Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice

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INTRODUCTION

Ernest Weinrib's theory of tort law is definitely the purest corrective justice theory among the various tort theories: it does not invoke any distributive or retributive justice considerations, either explicitly or implicitly, and it conceives of corrective justice considerations not only as relevant to tort law, but as the only relevant considerations for that field.[1] Weinrib dismisses deterrence and loss distribution as irrelevant to tort law and, consequently, objects to mixed theories that strive to accommodate both corrective justice and deterrence within tort law.[2] Weinrib would also reject justice theories that

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1 Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inquiries L. 107 (2001) [hereinafter Weinrib, *Correlativity*]; Ernest J. Weinrib, The Idea of Private Law (1995).

2 For mixed theories of tort law, see Izhak Englard, *The Idea of Complementarity as Philosophical Basis for Pluralism in Tort Law, in* Philosophical Foundations of Tort Law 183 (David G. Owen ed., 1995); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997). Jules Coleman, one of the most ardent proponents of corrective justice, also does not argue for the absoluteness of corrective justice in tort law. Jules Coleman, Risks and Wrongs 197-211 (1992). For a critical account of Coleman's theory for its failure to specify criteria for choosing between corrective justice and other considerations, see George P. Fletcher, *Corrective Justice for Moderns*, 106 Harv. L. Rev. 1658 (1993). Fletcher himself started with a corrective justice theory of tort law and ended up with a mixed theory; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972) [hereinafter Fletcher, *Fairness and Utility*]; George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 Law & Phil. 63 (1983).

arise out of dissatisfaction from "outcome responsibility," which either justify or criticize tort law from an *ex ante* perspective.[3]

At the heart of Weinrib's theory is the notion that tort liability reflects the doer and sufferer relationship between the plaintiff and the defendant. Under this notion, the injustice done by the defendant and the injustice suffered by the plaintiff are one and the same, and tort liability is designed to rectify this injustice. Weinrib's theory, derived from Aristotle and Kant, is both descriptive and normative; its two pillars are the ideas of correlativity and personality.

Under Weinrib's conception of correlativity, "liability reflects the conclusion that the defendant and the plaintiff have respectively done and suffered the same injustice. Correlativity structures this injustice: the elements of liability can be explicated only in terms of concepts whose normative force applies simultaneously to both parties."[4] Personality signifies that "all persons possess an equal capacity for rights and duties without being obligated to act toward any particular purpose; it thereby reflects the structure of the law of obligations as a system of negative duties of non-interference with the rights of others."[5]

The main purpose of this paper is to point out some of the difficulties that arise from this idea of correlativity as conceived by Weinrib. First, I argue against Weinrib's contention that comparison is both absent from tort law and inconsistent with corrective justice. Then, in the main part of the paper, I proceed to show that the concept of negligence in both tort law and

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3 *See, e.g.*, Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. Rev. 439 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. Rev. 143 (1990); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L.Q. Rev. 530 (1988); Jeremy Waldron, *Moments of Carelessness and Massive Loss, in* Philosophical Foundations of Tort Law, *supra* note 2, at 387.

4 Weinrib, *Correlativity, supra* note 1, at 110. Further on, he explicates the idea of correlativity as follows:

> In bringing an action against the defendant, the plaintiff is asserting that they are connected as doer and sufferer of the same injustice. As is evidenced by the judgment's simultaneous correction of both sides of the injustice, the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same injustice, so that what the defendant has done counts as the basis of liability only because of what the plaintiff has suffered, and vice versa. Each party's position is normatively significant only through the position of the other, which is the mirror image of it.

Id. at 116.

5 *Id.* at 111.

morality cannot be reconciled with Weinrib's understanding of correlativity. Lastly, I offer an *ex-ante* justice perspective to the plaintiff and defendant relationship alongside the *ex-post* justice perspective embraced by Weinrib and other theorists of corrective justice and argue that justice to the parties, especially the victim, is incomplete unless this additional perspective is taken into account.

I. COMPARISONS

Drawing on the Aristotelian model, Weinrib contrasts the idea of correlativity with the notion of comparison: while the former is embedded in corrective justice, the latter is embedded in distributive justice.

