Boston College Law Review

Volume 1 | Issue 2 Article 5

4-1-1960

Torts and Bankruptcy - A Synthesis

G Stanley Joslin

TORTS AND BANKRUPTCY — A SYNTHESIS

G. STANLEY JOSLIN*

"Oh what a tangled web . . ."

The all-powerful law of bankruptcy clashes with the basic law of torts in myriad places, completely inundating some areas, leaving islets here and there, and vast untouched continents in still other areas. Although the invasion of the bankruptcy law into this tort law area has occurred in many parts of the Bankruptcy Act, these points of contact are not, in many instances, as clearly marked as they might be; nor are the relationships among them recognized by the unwary. Each pocket of contact between the bankruptcy law and tort law may be well charted once the point is found and its relationship to other points of contact established, but the object herein is to point out and interrelate these areas of contact so that a broad chart of torts in bankruptcy is available.

Basically torts involved in bankruptcy may be considered from one of two approaches: either as a tort claim held by, or as a one held against, a bankrupt. The first approach presents a question as to whether the trustee in bankruptcy may take advantage of the claim as part of the estate available to creditors, and a second question as to whether one may use the claim as a base for sharing in a distribution of the bankrupt estate. Important and key differences are found in each of these two basic approaches and must be kept constantly in mind. In addition, gradations of torts must be carefully noted, such as those in which liability results from negligence, those for intentional misconduct, those characterized by good faith, and those in which liability exists without fault. In addition notice must be taken as to whether the tort results in injury to the person either physically or emotionally, or is reflected by damage to property. In addition to the consideration of the tort from the viewpoint of its being an asset of, or claim against, the estate, its gradation and object, it can not be overlooked that tort claims may pass through stages of metamorphosis during the administration of the estate from claim, to cause of action, to judgment. Keeping these important points of observation in mind, the over-all picture will develop into a logical whole with only a few soft spots of uncertainty.

TORT CLAIMS HELD BY THE BANKRUPT

A right of action based upon a tortious injury to the bankrupt may represent a very substantial asset of potentially great value to

* Professor of Law, Georgetown University Law Center. A.B., Columbia Univer- LL.B. 1939, University of Wisconsin; LL.M. 1952, University of Michigan.

his creditors if it can be brought into the bankruptcy proceeding as an asset of the estate. Section 70 of the Bankruptcy Act deals with this problem.[1] Under that section, the first determination to be made is whether the cause of action existed at the time of filing of the bankruptcy petition. If it arose subsequent to filing it can not be considered as an estate asset, but is held free of the bankruptcy proceedings.[2] Of the causes held by the bankrupt at the time of the filing of the petition some do and others do not become assets in the hands of the trustee. Those absolutely passing to the trustee are set out in Section 70a(6)[3] and include rights of action arising upon the unlawful taking or detention of, or injury to, the bankrupt's property. An important characteristic of a 70a(6) tort is that no further test need be made to determine whether the trustee takes the cause of action.[4] A second major category of tort actions which may ultimately be determined to be estate assets are covered by Section 70a(5) and fall into two types, those which are reachable by judicial process, and those which are transferable or subject to judicial process.[5] The first proviso of Section 70a(5) sets out what tort claims will pass to the trustee if they are subject to judicial process. It is to be noted that with respect to this category transferability of the claim is of no consequence, the essential factor is whether it is subject to judicial process. In this group are included ex delicto actions for libel, slander, seduction, criminal conversation and injuries to the person of the bankrupt or of a relative.[6] Thus it is seen that under Section 70a(6) all rights of action for tortious injury to property pass to the trustee[7] while under 70a(5), first proviso, rights of action for injuries to the person pass only if subject to judicial process.[8]

[1] 11 U.S.C. Sec. 110. Hereafter the Bankruptcy Act will be referred to in the text as the Act and in the footnotes by section.

[2] Sec. 70a; 11 U.S.C. Sec. 110a.

[3] 11 U.S.C. Sec. 110a(6).

[4] The trustee may reject a right of action where he deems it too burdensome and its enforcement unprofitable, Stephan v. Merchants Collateral Corp. 256 N.Y. 418, 176 N.E. 824 (1931). As to whether the creditors have the right to maintain the action in the name of the trustee or whether the cause of action reverts to the bankrupt, see Gochenour v. George & Francis Ball Foundation, 35 F. Supp. 508 (S.D. Ind. 1940), aff'd 117 F.2d 259 (7th Cir. 1941) cert. denied 313 U.S. 566 (1941).

