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Is Tort Law a Practice of Corrective Justice?

ABSTRACT:
In this paper, I will explore whether the view by Jules Coleman that tort law is a practice of corrective justice can be considered an appropriate explanation of the nature of tort law. I will argue that this may be possible, if some modifications are made to Coleman's account. This article will proceed in three parts. In part one, I will briefly introduce Coleman's view. I will also show that the corrective justice thesis is ambiguous, and I will suggest a disambiguation of it into three different claims: the parochial, conceptual and normative. Finally, I will explain how the conceptual claim can be understood as a basis for a general theory of the nature of torts. In part two, I will suggest several modifications to Coleman's account of the normative structure of tort law and the appropriate methodology to account for it. I argue that, as a conceptual claim, the corrective justice thesis is, at the same time, under- and over-inclusive, and suggests a way out from these problems. Finally, in part three, I will propose an account of the foundational justification for tort law. It is based on the idea that the reason for creating and maintaining a social practice of tort law is compensating for the deficiencies of moral responsibility with regard to solving the problem of redressing the harm caused by human agency.

KEYWORDS:
tort law, corrective justice, normative structure, conceptual analysis, justification, moral responsibility.

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In this paper, I will explore whether the view by Jules Coleman that tort law is a practice of corrective justice can be considered an appropriate explanation of the nature of tort law. I will argue that this may be possible, if some modifications are made to Coleman's account. This article will proceed in three parts. In part one, I will briefly introduce Coleman's view. I will also show that the corrective justice thesis is ambiguous, and I will suggest a disambiguation of it into three different claims: the parochial, conceptual and normative. Finally, I will explain how the conceptual claim can be understood as a basis for a general theory of the nature of torts. In part two, I will suggest several modifications to Coleman's account of the normative structure of tort law and the appropriate methodology to ac-

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1. *Coleman on the Nature of Tort Law*

1.1. *The Original Account*

In the third part of *Risks and Wrongs*[1], Jules Coleman introduces one of the most accurate and influential theoretical accounts of the practice of tort law. It may be referred to as the original account. The original account can be characterized as interpretive, parochial, instrumentalist, and predominantly moralist. From the methodological point of view, it is interpretive in a Dworkinian sense. It aims to illuminate the practice of tort law by explaining how its elements fit together and how it can be the best practice it purports to be. It is parochial in the sense that the object of the account is the Anglo-American practice of tort law – "our current tort practice"[2], according to Coleman. The original account does not aim to explain the nature of tort law, in a conceptual sense, by stating a set of essential elements that any practice of tort law must have in order to deserve that name, regardless of where and when it exists. Its core claim is the following: «at the core of tort law [that is the Anglo-American tort law] is a certain practice of holding people liable for the wrongful losses their conduct has occasioned»[3]. Let me refer to this as the core claim. Finally, it is instrumentalist, and predominantly moralist, because its basis is the belief that tort law is an instrument

1 COLEMAN 1992.
2 COLEMAN 1992, 197.
3 COLEMAN 1992, 198.

designed to achieve, along with some economic goals, a moral aim that determines its structure. The moral aim consists of meeting the demands of corrective justice[4].

A mixed conception of corrective justice is the key element of the account. It is the principle that holds the elements of tort law together. The core claim implies a plaintiff and a defendant. The plaintiff suffered a wrongful loss caused by the action of the defendant. For this reason, she ought to be compensated by the defendant. Correlatively, the defendant ought to be held liable to compensate the loss of the plaintiff. This implies the principle of corrective justice according to which «an individual has a duty to repair the wrongful losses that his conduct causes»[5]. This principle creates two sets of duties: first order duties (not to injure or harm) and second order duties (to repair). If a person violates the first order duty not to injure or harm the plaintiff, and causes the plaintiff to suffer a wrongful loss, then the second order duty to repair the loss arises[6].

