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*Risks and Wrongs' Account of Corrective Justice in Tort Law:
Too much or Too Little?*

ABSTRACT

In this paper I make two sets of comments about Coleman's analysis of tort law in *Risks and Wrongs*. First, I highlight the limited role of corrective justice (CJ) in explaining tort liability and the role of other considerations. Here my account is partially compatible with Coleman's. At times it develops existing themes; at other times it completes his account by referring to issues neglected in Coleman's analysis; yet at other times it criticises several aspects of Coleman's account. In particular I examine Coleman's treatment of distributive justice (DJ) constraints on the operation of CJ, his unjustified exclusion of egalitarian considerations in determining the scope of liability, the relevance of DJ in determining the content of CJ duties to repair, and a potential overlap between the goals of deterrence and CJ. I also critically examine his view about the issue of institutional competence and his account of products liability. My second set of comments refers to Coleman's analytical account of what CJ is – what liability is explicable as a matter of CJ and what is not. I have several queries about the usefulness and cogency of important parts of this account including the distinction between wrongs and wrongful gains, the relationship between wrongdoing, wrongs and liability rules, and Coleman's account of wrongdoing which is, at the same time, too wide and too narrow.

KEYWORDS

tort law, corrective justice, egalitarianism, institutional competence, wrongful gains and wrongful losses.

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1. *The role of non Corrective Justice considerations in tort law* –
1.1. *Distributive Justice constraints on the operation of Corrective
Justice* – 1.2. *The legitimacy of egalitarian considerations in deter-
mining the scope of tort liability* – 1.3. *Relevance of Distributive
Justice in determining the content of Corrective Justice duties to re-
pair* – 1.4. *Deterrence and Corrective Justice partial overlap?* – 1.5.
Institutional competence – 1.6. *Problems with Coleman's account of
products liability* – 2. *The Scope of Corrective Justice* – 2.1.
Wrongly excluded? Wrongs and wrongful gain – 2.2. *Useful distinc-
tions? Wrongdoing, wrongs and liability rules* – 2.3. *Coleman's ac-
count of wrongdoing – too wide and too narrow?*

Of the three parts of Coleman's thought-provoking *Risks and Wrongs (R&W)* I will focus on Part III and his account of tort law. As I understand it, Coleman's main two contributions in that Part are clarifying the relatively limited role of Corrective Justice (CJ) in determining the scope of tort liability and offering an account of the scope of CJ, namely, identifying instances in which compensation in tort is matter of CJ and instances in which it is not. Less importantly, there are also some

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normative suggestions (at times implicit) about the proper scope of tort liability. This distinction between the analytical and the normative – which seems to be important to Coleman himself – should rightly be borne in mind; if one agrees about the proper scope of tort liability, the classification of whether such liability (or its absence) is consistent with CJ or not is less crucial. For a legal realist, the important question is whether liability should be imposed or not; of much less importance is the question whether the result could be explained as consistent with CJ. Only a formalist who is also a CJ monist would first come up with a theory of CJ and then argue that results inconsistent with what is demanded by CJ are mistaken. In this sense, Coleman's «reluctance to treat departures from corrective justice as mistakes»¹ is important, and indeed a virtue.

I have stakes in this debate since I have previously argued that tort law is not just about corrective justice; more specifically I have argued that tort law could and should take into account distributive considerations and in particular the effects of imposing (or abstaining from imposing) tort liability in terms of increasing or decreasing inequality in society². As Steve Hedley has recently observed, most scholars engaging in instrumentalist accounts of tort and other areas of private law do not dispute the centrality of corrective justice to private law; what we do oppose is a hard-nosed flippant obliteration of other considerations³. Despite my

¹ COLEMAN 1992, 434-435.

² KEREN-PAZ 2007.

³ HEDLEY 2009 («indeed, much “externalist” writing goes little beyond the demand that internalism should be tempered with the occasional reference to the real world, or that the role of external preferences when choosing between internal theories should be more openly acknowledged»).

critique of several important aspects of Coleman's thesis in *R&W* I am much more comfortable with his account of CJ's role in tort law than I am with that of CJ monists such as Ernest Weinrib⁴, Robert Stevens⁵ and Allan Beever⁶. Similarly, I happily share Coleman's view that efficiency considerations should not (and do not) solely determine the scope of tort liability.

In what follows I will make two sets of comments. First, about the limited role of CJ in explaining tort liability and the role of other considerations. Here my account is partially compatible with Coleman's. At times it develops existing themes; at other times it completes his account by referring to issues neglected in Coleman's analysis; yet at other times it criticises several aspects of Coleman's account. My second set of comments refers to Coleman's analytical account of what CJ is – what liability is explicable as a matter of CJ and what is not. I have several queries about the usefulness and cogency of important parts of this account.

1. *The role of non Corrective Justice considerations in tort law:*

1.1. *Distributive Justice constraints on the operation of Corrective Justice*

Coleman correctly observes that if the underlying distribution is so unjust CJ cannot provide a moral reason to restore the interrupted status quo⁷; the corollary seems to be that

⁴ WEINRIB 1995.

⁵ STEVENS 2007.

⁶ BEEVER 2007.

⁷ COLEMAN 1992, 351.

underlying distributions which pass this threshold should trigger the operation of corrective justice even though they are not ideal⁸. Coleman's allowance of situations under which repair is not required as a matter of CJ is important; and yet I find his account deficient in several ways.

First, it assumes that distributive justice (DJ) could work only as a veto – to block the claim of a claimant who has undeserved riches against otherwise wrongful loss inflicted by the defendant. This overlooks the possible role of DJ in justifying liability to an extent exceeding what could be justified by CJ. Indeed, I have previously argued that due to tort law's bipolar structure it is easier to justify pro "haves-not" distributive approach than anti "haves" approach. The former will more reliably result with second-best distribution closer to the ideal distribution⁹.

Second, Coleman's second justification for applying CJ in a world far removed from the ideal distribution is too vague, or worse, tautological. Coleman has in mind a moral principle that requires protecting certain entitlements in the real world even if those entitlements would not exist under the best theory of DJ¹⁰. But this raises several problems: What is the dividing line between a background distribution that does not meet this moral principle and one that does? Is not the distinction more apparent than real given his conclusion that all distributions under liberal democracies seem to pass the threshold? Finally, the content of that moral principle is not sufficiently well flashed out. It is not entirely clear why the state should use its coercive power to rectify distributions which bring us closer to the ideal distributive scheme. In *Torts, Egalitarianism and Distributive Justice*

⁸ COLEMAN 1992, 353.