> Aristotle's original account contrasts the correlativity of corrective justice with the categorically different structure of distributive justice. Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions. Distributive justice, on the other hand, deals with the sharing of a benefit or burden; it involves comparing the potential parties to the distribution in terms of a distributive criterion. Instead of linking one party to another as doer and sufferer, distributive justice links all parties to the benefit or burden they all share. The categorical distinction between correlativity and comparison is certified by the difference between the numbers of parties that each admits. Corrective justice links two parties and no more, because a relationship of correlativity is necessarily bipolar. Distributive justice admits any number of parties, because in principle, no limit exists for the number of persons who can be compared and among whom something can be divided.[6]

For Weinrib, the inevitable conclusion is that since comparison is inconsistent with corrective justice and since tort law reflects exclusively corrective justice, one should not seek comparison in the realm of tort law.

In certain aspects, Weinrib's argument is uncontestable. Comparisons of the parties' wealth, status, or virtue are absent from tort law. Moreover, comparisons of these types are inconsistent with corrective justice as well, since they do not emerge either from the wrongdoing or from the parties' relationship as doer and sufferer. They have no bearing on the question of the injustice done or suffered, and they do not pertain to what the parties

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6 *Id.* at 117.

did, but to who the parties are. Needless to say, they also violate the idea of correlativity as developed by Weinrib.

Some comparisons are, however, inherent to tort law doctrines. Consider the doctrines of contributory and comparative fault, which imply a comparison of the parties' fault. The same is true with respect to the doctrine of contribution among tortfeasors.[7] Thus, insofar as Weinrib contends that comparisons are extraneous to tort law doctrines, his contention is inaccurate. Rather, in what follows, I show how even under Weinrib's theory of tort law, comparisons are consistent with corrective justice, and, moreover, with the idea of correlativity.

Imagine a motorist under a legal regime of comparative fault who negligently hits a pedestrian. The pedestrian also has been negligent, since he crossed the street while reading the morning newspaper. He is considered by the law to be one of the authors of his own losses, and his damages are reduced in accordance with his relative fault. The relative fault is determined by a comparison of the respective fault of each of the parties as manifested in the accident.

But it is not only prevalent tort law that requires such a comparison; this comparison is also mandated by corrective justice and the idea of correlativity. Indeed, determining the parties' relative fault is crucial for evaluating the injustice done by the motorist and suffered by the pedestrian, the gist of correlativity and corrective justice. Thus, from a corrective justice perspective, the case would have been totally different had the pedestrian been cautious, rather than negligent, when crossing the street.[8] The case also would have been different had the pedestrian been less negligent than he actually was. The nature of the injustice emerging from the parties' relationship that tort liability seeks to rectify thus changes when the relative fault of the parties changes. Consequently, corrective justice would advocate that the rule of liability accord with the relative fault of the parties. Reducing the damages awarded to the negligent pedestrian, the result of the comparison between the respective fault of the parties, is, accordingly, an appropriate response to the injustice done and suffered and consistent with both correlativity and corrective justice.

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7 Although comparisons under the contribution among tortfeasors doctrine are not conducted with respect to the injurer and the victim, but, rather, the various injurers, the relative fault of each injurer is derived from and contingent upon the injurer-victim relationship.

8 For a different view, see Richard A. *Epstein, A Theory of Strict Liability*, 2 J. Legal Stud. 151, 181 (1973).

II. NEGLIGENCE

Weinrib's understanding of correlativity is problematic in the context of negligence. Difficulty arises due to Weinrib's contention that liability under a negligence rule should be, and is in fact, determined only in terms of the risk actually created by the defendant, without any consideration of the burden he was required to bear in order to eliminate this risk. Weinrib grounds this conception in the argument that giving any weight to the defendant's burden in determining his liability would infringe the correlativity requirement, since it would allow the needs of one party (the defendant) to unilaterally demarcate the respective normative positions of both parties.

