Are Corporations Responsible Agents?

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Benjamin Ewing, The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility, 8 **J. Tort Law** 1 (2015).

In *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, Benjamin Ewing, a visiting assistant professor at Duke Law School, breaks fresh ground by stitching together contemporary tort theory and recent philosophical work on responsibility. By knitting these threads together, Ewing's fluent, sophisticated paper shows that imputing moral responsibility to artificial legal persons is an eminently plausible enterprise. *The Structure of Tort Law, Revisited* shows us that it makes eminently good sense to think about corporations not merely as institutions that we may manipulate to pursue valuable social objectives, but as institutions that bring responsibility upon themselves by their actions. In doing so, the paper broadens the horizons of normative non-instrumental tort theory.

As Ewing notes at the outset of his article, "moralized accounts of tort law" seem "particularly impotent" (whereas economic approaches to tort "seem especially powerful") in tort cases in which corporate defendants are either held vicariously liable for the torts of their employees, or are themselves held directly liable for the marketing of defective products. (P. 2.) "It is obvious that tort law may affect corporations' incentives but it is not self-evident that tort liability can be meaningfully understood as a form of moral accountability when it is imposed upon corporate rather than human persons." (*Id.*) The central insight of Professor Ewing's paper is that a particular form of responsibility— namely, "attributive responsibility"— is fundamental to accountability in both law and morals, and that corporations are attributively accountable agents.

Revisiting the Structure of Tort Law

In the 1980s and 90s, corrective justice theorists, particularly Jules Coleman and Ernest Weinrib, developed both a powerful critique of the economic theory of torts and a strong case for the corrective justice conception of the subject by calling attention to the bipolar structure of tort adjudication. Tort law unites plaintiffs with the defendants who have injured them, making the defendant's liability symmetric with the plaintiff's recovery. Weinrib explained the significance of this feature of tort adjudication by saying that tort law "treats the wrong, and transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each other."[1] Tort adjudication embodies "the correlativity of doing and suffering harm."[2] It institutes "[c]orrective justice [because it] joins the parties directly, through the harm that one of them inflicts on the other."[3] This unification of doing and suffering both expresses corrective justice and poses problems for instrumental accounts of tort, because bipolarity works to limit the pursuit of instrumental ends by tort means.

Economic theorists of tort have argued that tort law pursues two basic, valuable objectives— deterrence and insurance. Some accidents should be deterred; the social cost of their avoidance is less than the social cost inflicted by their occurrence. Other accidents should be allowed to happen; it is socially less costly to let them happen than to prevent them. Yet even accidents that should not be avoided should be insured against—and their concentrated costs dispersed—because concentrated losses generally diminish social welfare more than dispersed losses do. Precisely because it links injurer and victim through the wrong done by the former and suffered by the latter, the structure of tort law limits the pursuit of both deterrence and insurance. "When formulating forward-looking regulations designed to deter" risky behavior, "we seldom condition the applicability of regulation on the actual occurrence of harm." (P. 5.) Tort law, however, "generally abides by the adage 'no harm, no foul.'" (*Id.*) As a way of deterring harm, abiding by this adage is not especially attractive. Tort's bipolar structure similarly impairs the pursuit of loss-spreading as an

objective. "[I]n tort law, the only people who can be made to compensate a victim are individuals who bear a fairly close causal nexus to a victim's losses. Such people are generally few in number…. The idea that tort law is designed to spread losses stands in tension with the fact that potential defendants in tort law are limited to the specific agents who have caused each plaintiff's injuries." (*Id.*)

