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Causation and Liability

The issues we shall address are whether having caused a harm should be a necessary condition for liability for that harm, and if so, why.

Judith Jarvis Thomson describes the case of *Summers v. Tice* as follows:

> Plaintiff Summers had gone quail hunting with the two defendants, Tice and Simonson. A quail was flushed, and the defendants fired negligently in the plaintiff's direction; one shot struck the plaintiff in the eye. The defendants were equally distant from the plaintiff, and both had an unobstructed view of him. Both were using the same kind of gun and the same kind of birdshot; and it was not possible to determine which gun the pellet in the plaintiff's eye had come from. The trial court found in the plaintiff's favor, and held both defendants 'jointly and severally liable'.[1]

She then considers a hypothetical variant, *Summers II*. *Summers II* differs from *Summers v. Tice* in that "during the course of the trial, evidence suddenly becomes available which makes it as certain as empirical matters ever get to be, that the pellet lodged in plaintiff Summers' eye came from defendant Tice's gun."[2] Thomson believes that in *Summers II*, tort law yields the result which fairness requires—that Tice alone should be held liable.[3] She agrees that both Tice and Simonson acted badly. Perhaps they are equally morally blameworthy. But since Tice is responsible for

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1. Judith Jarvis Thomson, "Remarks on Causation and Liability," *Philosophy & Public Affairs* 13, no. 2 (Spring 1984): 102–103.
2. Ibid., pp. 104–105.
3. Ibid., p. 105.

the damage to Summers, Tice alone ought to be required to compensate Summers, according to Thomson.

Thomson's view is that liability ought to be associated with causation. This position can be contrasted with the view that "liability is to be shared among the actual harm-causer [if negligent] and anyone else (if there is anyone else) who acted as negligently toward the victim, and who nearly caused him a harm of the same kind as the actual harm-causer did."[4] On this sort of approach, which we shall call "Kantian," liability is associated (roughly) with morally bad activity (or perhaps, moral blameworthiness); and since, given their actions, it is pure chance that it was Tice's bullet (and not Simonson's) which hit Summers, both should be equally liable. Liability, the Kantian claims, should not depend on "moral luck"—it should depend on factors that are (in a suitable sense) under a person's control.[5]

Now there are many reasons not to adopt a Kantian system of tort law. A Kantian system is obviously impractical; whereas it is often possible to identify the person who has *caused* a harm, it is difficult to identify the class of people who acted equally negligently (in the relevant respect) toward the victim. Since negligence often leaves no trace, it is more difficult to isolate the pertinent class of negligent people than the class of actual harm-causers. Thus, it seems that the only feasible systems of assessing liability would be un-Kantian. Further, a mechanism for apportioning liability need not also apportion *moral* blame, and having separated the issue of determining moral blame from that of determining liability, there may be good reasons of efficiency to adopt an un-Kantian approach to liability. But we can (and we believe Thomson is willing to)

4. Ibid. Some alternative views are: 1) that liability ought to be spread among everyone, on the ground that we are our brothers' and sisters' keepers; 2) that liability for harms ought to be shared among all the people who have acted negligently; and 3) that liability for a harm ought to be shared among all who have acted negligently toward the victim, regardless of the nature of the negligence. All of the alternatives might be tempered by considerations of ability to pay.

5. Note that our use of the term "Kantian" to apply to our approach to liability is not meant to suggest that Kant would agree with all our arguments for it. The approach is Kantian at least in the sense that it insists that *moral luck* is irrelevant to liability. For interesting discussions of moral luck, see: Bernard Williams, "Moral Luck," *Proceedings of the Aristotelian Society*, supplementary volume L (1976), pp. 115-35; and Thomas Nagel, "Moral Luck," *Proceedings of the Aristotelian Society*, supplementary volume L (1976), pp. 137–51. Williams' article is reprinted in Bernard Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981). Nagel's article is reprinted in Thomas Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979).

