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Excesses of Responsibility? – Reconsidering Company Liability

Jan Tullberg

ABSTRACT. Several areas of expanding corporate responsibilities are evident from current practices. This article penetrates one such field, economic compensation through litigation, and discusses the possibility and desirability of reversing the trend. In court, companies are fined increasing amounts for an ever wider range of faults, or they settle out of court under this legal threat. This is not a local American problem, but European companies are increasingly involved because of globalization. The development in Europe is also driven by the same factors as in America – the mechanics of litigation and conventional ethics. The greed of plaintiffs and lawyers can mobilize the perceived virtue of sympathizing with a victim. Therefore it seems likely that a precondition for tort reform is an ethical reevaluation. Is it desirable and politically possible to make the individual more responsible for his own fate?

KEY WORDS: responsibility, liability, compensation, corporate social responsibility, limited responsibility, reciprocity

Introduction

Today, the trend when discussing corporate social responsibility (CSR) is to widen it. Contrary to this trend, the present article will discuss a possible trimming of corporate responsibility and of the significant amounts of money transferred from companies to individuals through the legal system. The moral foundation for the litigation process and its verdicts is that companies have a broad and expanding responsibility to provide compensation. This is not limited to refunds of payments or to replacing deficient services or products, but also includes indirect damage such as psychological strain, for example "post-traumatic stress disorder". A further component is punitive liability directed to benefiting the suing victim. The amounts reach levels where the epithet "victim" seems disputable and "winner" more appropriate. The corporate liability issue discussed in this paper can be seen as a penetration of one field of CSR.

John Ruggie is a special advisor to Kofi Annan on relations with business and is one of the architects of the UN initiative "The Global Compact". In spite of being an advocate of CSR, Ruggie notes that some international executives are beginning to see the enthusiastic attitude toward it as a bit simplistic. He writes: "Corporate leaders have begun to realize that the concept of CSR, which the NGOs have thrust on them, is infinitely elastic; the more they do, the more they will be asked to do" (Ruggie, 2002, p. 19).

This insight has also generated interest in a central distinction. "Three elite global business group . . . recently launched governance initiatives, not to *curtail* the public sector, but to clarify where the private sector responsibility ends and public sector responsibility begins" (Ruggie, 2002, p. 20).

This question begs for an answer, but that answer must also treat the responsibility limits of a third party. Where does the responsibility of the citizen/consumer begin and end? It seems to me that the discussion of responsibility has to revolve around the balance between these three subjects of responsibility. In such a broad field of questions, it is becoming apparent that CSR needs a more serious treatment

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than that of having a positive attitude toward the concept without clarifying its content.

When it comes to the aspect of corporate responsibility focused upon in this paper, the expanding corporate liability, current change is not so much a transfer of responsibility from the public to the corporate sector as from the individual to the corporate sector. This article examines the consequences for society and the ethical basis for the present order, as well as considering the desirability and possibility of reversing the present trend.

The article first briefly describes three cases of corporate liability. The purpose of these examples is to illustrate the litigation problem with some concrete cases and to indicate their economic/social magnitude. There is no ambition to offer the reader a thorough description of these special issues, or to penetrate the juridical topics. My aim is to contribute to the evaluation of the forest of litigation rather than a specific tree. In the second part, the dynamics of litigation compensation is discussed. Part three explores the ethical basis of the wide corporate responsibility and the ethical justification for an alternative with a more limited responsibility. In part four, rules determining a more narrow corporate responsibility are discussed, and finally, part five summarizes the analysis.

Three cases of company liability

Breast implants

Compensation for breast implants is an expanding field of litigation. The first product was launched in 1962 and a new type of implant was introduced 1975. There were very few complaints until 1992, but then they increased to 440,000 by 1995. No serious research shows any medical effects that support the claims. Furthermore, the Dow Corning Company's way of informing the buyers was above normal behavior; the company had not provoked the negative reactions by hard selling of the product. Certainly breast implants are a disappointment to many women, but another motivation might be most important. When courts are awarding payments the lucrative possibilities are inviting. An early example, perhaps an inspiration, was a compensation decision in 1991 of $7.3 million (Werhane, 1999).

The deal with Big Tobacco

In November 1998, a deal was made between US state governments and the tobacco industry with a multi-billion-dollar settlement. The price increase of 35 cents per pack will make a dent in demand and decrease the cigarette companies' profit to a minor degree, but more than 90% is expected to be passed on to the consumers. Annually, company profits are expected to fall by $1 billion and state revenues to increase by $13 billion (Bulow and Kamerer, 1999). This deal is technically legal, but in spirit hard to describe as anything else than unlawful taxation. The principle of ''taxation by the people'' can be ignored since this fee is classified as payment of damages, not as a tax. The signing states get revenues from cigarette sales in other states, even if these do not want to join. This is a strange procedure for a federation.

