Why Reparation?

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Date : September 5, 2019

Sandy Steel, C*ompensation and Continuity*, **Oxford Legal Studies Research Paper** (July 20, 2019), available at SSRN.

"Wrongdoers may incur duties to compensate the victims of their wrongs." This, the opening sentence of Sandy Steel's *Compensation and Continuity*, sounds like a truism. Who would deny it? It's hard to imagine the defendant in a normal tort lawsuit conceding liability but insisting that her concession in no way implied responsibility for repairing that wrongfully inflicted harm. In tort law, the obligation to repair harm tortiously inflicted seems to tumble out of the breach of the primary duty to avoid tortiously wronging someone. Moreover, the continuity here seems both reasonable and rooted in basic morality.

Suppose I am cycling past a grove of peach trees. I stop, sample a peach, and decide to fill my pockets and bag with as many peaches as I can. I take them home and make peach pies out of them. Unsurprisingly, it turns out that the peaches weren't just there for the taking. They were the property of a farmer who was growing them for sale. After reviewing her security tapes and deploying face recognition technology, the farmer shows up at my door demanding compensation. Surely, her demand is justified. I was wrong to have taken the peaches. I committed the tort of conversion, even if my assumption that the peaches were just there for the taking was an innocent mistake. Having baked the peaches into pies I am now unable to return them. So I must compensate the farmer for the peaches. This is what Aristotle called corrective justice and what John Locke called the obligation of reparation. [1] The obligation of reparation seems to be a basic principle of morality, picked up in the law of torts.

Professor Steele's paper investigates whether the fundamental logic of reparation is persuasively explained by what the late John Gardner called the "continuity thesis". That thesis explains remedial responsibility to repair in the following way. Failure to perform a primary obligation—to, say, exercise reasonable care to protect the plaintiff from avoidable harm—leaves that primary obligation undischarged. Yet, when that failure leads to avoidable, negligent harm, it also prevents "first-best" conformity with that obligation. It is no longer possible to exercise reasonable care and avoid harming the plaintiff. That impossibility does not, however, extinguish the defendant's obligation to the plaintiff *tout court*. Instead, it requires the defendant to do the "next-best" thing and repair the harm that it should have avoided in the first place. That remedial obligation is the rational residue of the undischarged primary obligation. Factually, matters have changed. It is no longer possible to exercise reasonable care and avoid harming the plaintiff. This factual impossibility is not the end of the normative obligation, however. The defendant's breach of her primary obligation does not *discharge* that obligation. On the contrary, the failure to perform the obligation leaves it unsatisfied. Indeed, a special responsibility tumbles out of that breach. The defendant's failure to perform her obligation makes her uniquely responsible for repair the harm that she has wrongly done.The fact that the obligation has been breached is the reason why the defendant must now do what she can to repair the harm that she has wrongly inflicted. As Steele puts it, "[i]f an agent fails to conform to a reason, and that reason persists, the person has a reason to come as close to conformity to the reason as possible." (P. 4.)

The thought that the normative continuity coupled with factual impossibility explains and justifies reparation in tort (and elsewhere) is intuitively attractive but it presents its own puzzles. For one thing, although it is true that *breaching an obligation is not a way of discharging* that obligation it does not follow that an undischarged obligation must continue to constrain the person who breached it in some legally enforceable way, as scholars like Arthur Ripstein are plausibly read to assert. Breach of an obligation might extinguish that obligation without discharging it; breach might simply make it impossible to perform the obligation. In fact, we know that some primary obligations in tort do not survive their

breach. In the nineteenth century, tort law did not recognize *any* recovery for wrongful death. Even now, the vast majority of jurisdictions do not attempt to award damages for the value to the victim of the life the victim has lost. In the circumstance where the primary obligation to exercise reasonable care to avoid inflicting harm on the plaintiff is breached and the ensuing harm is death, the law of torts effectively concludes that the failure to discharge a primary obligation brings that obligation to an end. Why should we think that other cases are different? Why should we think that the primary obligation persists when an arm, or a leg, or a table, or a chair is destroyed? As Steele says, "there is no duty not to kill the killed, to keep in confidence information that is no longer confidential, [and] there is no duty not to damage an irreparably damaged arm (in the precise respect in which it was irreparably damaged)." (P. 4.)

