

Outside Counsel

Expert Analysis

Updating Tort Law for Advances in Prosthetics

In 2009, the CBS news program 60 Minutes profiled Fred Downs, who lost his left arm in Vietnam. Downs, the former National Director of the Veterans Health Administration's Prosthetic and Sensory Aids Service, had relied upon a hook-style prosthetic for four decades at the time of the 60 Minutes program, when he strapped on a new prototype robotic arm and picked up a bottle of soda and raised it to his lips. In a subsequent episode in 2012, when recalling that moment, Downs became emotional, telling reporter Scott Pelley "the feeling is hard to describe, for the first time in 40 years, my left hand did this [grasping]...it felt so good to move *my* arm again." Pelley noted Downs had said "moved my arm again." Pelley asked if it actually felt like his arm. Downs emphatically responded "it did, it felt like my arm, it was me."¹

The arm that Downs was using was developed by the government's research division DARPA (Defense Advanced Research Projects Agency). It carries out multiple, simultaneous powered movements with sensors that let the hand precisely control its grasp.² It is expected that the next generation prosthetic will provide sensory feedback which will allow the user to feel a grape between his prosthetic fingers.³

Humans, particularly disabled humans, are increasingly merging with technology. Like implants that allow us to hear, see and pump blood, new prosthetics are physiologically integrated into the body through connections to the nervous system. Their damage can cause the owner to suffer lost earnings and lost enjoyment of life, yet because these prosthetics are synthetic and not biological, the law only allows recovery for repair or replacement value—property damage, not personal injury.⁴

My previous article for this column, "Rights of Cyborgs, Is Damage To Prosthetic a Personal

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Injury?" discussed the obstacles under the law to obtaining compensation for people with damaged prosthetics.⁵ (A cyborg is a person whose physiological functioning is aided by or dependent upon a mechanical or electronic device.)⁶ This article explores the legal theories and arguments that might be made to obtain such compensation.

Mechanical, not Organic

The previous article detailed the experience of a quadriplegic who was bedridden for 11 months after an airline destroyed his mobile assist device. The airline saw it as a matter of property damage and merely offered him \$1,500, the cost of repair.⁷

Amputees also suffer disparate treatment with respect to insurance coverage. While medical insurance covers necessary medical procedures regardless of cost, a necessary prosthetic is often subject to annual or lifetime caps, or excluded altogether. According to a May 2015 press release from the National Association for the Advancement of Orthotics and Prosthetics, Donna Frescatore, executive director of New York's health insurance exchange, ordered the elimination of a restriction limiting adult amputees in New York to one prosthesis per limb per lifetime effective in 2016.⁸

It is hard to come up with any justifiable or necessary reason to limit compensation to an individual solely because the injured body part is mechanical and not organic. A lawyer with such a case could make a forceful argument that the law

needs expansion. The judge would not have to await legislative action. The distinction between damages for personal injury and property exists as a matter of judge-made tort law.⁹

While tort law may seem immutable, most of our existing tort law developed during the latter half of the 19th century as a response to the Industrial Revolution.¹⁰ Thomas Koenig and Michael Rustad in their book, "In Defense of Tort Law," used a historical timeline to illustrate the adaptive nature of tort law. In 1784 the first American court awarded punitive damages. The year 1889 saw the first recovery for loss of love, companionship and affection. In 1891 the "egg shell plaintiff doctrine" was recognized. In 1897 a court allowed recovery for extreme emotional distress. In 1946 a plaintiff recovered for prenatal injuries. In 1960 the first products liability case was brought. In 1970 the claim for bad faith against an insurance company was recognized.¹¹

The scope and type of damages recognized by society tends to expand over time. Oliver Wendell Holmes Jr. observed, "the first requirement of sound law is that it correspond with the actual feelings and demands of the community, whether right of wrong." Supreme Court Justice Joseph Story, in 1852, called for the law to "forever be in a state of progress or change, to adapt itself to the exigencies and changes of society."¹²

So, perhaps, the expansion of personal injury damages to cyborgs is not such a big deal. All that is needed is the right case, an open-minded judge and a well-reasoned opinion. Such judge would need to think through the necessary implications. The doctrine would need to be flexible enough to determine when a mechanical device is personal and when is it property. It would be necessary to identify the fundamental basis of what property is in order to distinguish which right, personal or property, was injured.

Property or Personal?

James Wilson, U.S. Supreme Court justice and law professor, undertook a survey of the philosophical grounds of American property

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law in 1790 and 1791. In his "On the History of Property," he stated that "[p]roperty is the right or lawful power, which a person has to a thing" and that property can be possessed, used and disposed of. The thing may be tangible, such as land or a factory or a diamond ring, or they may be intangible, such as stocks and bonds or a bank account.¹³ He added, "industry should have her just reward. That reward is property, for of useful and active industry, property is the natural result."¹⁴ Using Wilson's definition, property is a "thing" that is possessed, used and disposed of, acquired through personal industry.

Clearly prosthetics are "things" that can be possessed, used and disposed of. They have been and will always be a form of property. The question here, is whether a prosthetic or implant can morph into something more, something personal to us?

If this sounds like legal voodoo, one should consider that the law is no stranger to this type of alchemy. There are states where courts have recognized something as personal as "reputation" to be property that can be commercially exploited.¹⁵ In the United States people can have a proprietary "right of publicity" over their "persona."¹⁶ The law may also recognize property rights over human tissue, organs and other body parts to the extent someone retains an ownership interest in them.¹⁷ So under what circumstances should a prosthetic or implant legally morph into a legally recognized part of the person?

The simple answer may be that a prosthetic is personal when its damage causes its "owner" personal injury. It would come down to a matter of proof. Instead of determining the remedy based on what the injured body part was made of, the focus would be on the effect the injury had on the person.