Weinrib argues that considerations that are not equally relevant to both parties should not be taken into account in determining tort liability.[9] Consequently, he rejects the Hand Formula, which advocates weighing risk (or expected damages) against burden (or costs of precaution). According to Weinrib, the only relevant factor in determining liability under a negligence rule is the risk created by the defendant, which is measured by the probability and the gravity of its effect on others. One gets the impression, therefore, that under Weinrib's theory, only the expected damages side of the Hand Formula matters:

> When liability for negligence is being considered, the unreasonableness of the risk created by the defendant is seen in terms of the probability and the gravity of its effect on others; the duty not to create the risk is seen in terms of its foreseeable effect on a group that includes the plaintiff; the definition of the risk through proximate cause is seen in terms of the kind of effect that leads us to think of the risk as unreasonable; and the factual causation of injury seen in terms of the materialization of this risk.[10]

This impression is reinforced when Weinrib adds:

> Accordingly, corrective justice rejects considerations whose justificatory force extends to only one party. By paying attention to one-sided considerations, the law would in effect be allowing one

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9 "In specifying the nature of the injustice, the only normative factors to be considered significant are those that apply equally to both parties." Weinrib, *Correlativity, supra* note 1, at 117. For criticism of Weinrib's theory, see Kenneth W. Simmons, *Justification in Private Law*, 81 Cornell L. Rev. 698 (1996); Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 Mich. L. Rev. 138 (1999).

10 Weinrib, *Correlativity, supra* note 1, at 116-17.

> of the two parties to demarcate the boundary between their respective normative positions. The fair terms of a bilateral interaction cannot be set on this unilateral basis.[11]

He also adopts Coleman's criticism of the Hand Formula:

> For instance, Coleman criticizes the Learned Hand formula for making the victim's entitlement to security dependent on the value that the injurer attaches to his own liberty, in violation of the principle of fairness that forbids one of the parties unilaterally to set the terms of their interaction.[12]

In the following paragraphs, I show that any concept of negligence, including a corrective justice one in Weinrib's tradition, cannot ignore the burden side of the Hand Formula. I also show that basing liability on risk only is nothing short of no-fault liability.

Take the following example:

> *The TV Program Case.* A motorist drives his car at 130 kilometers per hour, rushing home to be on time to watch his favorite TV program. In so doing, he hits a pedestrian. Had the motorist driven at 100 km/hr or less, the accident would have been prevented. The rule of law is negligence. Could the motorist successfully argue in court that his subjective urgent need to see the TV program should be taken into account in deciding whether he is liable or not?

It seems obvious that no court would accept this argument. The subjective benefit that the motorist could have derived in getting home earlier (which represents his burden of reducing the risk of his fast driving) would have no relevance, no matter how great this subjective benefit might be.[13]

Let us change the example, so that the reason for driving so fast is more acceptable to most people:

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11 *Id.* at 130.

12 *Id.* at 131. A similar conception of negligence appears to underlie Fletcher's reciprocity theory, Fletcher, *Fairness and Utility, supra* note 2. Otherwise, Gary Schwartz' criticism, Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 Cornell L. Rev. 313 (1990), according to which, Fletcher's integration of negligence into his theory is inconsistent with his rejection of the reasonableness paradigm, would have created a lot of difficulties for Fletcher's theory.

13 I assume that the objective benefit is nominal. The next case presents a situation in which this assumption is abandoned.

> *Saving the Motorist's Life Case.* A motorist drives his car at 130 kilometers per hour, in order to get to the hospital on time and save his own life. In so doing, he hits a pedestrian. Had the motorist driven at 100 km/hr or less, the accident would have been prevented. The rule of law is negligence. Could the motorist successfully argue in court that the risk to his own life should be taken into account in deciding whether he is liable or not?