1.2. *Disambiguating the Corrective Justice Thesis*

The original account has changed in several expects between the publication of *Risks and Wrongs* and the publication of the *Epilogue* (which accompanied the Spanish translation in 2010). In addition, *The Normative Structure of Tort Law*[7], an article written by Coleman along with Gabe Mendlow, develops several new ideas of the *Epilogue*. These changes create some tensions within the system of Coleman's theory of tort law and,

4 COLEMAN 1992, 209.
5 COLEMAN 1992, 325. See also COLEMAN and MENDLOW 2010.
6 COLEMAN 1992, 317.
7 COLEMAN and MENDLOW 2012.

to a certain extent, make it a different theory. This new theory may be referred to as the later account.

I will focus here on a question of interpretation, namely, whether Coleman's account still aims to be a parochial theory of the Anglo-American practice of law or whether it now purports to be a general theory of the nature of torts. Coleman claims that his account in *The Practice of Principle* is conceptual[8]. Furthermore, in *The Normative Structure of Tort Law* his ambitions follow the same direction. The following claim confirms it: «*a just tort law* is a practice of corrective justice» (emphasis added)[9].

Let me call this the corrective justice thesis. The corrective justice thesis is ambiguous because it makes reference to three possible meanings. It is possible to disambiguate it by means of distinguishing between three different claims: the parochial, conceptual, and normative. According to the parochial claim, Anglo-American tort law is a practice of corrective justice. The conceptual claim is that only practices of corrective justice can be appropriately called tort law systems. Finally, the normative claim asserts that any tort law practice should aim to satisfy the demands of corrective justice in order to be a just system of tort law. The parochial and the conceptual claims have an ontological

[8] COLEMAN 2001.

[9] Despite the difference between the parochial nature of the approach in *Risks and Wrongs* and the more general and conceptual nature of it in *The Practice of Principle* and *The Normative Structure of Tort Law*, Coleman says in the latter article that this claim has been constant over the years: «One feature of my work that has remained constant over the years is the claim that a just tort law is a practice of corrective justice. Part of what this means is that tort law partially specifies the content of corrective justice. To understand a just system of tort law is in part to understand the nature of corrective justice».

nature. They aim to account for the social reality of tort law practice. The parochial claim purports to account for the reality of tort law in the Anglo-American realm, and the conceptual claim purports to account for the social reality of tort law whenever and wherever it exists. The normative claim does not have this latter feature.

There is convincing evidence that Coleman's account in *Risks and Wrongs* focused on the defence of the parochial and normative claims. In contrast, the later account implies the endorsement of the conceptual and the normative claims. Nonetheless, in both accounts there is a tension between the ontological and normative nature that Coleman attributes, at the same time, to the principle of corrective justice. This tension creates a lack of clarity. In the original account, it is not clear whether corrective justice is an existent feature of the Anglo-American legal systems or is a normative property that the tort law practice should have in order to be just. Coleman seems to be more inclined to consider corrective justice as a goal. He says that it is a set of demands whose satisfaction is the goal of tort law[10]. This inclination would attribute a higher weight to the normative claim.

In the later account, it is not clear whether corrective justice is a necessary property of any tort law system or a norm that any tort law system should aim to follow. In *The Practice of Principle*, Coleman seems to consider corrective justice as a property of tort law. He endorses the view that the nature of tort law is a practice and that the *differentia specifica* of this practice is the embodiment of the principle of corrective justice. In this respect, corrective justice is not any more a goal to be achieved, but a principle already embodied in the practice of tort law[11]. Using a philosophical

[10] COLEMAN 1992, 209.
[11] COLEMAN 2001, 8 and 14.

methodology of explanation by embodiment, Coleman makes the conceptual claim: «corrective justice can provide an account of what tort law is»[12]. Thus, the conceptual claim would state that tort law is a practice in which «individuals who are responsible for the wrongful losses of others have a duty to repair the losses»[13]. This is the essence of this practice. The essence is not a norm that should be followed but something that already exists.