⁹ KEREN-PAZ 2007, 39.

¹⁰ COLEMAN 1992, 352.

(*TEDJ*) I argue that the arguments made in support of such a moral principle (summarised in the institutional competence section below) fail to convince that a partial redistribution in the correct direction is less just than retaining the status quo through a CJ duty to repair¹¹.

1.2. *The legitimacy of egalitarian considerations in determining the scope of tort liability*

Coleman is not sufficiently clear whether tort liability which is based on egalitarian considerations, rather than on CJ is defensible or not. At some places he argues that there is nothing wrong with liability which is not called for by CJ (as long it is not inconsistent with it)¹²; at other places he utters an agnostic view about non CJ considerations whose legitimacy depends on a theory of institutional competence which he does not provide¹³; yet at one place¹⁴ he suggests that imposing liability on a defendant who is neither responsible for wrongful loss nor cheaper cost avoider or good loss spreader would be inconsistent with CJ since it would impose wrongful loss on the defendant. If indeed this is Coleman's view, he seems to exclude from the domain of legitimate distributive considerations egalitarian ones (unless one interprets loss spreading and cost avoidance in an artificially expansive way). No reason is provided why instrumental considerations such as loss spreading and efficiency are legitimate, but egalitarian considerations are not. While efficiency zealots, similar to

¹¹ KEREN-PAZ 2007, ch. 3.

¹² COLEMAN 1992, 392.

¹³ COLEMAN 1992, 201-11, 435.

¹⁴ COLEMAN 1992, 394.

CJ purists, have a monist understanding of tort law which in their case views efficiency as the only legitimate goal tort law should advance, Coleman makes clear in his book that he dissociates from such a view. The implicit relegation of egalitarian considerations then calls for explanation, especially since Coleman does not provide any account of institutional competence that could justify this distinction. As I clarify immediately below, part of my point is that egalitarian (and other) distributive considerations are relevant for both deciding whether the loss is wrongful or not, and whether it is justified to impose liability in tort, despite the fact that the loss is not wrongful.

1.3. Relevance of Distributive Justice in determining the content of Corrective Justice duties to repair

Coleman's account implicitly views the relevance of DJ as external to the demands of CJ. Possibly, for him, tort liability could be justified by DJ despite the fact it is not required by CJ or alternatively, liability which is required according to CJ could be not imposed due to the demands of DJ. This traditional account overlooks the interaction between DJ and CJ. Distributive considerations can affect the determination whether the loss inflicted is wrongful, and possibly whether it is the defendant's responsibility. In *TEDJ*, I have argued that determinations of negligence (wrongdoing, in Coleman's lingo) should be made based on the actual defendant and foreseeable victim's holdings. The reason is not one of excuse (namely, the defendant is negligent but since he is poor he should be excused from liability). Rather, the poor defendant is justified in taking less precaution (even if sub-optimal) since the moral case for viewing the omission as faulty depends on the effective burden befalling on the parties from bearing the costs of precaution or the accident loss,

and these, in most cases would be wealth-dependent¹⁵. This important distinction might be compatible with Coleman's distinction between the syntax and meaning of rights (although Coleman believes that liability for wrongdoing is not based on the infringement of rights) – presumably, the structure of CJ is oblivious to distributive considerations but its meaning needs not to. Whether or not Coleman indeed would endorse such a connection between DJ and CJ is unclear, but any account of the role of DJ in justifying (and explaining) the scope of tort liability which ignores the interaction between DJ and CJ is deficient.

1.4. *Deterrence and Corrective Justice partial overlap?*

Similar analysis, yet more tentative, could be offered with respect to the way in which efficiency interacts with CJ. Coleman alludes to this connection in his distinction between the meaning of and grounds for fault liability: it might be that the meaning of being faulty is acting inefficiently (a proposition I oppose)¹⁶ but the ground for repair is the moral demand of CJ¹⁷. Similarly, Coleman's analysis of *Ybarra v Spangard*¹⁸ is that the incentive to reveal information will increase the chance that liability in this and similar cases will ultimately be imposed on those who

¹⁵ KEREN-PAZ 2007, 91-103.

¹⁶ Courts should (and largely do) make negligence determinations based on cost benefit analysis. However, by taking into account the social value of the interests involved, such calculus diverges from the requirements of efficiency. See KEREN-PAZ 2007, 125-29; *Tomlinson v Congleton* BC [2003] UKHL 47 [34]-[37].

¹⁷ COLEMAN 1992, 239.

¹⁸ 154 P 2d 687 (Cal 1944).

ought to compensate the victim according to CJ¹⁹.

But the connection between deterrence and CJ might go deeper than this. The tentative argument I am going to offer is one that is generally overlooked. If correct, it might align the demands of CJ with that of deterrence in a much tighter way than is admitted by CJ monists. The idea is that deterrence prevents future violations of rights which ought to be repaired as a matter of CJ. Arguably, it is mistaken to look at deterrence as reflecting merely a commitment to wealth maximisation. The deterrence created by the law of battery and negligence is desirable not because aggregate wealth will be increased, but since the rights of several potential victims to bodily integrity and to their property will not be wrongfully infringed, so reparation is unnecessary.

If we view tort law as an institution designed to protect certain rights, surely a state of affairs under which rights are respected, rather than infringed but repaired is superior to a state of affairs involving infringement and repair. This conclusion is bolstered when one realises that the ideal of full compensation is unrealisable at least in cases involving serious personal injury, damage to property which is not fungible and dignitary interests – namely the core of tort law.

But even if one stubbornly refuses to concede the point that no violation is superior to violation and repair, surely an approach which reduces the future number of infringements which call for duty to repair cannot be considered as inconsistent with the moral requirement to affect CJ when rights are breached. CJ monists take joy in explaining to anyone willing to listen that the real reason for a duty to compensate me if I was punched on my nose is that I suffered a wrong and not because the impo-

¹⁹ COLEMAN 1992, 395-396.

sition of liability would deter other people from punching potential victims on the nose. But this is a false dichotomy since liability in the above example is supported by both considerations and since imposing liability today will prevent future rights' violation which requires repair as a matter of CJ.