[5] 11 U.S.C. Sec. 110a(5).

[6] By "judicial process" is meant attachment, execution, garnishment, sequestration, or other judicial process as used in Sec. 70a(5) and 70a(5) first proviso; 11 U.S.C. Sec. 110a(5) and 110a(5) first proviso.

[7] Heitfield v. Benevolent and Protective Order of Keglers, 36 Wash. 2d 685, 220 P.2d 655 (1950); Empire Tractor Corporation v. Time, Inc., 91 F. Supp. 311 (D. Pa. 1950); Henderson v. Rounds and Porter Lumber Co., 99 F. Supp. 376 (D. Ark. 1951. In Boudreau v. Chesley, 135 F.2d 633 (1st Cir. 1943), a bankrupt's right of action for conspiracy to interfere with his position as a national bank president was held not an action for "injury to property."

[8] The problem of a cause of action involving both personal injury and property

If the right of action in tort is one that does not categorically pass to the trustee under Section 70a(6) and also is not precluded from so passing by Section 70a(5) first proviso then it still may pass into the bankrupt's estate according to its status in relation to the test of transferability or of being subject to judicial process as set forth in section 70a(5). The Act specifically provides that the trustee shall be vested with all the property of the bankrupt including rights of action which he could by any means have transferred, and which might have been levied upon and sold under judicial process and which, otherwise, might have been seized, impounded, or sequestered. Thus a personal injury action may be transferable and yet not subject to be taken into bankruptcy if not amenable to seizure, or sale under judicial process.[9] The total scope of Section 70 as it relates to torts, requires certain rights of action to go to the trustee, whether transferable or subject to judicial process and defines certain others which pass only if subject to judicial process. All others pass to the trustee if transferable or subject to judicial process.

As in so many matters in bankruptcy, a point of time is a crucial factor and that is true in the ascertainment and application of the various tests which determine whether or not a tort claim will pass to the trustee in bankruptcy and so become part of the assets of the estate, or be retained by the bankrupt free from the proceeding. Thus the tests of transferability or amenability to judicial process must be applied as of the time of the filing of the petition. Ordinarily this does not prove to be a troublesome point, for the time that a cause of action in tort arose is normally easily ascertained. However, a pre-petition tort cause of action may have changed its status sufficiently at the time of the petition so as to require a reappraisal of its status for a determination as to whether it qualifies as an estate asset. The common change of status occurs when a tort claim has become the subject of a contract or when legal action has been commenced on the claim. It is clear that a tort claim which has become the subject of a valid settlement contract prior to the filing of the petition has lost its tort character and passes to the trustee as a contract right of the bank-

damages was raised in the English case of Wilson v. United Counties Bank Ltd., [1920] A.C. 102, 88 L.J.K.B. 1033, where it was held that the trustee and the bankrupt suing jointly could recover to the extent of their respective injuries; cf. notes on this case in 33 Harv. L. Rev. 860 (1920), 20 Minn. L. Rev. 814 (1936).

[9] Finnerty v. Consolidated Telegraph and Electric Subway Co., 82 N.Y.S.2d 529 (Sup. Ct. 1948); Gering v. Superior Court in and for Los Angeles County 37 Cal. 2d 29, 230 P.2d 356 (1951). In Saper v. Delgado, 146 F.2d 714 (2d Cir. 1945), a personal injury judgment secured in New York, not being subject to attachment, execution, garnishment or third party order under New York law, could not pass to the trustee in bankruptcy.

rupt.[10] However, the status of a tort claim on which legal proceedings have been commenced is not so clear. To what extent is the tort claim effected by the filing of a complaint, trial, verdict or judgment? Since certain rights of action in tort do not pass to the trustee unless subject to judicial process, and others unless transferable, the key seems to be whether the tort claim is or has changed to such form or position at the time of the filing of the petition as to be at that time transferable or subject to judicial process. For example, the Act provides that rights of action ex delicto for injuries to the person of the bankrupt shall not vest in the trustee unless by State law such rights of action are subject to judicial process.[11] However, if legal action has been commenced at the time of the petition and the law of the state makes the rights under an existing action subject to judicial process, the action would pass to the trustee even though it involves a tort which would not itself have passed to the trustee. The same result is had when the tort action goes to judgment. Few tort claims are subject to judicial process while judgments normally are. Consequently when a judgment is entered prior to the petition in bankruptcy, the judgment will pass to the trustee as estate property, it being transferable or subject to judicial process.[12] The salient point is not the name given to the changed form of the tort claim at any particular time but whether at the critical time it is transferable or subject to judicial process.[13]