In addition to their medical problems the smokers have to pay an extra tax that is added to the price. It might be seen as slightly absurd that the people who are supposed to benefit from the damage payments actually are the ones paying, while the net receivers are, indirectly, the non-smoking citizens and, directly, the lawyers. The deal will bring substantial fortunes to the 500 lawyers involved, who will share 750 million dollars a year for 5 years and 500 million a year thereafter. A present-value calculation results in an average of $16 m per lawyer (Bulow and Kamerer, 1999). This settlement is often described as a victory against Big Tobacco. A more accurate description is to acknowledge that smokers are not compensated but punished by a sin tax in addition to the health risks. Furthermore, this sin tax is established in a principally dubious and very cost-inefficient way.

The ethical core of such procedures is that the company has a responsibility to protect people from effects of actions these people have decided upon by themselves. The very purpose of governmental information and warning texts on the packages was to give the potential smoker an extra reminder that his decision to smoke or not to smoke has vital consequences. Now, this responsibility is reconsidered and the companies are retroactively getting a more strict responsibility. That is a significant shift of responsibility from individuals to companies.

Asbestos

Exposure to asbestos may result in asbestosis, which causes severe breathing problems but is non-disabling, and mesothelioma, a lung cancer, which is usually fatal. The latency period is very long so there is a large group of people who are not sick but potentially might be so. The use of asbestos ended in the 70s, and cancer deaths attributed to asbestos exposure have been falling since 1992, but new claims increase year by year. Since the litigation started in the USA, 600,000 plaintiffs have sued, but that number is expected to grow to millions. The total bill of compensation amounted to $54 billion by 2001 and is expected to reach $200–250 billion (White, 2003).

Since most asbestos companies are already in bankruptcy, peripheral companies are under attack. Many companies have used products with asbestos and that way exposed their employees to the material. ''Typically, defendants never manufactured or sold asbestos-containing products'' (Meyer et al., 2005).

People that are actually sick by asbestos are a diminishing minority among the claimants. About 90% of the total cases are unimpaired, ''exposed only'' people claiming compensation for anxiety and the risk of becoming sick in the future. A class action settlement has to be accepted by 75% of the plaintiffs. It seems likely the distribution of compensation between the seriously sick, the impaired and the exposed only is influenced by one group being a vast majority. According to one study 65% of compensation is targeted for the unimpaired (White, 2003, p. 52).

Transaction costs are most significant. According to some estimates, 60–65% went to the litigation process itself (Hensler, 2002, p. 1900; White, 2003, p. 52; Issacharoff, 2002, p. 1925). Supreme Court justice David Souter has asked for legislation to deal with ''the elephantine mass of asbestos cases'' but so far this has not happened. A bit provocatively it seems motivated to ask, whether not the wrong companies are paying the wrong people in the wrong way.

The range of examples

These three examples cover cases with different degrees of harm and responsibility. In the breast implant case, there is no impressive proof of any harm done at all. In the smoking case, the harm must be seen as proven, but proven for such a long time that it should be general knowledge. The asbestos case concerns harm caused by an unknown factor, and it often occurred in the workplace, which makes it the strongest case for compensation. But the magnitude and dynamics of its litigation process indicate that even in this case there is a need to rethink standards and assign limits. I hold that the three examples also illustrate the dominant trend – company responsibility is stretched. The next issue to address is the possible reasons for this development.

The dynamics of structure

The first factor that is likely to influence the present trend of increasing payments is sympathy, in combination with the ''tyranny of small steps''. When considering a special case, it can easily be considered more deserving than the average case, because a person in flesh and blood is present and his or her suffering has been highlighted. The court may dismiss the case because it is overstated or there is a lack of proof, but if the case is considered to deserve compensation it is tempting to set an amount that is above, rather than below, average. A tyranny of small steps pushes the average upwards.

Influence by the ''no-win, no-fee'' rule for lawyers is a second factor. The practice of not paying the lawyer if the case is lost stimulates gray-zone cases. If the plaintiff has a strong personal conviction that his claim is right, he may pursue litigation even if the forecast of the verdict is uncertain, but without a financial risk such a moral conviction is less important. An amoral view of an opportunity that is worth exploring is sufficient. The opportunity is created by the system and, since most people seem to take it, why should an individual pass up the chance? The practice is not contained to the jurisdiction of the United States. Britain has taken several steps toward the American system of accepting lawyers who work on a commission.

A further factor is the transition of cases to high-fining courts. Plaintiffs have a choice both between countries and within countries, a phenomenon sometimes named ''jurisdiction shopping''. Cases

belonging to European courts by common-sense standards might be brought to American courts. The geographical extension of US courts is in full development. The Sarbanes–Oxley act, adopted in 2002, introduces new juridical demands not only on American but also on European companies. Also other countries introduce extra-territorial legislation, which leads to overlapping jurisdictions implying possibilities for the plaintiff to make a choice. For example South African plaintiffs were allowed to bring an asbestos case to British court (Kazen-Allen, 2000). Within the United States, there is a further selection of the courts that can be expected to award the most. Lawyers expect some county courts to be more generous, so some asbestos cases have been allocated to places far from industry. 2005 the new "Class Action Fairness Act" introduced some limitation to "jurisdiction shopping" by directing more cases to federal courts. The U.S. Public Research Group and the Consumer Federation of America made the following statement against the minor restriction introduced this year. "The class action fairness act will substantially reduce the effectiveness of one of the most important legal tools the consumer now have." (Woodall, 2004). Contrary to this judgment. I do not think this tool is consumer friendly, nor that it has been crucially restricted. It is a restrictive step, but the tide is moving in the other direction.