The conceptual claim is in tension with the instrumental nature of the original account. Consequently, in the latter account, Coleman departs from the instrumentalism[14]. The practice of tort law cannot be considered any more as an instrument for satisfying the demands of the principle of corrective justice, but as a practice that embodies, expresses or reflects this principle[15].

Consistent with his later account, Coleman introduced (for the first time in the *Epilogue*) and developed (in *The Normative Structure of Tort Law*) the difference between the normative structure and the foundational justification for tort law. While the foundational justification for tort law is the set of «good reasons for creating and sustaining» the practice[16], the normative structure refers to its salient normative features[17]. Coleman has not explained his view of the foundational justification for tort law yet. This makes the account unclear. Practices are sets of interlocking collective and individual intentional actions. As such, their struc-

[12] COLEMAN 2001, 14.
[13] COLEMAN 2001, 15.
[14] Coleman explicitly recognizes his departure from the instrumentalism in COLEMAN 2010.
[15] COLEMAN and MENDLOW 2012.
[16] COLEMAN and MENDLOW 2012.
[17] COLEMAN and MENDLOW 2012.

ture depends on the intended goal that the participants aim to achieve in the practice. For instance, the structure of the practice of issuing and using currency cannot be understood independently from the participants' intended goal of facilitating economic exchange. These goals motivate the collective acceptance of the attribution of the status-function of currency to the pieces of paper and metal that we call notes and coins. Concerning the normative structure, in Coleman's view, the salient normative features of tort law practice are primary and secondary rules and legal relations that exist between the participants in the practice[18]. These legal relations are the duty not to harm, and the duty to repair. Coleman's view is that the principle of corrective justice rationalizes these features. For this reason, it is a principle embodied in the normative structure of tort law.

Coleman's endorsement of the view that corrective justice is an ontological and conceptual feature is in tension with the claim that corrective justice is a norm[19], that is, a standard of assessment for states of affairs and institutional arrangements and a guide to conduct that generates reasons for actions. This claim is not consistent with either the parochial or the conceptual version of the claim. Either corrective justice is a description of a property that exists in the Anglo-American tort law system and/or a property that any tort law system cannot fail to have, or it is a norm that establishes an ideal for evaluating whether actual tort law systems (including the Anglo-American) are just or unjust. Either corrective justice is something that legally *is* or something that *should be*, unless the implausible claim is endorsed that all tort law systems already are as they should be.

In the following sections, I will argue that the conceptual

[18] In Hohfeldian terms: duties/rights and powers/liabilities.

[19] COLEMAN and MENDLOW 2012.

claim (with some modifications) is true and that it is a solid basis for a theory on the nature of tort law. However, given that the conceptual claim cannot be simultaneously endorsed with the normative claim, corrective justice cannot then be considered as a norm and cannot belong to the foundational justification for tort law. As a conceptual claim, the corrective justice thesis expresses the normative structure of tort law but not its foundational justification. I will, therefore, suggest a foundational justification that is independent from corrective justice.

2. *Corrective Justice in the Normative Structure of Tort Law*

2.1 *Testing the Conceptual Claim within Civil Law Systems of Torts*

Let me first address the question whether the conceptual claim can be considered as the basis for an appropriate general theory of the nature of tort law. This claim implies that a tort law system cannot fail to embody corrective justice or, in other words, that only a practice in which individuals have a duty to repair the wrongful losses that their conduct causes, can be called a tort law system.

A suitable experiment to determine whether the conceptual claim is true consists of asking the following question: to what extent is the corrective justice thesis an appropriate explanation of the practice of tort law in civil law systems? In these jurisdictions, the availability of damages is a necessary requirement of any tort law action. If damages are the same as losses, then it is not unreasonable to think that Coleman's principle of corrective justice may ground an explanation of the nature of torts not only in common law but also in civil law jurisdictions. Civil law jurisdictions received a strong influence from the *lex aquilia* of the Roman Law. This law limited the domain of torts

to the compensation of wrongfully caused losses: *damnum iniuria datum*. This limitation on the scope of tort law is a truism in continental legal systems.