The interesting question that both CJ and efficiency purists have to answer is this. If it could be proven that for some bizarre reason the imposition of liability will increase the chances that the defendant (or other potential tortfeasors) would punch people on their noses would it still be required (or even justified) morally to impose liability? I am not sure that the answer is positive. After all, why the right of today's claimant not be punched in the face – which underlines the duty to repair – should count more than potential victims' right not to be punched, and under the assumption that the latter right will be violated to a greater extent if we impose liability today? If this is correct, liability which is based on deterrence considerations is consistent with CJ and advances its attainment since it guards against future violation of rights protected by CJ.

I would not like to overstate this point. The overlap between CJ and deterrence is partial in the sense that deterrence could justify liability which should not be imposed according to certain understandings of CJ. For example, if liability under CJ hinges on the defendant having been at fault, strict liability could be justified from a deterrence (and distributive) perspective²⁰ but not from CJ's. Conversely, a negligent defendant might be under a CJ duty to repair but from a deterrence perspective should not be found liable, if the claimant is still the cheapest cost avoider²¹. It is less

²⁰ CALABRESI and HIRSCHOF 1972.

²¹ Lord Denning's reasoning in *Spartan Steele v Martin* [1973] 1 QB

clear however (and depends on the definition and goals of deterrence) whether the overlap exists when CJ is invoked in cases of strict liability. In the necessity cases we would not like to deter the defendant from using the claimant's property, and liability is not likely to prevent the infringement of the right, but liability could be (and for Coleman is) a matter of CJ.

1.5. *Institutional competence*

Coleman does not profess to provide an institutional competence theory of tort law²². According to Coleman, CJ does not have moral priority over other considerations and therefore the fact that liability imposed by tort law is not mandated by CJ is not for itself a cogent reason against such liability, as long as it does not amount to imposition of wrongful loss which is inconsistent with CJ²³. Ultimately, however, the decision whether tort law should impose liability based on considerations such as efficiency, DJ or inculcating desirable character traits depends on a theory of institutional competence which he does not profess to have or to defend. Implicitly, however, by endorsing a market-enhancing approach to products liability²⁴ and based on his discussion of local fault-based schemes²⁵ and other cases of fault without causation, such as the negligent failure to

27 denying a duty of care in relational economic loss cases could be understood as being partially based on this view.

²² COLEMAN 1992, 435.

²³ COLEMAN 1992, 392-395.

²⁴ COLEMAN 1992, 418-419.

²⁵ COLEMAN 1992, 405.

warn²⁶, Coleman assumes courts' institutional competence with respect to deterrence (and possibly loss spreading).

This raises two issues: one, about tort law's deterrence potential and the other, about tort law's institutional competence with respect to promoting distributive goals. Since neither is directly addressed in *R&W I* will be very brief. It has been noted that tort law's potential to achieve instrumental goals is limited²⁷. This is undoubtedly true. But this does not entail a conclusion that any attempt to promote efficiency or DJ is either futile or illegitimate. Moreover, the ability to promote either or both goals is likely to change with the context, as well as the relative weight that should be given to the different goals in different contexts. In *TEDJ I* I have attempted to show that claims that courts do not have institutional capacity to pursue distributive goals ultimately fail to justify a judicial refusal to engage with distributive considerations while determining the contours of tort liability. All the four main arguments against an attempt to promote DJ through tort law could be understood to reflect institutional competence concerns, although to a different extent. The argument from accountability maintains that such goals are political, as opposed to efficiency determinations or applying CJ, and judges are not accountable; the randomness concern is that an attempt to affect redistribution is unfair since the participation is partial and random; the excessive costs concern is that the attempt to promote DJ costs us too much in terms of achieving other goals; finally, the ineffectiveness concern is that the ability to promote DJ is limited due to structural features of litigation and institutional constraints. But while distributive analysis is often complex, and while in

²⁶ COLEMAN 1992, 387.

²⁷ EPSTEIN 1982.

many instances it might fail to direct the rule-maker towards a concrete recommendation, this is not always the case. When the distributive predictions are rather clear, there is no good reason to ignore them²⁸.

Rather than summarising here the discussion provided in *TEDJ*, I will attempt to give two examples, one from a House of Lords decision which relied in part on notions of DJ and one from my own work. With respect to the former, my point is not to defend the Court's holding, but rather to show that there is no ingrained institutional incompetence that prevents courts from relying on these considerations. Even if a fuller analysis could justify a different result, this does not mean that courts cannot do better (or ought not to try). And of course, if the legitimacy of distributive considerations is more openly embraced, lawyers and courts will develop a better methodology to assess the accuracy of the claims and their normative relevance.

In *McFarlane v. Tayside Health Board*²⁹ the normative reasons against compensating the parents for the financial costs of raising an unwanted child were that of fairness and of socio-economic equality. With respect to the former, since parents (rather than the public health-care system whose negligence resulted in the child's conception) benefit from raising the child, they should also bear the financial costs of raising her³⁰.

²⁸ KEREN-PAZ 2007, ch. 3. Similarly, the ability to discern what is the efficient rule (and the extent to which an attempt to advance efficiency is normatively attractive) changes with the context.

²⁹ [2000] 2 AC 59.

³⁰ The most explicit elaboration of this point was given by Lord Hope *id* at paragraph 97. For the fairness argument see also paragraphs 82, 105, 113 (Lords Steyn, Clyde and Millet). For the equality argument see paragraphs 83 (Lord Steyn), 91 (Lord Hope).

One might argue that such result is also mandated by CJ according to an approach that the defendant should compensate the plaintiff only for the net harm his wrong or wrongdoing caused (a point with respect to which Coleman is silent in his analysis of the car accident which saves the plaintiff from a plane crash³¹. But even if this is true it only goes to show that distributive considerations can sometimes lead to the same conclusion mandated by CJ³². It also goes to support Coleman's distinction between the analytical structure of CJ and the normative reasons to impose liability. The fairness consideration may explain why as a matter of CJ there should be no liability for pecuniary costs of raising an unwanted child.

³¹ COLEMAN 1992, 323.