Another change is the harmonization of laws in different countries. The harmonization within the EU is a project with strong support from the major political parties. Despite setbacks, it is likely to proceed towards similar rules. A question is whether this harmonization will be towards the high or the low end of the payment range. The ambition is certainly that the EU standard will have relevance for the international standard, and to set rules that will be ignored by plaintiffs choosing American courts would undermine that ambition. Moving towards lower liabilities would not only increase the distance to the American policy, but can be described as more company friendly, less redistributive and less empathetic with victims. This is not the ordinary type of relation between US and European politics, and it seems likely that the EU will move towards the high end of liability payments.

The influence of insurance companies is another factor to consider, but it is not likely to provide a countervailing power. These companies will lose during a period before premiums have been adjusted upwards, but subsequently increased liability primarily implies larger revenues. In addition, there are chances for an increased number of insurance buyers. If litigation payments are low, potential client firms can treat such payments as ordinary expenses, but if risks are significantly higher the firms will be more inclined to consider them too substantial without insurance.

The insurance company contributes to increasing fines in another way. Most jurors will be less inclined to large redistribution when taking from a small firm, since there is a risk of causing secondary victims by setting payments too high. Excessive punishment for the firm might bring hardship for owners, employees and customers. When an insurance company pays the fine, there are fewer such considerations since the company has a special income designated for this purpose. There are difficulties in keeping a jury uninformed about whether an insurance company is responsible for possible payments. Instructions by the judge that the jury should abstain from considering such information are unlikely to eliminate its effects.

If insurance companies have a limited function as a countervailing power, the question arises about the firm which is being sued. From a systemic perspective, it should be clear that high payments ordered by the courts cause high premiums. However, the insurance buyer often pays in the reverse order. When first having paid increasing premiums, the insurance payment for a fine following a court decision or a settlement can be seen as a payback of previous investments. The higher the fine, the better this insurance investment, which prevents being hurt by the fine, will appear. The firm may lose sight of its long-term interests and instead take pleasure in the vindication of its risk-aversive investment. When accused, the firm will often not opt for making its case by fighting and arguing in court. Rather it will make a settlement to limit brand damage. Settlements often include some clause in which the company denies any wrongdoing, combined with a substantial payment to the plaintiff.

The different factors seem to support each other in a vicious circle. An increased awareness of litigation possibilities will increase the number of cases. Increasing rewards will be a further motivation for

litigation. Firms will push the litigation costs (directly for plaintiffs and lawyers or indirectly through insurance companies) on to consumers. More consumers will see the higher prices as including some litigation potential. It is up to your determination and luck whether you become a sucker or a winner.

In his study of liability development in the USA under last century, Dan Anderson makes the forecast that courts, not law and rules, will set the development and that the liability system of the United States will be expanding (Anderson, 2000, p. 342).

The ethics behind the policies

Strict and straight responsibility

When causation is the only demand for responsibility this is often labeled ''strict responsibility''. For a ''straight rule of responsibility'' additional qualifications are needed (Mackie, 1977). According to the latter view negative effects coming as a surprise for everybody are not seen as implying responsibility, but have to be caused by intent or with negligence.

There are also demands of capability; a classical dictum is ''ultra posse nemo obligatur'' noboby can be obliged beyond his possibilities (Waldkirch, 2001). An agent's degree of freedom is also highly relevant for responsibility. A bank employee putting bills in the robber's bag with a gun against her head is not considered committing a crime. If agent A has the capacity and freedom to conduct or not to conduct action B with its negative effects, there is a need to anticipate these negative effects for being responsible for them. Having strong reasons for avoiding doing B, but neglecting those, creates responsibility. *Ex post* it is easy to criticize, declare regrets and make the analysis that if A had not done action B, the result C would not have happened to the person D. Lots of ordinary actions bring disaster to others, but responsibility and guilt should be reserved to situations were there are strong *ex ante* reason for not doing an action. Clairvoyance cannot be a moral obligation. Ignorance is not a general escape clause since ''willful ignorance'' of something one should have investigated is seen as on par with having that knowledge (Posner, 1999). In professional situations it is reasonable that the persons acting have knowledge in line with ''the present opinion of the profession''. However, future knowledge and hindsight are something else.

In my opinion Velasquez only exaggerates a little when stating: ''There is a wide agreement that two conditions completely eliminate a person's moral responsibility for causing a wrongful injury: (1) ignorance and (2) inability'' (Velasquez, 1988, p. 35–36). Employers' liability in Britain demands that there is a ''breach of duty'' that is causative of injury (Burt, 2002). Negligence, carelessness or malice are morally condemnable reasons for why relevant knowledge strongly motivating another action has been ignored.