This experiment suggests that the corrective justice thesis, as a conceptual claim, is a suitable candidate for a general explanation of the nature of tort law. However, the conceptual claim is, at the same time, under-inclusive and over-inclusive. Thus, it needs some amendments.

2.2. *Under-inclusiveness of the Conceptual Claim*

I will explain the under-inclusiveness of the conceptual claim first. I will begin with some methodological considerations.

Coleman is right in choosing a conceptual methodology for the purpose of illuminating the nature of tort law by means of the corrective justice thesis. Concepts mediate between thought and language, on the one hand, and entities of the world, on the other. Concepts are elements that are to be found in different thought contents which help to determine what those thoughts are about or involve. Thus, an analysis of the concepts that we use in tort law (responsibility, causation, duty, wrong, harm, loss, foreseeability, compensation) is adequate for the purpose of determining what essential properties the entity we call tort law has, and what kinds of entities can count as tort law. This is accomplished by means of understanding how the concept of tort law is deployed in our beliefs about it.

Coleman is also right when he claims that the appropriate way to undertake this conceptual analysis is by means of a reconstructive approach that rationalizes «the actions of the participants in terms of the norms of the practice and

the reasons to which those actions gives rise»[20]. Social practices are sets of recurrent collective intentional actions[21]. However, what are collective intentional actions? Although there are several accounts of the concept of collective intentional action[22], there are at least two necessary conditions that are common to the most emblematic accounts[23]: (1) the action must be performed by several individual agents acting together as a group, and (2) the individual agents acting together must act in accordance with, and because of, some appropriate we-intentions. We-intentions are intentions with a special content. Their content implies that the group performs the relevant action by means of the appropriate individual actions of its members. In addition, individual agents acting together typically share appropriate knowledge about the performance of the action by the group, and the we-intentions of its members. Accepting the rules of negligence or enacting civil liability legislation or the issuance of a judgment by a Supreme Court are collective intentional actions belonging to the practice of tort law.

Naturally, an analysis of the practice of tort law cannot aim to state the set of all collective intentional actions constituting the practice. As Coleman says, the best strategy for analysis requires only a reconstruction of the practice in terms of its normative structure. This relates to the legal rules and legal relations that the participants, who share the Hartian internal point of view, accept. It refers to the

[20] COLEMAN and MENDLOW 2012.

[21] On this concept of social practice, see Tuomela 2002, 3.

[22] For a summary, and an assessment of these accounts, see LUDWIG (mns).

[23] On these elements, and their relevance for the purpose of accounting for the nature of law, see SÁNCHEZ BRIGIDO 2009, 305-306.

rules to which the following properties apply: (1) that deviation gives rise to criticism and imposition of sanctions, and, as a consequence there is pressure for conformity; (2) that criticism for deviation and imposition of sanctions is regarded as legitimate, justified or made with good reason; and (3) that agents «must look upon the behavior in question as a general standard to be followed by the group as a whole (the so-called, "internal" aspect of rules)»[24].

Understood from this point of view, the principle of corrective justice is an existing legal rule prescribing that agents have a duty not to harm others and that if an agent causes a wrongful loss, she is liable to compensate the victim. The legal validity of this rule is a necessary property of any tort law system. Within a Hartian jurisprudential framework, it is legally valid because it is socially accepted by the legal officials. It is taken by them as a standard to be followed by all participants in the practice. Deviation from it gives rise to criticism and imposition of sanctions, and such a reaction is considered as legitimate.