³² Common wisdom will probably hold that the benefit in the airplane crash hypothesis is too remote to be taken into account. I disagree. While not all benefits should be taken into account, the *Restatement (Second) of Torts* (1965), section 920's criteria for setting off benefits seem to me as justified. These criteria focus on the benefit being unique to the victim, not too remote, and that the benefit conferred will be of the same kind as the interest infringed in order to preserve the plaintiff's autonomy not to be subject to a forced transaction in which one interest is traded with another. Since the benefit of missing the flight is unique to the claimant and the benefit conferred (bodily integrity) is of the same kind of that injured, setting off is warranted (and should result with no liability under the assumption that compensation for death would be higher than damages for the actual injury from the accident). Interestingly, applying the *Restatement's* criteria to wrongful conception cases should lead to the conclusion that the nonpecuniary benefits from raising an unplanned child should not be set off against the pecuniary costs of raising her since the interests are not identical (even ignoring the fact discussed below in the text that the nonpecuniary benefits are partially set off by non-pecuniary harm to the parents' autonomy).

The argument from equality against awarding costs of raising the unwanted child is that since the cost of raising a child is class-dependent, imposing such a duty will have a regressive effect when disproportionate part of compensation paid by the public purse will go to the better-off financially³³. What is missing from the distributive analysis is the truism that that the significant *nonpecuniary* costs of having an unplanned child – including having constant worries about the child’s wellbeing, losing sleep, having less leisure time and lesser ability to pursue one’s career and incurring the burden of educating, guiding and disciplining the child – are (still) borne disproportionately by women. Therefore, failing to compensate for these nonpecuniary losses (which, to be fair, were not asked for by the *MacFarlane* claimants) is problematic on gender equality grounds.

The appropriate scope of liability for nonpecuniary losses from raising an unplanned child is a *normative* question. Possible solutions range from denial of liability, through the award of a meagre conventional award of £15,000³⁴ to full compensation for these burdens (with the possible set-off of nonpecuniary benefits) based on sensitivity to gender equality considerations, or the award of pecuniary costs as admittedly crude but easily calculable proxy to these nonpecuniary costs. Nothing in the structure and procedure of tort law and the nature of adjudication renders judges lacking in capacity to make this normative call (to the same extent that nothing prevents them from relying on fairness and socio-economic equality as reasons to reject the claim for pecuniary costs of raising a child). One should separate the ques-

³³ *MacFarlane* (n14), 83 (Lord Steyn), 91 (Lord Hope).

³⁴ As subsequently decided by the majority of the House in *Rees v Darlington Memorial Hospital* [2003] UKHL 52.

tions whether the result is sound, fair and convincing and whether it is based on illegitimate considerations.

Similarly, I have argued that strict liability of clients who bought sexual services from victims of trafficking is supported by fairness, since the client benefit from the activity which violates the victim's rights, and by equality, since clients of sexual services are heterogenic group from a socio-economic perspective and overwhelmingly men while victims of trafficking are characteristically poor (or very poor) and overwhelmingly women³⁵. Again, one might dispute the normative conclusion that the above pattern justifies strict liability but it is hard to see how these considerations could be considered as illegitimate, irrelevant, or involving empirical questions that courts are incapable of processing.

Similar analysis could be offered with respect to deterrence. In some circumstances the prospect of liability is not likely to deter since the potential tortfeasor is not likely to be aware of the rule, is not likely to bear the costs of liability or is likely to suffer from cognitive biases causing her to dismiss the risk³⁶. For example, we have reasons to doubt whether public officials will be sensitive to the stick of tort liability since the damages are paid from neither their own pocket nor their department's³⁷. But in other circumstances, some potential tortfeasors might be more attuned to tort law's liability stick. For example, a policy analysis of the illegality defence in the context of human trafficking – in which traffickers attempt to deny the victim's claim based on the victim's illegal migration status – will clearly reveal that traffickers are likely to be more informed about the relevant legal rule than

³⁵ KEREN-PAZ and LEVENKRON 2009.

³⁶ For a general critique of tort's deterrence potential see SUGARMAN 1985.

³⁷ See COHEN 1990.

their victims. Since blocking the victim's claim increases the profitability of enslaving victims, deterrence requires that the illegality defence (which is otherwise weak) will be rejected. Moreover, since the limitation of migration purports to protect low paid domestic workers, a policy that effectively makes the employment of an illegal immigrant cheaper to the employer by blocking the illegal employee's claim (regardless of whether the illegal immigrant who is less informed than the employer is forced or not) undermines the policy behind the prohibition³⁸.

1.6. *Problems with Coleman's account of products liability*

For Coleman, products liability is (or should be – the point is not clear) based on markets rather than morals – the former is equated with hypothetical contract paradigm and the latter with CJ for non-consensual harm – since «we can treat product liability law as merely filling in the gaps in contracts between parties who are already in contracting relationship with one another»³⁹. But this explanation proves both too little and too much. It proves too little, since (as Coleman concedes in a footnote) it is inapplicable to injuries of third parties who are not consumers. It is unclear what Coleman suggests in this regard. Should existing (CJ based) rules apply to non-consumers while hypothetical contracts approach to consumers? Is this desirable? Or should the hypothetical contract approach apply to non-consumers? But if so, why should it not be applied in the rest of tort law?

This explanation also proves too much, since injuries occurring in interactions involving pre-existing contractual relation-

³⁸ I provide a fuller analysis of this point in KEREN-PAZ 2013, ch. 3.

³⁹ COLEMAN 1992, 419.

ships exist in other – quite significant – areas of tort law, such as professional negligence and work accidents. Should hypothetical contract be applied in these areas as well? If so, the core of tort law which is Coleman's concern shrinks significantly; if not, why? Moreover, normatively, it is unclear why the fact that the injury happened against a contractual background justifies an application of hypothetical contract (which Coleman identifies with efficiency⁴⁰) when the parties did not in fact allocate the risk? In the typical cases of tort liability within and without the context of product liability, the parties did not reach an agreement on the way to allocate the accidental loss. Why then hypothetical contract or efficiency approach is acceptable in one context but not in the other? More fundamentally, it is not quite clear why CJ's morality has to give way to the market just because a contractual background exists.

