that it would interfere with agency discretion in how to handle regulated entities' wrongful avoidance or subversion of regulation).
3. Some courts seem to understand medical monitoring claims in this way. Others deem them to be claims predicated on a completed tort—namely, exposure to a toxic substance that has been proven to cause physiological changes (if only at the subcellular level) and thus to have caused an effect that counts in the eyes of the court as a physical injury. *See, e.g.,*Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891 (Mass. 2009).
4. 199 P.2d 1 (Cal. 1948).
5. *See* John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, **88 Va. L. Rev.** 1625, 1713-14 (2002) (noting that in many such cases there is evidence of highly culpable wrongdoing, or a pre-existing relationship of defendant to plaintiff supporting an affirmative duty to protect).

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