All of this is true. Nonetheless, at this point Coleman's account is under-inclusive. The reconstruction of the practice of tort law as the principle of corrective justice, which grounds the duties not to injure and to repair, inappropriately constrains the scope of participants in the practice. It only takes into account the persons potentially and actually involved in a tort law suit and the legal officials who are empowered to adjudicate between plaintiffs and defendants. It overlooks other relevant participants of the practice and other salient normative features belonging to tort law that make this practice more complex.

Jurisdictional procedures are indeed a core part of tort law practice. In those procedures, a group of agents (legal

[24] HART 1994, 55-66.

officials) accepts the validity of the principle of corrective justice and the duties not to injure and to repair. Legal officials adjudicate cases according to the standards that this principle establishes. They do so taking into account the concrete relations between plaintiffs and defendants. However, the practice of corrective justice is only one part of tort law. Agents, whose roles may be to prevent losses, insure against losses, regulate risks, deter certain kinds of behavior, impose punitive damages and other types of retributive sanctions are themselves also participants in tort law practices. Thus, tort law practices cannot be reduced to the principle of corrective justice. Principles of distributive justice, principles of retribution and principles of prevention and precaution also belong to the practice of tort law and account for its salient normative features.

Nevertheless, Coleman's corrective justice thesis is true from two perspectives. Firstly, it describes a conceptually necessary or a core feature of any tort practice. In this sense, it is true that there cannot be tort law without the normative structure of corrective justice, understood in Coleman's sense. Secondly, it is possible to drawn from it that principles of distributive and retributive justice, and principles of precaution and prevention, belong to the practice of tort law only to the extent that they have a family resemblance to the normative structure of corrective justice.

I would like to suggest that Coleman's methodology of conceptual analysis by embodiment should be enhanced with a Wittgensteinian methodology of family resemblance, in order to achieve a complete understanding of the nature of tort law[25]. In this way, the analysis would begin with the ac-

[25] On Wittgenstein's thoughts about this methodology, see Wittgenstein 2001, parr. 65-71. On family resemblance and conceptual analysis, see STRAWSON 1959, 11.

ceptance of the principle of corrective justice as a paradigmatic explanation of the practice of tort law. A second step would be accepting that this principle grounds the duty not to cause wrongful losses and the duty to repair wrongful losses. Then, these two elements can be connected to the principles of distributive and retributive justice and to the principles of prevention and precaution by means of a series of overlapping similarities. The domain of distributive justice overlaps the domain of corrective justice because both principles deal with the attribution of the cost of losses to some relevant agents. Both retributive justice and corrective justice institutionalize the principle according to which every agent must be responsible for her actions and must assume liability for their negative consequences. As corrective justice, the principle of prevention relates to the duty not to cause wrongful losses under circumstances of empirical certainty. Finally, the precautionary principle relates to this duty in the same way, but it concerns circumstances in which it is unknown whether an action can cause a loss or generate a risk.

Consequently, the core of tort law is the practice of accepting the standard according to which individuals who cause the wrongful losses of others have a liability to repair those losses. However, the practice of tort law also covers other normative features. Sometimes individuals are liable to repair some loss that they did not cause because they created a risk that finally caused the loss and the victim does not deserve to carry the burden of the loss (distributive justice). Sometimes individuals are liable to pay damages beyond compensation for wrongful losses they caused (punitive damages) with the purposes of retribution and deterring other agents from performing identical or similar behavior. Finally, sometimes potential victims are empowered to use injunctions for the sake of preventing the happening of foreseeable wrongful losses. They can also use injunctions for imposing on an agent the duty to take precautions regarding risks with uncertain negative consequences.

2.3. *Over-inclusiveness of the Conceptual Claim*

As a conceptual claim, the corrective justice thesis is also over-inclusive. There is a pivotal area of tort law in which wrongful losses are not conceptually necessary. This would mean, in principle, that, for them, the corrective justice thesis cannot be a plausible explanation.

The corrective justice thesis is consistent with Coleman's view of the paradigm tort in the original account. He grounds this account on the assumption that cases of negligence are the best instances of the element that makes a tort a tort. A reasonable explanation of the practice of negligence litigation is that its objective is to attribute to the defendant the liability for compensating the wrongful losses the plaintiff has suffered.