distinguish the practical question from the question of what would be the "ideally" fair way of determining liability. That is, upon reflective consideration, what would be the fairest way of determining liability, apart from considerations of practicality and efficiency?[6]

Thomson has an intriguing argument in favor of her un-Kantian answer to this question. We shall divide her argument into two parts, and start with Part One. Suppose that A injured himself. That is,

(1) A caused A's injury, freely, wittingly, for purposes of his own; and no one other than A caused it, or even causally contributed to it.[7]

Now A wants to be compensated for his injury. But given that (1) is true of A's injury, A cannot legitimately exact compensation from B, according to Thomson. Allegedly B's freedom of action protects him against A's claim, and B's pockets are not open to A, no matter what we imagine about B—even that B is "playing Russian roulette on A, or throwing bricks at him."[8] In this case, according to Thomson, A may not call on anyone else for compensation—he caused his own injury.

In part two of Thomson's argument, we simply imagine that A is injured, and that B did not cause the injury. Thomson says:

> Then whatever did in fact cause A's injury—whether it was A himself who caused his injury, or whether his injury was due to natural causes, or whether C or D caused it—there is nothing true of B which rules out that A's injury had the history described in (1), and therefore nothing true of B which rules out that A should bear his own costs. Everything true of B is compatible with its being the case that A's costs should lie where they fell. So there is no feature of B which marks his pockets as open to A. . . ."[9]

Thomson's total argument, then, is briefly as follows. If B's behavior is causally irrelevant to A's injury, and A freely and wittingly caused his injury to himself, then B need not compensate A because of B's freedom

6. For discussions of these issues, see, for example, Jules Coleman, "On the Moral Argument for the Fault System," *The Journal of Philosophy* 71, no. 14 (August 15, 1974); and "Corrective Justice and Wrongful Gain," *The Journal of Legal Studies* 11, no. 2 (June 1982); and Joel Feinberg, "Sua Culpa," in *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 187–221.

7. Thomson, p. 110.

8. Ibid.

9. Ibid., pp. 110–11.

of action. And whenever B's behavior is causally irrelevant to A's injury, nothing about B rules it out that A caused his own injury. Thus, if B's behavior is causally irrelevant to A's injury, B need not compensate A. Thomson concludes that "causality matters to us, then, because if B did not cause (or even causally contribute to) A's injury, then B's freedom of action protects him against liability for A's costs."[10]

We have two different concerns about Thomson's argument for the role of causality in liability ascription, and also a concern about the alleged decisive role of freedom of action. First, it is not clear that Part One of the argument succeeds. That is, it is unclear that B is in all cases free from liability for the harm done by A to A. Suppose that both A and B took turns playing Russian roulette on A's foot. A pulled the trigger, and the barrel was empty. B pulled the trigger, and the barrel was empty, etc. Finally, A pulled the trigger, and wounded himself. In this case, B imposed a significant risk of harm to A *of the same kind as the actual harm.* When Thomson claims that B's pockets are not open to A, no matter what we imagine about B—even for example, that B was playing Russian roulette on A—her claim may gain force from a tacit assumption that the *actual* harm to A was *not* caused by (or not of the same sort as that which would have been caused by) A's engaging in Russian roulette, or whatever behavior B was by hypothesis negligently engaging in. If this assumption were made, then Thomson might be correct in saying that B's pockets would not be open to A, but this wouldn't cast doubt on the *Kantian* approach, since the example would *not* be one in which B nearly caused A a harm of the same kind as the actual harm-causer (A) did. Once it is made explicit that B was acting in a way that was *relevantly similar* to A, it is not so obvious that Thomson's claim that B need not pay some share of A's expenses is correct.[11]

Second, *even if* Part One of Thomson's argument were successful, it seems to us that Part Two fails; that is, even if Thomson's claim that B owes no compensation in the case where A causes his own injury is correct, she cannot legitimately go from this claim to a general association of causation with liability. We shall now assume, for the sake of argument, that Part One has succeeded. When (1) is true of A's injury, why might one intuitively feel that B should not be called upon to compensate A?

