Justifying Liability without Proof of Causation

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Date : May 11, 2018

Emmanuel Voyiakis, *Causation and Opportunity in Tort*, 38 **Oxford J. Legal Stud.** 26 (2018).

In 'Causation and Opportunity in Tort', Emmanuel Voyiakis offers a thought-provoking analysis of some of the field's classic causation problems. His focus is upon situations where the crux of the causal difficulty is epistemic – for some reason or other, we don't have enough evidence to attribute causality of a particular claimant's damage to a particular defendant's conduct according to the civil standard of proof.

To understand Voyiakis' approach, it'll be useful to consider his analysis of a case and contrast it with that of some other prominent theoretical frameworks. Consider, then, the decision of the House of Lords in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32. In *Fairchild*, D1, D2, D3, C's employers, each successively, but independently, expose C negligently to asbestos dust. C contracts mesothelioma, an asbestos-induced cancer, but cannot prove on the balance of probabilities (more likely than not) which of D1, D2, D3 (or which combination) was a cause of C's cancer. Scientific understanding of the aetiology of mesothelioma does not allow us to say whose exposure causally contributed to the mesothelioma. Applying the orthodox balance of probabilities approach, C will be unable to establish liability against any defendant, the probability of causation against each being only 1/3.[1] The House of Lords, nonetheless, held each defendant liable in full.

The finding of liability in a case like *Fairchild* is not terribly difficult for those who believe that it is morally permissible to use tort law to achieve optimal deterrence. In situations where defendants can predict that claimants will be unable to attribute causation to defendants' careless conduct, as in *Fairchild*, without the potential for liability, defendants would have no tort-law-given self-interested incentive to take reasonable care. For the optimal deterrence theorist, the question is then largely a technical one as to whether incentives to take proper care in situations of predictable causal uncertainty are best restored through a reversal of the burden of proof, liability in proportion to the probability of causation, or a liability rule based simply upon wrongful increase in risk.

But those who are not hard-nosed consequentialists tend to find these cases difficult. The reason is simple: the dominant non-consequentialist approach to tort liability insists that a defendant's liability to compensate is grounded in that defendant's violation of the claimant's rights. On the facts of *Fairchild*, the claimant was unable to establish against any particular defendant that that defendant violated his rights (or at least, not his right not to be negligently *harmed*).

And yet there is a powerful intuition that it would be unjust to reject the claimant's claim for compensation against the defendants entirely in cases like *Fairchild*. Rights-based theorists typically go to some lengths to show that their accounts can deliver such intuitive results in structurally similar cases of causal uncertainty. Thus Ernest Weinrib argues that *Summers v Tice*, 33 Cal 2d 80 (1948), where two negligent hunters fired simultaneously in the direction of the plaintiff, one bullet causing his primary injury, is correctly decided as a matter of corrective justice. By preventing the claim being established against the other defendant each defendant wrongfully injured either the plaintiff's bodily integrity, or the plaintiff's remedial right to his bodily integrity. ,. Therefore, both defendants wrongfully violated the plaintiff's right to bodily integrity.[2] This approach depends upon a controversial assimilation

of the right to bodily integrity and the remedial right to compensation for invasion of that right.

Voyiakis is neither a hard-nosed consequentialist nor a hard-nosed rights theorist. Drawing on the work of HLA Hart and TM Scanlon, Voyiakis suggests that the central justificatory question for the imposition of a burden, tort liability included, is whether the burden flows from: 'a principle that … allows those persons [subject to the burden] the opportunity to affect how things will go through their choices, and that opportunity is something that those persons have reason to value' (P.31). For example, it may sometimes be justifiable for a person to bear a harm without compensation if they were provided with a perfectly adequate warning which gave them a valuable opportunity to avoid incurring the harm. He dubs this the 'value-of-choice' account. This idea, Voyiakis argues, explains the general rule that the burden of proof on causation is on the claimant: this burden can be justified to the claimant because the burden is contingent on the claimant having access to a valuable opportunity: civil recourse (P.35). By contrast, a general rule that the defendant had the burden of disproving causation would not be a burden that is contingent upon a valuable opportunity for defendants: generally, defendants do not have reason to value a change in the status quo.

Cases like *Fairchild* are 'hard' cases, according to Voyiakis, because the parties do not have reason to value the opportunity to establish the causal truth: the causal truth is impossible to obtain, even on a balance of probabilities. So the imposition of the burden of proof on the claimant in such cases cannot be justified on the ground that it affords the claimant this valuable opportunity: 'A principle that required Fairchild claimants to prove causation on the balance of probabilities would not have put the outcome of the causal enquiry in the claimants' hands in any way' (P.37). The same is true of the defendants: the defendants also have no reason to value the opportunity to establish the causal truth in circumstances where it is impossible to do so.