Ewing's rehearsal of Coleman and Weinrib's arguments is expert, concise, and fluent. Even so, most law and economics scholars would contest the charge that economic considerations cannot justify the structure of tort law. Economic analysis is more sophisticated and fine-grained than Ewing's faithful exposition of corrective justice theory suggests. For example, victims are sometimes better insurers than injurers. The insurance rationale for tort liability may therefore not imply extensive loss-spreading by defendants. The proper extent of tort liability depends on the relative advantages of first- and third- party insurance. That may vary from context to context, and be a deeply empirical matter. So, too, under-deterrence is a threat to the efficiency of tort liability, but tort law's toolbox includes punitive damages, which can be deployed to address this very issue. Moreover, over-deterrence may be as much of a threat as under-deterrence. Striking the balance correctly may require fine-tuning damages in various ways (e.g., restricting or expanding pain and suffering damages). Consequently, it is far from obvious that tort law strikes an implausible balance among the instrumental policies that legal economists take it to serve.

Ewing would likely respond that these refinements still fail to explain and justify tort's deeply relational character, or the centrality of responsibility to tort. Tort law is concerned with *who did what to whom*. The intrinsic relation that it takes to exist between tortfeasor and victim poses a problem for instrumentalist explanations. They struggle mightily to explain why the backward-looking fact that A wronged (and harmed) B is a *reason* for the forward-looking conclusion that A should repair B's injury. Such a reframing of the matter would be fruitful, because Ewing's real contribution to this debate is to point out that corrective justice theory has shown that a particular form of responsibility—namely, "responsibility as attributability"—is fundamental to tort law. The importance of this point is overlooked, Ewing thinks, because the fact that this form of responsibility is an important ground of corporate responsibility is itself overlooked.

Responsibility as Attributability

Ewing's contribution, then, lies in characterizing the basic importance of bipolarity by saying that tort cares enormously about whether a harm is rightly attributed to someone. When wrongful harm is properly attributed to someone, tort law is strongly disposed to treat that person as liable. This aspect of tort tracks a distinction drawn in slightly different ways by two eminent moral philosophers—Gary Watson and Tim Scanlon. Watson distinguishes between "two faces of responsibility," namely "'attributability' (what reflects on a person), and 'accountability' (what demands can be appropriately placed on a person)." (P. 10.) Scanlon draws a similar distinction between "responsibility as attributability" and "substantive responsibility." (*Id.*) For both Scanlon and Watson, attributive responsibility flags the fact that some action or outcome is appropriately taken as a basis of moral appraisal of some agent. Strictly speaking, attributive responsibility says nothing about what the appraisal should be—whether or not an action is creditworthy, blameworthy, or neither.

Our tendency is to think that "substantive responsibility"—what we may reasonably hold people fully accountable for, *all things considered*— is the only important kind of responsibility. The lesson of Scanlon and Watson's work, however, is that "attributive responsibility" is also a fundamental form of responsibility. We may hold people accountable for outcomes that are attributable to them even when we would hesitate to say that those people are, all things considered, substantively responsible for those outcomes.[4]

Indeed, tort law is notorious for assigning credit and blame in ways which do *not* track moral blameworthiness. *Vaughan v. Menlove* is a classic case in point.[5] Menlove stacked his hay in a way that he was told was dangerous; it ignited and set fire to Vaughan's property. In the ensuing lawsuit, Menlove defended himself by saying that he had used his own best judgment; that he had no choice but to use his own judgment; and that he was not at fault because he could not have exercised the better judgment of a more competent person. The court imposed liability because the standard of care is fixed objectively (by what we may reasonably expect from a person of normal competence), not

subjectively (by what we may reasonably expect from someone with the defendant's particular capacities). Negligence law is prepared to hold Menlove responsible for the destruction of Vaughan's property even though he may have lacked the cognitive capacity to appreciate the dangerousness of his own conduct. Morally, if we accept Menlove's account of his own limited capacities, we may wish to excuse him for stacking his hay in an objectively unreasonable way. Legally, we are wholly prepared to hold Menlove "outcome responsible" for the harm that he has done. Negligence law holds Menlove accountable *just because the harm that he did was done by him and his conduct was objectively unreasonable*. It doesn't care if he lacked the mental capacity necessary to appreciate the objective unreasonableness of his conduct; his moral culpability is not tort law's concern.