10. Ibid., p. 111.

11. It should be noted that Thomson is skeptical about the possibility of determining what is "relevantly similar" action (ibid., p. 105).

It is plausible to think that this intuition is based on the principle that no one is morally obligated to compensate another person who has voluntarily injured *himself*. Our moral obligations, it might be supposed, do not extend to the remedying of (at least certain) harms to another which were caused by himself. Thus, no one (including B) would be required to compensate A for A's injury, when it is self-imposed. Here, no appeal is made to any sort of principle of freedom of action. Now let us consider Thomson's crucial claim, "Then whatever did in fact cause A's injury—whether it was A himself who caused his injury, or whether his injury was due to natural causes, or whether C or D caused it—there is nothing true of B which rules out that A's injury had the history described in (1), and therefore nothing true of B which rules out that A should bear his own costs."

If C caused A's injury, nothing true of B would *entail* that A's injury did not have the history described in (1), and therefore (still supposing, for the sake of argument, that Thomson's Part One has succeeded) nothing true of B would *entail* that A should not pay his own costs. But if C caused A's injury, it may nevertheless be true that A should be compensated, and compensated (partly) by B. Let us elaborate. If C caused A's injury, then it is the case, as Thomson says, that everything true of B would be *compatible* with A's injury's having the history described in (1) and thus with A's having no claim to compensation by B. That is, suppose that C actually caused A's injury. Then there exist possible worlds in which B behaves exactly as he actually did and in which A caused his own injury, and thus (still supposing Thomson's Part One to have succeeded) in which B owes no compensation. But it would be a mistake to conclude from this fact that in the *actual* world (in which *C rather than A* caused the injury) B owes no compensation.

One way in which one could go from the fact that B's behavior is *compatible* with A's injury's being caused by himself to the conclusion that B actually owes no compensation is to assume (as Thomson appears to do) that, in order for B actually to owe compensation, his behavior considered in itself must *entail* that A should not pay all his own costs. But this seems to be an overly strong and implausible assumption. We could instead believe that B's (bad) behavior, *together with other facts which actually occur*, such as A's *not* having caused the injury, make it the case that A need not pay his own costs (and that B should contribute).

The Kantian, then, can respond to Thomson as follows. It might indeed

be true that, when A caused his own injury, B need not compensate him, and this is because no one else need compensate A, since A caused his own injury. And it is clearly true that, when C caused A's injury, B's behavior is compatible with A's causing his injury, and thus is compatible with B's owing no compensation. But it does not follow that B owes no compensation. And insofar as C caused A's injury, we cannot appeal to the principle that no one is to be compensated for harm caused to himself to get B off the hook. This leaves it open to the Kantian to say that B ought to pay the same as C, insofar as his behavior was equally bad in the relevant respect.

What makes plausible Thomson's claim that, when A caused his own injury, B need not pay, is that it might seem that no one else need pay for a self-imposed injury. But it can't be concluded that *in general*, liability ought to be associated with causation. When A injures himself, it appears (still assuming the success of Thomson's Part One) that *no* compensation is owed A (and trivially, B need not compensate A). But when C injures A, compensation *is* owed A, and nothing that Thomson has said argues against the fairness of having B contribute to the compensation, if B's behavior is as bad as C's (in the relevant respect).

Finally, when C causes A's injury, can one appeal directly to B's freedom of action to protect B from having to pay compensation to A? We do not see how. Suppose that both B and C detest A, and they both (independently) shoot at A. Only C's bullet hits A. Who should pay? It doesn't seem that Thomson can appeal to B's freedom of action to yield the result that he need not pay. One could make such an argument by construing freedom of action as follows:

(2) Each person may (without penalty) engage in whatever activity he chooses, unless he *causes* injury to another person.

But why construe freedom of action in *that* way, rather than as follows?