Second, it is unclear how Coleman's recipe of founding products' liability on contract and drastically reducing (or eliminating) nonpecuniary damages⁴¹ sits with his analysis of damages in products liability as possibly reflecting wrongful losses⁴². Producers who breach the optimal precaution obligation under the hypothetical contract inflict a wrongful loss for which nonpecuniary damages should be awarded as a matter of CJ. But if the test for products liability should be strict (with contributory negligence as complete defence)⁴³ how would courts decide whether the manufacturer breached the terms of the hypothetical contract? Would not courts have to retain the existing tests for determining design defect which Coleman criticise as inefficient?

Third, the suggestion to revert to a strict liability test for de-

⁴⁰ COLEMAN 1992, 418.

⁴¹ COLEMAN 1992, 424.

⁴² COLEMAN 1992, 427-428.

⁴³ COLEMAN 1992, 423-424.

sign defect is not necessarily entailed by Coleman's underlying concerns and the suggestions to adopt contributory negligence as a full defence and to reduce nonpecuniary damages are normatively contested. A true strict liability which does not include a state of the art defence exposes producers to potentially enormous, uncertain and incalculable liability contrary to Coleman's concern about lack of predictability. Colman's advocacy for inserting contributory negligence as a full defence runs against the modern preference for the fairer partial defence of comparative negligence. Coleman's critique⁴⁴ that under the current negligence-based system «a victim's negligence has the perverse effect of enhancing rather than defeating his case» is unconvincing as well: for purposes of legal causation a foreseeable intervening act (by either the claimant or a third party) would generally not sever the defendant's responsibility while an unforeseeable intervention would⁴⁵. So why should foreseeable contributory negligence block liability in the products liability context? Furthermore, even if consumers' negligence is foreseeable, the manufacturer might still be the cheaper cost avoider, so according to economic analysis (at least *à la* Calabresi on which Coleman's analysis relies) the manufacturer should be liable⁴⁶.

It is also unclear whether the suggestion to reduce nonpecuniary damages is attractive. The distributive aspects of such a suggestion are complex but are entirely absent from Coleman's analysis. On the one hand, caps on nonpecuniary damages are inegalitarian since they harm disproportionately those with no or little earning capacity⁴⁷. On the other hand, since

⁴⁴ COLEMAN 1992, 424.

⁴⁵ *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) section 34 comment e and Reporters Notes to comment b.

⁴⁶ CALABRESI and HIRSCHOF 1972, n10.

⁴⁷ KOENIG and RUSTAD 2001, 114.

price discrimination is impossible, a general reduction of the size of damages awards is progressive since it reduces regressive cross subsidy. It is hard to know which element is more dominant, especially given the US practice to award nonpecuniary damages as a multiplier of the pecuniary losses awarded⁴⁸, exacerbating regressive cross subsidy. It might be then, that from an egalitarian perspective a cap on lost earning capacity, rather than on pecuniary losses is warranted.

Finally, Coleman's double liability proposition under which producers will be liable for nonpecuniary losses but victims will not receive compensation for these losses is a nonstarter. The idea is unattractive also in the absence of a contractual background but is even less attractive in the latter setting. Producers will price the costs of their liability to pay nonpecuniary losses but the amount collected from consumers will not be used to compensate those injured; it is far from sure that a rational consumer would agree to such a bargain. In the absence of contractual background, victims will not receive compensation for nonpecuniary losses but at least will not pay *ex ante* in premiums the cost of such liability⁴⁹. More broadly, whether products liability could be justified by distributive considerations, which could in turn be either grounded in the hypothetical contract or serve as an independent normative ground for tort liability, is an overlooked point in Coleman's analysis. Coleman does refer to loss spreading considerations (although does not exhaust the discussion thereof) but not to fairness and equality. Whether hypothetical contract approach necessitates an assumption of optimal investment in accident costs is also a matter of some dispute. I have in mind Gregory Keating's work on standards of precaution which vary based on the extent to which the

⁴⁸ PRIEST 1987, 1559.

⁴⁹ Cf. COOTER and PORAT 2002.

loss is capable of being spread and whether the injury is permanent and devastating or not⁵⁰. In short, Coleman's analysis fails to convince that products liability stand out as exception to other areas of tort liability.

2. *The Scope of Corrective Justice*

2.1 *Wrongly excluded? Wrongs and wrongful gain*

According to Coleman's mixed conception of CJ, CJ corrects wrongful losses rather than wrongs; Coleman also excludes from the realm of CJ the annulment of wrongful gains. This account raises a number of questions. First, a clearer explanation of what separates wrongful losses from wrongs is required, especially given tort law's distinction between trespass torts which are actionable per se, and actions on the case which require loss as a constitutive element of the cause of action. Surely trespass torts are significant enough to be considered at the core of tort law. Since in trespass liability is established without proof of damage is it not based on CJ? Or is it that Coleman identifies a wrongful loss for purposes of CJ that is not captured as a loss for purposes of the tort itself? This is not clear, and if the latter approach is taken, its cogency is doubtful, especially given the middle ground methodology used with respect to torts.

Second, Coleman's insistence that the annulment of wrongs is a matter of retributive justice rather than CJ is baffling. Punishment does not annul the wrong as between the victim and the tortfeasor and despite the colloquial use of the expression that the offender "has paid his debt to society" by being punished, it is doubtful whether punishment annuls the wrong in

⁵⁰ KEATING 2003, especially 743-46.

the relationship between the offender and society. These are complex issues that are not well treated in R&W. Is the wrong committed by the crime of rape, murder, of robbery being annulled by the offender being punished? And what about civil wrongs with no criminal counterpart – would Coleman deny that there was a wrong or wrongdoing at all? Would he deny that these wrongs are capable of being annulled? Or would he suggest that these wrongs are capable of being annulled but not by CJ (but if criminal law is unavailable and CJ does not annul the wrong what does)? If Coleman answers in the affirmative any of the last three questions what is the basis for such a view? Given Coleman's previous commitment to the annulment theory, his insistence on the centrality of rectifying wrongful losses is understandable, but even if rectification of wrongful losses is indeed an important aspect of CJ, it is not required to argue, as Coleman does, that the annulment of the *wrong* is not *as well* a demand of CJ.