Responsibility for a negative action motivates two kinds of measures. One is compensation to the person suffering the damage and the second is punishment for the agent to create incentives to abstain from similar negative actions. A strict responsibility implies scant legitimacy of these actions. The victim is compensated for effects of ''bad luck'', but this compensation is achieved by imposing costs of ''bad luck'' on the agent. An ambition of deterring people from doing wrongful acts fits poorly with punishing people or organizations for acts that cannot reasonably be classified as wrong when the decision was taken. It seem reasonable to demand that interference by courts should give a contribution to justice, not just produce arbitrary change. The liability payment is a punishment of the agent and punishment without crime is morally dubious at best.

Commenting on ''the elephantine mass'' of asbestos litigation and its benefactors Deborah Hensler draws the conclusion that ''the corrective justice and deterrence arguments in favor of tort litigation become weaker'' (Hensler, 2002, p. 1923). I agree with that conclusion. However, the litigation process seems vital and expanding despite a weaker connection to common ideas of justice and responsibility. There seem to be other ideas that have strong influence on the duty to compensate. Both the negligence restriction and the proof of causing harm seem to erode and a more general ''duty to care'' is gaining support.

Sympathy with the needy

Increasing liability is sustained by ethical ideas promoting sympathy with the needy, an attitude with

many respected and influential advocates. Famous authors like Charles Dickens and Victor Hugo can be mobilized as proponents for a sentimental sympathy with the weak. The story of Cinderella indicates that a life in rags gives some justification for a shift to a life in riches. After we identify with Cinderella for her hardship, her successful appearance at the ball implies not only happiness, but also fairness; she got the prince and the castle – and she deserved them.

Another example with a less romantic and a cruder materialistic design might be more instructive of the mechanisms of sympathy. In the 1950s, ''Queen for a Day'' was a popular TV show staging a competition between women in misery and misfortune. Experiences of car accidents, homes on fire, and straying teenagers and husbands were shared with an audience and the TV watchers. The audience then voted for the most pitiful contestant and she received the title and home appliances as compensation. This philosophy seems to have expanded from the television to the courtroom. Companies can make a miserable woman a bit less miserable. Is this not a good cause to support as a jury member? Might it be justified to stretch company responsibility a little? She bought the implants to get happy, and she isn't. Didn't she really buy happiness, not breast implants? Someone else has to be responsible.

The Golden Rule revisited

At the core of many ethical ideas is the Christian faith. I think an ethical reflection has to start by questioning some ideas widely popular also among secularized Westerners. In the Sermon on the Mount, the reciprocal individuals doing good deeds in expectation of receiving good deeds are condemned to behave as ''sinners''. The behavior recommended is to turn the other cheek to an attacker, and give more property to the thief. God is merciful to the ''ungrateful and wicked'' and this example is recommended to be followed. The reciprocal impression of the Golden Rule – ''Do unto others as you would have them do unto you'' (Luke 6:31) – is an illusion since the thought experiment is not directed to a situation of fair demands, but to imagining the desires of these ''ungrateful and wicked'' people. Their egoism demands altruism of others, and the Bible explicitly promotes such unbalanced exchange; the virtue of giving is combined with the interest in receiving. The focus is put on the altruistic giving, but the egoistic receiving is an integrated part of the transaction.

The Christian faith praises the generosity of God. God not only compensates, but overcompensates, when people who have faithfully endured some hardship in this world are given eternal life. Jesus could give fish and bread to the thousands and end up with a lot more than the five loaves and two fishes he started with. Here we have many receivers and no loss for the provider. This story carries far more attraction than the dogma of the dismal science – ''there is no such thing as a free lunch''.

However, in human relations there are more limited possibilities. Overcompensation for one party normally implies under-compensation for somebody else. There are reasons to consider the rule of reciprocity as an alternative to the Golden Rule, to promote fairness and balance rather than wishes for undeserved favors.

Further problems arise from unbalanced giving. Overcompensation often implies a moral hazard, as when an insurance company overpays material losses. Houses that generate more money when burnt down than when sold tend to catch fire. Even unnatural death can sometimes be less of a tragedy for the relatives and more of a golden opportunity in some legal lottery. This induces dubious emotional and ethical situations.

To receive according to your needs, and contribute according to your ability, sounds very attractive on the assumption that you yourself can specify your needs and have the possibility to be a bit more modest about your ability. What is considered desirable is not always feasible. Some enthusiasm is lost when it is clarified that the government makes these judgments and decides that your true needs are much more limited, but that your ability demands higher contributions. The dream of a Golden Rule is then replaced by the iron rule, the obedience to power: The Communist experience illustrates what happens when unrealistic dreams are brought into reality by determined force. This is the proper context in which to evaluate the silver rule of reciprocity.

The rule of reciprocity has a strong position on the level of personal sociality. If you want people to

invite you again for a good meal in their home you have to invite them back. The old "tit for tat" behavior brings synergy gains to be shared, but these benefits depend on one's own contributions; there are profits, but no windfall profits. However, the temptation remains to believe that society at large is different, offering opportunities of impressive windfall gains. In an affluent society the free-riding possibilities increase and some of the fortune at hand may reach the lucky plaintiff.