It seems strange that, in the *Epilogue*, Coleman is inclined to accept the following: «insofar as torts are wrongs the paradigm tort is a trespass or a battery – an intentional tort»[26]. This may be seen as controversial given that there can be trespass without loss. Consequently, intentional torts cannot be paradigmatic. Furthermore, corrective justice cannot explain the normative structure that is to be found in such torts. Trespass is actionable per se without proof of loss. This problem was discussed in Australia in *Plenty v Dillon*[27]. In that case, some police officers remained upon the plaintiff's land while seeking to serve a summons, even after permission to be on the land had been revoked. Justices Gaudron and McHugh, who expressed the view of the majority of the High Court of Australia, concluded that, although there was no damage to land and no loss suffered by the plaintiff as a consequence of the trespass, the defendant

[26] See COLEMAN 2010.

[27] *Plenty v Dillon* (1991) 171 CLR 635.

was nevertheless liable to compensate the plaintiff. They justified their decision on the ground that a purpose of the action of trespass was «vindicating the plaintiff's right to the exclusive use and occupation of his or her land»[28]. This is also true with regard to the action of trespass to the person, which aims to protect rights to bodily integrity and liberty.

Now, it could be argued that these violations of rights are kinds of losses. Nonetheless, this does not seem to be Coleman's view, at least in *Risks and Wrongs*, where he understands violations of rights as wrongs and not as losses[29]. In this sense, a violation of a right causing a loss makes the loss wrongful, but does not make the loss a loss. Hence, intentional torts do not conceptually imply a loss and the principle of corrective justice cannot explain their normative structure.

Nevertheless, this problem of over-inclusiveness can also be solved by means of the methodology of family resemblance. Intentional torts do not conceptually require the defendant to suffer a loss. However, their features are normatively similar to torts instantiating the principle of corrective justice. In both realms, there is an agent, who ought to be held liable, because her actions caused wrongful outcomes. In the realm of corrective justice, it caused wrongful loss. In intentional torts, it caused harm or some kind of disruption to the defendant or a violation of one of her rights.

Finally, there is another element of Coleman's account that is over-inclusive but the over-inclusiveness can only be solved by means of an amendment to the account. In *The Normative Structure of Tort Law*, Coleman and Mendlow insist that it is losses and not "harms", "wrongs" or "right infringements" what falls under the domain of corrective

[28] *Plenty v Dillon* (1991) 171 CLR 635, 654-5.
[29] COLEMAN 1992, 234, 300 and 355.

justice as the principle explaining tort law[30]. However, they define the primary duty that arises in torts from the principle of corrective justice as a duty "not to harm" either by failing to take appropriate precautions or to exercise reasonable care[31]. This duty is over-inclusive in relation to the principle of corrective justice. The domain of harms includes more than the domain of wrongful losses. There can be harms that are not wrongful losses. Given that this primary duty is a part of the principle of corrective justice, it should be amended accordingly. Thus, it should be understood as the duty not to cause wrongful losses.

3. *The Foundational Justification for Tort Law*

If corrective justice is a rule whose social acceptance and legal validity is the core feature of any tort law system, then it cannot be, at the same time, an aim the system should achieve. For this reason, it cannot belong to the foundational justification for tort law. This seems to be consistent with the following assertion by Coleman: «corrective justice is an account of the normative structure of tort law and not primarily an account of its justification». Nonetheless, this is in tension with the claim by Coleman, according to which, «securing corrective justice can be and is part of the foundational justification of our system of tort law»[32].