A safe generalization may be made to the effect that while rights of action in contract belonging to a bankrupt become part of his estate and pass to the trustee,[14] many rights of action in tort do not. A "no man's land" may therefore exist where the right of action has both tort and contract characteristics. A breach of warranty situation is of this nature. In such a case if the tort right could not be taken by the trustee but the contract right could, somewhat of an impasse appears to have been reached. It does seem that the bankrupt under such circumstances may elect which remedy he will pursue. If it could be presumed that he would always select that form of action which would remain a personal asset surviving bankruptcy, then it

[10] The trustee's title to a contract action is not affected by a provision in the contract forbidding assignment. Myers Motors Inc. v. Kaiser-Frazer Sales Corp., 178 F.2d 291 (8th Cir. 1949); Second Realty Corp. v. Fiore, 65 A.2d 926 (D.C. Mun. App. 1949); Gazlay v. Williams, 210 U.S. 41 (1908). Such a principle would apply to contracts of settlement.

[11] Sec. 70a(5) first proviso; 11 U.S.C. Sec. 110a(5) first proviso.

[12] For a case reaching a contrary result under New York law, cf. Saper v. Delgado, supra note 9, to the effect that, a certain tort action being non-assignable, a verdict on such an action was similarly non-assignable.

[13] Ruebush v. Funk, 63 F.2d 170 (4th Cir. 1933).

[14] Sec. 70a(5); 11 U.S.C. Sec. 110a(5).

might be argued that the claim should be treated as one in tort which would not pass to the estate. On the other hand it might be contended that since the now bankrupt had the right to elect whether he could treat the claim as one in tort or one in contract the right of election passes to the trustee under the provisions of the Act vesting in the trustee the powers of the bankrupt which he might have exercised for his own benefit.[15] If this latter theory be accepted, the trustee would presumably exercise the power by electing to treat the cause of action as one in contract. However, there is a serious doubt as to whether the scope of the "powers" in the Act dealt with would be broad enough to encompass the right to make such a selection.[16] It is suggested that this problem be resolved by applying the test of the bankrupt's position at the time of the petition. His position is that of one who may elect to enforce the cause of action either as one in tort, which necessarily would not pass to the trustee, or one in contract, which would so pass. It is into the shoes of the bankrupt in this position with his rights, powers, property interests, elections or alternate interests in this regard that the trustee steps. Consequently the trustee can make this claim an asset available to the creditors if it could have been transferred or levied upon and sold under judicial process. This means that a claim enforceable either as a contract or a tort claim is to be characterized as neither until an election has been exercised and the right of election passes to the trustee if it is assignable or subject to judicial process in that form. Of course, if the selection is made before the petition, the form of action so selected is either contract or tort and is to be treated accordingly in determining whether it is an estate asset. It is conceivable, however, that the pleadings would not make a clear selection. In that case, it is probable that the court, wherein the action is brought, would have to determine the true nature of the action for purposes of classifying it as a right of action sounding in tort or contract.

It is possible that the privilege of electing between a contract or tort cause of action might be lost by operation of law, as for example, by the outlawing of one or the other cause by the running of the statute of limitations. If such is the situation at the time of the filing of the petition the nature of the surviving enforceable right

[15] Sec. 70a(3); 11 U.S.C. Sec. 110a(3).

[16] "Generally stated, a 'power' is the right, ability or faculty of doing something; but in the restricted sense in which the term is herein used [Sec. 70a(3)], a 'power' is a 'liberty or authority reserved by, or limited to, a person to dispose of real or personal property, for his own benefit or the benefit of others, or enabling one person to dispose of an interest which is vested in another' "—Nadler, Creditor and Debtor Relations, p. 609, § 13, (1956); cf. Collier, Bankruptcy, ¶ 70.13 (14th ed. 1958); MacLachlan, Bankruptcy, Sec. 176, p. 177 (1956).

is the only one to be considered in determining whether the claim is an estate asset. As a tort right of action is more apt to be cut off by the statute of limitations than one in contract, it is conceivable that although a trustee would not ordinarily take if the petition was filed before election, he could take if by operation of law before the filing of the petition one right of action became unenforceable and the other was clearly classifiable as being of the type available to the estate.

