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I Pity The Fool: Ori Herstein's Defense of the Klutz

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Ori J. Herstein, *Nobody's Perfect: Moral Responsibility in Negligence*, **Canadian Journal of Law & Jurisprudence**, Vol. XXXII, No.1 (Feb. 2019), Pp. 109-125.

The sad story of Menlove, the defendant in the English case [Vaughn v. Menlove](#) is well known to all first-year torts students. Menlove was born, according to his lawyer, with the "misfortune of not possessing the highest order of intelligence," and, as a result did something quite imprudent with flammable material that no person of average or typical intelligence (or judgment) would have done, resulting in a fire that damaged the plaintiff, his neighbor.

Menlove's defense on appeal was that he had acted "to the best of his judgment," and it was unfair to call him a wrongdoer, given that he had acted prudently, given the cognitive and behavioral handicaps under which he operated. Of course, his defense was rejected and, as Holmes said memorably in [The Common Law](#), while "the courts of Heaven" might forgive Menlove, the common law courts would not, since "his neighbors . . . require him . . . to come up to their standard," not his. This is what is now known as the reasonable person standard, which holds that negligence in the law is measured against an objective standard of care under the relevant circumstances.

Ori Herstein offers a nuanced defense for why the court of Heaven would be right to hold Menlove harmless. Herstein's argument is worth the attention of torts scholars because it indirectly strengthens the objective standard and Holmes' approach, although it also makes more complicated the Restatement Third's further embrace of the idea that "if an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person."¹

Herstein begins with the classic question of why the pejorative "fault" is even attributed to unintentional injurious conduct. For intentional conduct, the action fulfills the actor's subjective purpose, and hence is easily attributable to the will of the "witting actor". But "all negligence is unwitting" since it produces a result at variance with the actor's purpose. More specifically, it is not so much that the result is at variance with one's purpose, since that can be true of intentional acts that go awry. Negligence occurs when one's conduct is at variance with one's purpose, and one's purpose was to perform the act in a conformity with a standard of care drawn either from an external source or from one's picture of what conduct is desirable. (Pp. 4 – 6.)

Herstein argues that the commonsense argument that fault is attributable whenever an actor had the capacity to cause her conduct to meet the purpose she desired is too harsh, and fails because is unfair to fault someone for failing to succeed at something where success depended on factors outside their agency. Herstein notes that it obviously would be unjust to find fault with an actor whose purpose – to act in a way that everyone agrees is careful – was thwarted by external conditions that the actor could not know about. (P. 7.) For the same reason, argues Herstein, it would be unfair to find fault with an actor whose purpose – to act in a way that everyone agrees is careful – was thwarted by internal conditions "regarding the actor herself," as in Menlove. (P. 7.) Herstein offer the following illustration of an internal condition which is not attributable to the actor – a doctor, never trained in a certain type of diagnosis, is no more responsible for missing a disease than a doctor trained in the right kind of diagnosis treating a patient whose symptoms have not yet presented. (P. 7). Where an actor's purpose is frustrated by external and internal conditions, her agency is frustrated and she cannot be held blameworthy or morally responsible.

Herstein's argument for the blamelessness of the internally frustrated but diligent actor is crucial to his argument. He

makes the following point. In an activity that is hard to do, we evaluate an actor's performance of the activity based on a baseline of competency. (P. 9.) His example is playing basketball. For someone who is competent at basketball, certain actions are part of the basic repertoire of actions that anyone who plays basketball knows how to do. For example, the "lay-up" is a basic shot that every competent basketball player knows how to do. It can be done competently or incompetently, and given the vagaries of external conditions, not every layup attempt will be successful, even if competently done. But, when a competent basketball player fails at a layup, it makes sense to find fault with the player's actions, even if she intended to make a competent layup, if, in retrospect the layup she executed failed to meet the minimum standard of conduct that constitutes competent play. (P. 9)

One the other hand, were I to attempt a layup, I would almost certainly fail, in terms of success (the ball would not go in the hoop) and action (my execution would fail to meet the minimum standard of conduct that constitutes competent play). That is because I played basketball a few times in my childhood and not once since then. Herstein would say that it would not be accurate to say that my layup is "faulty." The fault label would be inapt because my failure to perform a competent layup was not a reflection of my agency but of my lack of competency. (P. 10.) My lack of prior training in basketball means that I cannot be evaluated as someone for whom the practice of "playing basketball" is "reliably, regularly, readily, and relatively easily, and confidently available to" me. I am capable of playing basketball as well as a competent basketball player, but my failure to perform a lay-up is not something for which I should be held responsible, because I am not competent at basketball. For Herstein, my failure to make a lay-up in an empty court under ideal conditions is no more my responsibility than were I blocked by a falling piece of the roof as I attempted the shot. Not so for a competent player – her failure to achieve something she is capable of doing is excused only if her shot was blocked by an external event – something like the falling piece of roof.