(3) Each person may (without penalty) engage in whatever activity he chooses, unless he imposes (significant) risk of injury to another person.[12]

It doesn't seem that mere reference to our intuitive conception of freedom of action will decide the issue between (2) and (3). To insist that

12. Also, why rule out the following sort of construal?

(4) Each person may (without penalty) engage in whatever activity he chooses, unless others are in desperate need of assistance.

(2) is correct would appear to be question begging. Ultimately, in deciding whether C or both B and C should pay, one is deciding *whose* freedom of action should be curtailed (and to what extent), but a simple appeal to the notion of freedom of action doesn't settle the issue.

It might be thought that part of the motivation for choosing (2) over (3) is the difficulty of specifying what constitutes a "significant" risk in some non-*ad hoc* way. If we have enough trouble giving an account of rights against risky behavior, this alone may push us toward (2). But even if it is difficult to specify which risks are significant, we take it that it is clearly impermissible for a person to impose *certain kinds* of risks on another (without prior consent). And this is so, even if individuals do not have *rights* not to have risks imposed on them.[13] For example, you may not play Russian roulette (with a gun with six chambers) on your neighbor, and even if you do not shoot him, you do something wrong in playing the game with a loaded gun. We do not think it obviously wrong to claim that you would owe compensation to your neighbor simply in virtue of imposing such a risk on him, though this claim is not required by our position. All that is required is that you would be equally liable as someone who played a similar game and actually *did* shoot the neighbor.

We have suggested that in *Summers II* both Tice and Simonson should be considered equally liable for Summers' injury. The reason for this Kantian claim (we have suggested) is that liability should not depend on a certain kind of moral luck—on factors outside an agent's control. But consider now *Summers III*: Simonson awakens in the morning with a bad cold, and so he does not go hunting. Tice is alone when he shoots (negligently) and hits Summers. But we assume that had Simonson gone hunting, he would have acted just as negligently as Tice. (He would have behaved just as he did in *Summers I* and *Summers II*.) So, but for factors entirely outside Simonson's control (his getting a cold), he would have behaved just as badly as did Tice. But in *Summers III*, we do not believe that Simonson and Tice ought to be equally liable.[14]

13. Robert Nozick discusses this issue in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 54–87.

14. Nagel considers such examples in "Moral Luck." His example is one in which a German would have acted just as badly as the Nazis had he stayed in Germany, but the man left the country before the Nazi period (say, to go into business in Brazil). Though this person is culpable on account of his bad character (or his tendencies), it seems that he is less morally reprehensible than a Nazi who actually performs atrocities. And although his character is condemnable, it seems that the German who moved to Brazil couldn't reasonably be held liable for any of the harms to the Jews caused by the Nazis.

It is hard to explain exactly why there should be this intuitive difference between *Summers II* and *Summers III*. But note that in *Summers II* all of the relevant intentions, choices, and behavior of the two persons are *the same*; it is only the consequences of the behavior that are different (as a result of factors beyond the agents' control). In *Summers III* this is *not* the case—there are different choices and behavior. We suspect that this difference will lead the way to a basis for distinguishing the kinds of moral luck operative in the two cases.

Actual choices and behavior are morally different from mere dispositions to choose and behave in a way which is parallel to the moral difference between actual and hypothetical consent. If you consented yesterday to pick me up at the airport today, then you have a moral obligation to do so. But from the fact that you *would have* consented to pick me up at the airport had I asked you yesterday, it does *not* follow that you have any such obligation.[15]

Of course, we do not claim to have established the Kantian approach in this brief article. Rather, we have pointed to what we believe are inadequacies in a very interesting argument against Kantianism. No doubt, the Kantian approach is unacceptable for practical reasons; but this leaves it open that Kantianism is the ideally fair approach.

15. Ronald Dworkin makes this point about consent in: "The Original Position," *University of Chicago Law Review* 40, no. 3 (Spring 1973):500–533.