The Position of Creditors Having Tort Claims

Of the three main points of contact between the law of torts and bankruptcy, the first, dealing with the rights of the trustee in bankruptcy to tort claims held by the bankrupt, has been considered. The second main point of contact to be considered is the participation of a tort claimant against the bankrupt's estate. No generalized statement of principle in this regard covering the entire field of tort claims can be ventured, but here classifications must be made as to whether the tort claim rests on negligence or willful misconduct or whether the tort claim has been supplanted by a contract of settlement or release, or whether the claim has been the subject of litigation or has gone to judgment. Once the claim is so classified, the question as to its reception as a claim in bankruptcy will, in most cases, easily be ascertained.

To develop the present problem concerning tort claims against the bankrupt and the claimants' participation in the bankrupt's estate, a basic generalization may be made. No tort claim may be provable in bankruptcy unless such is specifically permitted by the Bankruptcy Act.[17] The Act grants its first important concession to tort claims in Section 63(7) wherein the right to recover damages in any action for negligence instituted prior to and pending at the time of the petition may be proved and allowed against the estate.[18] It will be noticed that only tort actions based on negligence may be the basis for such a claim.[19] No distinction is made in the Act between personal injury and property damage actions. There is no provision for claims resulting from either intentional torts or from those arising

[17] Schall v. Camors, 251 U.S. 239 (1920), noted 20 Colum. L. Rev. 481 (1920); 15 Ill. L. Rev. 220 (1920); 29 Yale L.J. 455 (1920). "The exclusion of tort claims in general seems an anachronism tracing back to the old idea that bankruptcy is only for traders." MacLachlan, Bankruptcy, Sec. 138, p. 128 (1956).

[18] 11 U.S.C. Sec. 103a(7).

[19] To the extent that awards of workmen's compensation involve injury or death from injury, if the injury occurred prior to adjudication in bankruptcy, it is a provable claim; Sec. 63a(7). The fact that the injury may have resulted from an intentional tort would not of course, under this section, affect its provable character.

in liability without fault cases, as a consequence of which such are never provable. It must be further noted that a right of action based on negligent injury to person or property is not by this fact alone provable, but in addition the action must have been instituted prior to and be pending at the time of the filing of the petition.[20] Actions dismissed before the petition in bankruptcy are, of course, not provable.[21] Likewise actions for negligent injury commenced after the petition is filed can not constitute provable claims.

While claims for torts resulting in willful injury to person or property are not provable even though action thereon was instituted prior to, and was pending at the time of, the petition, if such actions had progressed to judgment by that time they would be provable.[22] This is true also of judgments rendered on negligent torts prior to the petition.[23]

To summarize:

1. No differentiation is made between tortious injuries to person or to property.
2. Claims for negligent torts in themselves are not provable but become such when reduced to judgment before the petition or when litigation has been instituted thereon and is pending at the time of the petition.
3. Claims for willful tort are not provable but become such when reduced to judgment prior to the petition.

The dual-natured claim which may sound either in tort or contract may be provable under the Act, not as a tort claim but as one founded on a contract express or implied.[24] The tort or contract nature of a right of action when considered from the viewpoint of its provable character does not present a contentious problem. The same can not be said with respect to the discharge of such claims, this being an area in which the battle is bloody, and of which more will be said later when discharges are specifically discussed.

The third main point of contact between tort law and the Bank-

---

[20] Sec. 63a(7); 11 U.S.C. Sec. 103a(7); Collins v. Isaacs, 258 App. Div. 806, 15 N.Y.S.2d 983 (2d Dep't 1939). For an unusual case in which the negligence claim was tried before the referee in bankruptcy, no point having been made of the requirement of the institution of the action prior to petition under 63a(7), see In Re Sabbatino and Co., 150 F.2d 101 (2d Cir. 1945).

[21] Sec. 63a(7); 11 U.S.C. Sec. 103a(7).

[22] Landgraf v. Griffith, 41 Ind. App. 372, 83 N.E. 10, 21 (1875).

[23] Sec. 63a(1); 11 U.S.C. Sec. 103a(1); Lewis v. Roberts, 267 U.S. 467 (1925).