An important consequence of Herstein's argument is that negligence is a result of two variables: competency and agency. Herstein offers the following observation. Two surgeons, Ed and Ned, may be equally competent – equally dexterous and equally trained with equal grades and board scores and equal years on practice – but instantiate different degrees of "quality of agency" in surgery. "Quality of agency" means "how good [Ed and Ned] are at meeting their individual competency of doctoring." (P. 12.) In the hypothetical Herstein offers, Ed and Ned's competency is ex hypothesi the same (let's stipulate that is 1.0) but Ed is "better" at applying his 1.0 unit of competency every time he cuts into a patient – he's not perfect, but he is close, so let's stipulate that he performs the act competently 999 times out of 1000. Ned applies his 1.0 unit of competency less well, so let's stipulate that he performs the act competently 980 times out of 1000. Despite being equally competent, Ed is an excellent surgeon – 1/10 of 1% error rate – while Ned is merely an average surgeon, with a 2% failure rate. (Pp. 11 – 12.)

According to Herstein, if on the same day, in neighboring operating rooms, Ed and Ned fail the same way, we would react differently to the news that they had failed. In Ned's case, per standard medical malpractice doctrine, we would say that his failure was blameworthy. It is no defense to say that Ned tried his best, or that there is no such thing as perfect surgery. As Mark Grady observed, "when a surgeon forgets to count the sponges before she sews up a patient, she may not present a claim of innocent mistake to the jury" even if she can show that she took every precaution and had a good history of care.² A deviation from the standard of care is attributed to Ned's agency, and we fault him. But, curiously, according to Herstein, we should not fault Ed. Even if Ed is held legally liable (for the reasons Grady noted), we should not say that he is at fault. ("Ed is not responsible for his malpractice or, at least . . . he is far less responsible than Ned.") (P. 14.) Why?

Herstein's argues that the error – which is one in a thousand that will occur in Ed's life – is not the result of his agency, but the result of his humanity. (P. 13.) To err is human, and so some errors must be a result of our humanity, not a part of our personality. Herstein puts it this way: "[I]n the case of negligence, responsibility grows the more the failure of one's agency is due to shortcomings in one's facility – as an individual agent – to live up to one's competency." This produces a series of curious results. For example, according to Herstein's logic, although at least one of Ned's patients will be harmed by an error for which he is not at fault (the same must be true of Ned as Ed – his humanity causes one error), we will blame him for that error too, since we have no way of distinguishing between the one error cause of Ned's humanity and the none caused by his agency. That doesn't seem fair.

Also, as Herstein observes, if we can distinguish between degrees of competency, then it may be the case that certain less-competent surgeons, even when they are as diligent as Ed, will be held blameless for all erroneous surgeries, despite Ned being blamed for all of his. Imagine Meg, whose competency is 10% less than Ed and Ned's (perhaps she comes from a less – advantaged medical community, or is just a little more “hasty and awkward”, etc.) – but she compensates for this by being as diligent as Ed. So, she comes to each surgery with less competency than Ed and Ned and, because of her Ed-like ability to make the most of her reduced competency, she performs the surgical act competently 980 times out of 1000. According to Herstein, it makes sense to blame Meg for zero errors, even though we would blame Ed for twenty. (P. 22.)

Tort theorists should pay attention to Herstein's argument for two reasons. First, regardless of whether it is ultimately persuasive, it illustrates the wisdom of the reasonable person test and the rejection of Menlove's defense. Herstein concedes in a footnote that “legal negligence is not conditioned on competency,” (P. 7, n. 9.) but I think he understates the degree to which the objective standard endorsed by Holmes rejects not only competency but what Herstein calls agency. Both, after all, are variables that must be weighed in the moral judgment of negligence. Chief Judge Tindal, who ruled against Menlove, anticipated the practical difficulty of processing a defense based on these two variables. He noted that it would be impossible for a jury to make a judgment about fault if the question was whether “the Defendant had acted honestly and bona fide to the best of his own judgment”. The reference to “honest and bona fide” action recalls Herstein's concept of agency and the reference to “the best of his own judgment” recalls Herstein's concept of competency.