Dispersed costs – forgotten costs

Garrett Hardin deliberates on the attraction of combining private profits with communized costs (Hardin, 1993). Hardin's central concern is that it is hard to mobilize the common interest in environmental issues. This interest is not only shared but also diluted by the minor effects for each user in comparison with the substantial benefits for each abuser, who therefore are more strongly motivated. This advantage of private profits over communized costs is highly relevant to demands for compensation and help.

In order to motivate people to give significant help to others, reciprocity is probably a more reliable basis than altruism. The potential helper is likely to be more willing to make a sacrifice if expecting the beneficiary to be grateful and reciprocate at a later occasion. One-sided giving is popular as a rhetorical attitude, but less effective in generating help from one person to another. But if the cost of helping is communized, the situation might be different.

It is easier for helpers to see themselves in the more personal than the less personal position. They are tempted to adopt the perspective of a specific individual wanting a favor that is important to him when the cost is anonymous and dispersed. Egoism, wishful thinking and the appearance of generosity all pull in the same direction. Even when giving away other people's money, it still has some generous ring.

When people sympathize with somebody and proclaim solidarity with his interests, the idea is generally that somebody else should shoulder the responsibility of actually making a sacrifice. Sometimes this rhetorical altruism results in unintended altruism. It is taken for granted that the insurance company should be generous, not that the individual himself and other insurance buyers should split the bill and pay.

As Hardin notes, many people are unaware of the communized costs and neglect them. When people are not only disinterested in the costs, but also sympathize with private profit, the possibilities increase for a misallocation of resources. A sentimental attitude toward victims, supported by an honored altruistic philosophy, contributes to increasing the imbalance.

Expanding disability

An old faith can provide another perspective on how to view individuals who are marked by serious mistakes or just bad luck. The following is the advice of Oden, the senior god of the Viking era, in the poem *Havamal* (1969) (the author's translation):

> "The limp rides, the one-handed becomes a shepherd,
> the deaf is capable in battle.
> Blind is better than being burned;
> a corpse is of use to nobody."

The lack of sentimentality is dated, but still there seems to be a connection even with political correctness. The labels "Differently abled" and "Physically challenged" make the same statement: the handicapped is not a useless cripple. Oden's view also survives in many statements by modern authorities assigning priority to rehabilitating the sick and bringing them back to the job market. In addition to the adjustments in the workplace for the handicapped, there is also a much more important development in the workplace – the change towards producing fewer handicapped people. Machines instead of muscles are increasingly doing the back-breaking chores, and the workplace has become much more worker-friendly. Yet surprisingly, the worker has become less work-friendly. Some statistics from Sweden can illustrate the situation. Out of a total population of 9 million, no less than 550,000 of the working-age population are classified as "early-retired" for medical reasons (Statistics Sweden, 2005). The line between handicapped able to work, and handicapped unable to support themselves, is evidently drawn in a different way than a millennium ago.

The classification "Fit to work" initiates a deviation from medical judgment to personal judgment, with some influence from a hypochondriac definition of illness: If a person believes she is sick, she is right and other people should accept that judgment. A bureaucrat or a doctor persistently resisting such efforts to avoid the duty to work can expect to be considered hard and uncaring, rather than showing social spirit and stamina. A therapy culture supports the self-diagnosis that the person who feels sick needs an advanced treatment (Furedi, 2004; Dineen, 1999).

There are several ways in which the European systems differ from the American; the courts have a less central function and the political authorities direct the payments from companies to receivers. However, the victim-sentimental ethos is the same. Finally, at the end of all transfers, it is not the government, nor the insurance companies or other companies, but the working citizen that pays the bill of excessive transfers. In common for the two systems is also the general feeling of not really paying, but still obtaining some moral points by showing a generous attitude in preaching altruism to others. The unbalanced situation opens up for some egoistic possibilities. Receiving a favor that you do not really deserve has substantial attraction even if not justified. A moral attitude indirectly justifying free-riding is a temptation to anyone seeing work as a tedious obligation and nurturing other activities that are more rewarding.

The thesis is not that the welfare state is built only on altruism–egoism. To a high degree the welfare state is built on enlightened self-interest, and reciprocal morality was not only supported by liberals, but also by socialists. The First International declared that there should be "no duties without rights, and no rights without duties". But this reciprocal ethos is threatened by an ethics considered both higher and more lucrative; an inflation of rights threatens both the American and the European system. It can be suggested that a European system should take some heat out of the American liability system and that more of an "American dream" would empower the early retired in Europe. Unfortunately, I think the risk is that vice travels swifter than virtue. Furthermore, no import can substitute the need to bring the prevailing system into balance.

Empathy or sympathy?