Although the willingness to allow the burden argument in this case should be much stronger than in *The TV Program Case*, I would anticipate reservations for Weinrib-type reasons: one party would not be allowed to shift unilaterally his own problems or needs, urgent as they may be, onto the other party and, thereby, unilaterally demarcate their relations.[14]

However, these reservations are not convincing. In the present case, the burden the motorist would have to shoulder in order to reduce his driving speed, namely, placing himself at high risk, should not be ignored under a negligence regime. The reason is that one can not define the risk as reasonable or unreasonable without considering that burden. If we feel intuitively that there is a morality-related difference between the present case and *The TV Program Case*, it is only because of the different burdens borne by the two motorists. It may well be argued that the motorist in the present case, in contrast to the motorist in the previous case, did not create an unreasonable risk under the circumstances, because he behaved in exactly the same manner as any reasonable motorist would do in similar circumstances. How can his behavior be defined as unreasonable if every driver would behave in the very same way? Who is to say that driving at 100 kilometers per hour is reasonable, while driving at 130 is unreasonable? Reasonableness cannot be detached from the circumstances, which include the benefit of saving one's own life by driving so fast. Consequently, the motorist in the present case might be found not at fault, either morally or legally, and be exonerated from liability only because of the heavy burden he would have had to bear had he reduced his driving speed.[15]

Let us change our example yet again:

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14 A similar argument was used for justifying strict liability on the basis of corrective justice; Epstein, *supra* note 8.

15 A possible way out for Weinrib is to claim that the determination of whether or not a risk is reasonable does not depend on the particular circumstances of the accident, but, rather, on abstract circumstances. Take, for example, the determination that driving at 100 km/hr is reasonable and at 130 is unreasonable. This determination is made under an assumption of regularity or "average" circumstances: once reasonableness or unreasonableness has been determined in this manner, no particular circumstances

> *Saving the Victim's Life Case.* A motorist drives his car at 130 kilometers per hour, in order to bring his very sick passenger to the hospital. An accident occurs, and the passenger is injured. Had the motorist driven at 100 km/hr or less, the accident would have been prevented. The rule of law is negligence. Could the motorist successfully argue in court that although the high speed increased the passenger's risk of being injured in a road accident, at the same time, it decreased his risk of deterioration in his health and that the latter effect of the motorist's high speed, and not only the former, should be taken into account in deciding whether the motorist is liable or not?

In this case, the burden of decreasing the relevant risk to the victim is an increase of another risk to the same person. Consequently, in contrast to the two former cases, the burden would be borne not by the injurer, but by the victim himself.

The question that arises in this case is whether the positive influence on the passenger's health of the fast driving should be weighed against the negative influence of driving at that speed in determining the reasonableness of the motorist's behavior. The answer to this question is clearly, yes: tort law should not ignore the particular circumstances of the case and should take into account the benefit derived by the passenger from the fast driving (from an *ex ante* perspective). I would presume that Weinrib would also allow such consideration of both the positive and negative influences of the fast driving on the passenger's life. He would likely maintain that in the present case, no burden is involved: there are only risks to the potential victim at stake. But this claim would only emphasize the difficulty in Weinrib's concept of negligence: if the benefit to the passenger from the fast driving can have bearing on the motorist's liability, the same should be true with regard to the equivalent benefit to the motorist himself (*Saving the Motorist's Life Case*). The passenger's urgent needs are no more important and do not deserve stronger protection by the law than the motorist's own urgent needs. Denying this claim would bring us to the intolerable conclusion that one is expected to consider only the interests of others and to disregard one's own interests.

In the fourth and last variation of our example, below, reducing the

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can influence this determination. If this were to be Weinrib's response, it would amount to admitting that burden does matter, but only on an abstract level. This response, however, would not prevent Weinrib's theory from being at odds with prevalent negligence law, where liability is established on a "case-by-case" basis.

plaintiff's risk entails an increased risk to a third party. Therefore, the burden of decreasing the risk of the victim is borne by a third party who is exposed to a higher risk:

> *The Third Party Case.* A motorist drives his car at 130 kilometers per hour, in order to bring his very sick passenger, toward whom he owes a duty of care, to the hospital. An accident occurs, and a pedestrian is injured. Had the motorist driven at 100 km/hr or less, the accident would have been prevented. The rule of law is negligence. Could the motorist successfully argue in court that although the high speed increased the risk to the pedestrian, at the same time, it decreased the passenger's risk of deterioration in his health and that the latter effect of the motorist's high speed, and not only the former, should be taken into account in deciding whether he is liable or not?