Second, as my observations about Ned's situation relative to Ed and Meg illustrate, the argument for the objective standard is not just practical (although that may be sufficient). While Herstein concedes that conventional tort law would hold Ed, Ned, and Meg liable for each of their medical misadventures, the logic of his argument entails that if the legal system could ascertain, from a “God's Eye” vantage point, the facts as Herstein asserted them in his hypotheticals, the rationale for holding Ed and Meg liable sound in strict liability, but in negligence for Ned (in 19 out of 20 of his misadventures). Herstein's logic entails that holding Ed and Meg responsible for their misadventures is like blaming a competent basketball player for failing to complete a lay-up because a piece of the roof fell onto the ball in flight. A troubling by-product of Herstein's theory is that it forces tort law to embrace a theory of liability in cases like Ed and Meg's that, both rhetorically and normatively, goes further than necessary.

It is not clear why Ned is more blameworthy than either Ed or Meg. The implication is that Ned's conduct instantiates a normatively significant fact that grounds personal responsibility (as opposed to Ed and Meg, whose failures merely implicates their “humanity”). But it is quite mysterious (a) what mental states correspond to the “quality of agency” to which Herstein refers and (b) why agency is normatively significant in a way that competency is not.

Herstein is emphatic that the “quality of agency” is not a subjective state in relation to the purpose of the actor – that is clear from the description, consistent throughout the article, of negligence as unwitting agency. (P. 16.) But the “quality” of agency also presents in differing degrees in different unwitting actors (Ed and Meg have more of it than Ned). The problem is not with Herstein's claim that different actors produce similar outcomes for different reasons (although, as noted above, it may be very hard to discern the underlying cause of an identical error), the problem is that there seems to be little argument offered by Herstein as to why the different etiology of an error should matter. His one effort to explain why lower “quality of agency” is a ground for attributing fault is where he considers the objection that person's “quality of agency” may be immutable, like their competency. His response:

Moreover, even if to an extent our capability to meet our competency is set at birth . . . ascribing responsibility to an individual person based on her agency's innate shortcomings may still in some sense involve personal responsibility. Because responsibility here is attributed based on features that make one the individual person one is, rather than merely a member of a species. (P. 18.)

It is not clear in what way this is a justification. The argument could run in reverse – for the same reason that Herstein

doesn't think that attributing responsibility to Ed based just on his humanity is fair, neither should responsibility be attributed to Ned based on his innate "Ned-ness".

Herstein's analysis sheds light on a confusion suffered by Section 12 of Restatement (Third). Under the Restatement, Menloves are not treated more generously but the extra-competent are treated more harshly than the merely competent actor. Comment A of Section 12 says, "[O]n balance it is best to take persons' actual knowledge and skills into account when the level of their knowledge or skills exceeds the average." Under Herstein's logic, the Restatement would be right to treat Ed more harshly than Ned were he fail to "meet" his above-average competency and produce (for the sake of argument) 10 misadventures out of 1000. Despite doing better than both Ned and Meg, Ed is, according to Herstein, either equally or more blameworthy than they. For the same reason I cannot accept Herstein's differential treatment of Ed and Ned based on his agency analysis, I cannot accept Section 12's reverse analysis—that we should depart from the objective standard adopted by negligence law after Menlove in order to impose more liability on the actor with greater competency because their agency was somehow lacking. Perhaps the inadvertent lesson from Herstein's effort is that the objective standard should be preserved across the spectrum of competency in tort law—not more and not less.

Herstein's article is not about tort law, but it is instructive for tort lawyers because it illustrates how not to justify why we impose liability on the Menloves of the world. Barring a declaration that all tort law is either intentional torts or strict liability, the answer to Menlove, or Ed, Ned, or Meg, of why they are deemed faulty has to do with their what is reasonable for others to endure. Herstein's analysis shows why it is a fool's errand to try and ground judgments about personal fault on counterfactual outcomes that rooted in a fixed aspect of the character of the defendant that went 'awry'. The putative distinction Herstein draws between competency and agency is not only spurious, it is normatively banal, since, as Herstein is the first to admit, neither are sensitive to the conscious choices of the actor. To paraphrase Shakespeare, Herstein's mistake is to think that when it comes to negligence, fault must lay either in "our stars" or in "ourselves" – but that false dichotomy leads to confusion, not understanding.

1. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 12.
2. See Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 **U. Pa. L. Rev.** 887 (1994).

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