An interesting alternative to the emphasis on sympathy with the weak is the importance Adam Smith (1759) attributed to what is now called empathy. According to Smith, the moral point of view was present in our ability to put ourselves in the shoes of the "impartial spectator". Smith wrote about the need to move away from the subjective, egocentric view of the person involved. If he instead looked at his own behavior in that impartial spectator perspective, he would get a more balanced view and have a better opportunity to find a solution together with his opponent. The moral step to be taken was away from the emotions and interests of the situation, striving for a more rational and disinterested judgment. Fortunately, humans have such a capacity for empathy that involves the perspective of an outside witness fighting back egocentric sentimentality. The moral sense, "the man within", was attuned to "the man without", the spectator (Smith, 1759).

The presently widespread prescription of compassion ethics is quite different; the spectator should put himself in the shoes of one party – preferably the weak. He should no longer be an impartial spectator, and it is considered heartless to demand an effort by the victim to move into the impartial spectator position. The victim should not try to empathize with others, but is regarded as morally right in insisting on sympathy from others.

To identify with self-interest, self-pity and other human weaknesses is thought to be a solution rather than an encouragement to prolonged conflict. That such an encouragement can generate popularity with the supported person is easy to understand. How it can be considered a recommended attitude and a social benefit is hard to support with reason.

Statements like "I am sick, I need help" touch a strong sentiment in many people, and it is not only due to compassion. It is supported by the knowledge that this is considered a proper ethical reaction. Furthermore, it corresponds to a wish for treatment that is not only fair, but also generous if you end up in a similar situation. These motives are all very personal and emotional, and there is little reflection on them if they can be realized in a system that works. Will there be enough workaholics to provide for the free-riders?

Liberal worries

In a liberal society there is a need to argue for and maintain the idea of the individual as responsible and as a site of power. Is he or she not the sovereign? Power and responsibility are interrelated, and therefore the claim of being taken care of means abdication of power. Compassionate help to the poor by the powerful elite is not a liberal formula but an aristocratic *noblesse oblige*. In several respects, the citizen is transformed into a client rather than the principal of the politician. Already Tocqueville (1840) wrote about the contradiction of having the people electing politicians as their servants, and then these servants turning into the guardians of their masters. From his position of power the politician is to take care of the powerless citizen, and this caretaker philosophy has now expanded to business. Not only the citizen, but also the consumer, is seen as a dependent person; the individual should be compensated when something goes wrong – and that happens often. Stretching company responsibility to cover the private and the political domains seems to invite confusion about responsibility. Many individuals not only aspire to a natural death in old age after a healthy life, but think they have a right to such a life. When a major problem occurs, this is seen as an offense against nature and the individual; some villain must be responsible, and that villain ought to pay.

The general perception is not necessarily that companies should have such extensive responsibilities. Individuals might primarily consider the government to be responsible for them. One important reason is that many governments have proclaimed that they are shouldering such a responsibility. When governments fail to deliver, efforts are made to pass on these declared obligations to business. Some business leaders are most attracted by possibilities to declare compassion for the demands of their customers. If companies acknowledge such responsibilities, it is reasonable to forecast increasing expectations from the public. But there is the risk that companies will fail to meet these expectations. Both democracy and capitalism are very dependent on a capacity to deliver actual results, not only provide attractive visions. Promoting realistic expectations is a way to avoid disappointments, while promising to meet unrestrained hopes breeds later disappointments and seems extremely short-term.

It is understandable that authoritarian and rigid societies have use for lotteries. The rulers want obedience, but it can degenerate into apathy. Lotteries offer a hope to cling to when most people lack possibilities to improve their lot with constructive initiatives. In a dynamic liberal society, people should not feel so entrapped that posing as a victim, and thus becoming a winner in a "court casino", should be useful in order to avoid apathy. On the contrary, it is important that work and accomplishments are the road to economic success. The possession of property and an orderly transfer of possessions are cornerstones of society, according to a long liberal tradition with a special emphasis on David Hume (1740). Redistribution implies some moral idea of correcting and improving the basic economic system, but it also implies a moral critique against the ethics of the basic system. It might be argued that people at the lower end of the economic ladder also in capitalistic countries are poorly motivated and discontented. It seems more constructive to address this critique than to make concessions to it with such unfair and costly measures.

The "court casinos" create further direct and obvious strains in the system. Many companies have gone bankrupt because of litigation, implying dire consequences for investors and employees (Hantler, 2003). The smokers, the taxpayers, and the consumers have to pay vast amounts indirectly to compensate for a limited number of plaintiffs and their lawyers.

When a child loses her parents in a plane accident, compensating the child for the money she should have gotten from her parents seems to me a legitimate demand of high priority. To pay the parents of a lost child a few million dollars in a corresponding situation does not seem quite as reasonable. However, will parents who make the same moral judgment abstain from suing for moral reasons? The likely development is that parents, having lost a child in an airline accident, will declare that they are not interested in money and that no money can get their daughter back. Still, their lawyer will indicate a high expected value of suing and a chance that the airlines will do even more for safety in the future if the lawyer can squeeze out some money. Few persons would abstain from such a possibility. Most will say

something about money being unable to compensate for the loss of a loved one, and simultaneously go for the money.