Third, an understanding of CJ as committed to repairing also or only the wrong allows for the position which is supported by the case law that corrective justice restores prior legal *entitlements*, not simply prior *factual positions*. Although the victim «is factually better off at the end of the story than at the beginning, [...] she is no better off than... she was entitled to be at that time»⁵¹. One example would be a line of cases (albeit another line exists) under which courts do not deduct the effect of replacing old parts (subject to wear and tear) with new ones, following an accident caused by the defendant⁵². Another example would be the entitlement of a victim of trafficking to accumulation of tort damages and restitution of profits made at her expense by the trafficker,

⁵¹ BARKER 2004, 100-101.

⁵² *The Gazelle* (1844) 2 W Rob 279; *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*[1970] QB 447 at 476.

even if as a matter of fact, she would not have made the profit from the (forced) prostitution but for the wrong⁵³. Whether Coleman opposes such a view is unclear. In his discussion of the example of the road accident which pre-empts a flight crash he states the obvious, that the purpose of CJ is not to annul all the consequences of the wrong, only the wrongful ones. But from this it does not follow that the gains to the claimant from the wrongful activity (which are to be distinguished from the defendant's wrongful gains) should not be taken into account in deciding the scope of the duty to repair. Whether they should, depends on several considerations including the commitment to preserve the victim's autonomy against being subject to forced transactions.

Fourth, Coleman's relegation of wrongful gains from the realm of CJ to restitutionary justice is contested. This might be merely a matter of terminology but then it might not. Common wisdom which I endorse would view all interactions in the fields of torts, restitution and contracts as principally based on CJ. The content of (and ground for, to use Coleman's lingo) the duty is different, but what unites all instances as reflecting CJ is the understanding that it is something in the interaction between the parties, and usually (but not always)⁵⁴ in the defendant's behaviour that imposes on her an agent-specific reason to correct the matter between the two. For those believing that CJ has significant justificatory power – namely that a claim is much stronger (or could only be justified) if supported by CJ – Coleman's narrow demarcation of the contours of CJ is likely to be especially problematic.

⁵³ KEREN-PAZ 2010, 97-99.

⁵⁴ The classic example is mistaken receipt of money by the defendant who has done nothing, but is still under an obligation to make restitution. Cases of conferral of benefits under some circumstances (such as necessity) are another example to which I will return in the text.

2.2. *Useful distinctions? Wrongdoing, wrongs and liability rules*

Coleman's analytical framework is based on a tripartite classification of the relationship between compensation and justification. In *wrongdoing* the act is unjustified and there is a duty to repair as a matter of CJ even though there is not necessarily an infringement of right⁵⁵. In cases of *wrongs* (such as private necessity) there is an infringement of right which entails a duty to repair in CJ even though the action is justified. In the *third category* there is no infringement of right since the compensation justifies what otherwise would be a wrong. Accordingly, compensation in these cases is not a matter of CJ⁵⁶. Coleman's example of the third category is the performance of a primary contractual obligation (paying for what is ordered in a restaurant) but if I understand his view, compensation for injury from products when optimal care was taken belongs as well to this category.

This account raises several difficulties. First, the borderline between wrongdoing and wrongs is not sufficiently clear; this relates to the distinction between legitimate interests which are recognised as rights and those which are not. Peter Cane has famously observed that the scope of liability in torts is a combination of the claimant's protected interest, the tortfeasor's sanctioned conduct and the remedies for the wrong⁵⁷. When this is borne in mind, one may ask in what sense wrongdoing does not necessarily infringe the claimant's right? Cannot we say that with respect to certain interests the victim has a right that the tortfeasor will not negligently harm these interests? Does Coleman believe that a

⁵⁵ COLEMAN 1992, 291-292.

⁵⁶ COLEMAN 1992, 344.

⁵⁷ CANE 1997.

right could exist only if it is protected by a strict liability rule? Coleman does not suggest any normative or analytical framework to distinguish between legitimate interests and rights. The former are protected merely from wrongdoing (which causes wrongful loss); the latter's infringement, even if justified, is a wrong calling for correction as a matter of CJ. The absence of such framework renders his account of the duty to repair infringements of rights almost tautological. What is a right? – an entitlement protected from justified infringement. What is a wrong? – an action contrary to a right. An explanation that a right is protected by a property rule, which entails a right to exclude would not work either: in private necessity cases there is no right to exclude but according to Coleman's account a right has been infringed.

As necessity cases demonstrate, demarcating the line⁵⁸ between justified infringements which necessitate compensation as a matter of CJ (2nd category) compensation which renders the action justified so that compensation is not a matter of CJ (3rd category) is not particularly helpful either. Consider *Vincent v Lake Erie*⁵⁹. In what sense the liability in *Vincent* does not reflect an entitlement protected *only at times of emergency* by liability rule? Coleman constructs an unstable analytical edifice according to which the dock owner, if present, has the power to exclude the ship captain from being tied to the dock but might be responsible for the consequences of wrongful exclusion. But in what sense does the dock owner have a right to exclude if he is liable for exercising this right?

Moreover, not only such an approach is analytically confused, it is also based on a questionable assumption that such legal power to exclude exists under the circumstances. Had it

⁵⁸ COLEMAN 1992, 291.

⁵⁹ 124 N.W. 221 (Minn. 1910).

been possible to contact a judge for an injunction, surely the dock owner would fail to receive an injunction prohibiting the defendant from remaining moored to the dock. And under slightly different facts, had the dock owner attempted to prevent the captain from mooring to the dock, surely the court would have granted an injunction against the dock owner had the captain asked for it. Alternatively, if the ship captain had used reasonable force to tie the ship to the dock, against an attempt of the dock owner to prevent him from doing so, in all likelihood a battery claim by the dock owner would have failed, based on defence of property.

If this analysis is correct, the dock owner does not have a right to exclude others from the use of his property at times of emergency. But this does not mean that he should not get compensated. However, if the defendant did not do anything contrary to the right of the owner is not the duty to compensate best explained as protecting an entitlement protected under the circumstances by liability rule, so the compensation is a price paid for a legitimate activity (category 3) rather than for a justified infringement of right (category 2)? Since I incline to agree with Coleman that compensation in this case is required as a matter of CJ, I conclude that the distinction between the second and the third categories is unhelpful, or at least should be further reworked. I would suggest that an appropriation of an entitlement protected by liability rule is infringement of right. The right is to the stream of welfare associated with the entitlement. CJ demands that the appropriation will be accompanied by compensation even though the appropriation was justified.

