

What's Missing in New Zealand?

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David Enoch, [Tort Liability and Taking Responsibility](#) in [Philosophical Foundations of the Law of Torts](#) (John Oberdiek ed., 2014).

"What's missing in New Zealand?" That's the question [David Enoch](#) poses in his thought-provoking essay, *Tort Liability and Taking Responsibility*. As every tort scholar knows, New Zealand has abandoned tort law, at least for injuries caused by accidents. Instead of filing a tort suit, a person injured in an accident files a claim with the Accident Compensation Corporation, which quickly determines whether she suffered a qualifying injury and, if so, provides compensation for it. The money paid out is funded through levies on risk-generating activities. So the New Zealand scheme provides compensation and (at least some) deterrence. It also puts the costs of accidents on the people who risk causing them. And it does all that at a lower cost than maintaining a system of private lawsuits, like tort. That sounds pretty good to Enoch—so good, in fact, that he wonders what is to be said for tort law in face of the New Zealand alternative.

Perhaps there is nothing to be said on behalf of tort. That's what Enoch wants us to ponder. But he offers a tentative suggestion about what's missing in New Zealand, and a rather surprising one at that. "What's missing in New Zealand," he says, "is the tortfeasor taking responsibility for her actions." (P. 252) Now, we should pause here to acknowledge how odd that sounds. Many tortfeasors never take responsibility for their actions; they contest liability to the bitter end. Tort cannot ensure that tortfeasors take responsibility. What it can do, and does do, is assign responsibility, whether or not tortfeasors wish to take it.

So why does Enoch think that tort is way of taking responsibility? The answer lies in his claim that, absent tort law, we are not responsible for the consequences of our actions, or at least, not for those consequences that we did not intend. According to Enoch, "we are responsible for the *risks* we bring about, rather than for their (somewhat random) *realizations*." (P. 253) He declares himself an opponent of moral luck. The consequences of our actions, he suggests, do not matter for moral assessment, at least not when they are beyond our control: "If you and I both create a similar risk (say, by driving), and if your risk results in harm and mine does not, it isn't clear that there is a morally coherent sense in which you're *more* responsible than I am, or—therefore—that it would be appropriate to expect you rather than me to apologize." (P. 254) If this is right, Enoch says, then we have reason to abandon tort law in favor of the New Zealand scheme, which treats those who engage in risk-generating activities equally, without respect to whether the risks they generate are realized in injuries.

But that is not the end of Enoch's story. We may not be responsible for the consequences of our actions, but we can *take* responsibility for things we are not responsible for. When your daughter causes an accident, you may not be responsible for what she did (suppose there is no failure of yours that might have prevented it). But you could—and perhaps should—take responsibility for what she did, by apologizing for it, or offering to fix the damage. Or try this: while driving, you hit a pedestrian, but it's not your fault; you were being careful. You are not responsible for the pedestrian's injuries. But you could—and perhaps should—take responsibility for them, by expressing regret or even apologizing (here, compensation seems out of place if you are really not responsible). Or this: you may not be responsible for your country's military activities (perhaps you have no influence over them, or exercise

your influence to oppose them). But you could—and perhaps should—take responsibility for them, by apologizing for them when they are unwarranted.

The lion's share of Enoch's article is given over to an extensive investigation into what it means to take responsibility and the circumstances in which you ought to do it. These sections are interesting independent of tort law and well worth reading for anyone interested in responsibility. How do they apply to tort? Here, Enoch is (by his own admission) a bit sketchy. The idea runs roughly like this: We are responsible for the risks that we create, not the realizations of those risks. But we can—and perhaps should—take responsibility for those realizations. Why? Enoch offers several suggestions. One echoes Tony Honoré's argument in favor of outcome responsibility. We are happy to claim credit for the consequences of our actions when they turn out well, and we might think that commits us to accepting responsibility when things turn out poorly. Another possibility is that we have reason to see ourselves as creatures with (limited) control over the consequences of our actions, and therefore reasons to take responsibility for them.

If you find either of these ideas attractive, then Enoch suggests that you could see tort "as an institutionalized way of taking responsibility." (P. 268) Following on the first suggestion, we might think that each of us is already committed to taking responsibility for the consequences of our actions, on account of the fact that we tend to take credit for the fortuitous ones. Tort law is a way of making sure we take the bad with the good. Alternatively, Enoch suggests, tort law might reflect a collective act of taking responsibility. By maintaining an institution of tort law, we collectively commit to taking responsibility for the realizations of the risks we create. Tort law, on this picture, assigns reluctant defendants the responsibility we have collectively decided that they should take.

The last suggestion sits a bit uncomfortably with Enoch's earlier assertion (in discussing the responsibility one has for the actions of one's country) that he is an individualist about responsibility. (P. 255) If I am not responsible for what others do, it is not obvious that others can take responsibility on my behalf. But maybe there is a story to tell there. More worrisome, I think, is Enoch's exclusive focus on the people who create risks, to the exclusion of the people who suffer the consequences of them, and the relationship between them. Absent from Enoch's account is any suggestion that tortfeasors owe duties to the people they might injure, and that cuts him off from the possibility that liability is a response to the breach of a duty, for which a tortfeasor is properly held responsible.

Here is what I think is missing in New Zealand: an opportunity for the victims of wrongs to vindicate their rights by, among other things, holding the people who hurt them responsible for their injuries. In a negligence suit, for example, the plaintiff complains that she was injured by the defendant's failure to take ordinary care for her safety. If she is right, then we assign responsibility for the plaintiff's injuries to the defendant. Enoch finds this perplexing; lots of people might have failed to take ordinary care for the plaintiff's safety. Why limit our gaze to the person who injured her? The answer, I think, is that the risk that is realized in an injury leaves a mark—in some cases, quite literally. It becomes part of the story of our lives, in ways that require response more so than risks unrealized do. And the response required is not just repair, but rather recognition of the wrong. *That* is what is missing in New Zealand—an acknowledgment of the wrong from which the plaintiff's injuries resulted.

This is sketchy, even more so than Enoch's suggestion. (Stay tuned to SSRN this summer if you want to hear more; I'll post an essay on the expressive significance of tort liability, which develops these ideas in more detail.) And, it leaves open the question whether what New Zealand is missing is important enough to soldier on with tort. But Enoch is right to press those who would defend tort law to say just what it is New Zealand is missing. And he offers a provocative suggestion, showing that even those who (unlike me) are inclined to reject the idea that we are responsible for the consequences of our actions might nevertheless have reasons to support an institution that assigns responsibility for them.

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