Even if the ethics of the victim's relative are against compensation, his interests will be in favor of it, and following his own interests will not be considered unethical. Hence, it is improbable that excesses can be contained by individual ethics of moderation. To change the present behavior, it is necessary to change the rules of the game. But to obtain such new rules, the ethical judgments of fairness have to be altered through a difficult discussion.

A further problem is that there is no unity of people with an individualistic and antipaternalistic perspective. Robert Nozick (1974) takes a position defending high liability. I agree with Hailwood (2000) that this judgment is not based on sympathy for the needy, but on a very strict view on individual rights. Nozick writes: "Those voluntarily dealing with a corporation (customers, creditors, workers and others) will do so by contracts explicitly limiting the corporate liability if that is the way the corporation chooses to do business. A corporation's liability to those involuntarily intertwined with it will be unlimited and it presumably will choose to cover this liability with insurance policies" (Nozick, 1974, pp. 133–134). According to this view a limited liability can be agreed for e.g. breast implants, but asbestos exposure through an employer might be seen as "involuntarily intertwined" and then Nozick promotes strict liability and large transfers. A person's rights is attributed a holiness and a right to be untouchable that I think is incompatible with a world full of non-perfect individuals. The human life is always vulnerable to the whim of the environment, and other humans and their organizations are a part of that environment. The freedom to act for some individuals often implies negative externalities for other individuals. When counteracting these negative externalities for the second group in a Draconian way, the freedom of the first group becomes seriously restricted. Freedom of speech necessarily annoys, irritates, and offends a lot of people. The freedom to use cars strongly influences the character of a modern city also for those without car. With the intense human interaction, it is a Sisyphean task to punish all deeds resulting in negative effects for others; instead we should focus on those below a reasonable standard of consideration. Serious negligence, malice, and willful ignorance are such factors – strict liability is not.

In many ideological discussions, libertarians favoring strong negative rights and egalitarians favoring strong positive rights are opposed to each other. One or the other is likely to be supporting your position, but if suggesting restricting tort law both are likely to be against. The libertarians will prefer tort law to regulative law and big government, but egalitarians will not necessary choose regulative law instead of tort law, but consider the two alternatives as complementary ways for the significant transfers they consider justified (Cranor, 2002). The problem is not only strong positive rights, but strong rights generally. Rights can become so strong that the duties to be paid become excessive.

From specific cases to the common good

Most factors in the structure indicate a dynamics with an increasingly broad view of responsibility and increasing amounts awarded to the plaintiffs and their lawyers. Still, the situation is more promising for Europe than for the USA, where this development has reached further and is more strongly entrenched. The closer Europe moves towards the American position, the harder it will be to make the radical adjustments to be discussed later.

Unfortunately it is hardly sufficient to discuss specific issues of liability. The positions taken in specific cases will be highly influenced by vested interests, or at least accused of being instrumental to vested interests; anybody can be construed as an agent for big business or for the wealthy lawyers. No one will appear virtuous, and proponents of narrow responsibility will appear even more vicious. The self-interest of the poorer party in a conflict is often seen as more deserving than the self-interest of the richer party, and in the conflict with a huge company even the new millionaires can be considered poor.

Instead there is a need for more general reflection, vital to all citizens and not only defenders and plaintiffs. The aim should be a normative conclusion at the system level about which ethical rules are most useful. These are questions about the common good of society, the *res republica*.

Narrow responsibility – an alternative

While there are many different ways to structure corporate responsibility, it seems useful to present a portrait of an alternative, "narrow responsibility", that can be compared with the model in use, the "broad responsibility" of high and increasing liabilities. A more restrictive view of company responsibility could suggest the following in regard to compensatory and punitive liability.

Compensatory liability

Economic damage should be compensated by a conservative standard. There is a general risk that compensation of loss makes people more oriented toward risky behavior, and this problem of moral hazard increases when losses are not only compensated but overcompensated.

To expand economic damage to forecasts of future earnings opens the gate for unreasonable amounts. If liability payments are compensation for lost income, it is speculative to make claims for full future wages since this work will not be performed. Loss of a potential to work lacks the effort component, which is necessary for the transformation of potential work into real work. Nor is it reasonable to see all the potential future earnings of a parent as aimed at the child; when a child has finished its education, the parental support is normally significantly reduced.

With such reservations, I think the normal earnings of an average citizen are a useful reference point – yet not as a normal compensation and a basis for additional components, but as a number to which compensation can be related as a fraction. An anchor is needed to avoid fantasy numbers that can only be justified in relation to each other.

To give economic compensation for effects classified as non-economic damage clearly faces problems of conversion into money. Ambitions in the compensation systems "to make the victim whole again" (Cranor, 2002) are vaulting ambitions. Victims should not be compensated to the pre-loss level; rather they should be brought up to a level that gives an economic basis from which the victim has possibilities to confront the task of making the loss bearable. Rehabilitation, making the effort to bring the victim from a passive crippling to "differently abled", is a worthy objective. But compensation for effects like "post-traumatic stress disorder" should be low and standard. It seems better to have a standard set by legislation that is periodically reviewed and revised, instead of the present order whereby one court's judgment becomes the reference point for another court. The expanding numbers have to be constrained from a systemic point of view.