I would like to provide three further observations on the matter. First, in England, it is less clear that appropriations justified by necessity entail compensation⁶⁰. While I prefer

⁶⁰ The English position seems to absolve the defendant from the duty

the approach in *Vincent* this line of cases calls for explanation. Second, appropriations of entitlements protected by liability rule might be unjustified. At times liability rule is adopted only since obtaining consent is practically impossible (e.g., causing personal injury through negligent activity). This observation might require some refinement of Coleman's analysis. Third, Coleman's analysis largely overlooks analysing *Vincent* as a restitution case – the reimbursement of the rescuer's costs of saving, in this case the damage to the dock. Consider a variation of *Vincent*: the ship is about to drown and the captain is incapable of mooring the ship to the dock. The dock owner ties the ship to the dock (without having been able to get the captain's consent). The ship owner is liable for the damage to the dock which is the reasonable costs incurred to preserve the defendant's property in circumstances of emergency⁶¹. Clearly the defendant did not infringe any property right of the owner. There was no agency in this case, and there is no wrong. But is this case explicable only on hypothetical contract theory? Is not there, under these circumstances a moral duty to repair the loss and is not this duty grounded in the interaction between the parties? Are not we losing something by insisting that compensation here is only a matter of markets but not of morals⁶²? Alternatively, if one insists that compensation under

to compensate, although the interpretation of the cases is disputed. See *Romney Marsh v Trinity House Corp* (1870) L.R. 5 Ex 204; *Cope v Sharpe* [1912] 1 K.B. 496. See CLERK and LINDSELL 2006, 1140, n. 91 («[...] necessity is not favoured by the courts, especially where the defendant acted to protect private [...] interest»).

⁶¹ *Nicholson v Chapman* (1793) 126 ER 536; VIRGO 2006, 296-7.

⁶² I side step here the difficulties involved in founding an obligation to make restitution on hypothetical contract attributed to the bilateral monopoly and emergency characteristics of the situation; the latter

the variation is not a matter of CJ, is the difference from the actual facts of *Vincent* so marked that it justifies a conclusion that in *Vincent* compensation is a matter of CJ, but not in the variation?

2.3. *Coleman's account of wrongdoing – too wide and too narrow?*

Coleman's account of what amounts to wrongfully inflicted loss is at the same time too wide and too narrow. His account is too wide since it seems to ignore the requirements of duty of care and protected interest as conditions for negligence liability. Not all legitimate interests are protected against negligent interference (e.g., freedom from emotional distress) and even interests which are sometimes protected, might not be protected due to lack of duty of care. For example, economic loss is protected to some extent (and within limitations) in the context of negligent statements but not in the context of relational loss. Psychiatric injury of some secondary victims but not of others is compensable. Coleman suggests that responsibility for wrongdoing requires wrongdoing, causation and injury within the scope of risk that made D's conduct faulty⁶³ but the latter requirement reflects proximate cause, not duty of care⁶⁴. For example, in *Caparo v Dickman*⁶⁵ the auditors' duty to investors was not recognised, despite the fact that the investors' loss in relying on the defendants' negligent auditing fell within

raises the fear of exploitation, unless the hypothetical contract is made behind a veil of ignorance.

⁶³ COLEMAN 1992, 346.

⁶⁴ Restatement section 29.

⁶⁵ [1990] UKHL 2.

the scope of the risk that made the auditing negligent. Auditing is conducted in order to examine whether the company is financially stable. The risk from negligent auditing is exactly that people will conduct their behaviour based on the mistaken assumption that the company is well-run.

Coleman's account of justifiable departures from CJ reflects an unduly narrow understanding of CJ. What is crucial under expansive accounts of corrective justice is that losses that are identified as wrongly inflicted will be compensated so that 1) the tortfeasor pays the wrongful loss he created, no more no less; 2) victims are compensated for the wrongful loss, no more, no less; 3) the reason behind the transfer of wealth from the tortfeasor to the victim is based on the interaction between them (so is agent specific)⁶⁶.

If this is all what is required by CJ – and such a view seems to me both normatively and conceptually appealing and consistent with Coleman's own framework, then *Hymowitz v Elli Lilly*⁶⁷ is based on CJ rather than on a justified deviation from it in the form of local fault-based pool, as Coleman suggests⁶⁸. In cases of collective liability, as long as each victim does not receive more than the wrongful losses she suffered, and each tortfeasor does not pay more than the wrongful loss he inflicted (at least the expected loss) liability is justified as a matter of CJ despite the existence of victims' shifting according to which victims who in fact were harmed by manufacturer A are compensated by Manufacturer B and so on. Similarly, the fact that according to proportional liability rule each successful victim is compensated (in whole or in part) by several manufacturers despite the fact that her injury

⁶⁶ For similar arguments see SCHROEDER 1990; ROSENBERG 1984; PORAT and STEIN 2001.

⁶⁷ 539 N.E. 2d 1069 (N.Y. 1989).

⁶⁸ COLEMAN 1992, 405.

was the result of using the products of only one of them is not problematic, as long as each defendant does not pay in total more than the wrongful loss he caused.

There are at least two other forms of liability which might be understood to reflect an extended notion of CJ, rather than being a permissible deviation from CJ. One is the idea of evidentiary loss developed by Porat and Stein⁶⁹. Liability in *Summers v Tice*⁷⁰ for example might be explained based on the fact that the negligence of the hunter who did not cause the physical injury wrongfully prevented the claimant from suing successfully the first defendant. It is true that such an account increases the scope of recovery for economic loss, but this alone is not a convincing reason against adopting such a doctrine.

Summers can illustrate the other extension as well – liability which is justified as a second best from CJ perspective. This approach is based on two controversial assumptions. First, that whether imposition or denial of liability is compatible with CJ is a matter of degree and cannot be answered merely with a yes or a no. It is hard to see why we cannot (or should not) rank solutions according to the degree to which they deviate from the ideal of corrective justice⁷¹. If a rule results in claimants receiving consistently 1.5 times their real loss, is not this rule inferior in terms of achieving CJ to another according to which claimants receive only 1.2 times their real loss?

The second assumption is that for purposes of comparing the distance of different results from the ideal of CJ, all de-

⁶⁹ PORAT and STEIN 1996-97.