Presumably, the immediate reaction of most corrective justice theorists to this question would be that exonerating the motorist from liability in this case because of the benefit a third party (the passenger) derived from the fast driving would be tantamount to sacrificing the victim (the pedestrian) for the sake of a collective or public goal.[16] For a corrective justice theorist, it would be even more difficult to accept the burden argument in this case than in the *Saving the Motorist's Life Case*, for in the latter, only the doer and sufferer's interests are involved, whereas the former case involves third party interests. However, I believe the justification for considering the risk to the passenger in the present case is stronger than the justification for considering the risk to the motorist in the *Saving the Motorist's Life Case*. In the former case, one could not reasonably argue that the motorist try to shift his own needs onto the victim and unilaterally demarcate the boundary between the parties normative positions.[17] The circumstances involving the third party interests are totally external to the motorist[18] and should be given weight in determining his legal liability, as well as his moral responsibility. Ignoring the third party's interests would put the motorist *ex ante* in an impossible position: no matter what he does, if damage occurs, he will be found liable.[19] This outcome is nothing short of strict liability.[20]

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16 *Cf.* Fletcher, *Fairness and Utility, supra* note 2.

17 Weinrib, *Correlativity, supra* note 1, at 130.

18 For external and internal circumstances and their bearing on the liability issue, see also Honoré, *supra* note 3, at 548-50.

19 Either toward the passenger or the pedestrian, depending on whether the motorist drove slowly or quickly, respectively.

20 One may, indeed, argue that it is unjust to make the victim pay the price of

One should not confuse *The Third Party Case* with a case in which collective goals may influence the court's decision in determining tort liability. Ernest Weinrib once told me how critical he had been of a decision given by the Supreme Court of Canada in a malpractice suit, in expressing its willingness to consider as a relevant factor the influence that imposing liability on the defendants would have on the supply of accounting services in Canada.[21] While I am not surprised by Weinrib's objection to this opinion, I do think that it is necessary to distinguish between the argument that the Supreme Court of Canada found acceptable and my own argument with respect to the circumstances of *The Third Party Case*. The possible influence of the Court's decision on the supply of accounting services in Canada, important as that may be, is not relevant to the question of whether the actual defendant behaved reasonably. Yet, an efficiency-oriented court may, nevertheless, exonerate a defendant from liability if it believes that a rule of no-liability would better promote the public welfare. In contrast, in *The Third Party Case*, the effect of the defendant's behavior on the third party's interests is an inevitable consideration in evaluating whether the former's behavior was reasonable or not.

One should also avoid confusing the circumstances of *The Third Party Case* with those of the well-known American case *Brown v. Kendall*, which manifested the court's willingness to implant collective goals into tort law.[22] In *Brown*, the plaintiff accidentally hit another person with a stick while trying to break apart a dog fight. In dismissing the suit, the court emphasized the importance of the activity of separating the fighting dogs as a consideration for not finding the defendant liable. In one sense, this case is closer to *The Third Party Case* than the Canadian accountants case is: the social value attached to intervention in a dog fight can be considered essential to the assessment of the defendant's behavior as reasonable or not. In another sense, however, there is a great disparity between *Brown* and *The Third Party Case*. In *Brown*, the defendant was under no duty to separate the dogs. He took it upon himself voluntarily and should be commended for his courage and good will. However, it can be argued that since he chose to do so, even though for the public good, he should not be allowed to shift the increased risk created by his behavior onto the victim. This argument cannot

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protecting the third party's interests. While this may be true, it is nonetheless a general consequence of a negligence rule, as opposed to a rule of strict liability.