If corrective justice is an account of the normative structure of tort law, then its function is primarily descriptive. It reveals the ontology of tort law, its essence, the actual state of affairs of the practice, or as Coleman says: the «manner

[30] COLEMAN and MENDLOW 2012.
[31] COLEMAN and MENDLOW 2012.
[32] COLEMAN and MENDLOW 2012.

in which an institution distributes relevant normative relationships». This is aligned with his view that this principle is embodied in the practice of tort law. Nevertheless, Coleman understands corrective justice as a "norm"[33]. In this sense, corrective justice is normative. It is either a "standard of assessment" of a practice or of tort law institutions that can ground evaluative judgments about it, or it is a "guide to conduct" that provide reasons for actions. Further, either corrective justice is a description of the actual structure of torts, or it is a norm that helps us to evaluate this structure or to guide individuals. Were the latter true, corrective justice should be found in the foundational justification for the tort law practice: corrective justice were something that should exist. Were the former true, it should explain the structure of the practice: corrective justice were something that does exist in the legal sense.

In this section, I would like to claim that corrective justice cannot be a part of the foundational justification for tort law. Furthermore, I will suggest an account of the foundational justification for tort law that does not include the principle of corrective justice, and that is consistent with the view that this principle expresses the normative structure of tort law.

Suppose that there is a society of virtuous citizens called good Samaria. The Good Samaritans drive cars, make business, operate companies and fly planes like us, but they always do them carefully. They always respect the rights of other people. They have a full sense of solidarity, honor and responsibility. They never harm other people intentionally, and when they unintentionally do it, they compensate the losses suffered by those people. They are also ready to help the poor and, in general, everyone in need. In Good Samaria, there is no need for tort law. There is no need for

[33] COLEMAN and MENDLOW 2012.

corrective justice either. No one talks about duties, rights, powers and liabilities but about the great pleasure that it is to love the neighbor.

One day, however, a lady was drinking a ginger beer and was shocked when she found a snail in it. Her psychological disruption lasted hours, days and months. She has to pay thousands of dollars to psychologists. She could never go back to work. Her husband left her, and she lost everything that she had. When she saw herself without resources, she went to see the ginger beer producer and told him her story. She asked him to pay for the medical bills and to support her. The ginger beer maker, however, could not believe that a snail could be in a ginger beer bottle. Even if that had been the case, he thought, a snail could not be the cause of so much evil. His production of the ginger beer – he thought – was not the cause of harm to his neighbor. He lacked certainty about the cause of harm, and he refused to accept the requests from the ginger beer drinker.

After the refusal, the ginger beer drinker decided to ask one of the elders of Good Samaria what to do. The elder asked her to prove that a snail was in her ginger beer and that this was the cause of her misfortune. She did so easily. The day in question, she had bought a new ipad and a friend recorded the snail and the woman's shock. She also had receipts of her visits to the doctors, copies of medical records, the letter of her former employer finalizing her contract and the divorce papers in which her ex-husband argues that he left because she developed an unbearable depression.

The elder was moved by the story and went to see the ginger beer producer. This time he accepted that everything the ginger beer drinker had claimed about her suffering was true. Nonetheless, he still argued that he was not responsible for the harm. In fact, he said, he did not put the snail into the bottle.

The elder, then, talked to his mates in town. They felt compassion for the ginger beer drinker and disapproval for

the behavior of the ginger beer producer. This is a bad example for other Good Samaritans, they thought. Soon, their worst nightmares became reality. Other entrepreneurs learnt about the experience of the ginger beer producer and decided to stop compensating consumers, who claimed they were harmed by their products. This was the case, in particular, when they had doubts about the existence of the consumers' losses, causation or responsibility or when they did not have any resources with which to compensate the claimants. This created a situation in which all compensation of losses stopped. Chaos began to spread in Good Samaria.

In the middle of these circumstances, Good Samaria's elders organized a meeting. They acted together with a plan in mind[34]. They empowered some elders to hear the claims for compensation. They were also empowered to ask the claimants to prove the existence of losses, and that losses were wrongfully caused by an act of the defendant. They were also empowered to allocate liability to the defendants when the claimants managed to prove all these facts. At this stage, a system of tort law was created.