The lesson of Scanlon and Watson's work is that this kind "attributive responsibility" is a fundamental and defensible form of moral responsibility. Our moral judgments, attitudes and practices commit us to evaluating people in important part on the basis of the outcomes legitimately attributed to them.[6] Morally speaking, attributive responsibility is a precondition of substantive responsibility. People can be held substantively responsible only for actions that are properly attributed to them. If I kick you in the face because my evil colleague surprised me by hitting me with a rubber mallet, causing an involuntary muscle contraction, I am not attributively responsible for harming you. If, on the other hand, I kick you playfully in the shin as class is called to order, I am attributively responsible for the harm you suffer. When that harm turns out to be your leg falling off two days later, just how blameworthy I am is a matter of debate. Tort law often strikes moral philosophers as an odd duck precisely because a defendant's attributive responsibility for a bad outcome is typically taken to settle the question of the defendant's substantive responsibility for that outcome. Blameworthiness matters in criminal law and to punishment, but not in tort and to liability. Negligence is concerned with fault as defective conduct, not with fault as moral culpability. Attributive responsibility dominates substantive responsibility.

Corporate Responsibility and Tort

The tort norms governing the liability of organizations in tort are very much about the attribution of bad outcomes to actors. The heart of vicarious liability doctrine, for example, is the set of rules for attributing the torts of agents to the principals who employ them. Defect rules lie at the heart of product liability law, and they settle which product-related harms will be attributed to the firms responsible for manufacturing and marketing the products in question. Attributive responsibility is thus fundamental to corporate liability in tort. By bringing Scanlon's and Watson's important work on attributive responsibility into the conversation, Ewing makes the point that the attribution of an outcome to an agent is itself often a judgment that the agent is responsible for the outcome.

Simply reminding us that attributive responsibility is genuine responsibility is not enough, however. It is one thing to show that attributive responsibility for an outcome is an important form of moral responsibility; it's quite another to show that the agent to whom the responsibility is imputed is a moral agent. For perfectly good reason, we attribute many harms to natural forces. Earthquakes, fires, floods, and other natural disasters wreak havoc with people's lives. When we attribute harms to natural forces, however, we are asserting these harms do *not* have responsible causes. In morality and in law, an "act of God" negates human responsibility. Mother Nature is not accountable. Artificial persons such as corporations are neither forces of nature nor natural persons. We can manipulate them in pursuit of our ends—as economic theories attempt to do when they shape liability rules to give firms appropriate incentives to minimize the combined costs of accidents and their prevention—but it is not clear that they count as moral agents to whom intrinsic principles of accountability apply.

To meet this challenge, Ewing turns to recent works by Philip Pettit and Christian List. (P. 20 n.1 (citing, e.g., Christian List & Philip Pettit, **Group Agency: The Possibility, Design, and Status of Corporate Agents** (2011).) Pettit and List argue that organizations commonly develop forms of collective rationality that are partially autonomous from the persons who people and constitute them. Even an institution as simple as a multi-member judicial panel issues decisions that no single judge necessarily endorses as his or her own. The decision may be endorsed only by the collectivity—only by the panel. Both because individual persons tend to disagree with one another and because institutions are charged with specialized responsibilities, institutions tend to develop forms of practical rationality that

characterize the institutions as such. Absent perfect and persistent consensus, institutions adopt and act upon decisions, policies, and norms that are distinctively the institutions'. Over time, and often by explicit design, collective decision accretes into what Pettit calls "programs." For instance, corporations devise divisions of labor and put in place job responsibilities, protocols, and procedures in order to manufacture and market products, and then see to it that these cohere to actually do so.

Petit and List's account shows that and why many outcomes may properly be attributed to corporations. That attribution is an attribution of moral responsibility because the entities to which it is attributed exhibit the practical rationality essential to agency and responsibility. Or so Ewing argues.