For another, upon reflection, there are salient respects in which the obligation of reparation in tort seems to rest on reasons that *arise from* the failure to comply with the primary obligation. These reasons do not exist prior to the breach of the primary obligation and are not continuous with the reasons which justify the primary obligation in any obvious way. For example, it seems that obligations of reparation grounded on breach of primary obligations to, say, exercise reasonable care are grounded in new reasons created by the breach. It is the defendant's failure to discharge the primary duty of care which, along with various facts such as causation of harm to the plaintiff, subjects the defendant to an obligation of reparation. Breach of the duty makes the defendant responsible for the plaintiff's harm and it is that responsibility which explains and justifies the defendant's obligation of reparation. The tortious wrongdoer singles herself out as uniquely responsible for repairing the harm to the victim because she is uniquely responsible for wrongly inflicting that harm. The wrong, not the original duty, is the ground of responsibility. When, for example, I appropriate the farmer's peaches without her permission, through that wrongdoing I bring unique responsibilities upon myself. Everyone in the world was under an obligation not to take the peaches, but only I breached that obligation. By doing so, I subjected myself to a special obligation of reparation owed specifically to the farmer.

Third, it is unclear how to characterize the normativity that "continues". The existence of multiple "continuity theses" evidences the problem. Some scholars assert that continuity of *reasons* is the key (e.g., John Gardner); other scholars insist that continuity of *duty* is (e.g., Ernest Weinrib); and still others cast their lot with continuity of *right* (e.g., Arthur Ripstein). To an outsider, all of this can look like the proliferation of distinctions without differences or, worse, a circumstance where we don't even know what would make one of these competing versions of the continuity thesis more illuminating than the others, much less which formulation of the thesis is better. Is it, for example, an objection to "duty continuity" that the specific duty not to carelessly break someone's arm cannot be conformed to once the arm has been carelessly broken? Or does that just show that we must conceive of the relevant continuing duty more abstractly? Perhaps the relevant duty is not a duty to avoid breaking the victim's arm carelessly but "a 'duty to respect the victim's right to the physical integrity of their person.'" When we move to a higher level of abstraction it is unclear why that highly abstract duty calls for the particular action of reparation by the defendant. In some contexts, respecting a person's right to their body may require recognizing their right to have an abortion. Why does it now call for compensation?

Compensation and Continuity wrestles with these and other questions with subtlety, precision, and insight. It's a rich and clear paper which advances our understanding it at least three important ways. First, the paper clarifies respects in which claims of reasons continuity, rights continuity, and duty continuity are saying the same thing and respects in which they are disagreeing. Second, the paper argues persuasively that continuity explains some things about reparation but not everything. Breach of a primary obligation, and the responsibility that it brings upon the breaching party, plays a role in justifying many instances of reparation in tort. Other kinds of reasons may also be relevant. In a case like *Vincent v. Lake Erie*, for instance, reasons relating to the fair allocation or distribution of harm may play a role in explaining the obligation of reparation. Reasons of fair allocation are different from reasons rooted in the commission of a wrong and they may come to bear only after the fact—only when the squall has passed and the loss has landed on the plaintiff. These reasons may interact with reasons rooted in the plaintiff's pre-existing property rights and the continuing respect those rights demand.

Third, and most originally, in an all too modest way, *Compensation and Continuity* advances the hypothesis that the normative notion at the bottom of the "continuity thesis" may be *value*, not reason, duty or right. (Pp. 4, 9, 19-20.) The

same value(s) may ground both a duty of non-interference and a duty of compensation. Steele's arguments here are, in some respects, quite technical. They turn on how we should understand the relations among values, reasons, rights, and duties. But they are also intuitively attractive and restore direction to a debate which was in danger of becoming aimless. For example: the value of individual autonomy might ground the right not to be battered (and the correlative duty not to batter) and *also* the duty of reparation that a batterer has. Unrepaired physical harm impairs autonomy. Its repair is necessary to restore autonomy. The right not to be battered differs from the right to reparation; they impose different constraints. But the same value underpins them.

Among other things, this line of argument provides a satisfying explanation of why it is that the breach of a primary obligation sometimes ends all relevant obligation and why it sometimes does not. In some cases—when the plaintiff is killed, for instance—there may no way of continuing to serve the value that justified the prohibition on her killing. In other cases—when a table is totally demolished, say—it may still be possible to serve the relevant values by making compensation to the owner of the table sufficient to replace the value destroyed.

There is a still more general lesson, too. Primary and secondary obligations in tort (and elsewhere) form a unity and it pays to put that unity front and center in our thinking about the subject. There are much worse questions to ask than "what value is the law of torts serving here?" Indeed, few, if any, questions are better.

1. Aristotle, *Nicomachean Ethics* 85-86 (Roger Crisp ed., Cambridge Univ. Press 2000); John Locke, *Second Treatise on Government* 11 (C.B. Macpherson ed., Hackett 1980 (1690)).

Cite as: Gregory Keating, *Why Reparation?*, JOTWELL (September 5, 2019) (reviewing Sandy Steel, C*ompensation and Continuity*, **Oxford Legal Studies Research Paper** (July 20, 2019), available at SSRN), https://torts.jotwell.com/why-reparation/.