Punitive liability

The rationale for punitive payments is that a company should not be able to pocket the gains from undetected cheating in such quantity that they more than offset the costs of the cases brought to justice. Even if the company's gains from cheating a consumer are only half the compensation it will be fined, the company will make gains twice the fine if only one in four cases comes to court. A punitive multiple of three will render the incentives compatible with desired behavior, since the expected cost of the undesired behavior will be 50% higher than the gains.

However, it seems unfair that a plaintiff who has obtained compensatory awards in addition should collect these punitive awards on behalf of people who got the same negative treatment but nothing in compensation. Such an income transfer, designed to punish, does not seriously reflect over whom to benefit and why. The disciplinary effect upon the company is not reduced if the receiver is the state rather than private persons. The state is the natural receiver of income to the legal system, such as punitive payments, just as it is responsible for the costs of the system.

Furthermore, punitive liability should not be a kind of vengeance, but held at a level providing incentives for good behavior. Rather than punishing a company for lack of safety when an accident has occurred, the lack of safety by itself could motivate an appropriate fine. The incentive-oriented punishment should not become an extra taxation but be restrained to the purposes just mentioned. It should also be proportional and fair like other kinds of punishment. Adequate, not maximum, deterrence is what is appropriate.

Punitive liability is now the most pressing problem in size and growth. The guidelines of the Supreme Court (State Farm vs. Campbell, April 7, 2003) to stay with a single-digit ratio between punitive and compensatory awards are not a sufficient restriction according to the reasoning above.

Conclusion

Amounts paid by tobacco and asbestos companies appear designated to increase. Other products are in the pipeline. Lead litigation has so far not got a legal breakthrough (Smith, 2004). Obesity is without discussion a great threat to health. But should the food providers carry the responsibility? Several dams holding back a reservoir of potential claims are under pressure. A web of three different factors supports the trend towards increasing corporate liability.

The first factor is the mechanics of litigation described in the second part of the article. This also includes the pressure of special interests. Paramount among these is a very influential lobby group – ATLA, Association of Trial Lawyers of America – which defends the present order with generous contributions to politicians.

The second factor is the mentality of victimization. There is a seductive package with several personal advantages and few obligations. The victim status is normally generously attributed also to others, which can be seen as the person being sympathetic. However, the own personal responsibility both for the self and others is restricted, since if the person is not a prime victim himself, he is a co-victim. The request for helping is directed to other entities as a company or the state. Somebody should care, but that someone is seldom the person arguing for more compassion. With this contribution to the need of victims, the moralist is even more deserving if confronted with some hardship himself. This description sounds hard and unfamiliar, but I am sure the reader can put the usual attractive clothing on this skeleton of the major components. The impression is normally not of a ruthless hustler, but of a generally nice person occasionally in need of help.

The third factor is altruistic ethics. The article points at several problems with the popular and respected ethics in the Golden Rule tradition. The mission of ethics is to penetrate inconsistencies and justify more proximate moral ideas. A crucial question is if altruistic ethics can be justified. If so, the mentality in the paragraph above is justified. Certainly the prophets and the philosophers stress the virtue of giving more than the pleasure of receiving, but they recommend the unbalanced conditions of the transaction. A person posing as a receiver, and preaching altruism to others, follows the recommended model. Why should a person reconsider this comfortable and self-serving mentality if it is supported by the most respected ethics?

Another kind of ethics, which might be classified as less ambitious but more realistically attuned, can be considered. Such an ethics stresses reciprocity, fairness and human capacity for self-sufficiency despite serious mistreatment by man or nature. This ethical framework is compatible with the restrained rules of a narrow legal responsibility.

A radical change of the rules for responsibility and liability is not likely to occur until an ethical revision has taken place. One proposition in this paper is that there is a strong link between an ethics of universal care and a mentality of an entitlement of being cared for. Without a fundamental critique against the ethics of hope and overcompensation, it is probably impossible to achieve a tort reform; the present focus on sympathy with the victim has a too strong ideological support. A challenge of this view is an uphill struggle, but can mobilize one strong countervailing force – social responsibility of a serious kind. The crucial question is whether the present model is a sustainable way to organize a society, and the issue to be focused upon must shift from what is considered an appropriate ethical attitude to a more reflective ethical discussion.

The responsibilities between state, companies and citizens need to be sorted out. A central liberal principle is that individuals have to take a prime responsibility for their own lives. Freedom in a substantial way also includes responsibility and consequences. This includes encountering hardships, which is a part of the human condition. The state or a company can make a contribution to enduring the losses, but obligation cannot be so far-reaching as to bring the sufferer back to or above the pre-loss level. Both as empolyee, consumer and citizen the individual has to be more than a client being taken care

of. The ambition of the paper has not been to draw the line between the state and the company, but focusing the individual's waning responsibility.

The two sets of different legal polices are closely related to normative ideas about which ethics to honor. For a change of policies there is a need to shift from sympathizing with the weaker party in a conflict of interest to the Smithian perspective of an empathetic, but impartial, spectator.

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