This heuristic shows that a system of tort law is simply an instrument. Every well-organized society, like Good Samaria, must deal with losses people suffer and responsibility for losses caused by human actions. In a world of virtuous individuals, every person takes responsibility for her actions and every loss is compensated either by the person who caused it or by the society as a whole. In that world, corrective justice and tort law are not necessary. In a real society, however, there are some deficiencies. Tort law is an instrument whose aim is to compensating for them. The heuristic presented above illustrates these deficiencies. The

[34] In this story it is easy to see the influence of Scott Shapiro's heuristic on the creation of a legal system. See Shapiro 2011.

first is a lack of certainty about what should be compensated. The second is a lack of certainty about who should compensate what. The third is a lack of moral integrity of individuals who fail to take responsibility for their actions and the consequences. The fourth is a lack of resources for compensating losses. The fifth is a lack of due care to avoid damage. Let me refer to these deficiencies as the deficiencies of moral responsibility for solving the problem of redressing the harm caused by human agency.

A plausible foundational justification for tort law is the following: the reason for creating and maintaining a social practice of tort law is compensating for the deficiencies of moral responsibility with regard to solving the problem of redressing the harm caused by human agency. Tort law and the principle of corrective justice compensate for the lack of certainty about what should be compensated, by means of determining that only wrongful losses can be compensated. The principle of corrective justice compensates for the lack of certainty about who has to compensate wrongful losses by allocating to agents the liability to compensate only the wrongful losses that their conduct causes. The fact that legal officials are empowered to enforce this allocation of liability compensates for the lack of moral integrity of individuals who fail to take responsibility for their actions and the consequences that flow from those actions. The allocation to every one of the legal duty to take precautions compensates for the lack of due care to avoid causing harm. Finally, elements of distributive and retributive justice, the principle of prevention and the precautionary principle also compensate for these deficiencies and for the lack of resources to repair wrongful losses. The principle of distributive justice allocates insurance duties to secure resources for compensation of wrongful losses. Distributive and retributive justice ground punitive sanctions and the allocation of liabilities that create general and specific deterrence from conducts and creation of risks leading to wrongful losses. Finally, the prevention princi-

ple and the precautionary principle create specific duties to take precautions and empower potential victims to secure that these duties are honored by means of injunctions.

4. *Conclusion*

In this paper, I accomplished four goals. First, I showed that the view by Jules Coleman that tort law is a practice of corrective justice is ambiguous, and I suggested a disambiguation of it into three different claims: the parochial, the conceptual and the normative. Second, I argued that the conceptual claim can be understood as a basis for a theory of the nature of torts only with the introduction of some modifications. Third, I showed that the conceptual claim is both under-inclusive and over-inclusive. It is under-inclusive because it inappropriately constrains the participants in tort law practice to the persons potentially and actually involved in a tort law suit. It overlooks other relevant participants of the practice, the actions of these participants, and other salient normative features belonging to tort law that make the practice more complex. Agents, whose role is to prevent losses, insure against losses, regulate risks, deter people from certain kinds of behavior, impose punitive damages and other types of retributive sanctions, are also participants in the tort law practice. Those types of actions also belong to the practice of tort law. As amendment, I suggested the view that principles of distributive and retributive justice, the principle of prevention and the precautionary principle also belong to the practice of tort law and account for its salient normative features. I also suggested use of the methodology of family resemblance to understand what these salient normative features are. Further, I argued that, as a conceptual claim, the corrective practice thesis is over-inclusive because it includes the practice of intentional

torts, in which wrongful losses are not necessary. Nevertheless, I showed how the methodology of family resemblance can also be used in order to account for this area of torts. Finally, I suggested a way to understand the foundational justification for tort law in the following way: the reason for creating and maintaining a social practice of tort law is compensating for the deficiencies of moral responsibility with regard to solving the problem of redressing the harm caused by human agency.

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