⁷⁰ 199 P.2d 1 (Cal. 1948).

⁷¹ For a similar argument with respect to the possibility to rank results in terms of deviation from the ideal distributive scheme see KEREN-PAZ 2007, at 36-40.

viations should in principle count equally, namely, the victim not receiving damage he should have received is as bad as a defendant paying what he should not have paid and the tortfeasor not paying what he should have. Again, it is hard to see why this should seem objectionable. Recall that the basic preponderance of the evidence rule in civil cases is based exactly on such assumption – that an error in denying liability when it is due (which in the typical two party litigation entails also not imposing liability when it is due) is as bad as imposing liability which is not due. Whether efficiency concerns of minimising the risk of errors or deontological concerns of equal respect to the parties are invoked, the result is the same. Moreover, even if one were to accept the argument that imposing liability incorrectly is worse than the alternative due to the symbolic aspects of being held liable (a proposition which ignores the fact that denying the victim a deserved vindication of her right is also problematic symbolically) it would fail to support the case of the negligent but not causative hunter against liability. The reason is that what makes an incorrect finding of liability under negligence rule especially unfair is the finding that the defendant was at fault, despite the fact that he was not. Since both defendants in *Summers* were negligent (as all defendants need to be under the alternative liability doctrine) the claim against liability which is based on the symbolic harm from being incorrectly held liable is weak.

The last point could also be understood as a claim that erring against a negligent defendant who did not cause the injury is less serious than erring against an innocent claimant whose injury was caused by one of several negligent defendants. Indeed, an alternative support to *Summers* (described by Coleman as the common explanation) is a distributive preference of an innocent victim over a faulty, yet non-causative defendant. A combination of the two arguments explored above would maintain that liability is justified since it is both

just from distributive perspective, and is a second best solution from a CJ perspective. The conclusion that liability is justified as a second best CJ solution is bolstered if one discounts the gravity of the error of holding a negligent defendant liable, in comparison to error in the opposite direction.

If these assumptions are accepted, it is easy to see that the result in *Summers* better accords with CJ in comparison to a traditional no compensation rule, since the summed deviations from the ideal of CJ is smaller: the victim receives full compensation as he should, while the non-causative defendant pays half of what the other defendant should have paid – deviation of one unit. Under the alternative, the deviation is of two units: The victim does not receive anything and the hunter who caused the injury pays nothing. The only problem with this account is that it proves too much. It might justify imposition of liability on the rest of the world in cases we know that one person caused the injury but we do not know whom. However, the practical unfeasibility of such solution where a large number of potential defendants is involved might justify its rejection. In addition, when the group of potential defendants includes individuals who were not negligent, arguably, the assumption that each mistake should weigh equally is harder to defend, so the injustice of holding non negligent and non causative agents liable for the harm outweighs the harm from not providing compensation to the victim.

References

- BARKER K. 2004. *Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons*, in NEYERS J., MCINNES M. and PIRAL S. (eds.), *Understanding Unjust Enrichment*, Oxford, Hart Publishing.
- BEEVER A. 2007. *Rediscovering the Law of Negligence*, Oxford, Hart Publishing.
- CALABRESI G. and HIRSCHOFF A.T. 1972. *Toward a Test for Strict Liability in Torts*, in «Yale Law Journal», 81(6), 1972, 1055-1085.
- CANE P. 1997. *The Anatomy of Tort Law*, Oxford, Hart Publishing.
- COHEN D.S. 1990. *Regulating Regulators: The Legal Environment of The State*, in «University of Toronto law Journal», 40(2), 1990, 213-270.
- COLEMAN J.L. 1992. *Risks and Wrongs*, Cambridge, Cambridge University Press.
- COOTER R. and PORAT A. 2002. *Anti-Insurance*, in «Journal of Legal Studies», 31(2), 2002, 203-232.
- EPSTEIN R. 1982. *The Social Consequences of Common Law Rules*, in «Harvard Law Review», 96(8), 1982, 1717-1751.
- KEATING G.C. 2003. *Pressing Precaution Beyond the Point of Cost-Justification*, in «Vanderbilt Law Review», 56(3), 2003, 653-750.
- HEDLEY S. 2009. *Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century*, in ROBERTSON A. and WU T. (eds.), *The Goals of Private Law*, Oxford, Hart Publishing.
- KEREN-PAZ T. 2007. *Torts, Egalitarianism and Distributive Justice*, Burlington, Ashgate.
- KEREN-PAZ T. and LEVENKRON N. 2009. *Clients' Strict Liability towards Victims of Sex-Trafficking*, in «Legal Studies», 29(3), 2009, 438-463.
- KEREN-PAZ T. 2010. *AT v Dulghieru – Compensation for Victims of Trafficking, But Where Is the Restitution?*, in «Torts Law Journal», 18, 2010, 87-106.
- KEREN-PAZ T. 2013. *Sex Trafficking: A Private Law Response*, London, Routledge, (forthcoming).
- KOENIG T. and RUSTAD M. 2001. *In Defense of Tort Law*, New York, New York University Press.

- PORAT A. and STEIN A. 1996. *Liability for Uncertainty: Making Evidential Damage Actionable*, in «Cardozo Law Review», 18(6), 1996-1997, 1891-1960.
- PORAT A. and STEIN A. 2001. *Tort Liability Under Uncertainty*, Oxford, Oxford University Press.
- PRIEST G.L. 1987. *Current Insurance Crisis and Modern Tort Law*, in «Yale Law Journal», 96(7), 1987, 1521-1590.
- ROSENBERG D. 1984. *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, in «Harvard Law Review», 97(2), 1984, 849-929.
- SCHROEDER C.H. 1990. *Corrective Justice & Liability for Increasing Risks*, in «UCLA Law Review», 37(3), 1990, 439-478.
- STEVENS R. 2007. *Torts and Rights*, Oxford, Oxford University Press.
- SUGARMAN, S.D. 1985. *Doing Away with Tort Law*, in «California Law Review», 73(3), 1985, 555-664.
- VIRGO G. 2006. *The Principles of the Law of Restitution*, Oxford, Oxford University Press.
- WEINRIB E. 1995. *The Idea of Private Law*, Cambridge (Mass.), Harvard University Press.