To establish the injury the attorney would need to prove that the device was essential to some aspect of an individual's normal functioning as a human. A device that restores vision would qualify, but a device that allowed someone with normal vision to have telescopic vision would not.

While this sounds reasonable, trans-humanists, who believe that humans will merge with their machines and become super human,¹⁸ might object to this limitation in the law. They would want to be compensated for whatever abilities are lost, not merely their baseline ability. They would likely argue that under the current law a tortfeasor takes his plaintiff as he finds them. If you injure a professional athlete you must compensate her for the loss of her extraordinary physical capabilities.¹⁹

While the trans-humanist's argument may be on sound legal footing, this author would argue that the purchase of a prosthetic which enhances human capabilities renders it a "thing," a piece of property, not something personal, at least to the extent of the enhancement.

Further, for it to be personal, it must be,

like an arm, or a leg or an eye, something that cannot be easily replaced. We may be heading toward a future where our body parts can be easily replaced. And one day we may choose to cease relying on organic body parts entirely.

Making a Person Whole

There are also questions of one's means. Even today, an individual of substantial means may own several prosthetics. In addition to owning prosthetics for running, swimming and climbing, she might own spares of each. If one was damaged she would merely swap it out without loss of personal autonomy or function. Such an individual would struggle to prove a personal injury since she might not have suffered any, other than the extent the spare did not return her to her customary "normal" functioning.

On the other hand, an individual with less means who suffered the same accident would have an easier time proving personal injury damages. That individual may have mortgaged his house to afford the C-leg—a prosthetic with microprocessors²⁰—that was just crushed in an accident. He cannot afford another, or his insurance has an annual \$5,000 cap and will not pay to replace it. Without the C-leg he can no longer perform his job and support his family. He cannot recreate in the same fashion, associate with his wife and children in the same way, and he may be confined for a time to a manual wheelchair or even bed. His accident has caused a profound injury that society and the law should recognize.

To the wealthy individual who owns a spare C-leg, the prosthetic represents a thing she has acquired as a result of her industry, something that she possesses, uses, and at her option may dispose of. To the individual who owns but one, he may not view it as a "thing" but as a unique part of his body. He is as equally unable and unwilling to dispose of it as he is with a flesh and blood extremity.

From this, a potential doctrine arises. Someone who loses an extremity due to accident, illness or disease, does not acquire a prosthetic or medical implant as one acquires other property. It is not acquired as a reward for industry. It is a necessary part of the individual's medical treatment. It is uniquely fitted to the individual and the individual must learn to use it, to acclimate to it and become one with it. To the extent that the individual has become dependent on the prosthetic or implant, it loses its identity as a thing that can be disposed of.

However, that person might wish to acquire another prosthetic, a spare, which is also uniquely fitted to the individual and substantially serves the same basic and foundational life-enabling purposes as the initial one. At the moment the spare prosthetic or implant is obtained and fitted, the individual may no longer be able to prove that damage to one has caused him personal injury. It would be

an odd and unique legal doctrine. The device would either be property or personal, based on the individual's situation, not on the body part's organic or inorganic form. While such might seem classist, tort law rewards a person's wealth. A disabled surgeon's personal injury case is worth many times more than a disabled taxi driver's case. The law, like a good prosthetic, is designed to make a person whole, nothing more, nothing less.

The author is moderating a panel discussion on the topic of this article on Sept. 28, 2015, at the New York City Bar Association.

Endnotes:

1. "60 Minutes," CBS News, Sept. 20, 2009; Dec. 30, 2012, <http://www.cbsnews.com/videos/trying-a-new-arm-on-for-size/>.

2. <http://spectrum.ieee.org/automaton/biomedical/bionics/dean-kamen-luke-arm-prosthesis-receives-fda-approval>.

3. *id.*

4. 1 NY PJ3d2:311 at 903 (2013).

5. NYLJ, March 25, 2015, Outside Counsel; <http://gordon-silber.com/pdf/3-25-15-NYLJ-Rights-of-Cyborgs.pdf>.

6. <http://dictionary.reference.com/browse/cyborg>.

7. Linda MacDonald Glenn, "Case Study: Ethical and Legal Issues in Human Machine Mergers (Or the Cyborgs Cometh)," *Annals of Health Law* 175, 176 (2012), available at <http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1024&context=annals>.

8. <http://www.oandp.com/oandp-l/message.asp?frmMessageId=089ADA91-B4AD-484E-BB5D-E9FEE256A30E>.

9. 1 NY PJ3d2:311, *supra*.

10. "In Defense of Tort Law," Thomas Koenig, Michael Rustad. NYU Press, Oct. 1, 2003 at p. 29.

11. *Id.* at p. 14-15, 31, 47, 49.

12. *Id.* at 12-13.

13. *The Works of the Honourable James Wilson, L.L.D.: Late One of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia, At the Lorenzo Press, printed for Bronson and Chauncey, 1804, p. 181; https://books.google.com/books?id=74s0AAAAMAAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false*.

14. *Id.* at 185.

15. *Cypress Ins. Co. v. Clark*, 144 F.3d 1435 (11th Cir. 1998).

16. *Hart v. Electronic Arts*, 717 F.3d 141 (3d Cir. 2012).

17. *Moore v. The Regents of the Univ. of Cal.*, 51 Cal.3d 120, 793 P.2d 479, 489 (Cal. Sup. Ct. 1990).

18. <https://en.wikipedia.org/wiki/Transhumanism>.

19. 3 Pattern Discovery Products Liability 3d §26:21.

20. <http://www.ottobockus.com/C-Leg.html>.