But Voyiakis argues that the defendant is justifiably liable in *Fairchild* because it has a reason to value the opportunity to produce a situation where causation is impossible to prove. The defendant cannot reasonably object to an adverse finding on the causal issue where this finding is made contingent on the exercise of an opportunity that the defendant had reason to value. The defendant has a reason to value the opportunity to engage in an industry involving the use of asbestos dust, and set the conditions of safety for its employees, including the risks to which they are exposed. By contrast, from the claimant's perspective, it is difficult to see the value in their having the 'opportunity to decide whether or not to be exposed to the risk of harm of unclear aetiology' (P.38). This line of reasoning would also generate liability in *Summers v Tice*, according to Voyiakis, because the members of a hunting party have reason to value how to co-ordinate their hunt, including the type of bullets used. But it would not generate liability in a *Summers v Tice* variant where the shots came from different hunting groups: here the imposition of liability could not justified as contingent upon the exercise of an opportunity to co-ordinate one's conduct with hunt members (say, by using different bullets from each other). Hence, Voyiakis' approach does not generate liability *in every case* where there is causal uncertainty. Indeed a central attraction of his view is that it does not wholly undermine the general rule that claimant bears the burden of proving causation.

I will make three comments. First, it is true that the defendants have reason to value the opportunity to expose their employees to risk and to set the terms of doing so (at least up to a point: defendants also have reason to value reliable authorities setting standards of safety), but do they have reason to value this *because* it creates a situation where causation is impossible to prove (*cf* p.39 where the idea that a person with asbestos expertise has reason to value the opportunity to work in the asbestos industry is rejected on the ground that the person does not value the opportunity *for the reason* that it creates causal uncertainty)? Certainly, defendants have a self-interested reason to value this opportunity where the general burden of proof applies: producing causal uncertainty will get them off the hook from tort liability. But it is not obvious that having this, morally valueless, opportunity to deprive others of the

ability to enforce their rights is something that should play a normative role in determining the burden of proof (except in so far as we accept the deterrence arguments mentioned above).

Second, where the defendant is made liable without proof that they caused the claimant's damage, upon what valuable opportunity is the imposition of this liability contingent? The opportunity to produce a situation of causal uncertainty was only valuable (as a matter of the defendant's self-interest) where the law insists upon the general rule that proof of causation by the claimant is required. If the answer is that the defendant has reason to value the opportunity to engage in activities involving the exposure of employees to asbestos dust, this opportunity cannot be valuable *for the reason* that it allows the defendant to escape liability. The defendant does not escape liability. Perhaps the answer is that the defendant escapes *moral* responsibility for violating the claimant's rights, but Voyiakis doesn't go down this route. Or perhaps the idea that the opportunity must be valuable for the reason it allows the defendant to avoid responsibility should be dropped.

Third, the results reached by Voyiakis' account may not be so different from those reached by Ernest Weinrib's, at least once the latter's analysis is extended. Voyiakis' approach would find that the defendant is not liable in a hypothetical case where the employer provided employees with cheap and easy-to-use devices which detect when the employee was exposed to a risk of contracting cancer. In such circumstances, the absence of liability can be justified to the employee because he or she was provided with a valuable opportunity to provide causal proof. Here, by contrast, Weinrib could appeal to the idea that the invasion of the claimant's remedial right, in such circumstances, is wholly the claimant's own fault. On normal principles, this could lead to a break in the chain of causation between the defendant's breach of duty and the invasion of the claimant's remedial right.

These points notwithstanding, Voyiakis' account seems to register, at a general level, a plausible intuition that rights-based accounts miss: this is the idea that, in distributing a compensatory burden, it is important to consider the value of a person's opportunities to affect the incidence of that burden, even if these do not bear upon whether the person breached a duty. For those who think that the normative basis of liability in tort is not exhausted by rights-based considerations, nor considerations of optimal deterrence, the value of choice account offers an interesting alternative, or supplement, to these views.

1. This is a simplification, since the possibility of cumulative causation increases the probability of causation in relation to each defendant. This was not, however, considered by the House of Lords.
2. See Ernest Weinrib, *Causal Uncertainty*, 36 **Oxford J. Legal Stud.** 135 (2016); see also Allan Beever, **Rediscovering the Law of Negligence** 459-64 (2007); Sandy Steel, *Justifying Exceptions to Proof of Causation in Tort Law*, 78 **Mod. L. Rev.** 729 (2015).

Cite as: Sandy Steel, *Justifying Liability without Proof of Causation*, JOTWELL (May 11, 2018) (reviewing Emmanuel Voyiakis, *Causation and Opportunity in Tort*, 38 **Oxford J. Legal Stud.** 26 (2018)), https://torts.jotwell.com/justifying-liability-without-proof-of-causation/.