The Substance of Tort Law

The Structure of Tort Law, Revisited does a remarkable amount in a relatively short space. Tantalizingly, the paper stops at the doorstep of legal conceptions. Readers are left wondering whether and how far the conception of group responsibility deployed by Ewing can be mapped onto the legal conceptions that inform corporate tort liability. Product liability law, for example, relies explicitly on a mix of instrumental policies (deterrence and loss-spreading) and what the philosopher Joel Feinberg called "the benefit principle [of commutative justice] that accidental losses should be borne according to the degree to which people benefit from an enterprise or form of activity."[7] People have a prima facie responsibility to shoulder the harms that are a price of the benefits they are voluntarily reaping. Therefore, those who benefit from the imposition of product-related risks should shoulder responsibility for product-related harms. This principle takes the corporate form to be a vessel through which the responsibilities of natural persons flow. Employees, shareholders, suppliers, and consumers are responsible because they must take the bitter with the sweet. Ewing's arguments, I think, are wholly compatible with this principle of commutative justice, because Ewing's arguments bear on the attribution of harm in the first instance. But one wants to hear Ewing's thoughts on just how his account of group responsibility relates to the grounds that tort law itself gives for imposing corporate liability.

On their face, ideas of corporate control in vicarious liability law resonate more directly with Pettit and List's ideas. Scope of employment in vicarious liability law lends itself to explication in terms of "outcomes" that employers "program for" by virtue of the ways in which employers allocate authority and articulate job responsibilities. Can the idea of programming for outcomes illuminate ongoing debates about the scope of vicarious liability for such wrongs as sexual harassment, battery, and abuse? Institutional positions often enable the commission of such wrongs. Does that count as programming for them? If not, what more might be needed?

Still, it would be more than uncharitable to fault *The Structure of Tort Law, Revisited* for failing to delve deeper into the details of doctrines and cases. The paper's project is to show that instrumental manipulation is not the only possibility when corporate wrongdoing is at issue. It succeeds admirably in building a sophisticated and compelling case that corporations are, in fact, strong candidates for the form of responsibility most characteristic of tort liability in general. This paper's end point is a fruitful starting point for both Professor Ewing and the rest of us.

1. Ernest J. Weinrib, **The Idea of Private Law** 56 (1995). [?]
2. *Id.* at 78. [?]
3. *Id.* at 71. [?]
4. Strangely, attributive responsibility can strike us as simultaneously too weak and too strong. A sports example may be illustrative. In 2011, Roger Federer and Novak Djokovic played an epic semifinal match at the U.S. Open. Federer was serving for the match in the fifth set and hit an unexceptional first serve. Djokovic, who had decided to go for a "Hail Mary" return even before Federer served, returned Federer's serve with an unreturnable shot that seemed sure to fly out but, implausibly, landed just on the baseline. He went on to win the match. Afterwards, Federer was uncharacteristically unsportsmanlike. He made it clear that he had contempt for Djokovic for playing so recklessly on such a big point. Grownups didn't play that way. Others celebrated Djokovic's gutsiness. On the one hand, it seems clear that the return had to be *attributed* to

Djokovic. On the other hand, it seems clear that reasonable people can disagree profoundly over whether Djokovic was "really responsible" for the return or "absurdly lucky," and whether the return reflected brilliantly or badly on him. In tennis, Djokovic gets the credit and the win. In morality, he may deserve blame. [?]
5. *Vaughan v. Menlove*, (1837) 3 Bing. N.C. 467 (Ct. Common Pleas). [?]
6. Ewing also develops the point that "attributive responsibility" connects to the important idea of "outcome responsibility" articulated by Tony Honorè and further developed by Stephen Perry and John Gardner. [?]
7. Joel Feinberg, *Sua Culpa*, **Doing and Deserving**, 221 n.21 (1970). [?]

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