21 Hercules Managements Ltd. v. Ernst & Young, [1997] D.L.R. 577, 594.

22 Brown v. Kendall, 60 Mass. (6 Cush.) 292, *reprinted in* Torts — Cases and Materials 34 (Harry Shulman & James Fleming eds., 3d ed. 1976).

be analogically applied with regard to *The Third Party Case*: at the time of the accident the defendant owed duties of care toward both the passenger and the pedestrian. How can negligence law demand of the defendant anything short of reasonably balancing between the interests of these two persons and acting accordingly? Finding the defendant liable toward the pedestrian regardless of the passenger's interests would be tantamount to imposing strict liability.[23]

Would considering the burden — or the costs of precaution, in Hand Formula terms — relevant to the question of liability in each of the cases discussed above represent an infringement of corrective justice? If the answer is, yes, then I would argue that corrective justice alone cannot justify or explain negligence law. However, I believe that neither corrective justice nor correlativity creates a barrier for courts to consider the burden, and not only the risk created for the victim, in deciding negligence cases. In other words, I believe that the abstract idea implied by the Hand Formula is consistent with corrective justice, even if the economic application of the Formula is not.

What I propose is that in all the cases discussed above (excluding *The TV Program Case*), the burden is an essential factor in determining liability under corrective justice, and considering it also meets the correlativity requirement. In the *Saving the Motorist's Life Case*, the injustice done by the motorist and suffered by the pedestrian is very closely related to the reason for driving fast, which is expressed by the burden factor: the motorist drove fast, since driving more slowly would have entailed a burden of creating substantial risk to his own life. As far as the "doing" side of the equation is concerned, the difference between *The TV Program Case* and the *Saving the Motorist's Life Case* is self-evident. However, this difference

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23 Note that in *The Third Party Case*, the motorist who took the passenger to the hospital was not a volunteer. The cases discussed in this paper illustrate the existence of various types of negligence cases, which differ according to the different balances of interests that the injurer failed to conduct or act upon. In the paradigmatic case, the negligent injurer has failed to balance between his own interests and those of the victim. However, in some cases, the negligent injurer has failed in balancing between the interests of the victim alone; in other cases, he has failed in balancing between the victim's interests and those of a third party; sometimes the injurer has failed in balancing the victim's interests and the interests of the public or of society as a whole; and in yet other instances, he has failed in balancing between his own interests. I believe that the law should not treat in the same manner the different types of instances of failure in balancing between interests. This issue is beyond the scope of this comment, but is comprehensively discussed in Ariel Porat, *Negligence and Interests*, 24 Iyunei Mishpat 275 (2000) (Heb.).

also sheds light on the "suffering" side. The injustice done to the victim by the injurer who disregarded the victim's interests and decided to sacrifice the latter's safety for the sake of watching a TV program is much greater than the injustice done to the victim who was hit by a motorist rushing to the hospital to save his own life.

The same is true with regard to the other examples presented. The injustice done and suffered in the *Saving the Victim's Life Case*, where the burden of decreasing the relevant risk to the victim is the increase of another risk to the same victim, is also different in nature from the injustice done and suffered in *The TV Program Case*. The injustice done and suffered in *The Third Party Case*, where the burden of decreasing the risk to the victim is the increase of the risk to a third party, is also not the same injustice as in *The TV Program Case* and, probably, not the same as in the *Saving the Motorist's Life Case*, where the burden of decreasing the risk to the victim is the increase of risk to the injurer himself.

III. *EX ANTE* JUSTICE

The considerations of corrective justice are conceived as based on *ex post* scrutiny. Accordingly, corrective justice is *ex post* justice. *Ex post* justice means that the victim's entitlement to compensation is determined by considering the nature of the injury to him and the substance of his interest that was injured by the injurer's behavior. *Ex ante* scrutiny usually is conceived of as relevant to the deterrence objective of tort law, that is, to the objective of guiding the behavior of potential injurers and victims, but not pertinent to the considerations of justice. In what follows, I argue that this distinction is not accurate. Justice to the parties, and especially to the victim, cannot be derived from *ex post* scrutiny alone; *ex ante* scrutiny is no less vital for a "just" determination of the legal dispute between the injurer and the victim and, primarily, for protecting the victim's interests. While there are instances in which *ex ante* and *ex post* considerations of justice merge, sometimes they operate in opposite directions. Thus, it is possible that *ex post* considerations of justice will mandate holding the injurer liable towards the victim, while an examination of the victim's *ex ante* interest will indicate that it is preferable for the victim that the injurer not be held liable. In such a case, it will be necessary to decide between the different justice considerations and thus determine whether in the final tally, justice to the victim requires that liability be imposed or waived. The following example will demonstrate this argument.

