Dis-torting Discrimination Law

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Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 **U. Illinois L. Rev.** 1 (forthcoming 2013) *available at* SSRN.

As courts increasingly import principles from common law torts into discrimination cases, Sandra Sperino's new article, *Discrimination Statutes, The Common Law, and Proximate Cause*, is a welcome addition to a growing body of work pushing back against this trend. Her focus is on the Supreme Court's recent forays into proximate cause in connection with federal employment statutes. Laying out the problems of the proximate cause doctrine and the features of statutory protections from employment discrimination, Sperino demonstrates that importing proximate cause is undesirable and an obstacle to enforcing Congress' careful balance in enacting these statutes.

The article begins by describing what proximate cause is. Although the theoretical underpinnings of proximate cause are notoriously muddled, Sperino demonstrates that in a variety of ways, the doctrine appears to limit the reach of particular torts, depending on the type of tort at issue. As she notes, proximate cause is applied primarily in negligence actions in situations with multiple physical causes, where a potential plaintiff is far removed from the conduct of the defendant, or as a way to define the policy goals of the underlying cause of action. For intentional torts, proximate cause plays a much more limited role, in part because the actor's state of mind makes the actor more blameworthy, and we are willing to extend liability farther.

The article's bottom line is that these limiting and policy-expressing functions are simply not necessary for federal employment discrimination statutes, and in fact would interfere with their operation. Congress has built limits into these statutory regimes in a way that leaves no space for principles of proximate cause. Using Title VII as the primary example, Sperino shows how Congress defined the harm in a fairly specific and limited way, defined the causation standard, limited potential plaintiffs, and sped up the timeline for bringing an action.

One of the most important sections of the paper lays out the problems courts have had with causation much more fundamentally in the context of employment discrimination claims. While the bulk of the paper focuses on proximate cause, this concept is an added, more demanding limitation to the requirement of factual cause. There can be no liability if an employee's protected status did not cause the adverse employment action the employee suffered. Generally speaking, the debate has focused on whether Title VII requires that protected status be a necessary cause (but-for the protected status, no result), a substantial cause (it made the result significantly more likely along with other causes), or just a contributing cause (it played some role in the process that led to the result but so did other causes). Much of this difficulty lies in the fact that the operative language seems to embody not just notions of causation, but also some form of state of mind.

Sperino also carefully debunks each of the arguments courts and commentators have raised in favor of importing proximate cause: there is no indication that Congress drew on common law torts in enacting these statutes; the statutory language the courts point to has been used by common law courts to refer to factual as well as proximate cause; and Congress most likely intended for all factually injured plaintiffs to recover because the statutes provide only very narrow protections. Finally, she demonstrates that employment discrimination claims are simply not analogous to common law torts. Some discrimination claims seem to create strict liability, and others require a higher mental standard than even intentional torts. Moreover, most torts deal with physical injuries. Employment discrimination, on the other hand, deals with economic injuries, dignity injuries, and more abstract injuries to equality norms and to groups.

To the extent that the article contains a weak point, it is in drawing on separation of powers principles but then treating all or nearly all judicial interpretations of Title VII (except for those related to proximate cause) as valid interpretations rather than the creation of law. Separation of powers arguments certainly have traction, especially in the federal context, because the role of the judiciary is more expressly limited than in states. Still, even there, the doctrine is somewhat problematic. While it is easy to define that principle at a high level – federal courts cannot exercise legislative power – and easy at the extremes to distinguish between a legislative action and a judicial action, it becomes challenging rather quickly to distinguish once there is some legislative action for a court to work with.

Consider Title VII itself. The Supreme Court suggested most recently in Ricci v. DeStefano that the Court had essentially legislated the disparate impact theory – the majority in that case used the term "interpret," to describe the creation of the theory, but stated that the text did not expressly prohibit disparate impact and referred to disparate treatment as the "principle nondiscrimination provision" rooted in the text of Title VII. By casting doubt on the textual foundations of the disparate impact, the Court subtly drew on separation of powers principles to suggest that perhaps the adoption of that theory improperly stepped into legislative territory. Justice Ginsberg in her dissent appears to have accepted this implicit definition of the proper judicial role, but disagreed with the majority's conclusions about what the text meant.

The primary institutional competence point that the article raises in this context, however, is well taken and powerful. The product that we get from a common law process is significantly different from the product produced by the legislative process. The common law process involves the slow accretion and development over time of a body of policies created to allocate the costs of injury in individual disputes. It was also, at least at one time, designed to embody local concerns and norms. The legislative process uses deliberation, active information gathering, and consideration of multiple policy objectives to produce a comprehensive policy solution to an identified problem. And at the national level, those national policies are designed to supplant local policies where the local policies would conflict with the national ones. Sperino's article explains quite forcefully why it is that common law tort principles do conflict with the language and policy of the federal discrimination laws. I hope the courts are listening.

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