[24] F.L. Grant Shoe Co. v. W. M. Laird Co., 211 U.S. 445 (1909). To the effect that a tort giving rise to quasi-contractual relief constitutes a provable claim, see Crawford v. Burke, 195 U.S. 176 (1904); cf. notes in 13 Mich. L. Rev. 693 (1915); 31 Mich. L. Rev. 389 (1933).

ruptcy Act is that of discharge of a tort claim. Since the purpose of bankruptcy is primarily to relieve a debtor of a crippling debt load, the generalized result of a proceeding in bankruptcy is to discharge the bankrupt from all claims, debts and rights held against him so that he may be able to make a fresh start. However, certain defined obligations are not discharged and may be enforced after bankruptcy. Tort claims by their nature are more apt to survive the bankruptcy proceeding than claims based on contract. The Act has clearly excepted a vast area of tort claims from discharge but non-statutory authority for such exception is not easily found. Of course, non-provable claims are not dischargeable and survive the bankruptcy proceedings. Provable tort claims may share in the distribution of the bankrupt's estate and emerge with the unpaid balance of the claim still valid and enforceable against the discharged tort-feasor.

The vast majority of tort claims fall in the category of non-provable and so non-dischargeable claims. However, a cause of action for negligent tort instituted and pending, or a claim based on a judgment in any tort case existing, as of the time of the filing of the petition, is provable and so subject to discharge.[25] A claim based on a willful tort not reduced to judgment, as previously indicated, is not provable and so not dischargeable.

In summary tort claims are treated in bankruptcy as follows:

1. Willful tort claims not dischargeable.
2. Negligent tort claims not dischargeable.
3. Negligent tort action instituted and pending dischargeable.
4. Judgments in tort actions dischargeable.

The question as to what tort claims are provable and thus dischargeable has been considered from the standpoint of a clear and unified right of action for tort only. A more difficult problem presents itself when the right of action has both tort and contractual aspects. The dual nature of this type of claim is of interest as it bears upon discharge. The situation is critical when the claim regarded as a tort is not provable and thus not dischargeable; while regarded as a contract the contrary is true. It seems there could be three basic approaches to this problem. The first approach would be to require the claimant to elect, within the time specified for the filing of claims, how he wished his claim to be treated. Thus if he filed he would be regarded as treating his claim as one in contract and the tort aspects of it would vanish. The claim would then share in the estate and be

[25] There is still a question as to whether the provable tort claim is excepted from discharge by specific exception contained in the Act.

subject to discharge as any contract claim.[26] However, if he did not file his claim, the contract aspect would be forfeited and only the tort claim would remain. A second possibility would be to allow the claimant to assert his claim as a tort surviving and unaffected by the bankruptcy irrespective as to whether the contract claim was discharged. The third approach would be to permit the claimant to prove in bankruptcy as a contract claimant with the possibility of a recovery of any deficiency in a tort action subsequent to the bankruptcy. It seems that any claim which may be regarded as either contractual or tortious in nature should be so treated as to permit the claimant to pursue it to as complete a recovery as possible by allowing him to regard it as a contract claim for purposes of participation in the bankruptcy proceedings and at the same time as a tort claim for residual relief against the tort-feasor after discharge. However, it is generally held that such claims, since they can possibly be asserted in bankruptcy, must be handled as contract claims, provable and dischargeable.[27]

In determining whether a tort claim is dischargeable, the question of its provability must first be resolved as previously considered. If provable, it will be discharged unless some specific exemption from discharge covers it, included among which are exemption claims arising out of the torts of obtaining money or property by false pretenses or false representations, willful and malicious injury to person or property, seduction of an unmarried female, criminal conversation and fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.[28] Of these exceptions, the two most sweeping and generalized are those based on fraud, and on willful and malicious injuries. The intent of the Act, then, is to exempt from discharge only those tort claims resulting from the more serious breaches of conduct.

A claim for injury to persons or property, based upon simple negligence, is not dischargeable under any circumstances,[29] however, if the claim became the subject of a legal action pending at the time of the filing of the bankruptcy petition or was reduced to judgment at that time it would be discharged. On the other hand liabilities

---

[26] Sec. 63a(4); 11 U.S.C. Sec. 103a(4).