A patient is injured during an operation due to the negligent decision of

his surgeon. Let us assume that imposing tort liability on the doctor will increase, to a significant extent, the risk that surgeons will practice defensive medicine in this type of surgery. The traditional concept of corrective justice will ignore the consideration of defensive medicine, since it is regarded as not pertinent to the relationship between the injurer and the victim, but, instead, related to the overall social interest. However, this concept is problematic. From an *ex ante* perspective, a legal rule that imposes liability on a doctor towards a patient in such instances is likely to be detrimental to the patient and is in clear contradiction to his interests. The *ex ante* interest of the patient is that the only consideration that the surgeon who operates on him will take into account is the good of the patient. Exposing the surgeon to the risk of legal action is likely to influence his *ex ante* considerations and cause him to focus on "saving his own skin" rather than on the good of the patient. A liability rule is likely to lead the surgeon to choose a course of action that is not in line with good medicine, but, rather, with the lower risk to him. Accordingly, the patient who, on the one hand, tends to have faith in the professional skills of the doctor and in his desire to see to the patient's welfare and, on the other hand, is concerned about the behavior of a doctor who is subject to a legal regime that holds him liable for negligent exercise of his discretion is likely to prefer not to have the doctor subject to a liability rule. This will probably be compatible with the patient's *ex ante* interest in receiving good and proper treatment (although alongside this consideration, there might be an additional, contradicting consideration that the threat of legal liability will cause the doctor to be more cautious in a way that will be to the patient's benefit). Disregard for this interest of the patient and imposing liability on the doctor even in those instances in which the patient's *ex ante* interest is such that the doctor should not be held liable do not achieve justice for the patient and definitely do not protect his interests in the best way possible. The patient's interest is not only to receive compensation if he is injured by the doctor's negligence (*ex post* scrutiny), but also to receive the best treatment from the outset or, at least, to increase his chances of receiving such treatment (*ex ante* scrutiny). The apprehension with regard to defensive medicine, therefore, is not only a consideration that relates to the overall social interest, but also has direct ramifications for the relations between the concrete injurer and victim.

It is important to stress that the above line of argument is a complete divergence from the line of argument according to which it is necessary to take into account *ex ante* considerations in order to achieve economic efficiency or social welfare. It also differs from the line of argument that maintains that *ex ante* considerations are important for increasing the overall welfare of the specific injurer and the victim (as in the line of argument taken

by law and economics theorists in the context of contractual interactions[24]). The *ex ante* scrutiny described above focuses on the interest of the specific victim, and his alone. At the foundation of this scrutiny lies the presumption that it is possible to define the *ex ante* interest of the actual victim at the point at which he is identified as a potential victim.[25] However, unlike the traditional approach of corrective justice, which examines the victim's interest after the damage has occurred, the proposed approach is grounded in the presumption that justice to the victim can be achieved if, and only if, his *ex post* interest and *ex ante* interest are considered together.

CONCLUSION

Weinrib's theory of tort law is very sophisticated and well articulated. It is not easy to find cracks or incoherencies in his arguments. In this paper, I have taken upon myself an impossible mission. I think that most of the points I have made, even if found to be correct, can be easily answered within the framework of Weinrib's theory, because they do not touch on the foundations of his theory but, rather, on its application.

The only exception is Section III of the paper. It would be my guess that any traditional corrective justice theorist, including Weinrib, would tend to reject *ex ante* justice as irrelevant to tort law. But I would suggest that they would all be wrong in so doing. Justice to the doer and sufferer cannot be secured in the abstract. If the victim's *ex ante* interest is non-compensation *ex post*, ignoring this *ex ante* interest is nothing short of injustice.

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24 *See, e.g.*, Robert Cooter & Thomas Ulen, Law and Economics 183-86 (1996); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. Legal Stud. 597 (1990); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. Legal Stud. 271 (1992).

25 Accordingly, I am not dealing with a Rawlsian argument, under which a person cannot see beyond the veil of ignorance whether he will be an injurer or a victim. John Rawls, A Theory of Justice 136-42 (1971).