[27] Sec. 63a(4); 11 U.S.C. Sec. 103a(4). See Collier, Bankruptcy, ¶ 63.23, p. 1858 (14th ed. 1958); Remington, Bankruptcy, Sec. 3307 (6th ed. 1955). It is important to keep in mind that only the question of initial discharge of a claim which is provable is considered at this point. Some claims, though provable, may still not be discharged, because they are specifically exempted from discharge under the Act.

[28] Sec. 17a(4); 11 U.S.C. 351(4).

[29] Sec. 63a(7) and 17(a); 11 U.S.C. Secs. 103a(7) and 35(a).

for willful and malicious injuries are extempted from discharge.[30] The importance of this exemption of willful and malicious torts may be given undue significance unless one considers the improbability of this type of claim being processed in bankruptcy at all. Since a claim for damages caused by a tort is not provable in bankruptcy,[31] it seldom reaches the point where its exception from discharge is worthy of consideration or comment. In only three instances can claims for willful and malicious injury to person or property appear in a bankruptcy proceeding so as to raise any question as to their exemption from discharge, to wit when the claims had been reduced to judgment, or had been settled by contractual arrangements, or are of a mixed tort and contract nature. If the claim has been reduced to judgment or been the subject of a contract of settlement, it then, in its new form, becomes provable,[32] whereupon the question arises whether it survives discharge as a form of liability claim for willful and malicious injuries. It will be noted that "liabilities" for willful and malicious injuries are exempt from discharge under Sec. 17a(2). Since the judgment or contract which has replaced the original claim for damages arises out of a tort claim for a willful and malicious injury, it is not discharged and is enforceable against the tort-feasor after bankruptcy.[33] If the claim is both contractual and tortious in nature, and is properly filed and proved, it will not be discharged if the claim had arisen out of the obtaining of money or property by false pretenses or false representations or is for willful and malicious injuries.[34]

Torts exempt from discharge, other than those for fraud or willful and malicious injuries, need only be mentioned again with a warning that they may not be as extensive as a casual observation might indicate. Thus a claim for breach of promise of marriage is specifically exempt from discharge only if accompanied by seduction;[35] tort claims for fraud, embezzlement, misappropriations or defalca-

[30] Both willfulness and maliciousness are required under the Act. Sec. 17a(2); 11 U.S.C. Sec. 35a(2). See Seward v. Gatlin, 193 Tenn. 299, 246 S.W.2d 21 (1952). Thus a claim arising out of an automobile collision occurring because of lack of sleep of the operator does not constitute willful and malicious conduct. Johnstone v. Gardiner, 151 Me. 196, 116 A.2d 776 (1955).

[31] Sec. 63a; 11 U.S.C. Sec. 103a.

[32] Sec. 63a(1) & (4); 11 U.S.C. Sec. 103a(1) & (4).

[33] See Collier, Bankruptcy, ¶ 17.17, p. 1617 (14th ed. 1958).

[34] Sec. 17a(2); 11 U.S.C. Sec. 35a(2). The scope and exemption from discharge of liabilities for willful and malicious injuries to the person or property has been extended by interpreting "willful and malicious" to mean "intentional" injury. See Collier, op. cit. ¶ 17.17 and cases therein cited.

[35] Such a claim may be filed by the father for the loss of his daughter's services resulting from the seduction. In re Freche, 109 Fed. 620 (D. N.J. 1901).

tions by officers or those in a fiduciary capacity are also specially excepted from discharge.[86]

SUMMARY

As a tort becomes involved in a bankruptcy proceeding, it must be broken down into elements relevant to and controlled by the Bankruptcy Act. If the tort is carefully analyzed, its bankruptcy treatment can be charted. Some of the elements of tort to be carefully observed and placed in their relationship to the bankruptcy law are: (1) whether the tort claim belongs to the bankrupt or is a claim against him at the time of the filing of the petition; (2) whether it arises from an injury to the person or to property; (3) whether it is transferable or is subject to process; (4) whether it is based on an intentional or a negligent tort; (5) whether a suit was pending at the time of the petition or had been reduced to judgment at that time; (6) whether the claim is both contractual and tortious in nature; and (7) whether it is a claim based on a tort given special treatment by the Bankruptcy Act.

With these elements in mind, fate of the tort claim in bankruptcy may be traced without great difficulty. Most such claims will be denied participation in the bankruptcy procedure. Others will be received only to be cast out; only a few will run the course of bankruptcy proceeding and be subject to its asset gathering and distributing processes.

---

[86] Note 28, supra.